

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 669 of 2003**

1. Mohan Lal Died Through LRs-

1.A. Smt. Dhiyani Ramani W/o Late Mohanlal Aged About 61 Years R/o Subhash Ward, Distt. Kanker Chhattigarh

1.B. Rajesh Ramani S/o Mohanlal Aged About 43 Years R/o Subhash Ward, Distt. Kanker Chhattisgarh

1.C. Ashok Ramani S/o Mohanlal Aged About 40 Years R/o Subhash Ward, Distt. Kanker Chhattisgarh

1.D Mukesh Ramani S/o Mohanlal Aged About 34 Years R/o Subhash Ward, Distt. Kanker Chhattisgarh

1.E. Smt. Sneh Bhawandas Fatnani D/o Mohanlal Aged About 47 Years W/o Bhagwandas R/o Hiranandani, Distt. Thane (Maharashtra)

1.F Smt. Rekha Thavrani W/o Manoj Thavrani Aged About 37 Years R/o Sindhi Colony, Tilda Nevra, Distt. Baloda Bazar Chhattisgarh

---- Appellants**Versus**

1. Rikhi Ram S/o Nevandmal Aged About 44 Years R/o Majhapara, North Bastar, Kanker Chhattisgarh

2. State Of Chhattisgarh Through Collector Kanker Chhattisgarh

---- Respondents

For Appellants	:	Shri Parag Kotecha, Advocate
For Respondent No.1	:	Shri R.N.Jha, Advocate
For State	:	Shri Sanjay Kumar Agrawal, Govt. Adv.

S.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****22/08/2019**

This appeal is directed against impugned judgment and decree dated 24/09/2003 passed by the 2nd Additional Sessions Judge (FTC), North Bastar,

Kanker in Civil Appeal No.18-A/02, arising out of judgment and decree dated 27/03/2002 passed by the Civil Judge, Class-II, Kanker in Civil Suit No.3-A/2000 by which, the plaintiff / appellant's appeal has been dismissed and the judgment and decree of the Trial Court has been affirmed.

2. This appeal was admitted on following two substantial question of law -

“I) Whether the two Courts below were justified in rejecting the suit of the plaintiff only on the ground of suit being barred by limitation ?

II) Whether the First Appellant Court was justified in deciding the first appeal making the observations that the defendant is entitled for having separate patta in respect of the suit property when there was no claim specifically by the defendant either by way of a counter claim or by filing of any appeal before the Appellate authority ?”

3. The appellant / plaintiff filed a suit in respect of the property in dispute being a *kirana* shop admittedly run by defendant No.1, seeking recovery of possession and also for share of profit on the pleadings *inter alia* that the disputed property belong to the father of the plaintiff, namely, Khushiram who was granted lease in respect of the property. An agreement was entered into between plaintiff's father – Khushiram and defendant's father – Nevandmal on 30/11/1970 under which, the plaintiff's father allowed defendant's father to establish a shop. It was also agreed that the plaintiff's father would be entitled to 2 '*ana*' share in the profit of business run by Nevandmal, father of defendant No.1. During his lifetime, plaintiff's father – Khushiram kept on demanding share of profit but it was avoided and later on, he died on 18/04/1983. The plaintiff also kept on demanding his share in the shop but it was not paid by defendant No.1. Now, the plaintiff requires the said shop for the business of his own son. Despite notice given to defendant No.1, he neither paid share of profit to which the plaintiff was entitled nor possession of the shop was given. Therefore, cause of action arose

for the plaintiff to claim profit and possession.

4. Defendant No.1 denied claim of the plaintiff and stated that defendant No.1 is in possession of the disputed shop in his own title and infact, way back in the year 1980, plaintiff's father had given up his claim and having received consideration, had agreed that defendant No.1 may set up his own shop by obtaining lease of the said part. According to defendant No.1, the plaintiff was not entitled to any share and the plaintiff, having no title, was not entitled to seek any decree of possession. The plaintiff's claim was also resisted on the pleadings that the suit is otherwise barred by limitation.

5. Learned Trial Court framed as many as five issues which were as under -

- “1. क्या वाद भूमि का पट्टा वादी के पिता को प्राप्त हुआ था ?
2. क्या वाद दुकान वादी के स्वामित्व की है ?
3. क्या वादी एवं प्रतिवादी क्रमांक 1 के पिता के मध्य इस आशय का लिखित इकरारनामा निष्पादित हुआ था कि नेवंदमल द्वारा स्थापित किराना दुकान की आय का दो आना खुशीराम प्राप्त करेगा ?
4. क्या दावा समयावधि में है ?
5. सहायता एवं व्यय।”

While deciding issue no.1 in favour of the plaintiff, on the second issue, learned Trial Court, however, held that the plaintiff has no title over the shop. Even the agreement dated 30/11/1970 was not found proved. Learned Trial Court also recorded that otherwise also, the suit was barred by limitation as the period for bringing a suit for profit as provided under Article 5 of the Limitation Act was only three years and for recovery of possession, 12 years.

6. Aggrieved by the judgment and decree, the appellant / plaintiff filed an

appeal. Though the learned lower Appellate Court upheld finding that a part of the land in dispute was initially granted in favour of plaintiff's father, it held that the plaintiff failed to prove agreement dated 30/11/1970 and at the same time, held that defendant No.1 succeeded in proving agreement dated 05/09/1980 in his favour.

7. On the issue of limitation also, learned lower Appellate Court, affirming the finding of the learned Trial Court, held the suit barred by limitation.

8. Learned counsel for the appellant, on the first substantial question of law, would argue that the suit for share of profit and recovery of possession has wrongly been held to be barred by limitation. It is argued that it is an admitted position that in the beginning, the suit land was part of the leased property in respect of which, lease was granted in favour of plaintiff's father, namely, Khushiram. He would argue that the possession of the shop in dispute was given to defendant's father – Nevandmal under agreement dated 30/11/1970. Therefore, it was only permissive possession and not hostile one. The next submission is that the plaintiff, not only pleaded but also led oral and documentary evidence that later on, the nazul authorities had also recommended grant of renewal of lease in favour of the plaintiff after death of his father in the year 1983. The subsequent agreement dated 05/09/1980 relied upon by the defendant, would not change the nature of possession which the defendant's father and after his death, defendant was enjoying. Once the defendants were inducted on permissive basis, unless there is title over the disputed property, their possession could not be held to be hostile in nature. Therefore, it cannot be said that the plaintiff's suit for recovery of possession was barred by limitation. Next submission is that the period of limitation prescribed for seeking profit would be three years from the date of denial. According to him, the pleadings in the plaint are that the

defendant No.1 avoided payment and there is no specific evidence that the denial has taken place by the defendant or his father on a particular date. Therefore, limitation would begin to run only after giving a notice and expiry of notice as deemed denial. On the second substantial question of law, he would argue that the defendant, though denied counter case of the plaintiff on various grounds, he did not raise any counter claim that in respect of the disputed shop, he is entitled to a decree of declaration. Learned lower Appellate Court, even though there was no counter claim, has virtually granted decree in favour of the defendant by declaring his right that the defendant is entitled to get lease in respect of the disputed shop of which he is in possession. In his submission, such a finding was beyond the jurisdiction of the learned Court below.

9. On the other hand, learned counsel for the respondent would argue that none of the questions of law are substantial in nature because there are specific finding recorded by the learned Court below, both on the existence of the agreement dated 30/11/1970 (Ex.P/1) and agreement dated 05/09/1980 (Ex.D/1). He would argue that on merits of the case, apart from the issue of limitation, learned lower Appellate Court as also the Trial Court has recorded concurrent finding that the plaintiff has failed to prove agreement dated 30/11/1970 and defendant No.1 has succeeded in proving agreement dated 05/09/1980. Learned Courts below have recorded that the plaintiff has no title. Therefore, even if the aforesaid two questions of law are decided in favour of the plaintiff, it will have no bearing on the ultimate question and the aforesaid two findings have remained unchanged. Therefore, no substantial question of law arises.

10. In the alternative, learned counsel for the respondent would argue that the plaintiff's suit was clearly barred by limitation because once the learned Court below held proved agreement dated 05/09/1980, from that date, possession of the

defendant became hostile towards plaintiff's claim of title in respect of the property in dispute. He would argue that even for argument's sake, if it is accepted that on the strength of agreement dated 30/11/1970, possession of the defendant was permissive in nature, the permissive nature came to an end upon execution of agreement dated 05/09/1980 and possession of defendant No.1, thereafter, was only hostile and nothing less. Next argument is that once this legal position becomes clear, the plaintiff was required to file suit within 12 years which was not done. Therefore, the Court below has rightly held that the suit was barred by limitation.

11. Next argument is that unless the plaintiff succeeded in proving agreement dated 30/11/1970, claim of share of profit could not be raised. Therefore, the suit for profit could not be decreed. According to him, from the date, the defendant's possession became hostile, the cause of action arose for the plaintiff to receive share of profit in respect of the period prior to 05/09/1980. The suit was filed only in the year 2000. Therefore, findings of the Courts below does not warrant any interference.

12. On the second substantial question of law, learned counsel for the respondent would argue that the Court below has not granted any decree in favour of the respondent. The Court below has only examined the effect of agreement dated 05/09/1980 followed by certain observations not only in favour of the plaintiff but also in favour of defendant No.1 which does not amount to decree.

13. I have heard learned counsel for the parties and perused the records.

14. On the issue of limitation, it is found that both the Courts below have

recorded concurrent finding that the plaintiff's suit was barred by limitation.

The plaintiff, in its pleadings, came out with a case that the land in dispute was given to the father of defendant No.1 by the plaintiff's father under an agreement dated 30/11/1970. According to the plaintiff, the land in dispute was granted by way of lease to the plaintiff's father long back and during subsistence of that lease, the property in dispute was given to defendant's father for establishing a small ration shop along with an agreement that Nevandmal would run the business and would share the profit. The agreement stipulates that two 'ana' share of the profit would be given by Nevandmal – father of defendant No.1 to Khushiram – father of the plaintiff. Thus, the entire case of the plaintiff rests on this particular agreement. The Courts below have recorded concurrent finding that the plaintiff failed to prove agreement dated 30/11/1970. The defendant No.1 has come out with a case that his possession over the property in dispute was on his own title. Once the plaintiff's case of granting possession of property in dispute to the defendant under an agreement fails, in the absence of there being any other evidence of permissive possession, it cannot be held that the possession which was enjoying by Nevandmal was permissive possession.

15. The plaintiff has come out with a case that the property in dispute was given on lease to his father. Even if it is accepted that the property was leased out in favour of plaintiff's father, subsequent agreement dated 05/09/1980 (Ex.D/1) which has been found proved by the Courts below, clearly changes the nature of possession of the defendant since the date of execution of that agreement. The said agreement contains a recital that under an agreement of sale, for a consideration of Rs.6,000/-, the property has been handed over to Nevandmal and henceforth, Khushiram will have no objection or claim of title over the shop and it will be within the right of Nevandmal to take any action against him if Khushiram acts contrary to such interest of Nevandmal. This agreement, which

has been found proved by the Courts below, proves that possession of Nevandmal, from the date of execution of this agreement i.e. 05/09/1980 was no longer permissive but hostile to any claim, title or interest of Khushiram over the disputed property. If that be so, even if this Court, for the sake of argument would accept plaintiff's case that initially, the shop was given by Khushiram to Nevandmal, with the agreement of share of profit, from 05/09/1980 onwards, it no longer remained a permissive possession. Therefore, if Khushiram or his son (the plaintiff) had any claim over the property in denial of the agreement, the suit could be brought over a period of 12 years and not beyond that.

16. As far as claim for accounts is concerned, cause of action for the plaintiff arose as soon as agreement dated 05/09/1980 was executed between the parties. The recital of the said agreement is in denial of plaintiff's claim to receive any share in profit of the business because from 05/09/1980 onwards, the plaintiff had relinquished claim of receipt of the property in favour of defendant No.1. Therefore, in any case, the plaintiff ought to have filed a suit for share of profit within a period of three years to be reckoned from 05/09/1980. Otherwise also, the Courts below have recorded finding on the evidence of the plaintiff himself that despite repeated attempts made by plaintiff's father, the defendant was not sharing profit and defendant's father died in the year 1983. Therefore, apparently, the plaintiff's claim was completely barred by limitation.

As far as second substantial question of law is concerned, this Court found that the learned lower Appellate Court has not granted any decree as such in favour of defendant No.1. The plaintiff's case being that the property in dispute was handed over to defendant's father under an agreement dated 30/11/1970 that the possession was permissive, later on, in any case, w.e.f. 05/09/1980, defendant No.1 was enjoying possession to complete hostility to the plaintiff's claim, learned lower Appellate Court was called upon to decide various issues

framed by the learned Trial Court. In this process, learned lower Appellate Court held that the agreement dated 30/11/1970 was not proved and that agreement dated 05/09/1980 was found proved. Certain observations followed thereafter. But there is no such decree granted by the learned lower Appellate Court in favour of the defendant. Infact, the observations made by the learned lower Appellate Court in para 20 are observed both in respect of the plaintiff and defendant No.1. Therefore, the second substantial question of law also has to be answered against the appellant.

17. Even otherwise, there is considerable force in the submission of learned counsel for the respondent that the aforesaid two questions of law are not substantial questions because even if these questions are decided in favour of the plaintiff, it will have no material bearing on the ultimate question because the entire material on the basis of agreement dated 30/11/1970 has been rejected and agreement dated 05/09/1980 was found proved. Thus, on merits, the plaintiff's case is otherwise required to be dismissed as no question of law has been framed on the correctness and validity of those two agreements. The two questions of law framed by this Court cannot be said to be substantial question of law.

18. In the result, the appeal fails and is accordingly dismissed. Parties to bear their respective costs. Let appellate decree be drawn.

Sd/-
(**Manindra Mohan Shrivastava**)
Judge