PETITIONER:
MADHAVKRISHNA & ANR.

Vs.

RESPONDENT:
CHANDRA BHAGA & ORS.

DATE OF JUDGMENT: 23/09/1996

BENCH:
K. RAMASWAMY, G.B. FATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Leave granted.

This appeal by special leave arises from the judgment and order dated July 3, 1995 passed by the High Court of Madhya Pradesh Bench at Gwalior in S.A. No. 182/89.

The admitted facts are that Mansaram had two sons by name, Babulal and Parasram. The appellants are the descendants through Babulal and the respondents are descendants through Parasram. In an earlier suit No. 384-A/64, the respondents pleaded in their plaint that Mansaram, Babulal and Parasram were members of the joint family and, therefore, each of them was entitled to 1/3rd share in the suit property. They sought for partition and a decree for partition by meets and bounds to the extent of their 1/3rd share in the said house.

It was held that Mansaram was the exclusive owner of the property and that it was not a joint family property and that the respondent have no right to partition of the said property. The decree has become final. Mansaram, during his life time, had executed a registered will on March 28, 1964 bequeathing the properties to the appellants and Mansaram died on December 12, 1968. The appellants filed the suit on November 14, 1977 for declaration of title and for possession thereof. The Civil Court in Suit No. 942-A of 1984, VIIth Civil Judge, Class II, Gwalior by order dated May 10, 1985 decreed the suit. On appeal, the 4th Additional Judge, Gwalior upheld the same by decree and judgment dated August 21, 1989. The High Court in the second appeal while upholding that the Mansaram was the owner and had validly bequeathed it under the Will in favour of the appellants set aside the decree on the ground that the respondents had perfected the title by adverse possession. Thus, this appeal by special leave.

It is seen that the respondents have pleaded in their written statement in para 9 as under :

"The plaintiffs are not the exclusive owners of the suit house. The northern portion of House Municipal No.2/7 situated at Nimbaji Ka Bag, Jiwaji Lashkar, was

constructed by Parasram and Mansaram. Parasram had died 25 years ago. The defendants are the heirs of Parasram. The southern portion was constructed by the defendants and Mansaram together. In this way, the defendants are residing in the suit house in the capacity of owners which fact is within the knowledge of the plaintiffs and their ancestors from the very beginning. House Municipal No. 2/7 is of the joint Hindu Family of the plaintiffs and the defendants. For this reason, the plaintiffs have no right to file suit and recover possession and the defendants being in actual possession of the suit land for over 12 years, the suit is barred by limitation and deserves to be dismissed.

No doubt there is an issue raised on the plea of adverse possession and findings recorded by the courts below was that the respondents had not perfected their title by adverse possession. The High Court has reversed that finding on the ground that the respondents remained in possession for more than 12 years and thereby they perfected their title by adverse possession. The question is: whether the view of the High Court is correct in law ? A reading of the pleading would clearly indicate that they set up their own title to the property and they have remained in possession for more than 12 years and, therefore, they sought for the suit to be dismissed on that ground. In view of the fact that Mansaram was found to be the owner in the earlier suit and he died on December 12, 1968 until then the question of adverse possession as against Mansaram was not pleaded. In this case, except repeating the title already set up but which was negatived in the earlier suit, namely, that they had constructed the house jointly with Mansaram, there is no specific plea of disclaiming the title of the respondents from a particular date, the hostile assertion thereof and then of setting up adverse possession from a particular date to the knowledge of the respondents and of their acquiescence. Under these circumstances, unless the title is disclaimed and adverse possession with hostile title to that of the Mansaram and subsequently as against the appellant is pleaded and proved, the plea of adverse possession cannot be held proved. In this case, such a plea was not averred nor evidence has been adduced. The doctrine of adverse possession would arise only when the party has set up his own adverse title disclaiming the title of the plaintiff and established that he remained exclusively in possession to the knowledge of the appellant's title hostile to their title and that the appellant had acquiesced to the same. Since there is no plea that he had claimed any hostile title against Mansaram, the owner of the property, the earlier decree operates as res judicata. The present suit was filed within 12 years from date of the demise of Mansaram; hence, it was obvious that no adverse possession has been perfected against the appellant. Moreover, as against Mansaram, the predecessor in title of the appellant, the earlier decree operated as constructive res judicata. The present suit was filed within 12 years from the date of the demise of Mansaram; hence, it

was obvious that no adverse possession had been perfected against the appellant. Moreover, as against Mansaram, the predecessor in the title of the appellant, the earlier decree operates as constructive res judicata of the principle of might and ought. The High Court, obviously, was incorrect in its finding that the respondents had perfected their title by adverse possession.

The appeal is accordingly allowed. The judgment and decree of the High Court stands set aside and that of the trial Court and the appellate Court stand restored. No costs.