

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 322 of 2007

- Mohanlal Sindhi (Dead) Through LR's.
 1. **(1)** Smt. Rajkumari, Wd/o Late Mohanlal, Aged about 62 Years,
 1. **(2)** Narayandas, S/o Late Mohanlal, Aged about 34 Years,
 1. **(3)** Bhimsen Tulsani, S/o Late Mohanlal, Aged about 32 Years,
 1. **(4)** Bhojraj Tulsani, S/o Late Mohanlal, Aged about 28 Years,
 1. **(5)** Anil Tulsani, S/o Late Mohanlal, Aged about 26 Years,
 1. **(6)** Kum. Dipti Tulsani D/o Late Mohanlal, Aged about 23

No. 1 to 6 are R/o Gupta Chowk, Ward No.9, Ambagarh Chowki,
District Rajnandgaon (C.G.)

1. **(7)** Smt. Asha Bodhani, W/o Shri Santosh Kumar Bodhani, Aged about 36 Years, R/o Jhulelal Stores, Old Bus Stand, Dhamtari, (Chhattisgarh)
1. **(8)** Smt. Dropadi Sawani, W/o Shri Vijay Kumar Sawani, Aged about 30 Years, R/o House No. 1136/18 Jawahar Nagar, Durg, (Chhattisgarh)
1. **(9)** Smt. Deepa Belani, W/o Shri Rajkumar Belani, R/o Infront of Pankaj Garden, Raipur (Chhattisgarh)

---- Appellants

Versus

- Chamariya (Dead) Through LR's.
 1. **(1)** Smt. Tara Bai Dakne, W/o Late Ram Prasad Dakne, Aged about 50 Years,
 1. **(2)** Dattaram Dakne, S/o Late Chamriya Dakne, Aged about 34 Years,
 1. **(3)** Mehta Bai, W/o Late Chamariya Dakne, Aged about 60 Years, R/o Village Kolihyatola, Post Badsena, Tahsil Ambagarh Chowki, District Rajnandgaon (Chhattisgarh)
 1. **(4)** Uma Bai W/o Keshav Meshra, R/o Village Tadegaon, Tahsil Kulkeda, Distt. Garchiroli (Maharashtra)
 1. **(5)** Sushila Bai, W/o Vinayak Veragare, R/o Village Ramgarh, Tahsil Kulkeda, Distt. Garchiroli (Maharashtra)

1. (6) Rama Bai, W/o Chamariya Meshram, R/o Village Sinraitool,
Tahsil Ambagarh Chowki, Distt. Rajnandgaon (Chhattisgarh)
1. (7) Madhu W/o Dev Rao @ Deva Borkar, R/o Village Dadapur,
Tahsil Kulkeda, Distt. Garchiroli (Maharashtra)
1. (8) Bhagwati W/o Surendra Meshram, R/o Village Mongara,
Tahsil Ambagarh Chowki, Distt. Rajnandgaon (Chhattisgarh)

---- Respondents

For Appellants/Defendants : Shri Malay Shrivastava, Advocate
For Respondents/Plaintiffs : Shri Anup Majumdar, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

15/09/2016

1. The substantial questions of law involved, formulated and to be answered in the defendants' appeal, are as under:

- “(i) Whether the suit filed by the plaintiff is barred by limitation?
- (ii) Whether the Courts below passed the judgment and decree as per the provisions of the Chhattisgarh Accommodation Control Act, 1961?
- (iii) Whether the learned Appellate Court is justified in dismissing the application under Order 41 Rule 25 of the Code of Civil Procedure?
- (iv) Whether the Courts below are justified in decreeing the suit of the plaintiff without providing or declaring the title of the plaintiff over the suit house?”

2. The above stated substantial questions of law are required to be answered on the following factual back drop.

2.1. The respondent/plaintiff filed a suit for recovery of possession and also damages against the defendant stating inter-alia that on account of friendship, he had given the suit accommodation to the defendant for residential purpose as a licensee as he has promised to vacate the suit accommodation after construction of his house and he promised to pay Rs.150/- per month as damages/rent from the month of October, 2001 and the defendant is neither paying rent nor vacating the suit accommodation though the notice was served, therefore, the decree be granted in his favour for recovery of possession and damages.

2.2. The defendant filed written statement stating inter alia that suit accommodation was later on sold to the defendant in the year 1971 for consideration of Rs.16,000/- and the possession was handed over to him and the defendant is in possession as owner of the suit accommodation for last 12 years, therefore, he has perfected his title over the suit accommodation by way of adverse possession.

3. The trial Court after appreciation of oral and documentary evidence available on record, decreed the suit holding that the defendant is an encroacher on the suit land and the defendant has not established the agreement to sale executed by plaintiff in his favour.

4. On an appeal being preferred, the First Appellate Court dismissed the appeal affirming the judgement and decree passed by the trial

Court. Against which the Second Appeal has been preferred in which substantial questions of law have been formulated and incorporated in the opening paragraph of this judgement.

5. Shri Malay Shrivastava, learned counsel appearing for the appellants would submit that though initially the plaintiff has sold the suit accommodation by agreement to sale in the year 1971 and is in possession thereof as a purchaser and also perfected his title by way of adverse possession as defendant is in possession of suit accommodation for last 12 years and the pleas raised by the plaintiff in the plaint are inconsistent and mutually destructive. As such the substantial questions of law be answered in favour of the plaintiff and against the defendant and appeal be allowed.

6. Shri Anum Majumdar, learned counsel appearing for the respondents/plaintiff would submit that none of the questions of law formulated arise for consideration and further submit that the plaintiff having set-up the plea that he is in possession of the suit accommodation pursuant to agreement to sale is not available to him as such the Second Appeal deserves to be dismissed.

7. I have heard learned counsel appearing for the parties, considered their rival submissions made therein and gone through the records of the Courts below with utmost circumspection.

8. The question of limitation was not an issue either before the trial Court or before the first appellate Court as such Second Appeal, no plea on limitation can be permitted to be raised. Likewise, the provisions of Chhattisgarh Accommodation Control Act is not applicable as it is a case of the plaintiff that the defendant is his licensee and both the Courts below have concurrently held that the plaintiff is encroacher on the suit accommodation. The First Appellate Court has rightly rejected that their application under Order 41 Rule 25 of the CPC for framing additional issues holding there is no need for remanding the matter to the trial Court. The defendant has taken the plea that he came into possession of the suit accommodation pursuant to the agreement to sale in the year 1971 and at the same time has also taken a plea that he has perfected his title by way of adverse possession.

9. It is well settled that a person claiming to be in possession under agreement to sell his possession would be permissive possession and he cannot be permitted to contend that his possession is adverse and he has perfected his title by way of adverse possession.

10. In a decision reported in the matter of **Achal Reddi Vs. Ramakrishna Reddiar and others**¹, the Supreme Court has held that purchaser was placed in possession in pursuance of the contract, his possession cannot be adverse and held as under:

“In the case of an agreement of sale the party who obtains possession, acknowledges title of the vendor even though the agreement of sale may be invalid. It is an

¹. AIR 1990 SC 553

acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession. The well settled rule of law is that if a person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though the claims under another title having regard to the well-recognised policy of law that possession is never considered adverse if it is referable to a lawful title. The purchaser who got into possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse. In the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and in case in which there is a mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel applies estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper referable to a contract, it cannot be adverse."

11. Likewise, in a decision reported in the matter of **Mohan Lal (Deceased) Through his LRs. Kachru and Others Vs. Mirza Abdul**

Gaffar and Another², the Supreme Court has held that the plea of adverse possession is inconsistent with the plea of retention of possession under Section 53-A of the Transfer of Property Act and held as under in para 4 of the judgement.

“4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title of interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e. up to completing the period of his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.”

In view of the above stated legal position, the defendant cannot succeed on the plea of adverse possession.

12. Both the Courts below have concurrently held that the defendant is encroacher on the suit accommodation and holding that defendant has failed to prove the agreement to sale in his favour by the plaintiff. The said findings are based on evidence available on record, I do not find any illegality in the said findings and it is hereby affirmed.

² (1996) 1 SCC 639

13. Resultantly, the Second Appeal is dismissed and the decree passed by the trial Court duly affirmed by the First Appellate Court is re-affirmed, with no order as to costs.

14. At the request of learned counsel for the appellants, four months' time is granted to vacate the premises subject to appellant is complying the money part of the decree, if any, and appellant will submit an undertaking before the Trial Court within 30 days' from today that he will vacate the suit premise within a period of four months from today and comply with the money part of the decree.

15. A decree be drawn accordingly.

Sd/-
(Sanjay K. Agrawal)
JUDGE