

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 111 OF 2016****ALONGWITH****CIVIL APPLICATION NO. 165 OF 2016**

Punja Rama Bodke)
Since deceased through legal heirs)

1a. Smt.Laxmibai Punjaji Bodke)
Age : 74 years, Occ : Agriculturist)

1b. Shri Daulat Punjaji Bodke)
Age : 54 years, Occ : Agriculturist)

1c. Shri Balu Punjaji Bodke)
Age : 46 years, Occ : Agriculturist)

1d. Shri Kisan Punjaji Bodke)
Age : 43 years, Occ : Agriculturist)

1e. Shri Sadashiv Punjaji Bodke)
Age : 37 years, Occ : Agriculturist)
Appellant Nos. 1A to 1E,)
R/o. Ashewadi, Tal. Dindori,)
District : Nashik)

1f. Smt.Chandrabhagabai Pundlik Kangne))
Age : 52 years, Occ : Household,)
R/o. Post Talegaon, Tal. Dindori,)
District : Nashik)

1g. Smt.Tulsibai Baban Kapse)
Age : 50 years, Occ : Household,)
R/o. Ashewadi, Tal. Dindori,)
District : Nashik)

1h. Smt.Alkabai Prabhakar Landge)
Age : 48 years, Occ : Household,)

R/o. Chincholi, Tal. Sinnari,)
District : Nashik)

1i. Smt.Sarlabai Sanjay Mankar)
Age : 34 years, Occ : Household,)
R/o. Tal. Chadegaon, District : Nashik)

..... Appellants
(Org. Defendants)

VERSUS

1. Shivaji Vitoba Bodke)
Age : 57 years, Occ : Agriculture,)
R/o. Ashewadi, Tal. Dindori,)
District : Nashik)

2. Dhakambe Adivas Vividh Karyakari)
Seva Shetkari Society Ltd.,)
Office at Dhakambe, Tal. Dindori,)
District : Nashik)

..... Respondents
(No.1/Org.Pl't and
No.2 Org.Dft. No.2)

Mr.Satyajeet Dighe for the Appellants.

Mr.Girish Agrawal for the Respondent no.1.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 6th DECEMBER, 2016

PRONOUNCED ON : 16th DECEMBER, 2016

JUDGMENT :

By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants (original defendants) have impugned the judgment and decree dated 21st July, 2015 passed by the learned District Judge – 2, Nashik, allowing Civil Appeal No.70 of 2010 filed by the respondent no.1 (original plaintiff) thereby setting aside the judgment and decree dated 22nd February, 2007, passed by the

learned trial Judge in Regular Civil Suit No.10 of 2007 and passing a decree of partition in respect of the suit property and other reliefs. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The parties are described in this judgment as per their original status in Regular Civil Suit No.10 of 2007. Regular Civil Suit No.10 of 2007 was filed by the respondent no.1 herein against Punja Rama Dodake and another. During the pendency of the appeal, Punja Rama Dodake expired leaving behind his legal heirs and representatives, who are the appellants in this second appeal.

3. It was the case of the plaintiff that the plaintiff and the defendant no.1 lived in a joint family and had ancestral properties being Old Gat No.63, 67 and 35 which were in the name of the common ancestor late Ramji Janku Bodke. After the demise of the said Ramji Janku Bodke, the properties were mutated in the name of the father of the plaintiff Vithoba Ramji Bodke being the Karta and eldest son of the Ramji Janku Bodke. The father of the plaintiff and the defendant no.1 being brothers, jointly cultivated the aforesaid three properties until 1973 as members of the joint family. It was the case of the plaintiff that the father of the plaintiff had raised loan against the said properties from various financial institutions in the interest of joint family which could not be repaid timely. There was a dispute amongst the family members. Sometimes in the year 1973, the family settlement was arrived at pertaining to all joint properties.

4. It was the case of the plaintiff that as per the terms of the said family settlement, both the brothers started cultivating the land separately and were in possession accordingly. The terms of the settlement were reduced to writing in a deed dated 19th January, 1975. However, there was no actual measurement and

partition in respect of both the properties by metes and bound. The effect of the said family settlement was not given in the records of the right. On 13th April, 1998, the father of the plaintiff Vithoba Ramji Bodke expired. It was the case of the plaintiff that after demise of the father of the plaintiff, the properties which had come to the share of the father of the plaintiff in the partition and in possession came to the ownership and possession of the plaintiff. The plaintiff claimed to be in possession of land bearing Gat No.37 and Gat No.34. It was the case of the plaintiff that the property bearing Gat No.34 was a grass land. The plaintiff and defendant no.1 were enjoying the property by cultivating and cutting grass.

5. It was the case of the plaintiff that the defendant no.1 however installed a pipeline into the said plot of land and brought some portion under cultivation. In the month of June 2006, the plaintiff insisted that the boundaries of their each share be fixed and to bring the land under cultivation. The defendant no.1 however claimed the exclusive owner of the entire suit property and refused to carry out measurement. The plaintiff thereafter obtained the documents from the revenue record on 17th July, 2006. It was learnt by the plaintiff that after the loan was repaid by his father in the year 1982, defendant no.1 misrepresented and practiced fraud upon the father of the plaintiff and got some documents and affidavit executed from the father of the plaintiff and by misusing those documents got effected the mutation entry no.496 dated 19th August, 1984 in his exclusive name in respect of the entire suit property. It was the case of the plaintiff that the father of the plaintiff and plaintiff had no knowledge about the said mutation entry until 17th July, 2006. The plaintiff accordingly issued a notice to the defendants through his advocate for partition of the suit properties which the defendants refused to accept. The plaintiff accordingly filed a suit (Regular Civil Suit No.10 of 2007) inter alia praying for partition and possession of the share of the portion

of the suit property by metes and bound and for perpetual injunction. The plaintiff also impleaded Dhakambe Adiwasi Vivid Karyakari Seva Sahakari Society Ltd. as party defendant no.2 to the said suit from whom the loan was taken against the suit property.

6. The defendant no.1 filed his written statement and resisted the suit. The defendant no.1 did not deny the relation between the parties inter se and existence of the ancestral properties. It was however pleaded by the defendant no.1 that the suit was barred by law of limitation, that the plaintiff had no right, title or interest into the suit property and that the suit itself was not maintainable. It was contended by the defendant no.1 that the father of the plaintiff himself had preferred an application and affidavit pursuant to which the mutation entry no. 496 dated 13th November, 1984 had been effected and since 1984, he alone was in possession of the suit property as owner thereof. It was alleged by the defendant no.1 that by virtue of the mutation entry no.496, the suit properties had been allotted to him. It was alleged that the land bearing Gat No.63 came to the share of the father of the plaintiff which was sold and the entire consideration was accepted by the father of the plaintiff. It was the case of the 1st defendant that neither the father of the plaintiff ever raised any objection to the mutation entry no.496 until his death nor the plaintiff raised any objection until 2007. The defendant no.1 also alleged oral partition of the suit property in the year 1982. In the alternative, the defendant no.1 alleged that he was in possession of the suit property without any obstruction as against the plaintiff, as the owner thereof and therefore he had become the owner by adverse possession.

7. The defendant no.2 society filed a written statement and prayed that the concerned parties be directed to repay the loan obtained from the said society

against the suit properties. The learned trial judge framed 13 issues. The plaintiff examined himself and relied upon various documents. The defendant no.1 examined himself and relied upon various mutation entries.

8. The learned trial judge passed a judgment and decree dated 22nd February, 2010 and dismissed the said Regular Civil Suit No.10 of 2007. The learned trial judge however directed the defendant no.1 to repay the loan amount of defendant no.2. Being aggrieved by the said judgment and decree dated 22nd February, 2010 passed by the learned trial judge, the original plaintiff preferred an appeal (Civil Appeal No.70 of 2010) in the court of learned District Judge – 2, Nashik. The defendant no.1 did not challenge the said judgment and decree directing him to repay the loan of the defendant no.2. The learned District Judge-2, Nashik passed the judgment and decree on 23rd July, 2015 and allowed the said Civil Appeal No.70 of 2010 filed by the plaintiff. The learned District Judge was pleased to set aside the judgment and decree dated 22nd February, 2007 and decreed the Regular Civil Suit No.10 of 2007.

9. The learned trial judge declared that the plaintiff had one half share from the Northern side out of the suit property i.e. agricultural land Gat No.34 (Old Gat No.35) and that the plaintiff was entitled to partition of the said share by metes and bounds. The learned trial judge passed an order of perpetual injunction against the defendant no.1 his heirs or any other person on his behalf from causing any obstruction into peaceful possession of the plaintiff over northern half portion out of the suit property bearing Gat No.34 and from creating any third party interest therein. The said judgment and decree dated 23rd July, 2015 passed by the learned District Judge-2, Nashik is impugned by the defendants in this second appeal filed under section 100 of the Code of Civil Procedure, 1908.

10. The following substantial questions of law are arising in this appeal

(1) Whether the defendant no.1 could claim title based on the alleged oral partition and also at the same time by way of adverse possession? or both these pleas were inconsistent and could not have accepted by the first appellate court ?

(2) Whether the defendant no.1 who claimed title under alleged oral partition of 1982 being one of the co-sharer of the property could claim title by adverse possession without proving the dispossession of the plaintiff ?

11. Mr.Dighe, learned counsel appearing for the defendants invited my attention to some of the averments made in the plaint, written statement and some portion of the oral evidence led by both the parties. He submits that there was an oral partition of the suit property in the year 1982. The father of the plaintiff himself had made an application and had executed an affidavit pursuant to which the mutation entry bearing no.496 dated 13th November, 1984 had been effected exclusively in the name of the original defendant no.1 and since then he was in exclusive possession of the suit property as thereof. He submits that the suit property was allotted to the original defendant no.1 whereas the property bearing Gat No.63 which land came to the share of the father of the plaintiff was sold and the entire consideration was accepted the father of the plaintiff. He submits that since 1984, till the death of the father of the plaintiff, he never raised any objection to the mutation entry no.496 and after demise of the father of the plaintiff, the plaintiff did not raise any objection in respect of the mutation entry until 2007.

12. It is submitted by the learned counsel for the legal heirs of defendant no.1

that in any event, the defendant no.1 was continuously in possession of the suit property since 1982 which possession was adverse to the title of the plaintiff for more than 12 years and thus by virtue of the adverse possession, his clients became owners of the suit property.

13. It is submitted by the learned counsel for the legal heirs of the defendant no.1 that the learned trial judge had considered the oral and documentary evidence in right prospective and had rightly held that the plaintiff had failed to prove that his predecessors in title got half share into the suit property on partition in the year 1975 and that he had failed to prove that the mutation entry no.496 was null and void. He submits that though the learned trial judge had held that the defendant no.1 had failed to prove that there was an oral partition in the year 1982 and the entire suit property came to his share, the learned trial judge had rightly held that the defendant no.1 had proved that he had become the owner of the suit property by adverse possession. He submits that the learned trial judge had rightly held that the plaintiff had failed to prove that he was in possession of the half area of the suit property of the northern side and failed to prove that the defendant no.1 failed to obstruct his possession over half area of the suit property of the northern side.

14. It is submitted by the learned counsel for the legal heirs of the defendant no.1 that even if the defendant no.1 had failed to prove that there was oral partition in the year 1982, his client had established by leading oral and documentary evidence that he was in adverse possession which was adverse to the alleged title of the father of the plaintiff and thereafter to the title of the present plaintiff. He submits that the defendant no.1 was entitled to raise plea of ownership by virtue of partition being members of the family and also in the alternative was entitled to set up his title by virtue of adverse possession. In support of this submission, learned

counsel for the legal heirs of the defendant no.1 placed reliance on the judgment of this court in case of ***Venubai wd/o Natthu @Devidas Mankar and another vs. Vimlabai w/o. Kesharao Thakare and others, 2013(3) Mh.L.J.895*** and in particular paragraph (9).

15. Learned counsel for the defendant no.1 placed reliance on the judgment of Supreme Court in case of ***Md.Mohammad Ali (Dead) By LRS. vs.Jagadish Kalita and others, (2004) 1 SCC 271*** in support of his submission that the suit for possession was barred by law of limitation under Article 65 of the Schedule to the Limitation Act, 1963.

16. Learned counsel appearing for the defendant no.1 also placed reliance on the judgment of Madras High Court in case of ***Ibramsa Rowther (Minor) and others vs.Sk.Meerasa Rowther and others, AIR 1972 Madras 467*** on the issue of adverse possession raised by the defendant no.1 and more particularly paragraph (8). He submits that since the possession of the original defendant no.1 was settled for more than 12 years to the knowledge of the plaintiff, the legal heirs of the defendant no.1 cannot be ousted.

17. Mr.Agarwal, learned counsel for the respondent no.1 (original plaintiff) on the other hand invited my attention to some of the findings recorded by the learned trial judge in the judgment and decree dated 22nd February, 2010 while dismissing suit filed by his client. He submits that the learned trial judge has specifically rejected the case of the defendant no.1 that there was oral partition in the year 1982 and the entire suit property came to his share. He submits that admittedly the defendant no.1 did not file any cross objections challenging the said findings rendered by the learned trial judge.

18. It is submitted by the learned counsel for the plaintiff that partition took place between the father of the plaintiff and the original defendant no.1 by deed of partition dated 19th January, 1975. He submits that the land bearing Gat No.37 has been converted into Gat Nos. 36A, 36B. Land bearing Gat No.35 is converted into Gat No.34.

19. Insofar as land bearing Gat No.63 is concerned, half portion of the said land has been sold by the father of the plaintiff vide a sale deed. The remaining half portion of the said land is sold by the original defendant no.1 by separate sale deed. The entire consideration upon sale of the half portion of the defendant no.1 was collected by him exclusively. It is submitted by the learned counsel that the learned trial judge had totally overlooked the oral and documentary evidence led by the parties while rendering the findings in favour of the defendant no.1 that he had become the owner of the suit property by adverse possession. He submits that the learned District Judge considered the oral and documentary evidence on that issue in right perspective and has rendered a finding of fact that the defendant no.1 had failed to prove that he had become owner of the suit property by adverse possession. He submits that the learned District Judge confirmed the findings of the learned trial judge that there was no oral partition in the year 1982 and the entire suit property was not allotted to the share of the defendant no.1.

20. It is submitted by the learned counsel that both the courts below have rendered a finding of fact that the mutation entry no.496 in the name of the defendant no.1 was null and void. He submits that the first appellate court rightly held that there was partition between Vithoba Ramji Bodke who was father of the plaintiff and the defendant no.1 in the year 1975 and their share in the joint family

property was crystallized. The defendant no.1 had admitted the said partition effected in the year 1975 and also the execution of the agreement for sale.

21. Learned counsel for the plaintiff placed reliance on the judgment of Supreme Court in case of ***N.Padmamma & Ors. vs. S.Ramakirhsna Reddy & Ors. 2015 ALL SCR 3381*** and more particularly paragraph (11) in support of his submission that even if the defendant no.1 was in possession of the suit property as a co-heir, it is presumed to be on the basis of a joint title. He submits that the defendant no.1 who claimed to be in possession thus could not render his possession adverse to the possession of the plaintiff who was not in possession. Learned counsel for the plaintiff placed reliance on the judgment of Supreme Court in case of ***Govindammal vs. R.Perumal Chettiar and ors. AIR 2007 SC 204*** and more particularly paragraph (7) of the said judgment in support of the aforesaid submission.

22. Learned counsel for the plaintiff placed reliance on the judgment of Supreme Court in case of ***M.Arthur Paul Ratna Raju and others vs. Gudese Garaline Augusta Bhushanabai and another, AIR 1999 SC 2633*** in support of his submission that the co-owner cannot claim adverse possession against another co-owner unless it is established by convincing evidence that he has been ousted from the disputed property. He submits that in this case it was not the case of the defendant no.1 that the plaintiff was ousted from the suit property nor the same was proved before the learned trial judge.

23. Learned counsel placed reliance on the judgment of this court in case of ***Dilipkumar Bherumal Kucheriya vs. Subhashchandra Nemichand Kucheriya & Ors. 2014(6) ALL MR 1*** and in particular paragraphs 10 and 13 in support of his

submission that the plea of the defendant no.1 that he was the owner of the suit property by virtue of alleged oral partition and at the same time were claiming the ownership by virtue of alleged adverse possession were inconsistent and thus were rightly rejected by the learned trial judge.

24. Learned counsel for the defendant no.1 in rejoinder placed reliance on the judgment of this court in case of ***Venubai wd/o Natthu @Devidas Mankar and another*** (supra) and would submit that since there was an oral partition between the parties, merely because there were no partition of the property by metes and bounds, the plaintiff could not canvass that there was no partition at all.

25. Learned counsel for the defendant no.1 also placed reliance on the judgment of Madras High Court in case of ***Ibramsa Rowther (Minor) and others*** (supra) in support of his submission that the suit not having been filed by the plaintiff within the time prescribed under Article 65 of the Schedule to the Limitation Act, 1963, the suit itself was barred by law of limitation.

REASONS AND CONCLUSIONS

26. A perusal of the impugned judgment and decree passed by the learned trial judge indicates that the learned trial judge framed 13 issues. The learned trial judge has held that the plaintiff had proved that his predecessor in title Vithoba Ramji Bodke had got one half share into the suit property on partition in the year 1975. He had also proved that the mutation entry no.496 was null and void. The learned trial judge held that the defendant no.1 had failed to prove that there was an oral partition in the year 1982 and the entire suit property came to his share. The learned trial judge however rendered a finding in favour of the defendant no.1

that he had proved that he had become the owner of the suit property by adverse possession. The learned trial judge has also rejected the plea of the plaintiff that he had failed to prove that he was in possession of the half area of the suit property of the northern side.

27. It is not in dispute that insofar as the findings of the learned trial judge that the defendant no.1 had failed to prove an oral partition in the year 1982 and the entire suit property came to his share is concerned, the defendant no.1 did not challenge the said finding. The learned trial judge in paragraph (13) of the impugned judgment and decree held that from the evidence on record, it appears that due notice prior to mutation was given to the deceased Vithoba and effect of the said entry was given in the 7/12 extract of the affected properties. Until the death of Vithoba, no objection was raised by the defendant no.1 in respect of the said mutation entry no.496.

28. Learned trial judge held that except the bare words, the defendant no.1 had not got any other proof to show that there was oral partition of the property in the year 1982 or that the suit property came to his share upon oral partition.

29. Insofar as the issue as to whether defendant no.1 had proved his title by virtue of adverse possession is concerned, the learned trial judge held that except the bare words of the plaintiff that he was in possession of about half area of the northern side, the plaintiff did not bring any evidence to prove his possession of the half area of northern side whereas the evidence of the defendant no.1 was corroborated by the revenue record. It is held that the plaintiff and his father did not raise any objection in respect of the mutation entry inspite of being aware of the said mutation entry until the date of filing of the suit.

30. A perusal of the judgment and decree rendered by the learned District Judge indicates that the learned District Judge formulated 13 points for determination. Insofar as issue as to whether the defendant no.1 had proved oral partition in the year 1982 and that the entire suit property was allotted to the share of the defendant no.1 is concerned, learned District Judge after considering the oral and documentary evidence confirmed the findings rendered by the learned trial judge and answered the issue in negative. The defendant no.1 has neither filed any cross objection nor could demonstrate as to how the said concurrent finding is perverse.

31. Insofar as issue as to whether the defendant no.1 became the owner of the suit property by adverse possession is concerned, the learned District Judge discussed this issue in paragraph (26) of the impugned judgment and decree and held that the agreement for partition (Ex.62) relied upon by the plaintiff clearly showed that the suit property being agricultural land bearing Gat No.34 (Old Gat No.35) to the extent of one half share from the northern side was allotted to the share of the Vithoba and the southern side area was given to the share of the defendant no.1. The parties agreed further to get the property divided by metes and bounds. It is held by the learned District Judge that the defendant no.1 was claiming exclusive possession over the suit property i.e. Gat No.34 (Old Gat No.35) on the basis of the mutation entry no.496 which was illegal, null and void and it was got prepared by the representation of the defendant no.1. The learned District Judge rendered a finding that it was evident that there was partition between Vithoba and his brother Punja in the year 1975 and their shares were defined while an agreement marked as Ex.62 was reduced in writing in presence of Panchas. The learned District Judge accordingly disbelieved the claims of the defendant no.1 that he was in exclusive possession of the suit property. It is held

that the suit property was agricultural land and was a grass land. The learned District Judge considered the evidence of the defendant no.1 and held that the said evidence reflected that half portion out of the said property was got under cultivation and he had installed pipelines to irrigate half portion of the suit property and was bringing the water from land Gat No.36. The defendant no.1 also admitted that the half portion out of the said property was not under cultivation and it was a barren land. The learned district judge accordingly after considering the oral and documentary evidence held that the defendant no.1 failed to establish his exclusive possession over the suit property since 1984.

32. The learned trial judge also held that the mutation entry no.496 on the basis of which the defendant no.1 claimed adverse possession was null and void. In my view the findings of fact rendered by the two courts based on the oral and documentary evidence and that the mutation entry no.496 was null and void and that the defendant no.1 had failed to prove that there was oral partition in the year 1982 and the entire suit property came to his share being not perverse cannot be interfered with by this court under section 100 of the Code of Civil Procedure, 1908.

33. In my view, the findings of the learned district judge that since the plaintiff had proved that mutation entry was null and void and defendant no.1 had failed to prove that the oral partition of the suit property in the year 1982 and the case of the defendant no.1 of adverse possession was based on such mutation entry and in view of the fact that the defendant no.1 could not establish that his alleged possession in respect of the entire suit property was adverse to the title of the plaintiff, the learned district judge rightly reversed the findings of the learned trial judge and rightly held that the defendant no.1 failed to prove his adverse

possession upon the suit property. In my view, the learned trial judge has considered the oral and documentary evidence in right perspective and has rightly reversed the finding rendered by the learned trial judge on this issue.

34. Insofar as judgment of this court in case of ***Venubai wd/o Natthu @Devidas Mankar and another*** (supra) relied upon by the learned counsel for the defendant no.1 is concerned, in the said judgment the registered partition deed was relied upon and was proved. In that context, this court held that once the shares are defined by way of partition, the partition becomes complete. The parties may divide the property by metes and bounds or they may continue to live together and enjoy the property in common as before. The property ceases to be the joint family property upon the shares being defined and the parties hold the property as the tenant-in-common. In my view, since in this case the defendant no.1 had failed to prove oral partition and on the other hand the plaintiff had proved the partition in the year 1975 by a registered deed of partition, the judgment of this court in case of ***Venubai wd/o Natthu @Devidas Mankar and another*** (supra) would not assist the case of the defendant no.1 and is clearly distinguishable in the facts of this case.

35. Supreme Court in case of ***N.Padmamma & Ors.*** (supra) has held that the possession of one co-heir did not render its possession adverse to other co-heirs who are not in possession. The ouster of the other co-heirs must be evident of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other. Such possession in the hands of one of the co-heirs is treated as possession of all the co-heirs. In my view in this case, the defendant no.1 had failed to prove the exclusive possession of the suit property as is rightly held by the two courts below. Even if, the defendant no.1 continued to

be in possession inspite of the partition decree of 1975, the said possession of the defendant no.1 could not be considered as adverse to the title of the plaintiff. It was not the case of the defendant no. 1 that by virtue of the alleged partition of the partition of 1975, the plaintiff was dispossessed or evicted by the defendant no.1. In my view the principles of law laid down by the Supreme Court in case of **N.Padmamma & Ors.** (supra) would squarely applies to the facts of this case. I am respectfully bound by the said judgment.

36. Supreme Court in case of **Govindammal** (supra) has held that if the co-sharer gives notice claiming partition of the suit property and possession but does not pursue the said action further that will not be sufficient to show that co-sharer had lost her right by adverse possession. In this case, both the courts have held that the revenue entry in the name of the defendant no.1 was illegal and void and that the defendant no.1 could not prove any adverse possession based on such revenue entry. In my view the judgment of Supreme Court in case of **Govindammal** (supra) would assist the case of the plaintiff. The said judgment squarely applies to the facts of this case. I am respectfully bound by the said judgment.

37. This court in case of **Dilipkumar Bherumal Kucheriya** (supra) held that the party cannot claim possession pursuant to a partition in the joint family and at the same time claim adverse possession which is not permissible in law. In my view the plea of the defendant no.1 that there was a oral partition in the suit property in the year 1982 and at the same time he pleaded adverse possession against the other co-owners which is inconsistent and contrary. Be that as it may, the defendant no.1 could not prove any of these two pleas raised before the learned trial judge. The judgment of this court in case of **Dilipkumar Bherumal Kucheriya** (supra)

applies to the facts of this case. I am respectfully bound by the said judgment.

38. Insofar as substantial question of law no.1 formulated by this court is concerned, in my view the plea of the title under an alleged oral partition and claim of title under alleged adverse possession are inconsistent and thus learned District Judge rightly rejected the plea of adverse possession. The said substantial question is accordingly answered.

39. Insofar as substantial question no.2 is concerned, in my view the learned district judge has after considering the oral and documentary evidence has rightly held that the defendant no.1 had not proved the exclusive possession of the entire suit property. The said question is accordingly answered in negative.

40. In my view the second appeal is devoid of merits. I, therefore pass the following order :-

- (a) Second Appeal No.111 of 2016 is dismissed. In view of the dismissal of the second appeal, civil application does not survive and is accordingly dismissed.
- (b) No order as to costs.

[R.D. DHANUKA, J.]