

KRISHNAMURTHY S. SETLUR DEAD BY LRS.

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v.

O.V. NARASIMHA SETTY & ORS.

FEBRUARY 23, 2007

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

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Constitution of India ; Article 136—Civil Procedure Code, 1908; Section 96—Suit for declaration of title on adverse possession and for permanent injunction decreed in favour of Plaintiff—High Court, in appeal, reversed the judgment of the trial court—Correctness of—Held, High Court has committed serious errors in the impugned judgment and has not dealt with the plea of adverse possession as required to be done by an appellate court—Hence, matter remitted back to the High Court to decide the appeal in accordance with law—Limitation Act, 1963; Sections 27 & 64.

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Respondent-Original Plaintiff, who claimed to have purchased suit properties, filed a suit for permanent injunction for restraining the defendants - cultivating tenant and appellant - from interfering with his possession before trial court. The trial court dismissed the suit holding that the plaintiff had not proved his actual possession of the Suit properties; and that the tenant had attorned in favour of the appellant. The trial court, however, gave liberty to the plaintiff to file a suit on title and for possession of the suit properties. Neither the original plaintiff not his legal heirs filed a suit on title.

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Thereafter, the appellant filed a suit for declaration of title and for permanent injunction against the defendant-tenant before trial court which was dismissed . The respondent - original plaintiff was not made a party to the suit. The High Court, however, allowed the appeal of the appellant holding that he had possessory title over the suit properties.

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The appellants intituted a suit for declaration of ownership of the suit properties against the respondents - legal heirs of the original plaintiff and successors-in-title-and for permanent injunction. The trial court decreed the suit in favour of the appellants in view of the judgment of the High Court in earlier proceedings holding that the appellant had possessory title. The appeal filed by the respondents was allowed by the High Court.

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A In appeal to this Court, the appellate contended that neither the original plaintiff nor his legal heirs instituted a suit for declaration of title despite liberty given by the trial court and hence they lost their right to recover possession; that the possessory title held in favour of them cannot be allowed to be reopened in the present proceedings; and that the impugned judgment of the High Court is full of contradictions and inconsistent findings and hence the matter needs to be remitted back to decide afresh.

B The respondents, supporting the impugned judgment, contended that they were not parties to the proceedings in which the High Court had possessory title in favour of the appellants.

C Allowing the appeal and remitting the case back to High court, the court

D HELD: 1.1. Section 27 of the Limitation Act, 1963 operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely, ouster or adverse possession is a question of law and has to be considered by the court. [Para 13] [1107-G-H; 1108-A]

E 1.2. The impugned judgment of the High Court is a bundle of confusion. It quotes depositions of witnesses as findings. It quotes findings of the courts below which have been set aside by the High Court in the earlier round. It criticizes the findings given by the coordinate Bench of the High Court in the earlier round of litigation. It does not answer the question of law which arises for determination in this case. In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. None of the aspects have been considered by the High Court in its impugned judgment. Adverse possession or ouster is an inference to be drawn from the facts proved which is the work of the first appellate court.

[Para 14] [1108-C; G-H; 1109-A]

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5079 of 2000:

From the Judgment and final Order dated 22.3.1999 of the High Court of Karnataka at Bangalore in R.F.A. No. 672 of 1996. A

D.A. Dave, R.S. Hedge, Chandra Prakash, Rahul Tyagi and P.P. Singh for the Appellants.

V.A. Mohta, Shanti Bhushan, Jaideep Gupta, D. Bharat Kumar, Anand, Indrani, Abhijit Sengupta, Azim H. Laskar, N.K. Nayak and Indra Makwana for the Respondents. B

The Judgment of the Court was delivered by

KAPADIA, J. 1. This civil appeal arises out of judgment and decree rendered by Karnataka High Court on 22.3.1999 filed under section 96 CPC against judgment and decree dated 11.10.1996 passed in O.S. No. 3656/81 on the file of City Civil Judge, Bangalore, decreeing the suit for declaration. By the impugned judgment, the High Court has set aside the judgment and decree dated 11.10.1996. Hence this civil appeal has been filed by the LRs. of deceased Krishnamurthy S. Setlur (original plaintiff). C D

2. The facts giving rise to this civil appeal are as follows.

3. One Kalyana Sundram Iyer was the owner of the suit properties. H.R. Narayana Iyengar (represented by his LRs.) claimed to have purchased the suit properties from Iyer under sale deed dated 10.7.1942. At the relevant time, one Shyamala Raju was the cultivating tenant. Iyengar (since deceased) claimed that he had terminated the tenancy in 1948. On termination of the tenancy disputes arose between Iyengar and Shyamala Raju. Consequently, Suit No. 79/49 came to be instituted by Iyengar in the court of Second Munsiff, Bangalore. The suit was instituted by Iyengar against K.S. Setlur and Shyamala Raju stating that they had unauthorisedly disturbed his possession. Suit No. 79/49 was for permanent injunction restraining the defendants from interfering with the possession of Iyengar (plaintiff). In his defence Raju stated that he was in possession for eight years; that he continued to be in possession; that Iyengar was collecting rents arising from the suit properties as a constituted attorney of K.S. Setlur; that on termination of the Power of Attorney, he paid rent to K.S. Setlur and, therefore, he was in possession of the suit lands as a tenant under K.S. Setlur and not under Iyengar (plaintiff). He (Raju) in his written statement stated that he continued to remain in possession till 28.8.1950 (see p. 78 of the SLP Paper Book). According to Iyengar, defendant No. 2 (Shyamala Raju) was his tenant who E F G H

A turned hostile when he terminated the tenancy. According to Iyengar, there was collusion between Shyamala Raju and K.S. Setlur to defeat his rights. In the said suit, K.S. Setlur contended that he was the real owner who had appointed Iyengar as his constituted attorney to collect rent and profits. It was contended that the sale deed executed by Kalyana Sundram Iyer was a benami transaction. He further alleged that in 1946 he had cancelled the Power of Attorney in favour of Iyengar. He further alleged that after 1946, Shyamala Raju had considered him as the landlord. Rent was paid to him by Shyamala Raju. Raju had attorned in favour of K.S. Setlur. Lease deeds were executed by Shyamala Raju in favour of K.S. Setlur. By judgment dated 28.2.1951, delivered by the Munsiff Court in Suit No. 79/49, it was held that the factum of Shyamala Raju being in possession of the suit lands till 28.8.1950 stood proved, therefore, it was held that Raju was in possession of the suit lands from 1946 onwards. it was further observed by the trial court that the disputed suit lands were not in *de facto* possession of Iyengar. The trial court relied upon the revenue records of 1947-48 showing cultivation of the lands by Shyamala Raju (see p. 91 of the SLP Paper Book). The trial court did not believe the plaintiff (Iyengar) to say that he had entered into possession in 1947. However, the trial court also observed that the plaintiff had a conveyance in his favour from Kalyana Sundram Iyer but the suit was for permanent injunction and since the plaintiff was not in actual possession it was not possible to grant injunction restraining Shyamala Raju from entering the lands. The trial court further held that Shyamala Raju as a tenant had attorned in favour of K.S. Setlur. The trial court, however, held that it was not in a position to give a clear-cut finding as to whether Shyamala Raju was the tenant of Iyengar or of K.S. Setlur. In this connection we find on page 95 of the SLP Paper Book the conclusion of the trial court which states that, "the only inference that can be drawn is that the second defendant (Shyamala Raju) is in possession and cultivation of the suit disputed lands; whether he was tenant under the plaintiff (Iyengar) or the first defendant (K.S. Setlur) is not established." In the said judgment, the trial court further observed that since the plaintiff had instituted a suit for permanent injunction it was not necessary for the court to go into the question of the benami nature of the sale deed executed by Kalyana Sundram Iyer in favour of the plaintiff as well as the real ownership of the suit lands. According to the trial court, it was not necessary to go into the question of ownership except to the limited extent, namely, attornment of the tenancy by Shyamala Raju in favour of K.S. Setlur and not in favour of Iyengar (plaintiff). According to the trial court, since Shyamala Raju (defendant no. 2) had continued to remain in possession till he was prevented by an order of interim injunction which stood subsequently

vacated and since the plaintiff had failed to prove his actual possession, the plaintiff was not entitled to an order of injunction. The question of title was not gone into by the trial court. The question of title deed being *benami* was not gone into by the trial court. In conclusion, the trial court observed that it was open to the plaintiff to file suit on title and for possession. The trial court observed that grant of injunction is a matter of discretion. The court was, therefore, not inclined to grant permanent injunction in favour of the plaintiff. At this stage, we may point out that the litigation has a chequered history. We need not go into the various stages of this litigation except to state that ultimately by judgment dated 14.12.1961 delivered by Additional Civil Judge, Bangalore vide Regular Appeal No. 70/51 the suit filed by Iyengar (plaintiff-appellant) ultimately stood dismissed. The judgment of the trial court dated 28.2.1951 stood affirmed. The termination of tenancy of Shyamala Raju was proved but there was no evidence that the plaintiff had obtained actual possession from the ex-tenant on termination of tenancy. In the result, the appeal stood dismissed on the ground that the appellant (Iyengar) was not in possession of the suit lands on the date of filing of Suit No. 79/49 (see p. 118 of the SLP Paper Book). The appeal of Iyengar stood dismissed on 14.12.1961.

4. Coming to the second round of litigation, it may be stated that after Shyamala Raju attorned in favour of K.S. Setlur, differences arose which led to litigation between K.S. Setlur on one hand and Shyamala Raju on the other hand. In the said litigation, Iyengar was not a party. In the said litigation LRs. of Iyengar were not made party-defendants. Iyengar died on 6.12.1959. As stated above, disputes arose between K.S. Setlur and Shyamala Raju around 1962. K.S. Setlur instituted Suit No. 89/63 for declaration of his title and for permanent injunction. In the said suit K.S. Setlur contended, that Iyengar was his constituted attorney; that Iyengar had purchased the suit lands from Kalyana Sundram Iyer in 1942; that he had terminated the Power of Attorney in favour of Iyengar in 1946; that Shyamala Raju had attorned the tenancy in his favour in 1946 and that on 23.4.1962 Shyamala Raju had surrendered the suit lands to K.S. Setlur. In the said suit, K.S. Setlur alleged, that Shyamala Raju was his ex-tenant; that Raju had surrendered his possession on 23.4.1962, and after surrender he has been interfering with his possession. It appears that Shyamala Raju had purported to sell a portion of the suit lands which led Setlur to file Suit No. 89/63 saying that Shyamala Raju had no right to convey the suit lands or any portion thereof. In the said suit, originally one of the issues framed by the trial court was whether K.S. Setlur was the owner of the suit lands and whether he was in possession of the suit lands. Later

A on in appeal, the question framed was whether K.S. Setlur had proved his possessory title to the suit lands. This question was answered in favour of K.S. Setlur in the affirmative in RSA No. 545/73, which appeal stood disposed of by the High Court vide judgment dated 14.8.1981 arising from Suit No. 89/63 filed by K.S. Setlur. It is this judgment dated 14.8.1981 of the High Court which constitutes the basis of the judgment of the trial court in the present proceedings. Be that as it may, the High Court in its judgment in RSA No. 545/73 held that since Shyamala Raju had surrendered the suit lands in favour of K.S. Setlur in 1962 it was obvious that K.S. Setlur was put in possession through the intervention of the Tahsildar (see p. 126 of the SLP Paper Book). According to the High Court, the tenancy of Shyamala Raju stood terminated in 1946, that Setlur has been in possession since 1946, that Suit No. 89/63 was filed by Setlur against Shyamala Raju in February, 1963 and, therefore, when Setlur had been in possession for more than 12 years since 1946 he had the possessory title vested in him and his possession had to be protected against the whole world except the true owner and, therefore, according to the High Court, the trial court should not have dismissed the suit of Setlur against Shyamala Raju bearing No. 89/63 but should have given a declaration that Setlur had the possessory title for more than 12 years and the trial court should have given declaration to that effect. Accordingly, the High Court vide its judgment dated 14.8.1981 overruled the decision of the trial court dismissing the suit filed by Setlur for declaration of his title. Accordingly in the second round of litigation Setlur succeeded in obtaining a declaration to the effect that he had possessory title in him. At this stage, it may be noted that Iyengar (since deceased) never instituted a suit for declaration of title.

5. Before coming to the present suit, it may be pointed out that during the intervening period between the above two proceedings, K.S. Setlur had instituted Suit No. 94/56 against Iyengar for accounts and reconveyance based on the sale deed of 1942 executed by Kalyan Sundram Iyer in favour of Iyengar. In Suit No. 94/56, the question of possession or prescriptive title was neither raised nor decided. Issue No. 12 in that suit related to the plea of reconveyance. The said suit was dismissed on 10.11.1961 by the Additional Civil Judge, Bangalore. In that suit, Setlur had claimed that he was the real purchaser of the suit lands from Kalyan Sundram Iyer in 1941-42; that Iyengar was his agent and was only a benamidar and, therefore, the purchase by Iyengar was only for the benefit of K.S. Setlur and, therefore, Iyengar or his LRs. were liable to reconvey the suit lands to the plaintiff (K.S. Setlur). This story was not believed by the trial court. By the said judgment dated 10.11.1961, it was held that the case of Setlur was a fairy tale and that Setlur

had failed to prove that the suit lands were purchased from his funds or from the funds of his joint family. In the circumstances, it was held by the trial court that Setlur was not entitled to reconveyance and that he had failed to prove that Iyengar was only a *benamidar* in the transaction of 1941-42 with Kalyan Sundram Iyer. Accordingly, Suit No. 94/56 filed by Setlur against Iyengar stood dismissed. In the said suit, Setlur had also sought a permanent injunction restraining Iyengar/ his LRs. from interfering with his peaceful possession and also for restraining Iyengar/ his LRs. from claiming possession. According to the appellants herein, the prayer for injunction was not pressed in view of the judgment in the earlier Suit No. 79/49 on the question of possession between Iyengar and Setlur. However, according to the LRs. of Iyengar, Setlur did not press for injunction in the said suit for reconveyance as Setlur was dispossessed in 1953.

6. To complete the chronology of events, K.S. Setlur (plaintiff) in the present proceedings instituted, before the Additional City Civil Court, Bangalore, Suit No. 3656/81. This suit was instituted on 11.12.1981. The said suit was for a declaration that Setlur was the owner of the suit lands and that the LRs. of Iyengar or their alienees got no title from two sale deeds dated 21.5.1970 and 7.9.1970 executed by LRs. of Iyengar in favour of Narasimha Setty and others (defendants). In the said suit, Setlur once again alleged that the suit lands originally belongs to Kalyana Sundram Iyer, they were cultivated by Shyamala Raju, in 1942 he had purchased the suit lands through his constituted attorney (Iyengar), that the said deed of 1942 was nominally in favour of Iyengar as his agent and that Shyamala Raju had attorned in his favour in 1946. The above averment regarding the benami nature of transaction was made by K.S. Setlur in the present suit despite the dismissal of his Suit No. 94/56 against Iyengar. It was further submitted by K.S. Setlur that vide judgment dated 14.8.1981, delivered by the High Court in RSA No. 545/73, he has been declared to have acquired possessory title to the suit lands as being in possession thereof between 1946 and 1963 and, therefore, the LRs. of Iyengar had no right, title or interest to convey the suit lands on 21.5.1970 and 7.9.1970 to Narasimha Setty and others. In the said suit Setlur sought a declaration that he may be declared as an owner. He has also prayed for possession of a portion of the properties allegedly occupied by Setty and others and for permanent injunction (see p. 134 of the SLP Paper Book). In the said suit, the LRs. of Iyengar as well as their successors-in-title (defendants) denied that the suit property was purchased by Iyengar for K.S. Setlur as his Power of Attorney holder. They also denied the allegation that K.S. Setlur had obtained possession at the time of attornment of tenancy in 1946. The

A defendants contended that neither K.S. Setlur nor Shyamala Raju were in possession in 1946 and that documents of allotment were fictitious and never acted upon. They contended that they were in exclusive, continuous and undisturbed physical possession and enjoying the suit lands. The defendants asserted that Iyengar had purchased the suit lands from Kalyana Sundram Iyer and they were in lawful and exclusive possession of the suit lands. The defendants further stated that they were unaware of the proceedings between K.S. Setlur and Shyamala Raju culminating in the judgment and decree dated 14.8.1981 in RSA No. 545/73 and, in the circumstances, the said judgment of the High Court in RSA No. 545/73 was not binding on them. They denied of having taken possession without authority of law in September/ November, 1970 as alleged by K.S. Setlur (plaintiff). They also relied upon the revenue records from 1967 to show that they were in possession of the suit lands. (see p. 140 of the SLP Paper Book)

7. In the present suit, issues were framed by the trial court. One of the main issues was whether the plaintiff (K.S. Setlur) has proved that the defendants wrongly came into possession of the suit lands in 1970 and whether the plaintiff was entitled to get back the possession from the defendants herein. The said issue was answered in favour of the plaintiff by the trial court. In the reasoning, the case of the plaintiff has been set out to say that Suit No. 3656/81 (present suit) was filed for a different cause of action than the earlier suit filed by the plaintiff (K.S. Setlur) for reconveyance bearing Suit No. 94/56. That the present suit was filed by the plaintiff in view of his dispossession in 1970. (see p. 153 of the SLP Paper Book). According to the plaintiff, Iyengar had lost his suit for permanent injunction. The appeal therefrom was ultimately disposed of on 14.12.1961. Therefore, according to the plaintiff, up to 14.12.1961 Iyengar was not in possession since in that suit the court came to the conclusion that Iyengar was not in possession of the suit lands. That suit filed by Iyengar was Suit No. 79/49 which came to be ultimately dismissed vide judgment dated 14.12.1961 delivered by Additional Civil Judge, Bangalore in RA No. 70/51. In the present suit, the plaintiff contended that he had entered into settlement with Shyamala Raju in 1962-63; that on 23.4.1962 Shyamala Raju had surrendered his possession and K.S. Setlur (plaintiff) was put in possession, therefore, according to the plaintiff, he was in possession till 1962. (see p. 154 of the SLP Paper Book).

8. In the present suit, on the above pleadings and evidence, the trial court came to the conclusion that it is around 1970 that the plaintiff stood dispossessed when the LRs. of Iyengar executed two sale deeds on 21.5.1970

and 7.9.1970 in favour of defendant No. 1 and others and since the present A
 Suit No. 3656/81 stood instituted on 11.12.1981 it was within time of twelve
 years. According to the trial court, in view of the judgment of the trial court
 in the suit instituted by Iyengar bearing No. 79/49, K.S. Setlur was in possession
 of the suit property till December, 1961 and that the defendants had wrongly B
 entered into possession in April/ September, 1970. On the merits, the trial
 court held that since the High Court had declared vide its judgment dated
 14.8.1981 in RSA No. 545/73 that Setlur was in possession from 1946 to 1963
 he had become owner by adverse possession and since Setlur was
 dispossessed in 1970 the present Suit No. 3656/81 was well within limitation.
 According to the trial court, in view of the judgment of the High Court dated C
 14.8.1981 in RSA No. 545/73, defendant No. 1, Narsimha Setty, did not get a
 valid title in respect of the suit lands. According to the trial court, in view
 of the said judgment of the High Court dated 14.8.1981 in RSA No. 545/73
 there was no merit in the contention advanced on behalf of the defendants
 that the said judgment of the High Court dated 14.8.1981 was not binding on
 them since the High Court had declared that K.S. Setlur had possessory title D
 over the suit lands and in view of the said findings the defendants Narasimha
 Setty and others had failed to prove that they had derived valid title to the
 said suit lands under the above two sale deeds dated 21.5.1970 and 7.9.1970
 from the LRs. of Iyengar. The trial court further observed that K.S. Setlur had
 instituted the said suit for declaration and permanent injunction in 1981. That
 Suit was amended by K.S. Setlur as plaintiff alleged that he was in possession E
 in 1970 and that subsequently the defendants had unlawfully entered into the
 suit lands. The plaintiff accordingly amended the plaint. He sought possession.
 While seeking possession, the plaintiff in his evidence stated that he was
 dispossessed in 1970. According to the trial court, therefore, between 1946
 and 1962-63, K.S. Setlur was in possession. He had possessory title. He was
 in possession till 1970 when he was unlawfully dispossessed and in view of F
 the judgment of the High Court dated 14.8.1981 possessory title in the suit
 lands had vested in K.S. Setlur (plaintiff). In the circumstances, the trial court
 decreed the suit in favour of the plaintiff. The trial court declared that Narsimha
 Setty did not derive title from the LRs. of Iyengar under the above two sale
 deeds dated 21.5.1970 and 7.9.1970. G

9. Aggrieved by the said decision of the trial court dated 11.10.1996, the
 matter was carried in appeal by the LRs. of Iyengar and their alienees to the
 High Court under section 96 CPC vide RFA No. 672/96. By the impugned
 judgment dated 22.3.1999, the appeal filed by the defendants stood allowed
 and the impugned judgment of the trial court was set aside. Hence this civil H

A appeal.

10. As stated at the outset, the present civil appeal is filed by the LRs. of the deceased K.S. Setlur, the original plaintiff. This civil appeal arises out of the judgment of the High Court dated 22.3.1999 in RFA No. 672/96 filed under section 96 CPC.

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11. It is urged on behalf of the appellants-plaintiff that the suit is based on adverse possession. According to the appellants, Shyamala Raju was the tenant of K.S. Setlur since deceased. According to the appellants, Shyamala Raju had attained the tenancy in 1946 in favour of K.S. Setlur. According to the appellants, Shyamala Raju had surrendered possession to K.S. Setlur on 23.4.1962. According to the appellant, the High Court had categorically declared vide judgment dated 14.8.1981 in RSA No. 545/73 that the possessory title stood vested in K.S. Setlur. It is urged on behalf of the appellants that Iyengar had also instituted a suit for permanent injunction being Suit No. 79/49 in which it has been held that Iyengar was not in possession of the suit lands but he was certainly entitled to file a separate suit for declaration of his title.

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It was urged on behalf of the appellants that despite liberty being given to Iyengar to institute a separate suit for declaration on title, neither Iyengar nor his LRs. ever instituted a suit on title and, therefore, the possessory title found by the High Court vide judgment dated 14.8.1981 in favour of K.S. Setlur cannot be allowed to be reopened in the present proceedings. It was urged on behalf of the appellants that the trial court was right in coming to the conclusion that the possessory title stood vested in K.S. Setlur. In this connection, reliance was placed on judgment dated 14.8.1981 in RSA No. 545/73. According to the appellants the LRs. of Iyengar, in the above circumstances, had lost their right to recover possession. In this connection,

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the appellants placed reliance on Section 27 of the Limitation Act, 1963. It was urged on behalf of the appellants that the impugned judgment is full of contradictions and inconsistent findings. It was urged on behalf of the appellants that the matter needs to be remitted back since there are fundamental errors in the impugned judgment.

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12. On the other hand, it is urged on behalf of the respondents-defendants that the trial court has failed to appreciate that the judgment of the High Court dated 14.8.1981 in RSA No. 545/73 arose from proceedings/ Suit No. 89/63 filed by K.S. Setlur against his alleged tenant, Shyamala Raju. In that suit, the LRs. of K.S. Setlur were not made party defendants. According to the respondents, the present Suit No. 3656/81 filed by K.S. Setlur was a title suit

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for a declaration that the LRs. of Iyengar had no right, title or interest in the suit lands and that they had no right to transfer/ alienate the suit lands in favour of Narsimha Setty and others. According to the respondents, the trial court has erred in treating the present suit as a suit based on adverse possession. According to the respondents, the suit was based on title, it was subsequently amended falsely alleging that the plaintiffs were forcibly dispossessed. According to the respondents, K.S. Setlur was in fact dispossessed in 1953. According to the respondents, the trial court had erred in holding that K.S. Setlur was dispossessed in 1969-70. According to the respondents, the trial court had erred in holding that the tenant's possession during 1946 to 1963 was the plaintiff's possession, which, according to the respondents, was a fundamental error in the judgment of the trial court. According to the respondents, the judgment of the High Court dated 14.8.1981 was between K.S. Setlur and Shyamala Raju. In that proceedings, LRs. of Iyengar were not party defendants and, therefore, the judgment of the High Court dated 14.8.1981 was not binding on the respondents. According to the respondents, the trial court had proceeded on the basis of judgment dated 14.8.1981 which was not binding on the respondents and even if it is assumed that the said judgment was binding on the respondents even then the trial court had erred in holding that possession of Shyamala Raju was the possession of Setlur in reckoning the period of twelve years under Article 64 of the Limitation Act, 1963. It is urged on behalf of the respondents that even in the suit for permanent injunction instituted by Iyengar being Suit No. 79/49 the trial court has held that, even though Shyamala Raju is found to be in possession, whether Shyamala Raju was a tenant of Iyengar or K.S. Setlur was not fairly established and, therefore, in none of the earlier proceedings it had been established that Shyamala Raju was cultivating as a tenant of K.S. Setlur or as a tenant of Iyengar. This question has never been conclusively decided and even if one is to proceed on the basis that Shyamala Raju was a tenant of K.S. Setlur, will the tenant's possession be taken into account in calculating the period of twelve years under Article 64 of the Limitation Act, 1963? These questions, according to the respondents, have not been answered by the trial court.

13. Section 27 of the Limitation Act, 1963 operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right which the lawful owner has and against whom a claim for adverse possession is made, therefore, the plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and

A undisturbed possession. The question whether possession is adverse or not is often one of simple fact but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely, ouster or adverse possession is a question of law and has to be considered by the court.

B 14. As stated, this civil appeal arises from the judgment of the High Court in RFA No. 672/96 filed by the original defendants under section 96 CPC. The impugned judgment, to say the least, is a bundle of confusion. It quotes depositions of witnesses as findings. It quotes findings of the courts below which have been set aside by the High Court in the earlier round. It criticizes the findings given by the coordinate Bench of the High Court in the earlier round of litigation. It does not answer the question of law which arises for determination in this case. To quote an example, one of the main questions which arises for determination in this case is whether the tenant's possession could be treated as possession of the owner in computation of the period of twelve years under Article 64 of the Limitation Act, 1963. Similarly, as an example, the impugned judgment does not answer the question as to whether the decision of the High Court dated 14.8.1981 in RSA No. 545/73 was at all binding on the LR's. of Iyengar/ their alienees. Similarly, the impugned judgment does not consider the effect of the judgment dated 10.11.1961 rendered by the trial court in Suit No. 94/56 filed by K.S. Setlur against Iyengar *inter alia* for reconveyance in which the court below did not accept the contention of K.S. Setlur that the conveyance executed by Kalyana Sundram Iyer in favour of Iyengar was a benami transaction. Similarly, the impugned judgment has failed to consider the effect of the observations made by the civil court in the suit filed by Iyengar for permanent injunction bearing Suit No. 79/49 to the effect that though Shyamala Raju was in possession and cultivation, whether he was a tenant under Iyengar or under K.S. Setlur was not conclusively proved. Similarly, the impugned judgment has not at all considered the effect of the Iyengar or his LR's. not filing a suit on title despite being liberty given to them in the earlier Suit No. 79/49. In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner. None of these aspects have been considered by the High Court in its impugned judgment. As stated above, the impugned

judgment is under section 96 CPC, it is not a judgment under section 100 CPC. A
As stated above, adverse possession or ouster is an inference to be drawn
from the facts proved that work is of the first appellate court.

15. It is true that the litigation is pending for the last several years, however, we are in agreement with the contention advanced on behalf of the appellants that there are serious errors in the impugned judgment which warrants interference under Article 136 of the Constitution of India. We do not wish to express any opinion on the merits of the matter. Reasoning, if any, given hereinabove, should not be read as our conclusion on merits. B

16. For the reasons indicated above, without expressing any opinion on the merits of the case, we allow this civil appeal, set aside the impugned judgment of the High Court dated 22.3.1999 in RFA No. 672/96 and we remit the case back to the High Court to decide the said RFA No. 672/96 *de novo* in accordance with law. C

17. Since the above proceedings are pending from 1981 we request the High Court to expeditiously hear and dispose of the appeal bearing No. RFA 672/96, preferably within three months from the receipt of this judgment. Office is directed to send back records and proceedings to the High Court expeditiously. D

B.S.

Appeal allowed. E