

Natesan Vs. Chinnachi Kandara and Others

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Court : Chennai

Decided On : Mar-29-1996

Reported in : AIR1996Mad468; 1996(1)CTC699

Judge : Sathasivam, J.

Acts : [Limitation Act, 1963](#) - Articles 64, 65; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

Appeal No. : Second Appeal No. 417 of 1983

Appellant : Natesan

Respondent : Chinnachi Kandara and Others

Advocate for Pet/Ap. : Mrs. P. Hagyalakshmi

Judgement :

1. Plaintiff is the appellant. He filed O.S. No. 120 of 1978 on the file of Subordinate Judge, Karun, for declaration declaring that the Plaintiff and Defendants 2 and 5 are the owners of the suit properties, for recovery of possession of the same from the first defendant, for recovery of Rs. 9,000/- as past mesne profits and for recovery of future profits.

2. The case of the plaintiff as found in the plaint is as follows:--

The plaintiff is the son of Karunchami Kandar, who died in the year 1974 leaving behind him the plaintiff and the Defendants 2 to 5 as his heirs. The second defendant is the mother of the plaintiff, while the Defendants 3 to 5 are brothers and sister of the plaintiff. The suit plaintiff originally belonged to one Thoppakkutti alias Nallachi Kandar, son of Nallachi Kandar. It was purchased by the plaintiffs father on 10-3-1930 for a sum of Rs. 1000/- under Ex. A-1. The plaintiff's father was in possession of the property. Since the plaintiff's father had to leave for Ceylon, he leased out the property to Thoppakkutti alias Nallachi Kandar, viz., his vendor on an yearly rental of Rs. 170/-. The plaintiffs father had borrowed Rs. 300/- from Kangani Muthiah Kandar on 14-5-1932 and executed a simple mortgage deed, under Ex. A-3. As lessee Thoppakkutti alias Nallachi Kandar enjoyed the suit properties till 9-3-1935, the plaintiff's father borrowed a sum of Rs. 300/- on 8-3-1935 from Palaniyandi Gounder son of Ammasi Gounder and executed an usufructuary mortgage deed for a period of 3 years in his favour directing the mortgagee to discharge the simple mortgage deed dated 14-3-1932. The mortgagee was to enjoy the property in lieu of interest. The mortgagee Palaniyandi was in possession in pursuance of the mortgage, and he enjoyed the same till 10-3-1953. The plaintiffs father on 10-3-1953 redeemed the mortgage and leased out the same to one Emakutti Kandar, son of Thoppakkutti alias Nallachi Kandar for a period of 3 years on an annual rental of Rs. 240/-. Emakkutti Kandar was in possession of the property and enjoyed the same till 11-11-1953. Meanwhile, the plaintiffs father executed a power of attorney in favour of Rasaiah Kandar son of Kangani Muthiah Karjdar for the purpose of collecting the rent from lessee Palaniyandi. Meanwhile Chinna--chi Kandar son of Thoppakutti alias Nallachi Kandar claimed some right in the properties and therefore, the plaintiffs' father paid a sum of Rs. 200/- through his power-of-attorney agent Rasaiah Kandar and obtained a release deed from him on 18-3-1953. The lessee Emakkutti Kandar surrendered possession to the power of attorney on 11-11-1953. On 11-11-1953 the power of attorney agent leased out the property to Muthu Kandar for three years. Muthu Kandar was in possession and enjoyment of the property for a period of three years and then surrendered possession to the power of attorney agent. Therefore, the power of attorney agent leased out the property to one Chinnachi Kandar, son of Thoppakkutti Kandar alias Nallachi Kandar for a yearly rental of Rs.

225/- . Chinnachi Kandar was in possession and enjoyment of the same till his death which took place about 3 years ago paying the rent to the power of attorney agent of the plaintiff's father. The lessee Chinnachi Kandar had been living with the first defendant till his death. The first defendant has been helping the lessee Chinnachi Kandar in the cultivation of the suit property. After the death of lessee Chinnachi Kandar, the first defendant got into the suit property claims to be the only heir and ever since he is in possession of the same. The plaintiff returned from Ceylon in July, 1977 and has settled at Periyappalipalayam. The plaintiff has been demanding the defendant to pay reasonable rent at the rate of Rs. 3000/-for the years 1974-75, 76-76 and 1976-77. Since the first defendant has been evading, the plaintiff has issued a notice to him on 5-10-1977 calling upon him to pay the reasonable market rate. The first defendant sent a reply on 21-10-1977. The denial of title by the first defendant is false and untenable. The contention of the first defendant that he has been in possession and enjoyment of the suit properly as full owner is false and untenable. The mere payment of kist and his name in the revenue records will not clothe him with any right over the suit properties. Since Defendants 2 to 5 are in Sri Lanka and are not available, when the plaintiff has instituted the suit, they are made pro forma defendants. With these averments the plaintiff prayed for a decree as claimed.

3. The first defendant filed a detailedwritten Statement wherein it is contended that the suit is not maintainable and it is barred by limitation as per the provisions of Act 17 of 1978. The defendant does not admit that the plaintiff is the son of Karunchami Kandar. It is also not true to say that the suit property was owned by one Naltachi Kandar.The allegation that Karunchami Kandar had purchased the suit property on 10-3-1930 is denied. The plaintiff has no title to the suit property. Even if it is true, it cannot confer any right on the father of the plaintiff. The first defendant denies the allegations made in Paragraphs 7 to 19. The first defendant has been in possession and enjoyment of the property in his own right for more than a statutory period. He is paying kist for the suit property with patta in his name. He has raised paddy, sugarcane and other crops in and over the lands, and supplied sugarcane to the Cooperative Sugar Mills Ltd., Mohanur. The enjoyment of the suit properties by the defendant is known to every one including the plaintiff. Thus the defendant has become the absolute owner of the suit lands by adverse

possession. It is not true to say that the suit property originally belonged to Thoppak-kutty alias Nallachi Kandar. The allegation (hat Chinnachi Kandar has released his right is not admitted. The very allegations would go to show that by and under the sale deed of the year 1930 the plaintiffs father can never get any right to the property. It is not true to say that the property was leased out to Chinnachi Kandar. It is not true to say that ChinnachiKandar was in possession and enjoyment of the suit lands. The first defendant was never helping the said Chinnachi Kandar in the cultivation of the suit lands. The defendant is not the heir of the said Chinnachi Kandar. He never put forward any such claim. The defendant was not the lessee under the plaintiff's father. It is not true to say that the plaintiff made demands on the first defendant for rents. To the notice issued by the plaintiff, the defendant has sent a suitable reply. The suit is liable to be dismissed under the provisions of Act 17 of 1978. The defendant is not liable to pay any mesne profits. The plaintiff is not entitled to declaration or possession. With these averments, the first defendant prayed for dismissal of the suit.

4. The plaintiff himself was examined as P.W. 1, and he has also examined four more persons as P. Ws. 2 to 5 in support of his case. Fxs. A-1 to A-42, were marked. On the other hand, the first defendant was examined as D. W. 1, and one Devi Kandar was examined as D.W. 2, and Exs. B-1 to B-40, were marked in support of the defence of the first defendant.

5. After framing necessary issues, the trial Court, relying upon the oral and documentary evidence let in, came to the conclusion that the plaintiff and the Defendants 2 to 5 who are the heirs of Karunchami Kandar have got title to the suit property and the first defendant has not prescribed title by adverse possession. Consequently, by judgment and decree dated 20-12-1979, decreed the suit with costs.

6. Aggrieved by the decree of the trial Court, the first defendant filed appeal A.S. No. 142 of 1980 before the District Court, Tiruchirappalli. On the basis of the pleadings of the parties, after determining the necessary points for consideration, the learned District Judge disagreeing with the findings of the trial Court, after holding that first defendant has prescribed title to the suit property by adverse

possession, allowed the appeal and set aside the judgment and decree of the trial Court.

7. The unsuccessful plaintiff filed the present Second Appeal before this Court. While entertaining the second appeal, this Court has framed the following questions of law for consideration:--

i. Having upheld the appellants title to the suit property whether the Court below misdirected itself in law in concluding that the respondents have prescribed title by adverse possession since 1962?

ii. Whether the Court below materially misdirected itself in law in ignoring that there could in law be no plea of adverse possession against a person residing abroad admittedly till 1977 and in view the admission and acknowledgment of title emanating from the pleas claiming benefits of Tamil Nadu Act XVII of 1978 and various other admissions made by respondents and more so, the documents which date beyond 12 years do not relate to the suit property?

iii. Having regard to the undisputed origin of possession as a tenant, the Court below should have held that in law the plea of adverse possession is not tenable?

8. Mrs. P. Hagyalakshmi, learned Counsel for the appellant, after narrating the entire case, contended that

i. the lower appellate Court committed an error in holding that the first defendant has prescribed title by adverse possession;

ii. Inasmuch as the plaintiffs were admittedly residing in Ceylon till 1977, whether the plea of adverse possession can be permissible in the suit filed in the year, 1978?

iii. The first defendant having claimed the benefits under the Tamil Nadu Act 17 of 1978 as a tenant, not open to him to set up the plea of adverse possession.

On the basis of the abovementioned contentions, she relied upon the following decisions in support of her contentions:--

The State Bank of Travancore v. Arvindan Kunju Panicker : AIR 1971 SC996 ; Pon-naiyan v. Munian, (1995) 1 MLW 680; Mohamed Sulaiman Rowther v. N.K.A. Mohd.Ibrahim, : (1967)2MLJ483 ;S.M. Karim v. Bibi Sakina, : [1964]6SCR780 ; Padminibai v. Thangavva. : AIR 1979 SC1142 ; Gaya Parshad v. Nirmal Chander, : [1984]2SCR287 ; Chandrakantaben v. Vadilal Bapalal, : [1989]2SCR232 ; Rosily Mathew v. Joseph, : AIR1987 Ker42 ; Bhagavathy v. Savarimuthu, AIR 1976 Mad 124.

On the other hand, Mr. K. Chandramouli, learned Senior Counsel for the first respondent/first defendant, after taking me to the various factual findings supported by evidence, contended that the first defendant had placed necessary documentary evidence and proved his case, namely, the first defendant has perfected his title to the suit property by adverse possession. He also contended that inasmuch as the judgment of the lower appellate Court is based on the overwhelming evidence and in the light of the settled legal position, absolutely there is no merit in the second appeal. He also relied on the following decisions;--

Manikayala Rao v. Narasimhaswami, : [1966]1SCR628 ; Rukmani v. Gapalaswamy, : (1993)2MLJ598 ; Kshitish Chandra Bose v. Commissioner of Ranchi, : [1981]2SCR764 .

9. In the present appeal two things have to be considered, namely, whether the plaintiff Defendants 2 to 5 have TITLE TO THE SUIT PROPERTY? and whether the first defendant has perfected title to the suit property BY ADVERSE POSSESSION. In so far as the title of the plaintiff and defendants 2 to 5 are concerned, apart from the evidence of P. W. I, P. Ws. 2 to 5 were examined. It is (he case of the plaintiff that the suit property was leased out to one Chinnachi Kandar and that Chinnachi Kandar was living with the first defendant till his death and after the death of Chinnachi Kandar, the defendant entered possession of the property as the sole heir of Chinnachi. On the other hand, the first defendant has denied the title of the plaintiff and he had set up a case of adverse possession. Admittedly the first defendant has claimed benefit and protection under the Tamil Nadu Act 17 of 1978. According to him, the present suit is barred by the said Act. Act 17 of 1978 was enacted to give relief to the tenant in cyclone and flood

affected areas. It is needless to mention that in order to claim benefit under this Act, it is necessary for a person to mention that he is a tenant or a lessee of the property and that he is unable to pay the rent because of the flood and cyclone. When, such is the plea, it means that he accepts that the plaintiff is the owner of the property and he is only a tenant or lessee of the property. He has also made necessary averments in the written statement in this regard. The properties which are the subject matter of the suit are 3 items of properties. They are comprised in S.F. No. 40/2 which measures an extent of 94 cents, 40/3 measuring an extent of 14 cents and 79/2 of an extent of 1 acre 18 cents. The total extent in respect of which the suit is now laid is, 2 acres 26 cents. In the evidence D.W. 1, has deposed that as regards item No. 2, he claims title, while in respect of items 1 and 3, he deposed that he has prescribed title to the property by adverse possession and enjoyment. In order to prove title, the plaintiff very much relied upon Exs. A-1, to A-7 and A-11. The abovementioned documents, namely, sale deeds, mortgage deeds and release deeds clearly show that the plaintiffs have title to the suit property. Ex. A-11, which is the certified copy of the settlement register contains only the name of plaintiff's father as pattadhar in respect of S.F. No. 40/2 and 79/2 and in respect of properties comprised in S.F. No. 40/3 he is shown as one of the pattadhar. The abovementioned documents go to show that the suit properties are the properties which were purchased by Karunchami Kandar under Ex. A-1 and what was purchased under Ex. A-1, were enjoyed by Karunchami Kandar and his power of attorney agent under Exs. A-3 to A-8, and the plaintiff's father was the owner of the suit properties.

9A. Another important circumstance and reliance was placed on the oral evidence of first defendant as P.W. 1 in O.S. No. 494 of 1969. The said suit was filed by the first defendant with respect to the property obtained by him in the partition in the middle 40 cents and in that suit, he was examined as P.W. 1, wherein he has admitted the title of the father of the plaintiff. The relevant portion of the oral evidence of the first defendant in the said suit is as follows:-

(Vernacular mailer omitted-Ed.)

The admission of D.W. 1 coupled with the admitted physical features of the property and the evidence of D.W. 2. Devi Gounder, son of Kali Kandar would go to show that these items of properties are properties which originally belonged to Thoppakkutti alias Nallachi Kandar from whom it was purchased by the plaintiff's father and since the plaintiff's father was in Ceylon, it has been enjoyed by the first defendant in his absence. Further it is seen from the evidence of P.W. 1 that he was not here till 1977. He was in 'Ceylon for the most part of the relevant period. He is aged about 47. In the evidence of P.W. 2 he has categorically deposed that the plaintiff and the Defendants 2 to 5 are the only heirs of Karunchami Kandar. P.W. 3 is aged about 80 and apart from claiming that he knew the parties he attested the mortgage deed Ex. A-1. He deposed that the suit property belongs to Karunchami Kandar and it was mortgaged in favour of Palaniyandi son of Ammasi. He has attested the mortgage deed Ex. A-4. In the cross-examination it is elicited that Chinnachk, viz., D.W. 1 is cultivating the property for the last 4 or 5 years. As stated P.W. 3 is 80 years and he is a resident of Periyapallipalayam. The another witness examined on the side of the plaintiff is P.W. 4, namely, Katta Kandar, who is aged about 64 and he is also a resident of Periyapallipalayam. He has also spoken to the fact that the petitioner's father Karunchami Kandar leased out the suit properties to Emakkutti and that he has attested the lease deed Ex. A-5. He further stated that Emakkutti was in possession and enjoyment of the property only for a period of 7 or 8 years. It is seen that P.W. 4 has not only attested the lease deed Ex. A-4, but also attested the power of attorney, which is marked as Ex. A-6. It is admitted that he owns lands in the vicinity of the suit properties. He has also deposed in the cross-examination that P.W. 1 has been cultivating the properties only the past 4 or 5 years. He has also asserted that the property is the ancestral property of Chinnachi and Emakkutti. P.W. 5 is Emakkutti Kandar, son of Thoppakkutti Kandar alias Nallachi Kandar. He has also deposed to the fact that Chinnachi is his brother. He further stated that the suit property is their ancestral property and his father Thoppakkutti alias Nallachi Kandar mortgaged the property in favour of one Kali Gounder (father of P.W. 2) and that his father sold the same in favour of Karunchami Kandar; the father of the plaintiff. He has also stated that he has attested the sale deed Ex. A-1. The abovementioned oral evidence of P.Ws. 2 to 5 corroborates the case of P.W. 1 in all aspects.

10.. With regard plea of adverse possession, before going into the factual position in this case, it is better to refer the decisions cited by the learned counsel for the appellant. In the State Bank of Travancore v. Arvindan Kunju Panicker : AIR 1971 SC996 after narrating the facts in that case, the Supreme Court has held that a permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of the true owners for a period of 12 years or more. Para 9 of the said judgment is relevant for the purpose of our case, which runs as follows:--

'9. Now coming to the question of adverse possession, there is conclusive evidence to show that the suit property was at all times in the possession of the tenants of the Tharward referred to earlier. Krishnan Krishnan, Veltu and Kuruvilla at best could have only collected the rent. The evidence in this regard has been discussed in detail by the learned Judge of the High Court. It is not necessary to deal with that evidence over again. We accept the conclusion of the learned Judge that the suit property was all along in the possession of the tenants. Further as Krishnan Krishnan had only a lien over the property for the amount advanced by him his possession of the suit property which in this case is symbolical, must be held to be a permissive possession. The possession of Vellu and Kuruvilla for the same reason must be held to be permissive possession. A permissive possession cannot be converted into an, adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of true owners, for a period of twelve years or more. There is no evidence to show that either Krishnan Krishnan or Vellu or Kuruvilla asserted any hostile title to the suit property to the knowledge of the true owners at any time before the present suit.'

11. Another decision referred to by the learned counsel for the appellant is Gaya Parshed v. Nirmal Chander : [1984]2SCR287 . The relevant passage of the said judgment is as follows:--

'We have heard the learned counsel on behalf of the appellant and after hearing him and perusing the judgment of the High Court, we find ourselves wholly in agreement with the view taken by the High Court that mere termination of the

licence of a licensee does not enable the licensee to claim adverse possession, unless and until he sets up a title hostile to that of the licensor after termination of his licence. It is not merely unauthorised possession on termination of his licence that enables the licensee to claim title by adverse possession but there must be some overt act on the part of the licensee to show that he is claiming adverse title. It is possible that the licensor may not file an action for the purpose of recovering possession of the premises from the licensee after terminating his licence but that by itself cannot enable the licensee to claim title by adverse possession. There must be some overt act on the part of the licensee indicating assertion of hostile title. Mere continuance of unauthorised possession even for a period of more than 12 years is not enough. Here in the present case there is nothing to show that at any time after termination of his licence by Dr. Rama Shanker or by the first respondent the appellant asserted hostile title in himself. The High Court was, therefore, right in taking the view that the appellant had not established any title by adverse possession and in that view of the matter, the suit of the first respondent for recovery of possession of the premises from the appellant was not barred under Article 65 which is the only Article of the [Limitation Act, 1963](#) applicable in the present case. We accordingly confirm the judgment of the High Court and dismiss the appeal.'

12. The other decision relied on by the learned counsel for the appellant is Rosily Mathew v. Joseph : AIR1987 Ker42 . After referring : [1964]6SCR780 , the Kerala High Court has held:--

'A person who claims title to the property by adverse possession, must definitely allege and prove how and when adverse possession commenced, what was the nature of his possession and whether the fact of his adverse possession was known to the real owner. A mere suggestion in the relief clause that there was an uninterrupted possession for several 12 years or that the plaintiff had acquired an absolute title is not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea.'

13. Regarding burden of proof, the learned counsel for the appellant cited a decision in *Bhagavathy v. Savarirnuthu* AIR 1976 Mad 124. The principle laid down in that decision is as follows:--

'Article 65 relates to suits for possession based on title. In such a case period of limitation is 12 years when the possession of the defendant became adverse to the plaintiff. If in a suit falling under Art. 65, the defendant wants to defeat rights of the plaintiff, he has to establish his adverse possession for a period of 12 years which has the effect of extinguishing the title of the owner by operation of Section 27 of the Act. If he fails to do so then, the plaintiff cannot be non-suited merely because he was not able to prove possession within 12 years.

In the case of a suit for possession based on title the plaintiff has no longer to prove that he was in possession of the property for a period of 12 years. It is for the defendant to establish that his possession has been adverse for the requisite period of 12 years. In the instant case as the defendants have 'not established their case of adverse possession, the plaintiffs having proved title to the property are entitled to the possession thereof, so long as the defence has not established the plea of adverse possession.'

14. The other decision relied on by the learned counsel for the appellant is *S. M. Karim v. Bibi Sakina* : [1964]6SCR780 . In this case, the Supreme Court with reference to adverse possession held as follows -

'Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for 'Several 12 years' or that the plaintiff had acquired 'an absolute title' was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea.'

15. Finally, the learned counsel for the appellant relied upon a recent judgment of this Court reported in the case of *Ponnaiyan v. Munian*(1975) 1 M.I.W 680. In the said judgment A. S. Venkatachalamoorthy, J., summarised all the previous cases

of this Court as well as the Supreme Court in respect of adverse possession.

16. On the basis of the principles laid down in the above mentioned cases now we consider the case of the parties regarding the plea of adverse possession. It is true that the plaintiff has not produced any kist receipt, patta or any other Revenue records. On the other hand, the first defendant has produced kist receipts, which are marked as Exs. B.4 to B. 22. The learned counsel for the respondents apart from the kist receipts; also relied on Exs. B.25 to B.38, which are agreements executed by the first defendant with Mehanur Sugar Factory for supply of sugarcane. Ex. B.39, is the patta book issued to the first defendant in respect of items 1 and 3 of the suit properties. Ex. B.40 has been produced to show that the Authorised Officer, Musiri, issued notice to the first defendant demanding levy in 1975. With these abovementioned documentary evidence, the learned counsel for the 1st respondent/first defendant contended that the first defendant has been enjoying these lands at least from 1962.

17. Now we have to see whether the materials placed before the Court are sufficient to accept the case of first defendant regarding prescribed title by adverse possession. There is no statutory definition of adverse possession. Adverse possession refers to actual and exclusive possession coupled with intention to hold as owner. Adverse possession becomes hostile to the rightful owner, when a person openly and continuously possesses a land under a claim of right adverse to the title of the true owner for the statutory period. Adverse possession means a hostile possession which is express or implied in denial of the title of the true owner. Such possession must be actual and exclusive, under a claim of right, adequate in continuity in publicity and in extent so as to show that it is adverse to the true owner. Such possession, in denial of title of the true owner must be peaceful, open and continuous. Mere possession without a claim of right for over a long time is not sufficient to create adverse possession. A mere user of property cannot be taken as a definite assertion of proprietary right, there must be some definite quality in the possession, before it can be called adverse and there must be some fact of unequivocal character which may put the owner on guard. There can be no adverse possession if the person claiming does not know that he is enjoying somebody else's land. He must have the intention of using the property

adversely against the another having an interest in it. To summarise it, a person by holding possession of the property for the statutory period can acquire title only when his possession is (1) under a claim of title, (2) hostile to the true owner, and (3) actual, open, uninterrupted, continuous and exclusive. The above mentioned principles have been mentioned in the decisions cited by the learned counsel for the appellant.

18. In this case, as pointed out by me at the outset even in the written statement, the first defendant has contended that the suit itself is barred by virtue of the provisions of Tamil Nadu Act 17 of 1978. In order to emphasize the said plea, he claimed that he is only a tenant or lessee of the suit property. It is also made clear that the father of the plaintiff was settled at Ceylon till 1977. The other important factor is the oral evidence of the first defendant in an earlier suit in O.S. No. 494 of 1969 wherein he has mentioned that

(vernacular matter omitted--Ed.)

The (vernacular matter omitted--Ed.) refers to the plaintiffs father Karuncharni Kandar. I have already mentioned that the evidence of P.Ws, 2 to 5 who are elders (50 years and 65 years) supports and corroborates the oral evidence of P.W. 1, which would go to show that the possession of D.W. 1 is only as a tenant or lessee. The production of agreements with Mahanur Sugar Factory as borne out by Exs. B. 20 to A.30 do not support the case of the first defendant. Since in these documents no reference has been made with regard to survey number or patta number. The production of Exs. B.39 and B.40 is also of no use, because the fact that the first defendant is in possession and enjoyment of the property for the last 5 years is not disputed. The levy notice Ex. B.40 dated 23-10-1975 is also of no use in order to substantiate the case of the first defendant.

19. As stated by me the production of kist receipts, patta and documents relating to the agreements with the Mohanur Sugar Factory are not sufficient to accept the plea of adverse possession. Further, as pointed out by me, his plea for the benefit, of Act 17 of 1978 leads to a conclusion with his case that he is in possession and enjoyment of the property as a lessee, namely, permissive possession. Moreover, in the written statement, he has not stated specifically that he has been in

possession and enjoyment of the property adverse to the real owner. In the absence of specific pleading, any length of possession by the first defendant will not become adverse to that of the plaintiff. It is only in the year 1969 a notice was issued and in his reply, he has denied the title and has contended that he is in possession in his own right. Even assuming it to be so that his possession will become adverse only from 1969 whereas we find that the suit has been filed only in the year 1978. Hence the contention of the first defendant that he is in possession and enjoyment of the suit property adversely for the well over the statutory period cannot be accepted. As rightly pointed out by the trial Court, in the evidence given by the first defendant in O.S. No. 494 of 1969 he has clearly admitted that the property belongs to his 'MAMAN' (vernacular matter omitted-Ed.) and he is in possession of the property, because his uncle is at Ceylon. Thus, he has enjoyed the title of the plaintiffs father in the year 1969. In this respect the decisions referred to by the learned Senior Counsel for the respondents may not be much useful. In respect of the decisions referred to by the learned counsel for the respondent/ first defendant in view of the fact that the evidence adduced before the Courts below are not sufficient, I am unable to accept his arguments. The materials furnished by the first defendant to accept the said plea are not sufficient in the light of the decisions referred to by the learned counsel for the appellant. Mere production of kist receipts, patta book and some of the agreements with the Meha-nur Sugar Factory are not sufficient to accept the case of the first defendant in the light of his own admission in the suit O.S. No. 494 of 1969. In the light of the oral evidence of P.Ws. 1 to 5 as well as other documentary evidence, coupled with the admission of D.W. 1 in the above said suit recognising the plaintiffs father as the owner and of the fact that the plaintiffs father came to India only in the year 1977, at any rate, the possession of the first defendant can be termed only as permissive possession. It is settled law that this Court can interfere in a second appeal when finding of the lower appellate Court is based on mis-conception or not supported by acceptable evidence. As stated by me earlier, 'the finding of the lower Appellate Court is perverse and there are substantial questions of law as contended by the counsel for the appellant.'

20. For all the above reasons, I am in entire agreement with the contentions of the learned counsel for the appellant, consequently, the judgment and decree of the

lower Appellate Court are set aside and the judgment and decree of the trial Court are restored. There will be no order as to costs.

21. Appeal allowed

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