

(2001) 09 MP CK 0028

Madhya Pradesh High Court (Indore Bench)

Case No: Second Appeal No. 307/95

Motiram and Others

APPELLANT

Vs

Pannalal (dead) through L.Rs.
Chotti Nani and Others

RESPONDENT

Date of Decision: Sept. 6, 2001

Acts Referred:

- Limitation Act, 1963 - Article 65, 27

Citation: (2002) 2 MPHT 516 : (2002) 1 MPLJ 86

Hon'ble Judges: A.K. Gohil, J

Bench: Single Bench

Advocate: A.K. Sethi, for the Appellant; S.G. Gokhale, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Gohil, J.

The appellants/defendants have filed this second appeal u/s 100 of the CPC against the judgment and decree dated 17-8-95 rendered by XIth Additional Judge to the Court of District Judge, Indore in Civil Regular Appeal No. 18/91 confirming the judgment and decree passed by VIth Civil Judge, Class-II, Indore on 16-7-1991 in C.O.S. No. 195-A/78.

The brief facts for the purpose of deciding the controversy between the parties in this case are that the respondents/plaintiffs who are legal heirs of one Moolchand filed a suit for declaration and injunction against the appellants/defendants in respect of 3 acres of land out of Survey No. 501 and 1.28 acres out of Survey No. 502 situated at Village Asrawad Khurd, Tehsil and District Indore. Admittedly the aforesaid survey numbers stand in the name of defendants/appellants in the Revenue Records but in Column No. 12 of possession, the names of plaintiffs are mentioned. The plaintiffs case was that he is in possession over the land in dispute and their names are recorded in the Revenue Records and they are doing cultivation

and at the relevant time they had sowed crop of Jwar in the land. The respondents/plaintiffs further submitted that Smt. Pannabai, defendant No. 1 and one Mukund were litigating in Civil Court in C.O.S. No. 48/51 in which the plaintiffs father Moolchand helped Smt. Pannabai and due to his help compromise was arrived between the parties, thus by way of remuneration Smt. Pannabai orally gifted the suit land to Shri Moolchand who was the father of the plaintiffs. It was further stated that since 1951 plaintiffs remained in possession over the suit land and thus their possession is adverse and they became the Bhumiswami and owners of the property. It was further submitted that the appellants/defendants had filed a suit against the plaintiffs bearing Civil Original Suit No. 194-A/75 for possession which was dismissed in default in 14-12-1977. Consequently all the rights of the defendants stood extinguished in the said land. Since the appellants/defendants wanted to take forcible possession on 15-6-1978, the plaintiffs were forced to file the present suit. The present appellants/defendants controverting the aforesaid facts pleaded that the suit lands are not in possession of the defendants. The fact of adverse possession was also denied.

The Trial Court found that the respondents/plaintiffs are in possession over the suit land from 1951 and on the basis of principle of adverse possession they became the owner and Bhumiswami. It was further held by the Trial Court that the respondents/plaintiffs are entitled to invoke the principle of adverse possession and are also entitled to get a decree of declaration and injunction thereon, on that basis the suit was decreed by the Trial Court.

The First Appellate Court confirming the judgment and decree granted by the Trial Court rejected the appeal of the appellants/defendants. The First Appellate Court after appreciating the documentary as well as oral evidence on record, recorded a positive finding that the respondents/plaintiffs are in possession over the suit land from 1951 as an owner and they are also cultivating over the land. The First Appellate Court also found that in Ex. P-5, which is a certified copy of the Khasra entries from 1969 to 1973-74, and Ex. P-6, which is also a certified copy of the Khasra entries from 1974-75 to 1977-78, in which in the Column No. 12 of possession, the possession of respondents/plaintiffs has been recorded. The First Appellate Court also found that in rebuttal of those Khasra entries the appellants/defendants have not produced any material evidence. It was further found that Ex. D-2, which is a copy of the Panchnama prepared by the Revenue Inspector regarding the possession of the appellants/defendants, was not found believable as the statement of Revenue Inspector was not recorded. Therefore, it was found that the said Ex. D-2 is not a legal document. The First Appellate Court also relied on Ex. P-8 which is a copy of the plaint in C.O.S. No. 194-A/75 by which suit for possession was filed by appellants/defendants against plaintiffs and also on Ex. D-1 which is a copy of the order-sheet dated 14-12-1977 by which the aforesaid suit was dismissed. Thus, it was clearly found by the First Appellate Court that the appellants were not in possession over the suit lands. The Trial Court as well as the First Appellate Court

both recorded a concurrent finding that the possession of the respondents/plaintiffs over the land in dispute by way of adverse possession has become complete and they are entitled for a decree of declaration and injunction as the suit of the appellants/defendants for possession has already been dismissed. Being aggrieved the appellants/ defendants have filed this second appeal against the aforesaid judgments of both the Courts below.

This second appeal was admitted for final hearing on the following substantial questions of law:--

"(1) Whether the Courts below committed error of law in putting the burden of disproving the claim of plaintiffs so far as adverse possession is concerned ?

(2) Whether the Courts below have committed the error of law in mis-reading the Revenue Record in context with possession of litigants in respect of suit property ?

(3) Whether the judgment and decree impugned suffers from the infirmity of perversity on the counts mentioned above ?"

I have heard Shri A.K. Sethi, learned counsel for appellants/defendants; Shri S.G. Gokhale, learned counsel for respondent/plaintiff Nos. 1 and 2; and perused the record. None appeared for respondent No. 3-State.

The submission of Shri A.K. Sethi, learned counsel for appellants/defendants is that the First Appellate Court has mis-read the entries made in the Khasra and Khatonis and wrongly appreciated the documentary evidence on record. The entries made in remark Column No. 12 about possession are not conclusive and has no legal sanction and has also failed to appreciate and draw necessary inference from Ex. D-2 Panchnama which clearly indicates the possession of the appellants when the same is prepared by Revenue authorities. His foremost submission was that at the most the possession of the respondents/plaintiffs can be on the basis of oral agreement to sell and in such situation it cannot be said that the possession of the respondents/plaintiffs is adverse. The respondents/plaintiffs have also failed to prove their adverse possession and have also failed to prove the ingredients of adverse possession and both the Courts have wrongly granted a decree for declaration and injunction in favour of the respondents/plaintiffs. Shri Sethi placed reliance on various decisions on the point that the possession given or taken under agreement to sell cannot be termed into an adverse possession and for that he submitted the decisions reported in the case of Mohan Lal (deceased) through his L.Rs. Kachru and Ors. v. Mira Abdul Gaffar and Anr. (AIR 1996 SC 910), State of M.P. v. Harisingh and Anr. [1995 RN 188 (High Court)], Rugga v. Shaitan Bai and Ors. [1994 (1) MPJR 18], AchalReddi v. Ramakrishna Reddiar and Ors. (AIR 1990 SC553), [Tajibai and Others Vs. Hasan Khan](#), and] in which it has been held that in a case of agreement to sell if party in possession of suit land pursuant to said agreement, plea of title by adverse possession is not available to him and if the party has failed to prove his willingness for getting the sale deed executed or to perform his part of

contract not entitled to retain possession. The possession under agreement to sell is a permissive possession and not the adverse possession and on that basis no title can accrue to the party.

In the case at Achal Reddi (supra), it has been held by Apex Court of India as under :--

"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 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 a 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 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."

In reply the submission of Shri S.G. Gokhale, learned counsel for respondent/plaintiff Nos. 1 and 2 is that right from AIR 1919 Privy Council 44, in case of N. Varda Pillai and Anr. v. Jeevarathnammal, it is being held that in a case of invalid grant, possession of the person is adverse. It has been clearly and validly held by the Privy Council that where the donor did not effect a registered gift deed but allowed donee to enter into possession of the gifted property and the donee thus remained in possession for over 12 years, his title became perfected by adverse possession.

His further submission was that this judgment of the Privy Council is repeatedly being relied by the Courts in India. The aforesaid judgment was considered by the Supreme Court in [Mst. Kirpal Kaur Vs. Bachan Singh and Others](#),) and their Lordships of the Supreme Court did not disagree with the aforesaid Privy Council decision and on the facts of the case before them it was held that although an un-registered document affecting the Immovable property can be referred to for co-lateral purposes after showing the nature of possession of the property and the

aforesaid principle of the Privy Council was thus approved to that extent. M.P. High Court also in the case of mt.) placing reliance on the aforesaid judgment has held that the continuous, uninterrupted long possession over 12 years on the suit land under unregistered document, it can be treated that the right has accrued to the party to claim ownership on the basis of adverse possession.

Learned counsel for respondents/plaintiffs has also placed reliance on the decision in the case of Mt. Kasturi v. Baliram and Deokisan, reported in AIR 1924 Nagpur 222, in which it has been held as under:--

"In this case the alienation was void because no deed of gift was executed as required by law. The law is that where the intended conveyance is void from the commencement and for whatever cause, and possession is taken on the intended conveyance, the possession is adverse and after twelve years ripens into a good title. This has been held by the House of Lords in the President and Governors of the Magdalen Hospital v. Alfred Knotts, (1876) 4 A.C. 324. In that case a lease was executed which was void under the provisions of the Statute 13 Eliz c. 10.

In Adam Umar Sale v. Behu, (1909) 33 Bom. 116, it was held that possession acquired under an alienation made in contravention of Section 3 of Bombay Act V of 1862, can become adverse so as to bar a suit for recovery by the individual alienor or his representative-in-interest. It was held in that case that the possession obtained by the defendants' predecessor was possession obtained through a transaction which the law both prohibits and declares to be null and void, and that such possession would be adverse to the rightful owner. It is just such possession as this, that is, possession originating without colour of title, which is contemplated by the law of limitation."

Shri Gokhale also submitted that there is a difference between the executed and executable contract and drew my attention to the case of Bala s/o Dola v. Heeralal s/o Urajan and Ors., reported in 1988 MPLJ 781, in which R.C. Lahoti, J., as he then was, has held that where a person holds possession under an invalid deed of transfer of title, he holds, in and prescribes, his own title as an owner. It cannot be said that he holds under the previous owner by permission. Hence his possession is hostile from the first day. In the case of Bala (supra), reliance was placed on a number of decisions of the Apex Court as well as of this High Court and it was held that:--

"The next question is whether the possession of the defendants commencing under an invalid deed of transfer of title would be adverse. The learned counsel for the appellant submits that such possession must be deemed to be permissive because unless and until the transfer was validated it must be deemed that the person in possession was holding under the rightful owner. There is no warrant for such a proposition. It has been held in Peer Khan v. Hamirsingh, 1979 1 MPWN 58, that possession commencing under invalid deed of transfer can be adverse. In Peer Khan

this Court relied on the law laid down by the Apex Court in [State of West Bengal Vs. The Dalhousie Institute Society](#), . The possession was held under a grant which was not shown to have been made in the manner required by law. Quoting from an earlier decision in [Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others](#), , their Lordships stated the law by saying that a person having no legal title, but nevertheless holding possession of the land under colour of an invalid grant, such possession not being referable to any legal title is prima facie adverse to the owner from the very moment of taking possession of the land under the invalid grant. The view is consistent with the dictum of their Lordships of the Supreme Court in [Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others](#), , wherein it was held that A person in possession of land in assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner; and if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the Statute of Limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title.

It, therefore, follows that where a person hold possession under an invalid deed of transfer of title, he holds in, and prescribes, his own title as an owner. It cannot be said that he holds under the previous owner by permission. Hence his possession is hostile from the first day."

Shri Gokhale further submitted before me that in the case of Tajibai (supra) in which it has been clearly held that when the person is in possession of land under an agreement to sell in his favour, he could be said to be in permissive possession and would not be permitted to raise plea of adverse possession and also cannot be said to have acquired Bhumiswami rights in respect of land held by him. Therefore, his submission is that this case is fully covered by the judgment of the case of Bala (supra) and not by the case of Tajibai (supra).

Lastly Shri Gokhale submitted that the Privy Council decision is still binding upon the High Courts so long as the Supreme Court does not take a different view from the view taken by the Privy Council and for that he placed reliance on Full Bench decisions in the case of [State of Bombay Vs. Chhaganlal Gangaram Lavar](#), ; speaking for the Full Bench Chagla, C.J., as he then was, had said that:--

"So long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decision of the Privy Council is still binding upon High Courts. What is binding is not merely the point actually decided but an opinion expressed by the Privy Council which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."

And in the case of Kishan Chand v. Ram Babu, reported in AIR 1965 Allahabad 65, it has been held:--

"The decision of the Privy Council was a declaration of the law within the meaning of Section 212 of the Government of India Act and was binding upon all Courts in India. It was the law when the Constitution came into force, with effect from 26-1-50. Under Article 372 the law in force continued to be in force until altered or repealed. Even after Constitution the law declared by the Judicial Committee continues to be the law by virtue of Article 372, so long as the Supreme Court does not lay down a different law."

Having heard learned counsel for the parties, perused the record, considered the rival and forceful submissions of the learned counsel for the parties, this appeal has no substance and deserves to be dismissed as in my considered opinion the judgment and decree granted by the Courts below, the factual aspect of the matter, based on concurrent finding of facts stands concluded. The title of the respondent became perfected by virtue of adverse possession as he was found continuously in possession without any legal Gift-Deed in his favour. My this view is fortified by the view taken in the case of Bala (supra) by R.C. Lahoti, J., as he then was, placing reliance on the Supreme Court judgment in the case of [State of West Bengal Vs. The Dalhousie Institute Society](#) ; and in the case [Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others](#) ; that if the possession of a person under the colour of invalid grant continues without any legal title and such possession not being referable to any legal title is prima facie adverse to the owner from the very moment of taking possession of the land under the invalid grant. Thus in such a legal situation the possession of a person under invalid grant cannot be treated as permissive in nature. The party who is continuously in possession under invalid grant after more than 12 years his title can be said to have perfected by adverse possession and he can claim such a right. In this case undoubtedly both the Courts have recorded a concurrent finding that the plaintiff continuously is in possession under colour of invalid grant. Thus, both the Courts were right in upholding the contentions raised by the respondents/plaintiffs. The appellant/defendant could not make out any case before me on the questions of law which were formulated at the time of admission of this appeal that the Courts below have committed an error of law either in putting the burden of disproving the claim of the plaintiffs in the context of the adverse possession or the Courts below have committed an error of law in mis-reading the Revenue Record in context with possession of plaintiffs in respect of suit property and thus the judgments of both the Courts below do not suffer from any infirmity or perversity on the question of claim of the appellants/defendants. Ex. P-4 is Panch Sala Khasra entries for the years 1974-75 to 1977-78 in which the name of the plaintiff has been mentioned in the Column No. 12 of possession. The same is the position in Exs. P-5 and P-6 which are Khasra entries from 1969-70 to 1977-78. No other Revenue Record has been filed. Therefore, from the aforesaid documents which are part of Revenue Record clear factual position emerging is that the land in dispute is in possession of the respondents/ plaintiffs.

In view of this clear factual and legal position on record and under the facts and circumstances of the case, in my considered opinion both the Courts below have rightly held that the respondents/plaintiffs are in continuous possession over the suit land commencing under invalid transfer and which has rightly been held to be adverse and on that basis it has been further rightly held that the title of the plaintiffs became perfected by adverse possession. Thus, I do not see any case for interference in the judgments and decrees granted by the Courts below.

In the result this appeal fails and is dismissed with no order as to costs. A decree be drawn up accordingly. Record be returned.