

ROOP SINGH (DEAD) THROUGH LRS.

v.

RAM SINGH (DEAD) THROUGH LRS.

MARCH 28, 2000

[M.B. SHAH AND DORAISWAMY RAJU, JJ.]

Code of Civil Procedure, 1908 :

S.100—Second appeal—Jurisdiction of High Court—Agricultural land—Illegal possession—Suit by owner for restoration of possession—Defendant contending purchase of land—Also claiming to have perfected title by adverse possession—Trial Court decreed the suit—Appellate Court affirmed the decree—High Court in second appeal re-appreciating evidence and setting aside findings of fact recorded by courts below—Held, s.100 does not confer any jurisdiction on High Court to interfere with pure questions of fact—Land having been given to defendant on batai, it is for him to establish hostile animus and possession adverse to the knowledge of the owner—Mere possession for a long time does not result in converting permissive possession into adverse possession—Adverse possession—Transfer of Property Act, 1882, s.53A.

The appellant-plaintiff filed a suit against the respondent for recovery of certain agricultural land alleging that the latter was in illegal possession thereof. The defendant denied that he was a trespasser and contended *inter alia* that he had purchased the land 14 years prior to the filing of the suit and had paid full sale consideration to the plaintiff; that his possession was protected under Section 53A of the Transfer of Property Act, 1882; that he acquired the title by adverse possession. The trial court decreed the suit holding that the defendant did not make the necessary pleading for getting protection under Section 53A of the Act; that, even otherwise, defendant did not produce the so-called sale deed, and that the defendant failed to prove adverse possession because he specifically pleaded that he had got possession of the land as a result of contract with the plaintiff.

The appeal filed by the defendant was dismissed by the first appellate court, *inter alia*, holding that the land had been given to the defendant on 'batai'. The second appeal filed by the defendant was

A allowed by the High Court. Being aggrieved, the plaintiff filed the present appeal.

B It was contended for the appellant that the High Court failed to raise and decide substantial question of law; and that the High Court erred in re-appreciating the evidence considered by the trial court and the first appellate court, and arrived at a conclusion contrary to the evidence on record.

Allowing the appeal, this Court

C HELD : 1.1. Under Section 100 of the CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure question of fact. That apart, at the time of disposing of the matter the High Court not even notice that question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. [610-D-E]

D 1.2. Even with regard to appreciation of evidence, the High Court materially erred in considering the evidence of witnesses for holding that defendant had been in possession for 15-16 years from the date of the suit and that possession being not permissive and adverse to the title of the plaintiff, would ripen into perfect title. This finding is quite contrary to the evidence of the witnesses and the finding given by both the courts below who after appreciating the evidence of witnesses have specifically arrived at the conclusion that the witnesses have nowhere stated that defendant asserted his hostile title. [611-C-D]

F 1.3. The fact finding courts after appreciating the evidence held that the defendant entered into possession of the premises as a *bataidar*, that is to say, as a tenant, and his possession was permissive and there was no pleading or proof as to when it became adverse and hostile. These findings recorded by two courts below were based on proper appreciation of evidence and material on record and there was no perversity, illegality or irregularity in those findings. 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. The High Court ought not to

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have interfered with the findings of fact recorded by both the courts below. [610-E-H]

Thakur Kishan Singh (Dead) v. Arvind Kumar, [1994] 6 SCC 591 and *Mohan Lal v. Mirza Abdul Gaffar and Anr.*, [1996] 1 SCC 639, relied on.

2. The High Court has ignored the finding of fact to the effect that the defendant has failed to prove the so-called agreement of sale in his favour. He has not produced on record any sale-deed or any letter executed by the plaintiff in favour of the defendant or his brother. The appellate court has observed that defendant has not led the evidence of the persons in whose presence the said document was executed. There being no document on record, the alleged contents of the deed could not have been considered by referring to the oral say of the defendant. [611-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4430 of 1996.

From the Judgment and Order dated 29.9.88 of the Madhya Pradesh High Court in S.A. No. 255 of 1977.

Dhruv Mehta, S.K. Mehta, Ms. Shobha and Anil K. Sharma for the Appellant.

Vivek Gambhir and S.K. Gambhir for the Respondent.

The Judgment of the Court was delivered by

SHAH, J. This appeal is directed against the judgment and decree dated September 29, 1988 passed by the High Court of Madhya Pradesh at Indore in Second Appeal No.255 of 1977, whereby the High Court allowed the Second Appeal of respondent-defendant and set-aside the judgment and decree for possession of the suit land.

It is the case of the appellant-plaintiff Roop Singh (since deceased) that he owned 15.32 acres of agricultural land bearing Survey No.106 in village Shivana of Tehsil Bhikangaon. As the land was in illegal possession of the respondent Ram Singh (original defendant - since deceased), a notice dated 07.6.1966 was issued by the appellant calling upon the respondent to restore the possession of the suit land. The respondent did not hand over the possession of the land. Hence the plaintiff filed Civil Suit No.10A/1969 before the Civil Judge, Bhikangaon (MP) for possession of the suit land with mesne profit @ Rs.500 per year. The defendant denied the contention that

A he was trespasser and submitted that 14 years prior to the date of institution of the suit he had purchased the suit land for a consideration of Rs.611 and had paid full sale consideration to the plaintiff and since then he was in possession of the suit land. He contended that his possession is protected under Section 53A of the Transfer of Property Act. He also pleaded that he
B has acquired the title by adverse possession. In the alternative, he pleaded that he has made improvements in the suit land and if order for restoring the possession is passed, plaintiff should be directed to pay the cost of improvements. By judgment and decree dated 30.7.1971, the Civil Judge passed decree in favour of the plaintiff. But the Additional District Judge in Appeal No.46A/71 allowed the appeal and remanded the matter to the
C Trial Court for disposal after framing necessary issues. The Trial Court *inter alia* decided following two issues: -

“Whether the plaintiff had made a written contract for the sale of the disputed land in 1955 or near about it with the defendant or
D his deceased brother Manohar Singh and delivered the possession of the disputed land to the defendant after receiving the consideration of Rs.611 of the disputed land?

Whether the defendant had acquired the title of the disputed land by adverse possession?”

E After appreciating the evidence, the Court arrived at the conclusion that the defendant has not made all the pleadings which are necessary for getting protection under Section 53-A of the Transfer of Property Act. The Court also held that even if pleadings are presumed, defendant has failed to
F prove the said contention as so-called sale-deed was not produced on record and it was alleged that the said document was with the brother of the defendant who had expired because of snake bite and the document was lost. Therefore, Court held that the statement of the defendant was not sufficient to establish the so-called sale. For the adverse possession, the Court arrived at the conclusion that defendant has failed to prove adverse possession
G because he has specifically pleaded that he got possession of the suit land as a result of contract with the plaintiff. Hence, defendant's entry on the suit land was permissive and the permissive possession would become adverse only if hostile title is asserted and proved by overt acts. The Trial Court, therefore, decreed the suit of the plaintiff by judgment and decree dated
H 15.3.1976.

Civil Appeal No.20A of 1976 filed by the respondents was dismissed by the Addl. District Judge, Bargon on 24th March, 1977. The appellate court considered the contention of the defendant for the alleged sale of the suit land and arrived at the conclusion that the defendant has neither produced on record the so-called letter nor document executed in his favour by the plaintiff, nor he has taken it as a ground in his pleading that he had lost the said document, nor he has prayed for production of secondary evidence. The Court further appreciated the contention of the defendant with regard to the alleged sale by observing that even the so-called witnesses, in whose presence the talks for sale took place, namely, Gulab Singh and Dhyan Singh, were not examined by the defendant to prove that contract. As against this, it was found that plaintiff had handed over the land to the defendant in the year 1957-58 for *batai* (half share) only for two years and the defendant had not restored the land. The Court arrived at the conclusion that this fact is borne out by Ex.P1 Khasra for the Samvat Year 2014-15. The Court further considered that in the Khasra for the Samvat Year 2015-16 in remarks column there is no reference of any agreement of sale. The Court also referred to khatauni, P1 produced by the plaintiff which mentioned that disputed land stood in the name of defendant not as an owner. The Court appreciated and accepted the evidence of plaintiff that he has neither sold the land nor did he execute any document in favour of the defendant. After considering the evidence on record, the court observed that from the deposition of the witnesses examined by the defendant it can be stated that he was in possession of the suit land since 1956-57, but there is no evidence about the sale in his favour and held that plaintiff had given this land to defendant on *batai* for two years i.e. for Samvat Year 2014-15 and 2015-16 and thereafter defendant had been continuously in unauthorised possession. But from this fact, it can not be held that defendant had acquired title by adverse possession.

Against the said judgment and decree, the defendant preferred Second Appeal No. 255 of 1977 before the High Court of Madhya Pradesh. The High Court allowed the said appeal and set-aside the judgment and decree passed in favour of the plaintiff. That judgment and decree is challenged by the plaintiff by filing this appeal.

The learned counsel appearing on behalf of the appellant vehemently

A submitted that the judgment and decree passed by the High Court is, on the face of it, illegal and erroneous as the High Court has failed to raise and decide substantial question of law. She submitted that High Court has re-appreciated the evidence considered by the appellate court and the trial court and arrived at a conclusion which is contrary to the evidence on record. As
B against this learned counsel for the respondent submitted that the High Court passed the judgment and decree after framing the substantial question of law and in any case High Court rightly held that the defendant has perfected his title over the suit land by occupying the same for more than 12 years. He submitted that the High Court rightly observed that the settled legal position
C was that as soon as the possession of the premises is handed over pursuant to an agreement to sale, adverse possession commences from that date and, therefore, defendant has perfected his title by remaining in possession of the suit land continuously for more than 12 years as an owner.

D It is to be reiterated that under Section 100 of the CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC. That apart, at the time of
E disposing of the matter the High Court did not even notice the question of law formulated by it at the time of admission of the second appeal as there is no reference of it in the impugned judgment. Further, fact findings courts after appreciating evidence held that defendant entered into the possession of the premises as a *batai*, that is to say, as a tenant and his possession was permissive and there was no pleading or proof as to when it became adverse
F and hostile. These findings recorded by two courts below were based on proper appreciation of evidence and material on record and there was no perversity, illegality or irregularity in those findings. 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
G 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) v. Arvind Kumar*, [1994] 6 SCC 591]. Hence, the High Court ought not to have interfered with the findings of fact recorded by both the
H courts below.

It also appears that the High Court has ignored the finding of fact to the effect that defendant has failed to prove the so-called agreement to sale in his favour. He has not produced on record the said sale-deed or a letter executed by the plaintiff in favour of the defendant or his brother. The Appellate Court has further observed that defendant has not led the evidence of the witnesses in whose presence the said document was executed. In our view, there being no document on record, the alleged contents of the deed could not have been considered by referring to the oral say of the defendant.

Further, even with regard to appreciation of evidence the High Court materially erred in considering the evidence of Anoop Singh for holding that defendant had been in possession for 15-16 years from the date of the suit and that possession being not permissive and adverse to the title of the plaintiff, would ripen into perfect title. This finding is quite contrary to the evidence of Anoop Singh and the finding given by both the courts below who after appreciating the evidence of witnesses have specifically arrived at the conclusion that the witnesses have nowhere stated that defendant asserted his hostile title. From the deposition of the said witnesses and the revenue records, the Courts arrived at the conclusion that since 1956-57 the defendant was in possession but that possession was as a *bataidar*. As the suit was filed on 04.2.1969, it cannot be said that defendant has perfected his title by adverse possession. In the written statement, the defendant has only asserted that about 14 years ago plaintiff gave this land by executing the sale agreement for Rs.611; the sale deed was written in presence of two persons of the same village and hence since 1955 defendant is in possession of the land as an owner/purchaser. Therefore, he has become owner of the suit property by adverse possession. Except this bare evidence, there is no other evidence on record to establish that defendant got possession of the property by purchasing the same. As against this, the revenue record clearly establishes that plaintiff was the owner of the property and that he had handed over the possession of the suit land to the defendant for cultivation as *bataidar*. It appears that the High Court materially erred in not referring to the evidence of plaintiff who has specifically deposed that in the year 1956-57 he had given the suit land to the defendant for two years on *batai*. 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

A 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 v. Mirza Abdul Gaffar and Anr.*, [1996] 1 SCC 639.

B In the result, the impugned judgment and decree passed by the High Court in Second Appeal No.255 of 1977 requires to be set aside and is hereby set aside. The appeal is allowed and the judgment and decree passed by the Appellate Court in Civil Appeal No. 20-A of 1976 is restored. The parties shall bear their respective costs.

C Ordered accordingly.

R.P.

Appeal allowed.