

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.436 of 2002

Devki Bai (Dead) through LRs

1.a. Indra Kumar Singh, S/o Vishwanath Singh, aged about 42 years

1.b. Sunder Singh, S/o Vishwanath Singh, aged about 45 years

Both R/o Village Birimkela, Tahsil and P.S. Batuali, Post Bataikela,
District Surguja (C.G.)

(LRs of defendant No.1)
---- Appellants

Versus

1. Bhairo (Dead) through LR

1.a. Tej Bahadur, S/o late Bhairo Singh, aged about 50 years, R/o
Village Birimkela, Block Batauli, Tahsil Batauli, District Surajpur (C.G.)
(LR of plaintiff)

2. Janki Bai (Dead) through LRs

2.a. Arjun Singh, S/o Baalsai, aged about 45 years

2.b. Aamikaran Singh, S/o Baalsai, aged about 35 years

Both R/o Village Birimkela, Tahsil and P.S. Batuali, Post Bataikela,
District Surguja (C.G.)

(LRs of defendant No.2)

3. The State of C.G., through Collector, Bilaspur, Distt. Bilaspur (C.G.)
(Proforma defendant No.3)
---- Respondents

For Appellants: Mr. A.K. Prasad and Mr. Rishi Mahobia, Advocates.

For Respondent No.1.a.: -

Mrs. Hamida Siddiqui, Advocate.

For Respondent No.3 / State: -

Mr. R.K. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

11/03/2019

1. In this second appeal preferred by defendant No.1, following
substantial question of law was formulated for determination at the
time of hearing of the appeal on admission: -

“Whether the lower appellate Court while reversing the well reasoned judgment of the trial Court was justified in deciding the appeal of the appellant/plaintiff on the ground of adverse possession when the ground of adverse possession was not raised or pleaded in the plaint or in the proceedings before the trial Court?”

(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 suit property was originally held by Manohar Sai. He had two daughters namely, Devki Bai and Janki Bai who are defendants before the trial Court. The plaintiff filed suit that in the prevalent custom among the tribes, daughters do not get any share in the property left by their father and he being the brother's son of the defendants' father namely Ramsai, he inherited the property in exclusion of defendants No.1 & 2, as such, title be declared in his favour and he be delivered possession from defendant No.1 and defendant No.1 be also restrained by permanent injunction. The trial Court dismissed the suit holding that the plaintiff is not entitled for declaration of title as well as permanent injunction. The plea of adverse possession though faintly raised in the plant, but it appears to be not pressed by the plaintiff, but the first appellate Court found favour with the plea of adverse possession and decreed the suit of the plaintiff holding that he has perfected his title by adverse possession and he is entitled for permanent injunction against which this second appeal has been preferred in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.
3. Mr. A.K. Prasad, learned counsel appearing for the appellants/LRs of defendant No.1, submits that the plea of adverse possession was faintly raised by the plaintiff before the trial Court, but it was not pressed into service and that is the reason why the trial Court did not

frame and try any issue with regard to adverse possession. He would further submit that by amendment in the plaint by order dated 25-1-1994, the plaintiff sought the relief of recovery of possession from defendant No.1, yet the first appellate Court recorded a finding which is perverse to the record that the plaintiff is in possession and he has perfected his title by way of adverse possession ignoring the principle of law laid down by the Supreme Court in the matter of Gurdwara Sahib v. Gram Panchayat Village Sirthala and another¹, which is absolutely perverse and liable to be set aside.

4. Mrs. Hamida Siddiqui, learned counsel appearing for respondent No.1.a./LR of the plaintiff, would submit that the plaintiff has proved his adverse possession and he has rightly been granted decree by the first appellate Court which deserves to be maintained by dismissing the second appeal.
5. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the record with utmost circumspection.
6. The suit filed by the plaintiff that he is the title holder of the suit land was dismissed by the trial Court holding that the plaintiff has failed to establish that in Gond caste, daughters are not entitled to inherit the property of their father and only in exclusion, he would succeed the property being the nephew of the defendants father Manohar Sai. The said finding recorded by the trial Court was not expressly interfered with by the first appellate Court, but the first appellate Court reached to the finding that the plaintiff is in possession for fairly long time for more than 12 years over the suit land which has become adverse and therefore the plaintiff has perfected his title by way of adverse

¹ (2014) 1 SCC 669

possession. This finding recorded by the first appellate Court is challenged on the ground of its being perverse firstly that the plea of adverse possession was not expressly raised in the plaint except in para 7 of the plaint that the possession of the plaintiff is peaceful and undisturbed possession for a long time. It was further pleaded that he has perfected his title on the suit land which was amended on 25-1-1994 stating that during the pendency of suit, defendant No.1 has taken possession of the suit land and he is only in possession of house and badi constructed on the suit land. Since the issue of adverse possession was not framed, the trial Court did not address on that issue and dismissed the suit finding that the plaintiff is not in possession of the suit land. The first appellate Court found that the plaintiff is in possession of part of the suit land Khasra No.423, area 0.575 hectare and Khasra No.533, area 0.081 hectare, on which house and badi were constructed by plaintiff Bhairo Singh and granted declaration of title and permanent injunction.

7. In **Gurdwara Sahib** (supra), the Supreme Court in paragraph 8 of the judgment has clearly held that suit for declaration to the effect that adverse possession has matured into ownership based on adverse possession is not maintainable and held as under: -

“8. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.”

8. Thus, in view of the aforesaid proposition of law and in view of the fact that there is no express pleading and no appropriate evidence brought by the plaintiff to prove the fact of adverse possession, decree for

grant of title based on adverse possession granted by the trial Court is set aside. However, Their Lordships in Gurdwara Sahib (supra) further held that though the plaintiff cannot maintain suit for declaration of title based on adverse possession, but his suit for injunction on that count cannot be held not maintainable and observed as under: -

“10. As the appellant is in possession of the suit property since 13-4-1952 and has been granted the decree of injunction, it obviously means that the possession of the appellant cannot be disturbed except by due process of law. We make it clear that though the suit of the appellant seeking relief of declaration has been dismissed, in case respondents file suit for possession and/or ejection of the appellant, it would be open to the appellant to plead in defence that the appellant had become the owner of property by adverse possession. Needless to mention at this stage, the appellant shall also be at liberty to plead that findings of Issue 1 to the effect that the appellant is in possession of adverse possession since 13-4-1952 operates as res judicata. Subject to this clarification, the appeal is dismissed.”

9. Admittedly, the plaintiff is not in possession of the suit land except some part of the suit land as held by the first appellate Court which is correct also that the plaintiff by amendment claimed possession of the suit land except some part of the suit land in which he has constructed his house and staying therein and there is evidence available on record. Even defendant witness Tahlu (DW-4) has admitted that the plaintiff is in possession of the part of suit land by constructing a house / badi which has been identified by the first appellate Court as part of Khasra No.423 and Khasra No.533. Since he is in settled possession of the part of suit land by constructing house & badi, he cannot be disturbed except by due process of law from that portion of the suit land.
10. Accordingly, the decree granted by the first appellate Court granting decree for declaration of title and recovery of possession qua the suit

land is set-aside. However, since the plaintiff is in possession of the part of suit land Khasra Nos.423 & 533 by constructing house & badi, he cannot be dispossessed of house & badi except by due process of law. The plaintiff would be at liberty to take the plea of adverse possession, if suit is filed by the defendants. The substantial question of law is answered accordingly.

11. The appeal is partly allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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