

(1990) 11 AHC CK 0056
In the Allahabad High Court
Case No : C.R. No. 769 of 1989

Chatur Bhuj Prasad Khattri

APPELLANT

Vs

Hari Narain Khattri and others

RESPONDENT

Date of Decision : 09-11-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 6 Rule 2

Citation : AIR 1991 All 72 : (1991) RD 314

Hon'ble Judges : M.L. Bhat, J

Bench : Single Bench

Advocate : Mr. K.N. Saxena and MR. S.K. Mehrotra, for the Appellant; Mr. W.H. Khan, for the Respondent

Judgement

1. This revision is directed against an order of the Court below whereby it has allowed the defendants to amend the written statement by raising a plea of adverse possession in their written statement.
2. The plaintiff appears to have filed a suit for declaration in respect of a suit property which was resisted by the defendants on the ground that the suit property was purchased on 3-8-1939 from the funds of the defendants in the name of the plaintiff. The transaction was Benami. The defendants have further stated that the house in question which is suit property was demolished and reconstructed along with other portions of already existing house, under the integrated construction scheme. In para 15 of the written statement, the defendants have stated that the suit property has remained in their possession and they were exclusive owners thereof to the knowledge of the plaintiff and all others and their names were entered as owners over the disputed house in the Municipal records.
3. With the coming into force of the Benami Transactions (Prohibition) Act, 1988, the defendants wanted to amend the written statement so as to raise a specific plea of adverse possession and set up the plea that they have become the owners of the suit property by virtue of the adverse possession. The Court below

has allowed the amendment, hence this revision.

4. I have heard learned Counsel for the parties. Learned Counsel for the plaintiff-revisionist submitted that the plea of adverse possession sought to be raised by the defendants in their written statement by way of amendment is contradictory to the plea which the defendants have raised inasmuch as the defendants' plea was that they were the real owners and defendant No. 1 was Benamidar only. Now the defendants cannot be permitted to raise a contradictory plea because the plea of adverse possession cannot be raised unless the property is owned by some one else. If the defendants were owners as set up by them, they cannot raise a plea of adverse possession which pre-supposes that someone else is owner of the property and the person in long possession acquires the title by prescription.

5. My attention was drawn by learned Counsel for the respondents-defendants to para 15 of the written statement. In para 15 of the written statement they have specifically stated that the defendants remained in possession over the suit property as an exclusive owner to the knowledge of the plaintiff and all others. The plea of Benami and the plea of a long possession may be inconsistent but the defendants can resist the suit by raising inconsistent pleas in defence which are to be considered by the Court below as a plea of defence in alternative. The respondents have relied on two authorities of this Court: Khazan Singh v. Abhey Ram, reported in 1966 AWC 254 and Municipal Board Vs. Mt. Ram Sri and Another, . In the aforesaid authorities it is stated that if the plea of title is based over the possession which extended over 30 years, the plea of adverse possession need not be specifically pleaded as it is included in the plea of title which would mean if the defendant and plaintiff set up their title on the basis of long possession. The plea of adverse possession need not be set up specifically because long possession would itself mean that the parties are leading their title on adverse possession.

6. The plaintiff who filed a suit for possession on the basis of title, it is open to the defendants to say that at the determination of the period of limitation the right of the plaintiff to recover the possession has extinguished. The extinguishment of title of the plaintiff in the suit property is based always on long possession over the property by the defendant and the Court necessarily has to consider whether the long possession has matured in adverse possession of the defendants over the suit property. If the defendant is able to satisfy the Court that his possession was long to the knowledge of the plaintiff and in denial of his title the defendant need not specifically plead the adverse possession. If the plaintiff's title is extinguished by lapse of time that will have an effect of maturing the title of the defendant over the suit property by his long possession which is not permissible. However, these are the points which, are to be taken into consideration by the Court below while deciding the suit on merits. The Court below shall have an occasion to appreciate the evidence and shall find out whether the long possession of the defendants over the suit property has

matured into his title by prescription and whether the plaintiff's right to recover the possession is extinguished by lapse of time. At the same time the Court below has to consider whether the defendants are in possession of the property in suit and what is their nature of the possession over the suit property. If they are holding the suit property as licensee and with the permission of the plaintiff then the question of adverse possession would not arise. Similarly, if the defendants are not holding the property in their possession the question of adverse possession may not at all require to be determined because the plea of adverse possession pre-supposes the possession over the property.

7. Learned Counsel for the respondents has stated at Bar.that the evidence has already been recorded and the case is ripe for hearing. If the Court below takes into consideration the plea raised by the defendants in para 15 of the written statement on the basis of the evidence already on record, then it should also give a finding about the respondents' nature of possession; whether it is adverse or permissive. If the "respondents" long possession is matured into ownership they need not specifically plead the adverse possession. They can resist the suit by showing that the plaintiffs right to recover the property by lapse of time has extinguished. Therefore, amending the written statement with a view to raise a plea of adverse possession as a ground of defence seems to be redundant. However, the Court below will not be precluded from considering the plea of long possession set up by the defendants over the suit, property and its nature. If the possession of the defendants is to the knowledge of the plaintiff and is not permissive the Court below will be within its right to determine the nature of the possession and non suit the plaintiff if the defendants are holding the property from the date of purchasing of the house, that is from 1939 as pleaded by them, then they need not specifically plead ownership on the basis of the adverse possession. However, determination of the defendants being in possession and what is nature of that possession, is exclusively domain of the trial Court and has to be decided on the basis of the evidence already on record.

8. If the trial Court has not framed any issue with regard to the possession, it is directed to frame an issue with regard to possession of the property and determine the nature of the possession of the defendants; but no evidence shall be permitted to be led by either of the parties with regard to the issue which may now be framed with regard to the factum of the possession. It is stated that evidence with regard to the possession has already been recorded. Therefore, issue which requires to be framed with regard to the possession, if not framed already, shall be decided on the basis of that evidence and no further evidence shall be permitted to be adduced by either of the parties to the suit.

9. It was stated that the parties have led evidence with regard to their respective claim about the possession of the suit property and its nature, therefore, that evidence alone shall be considered for the purposes of deciding the possession of the defendants, if at all they are in possession, and the nature of that possession over the suit property. The long possession of the defendants, as the basis of

title, would include plea of prescription also. Therefore, amendment granted by the Court below was not required to be granted.

10. In case issue with regard to possession is already there, then it will not be framed at all. However, the Court below will frame an additional issue in that case stating that if the possession of the defendants is proved on the suit property; what is the nature of their possession and in what capacity they are holding the property and what is the effect of their possession over the title of the property. In case no issue is framed with regard to the possession also, then that issue shall also be framed along with the issue about the nature of the possession, of the defendants over the suit property and its effect on the right of the plaintiffs title.

11. The view, which I have taken in this case is based on the existing pleadings of the parties. No additional pleadings are required to be allowed to be introduced. Therefore, the order granting permission to the defendants to amend the written statement is liable to be set aside. Without amending the written statement, the defendants are permitted to prove their case in the light of the observations made herein above, and on the basis of the averment in para 15 of their written statement.

12. Accordingly, the revision succeeds to the extent indicated above and is allowed and the Court below is directed to proceed with the hearing of the case in the light of the observations made herein above and decide the case strictly in accordance with law.

13. Learned Counsel for the parties are directed to cause the presence of their respective clients before the Court below for further instructions on 22-12-90.

14. A certified copy of this order may be given to learned Counsel for the parties within three days on payment of usual charges.

15. Revision allowed.