

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 197 /2013**

1. Smt. Tulsi Bai, W/o. Late Kishori Lal, Aged About 40 Years.
2. Dheeraj, S/o. Late Kishori Lal, Aged About 22 Years.
3. Bimla Bai, D/o. Late Kishori Lal, Aged About 19 Years.

All R/o. In Front Of Gayatri Mandir, Vinoba Nagar, Bilaspur, Tahsil & District Bilaspur, C.G.

---- Appellants

Versus

1. Manoj Bhivgade, S/o. Late Vivekanand, Aged About 31 Years.
2. Sanjay Bhivgade, S/o. Late Vivekanand, Aged About 33 Years.
3. Geetanjali Bhivgade, D/o. Late Vivekanand, Aged About 27 Years.
4. Pushpanjali Bhivgade, D/o. Late Vivekanand, Aged About 24 Years
5. Tanuja Bhivgade, D/o. Late Vivekanand, Aged About 22 Years.
6. Sulakshana Bhivgade, W/o. Surendra Bagde, Aged About 29 Years.

All Respondent No.1 to 6 are R/o. Link Road, Bilaspur, Tahsil & District Bilaspur, C.G.

7. State Of Chhattisgarh, Through- Collector, Bilaspur, C.G.

---- Respondents

For Appellants : Mr. Sunil Kumar Soni, Advocate.

For Respondent No.1 to 6 : Mr. Prashant Gupta, Advocate

For Respondent No.7 : Mr. Sangharsh Pandey, Dy. G.A.

Hon'ble Shri Justice Goutam Bhaduri

CAV Order

13/05/2016

1. The instant appeal is preferred against the judgment & decree dated 07.12.2012 passed by the Court of Fifth Additional District Judge, Bilaspur, in Civil Appeal No.42-A/2011 whereby the judgment & decree dated 30.09.2011 passed by the Court of Seventh Civil Judge Class-II, Bilaspur, in Civil Suit No.16-A/2011 was affirmed.

2. The instant appeal is by the defendants. The case was at the stage of admission. It was fixed on 18.04.2016 when it was dismissed for want of prosecution, on a request made by the counsel Mr. C.K. Kesharwani for his personal reasons, it was restored. On the subsequent date, Advocate Mr. Sunil Kumar Soni appeared and stated that no objection has been given by the counsel Mr. C.K.Kesharwani and thereafter argued the case. The case was reserved for judgment on 25.04.2016. Thereafter on 26.04.2016 an application was filed to postpone the case which was reserved for orders on the grounds that the fresh vakalatnama was filed and entire documents were not provided by earlier counsel which were necessary for proper adjudication of the case. Though on the earlier date, the case was argued by the counsel. During argument it was stated that no objection has been given by Mr. C.K. Kesharwani. Subsequently, on 27.04.2016 a written submission was filed in the Registry by earlier counsel Mr. C.K.Kesharwani, despite the no objection given earlier. The Court is unable to understand such modus operandi as once having given the no-objection without seeking permission from earlier counsel or Court a written synopsis was filed though no orders were given to file written submission. On the whole such conduct of counsel whether were done jointly or not is uncalled for.
3. Now coming to the facts of this case, a civil suit was filed by Vivekanand Bhivgade, since dead, on 11.03.1998. The suit was for the possession and permanent injunction. Initially a claim for declaration was made and claim for possession was made subsequently by amendment in the year 2005. It was pleaded by the deceased that the plaintiffs, who have subsequently substituted by the legal heirs that they are the owners of the land bearing

Khasra No.652/1 admeasuring 0.41 Acre at Juna Bilaspur. The particulars of the land was shown in the map appended with the plaint with the boundaries thereon. It was stated that initially the defendants were the owner of the said land but having sold the same, the ownership did not remained with them and the predecessor entitle of the defendant Gangaram had sold 1800 sq.ft. of land out of Khasra No.651/3, which was further sold by different person and lastly Savita Das the last purchaser was in possession of the land after construction of the house. It was stated that the defendants tried to encroach upon the land by putting a pole though they are not the owners. It was further contended that earlier a civil suit was filed against Gangaram, the predecessor entitle of the defendants in respect of the land bearing Khasra No.652/1 and 638/1 which was Civil Suit No.17-A/1996, which was dismissed in default on 04.10.1998 and the restoration of the said suit was filed but the identity of the said land was different. It was further stated that while the present suit was pending, the defendant had encroached upon the land for which possession was prayed for and further it was prayed that after removing the encroachment, the plaintiffs be placed in possession of the suit land.

4. The defendants refuted the allegation and it was stated that the defendants have not encroached upon the land and the necessary parties were not included in the suit; therefore, the suit be dismissed for non joinder of parties. It was further stated that near the suit land bearing Khasra No. 651 and 650 are placed and further stated that the defendants are in possession of the land for last 60 years. Further a counter claim was made that they had become the owner of the land by way of adverse possession. In reply to the counter claim, it was pleaded by the plaintiffs that the

defendants were earlier owner of the part of land bearing Khasra No.651 subsequently after sale they were not in the possession of the land and the predecessor entitle had sold the property from Khasra No. 651/3 of 1800 sq.ft. and presently Savita Das is in possession.

5. The trial Court after evaluating the evidence and facts allowed the suit and the ejectment decree was passed and against such ejectment decree the appeal was preferred. The first appellate Court too also dismissed the appeal preferred by the defendants therefore the instant second appeal against the concurrent finding of fact.
6. Learned counsel for the appellants would submit that the judgment & decree passed by both the Courts below are perverse. It is stated that both the Courts below failed to take into notice that the earlier Civil Suit bearing No.17-A/1996 was dismissed which was in respect of the same land, therefore, the another suit in respect of the said land cannot be continued. It is further submitted that the defendants are in possession of the land bearing Khasra No.652/1 and they have become the owner of the said land by way of an adverse possession. It is further submitted that since both the concurrent finding of fact of both the Courts below are perverse, therefore, the appeal be admitted on the substantial question of law.
7. Perused the record of the Court below. Sanjay Bhivgade was examined as PW-1, who has proved the document Ex.P-5 & P-6, which are Panchshala Khasra & B1 revenue records of the land bearing Khasra No.652/1, which shows the name of Sanjay Bhivgade and others was recorded in the record of right. Though the defendant Tulsi Bai, DW-1, had stated that they are the owner

of the land but no document is on record to rebut the Ex.P-5 & P-6 has been placed on record to consider their right over the land. Though the defendants have stated that they have become the owner of the land by way of an adverse possession, but how they held the land adverse to the knowledge of the plaintiffs has not been proved by any documentary or oral evidence. Further, evidence is on record that adjacent to disputed land 652/1, another part of land 651/1 was there and defendants were the owner through their predecessor Gangaram. A sale was made by Gangaram of 1800 sq.ft. to Mahesh Bhardwaj, thereafter subsequent sale were made to Vijay Kumar Ojha and Ranjna Devi and ultimately it was sold to Savita Das. The sale deeds are marked as Ex. P-1 dated 01.07.1991, Ex.P-2 dated 05.04.1984 and Ex.P-7 dated 01.01.1994. Therefore, by such documents, it would show that the entire land of 1800 sq.ft. were sold to the predecessor entitle of the defendants. The plaintiffs have placed the demarcation of the land and is exhibited as Ex.P-8 & P-9. Perusal of Ex.P-8 would show that at the time of demarcation both the defendants and plaintiffs were present. It is recorded in such demarcation that over Khasra No. 652/1 over an area of about 0.26.5 Acres, the defendants are in possession and the rest of the land is open. Further, the Panchnama Ex.P-9 further shows that out of 652/1 admeasuring 0.41 Acre on 0.26.5 Acre the defendants are in possession and over 192 sq.ft. some hut exists wherein some tenants of Tulsi Bai is in possession. Tulsi Bai, DW-1, has shown her ignorance in the evidence to the question that over 0.41 dismil they have excavated. Therefore, possession of part of land as to whether the defendants were in possession of the entire area of land of 652/1 i.e. 0.41 dismil has not been proved instead the

demarcation shows over 26.5 dismil, the defendants has encroached upon.

8. During the evidence, the defendants have exhibited the alleged earlier Civil Suit filed by Vivekanand and Rewanand against Gangaram. In such plaint for Khasra No.652/1 area is shown to be of 0.54 Acres and in respect of the land Khasra No.638/1 it was shown to be 8.54 Acres. In such suit, possession was claimed by such Vivekanand. The averments of plaint shows that the particulars of land were shown in the Map attached with the plaint. The said copy of the plaint though was confronted to the plaintiffs during the evidence but Ex.D-2 the copy of plaint do not contain the Map of Schedule 'A'. The Map is not shown to be part of Ex.D-2. Therefore, by examination of Ex.D-2 the contention of the defendants that in respect of land earlier civil suit was filed for possession which was dismissed cannot be conclusively held that for same land, subsequent suit was filed. The Map being the integral part of earlier plaint was a necessary document to identify the land. Instead the plaintiff have filed the Map to show the demarcation and encroachment made by the defendants. Furthermore, neither any pleading was made that subsequent civil suit is for same land for which earlier suit was dismissed nor any issues were framed on said subject.
9. Perusal of the plaint would show that the amendment for possession was made in the year 2005, thereafter, the suit for possession was valued and the Court fees was paid. If the land according to the demarcation is an open land then the contention of the defendants that they are in possession except the part of the hutment cannot be accepted. Only oral submissions have been

made by the defendants to prove their possession, which is negated by demarcation report.

10. Accordingly, the finding of both the Courts below that the defendants have encroached upon the part of land and the concurrent finding to this effect cannot be faulted with.
11. In a result, the decree for possession which has been passed in favour of the plaintiffs cannot be faulted with. Therefore, on the facts which are existing on record, no substantial question of law arises for consideration in this second appeal.
12. Accordingly, the appeal is dismissed at the admission stage itself.

Ashok

Sd/-
(Goutam Bhaduri)
Judge