

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.259 of 2008Judgment reserved on: 24-6-2020Judgment delivered on: 10-8-2020

Buonabi (Dead) Through Legal Representative

(Defendant No.1)

Safil Beg, S/o Moharram Beg, aged 48 years, R/o Village Damapur,
Police Station Kunda, Tahsil Pandariya, District Kabirdham (C.G.)

---- Appellant

Versus1. Hafijudin, S/o Late Shri Sukharudin, aged 47 years, Occupation
Cultivator, Police Station Piparya, Tahsil Kawardha, District
Kabirdham (C.G.)

(Plaintiff)

2. Fatimabi, W/o Shri Niyajudin, aged 62 years, Occupation: Labour.

3. Nafees Khan, S/o Shri Niyajudin, aged 32 years

4. Sapraduth Khan, S/o Shri Niyajudin, aged 30 years

Respondents No.2 to 4 are R/o Beside Khududand Pani Tanki,
Behind Mashjid, Bilaspur, District Bilaspur (C.G.)

5. State of Chhattisgarh, Through Collector, District Kabirdham (C.G.)

(Defendants)

---- Respondents

For Appellant / Defendant No.1: -

Mr. Rajeev Shrivastava & Mr. Sourabh Sahu, Advocates.

For Respondent No.1 / Plaintiff: -

Mr. Pallav Mishra, Advocate.

For Respondent No.5 / State: -

Mr. Mateen Siddiqui, Deputy Advocate General.
-----Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Judgment1. Proceedings of this matter have been taken-up for final hearing
through video conferencing.2. This second appeal preferred by the original defendant No.1 has
been admitted for final hearing on 5-2-2020 by formulating the

following substantial question of law: -

“Whether the first appellate Court is justified in holding that the plaintiff, who came in possession pursuant to agreement to sell dated 10.5.1968 executed by Niyajuddin, husband of defendant No.1, has perfected his title by way of adverse possession and entitled for declaration of title and permanent injunction that too by recording a finding which is perverse and contrary to record?”

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

3. Sole plaintiff Hafijuddin brought a suit for declaration of title and permanent injunction stating inter alia that his father Sukhruddin entered into agreement to sale with Niyajuddin, S/o Sheikh Rohitddin Musalman, for purchase of suit land bearing Khasra No.386, area 3.09 acres, for a cash consideration of ₹ 6,500/- on 10-5-1968 by executing an agreement in presence of two witnesses and obtained peaceful possession of the suit land pursuant to the said agreement to sale. It was further pleaded that defendant No.1 is the first wife of Niyajuddin and after divorce with her, Niyajuddin married defendant No.2 and defendants No.3 & 4 are sons of Niyajuddin out of his wedlock with second wife Fatimabi. It was also pleaded that at the time of agreement to sale, the name of Niyajuddin's father Sheikh Rohitddin Musalman was recorded in the revenue records and Niyajuddin has assured the plaintiff's father that he will get his name recorded and will execute sale deed in his favour expeditiously. But thereafter, the whereabouts of Niyajuddin are not known for last 20 years, however, after death of his father, the plaintiff is in peaceful possession of the suit land and he made an application for entering his name in the revenue records, but the Nayab Tahsildar despite his possession over the suit land, recorded the name of defendant No.1 on the suit land against which he preferred an appeal before the Sub-

Divisional Officer (Revenue), Kawardha and thereafter before the Board of Revenue but remained unsuccessful in both proceedings, and it was also subject matter of attachment and proceeding under Section 145 of the Code of Criminal Procedure, 1973 before the Sub-Divisional Magistrate, Kawardha. It was finally pleaded that on the basis of agreement to sale dated 10-5-1968, the plaintiff is in possession of the suit land and also cultivated the suit land, therefore, by virtue of the principle of adverse possession, he has become the title holder and as such, decree for declaration of title over the suit land that he is the title holder of the suit land be granted and it be declared that Niyajuddin, the person with whom his father entered into agreement to sale, has died civil death and defendant No.1 be restrained from interfering with his possession and his title be declared by granting decree for declaration of title.

4. Resisting the suit, defendant No.1 filed her written statement seriously opposing and controverting the plaint averment and pleaded that she has given the suit land in *adhiya* to the plaintiff, but taking the advantage of her illiteracy and straightforwardness, the plaintiff got his name recorded as possession holder of the suit land which the Tahsildar directed to enter his name on 29-9-2001. It was further pleaded that the competent authority directed for attachment of the suit land against which revision was preferred by the plaintiff and that was dismissed as such, defendant No.1 is the title holder and possession holder of the suit land. It was also pleaded that the plaintiff was also convicted in a criminal case by imposing fine and sentencing till the rising of court pursuant to the report lodged by defendant No.1. It was finally pleaded that only on the basis of agreement to sale, suit for declaration of title has been filed which is not maintainable, as the remedy of the plaintiff is to file suit for

specific performance of contract and as such, the suit deserves dismissal for want of seeking remedy of specific relief and therefore the suit deserves to be dismissed.

5. Defendants No.2 to 4 by filing separate written statement opposed the plaint averment.
6. Upon appreciation of oral and documentary evidence available on record, the trial Court dismissed the suit though held that Niyajuddin – ex-husband of defendant No.1, has agreed to sell the suit land in favour of the plaintiff's father and also held that the plaintiff is entitled to be declared that Niyajuddin has died civil death. Finally, holding the suit to be within limitation, the trial Court dismissed the suit stating that the plaintiff is not entitled for declaration of title and permanent injunction against the defendants.
7. Feeling aggrieved and dissatisfied with the judgment & decree of the trial Court, the sole plaintiff preferred an appeal under Section 96 of the CPC. The first appellate Court allowed the appeal and reversed the judgment & decree of the trial Court and decreed the suit of the plaintiff holding that the plaintiff has right over the suit land against the original owner Niyajuddin, S/o Sheikh Rohitddin Musalman and the plaintiff has perfected his title by way of adverse possession over the suit land, as the claim of defendant No.1 is barred by Section 27 of the Limitation Act, 1963.
8. Calling in question the judgment & decree of the first appellate Court, this second appeal has been preferred in which substantial question of law has already been formulated and catalogued in the opening paragraph of this judgment for the sake of brevity.
9. Mr. Rajeev Shrivastava, learned counsel appearing for the appellant herein / defendant No.1, would submit that the plaintiff claimed

declaration of title on the basis of agreement to sale without seeking specific performance of alleged contract which cannot be granted under Section 34 of the Specific Relief Act, 1963. He would further submit that it is the specific case of the plaintiff that his father Sukhruddin came into possession pursuant to the agreement to sale with Niyajuddin – ex-husband of defendant No.1 / appellant herein and in view of the well settled law in this regard, possession pursuant to the agreement to sale is always permissive possession, it can never be adverse, in view of the fact that the plea of adverse possession was taken vaguely in paragraph 18 of the plaint and it was not pleaded specifically, consequently, no specific issue was framed by the trial Court as parties did not have the opportunity effectively to contest the issue of adverse possession. He would also submit that the plaintiff's father / plaintiff has entered into agreement to sale with Niyajuddin, then the remedy is to file suit for specific performance of contract and even the relief of permanent injunction cannot be granted in view of Section 41(h) of the Specific Relief Act, 1963, as equally efficacious relief of obtaining specific performance is available to the plaintiff which he has not chosen to avail for the reasons best known to him. As such, the suit as framed and filed is liable to be dismissed and the judgment & decree of the first appellate Court deserve to be set aside also for the reason that the first appellate Court travelled beyond the pleadings of the parties by taking the aid of Section 27 of the Limitation Act, 1963 which was never pleaded before the trial Court and before the first appellate Court as well. Therefore, judgment & decree of the first appellate Court deserve to be set aside and the suit deserves to be dismissed in toto.

10. Mr. Pallav Mishra, learned counsel appearing for the plaintiff /

respondent No.1 herein, would submit that the plaintiff is in possession with effect from 10-5-1968 without any interruption and though issue was not framed with regard to adverse possession, but both the parties have joined the issue and consequently, the trial Court in paragraph 11 of its judgment has also recorded a finding on the question of adverse possession which has been further deliberated by the first appellate Court in the appeal preferred by the plaintiff, therefore, once parties have joined the issue though specific issue was not framed, it cannot be held that defendant No.1 was deprived of the opportunity to contest the issue with regard to adverse possession and he is taken by surprise. The first appellate Court relying upon the evidence available on record rightly concluded that defendant No.1 has lost her right, if any, over the suit land by virtue of the provision contained in Section 27 of the Limitation Act, 1963, therefore, the judgment of the first appellate Court deserves to be maintained by dismissing the second appeal and answering the substantial question of law in favor of the plaintiff.

11. 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.
12. It is the case of the plaintiff that his father Sukhruddin entered into agreement with Niyajuddin, S/o Sheikh Rohitddin Musalman, who was husband of defendant No.1, to purchase the suit land on 10-5-1968 and Niyajuddin after taking divorce from defendant No.1 entered into marriage with Fatimabi – defendant No.2 and defendants No.3 & 4 are sons of Niyajuddin out of his wedlock with Fatimabi. It is the further case of the plaintiff that subsequent to the agreement to sale dated 10-5-1968, Niyajuddin agreed to sell the suit land in favour

of the plaintiff's father and delivered possession after obtaining cash consideration of ₹ 6,500/- and as already noticed, in the revenue proceeding, the name of defendant No.1 was recorded and in the remarks column possession of the plaintiff was shown in the document filed by the plaintiff as Ex.P-2 before the trial Court. In paragraph 18 of the plaint, the plaintiff claimed that on the basis of specific agreement to sale dated 10-5-1968, his father and thereafter, he himself is in possession by cultivating it, therefore, by way of adverse possession, he has become the title holder and thereafter he claimed that he is entitled for declaration of title over the suit land, meaning thereby, the plaintiff's father firstly came in possession pursuant to the agreement to sale and thereafter, after death of the plaintiff's father, the plaintiff came in possession over the suit land.

13. The question would be, whether a person coming into possession pursuant to the agreement to sale can claim that he has perfected his title over the suit land?
14. The law in this regard is well settled and it has conclusively been decided by their Lordships of the Supreme Court.
15. At this stage, it would be appropriate to notice Section 53A of the Transfer of Property Act, 1882 which provides as under:-

"53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an

instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

16. Following are the essential conditions contemplated by Section 53A of the Transfer of Property Act, 1882:-

- (1) there must be a contract to transfer for consideration of any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract.

17. Protection provided under Section 53A of the Transfer of Property Act, 1882 to the proposed transferee is a shield only against the transferor. It dis-entitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance of such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed into service against a third party. (See **Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra (Dead)**)

Through LR¹.)

18. By virtue of Section 53A of the Transfer of Property Act, 1882, where a transferee is already in possession, if continues in possession pursuant to the said agreement to sale, he shall be deemed to be in possession pursuant to the agreement and the nature of possession pursuant to the agreement to sale is no longer in dispute, it is always permissive in character.
19. In the matter of **Achal Reddy v. Ramakrishna Reddiar and others**², the Supreme Court while dealing with Articles 64 and 65 of the Limitation Act, 1963 in the case of an executory contract of sale where vendee getting possession of the property under agreement of sale while parties contemplating execution of registered sale deed subsequently, held that vendee in such a situation recognises title of vendor and as such cannot claim his possession to be adverse against the vendor. Paragraphs 9 and 10 of the report read as follows:-

"9. There is no controversy that the plaintiff has to establish subsisting title by proving possession within 12 years prior to the suit when the plaintiff alleged dispossession while in possession of the suit property. The first appellate court as well as the second appellate court proceeded on the basis that the plaintiff is not entitled to succeed as such possession has not been proved. The concurrent findings that the plaintiff had title in spite of the decree for specific performance obtained against him, when that decree had not been executed are not assailed by the appellant in the High Court. The appellant cannot, therefore, urge before us on the basis of the findings in the earlier suit to which he was not a party that Ex. A-1 sale deed is one without consideration and does not confer valid title on the plaintiff. The sole question that has been considered by the High Court is that of subsisting title. We have to consider whether the question of law as to the character of the possession Varada Reddi had between July 10, 1946 and July 17, 1947 is adverse or only permissive. 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

¹ (2004) 8 SCC 614

² (1990) 4 SCC 706

acknowledgment and recognition of the title of the vendor which excludes the theory of adverse possession. The well settled rule of law is that if 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 acknowledgment of the title of the vendor. The position is different in the case where in pursuance of an oral transfer or a deed of transfer not registered the owner of a property transfers the property and puts the transferee in possession with the clear animus and on the distinct understanding that from that time onwards he shall have no right of title to the property. In such a case the owner of the property does not retain any vestige of right in regard to the property and his mental attitude towards the property is that it has ceased to belong to him altogether. The transferee after getting into possession retains the same with the clean animus that he has become the absolute owner of the property and in complete negation of any right or title of the transferor, his enjoyment is solely as owner in his right and not derivatively or in recognition of the title of any person. So far as the vendor is concerned both in mind and actual conduct, there is a total divestiture of all his right, title and interest in the property. This applies only in a case where

there is a clear manifestation of the intention of the owner to divest himself of the right over the property. 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. The correctness of the decision in *Annamalai v. Muthiah*³ cannot, therefore, be doubted."

20. In the matter of **Mohan Lal (deceased) through his LRs. Kachru and others .v Mirza Abdul Gaffar and another**⁴, their Lordships of the Supreme Court have held that a person having come into possession under the agreement, his possession cannot be adverse and the plea of adverse possession is not available to the said person. Paragraph 4 of the report states as under:-

"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."

21. The decisions rendered by the Supreme Court in **Achal Reddy** (supra) and **Mohan Lal** (supra) have been followed by this Court in the matter of **Santram Janak Dewangan v. Shivprasad Garibram Dewangan**⁵ in which this Court held as under:-

"10. In view of the aforesaid position of law, the defendant, who came into possession of the suit land pursuant to the agreement to sell, cannot claim adverse possession and, as such, I do not find any illegality in the impugned judgment and decree and no such substantial question of law is involved in this second appeal."

22. Thus, in view of the settled legal position, a person coming into

3 ILR (1965) 1 Mad 254 : 78 Mad LW 172

4 (1996) 1 SCC 639

5 AIR 2016 Chhattisgarh 150

possession pursuant to the agreement to sale can never be in adverse possession and it is the case of the plaintiff also, as stated in paragraph 18 of the plaint.

23. At this stage, it would be appropriate to notice paragraph 18 of the plaint and paragraph 9 of the affidavit of the plaintiff filed under Order 18 Rule 4 of the CPC which state as under: -

Plaint

18/ यह कि वादी का वादग्रस्त भूमि पर खरीदने के कारण इकरारनामा दिनांक 10/5/1968 से लगातार सभी की जानकारी में शांतिपूर्ण कब्जा है तथा इस वर्ष भी काश्तकारी कार्य किया है जिससे वादी वादग्रस्त भूमि का विरोधी कब्जा के सिद्धांत के अनुसार भी स्वामी बन चुका है.

Affidavit under Order 18 Rule 4 of the CPC

9/ यह कि शपथकर्ता वादग्रस्त भूमि के विक्रय सौदा बाबत इकरारनामा दिनांक 10/5/68 से हो लगातार सभी की जानकारी में शांतिपूर्ण कब्जा में होकर काश्तकारी करते आ रहा है और इस वर्ष भी कृषि कार्य किया है. शपथकर्ता वादग्रस्त भूमि का स्वामी है. वादग्रस्त भूमि में प्रतिवादीगण को उसके कब्जे में हस्तक्षेप करने से रोका जाये.

24. A careful perusal of the aforesaid averments would show that the plaintiff claimed that his father and thereafter he himself came into possession of the suit land on 10-5-1968 pursuant to the agreement to sale and therefore his possession has become adverse. It is quite vivid that firstly, the plaintiff's father and thereafter, the plaintiff himself are in possession of the suit land pursuant to the agreement to sale dated 10-5-1968 as per own showing of the plaintiff and thus, the possession, if any, cannot be said to be adverse possession. Apart from this, the pleading of the plaintiff made in paragraph 18 of the plaint claiming adverse possession is a sort of necessary pleading for taking up the plea of adverse possession.

25. 1) In Ram Janmabhumi Temple Case in the matter of M. Siddiq (Dead) Through Legal Representatives (Ram Janmabhumi Temple Case) v. Mahant Suresh Das and others⁶, the Supreme Court (Constitution Bench) has clearly held that the claim on the basis of adverse possession amounts to acknowledgment of title of person against whom adverse possession is claimed and observed as under:-

"1142. A plea of adverse possession is founded on the acceptance that ownership of the property vests in another against whom the claimant asserts a possession adverse to the title of the other. Possession is adverse in the sense that it is contrary to the acknowledged title in the other person against whom it is claimed. Evidently, therefore, the plaintiffs in Suit No.4 ought to be cognizant of the fact that any claim of adverse possession against the Hindus or the temple would amount to an acceptance of a title in the latter. Dr Dhavan has submitted that this plea is a subsidiary or alternate plea upon which it is not necessary for the plaintiffs to stand in the event that their main plea on title is held to be established on evidence. It becomes then necessary to assess as to whether the claim of adverse possession has been established.

1143. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous possession which meets the requirement of being *nec vi nec claim* and *nec precario*. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence. Evidence, it is well settled, can only be adduced with reference to matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case. ..."

25.2) Their Lordships further relying upon the judgment of the Supreme Court in the matter of Karnataka Board of Wakf v. Government of India and others⁷ held that the ingredients in terms of that judgment must be set up in the pleadings and proved in evidence. There can be no proof sans pleadings and pleadings

⁶ (2020) 1 SCC 1

⁷ (2004) 10 SCC 779

without evidence will not establish a case in law.

25.3) Their Lordships also emphasized the need for making clear averment of adverse possession as under:-

"1154. In a judgment rendered in 2015, one of us (Abdul Nazeer, J.) as a Single Judge of the Karnataka High Court succinctly identified and laid down the prerequisites of a claim to adverse possession in the following terms: (*Pilla Akkayamma case*⁸, SCC OnLine Kar Para 27)

"27. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person, who does not acknowledge others' rights but denies them. Possession implies dominion and control and the consciousness in the mind of the person having dominion over an object that he has it and can exercise it. Mere possession of the land would not ripen into possessory title. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. Occupation only implies bare use of the land without any right to retain it. In order to constitute adverse possession, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. To prove title to the land by adverse possession, it is not sufficient to show that some acts of possession have been done. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. In other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation.

30. In a suit falling under Article 65 of the Limitation Act, plaintiff must establish his title to the property. He need not prove that he was in possession within 12 years. If he fails to prove his title, the suit fails, and the question of adverse possession does not arise in such a case. When the plaintiff has established his title to a land, the burden of proving that he has lost that title by reason of the adverse possession of the defendant lies upon the defendant. If the defendant fails to prove that he has been in adverse possession for more than 12 years, the plaintiff is entitled to succeed simply on the strength of his title. A person alleging that he has become owner of immovable property by adverse possession must establish that he was in possession of the property peaceably, openly and in assertion of a title hostile to the real owner. Stricter proof is required to establish acquisition of title by adverse possession for the statutory period."

8 Pilla Akkayamma v. Channnappa, 2015 SCC OnLine Kar 8226 : ILR 2015 Kar 3841

(emphasis supplied)

1155. In *Ravinder Kaur Grewal v. Manjit Kaur*⁹, a three-Judge Bench of this Court of which one of us, Abdul Nazeer, J. was a part, further developed the law on adverse possession to hold that any person who has perfected their title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In this view, adverse possession is both a sword and a shield.

1156. The plaintiffs have failed to adopt a clear stand evidently because they are conscious of the fact that in pleading adverse possession, they must necessarily carry the burden of acknowledging the title of the person or the entity against whom the plea of adverse possession has not been adequately set up in the pleadings and as noted above, has not been put forth with any certitude in the course of the submissions. Above all, it is impossible for the plaintiffs to set up a case of being in peaceful, open and continuous possession of the entire property. ..."

26. Coming to the plaintiff's pleading in the light of the aforesaid proposition of law held by the Supreme Court in **Ram Janmabhumi Temple Case** (supra), it is quite vivid that the pleading as contained in paragraph 18 of the plaint, noticed herein-above, is a sort of pleading to constitute the plea of adverse possession.
27. Now, the question would be, whether on the basis of agreement to sale, the plaintiff can claim decree for declaration of title which the first appellate Court has granted in his favour?
28. Section 34 of the Specific Relief Act, 1963 provides as under: -

"34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he

would be a trustee.”

29. A focused perusal of the aforesaid provision would show that only that person can have the remedy of obtaining decree of declaration, who is entitled to any legal character, or who has any right to any property. The question would be, what would be the meaning of “legal character”?

30. The Lahore High Court in the matter of **Haji Abdul Karim v. Sarriya Begum Minor under the guardianship of Nur Mohammad**¹⁰ while dealing with Section 42 of the Specific Relief Act, 1877 which is equivalent to Section 34 of the Specific Relief Act, 1963, held that the words “legal character” used in Section 42 are wide enough to include the status of a person. Similarly, in the matter of **Shanta Shamsheer Jung Bahadur Rana v. Kamani Brothers Private Ltd. and others**¹¹, the Bombay High Court has held that 'legal character' as used in Section 42 of the Specific Relief Act, 1877 (*pari materia* to Section 34 of the Specific Relief Act, 1963) is equivalent to legal status, and legal status is a legal right when it involves a peculiarity of the personality arising from anything unconnected with the nature of the act itself which the person of inheritance can enforce against the person of incidence. The Nagpur High Court also in the matter of **Dipchand Kundanmal Marwari and others v. Manakchand Multanmal Marwari and others**¹², held that a man's legal character is the same as his legal status.

31. As such, the plaintiff has neither claimed nor is entitled for any legal character within the meaning of Section 34 of the Specific Relief Act, 1963.

32. Now, the question is, whether the plaintiff has any right to the suit

10 AIR 1945 Lah 266

11 AIR 1959 Bom 201

12 AIR 1939 Nagpur 154

property to claim declaration under Section 34 of the Specific Relief Act, 1963?

33. According to **Salmond** (**Salmond on Jurisprudence**, 12th Edition, page 217) “right” means,

"Rights are concerned with intrests, and indeed have been defined as interests protected by rules of right, that is by moral or legal rules ..."

34. According to **Holland** (**The Elements of Jurisprudence** 13th Edition, page 82), a right "is one man's capacity of influencing the acts of another, by means, not of his own strength, but of the opinion or the force of society."

35. According to **Salmond** (page 218) “legal right” means,

"A legal right, on the other hand, is an interest recognised and protected by a rule of law—an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty".

36. According to **Holland** (Page 83):

"A legal right is a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others".

37. Therefore, according to both **Salmond** and **Holland**, every interest or right which is recognised and protected by the State, i.e., by the laws of the State, is a legal right and every such legal right involves a legal duty or obligation.

38. According to **Salmond** (page 229), every legal right has the following characteristics:

1. It is vested in a person who may be called the owner of the right, the subject of it, the person entitled, or the person of inherence.
2. It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of duty, or as the person of incidence.

3. It obliges the person bound to an act or omission in favour of the person entitled. This is the content of the right.
4. The act or omission relates to some thing (in the widest sense of the word), which may be termed the object or the subject-matter of the right.
5. Every legal right has a title, that is to say, certain facts or events, by reason of which the right has become vested in its owner.

39. Now, reverting to the facts of the present case in the light of the aforesaid legal definition of “legal right”, the question would be, whether by an agreement to sale, the plaintiff being party to agreement is entitled to the right to property or it can be said that the person who has agreed to purchase has got the right to property?

40. For this, reference may be made to Section 54 of the Transfer of Property Act, 1882 which also eventually defines “Contract for sale”, which reads as follows: -

“Contract for sale.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.”

41. The definition of the term “Contract for sale” appended to Section 54 of the Transfer of Property Act, 1882 clearly provides that a contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties, it does not, of itself, create any right in the property.

42. Therefore, in the considered opinion of this Court, mere agreement to sale, which is an un-concluded contract, does not itself create any interest or right in the property agreed to be purchased by the plaintiff and as such, on the basis of agreement to sale, the plaintiff cannot have any right over the suit land and consequently, he cannot obtain

any declaratory decree under Section 34 of the Specific Relief Act, 1963. Accordingly, the plaintiff is not entitled for decree of declaration of title under Section 34 of the Specific Relief Act, 1963 on the basis of agreement to sale dated 10-5-1968.

43. Now, the plaintiff has also claimed and it has been granted by the first appellate Court, decree for permanent injunction. Since the plaintiff, cannot obtain decree of declaration of title, Is he entitled for decree for permanent injunction under Section 38 of the Specific Relief Act, 1963?

44. In order to consider the plea, it would be appropriate to notice Sections 38 and 41(h) of the Specific Relief Act, 1963 which provide as under: -

“38. Perpetual injunction when granted.—(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the court may grant a perpetual injunction in the following cases, namely:—

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

41. Injunction when refused.—An injunction cannot be granted—

(a) to (g) xxx xxx xxx

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(l) & (j) xxx xxx xxx”

45. A careful perusal of the aforesaid provisions would show that perpetual injunction under Section 38 of the Specific Relief Act, 1963 cannot be granted when equally efficacious relief can be obtained by any other usual mode of proceeding. Section 38 has to be read with Section 41(h) and both the provisions have to be read together. The purpose of the aforesaid clauses is to prevent multiplicity of proceedings. The word 'efficacious' means which would put the plaintiff in the same position in which he would have been if he had not asked for a relief of injunction. It refers to the relief being capable of obtaining by another usual mode of proceedings able to produce the same result intended by the plaintiff; and based on the same set of facts and allegations as constitute the foundation of a suit for injunctions. The usual mode of proceeding where there is an agreement capable of being specifically enforced is obviously in a suit for specific performance of contract under Section 19 of the Specific Relief Act, 1963.

46. In the matter of **M/s. Jawahar Theatres Private Ltd. v. Smt. Kasturi Bai and another**¹³, the Madhya Pradesh High Court has clearly held that the Court would normally refuse to grant injunction in case where plaintiff is in a position to claim specific performance of contract.

47. The Supreme Court in the matter of **The Municipal Corporation of Delhi v. Suresh Chandra Jaipuria and another**¹⁴, has held that Section 41(h) of the Specific Relief Act, 1963 lays down that injunction cannot be granted when equally efficacious relief can be

13 AIR 1961 Madhya Pradesh 102

14 AIR 1976 SC 2621

obtained by any other usual mode of proceeding and held in para 10 as under :-

“10. Further, Section 41(h) of Specific Relief Act which lays down that an injunction, which is a discretionary equitable relief cannot be granted when an equally efficacious relief is obtainable in any other usual mode or proceeding except in cases of breach of trust was also relevant on this point. Thus the remedy under Section 169 of the Delhi Municipal Corporation Act 1957 was available to the plaintiff. This consideration had a bearing upon the question whether a prima facie case existed for the grant of an interim injunction.”

48. Likewise, in the matter of **Satish Bahadur v. Hans Raj and others**¹⁵, in identical fact-situation, the Punjab and Haryana High Court has held that since plaintiff was entitled to equally efficacious relief of specific performance of contract by filing suit, the bare suit for permanent injunction could not proceed and held as under :-

“Since the plaintiffs are entitled to another equally efficacious relief, the present suit for permanent injunction cannot proceed, because an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceedings. In the present suit the Court is not concerned with the limitation of three years for filing the suit for specific performance of the contract. The sole question to be decided is whether the present suit for permanent injunction can continue when an equally efficacious relief has become available to the plaintiffs during the pendency of the suit. It cannot be disputed that the subsequent events after the institution of the suit can always be taken into consideration while deciding the matter in controversy. Reference in this respect can be made to *Pasupuleti Venkateswarlu's case*¹⁶.”

49. Reverting to the facts of the present case finally in the light of the principles of law culled out from the judgments rendered by their Lordships of the Supreme Court, the M.P. High Court and the Punjab and Haryana High Court and keeping in view the provisions contained in Sections 38 & 41(h) of the Specific Relief Act, 1963, the plaintiff has also filed suit for permanent injunction on the basis of agreement to sale Ex.P-1 that he is in possession since 10-5-1968,

15 AIR 1980 Punjab and Haryana 351

16 AIR 1975 SC 1049

therefore the defendants be restrained from interfering with his settled possession, which has been granted by the first appellate Court overlooking the statutory provision contained in Section 41(h). Obviously, in the instant case, suit for specific performance of contract under Section 19 of the Specific Relief Act, 1963 could have been filed by the plaintiff and necessary relief of specific performance of contract could have been claimed of-course subject to period of limitation and could have prayed for consequential relief of permanent injunction and in that view of the matter, suit for declaration of title based on agreement to sale and based on that declaration, permanent injunction could not have been granted by the first appellate Court in view of the aforesaid provisions and settled legal position in this regard, as suit for permanent injunction under Section 38 of the Specific Relief Act, 1963 based on agreement to sale is hit by Section 41(h) of the Specific Relief Act, 1963, as such, the first appellate Court is absolutely unjustified in granting such relief in favour of the plaintiff. The substantial question of law is answered accordingly.

50. As a fallout and consequence of the aforesaid discussion, judgment & decree passed by the first appellate Court are set aside and that of the trial Court are held good, thereby restoring judgment & decree passed by the trial Court.

51. The second appeal is allowed leaving the parties to bear their own cost(s).

52. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge