

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.133 of 2007

Rajesh Sen, aged about 40 years, S/o Narayan Sen, R/o Pacharipara,
Tahsil and District Durg (C.G.)

(Defendant)
---- Appellant

Versus

Kamla Silvestor, D/o Late Shri Larence Silvestor, R/o Pacharipara, Durg
(C.G.)

(Plaintiff)
---- Respondent

For Appellant: Mr. Vinod Kumar Sharma, Advocate.
For Respondent: Mr. Avinash Chand Sahu, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

22/10/2019

1. This appeal preferred by the defendant (appellant) was admitted on the following substantial question of law: -

“Whether the lower appellate Court was not justified in holding that the present appellant is not the owner of the land on the basis of adverse possession?”

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

2. The respondent herein / plaintiff filed a suit stating inter alia that she has purchased the suit land bearing Khasra No.626/16, area 0.005 hectare, by registered sale deed dated 21-4-1992 from the erstwhile owner Dr. Vijay Singh Gupta and came in possession and when the land was demarcated, it was found that the defendant has encroached upon 15 ft. x 7 ft. = 105 sq.ft. of the land unauthorisedly and illegally for which suit for declaration of title and possession

was filed in which the defendant setup the plea that he has purchased the said land vide Ex.D-5 from Derharam on a cash consideration of ₹ 40,000/- and constructed a house thereon and alternatively, pleaded that he has also perfected his title by way of adverse possession.

3. The trial Court dismissed the suit of the plaintiff on appreciation of oral and documentary evidence on record, whereas the first appellate Court decreed the suit finding that the plaintiff has proved her title over the suit land and the defendant has encroached upon 105 sq.ft. of the land held by the plaintiff and negated the title of the defendant holding that the plea of adverse possession has also not been established against which this second appeal has been preferred by the defendant in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.
4. Mr. Vinod Kumar Sharma, learned counsel appearing for the appellant herein / defendant, submits that the first appellate Court is absolutely unjustified in granting decree in favour of the plaintiff holding that she is title holder and negating the plea of adverse possession raised by the defendant, therefore, the impugned judgment & decree deserve to be set-aside.
5. Mr. Avinash Chand Sahu, learned counsel appearing for the respondent herein / plaintiff, would support the impugned judgment & decree.
6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

7. The only question framed for consideration is, whether the defendant has perfected his title over the suit land by way of adverse possession. The plaintiff setup the plea that she has purchased the suit land from one Dr. Vijay Singh Gupta by registered sale deed dated 21-4-1992 and came in possession over the suit land out of which the defendant has illegally encroached upon 105 sq.ft. of the land. The demarcation report vide Ex.P-5 has been filed which has not been challenged seriously by the defendant in which it has been recorded that the defendant has encroached upon 105 sq.ft. over the suit land. The defendant in his written statement took the plea that he is the owner of the suit accommodation, as he has purchased the suit land vide Ex.D-5 from Derharam by registered sale deed for a cash consideration of ₹ 40,000/-, whereas Ex.D-5 is an unregistered notarised copy of agreement entered into between Derharam and the defendant herein in which it has been recorded that the original owner of the land is one Bahadur Singh Gupta and in which Derharam is only a tenant as such, it is not only inadmissible in evidence, even Derharam was the lessee of the said accommodation and he was having no right or title to transfer the leased premises to the defendant and even otherwise, that is not the suit land, therefore, no title has been conferred to the defendant by way of Ex.D-5. The first appellate Court has clearly recorded that the plaintiff has established her title as well as the fact of encroachment over the suit land by the defendant ad-measuring 105 sq.ft.. The defendant has set up the plea of title and adverse possession both, but the plea of adverse possession has not been pleaded specifically.

8. It is well settled law that the plea of title and adverse possession cannot coexist together, they are mutually destructive pleas and are not permitted to be raised unless the plea of title is renounced and title of the former (in this case, the plaintiff) is admitted by the defendant. In this case, the defendant has set up both the pleas which cannot be permitted to be raised. Even otherwise, the defendant has set up the plea of purchasing the land in dispute from Derharam through Ex.D-5 and he has not admitted the title of the plaintiff. The person claiming adverse possession must show, on what date he came into possession, what was the nature of his possession, whether the factum of possession was known to the other party, how long his possession has continued and his possession was open and undisturbed. (See **Karnataka Board of Wakf v. Government of India and others**¹.)
9. The plaintiff has admittedly failed to prove the aforesaid ingredients for setting aside the finding of adverse possession and it has not been proved by evidence available on record. The plea of adverse possession was not permissible to be raised and even that plea was halfhearted plea and cannot be permitted to be raised in view of mutually destructive with that of his own title. The basic infirmity in the case of the defendant is that though the trial Court negated the plea of adverse possession, but in the first appeal preferred by the plaintiff, the defendant did not assail that finding by filing cross-appeal or cross-objection, as such, the finding of adverse possession recorded by the trial Court against the defendant has already become final and no exception can be taken by the

¹ (2000) 10 SCC 777

defendant to the judgment & decree of the first appellate Court.

The substantial question of law is answered accordingly.

10. The second appeal sans merit. It deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma