

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ R.S.A. NO.66 OF 2014

% Date of decision : 20th February, 2015

RAMESH CHANDER GUPTA Appellant
Through: Mr. Munish Tyagi, Advocate

versus

KANTA GUPTA Respondent
Through: Mr. Sanjay Pathak, Advocate as
amicus curiae.

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. The appellant instituted a suit for declaration and permanent injunction against the respondent which was dismissed by the learned Civil Judge. The appellant's first appeal has been dismissed. The appellant has approached this Court in second appeal. For the sake of convenience, the appellant and the respondent are referred as per their rank in the plaint as 'plaintiff' and 'defendant', respectively.

2. The plaintiff and the defendant jointly purchased shop No.8, Market A-5B/A-5C, Janak Puri, New Delhi measuring 136.25 square feet (hereinafter referred to as the "suit property") from Delhi Development Authority in an auction on 19th May, 1975. The plaintiff claims to have paid the entire sale consideration of Rs.29, 200/-. The plaintiff further claims that the defendant's name was added merely for the sake of giving respect to the

defendant being his elder sister-in-law (The defendant is the wife of the plaintiff's elder brother). The plaintiff claims to be in continuous, uninterrupted and exclusive possession of the suit property from the date of the purchase. The plaintiff further claims that he was carrying on the business in the name of his proprietorship concern "Sandeep Store" in the suit property. The name of the proprietorship concern was later changed to "Janak Corner". The plaintiff relies on the registration certificate of the establishment in the name of his proprietorship concern. The plaintiff seeks declaration of sole, exclusive and absolute ownership of the suit property on account of long, continuous and uninterrupted possession for more than 12 years and permanent injunction from restraining the defendant from selling, transferring or alienating the same.

3. The defendant did not appear despite service and was proceeded *ex parte* by the Trial Court. The plaintiff led *ex parte* evidence by examining himself in the witness box as PW-1. The plaintiff proved the auction letter Ex.PW-1/2, which is in the joint names of the parties. The plaintiff proved the receipts of payment of the auction money as Ex.PW-1/3 and 1/4. The plaintiff proved the certificate issued by Bank of India as Ex.PW-1/5 to show that the bank draft towards the sale consideration was got prepared by him. The plaintiff proved the letters of Delhi Development Authority as Ex.PW-1/6 and 1/7, which are in the joint names of both the parties. The plaintiff proved the certificate of registration of his proprietorship firm as Ex.PW-1/8 and 1/9. The Plaintiff also proved the documents relating to the property tax as Ex.PW-1/10 and 1/11 to show the payment of property tax by him.

4. Learned counsel for the appellant urged at the time of hearing of the appeal that the plaintiff has become sole, exclusive and absolute owner of the suit property by adverse possession. It is submitted that the plaintiff paid the entire sale consideration of the suit property at the time of auction and the name of the defendant was added only to give respect to her being his elder sister-in-law. The plaintiff had been carrying on the business in the name of his proprietorship concern earlier as “Sandeep Store” and now as “Janak Corner”. The plaintiff is also paying the property taxes. It is further submitted that the defendant instituted a suit for permanent/mandatory injunction against the plaintiff in July, 1984, which was dismissed in default on 11th October, 1988. The defendant did not challenge the order of dismissal and therefore, the defendant has given up her rights in the suit property.

Law with respect to adverse possession

5. It is well settled that the possession of one co-owner is considered in law as possession of all co-owners. The possession of a co-owner is presumed to be on the basis of joint title. Long and continuous possession by itself would not constitute adverse possession. In order to constitute adverse possession, it is not enough to show that one of them is in sole possession and enjoyment of the properties. The co-owner out of possession must be proved to have had notice of assertion of hostile possession ousting him. The relevant judgments are as under:

5.1 In *P. Lakshmi Reddy v. L. Lakshmi Reddy*, AIR 1957 SC 314, the Supreme Court held that the possession of one co-heir is considered, in law, as possession of all the co-heirs. The relevant portion of the said judgment is

reproduced hereunder under: -

*“8...But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Corea v. Appuhamy*, 1912 AC 230 [C]. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.”*

(Emphasis supplied)

5.2 In *Maharajadhiraj of Burdwan, Udaychand Mahatab Chand v. Subodh Gopal*, (1970) 3 SCC 681, the Supreme Court observed that a possession of the co-owner, howsoever long, cannot by itself be held to be adverse. The relevant portion is reproduced as under:-

“11. We are unable to appreciate the contention of the appellant that he had acquired a permanent right in the suit lands in view of the fact that he was in exclusive possession of the same for a long time. The appellant had not put forward a plea of adverse possession. Once it is held that he is a co-owner of the lands in question, his possession, however long it might be, unless it is adverse to the other co-owners cannot confer on him any right.”

(Emphasis supplied)

5.3 In *Karbalai Begum v. Mohd. Sayeed and Anr.*, (1980) 4 SCC 396, the Supreme Court held that mere non-participation in the rent and profits of a land of a co-owner does not amount to ouster. Relevant portion of the said judgment is reproduced as under: -

“7... It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession....”

5.4 In *Kuldip Mahaton v. Bhulan Mahato*, (1995) 2 SCC 43, the Supreme Court held that the adverse possession has to be expressly pleaded and proved. Relevant portion is reproduced hereunder:-

“2. ... It is settled law that one co-owner cannot plead adverse possession against another co-owner unless, as stated earlier, there is an express plea and proof of hostile title asserted to and remained in possession in assertion of that right to the knowledge of the appellants. In the absence of such a pleading and proof, the finding of the appellate court that Bhulan had acquired the title to the property by prescription is clearly illegal.”

(Emphasis Supplied)

5.5 In *Vidya Devi v. Prem Prakash*, (1995) 4 SCC 496, the Supreme Court discussed the three essential ingredients for establishing the plea of ouster of a co-owner as under:-

28. ‘Ouster’ does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile

animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law. ”

(Emphasis supplied)

5.6 In *Annasaheb Bapusaheb Patil v. Balwant alias Balasaheb Babusaheb Patil*, AIR 1995 SC 895, the Supreme Court held that even mutation of the property in the name of one co-owner for collection of rent and revenue does not prove hostile act against the other. Relevant portion of the said judgment is reproduced as under:-

“15...The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member by of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one, therefore, is the possession of all. The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmation that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other.... ”

(Emphasis supplied)

5.7 Same view was taken in *Darshan Singh v. Gujjar Singh*, (2002) 2 SCC 62, in which the Supreme Court has held as under:-

“7...It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers.”

XXX

XXX

XXX

9. *In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.”*

(Emphasis supplied)

5.8 In *MD. Mohammad Ali v. Jagadish Katila*, (2004) 1 SCC 271, the Supreme Court held that long and continuous possession by itself would not constitute adverse possession; a co-sharer becomes a constructive trustee of other co-sharers and the right of the other co-owners would be deemed to be protected by the trustees. Relevant portion of the judgment is reproduced hereunder:-

“19. Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a constructive trustee of other co-sharer and the right of the appellant and/or his predecessors-in-interest would, thus, be deemed to be protected by the trustees...”

XXX

XXX

XXX

25. Possession of a property belonging to several co-sharers by one co-sharer, it is trite, shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in

the name of one co-sharer would not amount to ouster unless there is a clear declaration that the title of the other co-sharers was denied and disputed. No such finding has been arrived at by the High Court.”

(Emphasis supplied)

5.9 In *T. Anjanappa v. Somalingappa*, (2006) 7 SCC 570, the Supreme Court held that mere possession, howsoever long, does not necessarily mean that it is adverse to the true owner. Adverse possession really means hostile possession. Relevant portion of the said judgment is reproduced hereunder:-

“14. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful owner's title e.g. trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession:

“14. ... Adverse possession means a [hostile possession] which is expressly or impliedly in denial of title of the true owner. Under Article 65 [of the Limitation Act,] burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. ...

15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all. (See *Annasaheb Bapusaheb Patil v. Balwant* [(1995) 2 SCC 543, p. 554 : AIR 1995 SC 895, p. 902] , SCC p. 554, paras 14-15.)”

15. An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than an owner (that is, with the intention of excluding all persons from it, including the rightful owner), he is in adverse possession of it. Thus, if A is in possession of a field of B's, he is in adverse possession of it unless there is something to show that his possession is consistent with a recognition of B's title. (See *Ward v. Carttar* [(1865) LR 1 Eq 29 : 35 Beav 171 : 55 ER 860] .) Adverse possession is of two kinds, according as it was adverse from the beginning, or has become so subsequently. Thus, if a mere trespasser takes possession of A's property, and retains it against him, his possession is adverse ab initio. But if A grants a lease of land to B, or B obtains possession of the land as A's bailiff, or guardian, or trustee, his possession can only become adverse by some change in his position. Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession against all who cannot show a better title, but also, if the adverse possessor remains in possession for a certain period of time produces the effect either of barring the right of the true owner, and thus converting the possessor into the owner, or of

depriving the true owner of his right of action to recover his property and this although the true owner is ignorant of the adverse possessor being in occupation.
(See *Rains v. Buxton* [(1880) 14 Ch D 537 : 43 LT 88] .)”

(Emphasis supplied)

5.10 In *Pappayammal v. Palanisamy and Others*, (2005) 3 Mad LJ 32, the Madras High Court summarised the principles relating to the plea of adverse possession set up by a co-owner against the other co-owner. Relevant portion of the said judgment is reproduced as under: -

“32. The following are the important principles, laid down in the above decisions of this Court as well as the Supreme Court:

i) A party can plead adverse possession only when he admits that another person has got title.

ii) In the case of a co-owner, mere possession, however long it might be, would not constitute adverse possession. The possession must be over the statutory period and there must be clear ouster to the knowledge of the co-owner against whom the adverse possession is pleaded.

iii) As between the co-owners, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment of one of them to the knowledge of the other, so as to constitute the ouster. The burden of making out ouster is on the person, claiming to displace the lawful title of the co-owner, by his adverse possession.

iv) The party pleading adverse possession must state with sufficient clarity as to from when his adverse possession commences and the nature of his possession.

v) When the co-owners are close relations, something more is to be proved, to prescribe title by adverse possession, than a case between two strangers.

vi) It would not be sufficient to show that one co-owner was in separate possession of the property and another co-owner was out of possession.

vii) A single circumstance of payment of tax or mutation of records would not, by itself, establish ouster or adverse possession as against the co-owner.”

(Emphasis supplied)

6. **Findings**

6.1 The plaintiff has neither pleaded nor proved the plea of adverse possession.

6.2 The plaintiff has also not pleaded or proved the ouster of the defendant.

6.3 The plaintiff, admittedly, did not issue any notice to the defendant to claim absolute ownership to the exclusion of the defendant.

6.4 There are no pleadings as to when his adverse possession commenced.

6.5 The possession of the plaintiff is deemed to be on behalf of both the co-owners and the plaintiff cannot claim possession adverse to the defendant.

6.6 The continuous possession of more than 12 years would not entitle the plaintiff to claim the sole ownership of the suit property.

6.7 The payment of entire sale consideration by the plaintiff would not confer exclusive title on the plaintiff since the suit property has been admittedly purchased in the joint names of the parties,

6.8 The payment of property taxes by the plaintiff is not sufficient to confer the absolute ownership of the suit property on the plaintiff alone.

6.9 The dismissal in default of the suit for permanent/mandatory injunction instituted by the defendant against the plaintiff does not amount to ouster of the defendant and, therefore, does not help the plaintiff.

6.10 The plaintiff's claim also appears to be barred by the provisions of Benami Transactions (Prohibition) Act, 1988.

6.11 There is not infirmity in the concurrent findings of the Courts below.

6.12 No substantial question of law arises for consideration in this appeal.

Conclusion

7. On careful considerations of the submissions made by learned counsel for the plaintiff and applying the well settled law discussed above, this Court finds no merit whatsoever in the second appeal, which is hereby dismissed.

J.R. MIDHA, J

FEBRUARY 20, 2015

dk/rsk