

**Karuthayya thevar (Died) and ors. Vs. Karuthayya thevar and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/805913](http://sooperkanoon.com/805913)

**Court :** Chennai

**Decided On :** Nov-30-1953

**Reported in :** AIR1954Mad797; (1954)IMLJ675

**Judge :** Krishnaswami Nayudu, J.

**Acts :** Limitation Act, 1908 - Schedule - Article 142

**Appeal No. :** Second Appeal No. 2160 of 1948

**Appellant :** Karuthayya thevar (Died) and ors.

**Respondent :** Karuthayya thevar and ors.

**Advocate for Def. :** T. Krishna Rao, Adv.

**Advocate for Pet/Ap. :** M. Natesan, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**Krishnaswami Nayudu, J.**

1. This appeal arises in a suit for a declaration and injunction, or in the alternative for possession of the suit properties against the defendants. The plaintiffs claim title to the suit properties under Ex. D-3 dated 31-7-1925 and purchased in court auction and possession of which was delivered under Ex. p-2 dated 11-6-1926. Till

about 1931 the plaintiffs' possession of the suit land is not disputed. But after that, the defendants dispossessed the plaintiffs and there is evidence to show, at any rate, that from 1936 onwards the plaintiffs have not exercised any acts of possession in respect of this property. There is definite evidence that between 1934 and 1936 the defendants cultivated the land, as also after 1943 till about the institution of this suit. The dispossession in this case may therefore be taken to be some time prior to 1934.

2. On these findings it is contended that though by virtue of the decision of the Full Bench in --'Official Receiver, East Godavari v. Govindaraju', AIR 1940 Mad 798 (A), it is for the plaintiffs to establish not only title, but possession within 12 years of the date of the institution of the suit, the fact that the lands were not shown to have been cultivated between 1936 and 1943 should enure to the benefit of the plaintiffs and the plaintiffs as the owners must be deemed to be in constructive possession of the property within that period, which should be within 12 years of the suit, though in fact the plaintiffs have not actually made use of the lands for cultivable purposes. The decision in -- 'Ramanathan Chettiar v. Lakshmanan Chettiar', AIR 1931 Mad 644 (B) is relied upon by the appellants. That was a suit in ejectment. It was there held: 'As a general rule, in a suit in ejectment, when the plaintiff seeks, on the strength of title and dispossession, to oust the defendants in possession, he must prove possession within 12 years of suit. But the possession to be proved is such possession as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any acts of effective possession and the normal method of possession is not referable to any such act, and effective enjoyment of the property is not the customary method of exercising the right of possession, possession must be presumed to be with the person holding title to extent to which that title is found valid.' Another decision in -- 'Kayichankandi Ayissa v. Kunhaikalanathan', AIR 1948 Mad 420 (C) has also been referred to. There it was held :

'A person suing in ejectment on the strength of his title and dispossession should establish not only title but also possession within 12 years prior to the suit. If once he establishes that the date of possession or discontinuance of possession is within 12 years from the date of suit as required by Article 142 of the Limitation

Act, in order to establish prior possession within the meaning of the first column of that Article it is permissible having regard to the nature of the land such as vacant site, or having regard to the absence of evidence of effective possession or conflicting evidence as to possession before the date of dispossession, to invoke the aid of the presumption of possession following title.'

3. In both these cases emphasis is laid on the nature of the property and the normal method of the user of such property or possession as the property is capable of i.e. such enjoyment as is ordinarily made use of, of the property. If it is a vacant building site and if, in fact, a building is not constructed and there is dispossession by a trespasser, in a suit for ejectment the fact that it was a vacant site and not used for building purposes could not be taken to be a failure on the part of the plaintiffs to exercise any acts of possession. The ordinary act of possession to be exercised as regards vacant building site is to construct a building. Then in that case, the presumption of possession following title could reasonably be applied.

4. It is urged, however, in the present case that the commissioner who inspected the property has reported that at the time of his inspection, two or three items were found to have been not cultivated, at any rate, for the last 4 or 5 years prior to his inspection and that one item of property was cultivated with punja crops. But there is the other evidence in this case as to their having been cultivated for a certain period, for instance, between 1934 to 1936 and after wards from 1943 onwards. In this case, the property is not one which is not capable of being made use of and the nature of the property is such that it could be only left vacant and could not be used for cultivable purposes, but when it has been shown that it was utilised for cultivation by the defendants within the period of 12 years, that would amount to the defendants having enjoyed the land for a certain portion of the period of the 12 years prior the suit and the plaintiffs not having exercised any acts of enjoyment. The fact that for a period neither the plaintiffs nor the defendants used the land for cultivation, could not make the land uncultivable and change the nature of the land as one which cannot be enjoyed in the manner it was being enjoyed when it was cultivated.

As per the decision in -- 'AIR 1940 Mad 793 (A)', it is incumbent upon the plaintiff who sues to eject to establish acts of possession which the property is capable of at any time within the period of 12 years prior to the date of the suit. On the evidence in this case the learned Subordinate Judge has found that such possession has not been shown by the plaintiffs and their case is therefore bound to fail. It is no doubt true that the defendants have not been able to show continuous possession within 12 years prior to the date of the suit but that would only disentitle them to any acquisition of title by prescription by adverse possession. That would not absolve the plaintiffs from showing that they have been in possession within the period of 12 years by making use of the property, if the property is capable of being enjoyed in any particular manner.

5. The second appeal fails and is dismissed with costs. No leave.

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