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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE PRANAY VERMA**

SECOND APPEAL NO. 2571 OF 2022

BETWEEN:-

1. **BAJESINGH S/O BHAGIRATH, AGED ABOUT 41 YEARS, VILLAGE JHAD PIPALYA TEHSIL NARSINGHGARH DISTRICT RAJGARH (MADHYA PRADESH)**
2. **SHIVPRASAD S/O BHAGIRATH, AGED ABOUT 38 YEARS, OCCUPATION: NIL VILLAGE JHAD PIPALYA, TEHSIL NARSINGHGARH, DISTRICT RAJGARH (MADHYA PRADESH)**

.....APPELLANTS

(BY SHRI MANURAJ SINGH - ADVOCATE)

AND

1. **LEELABAI S/O VIKRAMSINGH, AGED ABOUT 60 YEARS, NEAR TO TEHSIL OFFICE PACHOR DISTRICT RAJGARH (MADHYA PRADESH)**
2. **STATION OF M.P. THROUGH COLLECTOR RAJGARH (MADHYA PRADESH)**

.....RESPONDENTS

.....
Reserved on :- 20.01.2023

Posting on :- 14.03.2023
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ORDER

Learned counsel for the appellants is heard on the question of admission.

02. This appeal under Section 100 of the CPC has been preferred by defendants 1 and 2 /appellants against the judgment and decree dated

03.09.2022 passed in RCA No. 67 of 2019 by the Ist Additional District Judge, Narsingharh, District Rajgarh affirming the judgment and decree dated 30.01.2019 passed in RCS No. 400026/2016 by the IInd Civil Judge Class-II, Narsingharh, District Rajgarh whereby the claim of plaintiff/respondent No.1 for possession of the suit land and permanent injunction had been decreed and their counter claim for declaration of title and permanent injunction had been dismissed.

03. As per the plaintiff she is the owner of the suit land and defendants 1 and 2 are her neighbors and have forcibly taken possession of the same. Defendants 1 and 2 had instituted an action in the Court of Civil Judge, Class-II Narsingharh against her which was dismissed by judgment and decree dated 13.08.2015 for want of evidence after which they have illegally taken possession of the suit land. She instituted proceedings under Section 145 of the Code of Criminal Procedure against defendants 1 and 2 but has been unsuccessful in obtaining possession of the suit land therein hence has instituted the present claim for possession and permanent injunction.

04. The defendants 1 and 2 contested the plaintiff's claim by filing their written statement submitting that on 15.08.1990 plaintiff had entered into an agreement to sale with defendant No.1 with respect to the suit land for a total consideration of Rs. 18,000/- upon receiving earnest money of Rs.1000/-. Thereafter she had received a sum of Rs. 17,000/- in furtherance of the contract and had thus received the entire sale consideration. Defendant No.1 has been in possession of the suit land ever since 15.08.1990 and despite requests by him plaintiff has not executed sale deed with respect to the suit land in his favour. Proceedings under Section 145 of the Cr.PC instituted by plaintiff were dismissed by the Sub-Divisional Officer on 16.03.2012. In the Civil Suit

instituted by defendant No.1 plaintiff had assured him that she would enter into a compromise with him hence he had got the suit dismissed but she has not executed any sale deed in his favour. The plaintiff's claim is barred by time and defendants 1 and 2 have even otherwise acquired title to the suit land by virtue of adverse possession.

05. The defendants 1 and 2 also laid a counter claim for declaration of their title to the suit land and for permanent injunction restraining the plaintiff from interfering with their possession over the same. The plaintiff contested the counter claim of defendants 1 and 2 by filing her written statement to the same.

06. The trial Court held that plaintiff has proved that she is the owner of suit land, that defendant No.1 has not proved that plaintiff has sold the suit land to him on 15.08.1990 for a consideration of Rs. 18,000/-, that he has also not proved that he has acquired title to the suit land by virtue of adverse possession and that since plaintiff is the owner of the suit land and defendants 1 and 2 have failed to prove their title thereupon, she is entitled for recovery of possession. On such findings plaintiff's claim was decreed whereas counter claim of defendants 1 and 2 was dismissed. The said judgment and decree have been maintained by the lower appellate Court in appeal having been preferred by defendants 1 and 2.

07. Learned counsel for appellants/defendants 1 and 2 submits that the judgment and decree passed by the Courts below are illegal and/ or contrary to law. The claim of plaintiff was apparently barred by time and ought to have been dismissed on that count alone. Plea in regard to the claim being barred by time was specifically raised in written statement hence it was imperative for the trial Court to have framed issue thereupon which would have enabled

defendants 1 and 2 to lead evidence upon the same. The trial Court however did not frame any issue as regards limitation and did not return any finding upon it. An application under Order 14 Rule 5 of the CPC was also filed by defendants 1 and 2 before the lower appellate Court for framing an issue as regards plaintiff's claim being barred by time which has been illegally rejected. The defendants 1 and 2 have categorically proved by way of the evidence adduced by them that they have been in possession of the suit land ever since 15.08.1990 hence have acquired title thereto by virtue of adverse possession whereas the Courts below have erred in holding to the contrary. It is hence submitted that the judgment and decree passed by the Courts below deserve to be set aside.

08 I have heard the learned counsel for the appellants and have perused the record.

09. Admittedly plaintiff is the recorded owner of the suit land. Though defendant No.1 contends that an agreement to sale was executed in his favour by plaintiff on 15.08.1990 but no claim for specific performance of contract on its strength was instituted by him. Even the claim which was instituted by him before Civil Judge Class-II, Narisinghgarh, District Rajgarh was dismissed by judgment and decree dated 13.08.2015. Thus, possession of defendant No.1 over the suit land is without any legal title, though may not be by way of encroachment but is instead under an agreement to sale. Since no steps have ever been taken by defendant No.1 for specific performance of contract dated 15.08.1990 and the suit instituted by him has already been dismissed in the year 2015, he is not entitled for the protection available under Section 53-A of the Transfer of Property Act. Plaintiff being owner of the suit land is entitled to recover possession from defendants 1 and 2 provided her claim for the same is

within time.

10. The claim would be governed by Article 65 of the Limitation Act which provides for period of limitation for a suit for possession of immovable property based on title. The period prescribed therein is 12 years which begins to run when possession of the defendant becomes adverse to the plaintiff. In the present case possession of defendant No.1 to begin with was under an agreement to sale which can only be permissive possession and cannot be treated to be hostile or adverse. There is no specific plea by defendants 1 and 2 in their written statement as to when and in what manner their permissive possession became hostile or adverse to the plaintiff. On the contrary defendants 1 and 2 have claimed to be the owner of the suit land under the agreement dated 15.08.1990. The period of limitation for plaintiff to institute the suit did not begin to run merely for the reason of defendant No.1 having come in possession on 15.08.1990. The same began to run only on 14.08.2015 when as per plaintiff she was forcibly dispossessed by defendants 1 and 2.

11. It is well settled that mere agreement to sale is wholly incapable of conveying or transferring title even if the entire sale consideration is paid thereunder. The Courts below have hence not committed any error in dismissing the counter claim of defendants 1 and 2 for declaration of title on the basis of agreement to sale. They having claimed title under an agreement to sale could not have been held to be the owners of the suit land by virtue of adverse possession and their claim in that regard has rightly been dismissed.

12. Merely because of institution of proceedings under Section 145 of the Code of Criminal Procedure, possession of defendant No.1 would not become adverse to the plaintiff. This would be particularly so when in their

written statement defendants 1 and 2 have not specifically pleaded ouster of plaintiff from the suit land even upon institution of proceedings under Section 145 Cr.PC. Even if it is assumed that possession of defendant No.1 became adverse to plaintiff in 2011 when proceedings under Section 145 Cr.PC were instituted, then also the present suit instituted on 18.03.2016 is well within the period of limitation as prescribed under Article 65 of the Limitation Act. Mere possession of defendant No.1 particularly when the same was permissive did not oblige plaintiff to institute suit for possession until such possession became adverse to her.

13. The defendants 1 and 2 had raised a plea in written statement as regards the claim being barred by time. Though no specific issue was framed by the trial Court in that regard but an issue was framed as to whether defendants 1 and 2 have acquired title to the suit land by virtue of adverse possession. That issue in itself embraced the issue as to whether plaintiff's claim was within time as the finding upon it would depend upon the finding recorded on the issue as to whether defendants 1 and 2 have acquired title by virtue of adverse possession since the period of limitation for plaintiff would begin only when possession of defendants 1 and 2 became adverse to her.

14. As regards adverse possession of defendants 1 and 2 categorical findings have been recorded by the Courts below negating the same. The findings rendered on that issue very well takes care of the plea of defendants 1 and 2 as regards plaintiff's claim being barred by time. From the record it is evident that the parties have led evidence as regards plaintiff's claim being within time hence merely for non-framing of issue it cannot be said that defendants 1 and 2 have been prejudiced in any manner. The lower appellate Court also did not commit any error in rejecting the application under Order 14

Rule 5 of the CPC filed by defendants 1 and 2 for framing an issue as regards plaintiff's claim being within time.

15. In view of aforesaid discussion, I do not find any illegality or perversity in the judgment and decree passed by the Courts below. The findings recorded by them are based upon proper appreciation of material available on record. No substantial question of law arises for determination in this appeal which is accordingly dismissed in limine.

rashmi



(PRANAY VERMA)
JUDGE