

**(2004) 10 MP CK 0035**

**Madhya Pradesh High Court**

**Case No:** Second Appeal No"s. 91 and 340

Smt. Sushila Singh

APPELLANT

Vs

Mawasi and Others

RESPONDENT

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**Date of Decision:** Oct. 29, 2004

**Acts Referred:**

- Limitation Act, 1963 - Article 65
- Madhya Pradesh Land Revenue Code, 1959 - Section 190

**Citation:** (2004) 4 MPHT 489 : (2005) 1 MPLJ 543

**Hon'ble Judges:** A.K. Shrivastava, J

**Bench:** Single Bench

**Advocate:** A.P. Singh, for the Appellant; Suyash Tripathi, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

A.K. Shrivastava, J.

This second appeal has been filed by the defendant assailing the judgment and decree passed by the First Appellate Court decreeing the suit of the plaintiffs, who are respondent Nos. 1 to 4 here in this appeal.

In brief the suit of the plaintiffs is that they are Bhumiswamis of the suit land. Earlier their father Vasai Ahir was the Bhumiswami. The suit land is situated in Khasra No. 143 area 0.672 arey. In 0.016 arey there was a hut comprising of two rooms of the plaintiffs in which Vasai lived and after his death the plaintiffs were residing. The rest portion of the land is being cultivated by them. Defendant Dadau without any authority and right sold the disputed land to defendant No. 2 Sushila Singh by a registered sale-deed. Thereafter on 9-2-1979 the husband of the defendant No. 2 along with Dadau came and inserted his lock. Thus a suit for cancellation of sale-deed executed by Dadau in favour of the defendant No. 2 and for recovery of possession was filed in the Trial Court. During the course of trial the hut, since it was

in dilapidated condition, fell down and now there is no structure on any part of the disputed land.

The defendant Nos. 1 and 2 filed their separate written statements and denied the plaint averments. According to them the suit land was owned by one Rudra Prasad Sharma, who on 25-12-1944 sold it to Dadau for a consideration of Rs. 36/-. Thereafter Dadau built two rooms and also planted the trees of guava. According to defendants since the date of sale, Dadau is in possession of land in question. By order dated 14-9-1967 passed by Revenue Court Dadau became Bhumiswami and eventually he sold the suit property to defendant No. 2 for a consideration of Rs. 1,000/-. It has been pleaded that the plaintiffs never remained in possession.

A plea of adverse possession has also been setforth in the written statement. According to the defendants since the suit property was being possessed by Dadau from the date of sale-deed in his favour he became Bhumiswami by way of adverse possession and therefore defendant No. 2 who is purchaser from Dadau is also Bhumiswami. On these premised pleadings it was prayed by the defendants that suit be dismissed.

The Trial Court on the basis of pleadings framed issues. The parties thereafter led their evidence. The Trial Court on scrutiny of the evidence came to hold that the defendants by way of adverse possession became owner of the suit property. It was also held that the sale-deed dated 5-2-1979 executed by the defendant No. 1 in favour of the defendant No. 2 is valid and eventually dismissed the suit of the plaintiffs.

The plaintiffs preferred first appeal before the Appellate Court which allowed it and decreed the suit by setting aside the judgment and decree of the Trial Court. Hence this second appeal.

On 6-4-1992, this appeal was admitted on following substantial question of law :--

"Whether the finding, that Dadau's possession over the suit land was not adverse so as to create title in his favour, is legal and valid?"

I have heard Shri A.P. Singh, learned Counsel for the appellant and Shri Suyash Tripathi, learned Counsel for the respondent Nos. 1 to 4. After hearing the learned Counsel for the parties, I am of the view that this appeal deserves to be dismissed.

In order to answer the substantial question of law which has been framed, it would be relevant to examine the pleadings and certain documents on record. The plaintiffs have specifically pleaded their right, title and interest in the suit property and according to them they are Bhumiswamis of the suit property. It has been prayed by them that the sale-deed dated 5-2-1979 be cancelled and possession of the suit property be delivered to them.

Though the case of the defendants is that Dadau was owner of the suit property, as he bought the suit property on 25-12-1944 from one Rudra Prasad Sharma, however, there is an alternative pleading that Dadau became owner of the suit property by adverse possession. Indeed substantial question of law has also been framed in regard to the adverse possession of Dadau on suit property.

On going through Ex, D-13 which is; a reply filed on behalf of the plaintiffs before the Tehsildar, Bandhogarh in a revenue case instituted in the year 1973-74 it is revealed that Dadau was claiming his Bhumiswami right by filing an application u/s 190 of the M.P. Land Revenue Code, 1959 (hereinafter referred to as the "Code"). On going through the reply it is revealed that on the basis of tenancy right defendant Dadau filed an application for the conferral of Bhumiswami right before the Tehsildar which would mean that his possession was not hostile to the plaintiffs and he was not possessing the land in question as Bhumiswami. The application filed before Tehsildar by Dadau was allowed. However, the appeal preferred by the present plaintiffs before the Sub Divisional Officer was allowed and the order of Tehsildar was set aside and it was held that Bhumiswami right was not conferred to Dadau and his application u/s 190 of the Code was dismissed. The order of the SDO dated 9-10-1975 is on record as Ex. P-3. Since Dadau was litigating against the present plaintiffs for the conferral of his Bhumiswami right, it can not be said that he acquired Bhumiswami right by adverse possession.

In the case of Deva (Dead) thr. Lrs. Vs. Sajan Kumar (Dead) by Lrs., the Supreme Court while dealing the point in hand has held that mere long possession of defendant for a period of more than 12 years without intention to possess suit land adversely to title of plaintiff and to his knowledge, it can not be said that right of adverse possession has been accrued in the defendant. For better understanding it would be relevant to quote Paras 11,12 and 13 which read thus :--

"11. The deposition extracted above, in any case, negatives the defendant's case of having prescribed title by adverse possession from the year 1940. The animus to hold the land adversely to the title of the true owner can be said to have started only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment on plaintiffs survey number.

The above-quoted admission contained in defendant's deposition, does not make out a case in his favour of having acquired title by adverse possession. Mere long possession of defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to latter's knowledge can not result in acquisition of title by the defendant to the encroached suit land.

The plaintiff suit is not merely based on his prior possession and subsequent dispossession but also on the basis of his title to Survey No. 452. The limitation for such a suit is governed by Article 65 of the Limitation Act of 1963. The plaintiffs title over the encroached land could not get extinguished unless the defendant had

prescribed title by remaining in adverse possession for a continuous period of 12 years."

On going through the aforesaid discussion, it is found that Dadau never claimed his title and possession hostile to plaintiffs as Bhumiswami, though he was litigating for the conferral of Bhumiswami right, but failed, in these state of affairs it can not be said that the possession of Dadau was adverse to the plaintiffs. The substantial question of law which has been framed, is answered accordingly.

Resultantly the appeal is found to be devoid of any substance and the same is hereby dismissed with cost. Counsel's fee Rs. 1,500/-, if pre-certified.