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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Reserved on 20th of August, 2024

Pronounced on 4th October, 2024

Regular Second Appeal No.820 of 1991 (O&M)

Surinder Kumar Kuthiala since deceased through his LRs and others
....Appellants

Versus

Ram Pal since deceased through his LRs
....Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Vinay Kuthiala, Sr.Advocate (in person) with
Ms. Vandana Kuthiala, Advocate
Mr. Shaurya Kuthiala, Advocate and
Mr. Munish Behl, Advocate for the appellants.

Mr. Sunil Chadha, Senior Advocate with
Mr. Parvinder Singh, Advocate and
Mr. Tara Dutt, Advocate for the respondents.

PANKAJ JAIN, J.

Plaintiffs are in second appeal.

2. For convenience, the parties hereinafter are referred to by
their original position in the suit i.e. the appellants as the plaintiffs and
the respondent as the defendant.

3 Plaintiffs filed suit for possession of a land measuring 79
Kanal 9 Marlas situated in village Jahan Khelan, Tehsil & District

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Hoshiarpur as detailed out in the plaint. As per the pleadings raised in the plaint, the defendant along with Mohinderpal, Parkash and Bant Ram entered into an agreement to purchase suit land for a valuable consideration of Rs.37,000/- with the plaintiffs on 12th of August, 1967. Amount of Rs.37,000/- was received by the plaintiffs vide subsequent agreement dated 19th of August, 1967. Actual possession of the land was delivered to the defendant with a right to cut trees from the suit land. Defendant sold trees. Three of the proposed transferees but for defendant in the present suit, filed suit for possession by way of specific performance of agreement to sell and in the alternate prayed for recovery of Rs.37,000/-. Defendant was impleaded as defendant No.1 in the said suit. Decree was passed *qua* alternate relief and recovery of Rs.18,500/- was ordered. The judgment attained finality. In order to recover possession from the defendant instant suit was filed. However, he filed written statement showing his unwillingness to get specific performance.

4. Defendant resisted the suit. Defendant claimed that the plaintiffs have no share in the suit land as they have already sold their respective shares in favour of one Niranjana Singh son of Ran Singh. Having lost their subsistent interest, they have no *locus standi* to maintain the suit. It was further claimed that the plaintiffs through their

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counsel served legal notice dated 6th of November, 1968 calling upon the defendant to treat the agreement to sell cancelled. The defendant continued in possession of the suit land thereafter, and thus has become owner by way of adverse possession.

5. On the basis of the pleadings of the parties, Trial Court framed the following issues:

- “1. Whether the plaintiffs are the owners of the land in dispute and there was any family settlement as alleged? If so its effect? OPP.
2. Whether the plaintiffs delivered the possession to the defendants and are entitled to recover the same as alleged in the plaint? OPP.
3. What is the effect of the decisions dated 7.5.83 and 11.6.74? Parties.
4. Whether plaintiffs are entitled to possession of the land in dispute as alleged in the plaint? OPP.
5. Whether Niranjana Singh and other co-sharers are necessary parties to the suit? OPD.
6. Whether plaintiffs have no locus standi to file the suit? OPD.
7. Whether the plaintiffs are estopped by their own acts and conduct from filing the suit? OPD.
8. Whether the defendant has become owner of the suit land by adverse possession? OPD.
9. Whether the defendant is entitled to retain possession of suit land as per agreement dated 12.3.67 and 6.2.68? OPD.
10. Whether the defendant is entitled to specific performance of the contract in this suit? OPD.
11. Whether the suit is time barred? OPD.

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12. Whether the defendant is estopped by his own acts and conduct from resisting the delivery of the possession to the plaintiffs? OPP.
13. Whether the defendant and Mohinder Pal etc. have committed breach of agreement to sell? If so to what effect in the suit? OPD.
14. Whether the plaintiffs are entitled to special costs of Rs.2000/- under Section 35-A CPC? OPP.
15. Relief.”

6. Trial Court decided issue No.1 w.r.t. ownership of the land against the plaintiffs. Issues No.2, 3 and 4 were decided together and in favour of defendants against the plaintiffs. Issue No.5, 6, 7, 9 and 10 were decided against the defendant and in favour of the plaintiffs. Issue No.11 and 12 were decided against the plaintiff and the suit was ordered to be dismissed.

7. In appeal preferred by the plaintiffs, Appellate Court affirmed the findings recorded by the Trial Court and dismissed the appeal holding that the limitation for the plaintiffs to seek possession started running from the day the plaintiffs refused performance of agreement vide notice Exhibit D1 i.e. 6th of November, 1968. The suit preferred on 7th of August, 1987 was beyond the prescribed period of limitation i.e. 12 years from the said date. Resultantly, the defendant has become owner by way of adverse possession.

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8. The appellant/plaintiff Mr. Vinay Kuthiala, who appears in person submits that the Courts below erred in ignoring the fact that the defendant came in possession of the suit land on the strength of agreement to sell executed by the plaintiffs in favour of the defendant along with other three persons. Thus for all intents and purposes the possession of the defendant over the suit land remained permissive and cannot be held to be adverse. He submits that it is settled proposition of law, that merely long and continuous possession cannot ripen-up into an adverse possession till the possessee is able to show that his possession was hostile to the title of the plaintiffs. He further submits that the stand of the defendant in the written statement is sufficient to demolish the plea of adverse possession. He refers to specific plea raised by the defendant claiming that he is still ready and willing to pay balance sale consideration and get the sale deed executed in terms of the contract and further pleaded that the defendant was entitled to retain possession pleading part performance of the contract to sell. He further submits that so far as finding on issue No.1 w.r.t. ownership of the land against the plaintiffs is concerned, the same also needs to be reversed as the plaintiffs have become owners in possession of the suit land in terms of the family settlement which has been held to be valid in a subsequent decree passed by Competent Court. Though the appellant

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claimed that the said judgment and decree whereby the land has come to share of the plaintiffs, has been placed on record but there is no such application for placing on record the judgment and decree being referred to by the appellant. Nor was he able to supply the same during the course of arguments. In support of his contention he has relied upon law laid down in **Civil Appeal No.83 of 2008 titled as Dagadabai (dead) through LR. vs. Abbas @ Gulab Rustum Pinjari, Shambhu Prasad Singh vs. MST. Phool Kumari and others, (1971) 2 SCC 28, State Bank of Travancore vs. Aravindan Kunju Panicker and others, (1972) 4 SCC 274, Achal Reddi vs. Ramakrishna Reddiar and others, AIR 1990 SC 553, Mohan Lal (deceased) through LR. Kachru and others vs. Mirza Abdul Gaffar and another, (1996) 1 SCC 639, Sajjadanashin Sayed MD. B.E. EDR (D) by LR's vs. Musa Dadabhai Ummer and others, (2000) 3 SCC 350, Roop Singh (Dead) through LR. vs. Ram Singh (Dead) through LR, (2000) 3 SCC 708, Virendra Nath through P.A. Holder R.R. Gupta vs. Mohd. Jamil and others, (2004) 6 SCC 140, Karnataka Board of Wakf vs. Govt. of India and others, (2004) 10 SCC 779, Corporation Bank vs. Saraswati Abharansala and another, (2009) 1 SCC 540, D.L.F. United Private Ltd. vs. Pt. Prem Raj and others, AIR 1981 SCC 805, State of Rajasthan vs. Stone**

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Industries (Kotah) Ltd. AIR 1985 SCC 466, Khepa Gorain vs. Kus Gorain, (1998) 9 SCC 144, State of Haryana vs. Mukesh Kumar and others, SLP(C) No.28034 of 2011, D.L.F. United Private Limited vs. Prem Raj and others (1981) 1 SCC 433, Uttam Chand (Dead) through vs. Nathu Ram (Dead) through LR's and others, (2020) 11 SCC 263, L.N. Aswathama and another vs. P. Prakash (2019) 13 SCC 229, P.T. Munichikkanna Reddy and others vs. Revamma and others, (2007) 6 SCC 59, M. Redheshyاملal vs. V Sandhya and another, Civil Appeal Nos. 4322-4324 of 2024, Government of Kerala and another vs. Joseph and others, Civil Appeal No.3142 of 2010, Qadir Bux vs. Ram Chand (Died) after him Gyan Singh and others, AIR 1970 ALL 289 and Mohini Mohan Dawn vs. Sris Chandra Hati, AIR 1978 CAL 434.

9. Per contra, Senior Counsel for the respondent submits that the ownership is *sine qua non* to maintain the suit for possession. Plaintiffs having failed to prove their ownership over the suit land cannot maintain the present suit for possession. In support of his contention, he relies upon ratio of law laid down in the case of **Delhi Diocesan Trust Association vs. Ashwani Kumar, 2014 (3) R.C.R. (Civil) 985** and that in the case of **Hukum Chand and others vs. Daya Ram and others, 2015 (34) R.C.R. (Civil) 804**. Senior Counsel

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further submits that admittedly the defendant is in possession of the suit land since 6th of February, 1968 on the strength of agreement to sell dated 12th of August, 1967/19th of October, 1967. Plaintiffs vide notice dated 6th of November, 1968 cancelled the aforesaid agreement to sell. The notice has been proved on record as Exhibit D-1. Thus, after 6th of November, 1968 the possession of the defendant over the suit land became adverse and, therefore, the present suit is barred by the provisions of Section 27 read with Article 65 of the Limitation Act. In order to hammer-forth his contention, counsel for the respondent has relied upon ratio of law laid down by the Apex Court in the case of **M/s Shyam Sunder Prasad and others vs. Mr. Raj Pal Singh and another, (1995) 1 SCC 311, Nelapatla Ramaiah and others vs. Kamatam Bikshamaiah and others, (2010) 2 SCC 139.**

10. I have heard both the parties and have carefully gone through records of the case.

11. Facts are not much in dispute. The plaintiffs entered into agreement to sell dated 12th of August, 1967 *qua* suit property in favour of agricultural land measuring 79 Kanal 9 Marlas in favour of Mohinderpal, Parkash, Bant Ram son of Labhu Ram and Ram Pal, the defendant in the present case. As per the terms of the agreement to sell total sale consideration was agreed to be Rs.37,000/-. Rs.13,000/- were

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paid as earnest money. It was also agreed between the parties that the defendant i.e. Ram Pal will be entitled to cut and sell the trees standing on the suit land and Rs.13,000/- would be paid over and above the earnest money. It was also agreed that the balance amount of Rs.7,000/- will be paid at the time of the execution of the sale deed. Amount of Rs.17,000/- was paid to the plaintiffs/appellants on 19th of October, 1967 and 6th of February, 1968. The three vendees i.e. Mohinderpal, Parkash and Bant Ram filed suit for specific performance against the plaintiffs in the present suit seeking decree of specific performance of agreement to sell dated 12th of August, 1967. Defendant was also impleaded as defendant No.1 in the said suit. A finding was recorded to the effect that it is defendant No.1 Ram Pal alone who sold the trees worth Rs.15,000/- and is liable to account for the said amount to his partners. The stand taken by defendant No.1 in the said suit was that defendants No.2 and 3 i.e. the present appellants are the actual owners of the suit land. He further pleaded that the three are not entitled for decree of specific performance.

12. Specific issues No.2 and 4 were framed in the said suit to the following effect:

- “2. Whether the plaintiff and defendants No.1 were given the vacant possession of the suit land? If so its effect on the present suit ? OPD

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3. xxx
4. Whether the plaintiffs are entitled to the decree for the specific performance of the contract ? OPP.”

13. Trial Court returned the finding on the issue No.2 that it is only the present defendant Ram Pal who was in possession of suit land. On issue No.4 the Trial Court concluded that since one of the parties i.e. Ram Pal-the defendant No.1 in the said suit has shown his unwillingness to execute the sale deed, suit for specific performance cannot be decreed. Observations made by this Court in RFA No.636 of 1974 read as under:

“On material Issue No.3, the trial Court found that it were defendants who were not ready and willing to perform their part of agreement. Under issue No.4, the trial Court concluded that since one of the parties, that is, defendant No.1, Ram Pal has shown his unwillingness to get the sale-deed executed although he is proved to be in possession of the suit land, so the suit for specific performance could not be decreed. Under Issue No.6 the trial Court found that trees worth Rs.15,000/- were cut by defendant No.1 Ram Pal alone and he is liable to account for this amount to the defendants-appellants. While discussing Issue No.5, the trial Court held that the plaintiffs are proved to have paid half of the amount as they were to get half share in the suit land, and, therefore, they are entitled to recover their half share of Rs.37,000/-. As a result of these findings the plaintiffs’ suit for Rs.18,500/- was decreed with costs.”

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14. The issue w.r.t. restoration of possession was raised and the same was dealt by this Court observing as under:

“The learned counsel for the defendant-appellant has contended that Ram Pal, Defendant No.1 who has been found in possession of the suit land should be directed to land over the possession on receipt of the decretal amount. According to the learned counsel, the present suit being one for specific performance of the agreement, P/5 agreement as such should be enforced and in case the plaintiffs are allowed to claim damages, they must hand over the possession of the suit land to the defendant-appellants.

After hearing the learned counsel for the appellants I do not find any merit in this appeal. According to the findings of the trial Court Ram Pal, Defendant No.1, was in possession of the suit land and not the plaintiffs and, therefore, under these circumstances no such direction or decree could be passed as to restore the possession to the defendant-appellants. Once it is found that the defendant-appellants were not ready and willing to perform their part of the agreement, then on the facts and circumstances of the present case, the trial Court rightly found that the plaintiffs are entitled to the damages under the agreement Exhibit P.1. Thus, I do not find any infirmity or illegality in the findings of the trial Court which are to be affirmed. Consequently, the appeal fails and is dismissed with costs.”

15. After the aforesaid appeal preferred by the appellants were dismissed on 3rd of May, 1983, the present suit was instituted on 17th of April, 1984.

16. From the rival contentions raised by the parties and the fact as noticed herein-above, this Court finds that following two questions arise for the determination of this Court:

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- (i) Whether the plaintiff can maintain suit for possession being a vendor against his vendee to whom he delivered possession as a part of contract *dehors* the fact that the defendant/vendee claims that the plaintiff is no more owner of the suit property? and
- (ii) Whether the defendant can claim adverse possession over the suit land admitting that the possession was delivered to him pursuant to agreement to sell by the plaintiffs/appellants?

17. Law recognizes difference between *petitorium* (a proprietary suit) and *possessorium* (a possessory suit). The issue was dealt by Supreme Court in the case of **Nair Service Society Ltd vs. Rev. Father K.C. Alexander and others**, AIR 1968 SC 1165 dealing with the plea of '*jus tertii*' pleaded by the defendant in possession. Apex Court observed as under:

“18. The proposition of law on the subject has been summed up by *Salmond on Torts* (13th Edn.) at page 172 in the following words :

"The mere de facto and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is therefore sufficient to support an action of trespass against such persons. Just as a legal title to land without the possession of it is insufficient

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for this purpose, so conversely the possession of it without legal title is enough. In other words, no defendant in an action of trespass can plead to *jus tertii*-the right of possession outstanding in some third person-as against the fact of possession in the plaintiff." The maxim of law is *Adversus extraneous vitiose possession prodesse solet*,* and if the plaintiff is in possession the *jus tertii* does not afford a defence. Salmond, however, goes on to say:

* Prior possession is a good title of ownership against all who cannot show a better.

"But usually the plaintiff in an action of ejectment is not in possession: he relies upon his right to possession, unaccompanied by actual possession. In such a case he must recover by the strength of his own title, without any regard to the weakness of the defendants. The result, therefore, is that in action of ejectment the *jus tertii* is in practice a good defend. This is sometimes spoken of as the doctrine of *Doe d. Carter v Barnard*. (1849) 13 QB 945."

Salmond, however, makes two exceptions to this statement and the second he states thus :

"Probably, if the defendant's possession is wrongful as against the plaintiff, the plaintiff may succeed though he cannot show a good title: *Doe d. Hughes v Dyball*, (1829) 3 C. and P. 610 *Davison v. Gent.*, (1857) 1 H and N 744. But possession is *prima facie* evidence is not displaced by proof of title. If such *prima facie* evidence is not displaced by proof of title in a third person the plaintiff with prior possession will recover. So in *Asher v. Whitlock*, (1865) 1 QB 1 where a man in closed waste land and died without having had 20 years' possession, the heir of his devisee was held entitled to recover it against a person who entered upon it without any title. This decision, although long, doubtful. may now be regarded as authoritative in consequence of its express

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recognition of the Judicial Committee in *Perry v. Clissold*, 1907 AC 73."

18. The same was further followed by Supreme Court in the case of **Ramesh Chand Ardawatiya vs. Anil Panjwani (2003) 7 SCC 350** holding as under :

“34.Section 6 of the Specific Relief Act, 1963, provides for any person dispossessed without his consent of immovable property otherwise than in due course of law being entitled to claim and successfully sue for recovery of possession thereof, notwithstanding any other title that may be set up in such suit if the suit is brought before the expiry of six months from the date of dispossession except against the Government. Article 64 of Limitation Act 1963 contemplates a suit for possession of immovable property based on previous possession, and not on title, being brought within twelve years from the date of dispossession. Such a suit is known in law as a suit based on possessory title as distinguished from proprietary title. The law discourages people from taking the law into their own hands, howsoever good and sound their title may be. Possession is nine points in law and law respects peaceful and settled possession. Salmond states in Jurisprudence (12th Edition)- "These two concepts of ownership and possession, therefore, may be used to distinguish between the de facto possessor of an object and its de jure owner, between the man who actually has it and the man who ought to have it. They serve also to contract the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature." (P.59)

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"In English law possession is a good title of right against any one who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law. Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms *petitorium* (a proprietary suit) and *possessorium* (a possessory suit)." (P.60)

35. The law in India is not different. In *Nair Service Society Ltd. v. K.C. Alexander and Ors.* -, the Court held--"the uniform view of the courts is that if Section 9 of the Specific Relief Act is utilized the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of 6 months has passed questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only in a suit under Section 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and

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title need not be proved unless the defendant can prove one.

The present amended Article 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. (Para 14)

19. In view of the aforesaid proposition of law, it is thus evident that the suit for possession by a vendor/plaintiffs seeking recovery of possession is maintainable and is not dependent on their ownership.

20. Coming on to the second issue i.e. the defendant/vendee having acquired ownership by prescription, the provisions as contained under Section Articles 64 and 65 of the Limitation Act, 1963 need to be analysed. The evolution of the provisions as contained under Articles 64 and 65 of the Limitation Act, 1963 *viz-a-viz* provisions contained under Article 142 and 144 of the Limitation Act, 1908 was considered by the Apex Court in the case of **C. Natrajan vs. Ashim Bai, (2007) 14 SCC 183** to conclude as under :

“16. 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

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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.

17. 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 plaintiff's claim to establish his title by adverse possession."

{See also *P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors.*, 2007(2) RCR (Civil) 847 : 2007(2) R.A.J. 621 : [(2007)6 SCC 29]; *Binapani Paul v. Pratima Ghosh & Ors.*, 2007(2) RCR (Civil) 801 : 2007(3) R.A.J. 7 : [(2007)6 SCC 100]; *Kamakshi Builders v. Ambedkar Educational Society & Ors.*, 2007(3) RCR (Civil) 222 : 2007(1) RCR (Rent) 627 : 2007(3) R.A.J. 219 : [AIR 2007 Supreme Court 2191] and *Bakhtiyar Hussai (dead) through LRs v. Hafiz Khan & Ors.* [CA Nos. 497-498/01 decided on 24.09.2007]}.

18. In *S.M. Karim (supra)*, this Court was considering a question of Benami as also adverse possession. In the aforementioned context, it was opined : "Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is

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no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered, because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal v. Kesho Prasad and another* (AIR 1940 Privy Council 202), the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea."

{See also *Prem Lala Nahata & Anr. v. Chandi Prasad Sikaria*, 2007(1) RCR (Civil) 870 : 2007(1) R.A.J. 588 : [(2007)2 SCC 551]}. Such a question does not arise for our consideration herein.

19. We have noticed hereinbefore that the defendant, inter alia, on the plea of identification of the suit land vis-a-vis the deeds of sale, under which the plaintiff has claimed his title, claimed possession. The defendant did not accept that the plaintiff was in possession. An issue in this behalf is, therefore, required to be framed and the said question is, therefore, required to be gone into. Limitation would not commence unless there has been a clear and unequivocal threat to the right claimed by the plaintiff. In a situation of this nature, in our opinion, the application under Order 7 Rule 11(d) was not maintainable. The contentions raised by the learned counsel for the respondent may have to be gone into at a proper stage. Lest it may prejudice the contention of one party or the other at the trial, we resist from making any observations at this stage.

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21. In case the present suit is to be taken as merely a suit based upon possessory rights, limitation will be governed by Article 64 of 1963 Act. As per the same, the limitation shall commence from the date of dispossession.

22. The word 'dispossession' has been interpreted by Supreme Court in the case of **Dhondiram Tatoba Kadam vs. Ramchandra Balwantrao Dubal (1994) 3 SCC 366** wherein the Apex Court held as under :

“Voluntary giving up of possession does not amount to dispossession unless the law provides for it. 'Dispossess' according to Black's Law Dictionary means: "To oust from land by legal process; to eject, to exclude from realty." The dispossession should have been, therefore, either by legal process or by physical act of exclusion. It would not include leaving possession voluntarily or by surrender.”

23. It being a case where a vendor parted with the possession in favour of the vendee in terms of an agreement to sell, this Court does not find that the plea raised by the defendant that the limitation to file suit shall commence from the service of notice, can be accepted as the possession of the defendant since inception remained permissive.

24. The issue involving nature of possession of a vendee on account of part performance of agreement to sell was dealt by Supreme

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Court in the case of **Mohan Lal vs. Mirza Abdul Gaffar (1996) 1****SCC 639** holding 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 March 8, 1956, he has perfected his title by prescription. Secondly, he pleaded that he is entitled to retain his possession by operation of Section 53A 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., upto completing the period of his title by prescription 'nec vi nec clam nec precario'. Since the appellant's claims is founded on Section 53A, 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.

5. The question then is whether he is entitled to retain possession under Section 53A. It is an admitted fact that suit for specific performance had been dismissed and became final. Then the question is whether he is entitled to retain possession under the agreement. Once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a transferee can avail of Section 53A only as a shield but not as a sword. It contemplates that where any person contracts to transfer for consideration any immovable 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

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transferee has performed or is willing to perform his part of the contract, he would be entitled to retain possession and to continue in possession which he has already received from the transferor so long as he is willing to perform his part of contract. Agreement does not create title on interest in the property. Since the agreement had met with dismissal of the suit his willingness to perform his part of the contract does not arise.

6. Even otherwise, in a suit for possession filed by the respondent, successor-in-interest of transferor as a subsequent purchaser, the earlier transferee must plead and prove that he is ready and willing to perform his part of the contract so as to enable him to retain his possession of the immovable property held under the agreement. The High Court has pointed out that he has not expressly pleaded this in the written statement. We have gone through the written statement. The High Court is right in its conclusion. Except vaguely denying that he is not ready and willing to perform his part, he did not specifically plead it. Under Section 16(c) of Specific Relief Act, 1963, the plaintiff must plead in the plaint, his readiness and willingness from the date of the contract till date of the decree. The plaintiff who seeks enforcement of the agreement is enjoined to establish the same. Equally, when transferee seeks to avail of Section 53A to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity must do equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted thereunder.

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25. The aforesaid view was reiterated by Supreme Court in the case of **Roop Singh (dead) through LRs vs. Ram Singh (dead) through LRs, (2002) 3 SCC 708** observing as under :

.....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. {*Re: Thakur Kishan Singh (Dead) vs. Arvind Kumar, [(1994) 6 SCC 591]*}. Hence, the High Court ought not to have interfered with the findings of fact recorded by both the courts below.

.....It is also to be stated that plea 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 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. (*Re: Mohan Lal vs. Mirza Abdul Gaffar and Anr., {(1996) 1 SCC 639}*).

26. The aforesaid principle was again relied upon in the case of **Mool Chand Bakhru vs. Rohan and others, (2002) 2 SCC 612** holding as under:

“8. The High Court relying upon a judgment of this Court in *Mohan Lal (deceased) through his Lrs. Kachru and others v.*

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Mirza Abdul Gaffar and another, 1996(1) SCC 639, came to the conclusion that since the respondents were claiming to be in possession of the property in part performance of the agreement to sell, the plea of acquisition of title by adverse possession was not available to them. Learned counsel appearing for the respondents did not assail this finding of the High Court. The view expressed in *Mohan Lal (deceased) through his LRs. Kachru and others case (supra)* has been reiterated by this Court in *Roop Singh v. Ram Singh, 2000(3) SCC 708 : 2000(2) RCR (Civil) 592 (SC)*. It has been held in the latter judgement that the pleas of adverse possession and retaining the possession by operation of Section 53A of the Act are inconsistent with each other. Such a plea is not available to a proposed vendee.”

27. Plea raised by the defendant in his written statement needs to be noticed :

“5. Para 5 of the plaint is wrong. As stated above the defendant has become owner of suit land by adverse possession & the plaintiffs have no right to interfere in his possession. Even in case it is not proved that defendant has become owner by adverse possession which is not admitted by defendant. The defendant is entitled to remain in possession under the agreements to sell dated 12.3.1967 and 6.2.1978. The defendant has already paid Rs.30,000/- out of Rs.37000/- the price of suit land agreed between parties. The defendant is ready and has always been ready to pay balance of sale consideration & get the sale deed executed in terms of contract. The defendant is entitled to retain possession on the basis of part performance of contract to sell.”

28. Applying the ratio of law in **Mohan Lal’s** case (supra) to the instant suit, once the defendant himself pleaded that he is in

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possession under the agreement to sell dated 12th of March, 1967 and 6th of February, 1968 and to retain possession relies on the part performance of contract to sell, he cannot plead adverse possession. Needless to reiterate that the possession of a proposed vendee under agreement to sell always is a permissive possession under the vendor till he pleads and proves that he gave up the permissive possession and re-entered into possession which was open and hostile to the knowledge of the true owner. There is no such plea raised in this suit.

29. In view of the aforesaid facts, this Court is of the considered opinion that both the Courts below erred in non-suiting the plaintiffs holding that the defendant has become owner of the suit property on the strength of adverse possession without even going through the pleadings raised by the parties.

30. There is another aspect to the aforesaid proposition. Admittedly, the defendant came in possession on the strength of agreement to sell executed in his favour by the plaintiffs. The defendant claims that the plaintiffs have lost their title over the suit land. Thus, in other words the defendant asserts that the contract stands frustrated after the plaintiffs lost their title to the property and has been rendered void in term of Section 56 of the Contract Act. That being so, the defendant being a beneficiary under the void contract

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needs to restore back the advantage that he received under the void agreement as per the mandate of Section 65 of the Contract Act. This is what the ‘principle of restitution’ is.

31. In view of above, this Court finds that the present second appeal merits acceptance. Consequently, the same is allowed. The impugned judgment and decree passed by both the Courts below are hereby set aside. The suit filed by the plaintiff is ordered to be decreed. Decree be drawn.

32. Ordered accordingly.

33. Pending application(s), if any, shall also stand disposed off.

October 04, 2024

Dpr

(Pankaj Jain)
Judge

Whether speaking/reasoned : Yes

Whether reportable : Yes