Shri Ajit Chopra vs Sadhu Ram And Ors on 2 November, 1999

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Bench: M.Jagannadha Rao, M.B.Shah

PETITIONER:
SHRI AJIT CHOPRA

Vs.

RESPONDENT:
SADHU RAM AND ORS.

DATE OF JUDGMENT: 02/11/1999

BENCH:
M.Jagannadha Rao, M.B.Shah

JUDGMENT:

M. JAGANNADHA RAO,J.

The appellant is the legal representative of the original plaintiff Sri R.C. Chopra in the suit bearing Suit No. 25/1 of 1970 on the file of the Senior Sub-Judge, Simla District, Simla, in the State of Himachal Pradesh. The present suit was filed by the said Sri R.C. Chopra for possession and Rs.610/-as past mesne profits. The trial Court decreed the suit on 30.11.1976 for possession but refused to pass a decree for mesne profits. The defendant appealed before the District Court, Simla which dismissed the appeal by judgment dated 23.7.1977. On further appeal by the defendant in R.S.A. No.70 of 1977, learned Single Judge of the High Court of Himachal Pradesh, by judgment dated 29.10.91 allowed the appeal, set aside the judgments of the lower Courts and dismissed the suit on a new question, namely, that the present suit was not maintainable in view of Section 47 of the Code of Civil Procedure, as it stood before the 1976 Amendment. The plaintiff died on 22.10.85,

during the pendency of the the Second appeal. This appeal by Special Leave has been preferred by the plaintiff's legal representatives.

The property in question belonged originally to one Dewan Chand Bhatia of Simla and the present plaintiff Sri R.C. Chopra purchased the same on 18.6.1957 by way of a registered sale deed. It appears that the plaintiff's vendor Sri Bhatia granted a lease in favour of the respondent - defendant on 10.2.1952. Later, Sri Bhatia filed an eviction petition on 19.7.1955 under Section 13 of the East Punjab Urban Rent Restriction Act, 1949 on various grounds. The respondent denied the relationship of landlord and tenant. The said contention of the tenant was accepted and the eviction case was dismissed by the Rent Controller, Simla on 25.9.1956. The landlord Bhatia's appeal before the Appellate Authority succeeded and appeal was allowed on 30.9.57 holding respondent was a tenant and that grounds existed for his eviction. (It was during the pendency of that first appeal that the present plaintiff purchased the property from Sri Bhatia on 18.6.1957, subject to the decision of the appeal). The respondent-tenant filed a revision in the High Court on 2.1.1958 contending that he was not a tenant and seeking stay of dispossession which was granted on 15.1.1958. Ultimately, the revision was dismissed by the High Court on 19.9.58 holding that the respondent was a tenant. Three months time was granted for vacation of the premises. The eviction order was not executed for quite some time but the present suit was filed by the appellant (purchaser from Mr.Bhatia) within 12 years from 2.1.1958, the dismissal of the tenant's revision.

It is the case of Sri R.C.Chopra, the present plaintiff that as a purchaser from Sri Bhatia, by sale deed dated 18.6.1957 he tried to evict the respondent but that the respondent entreated that he be not evicted. The present plaintiff was in Government service and was at Bombay and was being transferred from place to place. Therefore, it is said, the plaintiff agreed afresh to allow the respondent to continue as his tenant. But, it is said, the respondent was not paying rent and this led to the appellant giving a notice on 24.7.1969 to the respondent for eviction and demanding arrears of rent. There was no reply from the respondent.

At that stage i.e. after 24.7.1969, admittedly, Sri R.C.Chopra the present plaintiff filed a fresh eviction petition against the respondent, under the East Punjab Rent Restriction Act, 1949. In that eviction case, the respondent filed a counter contending that he was not a tenant, and that he was not liable to pay any arrears of rent and that he had acquired title by adverse possession.

The present suit for possession based on title was therefore filed on 5.8.1970 and also seeking Rs.610/- as compensation for use and occupation. The respondent filed written statement claiming adverse possession on the lines of his counter in the second eviction petition. The appellant filed replication on 28.10.1970. The appellant amended the plaint claiming compensation for a period of 3 years from 3.8.70 to 3.8.73. The trial Court and the first Appellate Court, decreed eviction and rejected the plea of adverse possession because the suit filed on 5.8.1970 was within 12 years from 19.9.1958, on which date the earlier Rent Control Case between the respondent and the plaintiff's vendor, Sri Bhatia was concluded by way of dismissal of the tenant's revision. On appeal by the defendant, the High Court of Himachal Pradesh, raised a new point which was not raised in the lower courts and held that the present suit was one, "in reality", in the nature of execution of the earlier eviction order in the rent control case filed by Mr. Bhatia before the Rent Controller and that

therefore, this suit stood barred by Section 47 of the Code of Civil Procedure since all matters concerning the execution, satisfaction and discharge of the previous suit were to be agitated in the execution proceedings in the previous eviction matter and not by a separate suit. In this appeal before us by Sri R.C.Chopra's legal representatives, their learned counsel contended that the point under Section 47 of the Code of Civil Procedure was not raised in the lower Courts, nor in the grounds of Second appeal and that the High Court ought not to have allowed the said question in the Second Appeal. It was argued that the suit was not "in reality" one in the nature of execution of the earlier order of eviction in favour of the plaintiff's vendor, Sri Bhatia in the rent control case and was not barred. It was argued that this suit was based upon a fresh cause of action, namely, the denial of Mr. Chopra's in the counter filed in the second eviction case of 1969. Assuming that the adverse possession started, it could not have started earlier than 19.9.1958 when the tenant-respondent's revision in the earlier eviction case was dismissed. The present suit, it is pointed out has been filed within 12 years from 19.9.58 on 5.8.70.

On the other hand, learned counsel for the respondent, contended that the question of adverse possession or limitation of 12 years apart, the basic objection was that the suit was not maintainable in view of Section 47 CPC inasmuch as this suit was in the nature of execution of the earlier eviction order obtained by the plaintiff's vendor, Sri Bhatia, against the respondent in the rent control case. The limitation, it was said started from the date of purchase by the plaintiff sri R.C. Chopra on 18.7.57 because Sri Chopra did not get himself impleaded as a co-plaintiff in the earlier eviction case filed by Sri Bhatia. It was contended that in any event, the decree for eviction in the earlier case became executable even as on 30.9.57 when the Rent Appellate Authority allowed Sri Bhatia's appeal and ordered eviction. The plaintiff could exclude only the period from 15.1.58 to 19.9.58 when the respondent obtained stay of eviction from the High Court. Therefore, the present suit was both not maintainable and was also barred by time. On the above contentions, the following points arise for consideration: (1) Was the High Court right in entertaining a new point for consideration in the Second appeal and treating it as a 'substantial question of law' and allowing the appeal on that ground? (2) Did limitation start against the appellant from 18.7.57 when the plaintiff purchased from Sri Bhatia or from 3.9.57 when the Rent Appellate Authority, in the earlier case ordered eviction in favour of Sri Bhatia? (3) In any event, was the present suit "in reality" one in the nature of execution of the first rent control eviction order obtained by the plaintiff's vendor Sri Bhatia against the respondent and was it therefore barred by Section 47 CPC? (4) If the order for eviction in the rent control case was not executed within limitation, could a fresh suit lie for eviction and was it be barred by Section 47 CPC? POINT NO.1 Learned counsel for the appellant placed reliance on the decision of this Court in Kshitish Chandra Purkait Vs. Santosh Kumar Purkait and Ors. [1997 (5) SCC 438] to say that under sub-clause (5) of Section 100 of the Code of Civil Procedure, as amended in 1976, the Second Appellate Court could not have taken up a new question of law without stating whether it was a substantial question of law.

We do not think it necessary to decide this point because we feel that this appeal can be disposed of in favour of the appellant on Points 2, 3 and 4, even assuming that the point raised by the High Court under Section 47, C.P.C. is a substantial question of law. POINT NO.2:

> We shall here assume that after the dismissal of the revision petition on 19.9.58 of the respondent, there was no fresh lease between the present plaintiff and the respondent in 1959 even though it was so contended in the present plaint.
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> In our view, during the period of 3 months from 19.9.58 granted by the High Court in the rent control case to the respondent to vacate, the respondent was in the position of a licensee as per the permission of the High Court i.e. upto 19.12.1958 and not as a trespasser. In the earlier Rent Control case filed by the present plaintiff's vendor, Sri Bhatia on the basis of tenancy, even though the said relationship was denied by the respondent and the Rent Controller accepted that plea of the tenant, the Rent Appellate Authority declared that there was in fact, a relationship of landlord and tenant between the parties and ordered eviction on 30.9.57. In our view, the said declaration as to the nature of the relationship between Sri Bhatia and the respondent would be effective from the date of filing of the eviction case on 19.7.55 by Sri Bhatia. Hence, there could not be any adverse possession from 19.7.1955 merely because the respondent denied his relationship as tenant from 1955 in the first eviction case.

When the High Court in revision confirmed the said finding of the Rent Appellate Authority on 19.9.58, the High Court too put its seal of approval that such a relationship of landlord and tenant existed from 1955 till the date of disposal of the revision petition. We are, therefore, clearly of the view that the respondent was a tenant upto 19.9.1958 when the revision was disposed of and, that thereafter the respondent was a licensee for a period of 3 months upto 19.12.1958. The adverse possession, if any, could never have therefore started before 19.12.1958. The suit filed on 5.8.1970 was in time. It was, however, argued for the respondent that the relationship of landlord and tenant stood determined on 30.9.57, once the Rent Appellate Authority ordered eviction. We are again unable to agree with this contention. The relationship as tenant continues throughout the proceedings before the Rent Controller, then during the pendency of the appeal and till the statutory revision under the Act is disposed of. It may be that in a given case the Rent Controller may pass an eviction order and in another case, the Appellate Authority may do so and in yet another case the revisional authority may pass the eviction order. It may also be that, in a particular case, there is a remand order at some stage and the authority to which the matter is remanded might come to a conclusion different from the one it arrived at before remand. Throughout the proceedings, the relationship as tenant continues till the eviction order ;is passed by the appellate or statutory revisional authority. The relationship does not go on oscillating during the pendency of the proceedings depending upon whether eviction is granted or not in between. In that view of the matter, the contention for the tenant that the relationship of landlord and tenant came to an end on 30.9.1957 when the landlord's appeal was allowed by the appellate authority and that there was no such relationship during the pendency of the tenant's statutory revision till 19.9.1958, must stand rejected.

We finally come to the contention that at any rate the respondent's adverse possession started as against Mr.Chopra (purchaser from Mr. Bhatia) from the date of sale by Sri Bhatia to the plaintiff on 18.7.57, inasmuch as Sri R.C.Chopra did not get impleaded in the first eviction case soon after his

purchase. We are unable to agree. Mr. Chopra's purchase was subject to the result of the litigation between the vendor Sri Bhatia and the respondent. That would mean that the plaintiff's right to possession of the property purchased, was by agreement with the vendor, dependant upon the result of the pending proceedings and the plaintiff had no immediate right to possession. The defendant continued to be in the position of a tenant vis-a- vis the vendor and vis-a-vis the premises even after the plaintiff's purchase. If the respondent was a tenant of the premises till the revision was disposed of, he could not claim that he was in adverse possession against Mr. Bhatia or against Mr. Bhatia's vendee when the latter had no right to immediate physical possession. Therefore, this contention of the respondent, cannot be accepted. Thus, even if the respondents adverse possession started on 19.12.1958, when the three months time granted by the High Court expired, or even if it be that the adverse possession started on 19.9.58 when the revision was rejected, the suit for possession filed on 5.8.70 was well within 12 years. The adverse possession did not start earlier. Point 2 is decided in favour of the appellant. POINT 3: We next come to the question whether the suit was not maintainable under section 47 CPC as held by the High Court for the first time in Second Appeal.

The suit having been filed on 5.8.1970, before the Amendment of the Civil Procedure Code under Central Act 54 of 1976, we go by the unamended section 47. That section read as follows:

> "47. Question to be determined by the Court executing decree:-
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> (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
>
> (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.
>
> (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation: For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit."

It will be noticed that under sub-clause (1), all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall have to be determined by the Court executing the decree and not by a separate suit.

The High Court observed: "Reading of the entire plaint would show that plaintiff claimed a decree for possession by "virtually" praying to enforce the order of ejectment and on the basis of the plea of defendant being a tenant in the premises by virtue of a fresh contract of tenancy". This view, in our

opinion, cannot be accepted. The plaint states in para 8 as follows:

> "That the defendant did not care to pay any rent of the said quarters to the plaintiff taking undue advantage of the plaintiff's absence from Simla because the plaintiff was in Government service in Maharashtra state. The plaintiff initiated proceedings for ejectment of the defendant from the said quarters under section 13 of the East Punjab Act No.III of 1949, on the ground of non-payment of rent in respect of the said quarters before the Learned Rent Controller. Simla and in the said proceedings the defendant has set up a false and frivolous plea of ownership of the said quarters by adverse possession. The plaintiff has, therefore, thought it advisable to file a suit for possession of the said quarters by ejectment of the defendant therefrom, whose occupation thereof till 13-11- 1958 is established as a tenant therein by judicial findings which are binding on the defendant." The defendant admitted in para 8 of his written statement in the present suit as follows:
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> "para 8 of the plaint is also emphatically denied except the pendency of the ejectment proceedings and the reply submitted thereto by the replying defendant"

From the aforesaid averments in para 8 of the plaint, it is obvious that the plaintiff referred to the fresh eviction case filed by Mr. Chopra in 1969 the present plaintiff, after the legal notice dated 24.7.1969. It was in that fresh rent control case that the respondent filed a counter stating that he was the owner of these four quarters and that he had prescribed title by adverse possession. This plea of the plaintiff was indeed admitted in para 8 of the present written statement. Thus, the present suit is not one for execution of the eviction order passed in the first rent control case. In our view, the High Court was, therefore, wrong in treating the present suit as one `virtually' for execution of the order of eviction passed in the earlier rent control case. Hence the ban under section 47 cannot apply. Point 3 is decided in favour of the appellant. Point 4: This point is crucial to the case. Now, if a suit for possession is decreed and the decree-holder gets possession and thereafter there is a fresh dispossession, there is no difficulty in holding that a fresh suit is maintainable for ejectment, because the fresh trespass creates a fresh cause of action. This principle is stated in Dhanraj Singh and Ors. Vs. Mt. Lakrani Kuar (AIR 1916 All. 163) referred to by the learned Single Judge in the judgment under appeal. But that is not the only situation in which it can be said there will be a fresh cause of action. There can be other situations where a fresh cause of action arises.

Where an earlier decree based on title for ejectment is not executed in time but a fresh suit is however filed on the same basis against the same defendant for ejectment relying on the earlier judgment, it has been held that a second suit does not lie. This is based on the principle that no second suit lies merely on the basis of an earlier judgment if the time for execution of the earlier decree has become barred. The cases relied up by the High Court in Ramanand and Ors. Vs. Jai Ram and Ors. (AIR 1921 All.

369), Sovani Jena Vs. Bhima Ray (AIR 1922 Pat. 407), Mal Singh Bika Singh and Ors. Vs. Mohinder Singh Mehar Singh (AIR 1970 P & H 509) belong to this category. But, in the present case, they are

distinguishable. The plaint before us is not based on the decree obtained in the first eviction case filed under the Rent Control law. We may add that Chhagan Lal Vs. The Indian Iron and Steel Co. and Ors. (AIR 1979 Cal.160) also belongs to this category.

We shall next turn to cases more directly in point. These are where the earlier suit is based on the relationship of landlord and tenant and the latter suit is based on title. In Kutti Ali Vs. Chindan and Anr. (1900 ILR (23) Mad.629), the earlier suit of 1890 was brought by the landlord against the defendant, on the basis of a lease. The decree was allowed to become time barred as no execution petition was filed within 3 years. A fresh suit was filed in 1898 on the basis of title for eviction The Division Bench held: "The defendants being tenants in 1890 cannot have acquired a prescriptive title in 1898 when this suit was brought. The plaintiff is, therefore, entitled to recover the land upon his title independently of any letting by him". Omission to sue on title in the earlier suit was not (constructive) res judicata.

This judgment, in Kutti Ali unfortunately, suffered several ups and downs. In a Full Bench of five Judges in Vedapuratti Vs. Vallabha Valiya Raja and Ors. (1902 ILR (25) Mad 300) the above case was held to be wrongly decided. In that case the first suit for redemption of a mortgage was decreed but execution got barred by time and a second suit for redemption was held not maintainable. Then came Mayankutti Vs. Kunhammad and Ors. (1918 ILR (41) Mad.641) (a case relied upon in the judgment of the High Court now in appeal before us). There the plaintiff's father had sued the defendant on a lease deed and obtained a decree for possession directing payment of compensation under the Malabar Compensation for Tenants Improvements Act. The execution got barred by time and then a fresh suit was filed on the genuine title. The suit was held barred following the Full Bench in Vedapuratti and dissenting from Kutti Ali. One peculiar feature of this case which makes it distinguishable is that the Malabar Act Section 5 stated that, notwithstanding, the determination of the tenancy, the tenant was entitled to remain in possession until evicted in execution of the decree and Section 6(4) stated that every matter arising under Section 3 was to be deemed to relate to execution. That would mean the statutory tenancy continued even after the eviction order till the compensation for improvement was paid to the tenant.

But after Raghunath Singh and Ors. Vs. Hansraj Kunwar and Ors. (1934 ILR (56) All. 561) was decided by the Privy Council, Vedapuratti stood impliedly overruled. Their Lordships held in that case that when execution of a decree for redemption was allowed to get barred, a fresh suit would lie. The important principle laid down by Lord Russell of Killowen in regard to the right to redeem was that the "right was not barred by res judicata". It meant that the Full Bench case in Vedapuratti which overruled Kutti Ali was no longer good law. This position became clear when a similar question arose before a Full Bench of the Madras High Court in Viroopakshan Vs. Chambu Nayar and Ors. (1937 ILR Mad. 545). That was again a case of a second suit for redemption, the execution in the first suit having become barred. Varadachariar J (as he then was), after referring to the decision of the Privy council observed that the Full Bench decision in Vedapuratti was no longer good law and a second suit lay "unless .....the right of redemption has been extinguished in one of the modes contemplated by the statutes and that the mere fact that a decree for redemption obtained on a former occasion has not been executed will not prevent the mortgagor from maintaining a subsequent suit for redemption". The result was that with the overruling of

Vedapuratti, the decision in Kutti Ali revived. To the extent Mayankutti Vs. Kunhammad (1917 ILR (41) Mad 641) (which was relied upon by the High Court in the judgment under appeal before us) dissented from Kutti Ali, the said dissent would therefore no longer hold good. That is how, Kutti Ali still remains and governs the situation on the facts before us. The facts before us are again similar to those in Amina Vs. Ahmad (1949 (1) MLJ

465). That decision is similar to Kutti Ali and the said ruling was followed. There the first suit was for eviction solely based on tenancy and the execution was allowed to become time bared as in the case before us. The second suit for eviction based on title was held maintainable and not barred. Satyanarayana Rao, J. observed:

> "On the principle of the decision in Kutti Ali vs. Chindan, I think that the second suit based on title is not barred.....A suit based on tenancy is very narrow in its scope and it is unnecessary very often for the plaintiff landlord to plead his title; it is enough for him in such a suit to prove the lease and the tenancy and that it was validly terminated."

In that case too, the fresh suit was filed within 12 years from the date fixed in the earlier compromise decree. The possession during the period granted under the compromise was treated as permissive. A similar situation arose again in Madhavan Variar vs. Chathu Nambiar [1950 (2) MLJ 501] before Satyanarayana Rao and Viswanatha Sastri, JJ. They observed (p.504) that "as the cause of action in the present suit was different from the cause of action in the earlier suit, the decision in Mayan Kutti vs. Kunhammad, had no application". In our view, the decision in Kutti Ali and in Amina are directly in point and are correctly decided. Both relate to an earlier suit based on a lease when the execution of the decree was time barred and the second suit was based on title. The second suit was held neither barred by section 47 CPC nor by section 11 CPC. So far as mortgage cases are concerned, the position stood settled long back by the decision of the Privy Council in Raghunath Singh's case as explained in the Full Bench in Viroopakshan. In fact, this Court approved the Privy Council judgment in Raghunath Singh and held that a second suit for redemption was maintainable even if the earlier decree for redemption stood barred by limitation. (see Mhadaagonda Ramgonda Patil and Ors. Vs. Shripal Balwant Rainade and Ors. [1988 (3) SCC 298], Maganlal Vs. Jaiswal Industries, Neemach and Ors. [1989 (4) SCC 344] and Harbans Singh and Anr. Vs. Guran Ditta Singh and Anr. [1991 (2) SCC 523]. We, accordingly hold on the above line of cases that the present suit is not barred by Section 11 or Section 47 of the Code of Civil Procedure.

We have, in the above discussion, covered all the cases referred to by the High Court in the judgment under appeal except one, namely, Dinu Yesu Desai Vs. Shripad Baji Carware (AIR 1919 Bom.34). That case, in our view, is clearly distinguishable because in the first decree for redemption which stood barred by time for execution purposes, it was also stated that the plaintiff's "right to redeem shall be for ever barred". In fact, in that case, on that ground the High Court distinguished Ramji Vs. Pandharinath (1918 ILR (43) Bom 334 (SB)) where there was no such clause. In Ramji, second suit for redemption was held maintainable as in the Privy Council case and Vedapuratti of the Madras High Court was clearly dissented. Hence Dinu Yesu Desai is clearly distinguishable and does not apply. In principle, if the second suit in redemption cases is maintainable "unless the right

to redeem itself stood barred", on the same parity of reasoning, the second suit on title (where the earlier decree on lease stood barred) would be maintainable "unless the title itself stood barred".

As stated under Point 2, the second suit on title was filed on 5.8.70 within 12 years of the commencement of the adverse possession on 19.12.58 i.e. before 19.12.70. The High Court was in error in holding the suit was not maintainable. The result is a judgment and decree, which was passed in a previous suit under the Rent Control Act by which it was held that respondent was tenant and that he was required to vacate the premises on or before 19.12.1958, would not bar a fresh suit for recovery of possession from a tenant. Reason being that the tenant has not acquired title over the property by adverse possession. It is true that the appellant could have executed the decree passed in the said suit. He had not executed the same on the alleged ground that there was a fresh agreement of tenancy. Whatever may be the position, after lapse of three years it was not open to the appellant to file an application for executing the said decree under the Limitation Act, 1908. Still there is no bar under the Rent Act or under the Limitation Act, 1908. Still there is no bar under the Rent Act or under the Code of Civil Procedure for filing a suit for recovery of possession from the tenant, who had failed to deliver the possession on the basis of a decree passed against him. Unless, the defendant - tenant establishes that he has become owner of the suit property by adverse possession, the suit filed by the owner on the basis of his title cannot be dismissed despite the fact that application for the execution of the decree passed under the Rent Act was barred after lapse of three years. The title of the plaintiff over the suit property was not extinguished (i) by the act of the parties including adverse possession, (ii) by the decree of the Court or (iii) by not executing the decree which was passed in a previous suit. If there is any agreement between the parties after passing of the decree, permitting the tenant to continue in the premises, he may either be a tenant, licensee or a trespasser. Presuming that no fresh tenancy was created or license was granted then also respondent has failed to acquire title by adverse possession on the date of the suit i.e. 5.8.1970, because as per the decree he was entitled to occupy the premises up to 19.12.1958 as a tenant. By lapse of time, plaintiff has lost right to execute the previous decree as it became time-barred but has not lost the title. Unless the title is extinguished, second suit by the owner if filed within period of limitation is not barred.

We allow the appeal and restore the decree of the eviction as granted by the trial Court and as affirmed by the first appellate Court. There will be no order as to costs in this appeal.