

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 15<sup>TH</sup> DAY OF JANUARY 2021**

**BEFORE**

**THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV**

**REGULAR SECOND APPEAL No.864/2015**

**Between:**

1. Smt. Noor Aftab Parveen,  
W/o Late Sri Syed Ali,  
Aged about 61 years.
2. Smt. Noor Aftab Zabeen,  
W/o Sri Mohammed Beig,  
Aged about 61 years,  
R/o. Channapura Village,  
Ajjampura Hobli,  
Tarikere Tq.,  
Chikmangaluru District.
3. Sri Nazarulla Shariff,  
S/o Sri Burnan Sharief,  
Aged about 56 years.
4. Sri Jafrulla Sharief,  
S/o Sri Burhan Sharief,  
Aged about 51 years.
5. Sri Noor Mehtab Yasmeen,  
S/o Sri Burhan Sharief,  
Aged about 47 years.

6. Sri Noor Mehatab Shaheen,  
S/o Sri Burhan Sharief,  
Aged about 46 years.
7. Sri Noor Mehatab Mubin,  
S/o Sri Burhan Sharief,  
Aged about 44 years.
8. Sri Shafiulla Sharief,  
S/o Sri Burhan Sharief,  
Aged about 41 years.
9. Sri Jamalulla Sharief,  
S/o Sri Burhan Sharief,  
Aged about 31 years.

Appellants 1, 3 to 9 are  
residents of Lingadahalli Village,  
Tarikere Tq.,  
Chikmangaluru District – 577 228.

... Appellants

(By Sri M.V.Hiremath, Advocate)

**And:**

Sri H.N. Chandrashekar,  
S/o Late H.G. Nagappa,  
Since deceased by his LR's

1. Smt. Vijaya,  
W/o Late Sri H N Chandrashekar,  
Aged about 60 years.

2. Sri Mohan,  
S/o Late Sri H N Chandrashekar,  
Aged about 45 years.
3. Sri Harsha,  
S/o Late Sri H N Chandrashekar,  
Aged about 55 years.

Respondent No.1 is the wife and  
Respondent Nos.2 & 3 are the Sons of  
Late Sri H.N. Chandra Shekaraiah.

All are residents of No.920, "Shivkrupa",  
Upstairs of Rudrappa's House,  
Deenadayal Road,  
Tyagarajanagara Extn.,  
Tarikere,  
Chikmangaluru District – 577 228.

4. Sri H.N. Renukappa,  
S/o Late Sri H.C. Nagappa,  
Aged about 61 years,  
R/o Beside Revanna,  
Siddeshwara Temple,  
Ramadevara Street,  
Tarikere,  
Chikmangaluru District – 577 228.
5. Sri H.N. Rudrappamurthy,  
S/o Late Sri H.C. Nagappa,  
Aged about 60 years,  
R/o Kuchappa Street,  
Tarikere Town,  
Tarikere,  
Chikmangaluru District – 577 228.

6. Smt. N.R. Leela,  
W/o Sri Rajashekar,  
Aged about 56 years,  
Junior Engineer, KEB,  
Devaraj Urs Road,  
Near New Railway Station,  
Shimoga Town,  
Shimoga – 577 201.

... Respondents

(By Sri G.Balakrishna Shastry, Advocate for  
Sri H.S.Chandramouli, Advocate for R4;  
V/o dated 29.09.2019, Service of Notice to R1 to R3,  
R5, R6 through paper publication is held sufficient)

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This Regular Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree dated 27.02.2015 passed in R.A.No.213/2011 on the file of the C/C 1<sup>st</sup> Additional District and Sessions Judge, Chikkamagaluru, dismissing the appeal and confirming the judgment and decree dated 26.11.2010 passed in O.S.No.95/2006 on the file of the Senior Civil Judge & Principal JMFC, Tarikere.

This Regular Second Appeal having been heard and reserved on 04.12.2020 and coming on for pronouncement of judgment this day, the Court delivered the following:

## **JUDGMENT**

This appeal is filed calling in question the judgment and decree dated 27.02.2015 passed by the I Additional District Judge, Chikkamagaluru in R.A.No.213/2011 affirming the judgment and decree dated 26.11.2010 passed by the Senior Civil Judge and Prl. JMFC, Tarikere in O.S.No.95/2006, whereby the suit filed by the plaintiffs seeking recovery of possession of suit schedule properties from the defendants and for award of *mesne* profits from the date of suit till the date of delivery of possession, has been dismissed.

The parties are referred to by their ranks before the trial Court for the purpose of convenience.

### **1. Facts of the case:-**

(i) The plaintiffs are the children of late Smt.Tairunnisa and seek to assert their rights with respect to the suit schedule properties that belonged to her. It is stated that the suit schedule properties had fallen to the share of

Smt.Tairunnisa in the proceedings for partition in O.S.No.317/1956 filed against her brother Sri Kasimsab. An agreement of sale was entered into between Sri H.C.Nagappa and Smt.Tairunnisa with respect to the suit schedule properties on 29.08.1968 and the prospective purchaser hereinafter referred to as 'purchaser' was put into possession under the said agreement. Sri H.C.Nagappa, the purchaser is now represented by his legal representatives in the present proceedings, while Smt.Tairunnisa the owner is also represented by her legal representatives.

(ii) As the sale transaction did not culminate in a sale deed and as purportedly the purchaser did not come forward, Smt.Tairunnisa filed O.S.No.53/1972 against Sri H.C.Nagappa seeking for the relief of permanent injunction. The said suit however came to be dismissed on 14.12.1973 while recording the finding that suit for injunction was not maintainable as it was proved that possession was delivered to Sri H.C.Nagappa pursuant to the agreement of sale.

(iii) In the interregnum, a suit came to be filed by loanee Smt.Rudramma to recover the money advanced by her to Smt.Tairunnisa on account of default in repayment. In the course of said proceedings in Execution Petition No.69/1982, the schedule properties were attached. Sri H.C.Nagappa, the purchaser had filed Misc.Case No.14/1983 and obtained release of the schedule properties from attachment as per the order dated 25.07.1987.

(iv) It is thereafter that on 01.03.1989, Sri H.C.Nagappa instituted a suit in O.S.No.237/1989 for specific performance against Smt.Tairunnisa, which came to be dismissed on 29.06.1991. Aggrieved by the same, R.A.No.50/1991 came to be filed challenging the judgment dismissing the suit. It is pertinent to note that an application came to be filed under Order VI Rule 17 of CPC to amend the plaint to include the relief of declaration of title by way of adverse possession. In the said appeal proceedings, the judgment and decree in O.S.No.237/1989 came to be set

aside remanding the matter to the trial Court, which order of remand was subsequently set aside with a direction that appeal was to be decided within a period of five months as per the order passed in MSA No.142/1994 preferred against the judgment and decree in R.A.No.50/1991.

(v) It is pertinent to note that after the appeal proceedings were resumed, consequent to the order of remand, Sri H.C.Nagappa filed a memo dated 03.03.2000 giving up his claim as regards the relief of specific performance while restricting the claim only with respect to the relief of adverse possession. On 17.01.2005, R.A.No.50/1991 came to be dismissed. It was taken up in appeal in R.S.A.No.1034/2005, which also came to be dismissed on 12.12.2005.

(vi) However, this Court while disposing of the second appeal had observed that once a person claims to be in possession pursuant to the agreement of sale, the claim of



adverse possession could not be raised. It was further observed that the claim regarding adverse possession even if it were to be considered, would only be from 03.03.2000 on which date a memo was filed before the First Appellate Court giving up the plea of specific performance of the agreement and restricting the claim only with respect to adverse possession.

(vii) The Court further observed that the purchaser admittedly being in possession of property could be evicted only in accordance with law by filing a suit for recovery of possession.

(viii) Subsequent to disposal of R.S.A.No.1034/2005, the present suit, viz., O.S.No.95/2006 came to be instituted seeking the relief of recovery of possession and grant of *mesne* profits.

(ix) On the basis of pleadings of the parties, the trial Court had framed the following issues which is reflective of the contentions raised:-

- 1) *Whether the plaintiffs prove that, the plaintiffs are entitled for possession of the suit schedule properties from the defendants?*
- 2) *Whether the plaintiffs are entitled for mesne profits from the date of delivery of the possession (sic)?*
- 3) *Whether the defendants prove that, they have perfected their title by adverse possession?*
- 4) *Whether the defendants prove that the suit is barred by time?*
- 5) *Whether the defendants prove that the suit is hit by constructive res-judicata?*
- 6) *What decree or order?"*

**2. Findings of the court of first instance:-**

(i) The suit in O.S.No.95/2006 came to be dismissed by judgment and decree dated 26.11.2010. The trial Court has held that the plaintiffs are not entitled for possession without seeking the relief of declaration of title. As regards

issue No.3, the Court has held in the affirmative holding that the defendant Sri H.C.Nagappa who was in possession from the year 1971 had perfected his title by way of adverse possession. As regards issue No.4, taking note that the cause of action arose on 03.03.2000, on which date the memo was filed by the defendant giving up his plea as regards specific performance while restricting the relief only as regards adverse possession and also noticing the observations made in R.S.A. No.1034/2005 reserving liberty to the present plaintiff to initiate proceedings for recovery of possession, the suit was held to have been filed in time.

(ii) As regards issue No.5 relating to bar of suit on the principle of constructive *res judicata*, the trial Court has held in the affirmative holding that Smt.Tairunnisa ought to have claimed possession by way of counter claim in the suit O.S.No.237/1989 which was filed seeking specific performance of the agreement and accordingly, the suit came to be dismissed.

### **3. Findings of the First Appellate Court:**

(i) In R.A.No.213/2011, the following points for consideration were framed:-

- "1) *Whether the learned trial judge erred in answering issue No.1, 2 and 4 in the negative, though the plaintiffs' mother was the owner and having a title?*
- 2) *Whether the trial Court erred in affirming issue No.3 and 5 when a suit filed by the father of the defendants in O.S.No.237/1969 (sic) for specific performance was dismissed on the ground of limitation?*
- 3) *Whether the learned trial judge erred in not granting the relief of possession when the plaintiffs have proved the possession of the defendants was unlawful and illegal?*
- 4) *Whether the learned trial judge erred in holding that the defendants have perfected their title by adverse possession?*
- 5) *Whether the judgment of the trial court calls for interference by this court?*
- 6) *What order?"*

(ii) The First Appellate Court had concluded that Article 64 of the Limitation Act, 1963 would not apply, as the suit for possession was not on the basis of dispossession. As regards

the applicability of Article 65 of the Limitation Act, it was held that the claim of Smt.Tairunnisa was on the basis of revenue records and in the absence of any exchange deed between Smt.Tairunnisa and her brother Sri Kasimsab, the suit on the basis of title under Article 65 of the Limitation Act could not be maintained.

(iii) As regards the finding of the trial Court on issue No.3 that the defendants had proved that they had perfected their title by adverse possession, the First Appellate Court had concluded that the finding by the trial court on issue No.3 was erroneous, as till memo was filed on 03.03.2000 giving up the plea of specific performance, there was no hostile intention to possess the property by the defendants in their own right and the present suit, viz., O.S.No.95/2006 having been filed in the year 2006 (within 12 years from the filing of memo), the finding that the defendants had perfected their title by way of adverse possession was held to be erroneous.

(iv) As regards the finding by the trial Court on issue No.4 that the suit was filed within time, the First Appellate Court had differed with such finding while holding that, when the agreement of sale was rescinded on 01.01.1971 Smt.Tairunnisa ought to have filed a suit for possession against Sri H.C.Nagappa. It was further noted that O.S.No.53/1972 which was filed against the defendant for injunction also came to be dismissed affirming that the defendant was in possession and atleast from such date, the limitation had started to run. Accordingly, it was held that the plaintiffs' right for recovery of possession stood extinguished in terms of Article 27 of the Limitation Act 1963, in light of the legal requirement of having to file a suit for recovery of possession within a period of twelve years of dispossession from the immovable property. Consequently, the appeal was dismissed affirming the judgment and decree in O.S.No.95/2006, though the findings of the Court of first instance on issue Nos.3 and 4 were differed with.

(v) The present second appeal came to be admitted on the following substantial question of law:-

“Whether the finding by the trial Court that appellants are not entitled for possession of the suit schedule properties is based on the evidence on record and similarly, whether the finding by the appellate Court that the appellants’ rights to seek possession of the subject properties stood extinguished under Section 27 of the Limitation Act is based on the evidence on record and is permissible in Law?”

However substantial question of law framed earlier was modified as per the order dated 04.12.2020 and reframed as follows:-

“(i) Whether the finding by the First Appellate Court that the right of the plaintiff (appellant) to seek for recovery of possession of the suit properties stood extinguished under Section 27 of the Limitation Act, 1963, is based on the evidence on record and is to be sustained?

(ii) Whether the concurrent findings of the trial Court and the First Appellate Court that the plaintiff did not have title to the property and accordingly present suit for recovery of possession was not maintainable without seeking for declaration of title in light of Article 65 of the Limitation Act calls for confirmation in light of the evidence and pleadings on record and the rights over property as demonstrated by the plaintiff?

(iii) Whether the affirmative finding by the trial Court on issue No.5 (affirmed by the First Appellate Court) that the suit was hit by constructive *res judicata* insofar as the plaintiffs who were defendants in O.S.No.237/1989 had failed to lodge a counter claim regarding possession was a bar to institute the present suit in terms of Order II Rule 2 of CPC in light of the pleadings and evidence on record?"

#### **4. Contentions of Appellants-plaintiffs.-**

(i) Sri M.V.Hiremath, learned counsel appearing on behalf of the plaintiffs has contended that the suit is filed



within three years of dismissal of R.S.A. No.1034/2005 and accordingly has been filed in time. In terms of Article 113 of the Limitation Act, 1963, when once possession of defendant has been held to be unauthorized, the true owner can file a suit without seeking declaration as regards his title as long as the same is within the period of limitation. Reliance is placed on the judgment of the Apex Court in the case of **Revanasiddayya v. Gangamma alias Shashikala and Another<sup>1</sup>**.

(ii) By placing reliance on the Apex Court's judgment in the case of **Narasahalli Kempanna v. Narasappa<sup>2</sup>**, it is contended that the second suit between the parties on a different cause of action is maintainable.

(iii) It is further submitted that after dismissal of the suit in O.S.No.237/1989 (initially filed seeking relief of specific performance and subsequently restricting the relief claimed

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<sup>1</sup>AIR 2017 SC 5682

<sup>2</sup>AIR 1989 KAR 50

only as regards adverse possession) culminating in the judgment in R.S.A. No.1034/2005, it cannot now be contended that possession could be protected under Section 53A of the Transfer of Property Act, 1882.

**5. Contentions of respondents-defendants.-**

(i) Sri G.Balakrishna Shastry, the learned counsel appearing for the respondents has on the other hand contended that in light of concurrent findings of fact, there arises no substantial question of law and accordingly there can be no interference with the concurrent findings of fact.

(ii) It is submitted that the plaintiffs have not proved title to the suit property and have merely relied upon the revenue entry and that a bare suit for recovery of possession without any declaration as regards title is not maintainable. That the suit was rightly held to be barred by time by the First Appellate Court and the suit for possession ought to have been filed shortly after 01.01.1971, when the agreement was

cancelled. It was further contended that the observation while disposing of R.A.No.50/1991 and R.S.A. No.1034/2005 that Smt.Tairunnisa could recover possession by filing a suit would have to be construed as providing for institution of suit, if law permitted such proceedings. It is submitted that in the present case, once limitation had begun to run, the same could not be interrupted and accordingly, the present suit which ought to have been filed within the legally permissible time after 01.01.1971 was barred by time when instituted in the year 2006.

(iii) It is contended in the alternative that plaintiff had lost possession on 29.08.1968 and the suit filed in the year 2006 was not maintainable under Article 64 of the Limitation Act and consequently the right stood extinguished in terms of Section 27 of the Limitation Act. That the finding of First Appellate Court reversing the finding of trial Court that the defendant had perfected his title by adverse possession was erroneous and the defendant in the present appeal was

entitled to challenge such finding by virtue of Order 41 Rule 22(1) of C.P.C.

(iv) It is also contended that, as Sri H.C.Nagappa's claim for having perfected title by adverse possession would commence from 01.01.1971, as Sri H.C.Nagappa's name finds entry in the revenue records continuously and also when Sri H.C.Nagappa raised the dispute and denied the rights of Smt.Tairunnisa by filing written statement in O.S.No.53/1972, the claim of adverse possession having commenced from such points of time as referred to above, the present suit filed belatedly in the year 2006 is bad in law.

**6. CONSIDERATION:-**

**I. Substantial question of law No.1.-**

"Whether the finding by the First Appellate Court that the right of the plaintiff (appellant) to seek for recovery of possession of the suit properties stood extinguished under Section 27 of the Limitation Act, 1963, is based on the evidence on record and is to be sustained?"

(i) The fact that O.S.No.53/1972 was filed for permanent injunction and dismissed affirming the possession of defendant is not in dispute nor can it be denied that Smt.Tairunissa had cancelled the agreement on 01.01.1971. Though it has been contended that the right to sue for possession had accrued as on 01.01.1971 and later as on the date of dismissal of O.S.No.53/1972 which was filed seeking the relief of injunction by Smt.Tairunnisa, however, it cannot be lost sight that subsequent to the dismissal of O.S.No.53/1972, the suit for specific performance of the agreement to sell came to be filed by the defendants in O.S.No.237/1989. The suit was eventually dismissed and taken up in appeal in R.A.No.50/1991, which was dismissed on 17.01.2005 and was called in question in R.S.A. No.1034/2005 and was disposed off on 12.12.2005 with certain observations.

(ii) While disposing of R.S.A. No.1034/2005, the Court took note of the fact that the defendant who was the purchaser, was in admitted possession and had observed that

the claim for adverse possession cannot be considered when a person has entered possession pursuant to an agreement of sale (however it was clarified that all contentions could be taken up as a defence in the suit to be filed by the plaintiff for recovery of possession). In light of peculiar facts, wherein a memo was filed on 03.03.2000 giving up the relief of specific performance and restricting the claim with respect to adverse possession, it was observed that the time from which the claim of adverse possession could be raised was only subsequent to 03.03.2000.

(iii) The Court had proceeded to observe that the defendant being in possession of the suit schedule property could be evicted in accordance with law by filing a suit for possession and in such suit, it was open to the defendant to raise appropriate contention. The second appeal was disposed off on 12.12.2005 and the present suit was filed on 07.12.2006.

The matter could be dealt with in light of substantial question of law no.1 framed on the following points for consideration:

**(a) Starting point of claim of adverse possession as asserted by the defendant.-**

(i) The question as to whether the present suit is barred by limitation must be examined from the point as to whether the defendant has perfected his title by adverse possession by the time the suit for recovery of possession filed by the plaintiff in the year 2006. As rightly observed by the First Appellate Court, the claim as regards adverse possession by the defendant cannot be stated to have begun till 03.03.2000, when memo was filed by the defendant in R.A. No.50/1991 wherein, unequivocally the defendant has given up his claim for specific performance.

(ii) The claim of adverse possession requires fulfillment of the three criteria concurrently which are:-

- (a) **nec vi** - adequate in continuity
- (b) **nec clam** - adequate in publicity
- (c) **nec precario** - adverse to a competitor in denial of title and to his knowledge.

Hence to begin with, the assertion of the defendant should be an assertion to possess with requisite intention adverse to the title of the true owner and to his knowledge. It is only the possession with requisite intention for twelve years which would lead to conferment of title by way of adverse possession.

(iii) The claim of adverse possession cannot run concurrently with acceptance of title of the plaintiff. In the present case, it comes out from the admitted facts that the defendant had accepted the ownership of plaintiff, as he had entered into possession only on the basis of agreement to sell dated 29.08.1968 executed by Smt.Tairunnisa.



(iv) When O.S.No.237/1989 was filed by Sri H.C.Nagappa seeking specific performance of the sale agreement, clearly, the title of the plaintiff was undeniably and unequivocally accepted which was the basis of the relief of specific performance claimed. It must be specifically noted that the claim of specific performance was given up only on 03.03.2000 by filing a memo. It is only from such date the claim for adverse possession could be construed to have begun as long as the other legal components were fulfilled.

(v) The judgment of Apex Court in the case of **Karnataka Board of Wakf v. Government of India and Others**<sup>3</sup> as regards this aspect further sheds light and the following extract need be noticed.

*"12. A plaintiff filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See S.M.Karim v. Bibi Sakina [AIR 1964 SC 1254].) In P. Periasami v. P. Periathambi*

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<sup>3</sup>(2004) 10 SCC 779

[(1995) 6 SCC 523] this Court ruled that: (SCC p.527, para 5)

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

**The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.**

Dealing with *Mohan Lal v. Mirza Abdul Gaffar* [(1996) 1 SCC 639] that is similar to the case in hand, this Court held: (SCC pp. 640-41, para 4)

"4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the

*agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."*

*(emphasis supplied)*

(vi) In light of the law laid down, the period of adverse possession still to be established with reference to the ingredients could be deemed to have commenced only from 03.03.2000, when the defendant had stopped claiming under the title of the plaintiff, while specifically repudiating the plaintiff's title and had set up the plea of adverse possession. Incidentally, even if the ingredients of adverse possession had been established as the suit was filed in the year 2006, the period of twelve years had not yet concluded, if the starting point was taken as 03.03.2000.

**b) Whether the right of plaintiff to sue for recovery of possession stood extinguished by virtue of Section 27 of the Limitation Act, 1963:-**

(i) Section 27 of the Limitation Act, 1963 reads as follows:

**"27.Extinguishment of right to property.—**

*At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."*

In the present case, the defendant has specifically contended that the plaintiff ought to have filed a suit for recovery of possession on 01.01.1971 when the agreement of sale was rescinded by Smt.Tairunnisa or on subsequent dates including when the defendant filed the written statement in O.S.No.53/1972 seeking the relief of permanent injunction or when order in Misc.Case No.14/1983 was passed on 25.07.1987 with respect to an application under Order 21 Rule 58 of C.P.C. whereby attachment of suit schedule property pursuant to the proceedings in Execution Case No.69/1982 at the instance of the borrower, Smt.Rudramma came to be vacated at the instance of Sri H.C.Nagappa. In such proceedings there was a finding that Sri H.C.Nagappa was in adverse possession. It has also been asserted that plaintiff

was also put on notice of adverse possession once the mutation entry was entered into the name of Sri H.C.Nagappa by an order dated 03.03.1990, while simultaneously deleting the entry in the name of Smt.Tairunnisa in the proceedings in R.R.T.No.21/1989-90 and as per the order passed in M.R.No.19/1989-90. Accordingly, it is submitted that the present suit is barred by time.

(ii) It is a matter of record that the plaintiff had rescinded the agreement of sale on 01.01.1971 and that the suit for injunction in O.S.No.53/1972 filed by Smt.Tairunnisa against Sri H.C.Nagappa came to be dismissed on 14.12.1973. It is also a matter of record that at the instance of Sri H.C.Nagappa, attachment of suit schedule properties in Execution Case No.69/1982 with respect to the proceedings for recovery of amount lent by Smt.Rudramma to Smt.Tairunnisa came to be vacated in Misc.Case No.14/1983 filed under Order 21 Rule 58 of C.P.C. on 25.07.1987, while observing that Sri H.C.Nagappa was in adverse possession.

(iii) However, O.S.No.237/1989 seeking specific performance of the agreement of sale was instituted in 1989 by Sri H.C.Nagappa through whom the defendants claim and upon its dismissal, R.A.No.50/1991 came to be filed. It was only on 03.03.2000 that a memo was filed giving up the plea of specific performance of the agreement and restricting the prayer as regards adverse possession. As discussed supra at para-6(a)(vi), 03-03-2000 would be the commencement of the period of adverse possession. The suit has been filed in 2006 i.e. within twelve years of 03.03.2000 and therefore it cannot be stated that the defendant had obtained title by adverse possession as on the date of filing of the suit thereby extinguishing the title of the plaintiff.

(iv) Finally, the proceedings in R.A.No.50/1991 culminated in R.S.A. No.1034/2005 came to be disposed off on 12.12.2005. Both in R.A.No.50/1991 and R.S.A. No.1034/2005, the Courts have specifically observed that the defendant being in settled possession pursuant to the delivery

of possession under the agreement of sale executed by Smt.Tairunnisa, the only course available to the plaintiff was to institute proceedings for recovery of possession. Soon after disposal of R.S.A. No.1034/2005 on 12.12.2005, the present suit, viz., O.S.No.95/2006 has been instituted on 07.12.2006.

**(c) Mere possession without *animus possidendi* is not sufficient:**

(i) Another aspect that needs to be noticed is that mere possession without the requisite *animus* would not turn possession under the agreement of sale executed by the plaintiff into possession which is adverse. The nature of *animus* and the absence of it becomes apparent on filing of O.S.No.237/1989 seeking the relief of specific performance. Between 01.01.1971 when the agreement of sale is said to have been rescinded by Smt.Tairunnisa till 01.03.1989 when O.S.No.237/1989 was filed, the legal benefit, if any, claimed by the defendant by pointing out inaction of the plaintiff in instituting the suit for recovery of possession has been wiped

away by the action of the defendant in accepting the title of the plaintiff by filing a suit for specific performance on 01.03.1989.

(ii) In fact, as regards to the construing of "intention to dispossess" in the case of **Powell v. McFarlane and Another**<sup>4</sup>, it was observed as follows:-

*"(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")*

*".....If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."*

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<sup>4</sup> 1979 (38) P. & C.R. 452



(iii) As pointed out, irrespective of the events which the defendants rely upon to contend their possession to be adverse possession prior to the filing of suit for specific performance, the subsequent conduct of the defendants in filing O.S.No.237/1989 for specific performance, clearly admitting Smt.Tairunnisa to be the owner would amount to ambiguous conduct and not clear enough to indicate possession with '*animus possidendi*', in light of the principle enunciated in **Powell's case (supra)**. Accordingly, it cannot be stated that the plaintiffs were ever dispossessed till 03.03.2000.

(iv) As noticed, the legal title of the plaintiff has not been extinguished by the graduation of possession of plaintiff into adverse possession and completion of twelve years of such adverse possession. Till such extinction of title of the plaintiff by perfection of title in the defendant, it cannot be stated that the right to sue for recovery of possession sought to be exercised by the plaintiff stood extinguished. It can be

safely stated that the right of the plaintiff to sue for possession would remain till the defendant acquires positive title by adverse possession so as to extinguish the plaintiff's right, which alone would result in extinguishment of plaintiff's right under Section 27 of the Limitation Act. Accordingly, the right of the plaintiff to sue for recovery of possession is not extinguished under Section 27 of the Limitation Act.

Hence, the substantial question of law No.1 is answered in the negative.

## **II. Substantial question of law No.2:**

"Whether the concurrent findings of the trial Court and the First Appellate Court that the plaintiff did not have title to the property and accordingly present suit for recovery of possession was not maintainable without seeking for declaration of title in light of Article 65 of the Limitation Act is sustainable in light of the evidence and pleadings on record and the rights as asserted by the plaintiff?"

(i) It must be noted that both the Courts, i.e. of first instance and the First Appellate Court have concurrently held that the plaintiffs' title could not be taken to be unimpeachable, as the assertion of Smt.Tairunnisa that by virtue of her brother giving up the rights with respect to the suit schedule properties in a partition was not supported by legal transfer of the said properties in favour of Smt.Tairunnisa by her brother Sri Kasimsab.

(ii) Article 64 of the Limitation Act, reads as follows:

Article	Description of suit	Period of limitation	Time from which period begins to run
64	For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of possession

In the present case, as handing over of possession to the defendant was under an agreement of sale, at no point of

time, there has been any dispossession. In fact, the claim of the plaintiff has always been on the basis of title vested in Smt.Tairunnisa. Accordingly, the finding that Article 64 of the Limitation Act was not applicable to the present suit requires to be accepted.

(iii) Insofar as the finding of the First Appellate Court that Article 65 of the Limitation Act cannot be invoked, as title to the property was not vested with Smt.Tairunnisa as there was no document transferring the property to her by her brother Sri Kasimsab, is erroneous and is to be interfered with.

(iv) The learned counsel for the defendants has contended that the plaintiffs must succeed on the strength of their case irrespective of whether the defendants have proved their case or not as held by the Hon'ble Supreme Court in the case of **Union of India and Others v. Vasavi Cooperative**

**Housing Society Limited and Others**<sup>5</sup>. Further, while asserting that revenue entry does not confer title, he has relied on the decision of Apex Court in the case of **State of H.P. v. Keshav Ram and Others**<sup>6</sup>. It is specifically asserted that when there was a cloud over the plaintiff's title and where possession is sought to be recovered, declaration must be sought for, as held by the Apex Court in the case of **Anathula Sudhakar v. P.Buchi Reddy (dead) by LRs. and Others**<sup>7</sup>. There is no quarrel as regards the principle of law laid down in the judgments referred to hereinabove, however, in light of the discussion infra wherein, it is concluded that the title of Smt.Tairunnisa is superior title, the authorities relied on by the plaintiffs are of no avail.

(v) It ought to be noted that the present suit is in fact a suit instituted under Article 65 of the Limitation Act.

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<sup>5</sup> (2014) 2 SCC 269

<sup>6</sup> (1996) 11 SCC 257

<sup>7</sup> AIR 2008 SC 2033

Article 65 of the Limitation Act reads as follows:-

Article	Description of suit	Period of limitation	Time from which period begins to run
65	For possession of immovable property or any interest therein based on title.....	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

It is the clear case of the plaintiff that title was vested with Smt.Tairunnisa by virtue of the proceedings for partition in O.S.No.317/1956 and in fact, Khatha of the suit schedule properties was also standing in her name at a certain point of time.

(vi) The question of title for the purposes of Article 65 of the Limitation Act ought to be interpreted contextually. In the present case, the disputants are Smt.Tairunnisa on one hand, who claims title by virtue of judgment in O.S.No.317/1956, while Sri H.C.Nagappa and his legal representatives claim rights under the agreement of sale and

hence, are strangers to the family of Smt.Tairunnisa and her brother. In light of the position of legal representatives of Smt.Tairunnisa vis-à-vis, the position of legal representatives of Sri H.C.Nagappa, the title of Smt.Tairunnisa in a legal action instituted by them against the defendant is good as against the whole world, except the true owner.

(vii) It is to be noticed that till 03.03.2000, the defendants had accepted the title of the plaintiffs and were seeking enforcement of the contractual rights and accordingly till then the *de facto* possession of the defendants did not water down the *de jure* possession of the plaintiffs holding out as owners. Subsequently, the suit came to be filed within six years and as noticed in paras-6(c)(ii) and (iii) applying the principle in ***Powell's case (supra)***, it can be held that the possession of the defendants was not with the required *animus* and accordingly, such possession of the defendants cannot be construed to be dispossession of the plaintiffs. If

that were to be so, the possession of plaintiffs is deemed to have continued.

(viii) The principle as laid down by the Privy Council in the case of **Perry v. Clissold and Others**<sup>8</sup> is that.-

*"It cannot be disputed that a person in possession of land in the 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..."*

which principle has been accepted and approved by the Apex Court in the case of **Ram Daan (Dead) through LRs. v. Urban Improvement Trust**<sup>9</sup> to be the law applicable in our courts also. If that were to be so, there could be an extension of the above principle while construing title for the purpose of Article 65 of the Limitation Act. The title of Smt.Tairunnisa as derived from the suit for partition in O.S.No.317/1956 and also noting the revenue records at a certain point of time was standing in

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<sup>8</sup> [1907] A.C. 73

<sup>9</sup> (2014) 8 SCC 902



the name of Smt.Tairunnisa, the possessory title of Smt.Tairunnisa vis-a-vis the defendants who are outsiders to the family is superior and sufficient to invoke Article 65 of the Limitation Act.

(ix) It is also to be noticed that the defendants in the suit for specific performance in O.S.No.237/1989 have specifically admitted the ownership of the defendant which is the basis for the suit filed for specific performance though such relief was subsequently given up. Even as regards the relief of adverse possession as was sought for in R.A.No.50/1991, the defendants have admitted unequivocally the ownership with Smt.Tairunnisa. In light of such stand, the defendants are estopped by conduct to now plead that Smt.Tairunnisa was not the owner and that title vested with her brother. That apart, it is the settled position of law that a party cannot be permitted to approbate and reprobate and the defendants cannot now be permitted to take any plea denying the title of Smt.Tairunnisa. In fact, the very plea of

adverse possession is based on the premise and acceptance that Smt.Tairunnisa is the owner and the defendants had perfected their title by way of adverse possession as against Smt.Tairunnisa. This being so, the defendants are prohibited from taking any other contention to the contrary in light of the earlier conduct.

(x) Accordingly, the finding of both the Courts that the plaintiffs did not have title is clearly erroneous and contrary to law and accordingly the said finding is liable to be interfered with.

(xi) In light of the above discussion, the substantial question of law No.2 is answered in the negative and the findings of the trial Court and the First Appellate Court are liable to be set aside.

(xii) Insofar as the contention by learned counsel for the defendants that conclusion by the First Appellate Court in rejecting the plea of adverse possession is erroneous and is

liable to be interfered in exercise of powers under Order 41 Rule 22(1) of C.P.C., the said contention cannot be construed as raising a substantial question of law calling for consideration.

**III. Substantial question of law No.(iii)-**

"Whether the finding made in the affirmative by the trial court on issue No.5 (affirmed by the First Appellate Court) that the suit was hit by constructive *res judicata* insofar as the plaintiffs who were defendants in O.S.No.237/1989 had failed to lodge a counter claim regarding possession and accordingly the present suit was barred, is contrary to the settled position of law?"

(i) The finding that the plaintiff ought to have sought for recovery of possession by way of a counter claim while filing the written statement in the position of defendant in the suit O.S.No.237/1989 filed seeking specific performance of the agreement to sell executed by Smt.Tairunnisa (finding is recorded on issue no. 5) requires to be examined.

(ii) It is the settled position of law that for the purpose of recording a finding as regards *res judicata* or bar under Order II Rule 2 of CPC, it is necessary that the pleadings in the previous suit ought to be placed before the Court and the Apex Court in the case of **Gurubux Singh v. Bhooralal**<sup>10</sup> has held as follows:

"6. ....As the plea is a technical bar, it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order II Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the court the identity of the cause of action in the two suits...

7. ...Just as in the case of a plea of *res judicata* which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under Order 2 Rule 2 of the Civil Procedure Code cannot be made out except on proof of the plaint in

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<sup>10</sup> AIR 1964 SC 1810

*the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the defence which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed...*

(iii) In the present case, neither the plaint nor the written statement in O.S.No.237/1989 has been placed before the trial Court. It is the specific case that the plaintiff ought to have sought for a counter claim regarding possession while defending the suit for specific performance in O.S.No.237/1989. In the absence of a pleading i.e. the plaint in O.S.No.237/1989, mere production of judgment in O.S.No.237/1989 will not be sufficient to record a finding as to whether the plaintiff ought to have sought for possession by

way of counter claim and accordingly, the finding that the present suit by the plaintiff seeking recovery of possession was barred by the principle of constructive *res judicata* is not sustainable.

(iv) For the purpose of recording a finding as to whether the present suit is barred consequent to failure to lodge a counter claim in the earlier proceedings and accordingly the present suit was barred by the principle of *res judicata* and so also Order II Rule 2 of CPC, it is the identity of cause of action in the earlier suit and the present suit that needs to be looked into. The cause of action is one that is to be construed on reading of the entire plaint and is not necessarily limited to the cause of action as detailed in a particular paragraph of the plaint. If identity of cause of action of previous suit and the present suit is not established, it cannot be stated that the present suit is barred. To arrive at such conclusion, the pleadings are *sine qua non* which are absent in the present case. In the absence of pleadings, further enquiry into the

merits of the contention as encapsulated in the substantial question of law would not arise. Accordingly, the reliance on the judgments of Apex Court in the case of **Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited**<sup>11</sup> and in the case of **Van Vibhag Karamchari Griha Nirman Sahakari Sanstha Maryadit (Registered) v. Ramesh Chander and Others**<sup>12</sup> as regards the substantive principle of law under Order II Rule 2 of CPC do not come to the aid of the defendant in the absence of pleadings, without which no conclusive finding on the point urged could be arrived at. Accordingly, the substantial question of law No.3 is answered in the affirmative.

(v) In the result, the appeal is allowed with costs. The judgment and decree dated 27.02.2015 passed by the I Additional District Judge, Chikkamagaluru in R.A.No.213/2011 is set aside and consequently, the judgment and decree dated 26.11.2010 passed by the Court of first instance, viz., Senior

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<sup>11</sup> (2013) 1 SCC 625

<sup>12</sup> (2010) 14 SCC 596

Civil Judge and Prl. JMFC, Tarikere in O.S.No.95/2006 is also set aside and in light of the discussion above, the suit is decreed.

(vi) The defendants are directed to hand over the possession of suit schedule properties to the plaintiffs within a period of three months from this day. There would be a separate enquiry as regards *mesne* profits from the date of suit till the date of delivery of possession as per Order 20 Rule 12 of C.P.C.

**Sd/-  
JUDGE**

VGR