

Chua June Ching Michelle v Chai Hoi Tong and others
[2011] SGHC 180

Case Number : Suit No 377 of 2009
Decision Date : 29 July 2011
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Edwin Lee and Joni Tan (Eldan Law LLP) for the plaintiff; Samuel Chacko and Angeline Soh (Legis Point LLC) for the first defendant.
Parties : Chua June Ching Michelle — Chai Hoi Tong and others

Land – Adverse possession

29 July 2011

Judgment reserved.

Choo Han Teck J:

1 “Adverse possession” is the law that recognises one’s claim to ownership of soil and plaster he knows do not belong to him. That law will become obsolete in time. This case is a relic from a past not affected by the change in law, and concerns the ownership of a property located at 89 Amoy Street, Singapore 069908 described as lot number TS3-99095P in the lot base system operated by the Singapore Land Authority (“the Property”). Chua June Ching Michelle (“the Plaintiff”) and Chai Hoi Tong (“the Defendant”) are rival claimants to the Property, both claiming by the doctrine of adverse possession. The 2nd, 3rd and 4th defendants did not enter an appearance in the action, and were not involved in the proceedings at trial.

2 The history of this case so far as it can be proved or was undisputed showed that on 13 June 1936, a Statutory Declaration declared Tan Seang Guat Neo the owner of the Property by way of adverse possession. Tan Seang Guat Neo bears no relation to either the Plaintiff or the Defendant. The Plaintiff and Defendant could not agree on what happened thereafter. The Plaintiff’s version of the story was as follows. Tan Seang Guat Neo leased the Property to the Defendant’s predecessors for \$840 a year. On 23 October 1936, and after the lease was granted, Tan Seang Guat Neo mortgaged the Property to the Plaintiff’s grandmother, one Goh Tim Hneo (“the Plaintiff’s grandmother”). Subsequent to the grant of the mortgage, the Defendant’s predecessors paid the rent to Goh Tim Hneo. It was not known why the “rent” of \$840 was collected by Goh Tim Hneo (the mortgagee) rather than Tan Seang Guat Neo (the registered owner), but in any event this showed that if Goh Tim Hneo was to have any claim to ownership of the Property, she would have to establish her claim by way of adverse possession, and significantly, the Plaintiff cannot have a better claim through her predecessors than her present claim (also based on adverse possession). Tan Seang Guat Neo and/or her successors, if any, did not made any claim over the Property and in light of this, it is not necessary to determine the effect of the mortgage on the claims of either party.

3 The Plaintiff’s grandmother granted a power of attorney to the Plaintiff’s father, one Chua Eng Cheong (“the Plaintiff’s father”) on 24 January 1951. From that time on, the Plaintiff’s father collected the “rent” from the Defendant’s predecessors. The Plaintiff’s grandmother died in 1955 and the Plaintiff’s father died in 1971. The Plaintiff’s case was that from 1971, until December 2008, she had been collecting payments by way of rent from the Defendant amounting to \$840 a year, and her

adverse possession claim rests on her assertion that she was the landlord of the Property. I will hereafter refer to the \$840 payments as "the Payments" as a neutral term rather than "rent".

4 The Defendant's version of the facts differed from the Plaintiff's in several important respects. He disputed that the Payments were made, and also the nature of the Payments. He claimed that if the Payments were made, they were not rental payments but financial assistance. He testified that the Plaintiff's father was in financial difficulty from as early as 1956, and frequently sought financial assistance from the Defendant's own father, who generously offered \$840 a year for that purpose. The Defendant's father was one of two partners in a partnership known as Kwong Thye Hin, which had its business premises at the Property and had as its other partner one Chai Xing. Upon the Defendant's father's death, the Defendant took over his share of the partnership. Chai Xing has since passed away and the partnership has since been dissolved.

5 On 11 September 2008, the Defendant filed Originating Summons No 1183 of 2008 ("the application"), *ex parte*, for a court order to grant him title to the Property as adverse possessor as against the 2nd to 4th defendants ("the defendants") named in the counterclaim in the present proceedings. The Plaintiff was not named as a defendant to that application. The Defendant claimed that he was unable to locate the defendants, and he was allowed to serve the application by substituted service. He placed advertisements in two local newspapers (the Straits Times and Lianhe Zaobao) on 26 September 2008 giving notice of the application. However, the Plaintiff claimed that she received no notice of the application and thus did not attend the hearing. The Defendant was granted a declaration by an *ex parte* Order of Court dated 16 October 2008 ("the Order of Court") that he was the owner of the Property and the building erected thereon by reason of his adverse possession of the Property for a continuous period of 12 years prior to 1 March 1994. He subsequently procured the registration of title to the Property in his name on 18 December 2008. On 6 April 2009, the Plaintiff lodged Caveat No IB/325458M against the Property, and when the Defendant sought to remove the caveat, she initiated the present proceedings.

6 The Plaintiff claimed that the Order of Court was irregularly or fraudulently obtained. Before this court, she sought a declaration that the Order of Court be set aside on the grounds that it was obtained *ex parte*. The Plaintiff also sought an order that the Defendant's title to the Property be extinguished and the land-register be rectified by cancelling the registration on the grounds of fraud. The Plaintiff further sought a declaration that she was the owner of and was entitled to all the rights and title to and possession of the Property, and an order that the Registrar of Titles registered her as the proprietor of the Property. In his counterclaim, the Defendant prayed for an order that the Caveat against the Property be removed, that the Registrar of Land Titles be directed to remove and/or expunge the Caveat from the land register, and for damages to be assessed.

7 To succeed, a party has to show both that he or she had adversely possessed the Property as against the paper owner Tan Seang Guat Neo (who did not enter appearance), and that he or she had adversely possessed the Property against the other. Order 32 rule 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) provides that an *ex parte* order may be set aside in the interests of justice, if the party who was not heard wishes to object. One of the grounds for the setting aside of *ex parte* orders is that the applicant did not make full and frank disclosure of material facts in his application (see *Nikkomann Co Pte Ltd v Yulean Trading Pte Ltd* [1992] 2 SLR(R) 328). Here, the Plaintiff alleged that the Defendant deliberately did not disclose the material fact that he paid rent to her in respect of the Property in his *ex parte* application. The nature of that payment was an important issue before me. I shall revert to this issue shortly.

8 Indefeasibility of the registered title is an important feature of the system of land registration. An exception to this indefeasibility is the court's power to order rectification of the land-register if it

is satisfied that a registration was procured through fraud, omission or mistake, as stated in s 160(1) (b) of the Land Titles Act (Cap 157, 2004 Rev Ed). In this case, the Plaintiff claimed that the Defendant had been dishonest in procuring the registration of the Property in his name, because he had deliberately not disclosed that he had paid rent to her in respect of the Property. As stated in *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [34] —

The hallmark of fraud is dishonesty or moral turpitude, which usually stems from greed, and greed simply means taking something of value which does not belong to you.

9 Under s 50 of the Land Titles Act 1993 (Act No 27 of 1993) ("LTA 1993") which came into effect in Singapore on 1 March 1994, acquisition of title by adverse possession was effectively abolished. However, the LTA 1993 contained transitional provisions (see s 174(8)) to preserve the rights which had already crystallised prior to 1 March 1994. While s 174(8) is not found in the edition of the Land Titles Act in force today, *ie* the Land Titles Act 2004 (Cap 157, 2004 Rev Ed) ("LTA 2004"), it survives and operates by virtue of s 5 of the Revised Edition of the Laws Act (Cap 275, 1995 Rev Ed). To this date, the Property is unregistered land, and thus s 50 of the LTA 2004 does not operate to preclude claims of adverse possession that crystallised before 1 March 1994. Therefore, if 12 continuous years of adverse possession had been completed prior to 1 March 1994, the right of ownership over the Property would be preserved by s 174(8) of the LTA 1993 read with s 9 of the Limitation Act (Cap 163, 1996 Rev Ed).

10 At common law, two elements have to be proved in order to substantiate a claim of adverse possession. The first is factual possession, which must be "open, adverse and exclusive" (*Elements of Land Law* (Kevin Gray and Susan Francis Gray) (OUPS, 5th Ed) at p 1180 – 1185), and the second is the *animus possidendi* – the intention to possess. One issue that has to be dealt with at the outset is whether "factual possession" must be proved by physical occupation of the Property. The Plaintiff did not rely on physical possession of the Property but on the claim that she had received the Payments which were in the nature of rent from December 1971 till December 2008, a period of 37 years. In other words, the Plaintiff claimed that she was the landlord of the Property, and that the Defendant was merely her tenant. The Defendant in contrast, based his claim to the Property on the fact that he had been in continuous physical occupation of the land since 1965.

11 It is generally accepted that factual possession requires "a sufficient degree of *physical* custody and control" (*Tan Sook Yee's Principles of Singapore Land Law* (Tan Sook Yee, Tang Hang Wu and Kelvin K F Low) (LexisNexis, 3rd Ed, 2009) at page 824). However, "physical" custody and control may require elaboration.

12 Physical occupation of land is neither a necessary nor a sufficient condition for possession in law because a person may in law be in "possession" of land without asserting his physical presence on it. "Possession" and "occupation" are distinct concepts. The common law is replete with examples. (See, *eg*, *Western Australia v Ward* (2002) 213 CLR 1 at [518]; and *Nicholson v Samuel Property Management Ltd* (2002) 217 DLR (4th) 292 at [14]). In Singapore, the Court of Appeal held in *Soon Peng Yam & Anor (trustees of the Chinese Swimming Club) v Maimon bte Ahmad* [1995] 1 SLR(R) 279 ("*Soon Peng Yam*"), that "a possessor need not personally be in occupation of the land to be in factual possession or to have the requisite *animus possidendi*" (at [14]). While factual possession implies an "appropriate degree of physical control" (at [11]), it could be assumed, for example, by the collection of rent:

14 ...factual possession is constituted by a possessor "dealing with the land in question as an occupying owner might have been expected to deal with it". *This clearly contemplates physical possession but it certainly encompasses much more. It is the exercise of acts of ownership*

which is crucial. Receipt of rent or grant of licence in respect of the property by the respondent would be an act of ownership which is adverse to the title of the club...

[emphasis added]

If acts of ownership are of paramount importance, it would be unduly restrictive to insist that physical occupation be the sole criterion of factual possession. It is acts of ownership that reflect the nature of adverse possession – the doctrine under which ownership of land passes from the paper owner to an adverse possessor.

13 The Plaintiff claimed that she exercised an act of ownership by collecting rent from the Defendant. She claimed that the Payments had been collected by her as rent, from the Defendant since 1971. The Plaintiff testified that the Payments had been made by way of cheque from 1971 to 1990, but she only tendered two cheques in evidence made out by Kwong Thye Hin (for the years 1984 and 1989). Since the Payments were allegedly collected at the end of the year, it would be sufficient for the Plaintiff to show that Payments had been tendered for a total of 12 years from the end of 1981 to the end of 1993 ("the relevant period").

14 In relation to the relevant period, the Plaintiff adduced:

(a) bank passbook records from 1984 to 1988, and 1990;

(b) two cheques for the years 1984 and 1989; and

(c) receipts handwritten by one Chua Kah Lock ("the Plaintiff's brother") from 1981 to 1994.

With regard to (a), there were two sets of bank passbook records, the first of which was an account held jointly by the Plaintiff and her mother, which was operated by the Plaintiff. Sums of \$840 were deposited by cheque in 1984 and by cash in 1985. The second set of records was an account held jointly by the Plaintiff and her brother, which showed that payments of \$840 were deposited by cheque in 1986, 1987, 1988 and 1990. For the years where there was no bank record of a sum of \$840 being deposited, the Plaintiff claimed that she used the money to pay for her household expenses. I accept this as a reasonable explanation. With regard to (c), on the face of each of the documents was stated that it was a receipt for rent received from Kwong Thye Hin for a specified period. The Defendant had two objections to the purported receipts. First, he claimed that they were of doubtful probative value because they were made out to Kwong Thye Hin and not him personally. However, he had admitted under cross-examination that owing to his stake in the partnership, receipts issued to Kwong Thye Hin were as good receipts issued to him. The Defendant's second objection was that the receipts for the period 1981 to 1984 were made out to one "Koh Tee Tee", the Plaintiff's late mother who died in 1985. The Plaintiff explained that she and her mother collected the Payments together for that period of time, and that she had written her mother's name on the receipts out of respect for her mother. I accept this explanation. Further, even if the rent had been collected by Koh Tee Tee, the Plaintiff could take over and continue the period of adverse possession that her mother had started on her own behalf, as was held in *Jubilee Electronics Pte Ltd and others v Tai Wah Garments and Knitting Factory Pte Ltd* [1996] 1 SLR(R) 352 at [42], "[s]o long as the adverse possession continues unbroken, it makes no difference who continues it". Therefore, the Plaintiff could have continued the adverse possession started by her mother, as evidenced by her

collection of rent from 1985 onwards. In sum, I find that the receipts, corroborated by passbook entries and cheques in certain years, prove that the Payments were received by the Plaintiff from the Defendant for the relevant period.

15 I now turn to whether the Payments were in the nature of rent. Mr Samuel Chacko, counsel for the Defendant, submitted that if the Payments were indeed rent, the Plaintiff would have sought to raise the amount paid over the years, given that an annual rent of \$840 was incongruous with the favourable location of the Property. He submitted that the Payments were really a form of financial assistance from the Defendant's family to the Plaintiff's family. However, I was not convinced. The odd and unexplained figure of \$840 was an unusual sum for financial assistance. That might have been more likely had it been a one-off charity, not as an annual payout, for so many years. The Defendant's claim that the Plaintiff's family was in dire financial straits from 1956 all the way to 2008 was unsubstantiated, and in any event does not necessarily lead to the conclusion that they would have received handouts from the Defendant's family in the form of the Payments. I find the Plaintiff's explanation, viz that her father had instructed her not to raise the amount demanded because of his belief that the Property was subject to the Control of Rent Act (Cap 58), to be the more plausible version of events.

16 The Defendant was living at the Property during the relevant period, and under cross-examination he testified that he would have to pay rent for staying at the Property, even if it belonged to him. That made no sense and he must have realised this later, and upon re-examination, he changed his testimony, claiming that it was Kwong Thye Hin which had paid rent, not for the Property, but in respect of a warehouse on the corner of Amoy Street. Kwong Thye Hin's tax records from the years 1965, 1967, and 1969 show that the partnership had made some payments for the single itemised amount of "Rent, Water, Light" every year. The Defendant had not made the tax records for the relevant period available, but it was clear that Kwong Thye Hin had to pay some form of rent in the past. The Defendant claimed that the word "Rent" referred to the rent for the warehouse and the words "Water, Light" referred to the utilities for the Property. I do not find his explanation at all convincing. The warehouse did not feature in the Defendant's case or evidence until the re-examination stage of the proceedings, and appeared to be an afterthought. Moreover, it is absurd that in the single itemised amount of "Rent, Water, Light", "Rent" was attributed to one property and "Water and Light" to another, without the document making this explicit on its face. Given the context in which the Payments were given and received, I find that they were in the nature of rent.

17 Having established that the Plaintiff had exercised ownership by collecting rent from the Defendant, I now return to the other requirements for factual possession, namely, that it be open, adverse and exclusive. Only the latter two requirements are controversial in the instant case. The requirement that possession be adverse means that the possession must be without the consent of the paper owner. The Plaintiff's collection of rent was clearly without the consent of the paper owner. The Defendant's physical occupation was also against the consent of the paper owner, but since he had been paying rent to the Plaintiff, he was in physical occupation of the Property only with her consent and he thus cannot show that he had adversely possessed the Property as against the Plaintiff. His claim fails on this point alone.

18 The requirement that possession be exclusive means that the claimant must have excluded the whole world including the paper owner. However, this requirement being also a necessary component of a tenancy, which is defined as exclusive possession at a term (*Street v Mountford* [1985] UKHL 4) with rent optional (*Ashburn Anstalt v Arnold* [1988] EWCA Civ 14) presents an ostensible obstacle to the Plaintiff's case. If she had granted exclusive possession to the Defendant in the lease, could she have satisfied the requirement of exclusive possession herself? Mr Edwin Lee, counsel for the

Plaintiff, relied on the case of *Soon Peng Yam* in which the appellant claimant sought to vindicate her title to the land by way of adverse possession against the respondent paper owner. The claimant was initially in physical occupation of the land and then later moved off the land and tenanted it out to a third party. The Court of Appeal (at [17]) held that the claimant was in exclusive possession of the land during the time she was in physical occupation of the land, and further, after the claimant had granted the lease, she continued to be in adverse possession of the land *through her tenants*" (at [13]) (emphasis added).

19 The Court of Appeal's dicta that a landlord can satisfy the requirements of adverse possession through her tenants is not consistent with the fact that the landlord has granted exclusive possession to the tenant in the lease. The nature of exclusive possession is that it is exclusive. The landlord and tenant cannot both concurrently enjoy this exclusivity. As stated above (at [12]) the doctrine of adverse possession is one under which the ownership of land can change from the paper owner to the adverse possessor. If the exercise of acts of ownership has been proved on the part of the would-be adverse possessor, the requirement of exclusive possession should not prove a stumbling block to him or her. The two concepts are discrete, and while the law does not hold that one implies the other, they bear an important relation to each other. Exclusive possession is an incident, not an exclusive definition, of ownership. While it is true that a tenant has exclusive possession even though he is not the owner, he only has exclusive possession by way of grant from the landlord, and acknowledges that another is the owner. In the context of adverse possession, exclusive possession is treated as a mere incident of the larger consideration, which is to show that the would-be adverse possessor was dealing with the land as an owner would. As the Plaintiff's collection of rent is an act of ownership, I am of the view that even though she was not in exclusive possession during the relevant period, she had, nonetheless, fulfilled the requirement of factual possession.

20 The Plaintiff still needed to prove that she had demonstrated the *animus possidendi*. *Tan Sook Yee* at page 824, described *animus possidendi* ("the *animus*") as "an intention to exercise such custody and control on one's own behalf and for one's own benefit", and the "requisite intention is one to possess, not to own". In our case, the Plaintiff's intention was one to own and not to possess, and the question remained as to whether that would preclude her claim to adverse possession. The intention to own is a more precise and exacting intention than the intention to possess. Adverse possession is a doctrine under which the ownership of land may change from the paper owner to the adverse possessor, and if the would-be adverse possessor himself has the more specific and relevant intention of ownership, then this should adequately demonstrate his *animus*. The standard definition of *animus* in *Tan Sook Yee* required merely the intent to possess only because it was a more general intention and a more easily satisfied requirement than the intention to own.

21 In previous cases where the claimant was not in physical occupation of the property, acts such as paying property tax, utilities and carrying out maintenance and repair work for the property were held to be evidence of the *animus* (see *Soon Peng Yam* and *Tan Ah Suan v Ng Aik Kern and Others* [2002] 2 SLR(R) 1135). In the present case, the Plaintiff has done none of the above. On the contrary, it was the Defendant who paid the taxes and the utility bills in respect of the Property. Although the Plaintiff was aware that the Defendant intended to undertake extensive renovation to the Property in 1994, she did not ask the Defendant for either the plans or the bank loans obtained for the purposes of the same. I do not think that she would have lost the requisite *animus* on that account. It was clear that the Plaintiff continued to receive the Payments in the resolute belief that they were rent. She explained that she did not pay property tax and the utility charges because she was already collecting such a low sum of rent and it would not be commercially viable for her to make these additional payments in respect of the Property. I accepted her explanation which seemed plausible in the circumstances. I find that the Plaintiff's collection of rent from the Defendant constituted an act of ownership, and that she had been dealing with the Property as if a landlord-

owner would for 37 years.

22 In conclusion, I find that the Plaintiff has demonstrated both factual possession and the requisite *animus* and is thus able to claim ownership over the Property on the basis of adverse possession. I declare that the Plaintiff is the owner of and is entitled to all the rights and title to and possession of the Property, and grant an order that the Registrar of Titles registers her as the proprietor of the Property. The land-register must be rectified, by cancelling the registration the Defendant obtained on the basis of the Order of Court, on the grounds of fraud.

23 Costs to follow the event and to be taxed if not agreed.

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