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Item : 01
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**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION**

APPELLATE SIDE

**SAT 439 of 2019
CAN 1 of 2020
CAN 2 of 2023**

Debi Das @ Rajak
Vs.
Shyamal Kuamr Das

Mr. Pinaki Dhole, Advocate

.....for the Appellant

1. The defendant has filed the instant Second Appeal assailing the judgment and decree of both the Courts below on the ground that there is an erroneous finding recorded to the extent that during the pendency of the suit one of the defendants died and instead of substituting the heirs and legal representatives, an application for expunging the name of the said deceased was taken out which was eventually allowed and, therefore, the decree passed in the suit is not only incapable of being executed but is defective and infirm in absence of a necessary party.
2. Admittedly, the plaintiff/respondent purchased the property in question from the admitted owner upon payment of consideration shown therein. The defendant/appellant is related to the plaintiff/respondent and it is a specific case made out in the plaint that both the original defendants were permitted to occupy a portion of the larger premises which is described in the schedule appended to the plaint, as permissive occupants for a period of one year.

3. However, the moment they refused to hand over the possession, the suit was filed not only for declaration of title but also recovery of possession from the original defendants. The original defendants happened to be the husband and wife and it appears from the record that the husband died during the pendency of the suit and his name was expunged as the wife being one of the successor to the state left by the husband, was already made a party and even in absence of any substitution of the other heirs, the suit cannot be regarded to have abetted as one of the heirs was already on record.
4. The wife continued to defend the suit taking a plea that immediately upon purchase of the property by the plaintiff/respondent, an agreement was entered into between them to sell a portion thereof at the consideration money and, in fact, a portion of the consideration money was paid to the plaintiff/respondent. The second line of defence which can be seen from the written-statement filed by the original defendants/ appellants that they claimed perfection of title by way of adverse possession as they constructed a structure upon the said property.
5. Both the Courts below have disbelieved the story set up by the appellant and decreed the suit by directing the recovery of possession from the suit premises.
6. At the very outset, we must record that the plea that they have acquired right, title and interest by way of alleged agreement for sale of a portion of the property is not only inconsistent but mutually

destructive to the other plea of adverse possession. Secondly, section 54 of the Transfer of Property Act clearly envisaged that an agreement for sale does not create title into the purchaser unless a deed of sale is executed and registered in their favour in accordance with law.

7. The question which involves in the instant appeal as to whether non-impleadment of the other heirs of the deceased defendant can invalidate the decree or the decree would be regarded as infirm and/or illegal. The doctrine of representation is well recognized in the Indian judicial parlance. If the state of a person can be sufficiently represented, even if the other heirs/successors are not impleaded as party, the decree cannot be said to be invalid or infirm. The left out heirs does not have a special defence what has already been taken by the predecessor nor can take a contrary defence to the person who is representing the estate of the deceased.
8. Furthermore, in a case of joint licence which is distinct from a tenancy having been created in their favour, if one of the joint licensee is defending the case, we do not find that there is any fetter in the law which stand in the way of continuing the suit with the surviving licensee when she is also one of the heirs and the legal representatives of the other joint licensee.
9. We, thus, do not find that the point raised before us raises any substantial question of law for the purpose of Section 100 of the Code of Civil Procedure.

10. So far as the plea of adverse possession is concerned, one of the foremost principles required to be seen in this regard is based on a legal maxim, *nec vi, nec calum, nec precario*. The moment the defendant has taken such plea of adverse possession, the onus lies on him to prove it.
11. Since both the Courts have concurrently held that the defendant/appellant has failed to lead any evidence with regard to the claim of adverse possession, such being primarily question of fact, we do not find that such concurrent finding of fact needs to be disturbed and/or interfered with by the second appellate Court.
12. On both the counts, we do not find any substantial questions of law involved in the instant appeal.
13. The appeal being **SAT 439 of 2019** is thus **dismissed**. No order as to costs.
14. In view of the dismissal of the appeal at the admission stage, the connected applications being **CAN 1 of 2020** and **CAN 2 of 2023** also stands **disposed of**.

(Harish Tandon, J.)

(Ajay Kumar Gupta, J.)

