

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.49 of 2011Judgment reserved on: 6-7-2021Judgment delivered on: 13 -7-2021

Radheshyam Pathak (dead) through legal representatives
(Plaintiff)

1A. Smt. Usha Mishra, W/o Late Shri R.A. Mishra, R/o Chhoti Koni, Bilaspur (C.G.)

1B. Smt. Nisha Sharma, W/o A.P. Sharma, R/o Ganganagar, Bilaspur (C.G.)

1C. Smt. Shandhya Dube, W/o Shri Roopchandra Dube, R/o 1008, Kaveri Vihar, Jamnipali, Korba (C.G.)

1D. Smt. Pratibha Dubey, W/o Shri Ramchandra Dube, R/o STPP, Darri, Korba (C.G.)

1E. Smt. Sandhya Pandey, W/o Shri V.B. Pandey, R/o 'Anukampa' Jorapara, Sarkanda, Bilaspur (C.G.)

1F. Smt. Rekha Dwivedi, W/o Shri R.K. Dwivedi, Opp. ITI Koni, Bilaspur (C.G.)

1G. Shri Prabhat Pathak, S/o Late Radheshyam Pathak, R/o Devendra Nagar, Phase-II, Seepat Road, Bilaspur (C.G.)

1H. Shri Jay Prakash Pathak, S/o Late Shri Radheshyam Pathak, R/o Near Baghwa Mandir, Purana Sarkanda, Bilaspur (C.G.)

1I. Shri Vijay Prakash Pathak, S/o Late Shri Radheshyam Pathak, R/o Near Baghwa Mandir, Purana Sarkanda, Bilaspur (C.G.)

1J. Shri Prasun Pathak, S/o Late Shri Radheshyam Pathak, R/o Near Baghwa Mandir, Purana Sarkanda, Bilaspur (C.G.)

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Versus

1. Kanhaiyaa Gond, S/o Late Mahesh Gond, Aged about 32 years

2. Nandlal Gond, S/o Late Mahesh Gond, Aged about 26 years

3. Smt. Beha Bai, W/o Late Mahesh Gond, Aged about 60 years

All three R/o Village Ghutku, Tahsil Takhatpur, District Bilaspur (C.G.)
(Defendants)
---- Respondents

For Appellants: Mr. Arvind Shrivastava, Advocate.
For Respondents: Mr. Ravindra Agrawal, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. Proceedings of this matter have been taken-up through video conferencing.
2. This second appeal preferred by the plaintiff / appellants herein (LRs of the plaintiff) was admitted for hearing on 29-11-2013 by formulating the following substantial questions of law: -

“1. Whether the first appellate Court was justified in reversing the finding of the trial Court on the basis of the defendants perfecting their right by adverse possession?

2. Whether the case of the plaintiffs was established before the trial Court through the power of attorney holder, was proper or not?”

(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. Plaintiff Radheshyam Pathak filed suit through power of attorney Vijay Prakash Pathak, for recovery of possession based on title stating inter alia that the suit house was purchased by the plaintiff on 27-11-1976 from Shesh Narayan Lal Agrawal and obtained possession of the suit land and immediately thereafter, it was given on license to Mahesh Gond – father of defendants No.1 & 2. The defendants are sons and widow of Mahesh Gond. In the year 1990, license was terminated and the suit house was sought to be vacated by serving notice dated 3-9-2007 which has not been vacated leading to filing of suit for decree for recovery of possession of the suit house. The defendants filed written statement stating inter alia that they are in possession for long time uninterruptedly and without interference and Shesh Narayan Agrawal

has no right to alienate the suit property in favour of the plaintiff, they are not licensee and the plaintiff's suit is barred by limitation.

4. The trial Court after appreciating oral and documentary evidence available on record decreed the suit in favour of the plaintiff which was appealed by the defendants before the first appellate Court and the first appellate Court reversed the decree of the trial Court and dismissed the suit which has been called in question by the plaintiff in this second appeal in which substantial questions of law have been formulated and which have been set-out in the opening paragraph of this judgment for the sake of completeness.
5. Mr. Arvind Shrivastava, learned counsel appearing for the appellants herein / LRs of the plaintiff, would submit as under: -
 1. The trial Court and the first appellate Court, both, have concurrently held the plaintiff to be the title holder of the suit house, therefore, since the defendants have not pleaded and established their plea of adverse possession, decree for possession passed by the trial Court could not have been interfered and reversed by the first appellate Court.
 2. In view of Article 65 of the Limitation Act, 1963 once title is proved by the plaintiff in a suit for possession based on title, it is for the defendant who has to plead and prove the plea of adverse possession and suit cannot be dismissed holding it barred by limitation, unless the defendant pleads and establishes the plea of adverse possession.
 3. The finding of the first appellate Court that Mahesh Gond and thereafter, the defendants are not licensee of the plaintiff is perverse and even otherwise has no adverse bearing to the

decree passed by the trial Court. Once the title of the plaintiff is proved, non-examination of the original plaintiff has no bearing in view of the finding recorded by the first appellate Court that the plaintiff is title holder of the suit house. As such, the impugned decree be set-aside and that of the trial Court be restored.

4. The defendants have taken the plea of title and adverse possession, both, which cannot dwell together in view of the decision of this Court in S.A.No.112/2004 (Ashok Kumar Gupta v. Sushila and others), decided on 15-10-2019.
6. Mr. Ravindra Agrawal, learned counsel appearing for the respondents herein / defendants, would support the judgment & decree of the first appellate Court and submit that the plaintiff was required to prove his title over the suit land in view the decision rendered by the M.P. High Court in the matter of **Daryasingh Harisingh and another v. Kalma Nihala**¹. He would further submit that non-examination of the plaintiff is fatal in view of the decision rendered by the Supreme Court in the matter of **Mohinder Kaur v. Sant Paul Singh**².
7. 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.
8. Article 65 of the Limitation Act, 1963 states as under: -

	Description of suit	Period of limitation	Time from which period begins to run
65.	For possession of immovable property or any interest therein based on title. <i>Explanation.</i> —For the	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

¹ AIR 1961 MP 179

² (2019) 9 SCC 358

purposes of this article— (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		
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9. From a careful perusal of the above-stated provision of law, it is quite vivid that when the suit is based on title for possession, once the title is established on the basis of relevant document and other evidence, unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited.
10. The Supreme Court in the matter of **Saroop Singh v. Banto and others**³ has held that in the light of Article 65 of the Limitation Act, 1963, the 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 plaintiffs, but

³ (2005) 8 SCC 330

commences from the date the defendant's possession becomes adverse. Paragraphs 28, 29 and 30 of the report are 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 hereinbefore, 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](#) the 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 becomes adverse. (See [Vasantiben Prahladiji Nayak v. Smonth Muljibhai Nayak](#)⁴.)

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 *Mohd. Mohd. Ali v. Jagadish Kalita*⁵, SCC para 21.)”

11. This view has been approved and followed by the Supreme Court in the matter of **M. Durai v. Muthu and others**⁶ and it has been 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.”

4 (2004) 3 SCC 376

5 (2004) 1 SCC 271

6 (2007) 3 SCC 114

12. Similarly, in the matter of C. Natarajan v. Ashim Bai and another⁷, the Supreme Court has held that in a suit governed by Article 65 of the Limitation Act, 1963, the plaintiff would succeed, if he proves his title and it would be for the defendant to plead and establish his title by adverse possession. It was observed as under: -

“15. The law of limitation relating to the suit for possession has undergone a drastic change. In terms of Articles 142 and 144 of the Limitation Act, 1908, it was obligatory on the part of the plaintiff to aver and plead that he not only has title over the property but also has been in possession of the same for a period of more than 12 years. However, if the plaintiff has filed the suit claiming title over the suit property in terms of Articles 64 and 65 of the Limitation Act, 1963, burden would be on the defendant to prove that he has acquired title by adverse possession.

16. In Md. Mohammad Ali (dead) by LRs. v. Jagdish Kalita and Ors. [(2004) 1 SCC 271], it was held :

“By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiffs claim to establish his title by adverse possession”.

{See also P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors. [(2007) 6 SCC 29]; Binapani Paul v. Pratima Ghosh & Ors. [(2007) 6 SCC 100]; Kamakshi Builders v. Ambedkar Educational Society & Ors. [AIR 2007 SC 2191] and Bakhtiyar Hussai (dead) through LRs v. Hafiz Khan & Ors. [CA Nos.497-498/01 decided on 24.09.2007]}.”

13. Thus, the legal position as stands today is that in a suit governed by Article 65 of the Limitation Act, it is for the plaintiff to aver, plead and establish his / her title over the suit land and it would not be obligatory for him to prove that he was in possession within 12 years preceding

⁷ AIR 2008 SC 363

the filing of suit, and rather it is for the defendant to plead and establish the plea of adverse possession to non-suit the plaintiff.

14. Reverting to the facts of the present case in the light of the aforesaid legal position, it is quite vivid that the trial Court has held that the plaintiff is the title holder of the suit land and finding the defendants to be the licensee, granted decree for delivery of possession in favour of the plaintiff which was set aside by the first appellate Court in the appeal preferred by the defendants. Though the first appellate Court in para 15 of its judgment held that the plaintiff is registered owner of the suit land and defendants are not licensee, but further held that the plaintiff's suit for possession based on title is barred by limitation as the suit ought to have been preferred within 12 years from the date of execution of sale deed and consequently, allowed the appeal and set aside the decree granted in favour of the plaintiff.
15. The plaintiff's suit was for recovery of possession based on title and the plaintiff has proved his title as held by the trial Court and duly affirmed by the first appellate Court. According to Article 65 of the Limitation Act, 1963, as noticed herein-above, once the plaintiff proves his title then the defendant has to plead and establish the plea of adverse possession, but in this case, the defendants have asserted that they are title holders and in case they are not found to be title holders, they have perfected their title by way of adverse possession. Plea of title and adverse possession, both, are mutually destructive plea and inconsistent as well. Therefore, the defendants cannot be permitted to raise mutually destructive plea. However, since the plaintiff has claimed and proved his title over the suit house as held by both the Courts below, it was incumbent on the part of the defendants

to plead and establish the plea of adverse possession which they have neither seriously pleaded nor established.

16. The first appellate Court without noticing the provisions contained in Article 65 of the Limitation Act, 1963, came to a wholly erroneous finding that suit ought to have been filed within 12 years from 26-11-1976 (Ex.P-1) i.e. the date when the sale deed was executed by the erstwhile seller in favour of the plaintiff. Once the plaintiff has proved title over the suit land, it was for the defendants to plead and establish the plea of adverse possession which they have halfheartedly taken and did not plead the essential ingredients of adverse possession that are *nec vi, nec clam, nec precario* and failed to establish the same, yet the first appellate Court held that the suit is barred by limitation.
17. In the considered opinion of this Court, the plaintiff having pleaded and proved title over the suit house as held by both the Courts below by virtue of Article 65 of the Limitation Act, 1963, the defendants are required to plead and establish adverse possession which they have neither pleaded expressly nor proved to the satisfaction of the Court and thus, the suit could not have been held to be barred by limitation by the first appellate Court. The first appellate Court has failed to notice that the law of limitation relating to the suit for possession has undergone a drastic change and Article 65 of the Limitation Act, 1963 is differently worded than Articles 142 & 144 of the Limitation Act, 1908 and in Articles 142 & 144 of the Limitation Act, 1908, the plaintiff was required to show that he was in possession within 12 years preceding the filing of the suit and it has changed by introduction of Article 65 of the Limitation Act, 1963. However, non-examination of the plaintiff is no adverse bearing as two Courts below have already held that the plaintiff is title-holder of the suit land and as such, the

judgment cited on this point by learned counsel for the respondents/defendant is clearly inapplicable. The substantial questions of law are answered accordingly.

18. As a fallout and consequence of the aforesaid discussion, judgment and decree passed by the first appellate Court are hereby set aside and that of the trial Court are restored. The second appeal is allowed to the extent indicated herein-above. No order as to cost(s). Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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