

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.334 of 2005**

Anil Kumar Thakur Age About 30 Yrs. S/o Gautam Singh Thakur, Caste-Kshatriya, Occupation-Business R/o Vill. Shitalapara, Kanker, Teh. & Distt. Kanker (CG)

---- Appellant/Plaintiff

Versus

1. Smt.Phool Sunder Devi Age 45 Yrs. W/o Byaas Prasad Sharma Caste-Brahmin, Occupation-Housewife R/o Village. Lattipara, Kanker, Teh. & Distt. Kanker (CG)
2. State of Chhattisgarh thro. Collector, Kanker

---- Respondents

For Appellant/Plaintiff	: Mr.Raja Sharma, Advocate
For Respondent No.1/Defendant	: None present
For Respondent No.2	: Mr.Akash Pandey, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

29.08.2019

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the plaintiff is as under:-

“Whether the reasonings and findings of the first appellate court is perverse ?”

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

2. The plaintiff filed a suit for possession based on title stating inter-alia that he is owner of Nazul Sheet No.13A, Plot No.103/2, area 57 sq.mtr., out of which 3.50 sq.mtr. have been encroached by the defendant, which the defendant has denied by filing written statement

stating inter-alia that the suit is barred by limitation. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 25.1.2002, decreed the suit holding that the plaintiff is owner of the suit land and the defendant has encroached upon the suit land owned by the plaintiff as proved by Ex.P-4 and Ex.P-5, which was reversed by the first appellate Court holding that the suit is barred by limitation, against which, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.

3. Mr.Raja Sharma, learned counsel for the appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in dismissing the suit as barred by limitation as the defendant has not pleaded and established the plea of adverse possession as required under Article 65 of the Limitation Act, 1963 (hereinafter called as 'the Act of 1963'), therefore, it ought not to have been allowed by the first appellate Court, as such, the judgment and decree of the first appellate Court deserves to be set aside.
4. None present for respondent No.1 though served with the notice of appeal.
5. I have heard learned counsel for the appellant/plaintiff and considered his submissions made hereinabove and also went through the records with utmost circumscription.
6. Article 142 of the Schedule under Indian Limitation Act, 1908 which

is pari-materia provision to Article 65 of the Limitation Act, 1963 reads as under:-

"142	For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession	Twelve years	The date of the dispossession or discontinuance"
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7. Article 65 of the Act of 1963 provides as under:-

"65	For possession of immovable property or any interest therein based on title	Twelve years	When the possession of the defendant becomes adverse to the plaintiff."
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8. From the above provision, it is quite vivid that under old Limitation Act, 1908, the period of limitation commences from the date of dispossession or discontinuance of the possession by the plaintiff, whereas under the Act of 1963, the period of limitation would commence only after the possession of the defendant becomes adverse to the plaintiff. If that is so, the question that falls for consideration would be "when the possession of the defendant became adverse to the plaintiff."

9. The Supreme Court in the matter of Indira v. Arumugam and another¹ has held that when the suit for possession is based on title, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff suit cannot be dismissed. Para 5 of the report as under:-

¹ AIR 1999 SC 1549

“5. It is, therefore, obvious that when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. Unfortunately, this aspect of the matter was missed by the learned Judge and, therefore, the entire reasoning for disposing of the second appeal has got vitiated. Only on that short ground and without expressing any opinion on the merits of the question of law framed by the learned Judge for disposing of the second appeal, this appeal is allowed. The impugned decision rendered is set aside and the second appeal is restored to the file of the High Court with a request to proceed further with the hearing of the appeal with respect to the substantial question aforementioned in accordance with law. No costs.”

10. The Supreme Court in the matter of Saroop Singh v. Banto²

has held that in the light of Article 65 of the Limitation Act, plaintiffs have to prove their title and it is for the defendant to prove title by adverse possession and in terms of Article 65 of the Limitation Act, 1963 starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession become adverse to the plaintiff. Paras 28, 29 and 30 of the report states as under:-

“28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, plaintiff-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinabove, the first defendant-Appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

29. In terms of Article 65 of the Limitation Act, 1963

² (2005) 8 SCC 330

starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession become adverse. [See Vasantiben Prahladi Nayak and Others vs. Somnath Muljibhai Nayak³].

30. 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the Appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. [See Md. Mohammad Ali v. Jagdish Kalita⁴].”

- 11.** This view has been approved and followed by the Supreme Court in the matter of **M. Durai v. Muthu and others**⁵ and held as under:-

“7. The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-a-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession.”

- 12.** Applying the principle of law laid down by the Supreme Court in the above-stated judgments (supra) to the facts of the present case, it is quite vivid that the plaintiff has proved his title over the suit land and also proved that the defendant has encroached upon 3.50 sq.mtr. by proving demarcation report Ex.P-4 and Ex.P-5, preceding date of institution of the suit under Article 65 of the Act of 1963, once the plaintiff proves his title, the burden is upon the defendant to establish that he has perfected his title by adverse possession. Neither the

3 (2004) 3 SCC 376

4 (2004) 1 SCC 271

5 (2006) 9 SCC 612

defendant has raised any plea that he has perfected his title by adverse possession nor he proved adverse possession for the prescriptive period against the plaintiff, therefore, the plaintiff's suit for possession based on title on which the defendant has encroached, could not have been dismissed by the first appellate Court to be barred by limitation.

13. In view of above, the judgment and decree of the first appellate Court is hereby set aside and that of the trial Court is hereby restored. The substantial question of law is answered in favour of the plaintiff and against the defendant.
14. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).
15. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-