

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 220 of 2001**Parmanand and others ---- **Appellants/Plaintiffs****Versus**Bitawan Bai and others ----**Respondents/Defendants**

Mr. B.P. Sharma, Advocate with Mr. Sameer Uraon,
Advocate for the appellants.
Mr. Neeraj Sharma, Dy. G.A. for the State.
None for the respondents.

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order****06/01/2016**

Heard.

1. This second appeal is directed against the impugned judgment and decree dated 09.04.2001 passed by IIIrd Additional District Judge, Raipur in Civil Appeal No.1-A of 2000 by which, the learned Court below has affirmed the judgment and decree of the Trial Court and dismissed the appeal.

2. This appeal was admitted on the following substantial question of law :

“ Whether the Court below has erred in law in as much as in not appreciating the legal position that whether the co-owner can be ousted from his right as a co-owner applying the principle of adverse possession.”

3. The appellants/plaintiffs filed suit seeking a declaration and

injunction in their favour and against the defendants on the pleadings *inter alia* that the original plaintiffs and defendant No.1 are daughters of Itwari and Rambati (deceased defendant No.2). Itwari died on 07.08.1962. The plaintiffs and defendants being the heirs were entitled to succeed to the property of deceased Itwari, in equal share. It was pleaded that the plaintiffs came to know and cause of action arose for them when it was revealed that defendant Bitawan Bai, their sister proceeded to enter into agreement to sell joint property to third parties and apprehending that she may dispose off the joint property effecting the interest of the plaintiffs, suit is being filed.

4. In the written statement, Bitawan Bai defendant No.1 took the stand that the property left behind by Itwari after his death was already partitioned and the land in dispute allotted to her share. It was also stated that after death of Itwari, his entire property was recorded in the name of their mother Rambati and continued as such till her death. During her lifetime, Rambati executed a sale deed in favour of Bitawan Bai in respect of various land including land in dispute on 09.10.1967. Thereafter, Bitawan Bai acquired the title through transfer and later on, her name was also recorded in the revenue records to the exclusion of all. She has also perfected title by adverse possession against the plaintiffs.

5. It is relevant to note that when the suit was filed, an order of temporary injunction was passed on 17.01.1989 by the Trial Court restraining the defendants from executing and registering sale deed in respect of the land in dispute. However, on that day itself, sale deed was executed by Bitawan Bai in favour of other defendants.

6. Learned Courts below dismissed the suit recording a finding that Bitawan Bai had perfected title by adverse possession as against all including plaintiffs as the land in dispute was recorded in the name of Rambati after death of Itwari and thereafter, in the year 1967, it was sold by Rambati in favour of Bitawan Bai and Bitawan Bai thereafter, continued in possession of the property in dispute and thereby perfected her title by possession which was adverse

and hostile to the plaintiffs. In this manner, even though, it was held that being successor of deceased Itwari, all the daughters including plaintiffs, defendant No.1 were entitled to share, holding that the plaintiffs lost title due to prescription of title by adverse possession by defendant No.1, dismissed the suit.

7. Relying upon the judgment of the Supreme Court in the case of **Md. Mohammad Ali (dead) By Lrs vs. Jagadish Kalita and others, (2004) 1 SCC 271**, learned counsel for the appellants argued that the Courts below have committed gross illegality in dismissing the suit by recording finding of prescription of title by adverse possession. It was argued that upon death of Itwari, the four sisters which included all the original plaintiffs and defendant No.1 including their mother Rambati being class I heir, succeeded to the properties of deceased Itwari in accordance with the provision of Hindu Succession Act. Thus, after death of Itwari, all of them became co-owners of the property in dispute and other property held by Itwari at the time of his death. Merely, because Rambati was residing in the house situated over the land in dispute and later on, Bitawan Bai the defendant No.1 joined her to live in the same house would not amount to adverse possession unless there is an evidence of ouster of the appellants or any other hostile act on the part of Bitawan Bai or Rambati within the knowledge of the plaintiffs so as to convert their possession into a hostile possession.

8. Further relying upon the judgment of the Supreme Court in the case of **N. Padmamma and others vs. Ramakrishna Reddy and others, (2015) 1 SCC 417**, learned counsel for the appellants argued that the possession of Rambati and Bitawan Bai in the house situated over the land in dispute would be treated as possession of all other co-heirs and the same cannot be treated as adverse possession merely by any secret hostile animus on the part of Rambati or Bitawan Bai in derogation of title of other co-heirs.

9. None has appeared on behalf of the respondents despite service of notice.

10. It is not disputed that the property in dispute was originally held by Itwari. Further, it is not in dispute that all the original plaintiffs namely Mangtin Bai, Birajo, Thagiya and Bitawan Bai, were all daughters of late Itwari. Rambati is their mother. There is no evidence of any of the party that except this, there was any other successor of late Itwari. Both the Courts below have also recorded concurrent finding on this aspect that after death of Itwari, four daughters and Rambati were his successors. If that be so, apparently and also held by the Courts below, the property of Itwari devolved by intestate succession on all the daughters and his wife, who are all class I heirs and shall take equal share.

11. The question, however, which arises for consideration in this appeal is whether in the facts and circumstances, Bitawan Bai can be said to have perfected title by adverse possession as against other co-owners namely Mangtin Bai, Birajo, Thagiya, who are admittedly her sisters.

12. From the pleadings and evidence of both the parties, the only act of hostility pleaded by defendant is firstly execution of sale deed in respect of the entire land in dispute by Rambati in favour of Bitawan Bai on 09.10.1967 and the other hostile act of Bitawan Bai being an act to dispose off the entire property by entering into agreement to sell and then execution of sale deed on 18.01.1989. It is relevant to mention here that the plaintiffs and defendant No.1 as well as defendant No.2 all had become co-owners of the property of late Itwari, as discussed herein above. If the parties are co-owners, unless there is some act of hostility displayed and acted upon by one of the co-owners as against other co-owners and thereby, retaining possession of the property to the exclusion of other and at the same time, completely hostile and adverse to their respective interest as co-sharer for a continuous period of more than 12 years, it cannot be said that one co-owners has perfected title adverse to the interest of other co-owners of the joint property. The legal position in this regard has been propounded by the Supreme Court in the case of *Md. Mohammad Ali (supra)*, wherein it was held as below :

“17. The fact of the matter, as noticed hereinbefore, is not much in dispute. If it be held that the two brothers Gayaram Kalita and Kashiram Kalita partitioned the properties in question, the heirs and legal representatives of Gayaram Kalita ceased to have any right, title and interest in respect of the share held by Kashiram Kalita. Defendants 7, 8 and 9 had, therefore, a transferable title, unless the same became extinguished.

18.On the other hand, if no partition by metes and bounds took place, the respondents herein were bound to plead and prove ouster of the plaintiff and/or his predecessors-in-interest from the land in question. For the said purpose, it was obligatory on the part of the respondents herein to specifically plead and prove as to since when their possession became adverse to the other co-sharers. Moreover, if the possession of Prafulla Kalita was permissive or he obtained the same pursuant to some sort of arrangement as had been observed by the High Court, the plea of adverse possession would fail.

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 construction 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. As noticed

hereinbefore, the respondents in their written statement raised a plea of adverse possession only against the third set of the defendants. A plea of adverse possession set up by the respondents, as reproduced hereinbefore, does not meet the requirements of law also in proving ouster of a co-sharer. But in the event, if the heirs and legal representatives of Gayaram Kalita and Kashiram Kalita partitioned their properties by metes and bounds, they would cease to be co-sharers in which event a plea of adverse possession as contradistinguished from the plea of ouster could be raised. The courts in a given situation may on reading of the written statement in its entirety come to the conclusion that a proper plea of adverse possession has been raised if requisite allegations therefor exist. In the event the plaintiff proves his title, he need not prove that he was in possession within 12 years from the date of filing of suit. If he fails to prove his title, the suit fails.

20. By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.

21. For the purpose of proving adverse possession/ouster, the defendant must also prove animus possidendi.

22. However, in the event, the case of the defendant was that the predecessors-in-interest of the plaintiff ceased to be his co-sharers for any reason whatsoever, it was not necessary for them to raise a plea of ouster. We may further observe that in a proper case the court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession has been raised in the written statement or not which can also be gathered from the cumulative effect of the averments made therein.

23. The respondents herein, as noticed hereinbefore, have failed to raise any plea of ouster. No finding has been arrived at by the High Court as to from which date they began to possess adversely against the plaintiff or his predecessors-in-interest. Mere non-payment of rents and taxes may be one of the factors for proving adverse possession but cannot be said to be the sole factor. The High Court has not assigned any reason as to how there had been an open ouster by Prafulla Kalita since 1950.

24. Furthermore, the first appellate court applied a wrong principle of law in relation to interpretation of Article 65 of the Limitation Act, 1963. The High Court fell into the same error.

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.

In a subsequent decision in the case of *N. Padmamma and others (supra)*, the aforesaid legal position was reiterated in following words :

10. It is fairly well-settled principle of law that the possession of a co-heir is in law treated as possession of all the co-heirs. If one co-heir has come in possession of the properties, it is presumed to be on the basis of a joint title. A co-heir in possession cannot render its possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs. Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other. [See *Corea v. Appuhamy*, 1912 AC 230 (PC)] Reference may also be made to the decision of this Court in *P. Lakshmi Reddy v. L. Lakshmi Reddy*, AIR 1957 SC 314 wherein this Court has succinctly summed up the legal position as under: (AIR p. 318, para 4)

“4. ... 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. 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."

11. Relying upon the principles stated above, this Court in *Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee*, (1971) 1 SCC 556, almost in similar circumstances held: (SCC p. 561, para 10)

"10. ... In this case we have to consider whether the appellants had laid a claim which a co-sharer could not put forward except by pleading ouster or any other independent ground. Even if they were in actual Khas possession within the meaning of Section 2(k) of the Act it must be held that the plaintiff who was a co-sharer was in constructive possession through the appellants as 'under the law possession of one co-sharer is possession of all the co-sharers'. We see no reason to hold that the observations of this Court to the above effect in *P. Lakshmi Reddy v. L. Lakshmi Reddy* (*supra*) are not applicable to the case before us. The appellants do not claim to be trespassers on the property: neither did they claim any title to the lands adversely to the plaintiff-respondent. The deeming provision of Section 6 must therefore ensure for the benefit of all who in the eye of the law would be regarded as in

actual possession. It follows that the plaintiff had not lost his share in the Bakasht lands and had a right to them though not as tenure-holder or proprietor but certainly as a Raiyat under the provisions of the Land Reforms Act. The appeal must therefore be dismissed with costs.”

12. In *Kalgonda Babgonda Patil v. Balgonda Kalgonda Patil*, 1989 Supp (1) SCC 246, this Court was dealing with inam lands held by the ancestors of the appellants under Vat Hukums of Kolhapur State. The ancestors of the appellant were holding the watan (inam) land in lieu of service and as they were holding in the capacity of watan or inam, they were impartible. The trial court decreed the suit for partition in regard to watan land. In an appeal before the High Court of Bombay, the Division Bench of that Court held *Kalgonda Babgonda Patil v. Balgonda Kalgonda Patil* (1976) 78 Bom LR 720 that when watan (inam) rights were abolished, all rights including the right of partition also stood abolished. A three-Judge Bench of the High Court of Bombay overruled *Laxmibai Sadashiv Date v. Ganesh Shankar Date*, AIR 1977 Bom 350, the view in another case holding that in view of abolition of inam, the properties enure for enjoyment of the members of the family who are entitled to claim partition. This Court held: (*Kalgonda Babgonda Patil*, SCC p. 250, para 13)

“13. ... These watan lands continued to be the hereditary property of the family although according to the custom the watan was only in the name of the senior member of the family and the succession according to the custom was in accordance with rule of primogeniture. ... for the first time under this Act these watans

were abolished and the lands were converted into ryotwari lands and therefore it became partible.”

13. The decisions in *Kalgonda case (supra)* and *Nagesh Bisto Desai Vs. Khando Tirmal Desai*, (1982) 2 SCC 79 were followed in *Shivappa Tammannappa Karaban v. Parasappa Hanammappa Kuraban*, 1995 Supp (1) SCC 162. That was a case arising under the Karnataka Village Offices Abolition Act, 1961. Re-grant was made in that case in the name of the former holder of the village office as a watandar. This Court held that just because the grant was made in the name of watandar, did not mean that the properties ceased to be joint family properties.

14. In *Lokraj v. Kishan Lal*, 1995 (3) SCC 291, also this Court was dealing with abolition of inam under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955. A suit for partition of the inam land was filed which was contested on the ground that abolition of the pre-existing right, title and interest of inamdar and grant of occupancy right to the occupant of the land disentitled anyone to claim a partition of such land. This Court while holding that the suit was not maintainable on account of abolition of pre-existing right, title and interest of the inamdar, observed: (SCC p. 293, para 4)

“4. Consequent to the abolition, the pre-existing right, title and interest of the inamdar or any person having occupation of the inam lands stood divested and vested the same in the State until re-grant is made. The inamdar, thereby lost the pre-existing right, title and

interest in the land. The right to partition itself also has been lost by the statutory operation unless re-grant is made. We are not concerned with the consequences that would ensue after re-grant of this appeal. Therefore, it is not necessary for us to go into the question that may arise after the re-grant.”

15. It is evident from the above that the right of partition was held to have been lost by operation of law. Till such time the grant was made no such right could be recognised, observed this Court. This Court specifically held that it was not concerned with the consequences that would ensue after grant is made. The suit in the present case was filed after the grant of occupancy rights. The question here is whether the grant of such rights is for the benefit of one of the members of the joint family or for all the heirs left behind by Ramachandra Reddy. Our answer to that question is in favour of the appellants. In our opinion, the grant of such occupancy rights in favour of Respondent 1 was for the benefit of all the legal heirs left behind by Ramachandra Reddy. Reliance upon *Lokraj (supra)*, therefore, is of no assistance to the respondents. We are also of the view that the decision in *Lokraj case*, does not correctly apply the earlier decision of this Court in *Bhubaneshwar Prasad Narain Singh (supra)*. With utmost respect to the Hon'ble Judges who delivered the decision in *Lokraj case*, the law was not correctly laid down, if the same was meant to say that even in the absence of a plea of ouster, a co-heir could merely on the basis of grant of the occupancy rights in his name exclude the other co-heirs from partition of the property so

granted.

13. In view of the aforesaid authoritative pronouncement of the Supreme Court, it is crystal clear that unless there is a clear pleadings and proof of ouster, the possession of one co-owner shall be treated a possession of one co-owners and mere possession, cannot by itself, without anything more, be said to be possession hostile to the interest and right of other co-owners. On the contrary, in the absence of any evidence of hostility or ouster, it has to be treated as possession on behalf of other co-owners. Thus, by a mere long possession, one co-owner cannot be set up hostile title against other co-owners unless it is proved that the possession was hostile and open to the knowledge of other co-owners interest, which was within the notice and knowledge of other co-owner and yet did not take any step to get the property repossessed by appropriate relief in a Court of law.

14. If the aforesaid legal position is applied to the facts and circumstances of the present case, it is found that though Rambati had executed a sale deed on 09.10.1967 in favour of Bitawan Bai, there is no evidence to prove that it was within the notice and knowledge of the plaintiffs. Had it been so, certainly it could be said that from the date of knowledge of the sale deed, the possession of Bitawan Bai became hostile to title and interest of plaintiffs. In the present case, there is no such evidence to prove that the plaintiff had been noticed and in knowledge of sale deed of 1967. The defendants disclosed the sale deed for the first time in the written statement. No evidence has been led by the defendants to prove that the execution of sale deed by Rambati in favour of Bitawan Bai was in the notice and knowledge of the plaintiffs. The disclosure of the same at the time of filing of written statement would only be the starting point of hostile possession.

15. The defendant No.1 executed a sale deed in favour of other defendants (purchasers) on 18.01.1989. The order passed by the Trial Court on record shows that on 18.01.1989 itself, the learned Trial Court passed an order restraining defendants from alienating and registering sale deed in respect of the property in dispute.

Therefore, subsequent sale deed which was executed after filing of the suit and in violation of interim order of injunction passed by this Court is of no effect and does not transfer title in favour of respondents/subsequent purchasers.

16. However, the claim of the plaintiffs to 1/4th share as co-owners cannot be accepted because admittedly at the time of death of Itwari, he had living wife and four daughters. Thus, they were in all, five class I heirs. Therefore, each of them would take to the extent of 1/5th share and not 1/4th share as claimed by the plaintiffs. In the result, it is held that the Courts below committed illegality in recording finding that the defendant Bitawan Bai perfected title by hostile possession as against the plaintiffs in respect of the property in dispute.

17. The sale deed dated 09.10.1967 executed by Rambati is not binding upon the plaintiffs in excess of 1/5th share of Rambati over the property in dispute. In other words, the sale deed executed by Rambati in favour of Bitawan Bai has the effect of validity transferring only her share in the joint property held by five co-owners. Therefore, in excess of Rambati's share in the property in dispute, sale deed shall not be binding upon the plaintiffs.

18. In the result, the impugned judgment passed by the Courts below are set aside. Suit filed by the plaintiff is decreed. It is held that each of the plaintiffs along with respondents Bitawan Bai and her deceased mother were entitled to 1/5th share upon death of Itwari and are declared co-owners to the extent of aforesaid declared share in the disputed property. The appellants are also entitled to decree of injunction to the effect that the defendant Bitawan Bai shall not sell, alienate or dispose off the property in dispute.

19. The appeal is partly allowed and decree be drawn accordingly.

Sd/-
(Manindra Mohan Shrivastava)

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