

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.321 of 2007

Shivratan (Dead) through LRs'

1. Bisahin Bai aged about 65 years, R/o. Village Gadhwat, Tah. Ratanpur, District Bilaspur (CG)
2. Hanumant Prasad Kashyap aged about 45 years, R/o. Village Gadhwat, Tah. Ratanpur, District Bilaspur (CG)
3. Balwant Kashyap, aged about 42 years, R/o. Village Gadhwat, Tah. Ratanpur, District Bilaspur (CG)
4. Jaywant Kashyap, aged about 40 years, Son of late Shivratan, R/o. Village Gadhwat, Tah. Ratanpur, District Bilaspur (CG)
5. Shyamwant Kashyap, aged about 37 years, Son of late Shivratan, R/o. Village Gadhwat, Tah. Ratanpur, District Bilaspur (CG)
6. Om Kumari, aged about 35 years, Daughter of late Shivratan, W/o. Rajendra Kashyap, R/o. Village Gidhori, Tahsil and District Bilaspur (CG)
7. Rajwant Kashyap, aged about 31 years, Son of late Shivratan, R/o. Village Gadhwat, Tah. Ratanpur, District Bilaspur (CG)
8. Ramwant Kashyap, aged about 27 years, Son of late Shivratan, R/o. Village Gadhwat, Tah. Ratanpur, District Bilaspur (CG)

----- Appellants

Versus

State of Chhattisgarh through Collector, Bilaspur (CG)

----- Respondent

For Appellants/Plaintiff	: Mr.Amit Kumar, Advocate
For Respondent/Defendant	: Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

04/10/2019

1. The second appeal preferred by the plaintiff was admitted for hearing by formulating the following substantial question of law:-

"Whether the first appellate Court was

justified in setting aside the decree granting permanent injunction in favour of the plaintiffs in appeal filed by the plaintiff without being any cross objection or cross appeal filed by the respondent/State, by recording a finding, which is perverse to the record ?"

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

2. The plaintiff filed a suit for declaration of title stating inter-alia that he has perfected his title by way of adverse possession over the suit land/tank bearing Khasra No.2148, area 25.84 acres. It is admitted fact between the parties that the suit land/tank bearing Khasra No.2148, area 25.84 acres is the Government land in which the Tahsildar in proceeding under Section 248 of the Chhattisgarh Land Revenue Code, 1959 (hereinafter called as "the Code") directed the plaintiff to be evicted from the suit tank, against which, he preferred revision before the Collector, Bilaspur, the Collector dismissed the revision and second revision was also dismissed by the Additional Commissioner, Bilaspur Division, Bilaspur on 19.3.1984 vide Ex.P-8 and directed the Sub-Divisional Officer, Bilaspur to proceed under Section 57(2) of the Code. The the Sub-Divisional Officer, Bilaspur on 28.9.98 (Ex.P-11C) held that the suit tank is filled with water and it is the State Government's owned tank.

3. The defendant filed his written statement and

denied the averments made in the plaint stating inter-alia that the suit land is government land/tank, as such, the suit deserves to be dismissed.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 13.5.2005, held that the suit tank is filled with water and in Nistar Patrak, it is used for nistar rights of the villagers and therefore, the plaintiff has no title over the suit tank, but held that the plaintiff can be evicted from the suit land/tank in accordance with the provisions of the Code, against which, the plaintiff preferred first appeal under Section 96 of the Code before the first appellate Court. The first appellate Court not only dismissed the appeal, but also held that the plaintiff is not entitled for permanent injunction. Feeling aggrieved and dissatisfied with the judgment and decree passed by the first appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which substantial question of law has been formulated and set-out in the opening paragraph of this judgment.
5. Mr.Amit Kumar, learned counsel for the appellant/plaintiff, would submit that in the plaintiff's first appeal, decree for permanent

injunction could not have been set aside by the first appellate Court, as such, the judgment and decree of the first appellate Court deserves to be set aside.

6. Mr. Ravi Bhagat, learned Deputy Government Advocate for the respondent/defendant, would submit that the suit tank is owned by the Government as mentioned in Nistar Patrak and it is used by the villagers for nistar rights, therefore, decree passed by the first appellate Court is in accordance with law.
7. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
8. Admittedly, the suit tank is owned by the Government, in which order of eviction was passed by the Tahsildar under Section 248 of the Code, which was challenged up to the second revisional authority and the Additional Commissioner, Bilaspur Division, Bilaspur by order dated 19.3.1984 (Ex.P-8) directed the Sub-Divisional Officer, Bilaspur to proceed under Section 57(2) of the Code. The Sub-Divisional Officer, Bilaspur by its order dated 28.9.98 held that the suit tank is filled with water and it is recorded in the name of the Government (beneath water) and refuted the claim of the plaintiff that he is cultivating over

the suit land and the order passed by the SDO under Section 57(2) of the Code has become final as in civil suit filed by the plaintiff, he has not challenged the order passed by the SDO under Section 57(2) of the Code. Both the Courts below have concurrently held that the plaintiff has failed to prove adverse possession over the suit tank.

9. The question for consideration is whether the plaintiff, who is in possession of the suit tank land, has perfected his title over the suit land by remaining in possession since then.

10. Article 112 of the Limitation Act, 1963 provides for period of limitation for filing suit by Central or State Government :-

112	Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government, including the Government of the State of Jammu and Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.
-----	---	--------------	--

11. By virtue of above-stated provision, the period of limitation against the State government being 30 years, a person can convert his possession into an

absolute title against the government, only by proving possession for 30 years. In order to claim adverse possession against the government, a person has to prove such possession for the full statutory period and he has to prove adverse possession. So, on mere proof of long possession, the burden is not shifted on the State to show that it had held possession within the period provided by the Article.

12. Article 112 of the Limitation Act, 1963 is *para materia* provision to Article 144 of old Limitation Act, 1908. The Nagpur High Court, in the matter of **Provincial government, Central Provinces and Berar v. Govindrao Tukaram**¹ while considering adverse possession under old Article 144 of Limitation Act, 1908, has held that government having fundamental rights in all land, possessory title cannot prevail against it and a person must prove adverse possession for continuous period of 60 years and observed as under:-

“That a possessory title is good against all but the true owner, is a proposition which can be accepted, but the government has the fundamental right in all land and is, therefore, the true owner. Accordingly a person who relies on a possessory title cannot succeed against government unless he can show either that the government has parted with its title in some way to the plaintiff or his predecessors or that the plaintiff and his predecessors have been

1 AIR 1949 Nagpur 403

holding adversely against government and so have acquired a good title against government by adverse possession. The adverse possession necessary in the case of government is 60 years."

It was further held that continuous and uninterrupted possession over a long period can give rise to presumption in possession is there with title would not apply to the case of a State Government having fundamental right over the land observing as under:-

"Continuous and uninterrupted possession over a long period can give rise to a presumption that the person in possession is there with title even when the possession is short of the statutory period. This presumption may apply in a case between private individuals but it cannot apply to the case of a body in whom the fundamental right resides, such as the government."

13. A person who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to

the property claimed.[please see **Annasaheb Bapusaheb Patil and others v. Balwant @ Balasaheb Babusaheb Patil (Dead) by LRs. & Heirs and others²**].

14. It is not in dispute that title by adverse possession can be prescribed also against the government, but where the claim of adverse possession in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right and title of State to immovable property and also conferring upon a third party encroacher, title where he had none. [See **State of Rajasthan v. Harphool Singh (Dead) through his LRs³**].

15. The Supreme Court, in the matter of **R. Hanumaiah and another v. Secretary to Government of Karnataka, Revenue Department and others⁴** has held that in order to establish the plea of adverse possession, the limitation period would be thirty years and further laid down principles of the law indicating the nature of proof required in a suit for declaration of title against the government, which is reproduced herein below :-

Nature of proof required in suits for declaration of title against the Government

2 (1995) 2 SCC 543

3 (2000) 5 SCC 652

4 (2010) 5 SCC 203

"19. Suits for declaration of title against the Government, though similar to suits for declaration of title against private individuals differ significantly in some aspects. The *first* difference is in regard to the presumption available in favour of the Government. All lands which are not the property of any person or which are not vested in a local authority, belong to the Government. All unoccupied lands are the property of the Government, unless any person can establish his right or title to any such land. This presumption available to the Government, is not available to any person or individual. The *second* difference is in regard to the period for which title and/or possession has to be established by a person suing for declaration of title. Establishing title/possession for a period exceeding twelve years may be adequate to establish title in a declaratory suit against any individual. On the other hand, title/possession for a period exceeding thirty years will have to be established to succeed in a declaratory suit for title against the Government. This follows from Article 112 of the Limitation Act, 1963, which prescribes a longer period of thirty years as limitation in regard to suits by the Government as against the period of 12 years for suits by private individuals. The reason is obvious. Government properties are spread over the entire State and it is not always possible for the Government to protect or safeguard its properties from encroachments. Many a time, its own officers who are expected to protect its properties and maintain proper records, either due to negligence or collusion, create entries in records to help private parties, to lay claim of ownership or possession against the Government. Any loss of government property is ultimately the loss to the community. Courts owe a duty to be vigilant to ensure that public property is not converted into private property by unscrupulous elements.

20. Many civil courts deal with suits for declaration of title and injunction against the Government, in a casual manner, ignoring or overlooking the special features relating to government properties. Instances of such suits against the Government being

routinely decreed, either ex parte or for want of proper contest, merely acting upon the oral assertions of plaintiffs or stray revenue entries are common. Whether the Government contests the suit or not, before a suit for declaration of title against a Government is decreed, the plaintiff should establish, either his title by producing the title deeds which satisfactorily trace title for a minimum period of thirty years prior to the date of the suit (except where title is claimed with reference to a grant or transfer by the Government or a statutory development authority), or by establishing adverse possession for a period of more than thirty years. In such suits, courts cannot, ignoring the presumptions available in favour of the Government, grant declaratory or injunctive decrees against the Government by relying upon one of the principles underlying pleadings that plaint averments which are not denied or traversed are deemed to have been accepted or admitted.

21. A court should necessarily seek an answer to the following question, before it grants a decree declaring title against the Government: whether the plaintiff has produced title deeds tracing the title for a period of more than thirty years; or whether the plaintiff has established his adverse possession to the knowledge of the Government for a period of more than thirty years, so as to convert his possession into title. Incidental to that question, the court should also find out whether the plaintiff is recorded to be the owner or holder or occupant of the property in the revenue records or municipal records, for more than thirty years, and what is the nature of possession claimed by the plaintiff, if he is in possession—authorised or unauthorised; permissive; casual and occasional; furtive and clandestine; open, continuous and hostile; deemed or implied (following a title).

22. Mere temporary use or occupation without the animus to claim ownership or mere use at sufferance will not be sufficient to create any right adverse to the Government. In order to oust or defeat the title of the

Government, a claimant has to establish a clear title which is superior to or better than the title of the Government or establish perfection of title by adverse possession for a period of more than thirty years with the knowledge of the Government. To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner (and therefore necessarily with the knowledge of the owner) and continued during the entire period necessary to create a bar under the law of limitation. In short, it should be adequate in continuity, publicity and in extent. Mere vague or doubtful assertions that the claimant has been in adverse possession will not be sufficient. Unexplained stray or sporadic entries for a year or for a few years will not be sufficient and should be ignored.

23. As noticed above, many a time it is possible for a private citizen to get his name entered as the occupant of government land, with the help of collusive government servants. Only entries based on appropriate documents like grants, title deeds, etc. or based upon actual verification of physical possession by an authority authorised to recognise such possession and make appropriate entries can be used against the Government. By its very nature, a claim based on adverse possession requires clear and categorical pleadings and evidence, much more so, if it is against the Government. Be that as it may."

16. At this stage, it would be appropriate to notice Order 41 Rule 33 of the CPC which reads as under:-

"33. Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties,

although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has *omitted* or refused to make such order."

17. A close, careful and critical reading of the above-stated provision would show that the object of Order 41 Rule 33 of the CPC is to avoid contradictory and inconsistent decisions on the same questions in the same suit. This Rule does not confer an unrestricted right to re-open decrees which have become final and it should be exercised in exceptional and rare cases.

18. Way back in the year 1982 in the matter of **Choudhary Sahu (Dead) by LRs. vs. State of Bihar**⁵

Their Lordships of the Supreme Court have held that this rule (Order 41 Rule 33) is widely expressed and it must be applied with great caution. The object of this Rule is to empower the appellate court to do complete justice between the parties. Under this Rule the court has power to make a proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties

5 (1982) 1 SCC 232

even though they may not have filed an appeal or objection. It was observed in paragraph 12 and 13 as under:-

"12. The object of this Rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The Rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from.

13. Ordinarily, the power conferred by this Rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this Rule the court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the law of limitation or the law of court fees etc.

Their Lordships of the Supreme Court have further held that the findings recorded by the lower court in favour of the appellants cannot be interfered with by the appellate court in absence of any appeal filed by the respondents and held in paragraph 7 as under:-

"7. The first part of this Rule authorises the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the court below. The first part thus authorises the respondent only to support the decree. It does not authorise

him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of sub-rule (1) of Rule 22 of Order 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has set aside the finding in favour of the appellants on the strength of Order 41, Rule 22(1). In our opinion this he could not do."

19. Likewise, similar is the proposition laid-down by Their Lordship of the Supreme Court in the matter of Mahant Dhangir and another Vs. Madan Mohan and others⁶. The Supreme Court has considered the words "as the case may require" used in Rule 33 of Order 41. It have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. It is true that the power of the appellate court under Rule 33 is discretionary, but it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities.
20. In the matter of State of Punjab and others vs. Bakshish Singh⁷, Their Lordships of the Supreme Court have held that power under Order 41 Rule 33

6 1987 (Supp) SCC 528

7 (1998) 8 SCC 222

CPC has to be exercised cautiously and in rare cases where a totally uncalled for decree/order has been passed by lower court. It was observed in paragraph 8 and 9 as under:-

"8. This provision gives very wide power to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections.

9. The discretion, however, has to be exercised with care and caution and that too in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot, in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case."

21. Likewise, in the matter of **K. Muthuswami Gounder vs. N. Palaniappa Gounder**⁸, Their Lordships of the Supreme Court following the judgment of **Mahant Dhangir** (supra) have held that in exceptional cases Order 41 Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties

8 (1998) 7 SCC 327

may not have filed an appeal.

22. Finally, reverting to the facts of the present case in the light of discussion made herein-above, it is quite vivid that in the present case, in second round of litigation by the order of the Sub-Divisional Officer (R.), Bilaspur dated 28.9.98 [Ex.P-11(C)] under Section 57(2) of the Code, the plaintiff's right over the suit land/tank has decided against him and thereafter he preferred the instant suit for declaration of title and permanent injunction, in which also, both the Courts below have negatived the title of the plaintiff holding that he has no right and title over the suit land/tank and it is held and owned by the State Government and it is being used for nistar right of the villagers, but the trial Court while considering the suit only granted permanent injunction in his favour, which has been vacated by the first appellate Court keeping in view that dispute has decided under Section 57(2) of the Code in respect of right of the plaintiff over the suit land/tank and further taking into consideration that the suit land/tank is being used for nistar right of the villagers and huge governmental property running into i.e. 25.84 acres, exercised the powers vested under Order 41 Rule 23 of the CPC despite the fact that no appeal was preferred by

the State Government against decree granting permanent injunction in favour of the plaintiff. In my considered opinion, the first appellate Court is absolutely justified in interfering with the part of decree granting permanent injunction in favour of the plaintiff in absence of appeal on behalf of the State Government keeping in view the order under Section 57(2) of the Code negating the right of the plaintiff over the suit land/tank and further taking into consideration the larger public interest that nistar right of the villagers are being affected by that and this is purely governmental property, which the plaintiff has no right and title and further taking into consideration that the order passed by the Sub-Divisional Officer (R.), Bilaspur dated 28.9.98 under Section 57(2) of the Code was not challenged by the plaintiff in the suit from which this second appeal has arisen, the first appellate Court is absolutely justified in setting aside the judgment and decree of the trial Court without being appeal preferred by the State Government. The substantial question of law is answered in favour of the defendant and against the plaintiff.

23. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

24. A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-