

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 217 of 2017**

- Krishna Kumar Yadav, S/o Late Gendlal Yadav, Aged About 60 Years, Executive President Ganrashtriya Canteen Samiti (Bapu Ki Kutiya), Durg, Tahsil and District Durg, Chhattisgarh

---- **Petitioner****Versus**

1. State Of Chhattisgarh, Through The Collector (Nazul Branch), Collectorate, Durg, Tahsil and District Durg, Chhattisgarh
2. The Municipal Corporation, Durg, Through Its Commissioner (Wrongly Mentioned As Chief Executive Officer) Durg, Tahsil and District Durg, Chhattisgarh

---- **Respondents**

For Appellant

Shri Goutam Khetrupal, Advocate

For Respondent-State

Shri P. K. Bhaduri, GA

For Respondent No.2

Shri B. L. Sahu, Advocate on behalf of
Shri A. S. Kachhawaha, Advocate**Hon'ble Justice Shri Prashant Kumar Mishra****Hon'ble Justice Smt. Vimla Singh Kapoor****Order On Board****13/09/2018**

1. Plaintiff's suit for declaration of title on the ground of adverse possession has been dismissed by the trial Court. The suit was preferred on pleading that the plaintiff is in adverse possession of a canteen in the capacity of he being the Executive President of Ganrashtriya Canteen, Bapu Ki Kutiya, Tehsil Premises, Durg w.e.f. 26.01.1958 and since the possession is hostile, peaceful and

uninterrupted, the plaintiff has acquired title by adverse possession. The defendant remained *ex parte*, however, the trial Court has still dismissed the suit on the ground that mere long possession is not a ground for passing a decree for adverse possession.

2. Since the appellant/plaintiff has moved an application under Order 23 Rule 1 (3) of CPC for withdrawal of the suit with liberty to move a duly constituted suit afresh, therefore, we shall first dwell on the application.

3. Under Order 23 Rule 1 (3) of CPC, plaintiff can be permitted to withdraw the suit on being satisfied that the suit itself would fail for the reason of some 'formal defects' or that there are 'sufficient grounds' for allowing the plaintiff to institute a fresh suit for subject matter of a suit or part of claim. The law on the issue as to when the Court should exercise judicial discretion allowing the plaintiff to withdraw the suit is well settled that when an application is filed, the Court must be satisfied about the 'formal defects' or 'sufficient grounds'. Even if the word 'formal defect' is construed liberally, the same is necessarily to be construed to mean misjoinder of parties, misdescription of suit property, failure to disclose a cause of action or other defects of like nature.

4. In the case at hand, the suit suffers from the following defects:-

- I. The description of suit property has not at all been mentioned nor any schedule of property is attached with the plaint.
- II. Plaintiff claims to be in adverse possession w.e.f. 26.01.1958. His age on the date of filing of the suit i.e.

18.09.2010 is mentioned as 60 years. Thus, as on 26.01.1958, the plaintiff was only about 8 years of age.

III. Plaintiff has arrayed the State of Chhattisgarh and Municipal Corporation, Durg as defendants without mentioning as to who the true owner of the property is. If the owner is State of Chhattisgarh, the plaintiff was required to serve notice under Section 80 of CPC, which he failed to do and the said defect has been stated as one of the reason for dismissing the suit. Similarly, if the true owner is Municipal Corporation, Durg, then the plaintiff was required to serve a notice to the Municipal Corporation, Durg under Section 401 of the Municipal Corporation Act, without which the suit could not have been instituted.

IV. In one of the document filed by the plaintiff vide Ex-P-1C, which is the front page of some register, there is mention of name of Ganrashtriya Canteen (Durg) Samiti Chaturth Varg Karmachari established on 26.01.1958 recognized by the Collector, Durg. This document is suggestive of the fact that an association of the Class IV employees of the Collectorate was recognized by the Collector and it was allowed to occupy the piece of land, on which the association is running a canteen. Thus, the possession at the beginning was permissive in nature, therefore, if at any subsequent point of time, the plaintiff or the Ganrashtriya Canteen has treated its possession to be adverse to the true owner, it was necessary for the plaintiff to have mentioned the date on which the

possession became adverse after 26.01.1958. This apart from the legal hurdle that a possession which was permissive at the inception is never considered to be adverse possession at any subsequent point of time unless the real owner has revoked the permission but the person in possession continued to occupy the property with open hostility without interruption by the true owner for the entire required length of time so that on and from the said date, the possession becomes adverse and on expiry of the statutory period, the plaintiff prescribes title by adverse possession.

5. In our considered opinion, the suit suffers from material and substantial defects and not with formal defects only, therefore, the application under Order 23 Rule 1 of CPC deserves to be and is hereby dismissed.

6. In the impugned judgment and decree, the trial Court has framed only one issue for trial as to whether the plaintiff has prescribed his title by adverse possession. Referring to the law laid down by the Supreme Court in the matter **Karnataka Board of Wakf vs Government of India and others**¹, the trial Court has observed that the burden to prove adverse possession is on the party who claims to have prescribed his title. Referring to the defects and omission for plaintiff's pleading and evidence about certain essential facts, which are necessary to be proved to establish adverse possession, the trial Court has found that the plaintiff has neither proved adverse possession nor is entitled to prescribe his title. Moreover, the plaintiff has led only oral evidence to prove his

¹ (2004) 10 SCC 779

possession without submitting any documentary evidence. The trial Court has also observed that it was necessary for the plaintiff to have properly described the suit property as required under Order 7 Rule 3 of CPC.

7. In the matter of **S. M. Karim vs Mst. Bibi Sakina**², the Supreme Court has held that the party claiming adverse possession must prove the date on which the possession became adverse.

8. Having considered the material available in the record of the trial Court, we are fully satisfied that the findings arrived at by the trial Court are borne out from the record and the discussion on the plaintiff's requirement to prove adverse possession is also based on correct application of settled legal principles, therefore, the suit has rightly been dismissed. The impugned judgment and decree deserves to be and is hereby affirmed.

9. The appeal being bereft of any substance, it deserves to be and is hereby dismissed.

Sd/-
Prashant Kumar Mishra
Judge

Sd/-
Vimla Singh Kapoor
Judge

Nirala

2 AIR 1964 SC 1254