

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 14 of 2016**

Santram Dewangan, S/o Shri Janak Dewangan, aged about 55 years, R/o. Village – Nawagarh, Thana & Tahsil – Nawagarh, Civil & Revenue District Janjgir-Champa (C.G.)

....Defendant

---- Appellant

Versus

Shivprasad, S/o Garibram Dewangan, aged about 45 years, R/o. Village – Nawagarh, Thana & Tahsil – Nawagarh, Civil & Revenue District – Janjgir-Champa (C.G.)Plaintiff

---- Respondent

For Petitioner:	Mr. Sunil Sahu, Advocate.
For Respondent/State:	Mr. Ravindra Agrawal, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****21/07/2016**

Heard.

(1) This is defendant's Second Appeal under Section 100 of the Code of Civil Procedure (for short 'the CPC') against the judgment and decree dated 16.12.2015 passed by 1st Additional District Judge, Janjgir-Champa in Civil Appeal No. 55-A/2015, reversing the judgment and decree dated 03.02.2011 passed by 1st Civil Judge, Class II, Nawagarh, Distt. Janjgir-Champa in Civil Suit No. 16-A/2009, decreeing the suit.

[For sake of convenience, the parties would be referred hereinafter as per their status before the trial Court]

(2) The plaintiff filed suit for recovery of possession stating inter alia that he is the owner of the suit land but pursuant to the agreement to sell dated 16.07.1997 he has delivered the possession to the defendant but defendant has not taken any steps to get the sale deed registered within the period stipulated for registration of the sale deed and, thereafter, defendant possession has become illegal and capacity of the defendant is encroacher and, therefore, decree of possession be granted in favour of the plaintiff.

(3) The trial Court dismissed the suit by its judgment & decree dated 03.02.2011, however, directed the plaintiff to get the sale deed registered in favour of defendant.

(4) Plaintiff preferred first appeal there-against. The First Appellate Court granted decree in favour of the plaintiff setting aside the judgment & decree of the trial Court, against which, second appeal under Section 100 of the CPC has been filed.

(5) Shri Sunil Sahu, learned counsel appearing for the defendant would submit that the defendant remained in possession pursuant to the agreement to sell dated 16.07.1997 for more than 12 years and, therefore, he has perfected his title by way of adverse possession and, therefore, the decree granted in plaintiff's favour is perverse and that give rise a substantial

question of law for determination in this appeal.

(6) The defendant, by filing written statement, categorically pleaded that he is in in possession over the suit land since 16.7.1997 pursuant to the agreement to sell and since then he is in possession over the suit land i.e. more than 12 years, and therefore, the suit is barred and he has perfected his title over the suit land by way of adverse possession.

(7) It is well settled that a person claiming to be in possession under the 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.

(8) The Supreme Court in case of **Achal Reddi Vs. Ramakrishna Reddiar and others**¹ has held as under:-

“There is no controversy that the plaintiff has to establish subsisting title by proving possession within 12 years prior to the suit when the plaintiff alleged dispossession while in possession of the suit property. The first appellate Court as well as the second appellate Court proceeded on the basis that the plaintiff is not entitled to succeed as such possession has not been proved. The concurrent finding that the plaintiff had title in spite of the decree for specific performance obtained against him, when that decree had not been executed are not assailed by the appellant in the High Court. The appellant cannot, therefore, urge before us on the basis of the findings in the earlier suit to which he was not a party that Ex.A-1 sale deed is one without consideration and does not confer valid title on the plaintiff. The sole question that has been considered by the High Court is that of subsisting

1 AIR 1990 SC 553

title. We have to consider whether the question of law as to the character of the possession Varada Reddi had between 10-7-1946 and 17-7-1947 is adverse or only permissive. In the case of an agreement of sale the party who obtains possession, acknowledge title of the vendor even though the agreement of sale may be invalid. It is an acknowledgment and recognition of the title of the vendor which excludes the theory of adverse 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 he claims under another title having regard to the well-recognized 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 a 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 character, it cannot be adverse."

(9) Further, in the matter of **Mohan Lal (deceased) through his LRs. Kachru and others v. Mirza Abdul Gaffar and another**², their Lordships of the Supreme Court has held that plea of adverse possession is not available to the person, who is in possession pursuant to the agreement to sell and held as under:-

"The question then is whether he is entitled to retain possession under Section 53-A. It is an

2 (1996) 1 SCC 639

admitted fact that suit for specific performance had been dismissed and became final. Then the question is whether he is entitled to retain possession under the agreement. Once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a transferee can avail of Section 53-A only as a shield but not as a sword. It contemplates that where any person contracts to transfer for consideration any immovable property by writing, signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has performed or is willing to perform his part of the contract, he would be entitled to retain possession and to continue in possession which he has already received from the transferor so long as he is willing to perform his part of the contract. Agreement does not create title or interest in the property. Since the agreement had met with dismissal of the suit his willingness to perform his part of the contract does not arise.”

(10) In view of the aforesaid position of law, the defendant, who came into possession of the suit land pursuant to the agreement to sell, cannot claim adverse possession and, as such, I do not find any illegality in the impugned judgment & decree and no such substantial question of law is involved in this second appeal.

(11) As a fall out and consequence of the aforesaid discussion, the the second appeal is held to be devoid of merit and is, therefore, dismissed. However, the defendant is at liberty to proceed in accordance with law for recovery of advance amount given to the plaintiff.

(12) No order as to cost (s).

Sd/-
(Sanjay K. Agrawal)
Judge

D/-

