

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 250 of 2009****Reserved on 11.12.2020**
Pronounced on 17.12.2020

- Phul Bai (Dead) Through Lr- Ramesh Kumar Sahu S/o Late Shri Johatram Sahu, Aged About 68 Years, Presently Residing In Village Rajim, Post Rajim, Thana And Tehsil Rajim District Raipur Chhattisgarh.,

---- Appellant/Defendant**Versus**

1. Samaru Ram Sahu S/o Late Brijlal Sahu, Aged About 55 Years R/o Village Sankra, Tahsil Kurud, District Dhamtari Chhattisgarh.....Plaintiff,
2. Ramadhin Sahu, S/o Late Brijlal Sahu, Aged About 50 Years R/o Village Sankra, Tahsil Kurud, District Dhamtari Chhattisgarh.....Plaintiff,
3. Deleted (Karmoutin Bai) As Per Honble Court Order Dated 13-03-2020
4. Ramla Bai, D/o Late Brijlal Sahu, Aged About 45 Years R/o Village Sankra, Tahsil Kurud, District Dhamtari Chhattisgarh.....Plaintiff,
5. State Of Chhattisgarh Through Collector, Dhamtari, District Dhamtari Chhattisgarh,

---- Respondents

For Appellant	:Shri Sushil Dubey appears along with Shri Aman Upadhyay, Advocate.
For Respondents No.1,2 & 4	:Shri Saurabh Dangi appears along with Smt. Aditi Singhvi Agrawal, Advocate
For Respondent No.3	:Deleted due to her death.
For Respondent 5/State	:Shri Udhaw Sharma, Advocate

Hon'ble Shri Justice Sanjay S. Agrawal**C.A.V. Judgment**

1. This appeal has been preferred by Defendant No.1 Dhelaurem (since deceased now represented by his widow Phul Bai), questioning the legality and propriety of the judgment and decree dated 20.01.2009 passed by the

Additional District Judge, Dhamtari, in Civil Appeal No.40-A/2004, whereby the lower appellate Court, while affirming the judgment and decree dated 05.12.2003 passed by the 2nd Civil Judge, Class-2, Dhamtari in Civil Suit No.88-A/2001, has decreed the Plaintiffs' claim holding to be the owner of the property in question by way of adverse possession. The parties to this appeal shall be referred herein after as per their description before the trial Court.

2. The facts, which are essential to be stated for adjudication of this appeal, are that Plaintiffs instituted a suit claiming declaration of title and injunction with regard to the property in question bearing Kh.No.173/2 area 1.55 acres and Kh.No.173/5 area 0.45 acres (new numbers upon its settlement have been shown Kh.No.123 area 0.79 *aarey* and Kh.No.118 area 0.29 *aarey*) situated at village Sankra Tahsil Kurud District Dhamtari, submitting inter alia that the predecessor-in-interest of theirs, namely, Brijlal had purchased the same from defendant Dhelaaram in 1975 for a consideration of Rs.2,000/-, though the sale deed was not executed, but, they are continuously in possession since then and have, thus, acquired their right, title and interest by way of adverse possession. It is pleaded further, while referring to a notice dated 13.01.1990 issued by said Defendant that the possession of the suit property was handed over to him on 13.11.1987 in pursuance of an oral agreement to sale. Further contention of theirs is that the revenue records, which were recorded in their names based upon the possession vide order dated 20.02.1987 passed by the Assistant Superintendent of Land Records, were, however, reversed by the Sub-Divisional Officer, Dhamtari, vide order dated 22.06.2001 in Revenue Appeal No.16-A/6/2000-01 preferred by the said Defendant, therefore, they have been constrained to institute the suit in the instant nature, instituted on 13.07.2001.

3. While denying the aforesaid claim, it was pleaded by Defendant No.1 Dhelaaram that the property in question was never alienated to said Brijlal in 1975 or possession of it was ever delivered in pursuance of the alleged oral sale. According to him, the Plaintiffs' predecessor-in-interest, namely, Brijlal used to cultivate the land in question on his behalf being close relative (साढ़ू) of him as per his permission as he was living in Rajim at that particular time and that by taking undue advantage of his absence, he (Brijlal) succeeded to get the revenue papers mutated in his name in connivance with the concerned Patwari, and therefore, it was reversed by the Sub-Divisional Officer vide its order dated 22.06.2001 in an appeal preferred by him.

4. After considering the evidence led by the parties, it was held by the trial Court that the predecessor-in-interest of the Plaintiffs, namely, Brijlal had purchased the suit property from Defendant No.1 Dhelaaram for a consideration of Rs.2,000/- and since the date of its purchase, said Brijlal and thereafter the Plaintiffs, being his legal representatives, are in continuous possession over it and have prescribed their interest by way of adverse possession. As a consequence of it, the trial Court has decreed the claim, which has been affirmed further by the lower appellate Court in an appeal preferred by Defendant No.1 – Dhelaaram. Being aggrieved, the instant appeal has been preferred by him, which was admitted vide order dated 25.01.2010 on the following substantial question of law:-

“Whether in view of the plaint averments that the plaintiff had purchased the land from Dhelaaram by paying a sum of Rs.2,000/- and in view of the fact that possession being permissive, the learned Courts below have committed an error of law by passing a decree declaring perfection of title by the plaintiff on the ground of adverse possession ?”

5. According to Shri Sushil Dubey, learned counsel appearing for the appellant/Defendant No.1 Dhelaaram, the finding of the Courts below holding that the Plaintiffs have prescribed their interest over the property in question by virtue of adverse possession is apparently contrary to law. While inviting attention to paragraphs 12 & 15 of the plaint, it is contended that the Plaintiffs are claiming their ownership on the basis of sale, alleged to have been executed by Dhelaaram in 1975 in favour of their predecessor-in-interest, namely, Brijlal and, as such, they are precluded from claiming such a right by way of adverse possession as both the pleas are destructive with each other and in absence of specific plea of ouster, the Plaintiffs cannot claim their ownership by way of adverse possession. Having failed to consider the same in its proper manner, the Courts below have committed an illegality in decreeing the Plaintiffs' claim on the basis of adverse possession.

6. On the other hand, Shri Saurabh Dangi, learned counsel appearing for Respondents No. 1, 2 & 4/Plaintiffs submits that as the Plaintiffs are continuously in possession since the date of its purchase and have thus prescribed their interest by way of adverse possession and the Courts below have, therefore, not committed any illegality in decreeing their claim as such.

7. I have heard learned counsel appearing for the parties and perused the records of the Courts below carefully.

8. The only question to be decided in this appeal is as to whether the Courts below were justified in holding that the Plaintiffs have prescribed their title by way of adverse possession over the property in question?

9. Admittedly, the Defendant Dhelaaram was the owner of the suit property. According to the Plaintiffs, it was purchased by their predecessor-in-interest, namely, Brijlal in 1975 for a consideration of Rs.2,000/- and the sale

deed was to be executed and registered 2 – 3 days thereafter while putting him in possession thereof. Further contention of theirs is that as they are in continuous possession of it, and therefore, they have prescribed their right, title and interest by adverse possession. The contention of the plaintiffs was denied by the said Dhelaaram by saying that the property in question was ever sold by him as claimed by them.

10. What is, therefore, reflected from the averments made in the plaint is that a sum of Rs.2,000/- was paid by said Brijlal in 1975 to Defendant Dhelaaram, who was put in possession thereof and the sale deed was required to be executed and registered thereafter and based upon the said assurance, the Plaintiffs are in continuous possession since then and, alternatively claimed that they have prescribed their interest by way of adverse possession as well. The Plaintiffs have thus set up their interest based upon the alleged transaction, purported to have been made in the year 1975. But, the right, title and interest of said Dhelaaram in absence of execution of registered deed of sale cannot be held to be extinguished, in view of the provisions prescribed under Section 54 of the Transfer of the Property Act, 1882 read with Section 17 of the Indian Registration Act, 1908. In such circumstances, the possession of the Plaintiffs at the most could be held to be of permissive in nature and cannot be held to be ripen by way of adverse possession.

11. At this juncture, the principles laid down by the Supreme Court in the matter of *Achal Reddy vs. Ramakrishna Reddiar and others* reported in (1990) 4 SCC 706 are to be seen wherein the transaction of July 10, 1946 between one Dasu Reddi and Varada Reddi was executed only with regard to an agreement for sale and based upon it Varada Reddi came in possession thereof. In that factual scenario, it was held at paragraphs 9 and 10 as

under :-

“9. In the case of an agreement of sale the party who obtains possession, acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession . The well settled rule of law is that if a person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another title having regard to the well recognised policy of law that possession is never considered adverse if it is referable to a lawful title. The purchaser who got into possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse. In the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and in a case in which there is a mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel applies estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse.”

“10. In the case of an executory contract of sale where the transferee is put in possession of the property in pursuance of the agreement of sale and where the parties contemplate the execution of a regular registered sale deed the animus of the purchaser throughout is that he is in possession of the property belonging to the vendor and that the former's title has to be perfected by a duly executed registered deed of sale under which the vendor has to pass on and convey his title. The purchaser's possession in such cases is of a derivative character and in clear recognition of and in acknowledgement of the title of the vendor.” “On the other hand in the case of an executory contract the possession of the transferee until the date of registration of the conveyance is permissive or derivative and in law is deemed to be on behalf of the owner himself.”

12. Likewise, in the matter of *Ram Nagina Rai and Another vs. Deo Kumar Rai (Deceased) By Legal Representatives And Another* reported in (2019) 13 SCC 324, it has been observed by the Supreme Court at paragraphs 8, 9 and 17 as under :-

“8.Adverse possession means a hostile assertion i.e. a possession which is expressly or impliedly in denial of the title of the true owner. The person who bases his title on adverse possession must show, by clear and unequivocal evidence, that the possession was hostile to the real owner and it amounted to the denial of his title to the property claimed. In deciding whether the acts alleged by the person constitute adverse possession, regard must be given to the animus of the person doing such acts, which must be ascertained from the facts and circumstances of each case. It is needless to observe that where the possession can be referred to a lawful title, it would not be considered to be adverse, the reason being that the person whose possession can be drawn to a lawful title, will not be permitted to show that his possession was hostile to another's title. Simply put, one who holds possession on behalf of another, does not by mere denial of the other's title, make his possession adverse so as to give himself the benefit of the statute of limitation.”

“9. All through, as is evident from the material evidence on record and their contentions, the defendants have tried to show that they have been in continuous possession of the property for more than 60 years. But there is no iota of evidence to show as to when the defendants' possession in fact became adverse to the interest of the plaintiff. Except for the change of *Khatian* sometime in the year 1970 by the defendants and the payment of taxes for being in possession of property, no material is produced by the defendants to show whether the possession was really hostile to the actual owner.”

“17. Applying the test of *nec vi, nec clam, nec precario* i.e. “without force, without secrecy, without permission” as an established test for finding adverse possession, we find that the defendants have not proved their possession to be adverse to that of the real owner inasmuch as they entered into possession as licensees to begin with and there is nothing on record to show as to when the permissive possession became adverse to the interest of the real owner. “*Animus possidendi*” is one of the ingredients of adverse possession, and unless the person possessing the property has the requisite hostile animus, the period of prescription does not commence.

Virtually, the defendants are required to prove the possession to be adequate in continuity, adequate in publicity and to adequately show that their possession is adverse to that of the true owner. It must start with wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

13. In the matter of *Roop Singh (Dead) Through Lrs vs. Ram Singh (Dead) Through Lrs.* reported in (2000) 3 SCC 708, it has been held at paragraphs 7 and 9, which read as under :-

“7. Further, the fact-finding courts after appreciating the evidence held that the defendant entered into the possession of the premises as a *batai*, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. If the defendant got the possession of suit land as a lessee or under a *batai* agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession.”

“9. It is also to be stated that the pleas of adverse possession and retaining the possession by operation of Section 53-A of the Transfer of Property Act are inconsistent with each other. Once it is admitted by implication that the plaintiff came into possession of the land lawfully under the agreement and continued to remain in possession till the date of the suit, the plea of adverse possession would not be available to the defendant unless it has been asserted and pointed out hostile animus of retaining possession as an owner after getting in possession of the land.”

14. Yet, in the matter of *Karnataka Board of Wakf vs. Government of India and others*, reported in (2004) 10 SCC 779, it has been held by the Supreme Court at paragraph 11 as under:-

“11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't

affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See *S.M. Karim v. Bibi Sakina AIR 1964 SC 1254*, *Parsinni v Sukhi (1993) 4 SCC 375* and *D.N.Venkatarayappa v. State of Karnataka (1997) 7 SCC 567*.) Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [*Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma, (1996) 8 SCC 128*]"

15. In the present case, it appears that although the revenue records were found to be mutated in the name of Plaintiffs based upon the order dated 20.02.1987 passed by the Assistant Superintendent of Land Records, but the moment when it came to the knowledge of Defendant Dhelaaram, it was questioned in appeal before the Sub-Divisional Officer, Dhamtari, who in turn, vide its order dated 22.06.2001 (Ex.P.6) has reversed the same in Revenue Appeal No.16-A/6/2000-01 while remanding the matter before the concerned Naib Tahsildar for deciding the said proceedings in accordance with the provisions prescribed under Sections 109 and 110 of the Chhattisgarh Land Revenue Code, 1959. In view of the said background, it cannot be held that the Plaintiffs' names are there in revenue records so as to hold that they have prescribed their interest by way of adverse possession. Merely, a bald statement that there was adverse possession would not be enough to the said

plea of adverse possession. It has to be carefully set up that from which date it commenced and became hostile to the rightful owner of the property in question, as held in the aforesaid decisions, which is, however, as observed herein above, completely missing in the averments made by the Plaintiffs.

16. That apart, it is the settled principles of law that the plea of title and adverse possession as made by the Plaintiffs herein are mutually inconsistent as the plea of adverse possession does not begin to operate unless and until the plea of title is given up. Here, as reflected from the averments made in the plaint, the Plaintiffs have not given up their claim by way of alleged oral sale executed in 1975, and therefore, they cannot set up their interest over the property in question by way of adverse possession as both the pleas are, in fact, destructive with each other, as held by the Supreme Court in the matter of ***Mohan Lal (Deceased) Through His Lrs. Kachru and Others vs. Mirza Abdul Gaffar and Another*** reported in (1996) 1 SCC 639 wherein at paragraphs 3 and 4 observed as under:-

“3. The only question is whether the appellant is entitled to retain possession of the suit property. Two pleas have been raised by the appellant in defence. One is that having remained in possession from 8-3-1956, he has perfected his title by prescription. Secondly, he pleaded that he is entitled to retain his possession by operation of Section 53-A of the Transfer of Property Act, 1882 (for short 'the Act')

4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.”

17. In the present case, as observed herein above, the Plaintiffs are claiming their exclusive ownership with regard to the property in question based upon an oral agreement of sale, purported to have been executed in 1975 by Defendant No.1 Dhelaaram in favour of their predecessor-in-interest, namely, Brijlal and who obtained the possession of it as such. The Plaintiffs' possession is thus permissive in nature and in absence of any deed of title, much less, the deed of registered sale and in absence of specific plea of ouster, it cannot be held from stretch of any imagination that the Plaintiffs' interest had ripened into by way of adverse possession against the rightful owner of the property in question. In view of that, the right, title and interest of Defendant No.1 Dhelaaram cannot be held to be extinguished or the right of the Plaintiffs are perfected by adverse possession, as held by the Courts below.

18. Consequently, the substantial question of law framed is answered in positive and it is held that the Courts below have committed a serious illegality in holding that the Plaintiffs have prescribed their interest over the property in question by adverse possession.

19. The appeal is allowed and the Plaintiffs' claim is accordingly dismissed. No order as to costs.

20. A decree be drawn accordingly.

Sd/-
(Sanjay S. Agrawal)
Judge