

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 470 of 2006****Judgment reserved on 04/12/2019****Judgment delivered on 10/12/2019**

1. Bansdev, S/o Late Uday Khairwar (died) through Lrs.

(i) Smt. Manbasiya, Widow of late Bansdev, Aged about 60 years.

(ii) Sukhdev Singh, S/o Late Bansdev, Aged about 44 years.

(iii) Suryadev Singh, S/o Late Bansdev, Aged about 40 years.

(iv) Jhuvali, D/o Late Bansdev, Aged about 35 years.

2. Siju, S/o Late Uday Khairwar (died) through Lrs.

(I) Lalmohan, S/o Late Siju, aged about 50 years.

(ii) Pitamber, S/o Late Siju, Aged about 45 years.

All R/o Village Chumra, Thana Ramanujganj, Tahsil Pal, District Surguja, Chhattisgarh.

3. Harvansh, S/o Late Uday Kumar Khairwar, Aged about 46 years, Caste Khairwar, R/o Village Chumra, Thana Ramanujganj, Tahsil Pal, District Surguja, Chhattisgarh.

--- Appellants/Plaintiffs

Versus

1. Shri Mandev, Son of Shri Ganesh Khairwar, Aged about 25 years.
 2. Smt. Amavasya Devi, W/o Shriman Dev Khairwar, D/o Ramjit Khairwar, Aged about 21 years.
 3. Shri Ganesh, S/o Late Teja Khairwar, Aged about 40 years.
 4. Shri Parmeshwar, S/o Late Teja Khairwar, Aged 42 years.
- All by caste Khairwar, R/o Village Chumra, Thana Ramanujganj, Tahsil Pal, District Sarguja, Chhattisgarh.
5. State of Chhattisgarh, Through Collector, Sarguja, Ambikapur, Chhattisgarh.

--- Respondents/Defendants

For Appellants	:	Mr. H.B. Agrawal, Senior Advocate with Ms. Preeti Yadav, Advocate
For Respondents	:	Mr. Rakesh Pandey, Advocate
For State	:	Mr. Ravi Bhagat, Deputy Government Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the plaintiffs/appellants herein was admitted for hearing on the following substantial question of law :-

"Whether finding of the Court below dismissing the Plaintiffs' claim by holding that in absence of seeking the relief of possession by virtue of proviso to Section 34 of the Specific Relief Act, 1963 despite observing that Plaintiffs are mere heirs of said Dilwaso Bai, is perverse ?"

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court.)

2. Sukhi Khairwar had two sons namely Hari and Uday.

- Hari Khairwar had only son Ramdhani, who died issueless leaving behind the suit land to her wife namely Dilwaso Bai as a limited owner.
- Uday Khairwar had four sons, being plaintiff No. 1 – Bansdev, plaintiff No. 2 – Siju, plaintiff No. 3 – Harvansh and one Teja who died leaving behind two sons i.e. defendant No. 3 – Ganesh and defendant No. 4 – Parmeshwsar. Defendant No. 1 – Mandev and Defendant No. 2 – Amavasya Devi are son and wife of Ganesh i.e. defendant No. 3 respectively.

3. The three plaintiffs filed a civil suit only for declaration of title and permanent injunction stating *inter alia* that in 'Khairwar' caste, a widow gets limited right in the suit property left behind by her deceased husband. She does not have the right to alienate the suit property nor can she execute a Will deed and can only do so if it is the self-acquired property, as such, Ramdhani Khairwar's widow namely Dilwaso Bai too, only inherited the suit land as a limited owner after the death of her husband and then, she too died on 16/11/2002. After her death, plaintiffs have become the title-holders of the suit land.
4. Defendants set up a plea that Dilwaso Bai had adopted defendant No. 2 namely Amavasya Devi by registered adoption deed dated 29/12/1993 (Ex. D/1) and therefore, defendant No. 2 Amavasya Devi i.e. wife of Defendant No. 1 Mandev is the title-holder of the suit land and has been in possession of the same.
5. Learned trial Court, after consideration of oral and documentary evidence on record, vide its judgment and decree dated 29/11/2003, dismissed the suit of the plaintiffs.

6. On appeal being preferred by the plaintiffs, learned first appellate Court, vide its judgment and decree dated 04/08/2006, dismissed the appeal though holding that Dilwaso Bai had full title over the suit land and after her husband's death, she was not a limited owner of the suit land and the adoption deed dated 04/08/2006 (Ex. D/1) executed in favour of defendant No. 2 has not been proved therefore, defendant No. 2 is not the title-holder of the suit land, and plaintiffs being the nearest relatives of Dilwaso Bai will succeed the suit land of Dilwaso Bai, but further held that since the defendants are in possession of the suit land and plaintiffs have not sought any relief of possession, they cannot be granted the relief of possession over the suit land as per proviso to Section 34 of the Specific Relief Act, 1963.

7. Questioning the judgment and decree of the first appellate court, this second appeal under Section 100 of the CPC has been preferred by the plaintiffs which was admitted for hearing by formulating one substantial question of law that has been set out in the opening paragraph of this judgment. During the course of pendency of this

second appeal, an application for amendment in the plaint was filed on 21/10/2019 seeking insertion of relief of possession which has seriously been opposed by learned counsel for the defendants, though no written reply has been filed by him.

8. Mr. H.B. Agrawal, learned senior counsel appearing for the appellants/plaintiffs would submit that though plaintiffs have not been found in possession of the suit land by the first appellate Court therefore, application for amendment has been moved seeking the relief of possession which they are entitled for. He further places reliance upon the decision rendered by the Supreme Court in the matter of ***Mst. Rukhmabai v. Lala Laxminarayan and Ors.***¹ and states that as a matter of right, this application for amendment deserves to be allowed by following necessary procedure for adjudicating the relief of possession.

9. Mr. Rakesh Pandey, learned counsel for the respondents/defendants would submit that once the defendants are in possession of suit land and plaintiffs' suit for possession, which they have

¹ AIR 1960 SC 335

now claimed by way of application for amendment, has become barred by limitation, therefore, amendment cannot be allowed to be incorporated in the plaint and Article 65 (b) of the Limitation Act would apply. He relies upon the decision rendered by the Supreme Court in the matter of ***Muni Lal v. Oriental Fire & General Insurance Co. Ltd. And Anr.***².

10. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

11. Plaintiffs filed a suit for declaration of title that they are the legal heirs of deceased Dilwaso Bai and they are in possession therefore, they are entitled for declaration of title and permanent injunction which was dismissed by the trial Court vide its judgment and decree dated 29/11/2003 holding that they are not the titleholders of the suit land and they are also not in possession. Being aggrieved, the plaintiffs preferred an appeal wherein learned first appellate Court also dismissed their appeal by its judgment and decree dated 04/08/2006 though

² (1996) 1 SCC 90

holding that plaintiffs are the legal heirs of deceased Dilwaso Bai, but further holding that defendants No. 1 and 2 namely Mandev and Amavasya Devi are in possession of the suit land and plaintiffs have not sought the relief of possession therefore, no relief of declaration of title can be granted in their favour in view of proviso to Section 34 of the Specific Relief Act against which this second appeal has been preferred by the plaintiffs.

12. Section 34 of the Specific Relief Act, 1963 provides as under :-

"S. 34. Discretion of court as to declaration of status or right. - Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

13. Proviso to Section 34 of the Act has been inserted to avoid multiplicity of suits by preventing a person from getting mere declaration of right in one suit and then seeking in another suit remedy without such declaration would be useless and the Court may not grant a decree for declaration simpliciter where plaintiff being in a position to claim a further relief omits to claim it . [See: *M.K. Rappai and Ors. v. John and Ors.*³, *Ram Saran and Anr. v. Smt. Ganga Devi*⁴, *Anila Bala Devi v. Madhabendu Narain Roy*⁵, and *Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, virudhnagar v. Chandran and Ors.*⁶]

14. In the instant case, both the Courts below have held that since the plaintiffs are not in possession of the suit land therefore, in view of proviso to Section 34 of the Specific Relief Act, suit is barred, which is correct view of the matter and is in accordance with the well-settled law noticed herein-above.

15. On 21/10/2019, at the time of final hearing of this second appeal, appellants/plaintiffs filed an application under Order 6 Rule 17 of the CPC

3 (1969) 2 SCC 590

4 AIR 1972 SC 2685

5 AIR 1993 SC 957

6 (2017) 3 SCC 702

praying for insertion of relief of possession in the plaint and learned counsel for the appellants/plaintiffs has argued that in view of the decisions rendered by the Supreme Court in the matters of **Sampath Kumar v. Ayyakannu and Anr.**⁷ and **Mst. Rukhmabai** (supra), he should be permitted to amend the plaint and to insert additional relief for possession as merely on the ground that plaintiffs are not in possession of the suit property and in view of Section 34 of the Specific Relief Act, the first appellate Court has dismissed their appeal.

16. The Supreme Court in **Rukhmabai** (supra) has held that plea based on proviso to Section 34 of the Specific Relief Act should be taken at the earliest point of time in order to enable the plaintiff to make necessary amendment. If he seeks to do so, the question would be whether the application for amendment seeking relief of possession filed by the plaintiff can be granted ?

17. Admittedly, the civil suit was filed on 09/04/2003 and it was dismissed by the trial Court on 29/11/2003 by clearly returning a

⁷ AIR 2002 SC 3369

finding in issue No. 4 that plaintiffs are not in possession of the suit land but defendant No. 2 is in possession of the suit land. Similarly, the first appellate Court by its judgment and decree dated 04/08/2006 clearly held that though plaintiffs are legal heirs of Dilwaso Bai but plaintiffs are not in possession of the suit land and defendants No. 1 and 2 are in possession of the said land and plaintiffs have not sought the relief for possession, yet from 09/04/2013 till 21/10/2019, for the last six years/during the pendency of this second appeal, plaintiffs did not move any application permitting them to amend the plaint seeking insertion of relief of possession.

18. The Supreme court, in the matter of **Smt. Ganga Bai v. Vijay Kumar and Ors.**⁸, has held that the power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the Court.

8 (1974) 2 SCC 393

19. Likewise, in the matter of *Revajeetu Builders and Developers v. Narayanaswamy and Sons and Ors.*⁹, the Supreme Court has followed the principle of law laid down in *Ganga Bai* (supra) and it has been held that the Courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care. It has also been held that any such amendment which changes the entire character of the plaint cannot be permitted and that too after a lapse of four years after the institution of the suit.

20. Reverting to the facts of the present case in light of the aforesaid legal position, it is quite vivid that plaintiffs' suit was dismissed by the trial Court as back as on 29/11/2003 after holding that plaintiffs are not in possession of the suit land, but defendant No. 2 is. Thereafter, on 04/08/2006, the first appeal preferred by the plaintiffs was also dismissed holding that though plaintiffs are the legal heirs of Dilwaso Bai but defendants No. 1 and 2 are in possession of the suit property, yet for the last 13 years from the date of dismissal of

9 (2009) 10 SCC 84

their suit, plaintiffs did not seek any leave to amend the plaint either before the first appellate Court or before this Court and only on 21/10/2019, at the time of final hearing of this second appeal, they moved an application and sought to amend the plaint. Considering the fact that there has been an inordinate delay in making the prayer for amendment in the plaint and even the said application filed by the plaintiffs under Order 6 Rule 17 of the CPC is bereft of any valid reason constituting 'sufficient cause' of that delay, this Court is not inclined to grant the said application seeking amendment in the plaint and it is accordingly rejected.

21.The first appellate Court is absolutely justified in holding that since the plaintiffs are not in possession of the suit property and relief of possession has not been sought by them, their suit is barred by proviso to Section 34 of the Specific Relief Act, as such, I do not find any perversity or illegality in the said finding.

22.The second appeal deserves to be and is accordingly dismissed with no order as to cost(s).

23. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet