

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.607 of 1995****Judgment reserved on: 17/08/2016****Judgment delivered on: 08/09/2016**

- A. Tulan Ram S/o Late Jangu, Aged about 78 years,
R/o Village – Juigu, Post-Kurdeg, P.S. & Tahsi
Bagicha, Civil & Revenue Distt.Jashpur (CG)
- B. Harbhajan S/o Late Jangu, Aged about 58 years,
R/o Village Phuldih, Post-Jhiki, P.S. & Tahsil-Bagicha,
Civil & Revenue Distt.Jashpur (CG)

---- Appellants**Versus**

- 1A. Baldev Ram S/o Late Sukhnath Ram, aged about
80 years, R/o Village Jamdih, P.S.-Sitapur,
Distt.Surguja (CG)
- B. Rijhan Ram S/o Late Sukhnath, aged about 45
years, R/o Village & Post-Lodam, P.S. Chowki-
Lodam, Tahsil & Distt.Jashpur (CG)
- C. Dhiran S/o Budhram, aged about 35 years, R/o
Village- Mariya, P.S. Kedma, Distt.Surguja (CG)
- D. Anil S/o Nanhi, aged about 40 years, R/o Village
Karabes, P.S.-Sitapur, Distt.Surguja (CG)
2. Paras aged about 27 years, son of Hunda, R/o
village Phooldeey, Tahsil Bageecha, District
Raigarh.

---- Respondents

For Appellants : Mr.B.P.Sharma and Mr.A.N.Pandey, Advocates
For Respondents : Mr.H.B.Agrawal, Senior Advocate with
Mr.J.K.Saxena, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

1. The substantial question of law involved, formulated and to
be answered in the plaintiff's second appeal is as under:-

“Whether the finding of the lower appellate Court is perverse in view of the Hindu Succession Act, 1956.”

[The parties will be referred hereinafter in this second appeal as per their status shown in the plaint before the trial Court.]

2. In order to answer the above-stated substantial question of law, following facts are essential to be noticed are as under:-

(i) Original plaintiff Pandari, [who died during pendency of this second appeal and her LR's were brought on record] filed a suit for declaration of her title and permanent injunction over the schedule suit land. The plaintiff and defendant No.1-Khudi [who also died and her LR's were brought on record] both were sisters and defendant No.2 is their sister's son. The suit property originally held by mother of defendant No.1 and the plaintiff namely Mst.Tilkho widow of Ghasi. The plaintiff's suit before the trial Court was based on two grounds. Firstly, she has purchased the schedule suit property (mentioned in Schedule A) from her mother Smt.Tilkho by payment of cash consideration of ₹ 400/- and registered sale deed was executed in her favour on 14.2.55 and she possessed the suit land from the date of purchase i.e. 14.2.55. It was also the case of the plaintiff that defendant No.1 and mother of defendant No.2 Gewa got

their names mutated in the suit land, against which she made an application to the revenue authorities pursuant to which her exclusive name came to be recorded in the revenue records on 11.1.61 as Bhumiswami of the schedule suit land and thereafter, defendant No.1 and mother of defendant No.2 harvested the crops shown by her in the year 1960 and on lodgment of the report by the plaintiff, a Criminal Case No.23/1960 for offence under Section 379 of the IPC was registered and they were charge-sheeted in the Court of Judicial Magistrate Class-II, Jashpur and defendant No.1 and father & mother of defendant No.2 were sentenced to fine by order of that Court dated 30.7.62. Secondly that suit that her title and possession has been accepted by defendants No.1 and 2 fully and therefore, she has perfected her title by adverse possession. It was also pleaded incidentally that mutation order dated 11.1.1961 was set aside by the Tahsildar, Bagicha by order dated 22.12.82, against which, the plaintiff preferred an appeal before the Sub Divisional Officer, Jashpur, which was dismissed by the Sub Divisional Officer, Jashpur and revision was also dismissed by the Commissioner by order dated 21.3.85 necessitating institution of the suit for declaration of her title and permanent injunction.

(ii) Defendants No.1 and 2 filed their joint written statement

before the trial Court stating inter-alia that the registered sale deed dated 14.2.55 Ex.P/1 is null and void and it did not confer any title to the plaintiff as Mst.Tilkho, mother of defendant No.1 and grandmother of defendant No.2 had no right to sell the schedule suit land as it was ancestral and joint property of the plaintiff, defendant No.1 and mother of defendant No.2 and it was jointly possessed by all three and they are in possession of the respective share of the schedule suit property and order of mutation was passed beyond their back and as such, the plaintiff is not entitled for any relief as prayed for.

(iii) The trial Court has framed the following issues and recorded the conclusion as under:-

	वाद प्रश्न	निष्कर्ष
1.	क्या वादीनी ने विवादग्रस्त भूमि को दिनांक 14-2-55 को 400/- रु. में मु. तिलखों से खरीद कर कब्जा प्राप्त किया था ?	हाँ, कब्जा प्राप्त करना प्रमाणित नहीं
2.	क्या वादीनी द्वारा दि. 14/2/55 को पंजीयन विक्रय पत्र द्वारा जो जमीन खरीदी गई थी, वह विक्रय अवैध एवं शून्य है ?	पैरा 10 अनुसार विक्रय पत्र अंशतः अवैध एवं शून्य है।
3.	क्या राजस्व न्यायालय द्वारा पारित आदेश अवैध एवं शून्य है ?	हाँ
4.	क्या विवादग्रस्त भूमि के भूमि स्वामी मालिक वादीनी है ?	विरोधी आधिपत्य के आधार पर स्वामी है।
5.	क्या विवादग्रस्त भूमि वादीनी प्रतिवादी कं. 1 एवं प्रतिवादी कं. 2 की माता गेवा की संयुक्त स्तत्व एवं आधिपत्य की भूमि थी ?	हाँ
6.	क्या वादीनी ने न्यायालय शुल्क कम अदा किया है ?	आदेश दिनांक 10.7.90 द्वारा निराकृत। कृपया

		आदेशपत्र दिनांक 10.7.90 देखे।
7.	क्या वादीनी विवादग्रस्त भूमि पर स्थाई निषेधाज्ञा पाने की अधिकारीणी है ?	हाँ
8.	क्या विवादग्रस्त भूमि पर वादीनी का आधिपत्य है ?	वर्तमान में राजस्व न्यायालय के आदेश से सयुक्त आधिपत्य है।
9.	सहायता एवं व्यय ?	कंडिका 15 के अनुसार दावा सव्यय डिकि की गया।

(iv) Upon appreciation of oral and documentary evidence available on record, the trial Court by its judgment dated 23.11.91 decreed the suit in favour of the plaintiff by recording the following finding:-

(i) The schedule suit property was held jointly by the plaintiff, defendant No.1 and mother of defendant No.2 till 11.1.1961.

(ii) From 1961 to 1981 the plaintiff remained in possession of the suit land, thereby perfected her title by way of adverse possession and entitled for relief (s) claimed in the suit.

(iii) Mst. Tilkho, mother of the plaintiff and defendant No.1 was entitled to sell only her right and interest in the suit property, she could not have transferred the entire suit land in favour of the plaintiff as the suit property was jointly held and possessed by the plaintiff and the defendants.

(v) The defendants preferred first appeal before the First Appellate Court questioning the judgment and decree of the trial Court partly decreeing the suit on the ground of adverse possession.

(vi) The plaintiff did not prefer any cross-appeal or cross-objection questioning the finding holding the defendants also to be co-owners of the suit property.

(vii) The First Appellate Court by impugned judgment and decree, allowed the appeal and set aside the judgment and decree passed by the trial Court and held that plea of adverse possession has not been proved by the plaintiff as the suit property was owned and possessed jointly by the plaintiff and the defendants.

(vii) Questioning the judgment and decree of the First Appellate Court, this second appeal under Section 100 of the Code of Civil Procedure has been filed, in which substantial question of law framed has been incorporated in the opening paragraph of this judgment.

3. Mr.B.P.Sharma, learned counsel appearing for the appellants, would submit that the plaintiff has clearly established her title of adverse possession, but the First Appellate Court gravely erred in reversing that finding without meeting with the reasonings recorded by the trial Court. He would further submit

that the defendants were convicted for offence under Section 379 of the IPC as they were found dishonestly taking the crops sown by the plaintiff in the suit land and they were sentenced to fine. He would also submit that the plaintiff has also proved that she is Uraon (Gond) by caste and provisions of the Hindu Succession Act, 1956 (hereinafter called as “the Act of 1956”) are inapplicable by virtue of the provision contained in Section 2 (2) of the Act of 1956 and therefore, the plaintiff's mother had a right to sale the entire suit property in favour of the plaintiff and the defendants cannot claim any share in the suit property. Therefore, substantial question of law to be answered in favour of the plaintiff and against the defendants.

4. Mr.H.B.Agrawal, learned Senior Advocate with Mr.J.K.Saxena, learned counsel appearing for the respondents/defendants, would submit that the plaintiff's suit as framed and filed based on plea of perfection of title by adverse possession was not maintainable in law in view of the decision rendered by the Supreme Court in the matter of **Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another**¹. He would further submit that the trial Court has clearly recorded a finding that the plaintiff and defendants No.1 and 2 were co-owners of the suit property, therefore, Mst.Tilkho, mother of the plaintiff and defendant No.1 has no right and title to sale the entire suit property

¹ (2014) 1 SCC 669

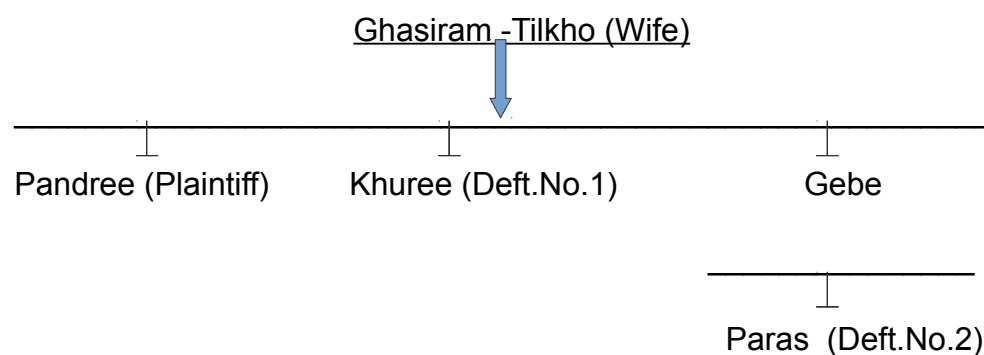
in favour of the plaintiff and finding of the trial Court attained finality in absence of any challenge by the plaintiff by filing cross-appeal or cross-objection before the First Appellate Court. He would also submit that in second appeal preferred by the plaintiff she can question only the finding of adverse possession as on that basis the decree of the trial Court was set aside, but she cannot question the finding recorded by the trial Court holding that the plaintiff, defendant No.1 and mother of defendant No.2 are co-owners of the suit property and therefore, the plaintiff's mother-Mst.Tilkho has no right and title to sale the entire suit property in favour of the plaintiff. He submits that the plaintiff has neither pleaded nor proved that the provisions of the Act of 1956 would not be applicable in the present case. In alternate, he also submits that the plaintiff has even not pleaded the custom applicable among the parties and not led any evidence in this regard and therefore, new plea cannot be permitted to be raised for the first time in the second appeal. He lastly submits that possession of co-owner is deemed to be possession by all the co-owners and therefore, the First Appellate Court has rightly held that the plaintiff has not perfected his title by way of adverse possession and rightly set aside the decree granted by the trial Court, which requires no interference by this Court.

5. In rejoinder, Mr.B.P.Sharma, learned counsel appearing for

the appellants, would submit that question of applicability of provisions of the Act of 1956 is a pure question of law and as such the Act of 1956 would not be applicable to the parties. He would further submit though the plaintiff did not prefer any appeal against the finding recorded by the trial Court by which it was held that defendant No.1 and mother of defendant No.2 along with the plaintiff were co-owners of the suit property, yet that finding will not prevent the plaintiff to question that finding by virtue of provisions contained in Order 41 Rule 33 of the CPC and therefore, substantial question of law deserves to be answered in favour of the plaintiff and against the defendants and second appeal deserves to be allowed and decree of the trial Court be restored with cost(s).

6. I have heard learned counsel appearing for the parties, considered their rival submissions made therein and also gone through the records with utmost circumspection.

7. The following genealogical tree will demonstrate the relationship among the parties:-



8. It is quite vivid that the trial Court recorded a finding while

granting decree in favour of the plaintiff that Tilkho, mother of the plaintiff and defendant No.1 had no right and title to sale the entire schedule suit land to the plaintiff as it was jointly owned and possessed by the plaintiff, defendant No.1 and Geba, mother of defendant No.2 and further held that Tilkho, mother of the plaintiff and defendant No.1, would have only right to alienate her share in the suit land, but decreed the suit on the ground that the plaintiff remained in possession of the suit land from 11.1.1961 to 1981 and the defendants were also convicted by the Criminal Court for offence under Section 379 of the IPC. An appeal being preferred by the defendants, the First Appellate Court set aside the decree holding that the plaintiff and defendants are co-owner of the suit property and therefore, possession of one co-owner cannot be said to be the adverse possession.

9. In order to substantiate the question of law framed, Mr. B.P.Sharma submits that the parties are Uraon by caste i.e. Schedule Tribe and the provisions of the Act of 1956 are not applicable by virtue of Section 2(2) of the Hindu Succession Act, 1956

10. A careful perusal of the plaint would show that the plaintiff has not made such a plea in the plaint, which was filed before the trial Court and even the trial Court in paragraph 9 of its judgment has clearly noted that the plaintiff has not pleaded and proved that

in Uraon caste (Scheduled Tribe), the daughters do not get any share in the property and as such, in absence of plea and proof with regard to the applicability of the provisions of the Act of 1956 to the parties, the appellant/plaintiff cannot be allowed to raise an altogether new plea before this Court in the second appeal.

11. The law in this regard is very well settled. Their Lordships of the Supreme Court in the matter of Panchugopal Barua and others Vs. Umesh Chandra Goswami and others² have held in no uncertain terms that an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than jurisdictional one) not supported by pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under amended provisions. It was held as under:-

“7. A bare look at Section 100 CPC shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a *substantial question of law*, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the section shows that nothing shall be deemed to take away or abridge the power of the court to hear, *for reasons to be recorded*, the appeal on any other substantial question of law, not

2 (1997) 4 SCC 713

formulated by it, if the court is satisfied that the case involves such a question. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a “substantial question of law” is thus, the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 CPC.

8. Generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended provisions. In the present case, no such question of law was formulated in the memorandum of appeal in the High Court and grounds (6) and (7) in the memorandum of the second appeal on which reliance is placed did not formulate any substantial question of law. The learned Single Judge of the High Court also, as it transpires from a perusal of the judgment under appeal, did not formulate any substantial question of law in the appeal and dealt with the second appeal, not on any substantial question of law, but treating it as if it was a first appeal, as of right, against the judgment and decree of the

Subordinate Court. The intendment of the legislature in amending Section 100 CPC was, thus, respected in its breach. Both the trial court and the lower appellate court had decided the cases only on questions of fact, on the basis of the pleadings and the evidence led by the parties before the trial Court. No pure question of law nor even a mixed question of law and fact was urged before the trial court or the first appellate court by the respondent. The High Court was, therefore, not justified in entertaining the second appeal on an altogether new point, neither pleaded nor canvassed in the subordinate courts and that too by overlooking the changes brought about in Section 100 CPC by the Amendment Act of 1976 without even indicating that a substantial question of law was required to be resolved in the second appeal. To say the least, the approach of the High Court was not proper. It is the obligation of the Courts of law to further the clear intendment of the legislature and not to frustrate it by ignoring the same. ”

12. Following the principle of law laid down by the Supreme Court in Panchugopal Barua (supra), in the matter of Kshitish Chandra Purkait vs. Santosh Kumar Purkait and others³, Their Lordships of the Supreme Court have held as under:-

“12. In the light of the legal position stated above, we are of the view that the High Court

3 (1997) 5 SCC 438

acted illegally and in excess of its jurisdiction in entertaining the new plea, as it did, and consequently in allowing the second appeal. Even according to the High Court, the point urged on behalf of the appellant was only a “legal plea” though no specific plea was taken or no precise issues were framed in that behalf. The High Court failed to bear in mind that it is not every question of law that could be permitted to be raised in second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in subsection (5) of Section 100 CPC. Under the proviso, the Court should be “satisfied” that the case involves a “substantial question of law” and not a mere “question of law”. The reason for permitting the substantial question of law to be raised, should be “recorded” by the Court. It is implicit therefrom, that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that could be raised at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded. Thereafter, the opposite party should be given a fair or proper opportunity to meet the same. In the present case, as the extracts from the judgment quoted hereinabove should show, the High Court has totally ignored the mandatory provisions of Section 100 CPC. The High Court

proceeded to entertain the new plea and rendered its decision without following the mandatory provisions of Section 100 CPC. On this short ground, we are of the view that the judgment and decree of the High Court dated 30-11-1982 are illegal and in excess of its jurisdiction and so unsustainable and deserve to be set aside.....”

13. In the present case, no specific plea was taken in this regard by the appellant/plaintiff before the trial Court-duly noted by the trial Court in its judgment, consequently no specific issue was framed and put to trial in that behalf and as such, the appellant/plaintiff cannot be allowed to raise a altogether new plea at the stage of second appeal. The said plea is even otherwise not a substantial question of law as neither there is pleading nor it was considered rather it was recorded by the trial Court in its judgment dated 23.11.1991 (see para.9), yet the appellant/plaintiff did not think it proper to amend its pleading and continued to prosecute her first appeal and second appeal on the basis of original pleadings (unamended). The second appeal was admitted for hearing on 30.10.95 on an substantial question of law incorporated in opening paragraph of this judgment and the appellant/plaintiff on 3.8.2016 filed an application for framing an additional substantial question of law, which has been considered and rejected (see ordersheet dated 8.9.2016).

14. At this stage, Mr.B.P.Sharma, learned counsel appearing for the appellants, would submit that by virtue of the provisions contained in Order 41 Rule 33 of the CPC, the plaintiff is entitled to question the adverse finding recorded by the trial Court and therefore, such finding being perverse and contrary to the record can be challenged successfully by the plaintiff in this appeal though no cross-appeal or cross-objection was filed before the First Appellate Court.

15. In order to appreciate the plea raised at the Bar, it would be appropriate to notice the provision of Order 41 Rule 33 of the CPC which reads as under:-

“33. Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has *omitted* or refused to make such order.

16. A close, careful and critical reading of the above-stated provision would show that the object of Order 41 Rule 33 of the CPC is to avoid contradictory and inconsistent decisions on the same questions in the same suit. This Rule does not confer an unrestricted right to re-open decrees which have become final and it should be exercised in exceptional and rare cases.

17. Way back in the year 1982 in the matter of **Choudhary Sahu (Dead) by LRs. vs. State of Bihar**⁴ Their Lordships of the Supreme Court have held that this rule (Order 41 Rule 33) is widely expressed and it must be applied with great caution. The object of this Rule is to empower the appellate court to do complete justice between the parties. Under this Rule the court has power to make a proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection. It was observed in paragraph 12 and 13 as under:-

“12. The object of this Rule is to avoid contradictory and inconsistent decisions on the

4 (1982) 1 SCC 232

same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The Rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate court does not agree with the opinion of the court appealed from.

13. Ordinarily, the power conferred by this Rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this Rule the court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the law of limitation or the law of court fees etc.

Their Lordships of the Supreme Court have further held that the findings recorded by the lower court in favour of the appellants cannot be interfered with by the appellate court in absence of any appeal filed by the respondents and held in paragraph 7 as under:-

“7. The first part of this Rule authorises the respondent to support the decree not only on the grounds decided in his favour but also on

any of the grounds decided against him in the court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part, that is, he has to file a cross-objection if he has not already filed an appeal against the decree. Admittedly, the State of Bihar had neither filed any appeal nor cross-objection. Obviously, therefore, on the strength of the first part of sub-rule (1) of Rule 22 of Order 41 the State of Bihar could only support the decree not only on the grounds decided in its favour but also on the grounds decided against it. The Commissioner however, has set aside the finding in favour of the appellants on the strength of Order 41, Rule 22(1). In our opinion this he could not do.”

18. Likewise, similar is the proposition laid-down by Their Lordship of the Supreme Court in the matter of **Mahant Dhangir and another Vs. Madan Mohan and others**⁵. The Supreme Court has considered the words ”as the case may require” used in Rule 33 of Order 41. It have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. It is true that the power of the appellate court under Rule 33 is discretionary, but it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that

5 1987 (Supp) SCC 528

discretion on mere technicalities.

19. In the matter of State of Punjab and others vs. Bakshish Singh⁶, Their Lordships of the Supreme Court have held that power under Order 41 Rule 33 CPC has to be exercised cautiously and in rare cases where a totally uncalled for decree/order has been passed by lower court. It was observed in paragraph 8 and 9 as under:-

“8. This provision gives very wide power to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may be require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections.

9. The discretion, however, has to be exercised with care and caution and that too in rare cases where there have been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot, in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case.”

20. Likewise, in the matter of K. Muthuswami Gounder vs.

6 (1998) 8 SCC 222

N. Palaniappa Gounder⁷, Their Lordships of the Supreme Court following the judgment of **Mahant Dhangir** (supra) have held that in exceptional cases Order 41 Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal.

21. The Supreme Court in the matter of **Hardevinder Singh Vs. Paramjit Singh and others**⁸, Their Lordships of the Supreme Court have considered the earlier judgments of the Supreme Court on maintainability of cross-objection/cross-appeal against the finding and it has been clearly held that after the 1976 Amendment of Order 41 Rule 22, it is permissible to file a cross-objection against a finding. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It was observed in para 21 as under:-

“21. After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends

7 (1998) 7 SCC 327

8 (2013) 9 SCC 261

to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi v. Ram Pal*⁹, it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-

9 (2003) 9 SCC 606

objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code.”

22. In the light of the principles laid down by the Supreme Court in the aforesaid case, if the facts of the present case are examined, it is quite vivid that the plaintiff while defending the appeal preferred by the defendants before the First Appellate Court did not prefer either cross-appeal or cross-objection to question a finding with regard to joint ownership and possession recorded by the trial Court and only defended decree passed by the trial Court in her favour based on adverse possession and when the First Appellate Court allowed the appeal of the defendants, finding of the trial Court regarding joint ownership and joint possession has now become final. The First Appellate Court did not find it proper and appropriate to invoke the provision contained in Order 41 Rule 33 of the CPC which is discretionary power, and which has to be exercised in exceptional and rare cases to balance the rights of the parties. In the second appeal preferred by the plaintiff, it cannot be contended successfully that the First Appellate Court ought to have exercised the power under Order 41 Rule 33 of the CPC to set

aside those findings recorded against the appellant/plaintiff. The arguments raised in this behalf is hereby rejected.

23. This brings me to the next point that the plaintiff has perfected her title by way of adverse possession and as such, the trial Court has granted decree and the First Appellate Court set aside the same finding the possession to be permissive.

24. The question whether the plaintiff can maintain a suit for declaration of her title and possession on the basis of adverse possession is no longer res integra, very recently, it has been held by Their Lordships of the Supreme Court in Gurudwara Sahib (Supra), that plaintiff cannot maintain suit for declaration of title based on adverse possession and it can use his adverse possession as a shield/defence. Para 8 of the report succinctly held as under:-

“8. There cannot be any quarrel to this extent that the judgments of the Courts below are correct and without blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession was matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.”

25. The plaintiff has claimed that she came into possession

over the suit land pursuant to the sale deed dated 14.2.55 Ex.P/1 executed by her mother and the trial Court has clearly recorded a finding that the suit land is held by the plaintiff, defendant No.1 and mother of defendant No.2 and jointly possessed by them. The First Appellate Court has held the possession to be permissive and set aside the decree based on adverse possession. The said finding recorded by the First Appellate Court is finding of fact and in accordance with law. I do not find any illegality in the said finding.

26. Question is whether the possession of one co-owner can be adverse to other co-owners. The legal position is well settled and *no longer res-integra* and stand decided by judgments of the Supreme Court. Some of them may be noticed herein profitably:-

(i) In the matter of Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri¹⁰, Their

Lordships of the Supreme Court have held as under:-

“18.Possession by one co-owner is not by itself adverse to other co-owners. On the contrary, possession by one co-owner is presumed to be the possession of all the co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them.....”

(ii) Likewise, in the matter of Vidya Devi v. Prem Prakash¹¹,

Their Lordships of the Supreme Court have held as under:-

“21. Normally, where the property is joint, co-

¹⁰ (1971) 1 SCC 597

¹¹ (1995) 4 SCC 496

sharers are the representatives of each other. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of other joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition.

22. “Adverse possession” means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. (See: *Gaya Parshad Dikshit v. (Dr) Nirmal Chander*¹².) The denial of title of the true owner is a sign of adverse possession. In *Ejas Ali Qidwai v. Special Manager, Court of Wards*¹³ it was observed:

“The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.”

23. Dr Markby in his treatise *Elements of Law* (2nd Edn.) has observed that possession “to be adverse must be possession by a person who does not acknowledge the other’s rights but denies them. (See also: *Munnalal v. Kashibai*¹⁴)

24. It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owners. (See: *Maharajadhiraj of Burdwan, Udaychand Mahatab Chand v. Subodh Gopal*¹⁵; *P. Lakshmi Reddy v. L.*

12 (1984) 2 SCC 286

13 AIR 1935 PC 53

14 AIR 1947 PC 15

15 (1970) 3 SCC 681

*Lakshmi Reddy*¹⁶; *Mohd. Baqar v. Naim-un-Nisa Bibi*¹⁷.)

25. In *Karbalai Begum v. Mohd. Sayeed*¹⁸ it was held that a co-sharer in possession of the property would be a constructive trustee on behalf of other co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustee co-sharer.

27. From the underlined portion extracted above, it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in *P. Lakshmi Reddy case* (supra) which has since been followed in *Mohd. Zainulabudeen v. Sayed Ahmed Mohideen*¹⁹.

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."

(iii) Further in the matter of **Md. Mohammad Ali v. Jagadish**

Kalita²⁰, Their Lordships of the Supreme Court have held as

under:-

"18. On the other hand, if no partition by metes and bounds took place, the respondents herein were

16 AIR 1957 SC 314

17 AIR 1956 SC 548

18 (1980) 4 SCC 396

19 (1990) 1 SCC 345

20 (2004) 1 SCC 271

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.

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.

29. In *Karbalai Begum v. Mohd. Sayeed*²¹ the law has been stated by this Court in the following terms: (SCC p. 399, para 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.”

30. In *Annasaheb Bapusaheb Patil v. Balwant*²² this Court held: (SCC p. 554, para 15)

“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.”

31. In *Vidya Devi v. Prem Prakash*(supra) this Court

21 (1980) 4 SCC 396

22 (1995) 2 SCC 543

upon referring to a large number of decisions observed: (SCC p. 505, paras 27-28)

“27. ... It will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in *P. Lakshmi Reddy case*(supra) which has since been followed in *Mohd. Zainulabudeen v. Sayed Ahmed Mohideen*(supra).

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.”

32. Yet again in *Darshan Singh v. Gujjar Singh*²³ it is stated: (SCC pp. 65-66, para 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.”

It has further been observed that: (SCC p. 66, para 9)

“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

23 (2002) 2 SCC 62

to ouster unless there is a clear declaration that title of the other co-sharers was denied.”

27. Thus, it is well settled that if one co-sharer is in possession of the entire property, his/her possession cannot be adverse to the other co-sharers unless an ouster of other co-sharers is established.

28. Mr.B.P.Sharma, learned counsel for the appellants, placed reliance upon the judgment of the Supreme Court in the matter of Govindammal Vs. R. Perumal Chettiar and others²⁴. In the aforesaid judgment, the Supreme Court relied upon the judgment of the Madras High Court in the matter of Mohaideen Abdul Kadir Vs. Mohd. Mahaideen Umma²⁵ which has laid down the relevant factors to prove ouster and adverse possession against a co-owner which are as under :

- (i) exclusive possession and perception of profits for well over the period prescribed by the law of limitation;
- (ii) dealings by the party in possession treating the properties as exclusively belonging to him;
- (iii) the means of the excluded co-sharer of knowing that his title has been denied by the co-owner in possession.

29. In the considered opinion of this Court, the plaintiff has failed to establish that there has been an ouster of the other co-sharers.

24 (2006) 11 SCC 600

25 ILR (1970) 2 Mad 636

30. Resultantly, I hold that the First Appellate Court is absolutely justified in granting the appeal by setting aside the decree granted by the trial Court. The Substantial question of law is answered in favour of the defendants and against the plaintiff and the second appeal is dismissed, thereby the plaintiff's suit would stand dismissed. No cost(s).

27. Decree be drawn up accordingly.

Sd/-

(Sanjay K Agrawal)
Judge

B/-