

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Appeal Suit No.444 of 1997

JUDGMENT:

This first appeal suit, under Section 96 of the Code of Civil Procedure, 1908, by the appellants-defendants 1 to 3, is directed against the decree and judgment, dated 19.02.1997, of the learned Senior Civil Judge, Adilabad, passed in O.S.No.52 of 1996.

2. I have heard the submissions of Sri *V.Ravi Kiran Rao*, learned counsel appearing for the appellants-defendants 1 to 3, and of Sri *V.Ravinder Rao*, learned counsel appearing for the contesting respondents. I have perused the material record.

3. The parties shall hereinafter be referred to as the plaintiff and the defendants for convenience and clarity.

4. As this is a first appeal suit and this Court is the last Court of fact, it is necessary to refer to the pleadings of the parties.

4.1 The case of the plaintiff, in brief, is this: - 'The 1st defendant is the elder brother of the plaintiff. The defendants 2 & 3 are the sons of the 1st defendant. The plaintiff and the defendants 1 to 3 constitute a Hindu Joint Family. The land in Survey No.67/ A, admeasuring Ac.4.33 guntas, situated in Savergaon Village (hereinafter referred to as 'suit land'), is a joint family property of the plaintiff and 1st defendant. The father of the plaintiff and the 1st defendant died about 50 years ago. Since then, the 1st defendant, as the head of the joint family, is managing the properties of the joint family. The plaintiff married a woman of Thantoli Village, which is situated at a distance of 5 to 6 kms., from Savergaon Village. After the marriage, the plaintiff lived with her at Savergaon for about one year. As the father-in-law of the plaintiff had no male issues and as he died prior to the marriage of the plaintiff, the

plaintiff shifted to Thantoli Village leaving the suit land in the hands of the 1st defendant. The 1st defendant was cultivating the suit land. After deducting the cost of cultivation, the 1st defendant was giving half share in cash and kind to the plaintiff every year till the year 1993-94. On 26.02.1995, when the plaintiff approached the 1st defendant and asked him for giving his half share, the 1st defendant, with a *mala fide* intention, refused to give the share of the plaintiff. The plaintiff came to know that the defendants 1 to 3 are negotiating to sell the suit land to the 4th defendant. The plaintiff demanded for partition of the suit land; but, the defendants 1 to 3 refused to cooperate for partition of the suit land. Hence, the suit is filed for partition of the suit land into two equal shares and allotment of one such share to the plaintiff.'

4.2 The 4th defendant remained *ex parte*.

4.3 The averments in the written statement of the defendants 1 to 3, in brief, are as follows: - 'The plaintiff and the defendants 1 to 3 do not constitute a Hindu Joint family. The father of the plaintiff and the 1st defendant died about 60 years ago. He had no agricultural land at Savergaon village. He was only doing agricultural labour work. He was not the owner, pattedar and possessor of the suit land. The plaintiff had separated from the 1st defendant about 50 years ago. When the plaintiff and the 1st defendant started living separately, they had no ancestral properties, except one small house with mud walls and country tiled roof. The father of the plaintiff and the 1st defendant did not acquire any land in his name. As per the advice of the elders, the 1st defendant paid money to the plaintiff towards his share in the ancestral house and became the exclusive owner of the said house. The 1st defendant saved some amount from his earnings and purchased the suit land about 40 years ago from one Gaddam Pothanna. The 1st defendant is the exclusive owner and pattedar of the suit land. The plaintiff has no right or interest over the suit land. He has no right to claim any share in the suit land.'

The 1st defendant is cultivating the suit land openly, publicly and uninterruptedly, since the time of his purchase, as owner of the same. No one had made any claim or objected to his title over the suit land at any time. Even if it can be said that the plaintiff had any rights over the suit land, he lost all his rights as the 1st defendant has been cultivating the suit land openly, publicly and adversely, as owner thereof. As the father of the plaintiff and 1st defendant was not the owner of the suit land, the question of claiming any right or interest over this land by the plaintiff through late Bhojanna does not arise. The plaintiff has never cultivated the suit land and he was never in possession of it. The plaintiff never enjoyed the produce from the suit land and the 1st defendant did not give any share from the produce of the suit land to the plaintiff. As the 1st defendant purchased the suit land in his name, his name is shown as owner and pattedar of this land in revenue records. The plaintiff is not the joint owner and possessor of the suit land along with the 1st defendant. The suit land is not the joint property of the plaintiff and 1st defendant. After his marriage with one Mallubai of Thantholi village, the plaintiff shifted to Thantholi village. The averments in the plaint that the 1st defendant as head of the joint family is managing the suit land since the death of his father is not correct. The question of giving a half share every year in cash or kind to the plaintiff till 1993-94, after deducting the cost of cultivation did not arise. The plaintiff did not approach the 1st defendant on 26.02.1995, for giving his share in the suit land. The 1st defendant did not sell the suit land to the 4th defendant and did not execute any agreement of sale in his favour. The value of the suit land is Rs.80,000/- per acre and as such the plaintiff has not properly valued the suit land. The plaintiff has no cause of action to file this suit. The plaintiff filed O.S.No.35 of 1994 in the Court of District Munsif, Adilabad, in respect of the very same land for partition. The same was dismissed on 25.03.1996. This fresh suit is barred under Section 9 of the Code. After the plaintiff filed this suit, the defendants filed a petition under Section

10 of CPC praying to stay this suit till the disposal of O.S.No.35 of 1994. After filing of that petition, O.S.No.35 of 1994 was dismissed. Hence, this suit is not maintainable. The defendants are entitled to claim compensatory costs of Rs.10,000/- . Therefore, the suit is liable to be dismissed, with compensatory costs of Rs.10,000/- .'.

5. On the basis of the above pleadings, the trial Court framed the following issues for trial:

- “ 1. Whether the father of the Plaintiff was the owner and Possessor of the land in sy.no.67/ A measuring Ac.4-33 guntas situated at Savergaon village?
2. Whether the suit land was purchased by the defendant no.1 with his own funds, whether he is the exclusive owner of the same?
3. Whether the suit land was in joint possession of the plaintiff and defendant No.1?
4. Whether the suit land is joint family property of the Plaintiff and defendant No.1?
5. Whether the Plaintiff paid Court fee sufficiently?
6. Whether the Plaintiff has cause of action to file the Suit?
7. Whether suit is within limitation?
8. Whether the defendants perfected title by adverse possession to the suit land?
9. Whether the Plaintiff is entitled to partition and separate Possession?
10. Whether the defendants are entitled to compensatory costs as claimed?
11. Whether the present suit is valid as previous suit in O.S.35/ 94 on the file of the Court of the District Munsif at Adilabad was filed and dismissed in default?
12. To what relief?

5.1 During the course of trial, PWs 1 & 2 and DWs 1 to 4 were examined and exhibits A1 & A2 and exhibits B1 to B43 were marked. Exhibit C1 was also marked.

6. On merits and by the judgment impugned in this appeal, the trial Court decreed the suit of the plaintiff. Aggrieved thereof, the defendants 1 to 3 preferred this appeal suit.

7. Learned counsel for the defendants 1 to 3 while reiterating the defence of the defendants, which is already stated supra, contended as follows: 'The relationship is admitted. The trial Court ought to have seen that there is no

joint family and that after his marriage, the plaintiff left for Tantholi, the village of his wife. The plaintiff and the 1st defendant separated 50 years prior to the filing of the written statement. The property is not that of the father of the plaintiff and the 1st defendant. In fact, from the savings out of his earnings, the 1st plaintiff purchased the suit land from G.Pothanna about 40 years prior to the filing of the written statement. The plaintiff is the exclusive owner and pattedar of the suit land. The property also stands in his name in the revenue records. Therefore, the questions of the plaintiff's entitlement to a share in it and the sharing of profits do not arise for consideration. The only ancestral house became the exclusive house of the 1st defendant on payment of the value of the share of the plaintiff by the 1st defendant. The findings recorded by the trial Court that the father of the plaintiff and the 1st defendant was the owner and possessor of the suit land and that after his death, the property devolved upon the brothers are not sustainable. The trial Court ought to have seen that the burden of proof is on the plaintiff and that the plaintiff failed to establish that his father or paternal grandfather was the owner and possessor of the suit land. Hence, the conclusion that the 1st defendant got the suit land through inheritance and that it belongs to him and the plaintiff is erroneous being based on presumptions. That the plaintiff received money towards his share in the house, which is the only ancestral property, and got separated from the 1st defendant and is living in the village of his wife since marriage and a long time sufficiently establishes that there is no joint family and that the suit land is the exclusive property of the 1st defendant. Even otherwise, the 1st defendant, being in exclusive possession, was and is cultivating the suit land as owner thereof openly, publicly and uninterruptedly since several decades. Hence, the plaintiff lost his rights, if any, in the suit land and the 1st defendant perfected title by adverse possession. The trial Court ought to have seen that the 1st defendant pleaded and established his alternative plea of adverse possession and that the plaintiff

never made any claim or objection with regard to the suit land at any time till the institution of the suit in the year 1996 and that by that time, the right of the plaintiff to seek partition stood extinguished by lapse of time. Therefore, the trial Court ought to have dismissed the suit of the plaintiff. The Court below ought to have seen that the plaintiff earlier filed O.S.no.35 of 1994 in the Court of District Munsif, Adilabad, for partition of the same suit land and that the said suit was dismissed, on 25.03.1996, and hence, the present suit is barred under Section 9 of the Code. The trial Court failed to appreciate the facts and the evidence correctly and in proper perspective and arrived at incorrect conclusions. The said findings, which are erroneous, are liable to be set aside. Hence, the appeal suit may be allowed as prayed for.'

8. Learned counsel for the plaintiff while supporting the decree and judgment of the trial Court, contended as follows: 'The trial Court after considering the facts correctly and appreciating the evidence in proper perspective arrived at correct conclusions on all the issues and decreed the suit of the plaintiff after adverting to the legal position and further rightly held that the plaintiff is having a share in the suit lands. The trial Court also noted that the possession of the 1st defendant over the suit land being the possession of a co-owner would amount to joint possession for benefit of both the sharers/ co-owners and that therefore, the plea of adverse possession is not available and it cannot be said that the 1st defendant perfected title by adverse possession. The trial Court also held that no plea of 'ouster' was raised in the defence and there is no proof of 'ouster' and that exclusive possession of the 1st defendant is of no avail and is not sufficient to non suit the plaintiff. The trial Court rightly held that the improvised version of the defendants during the course of trial, based on entries in revenue records is unreliable. The trial Court also held that since the 1st defendant is the elder of the family, his name alone was recorded as owner and possessor of the lands belonging to the family as it is not uncommon for the revenue authorities making such entries at the

time of preparation of the pahanies. The trial Court also held that mere recording of the name of the 1st defendant in the revenue records does not support the plea that he purchased the suit land from Gaddam Pothanna. The case of the 1st defendant that he purchased the land with the savings from out of his earnings cannot be believed in the absence of a document of title. The absence of such document in favour of the 1st defendant and proof of the said plea by the defendants coupled with the fact that there will not be any document for ancestral property probablizes the case of the plaintiff. The former suit was dismissed for default on the ground of non-maintainability in the Court of Junior Civil Judge, which had no jurisdiction. Any finding by a Court without jurisdiction or a dismissal decree of such a Court is no bar to the present suit instituted in the Court having jurisdiction. Further, even after dismissal of the former suit, the property remained joint and therefore, the cause of action to file a suit for partition, which is a continuing cause of action, is available to the plaintiff as long as the property remained joint without partition. Hence, the present subsequent suit for partition is not barred under law, as rightly held by the trial Court. The well considered judgment of the trial Court does not call for interference. The contentions raised in the appeal suit are without merit. The appeal suit is liable to be dismissed.'

9. I have given earnest consideration to the facts & submissions. I have carefully perused the material record.

10. The points that arise for determination are:

- (i) Whether the suit land is the joint family property of the plaintiff and the 1st defendant? And, if so, whether the plaintiff is entitled to claim a half share in the said land and seek partition of the suit lands into two equal and equitable shares and allotment of one such separated share to him?
- (ii) Whether the 1st defendant perfected title to the suit land by adverse possession?

- (iii) Whether the decree and judgment of the trial Court are unsustainable under facts and in law, as being contended by the defendants 1 to 3/ appellants?
- (iv) To what relief?

11. POINT No.1:

11.1 The relationship between the plaintiff and the defendants 1 to 3 is admitted. The 4th defendant was impleaded, as according to the plaintiff, the 1st defendant was negotiating to sell the suit land to him at the time of the institution of the suit. As noted, the plaintiff claims that the plaintiff and the 1st defendant are members of a Joint Family; that their father died about 50 years prior to the suit; that since then, the 1st defendant being the elder of the two is the Head and Manager of the family; that he was managing the suit lands; that the plaintiff married a girl of Thantoli village; that his father-in-law, who had no male issues, was no more by the time of the marriage; that a year after his marriage, at the instance of his mother-in-law, he left for Thantoli village leaving the management of plaint schedule/ suit land in the hands of the 1st defendant; that the 1st defendant paid his net half share of produce in cash and kind every year till 1993-94; that the 1st defendant with a *mala fide* intention refused to give his share when he approached him, on 26.02.1995; that the 1st defendant further refused to comply with the demand for partition; and, that, therefore, the suit is filed. The defendants while denying the case of the plaintiff *inter alia* contend that there is no joint family; that the father died 60 years prior to the filing of the written statement; that the plaintiff separated 50 years prior to the filing of the written statement; that the only ancestral house was exclusively taken by the 1st defendant after paying the value of the share to the plaintiff; that the suit land was not that of the father; that from out of the savings of his earnings, the 1st defendant purchased the suit land from Gaddam Pothanna about 40 years back; that it is his exclusive property; that the plaintiff has no share or

right, title and interest in the same; and, that the revenue records like khasra pahanies support his case.

11.2 It is to be noted that PW1 asserted his case in his evidence and filed exhibit A1, certified copy of khasra pahani for the year 1954-55 and exhibit A2, certified copy of khasra pahani for the year 1951. DW1 while reiterating his defence, filed, apart from other documents, exhibit B6 to B43, a bunch of certified copies of pahanies of the years 1952, 1953, 1954, 1954-55, and also of the years from 1958-1959 to 1991-1992. In the evidence, DW1 also stated that he earlier worked in Railways and that at the time of leaving his job, he received some service benefits and with that amount, he purchased the suit lands for a consideration of Rs.1,000/- and that since the time of purchase, he is in exclusive possession and enjoyment of the suit land and that the Tahasildar implemented his name as pattedar, owner and possessor and that his father is only a farm servant without any agricultural land and that the residential house left by the father became his exclusive property on payment of value of half share of the plaintiff in the said house.

11.3 In this backdrop, it is necessary to refer to the family genealogy as the claim is that the property is of the joint family and as it is necessary to know as to who are the persons whose names are appearing in the land/ village records. One Logeti Bakkana is the ancestor. He had two Sons, viz., Linganna (who went in illatom) and Bhojanna; and, one daughter, Gaddam Pochubai w/o Yerranna. Bhojanna had two Sons, viz., Bakkanna (1st defendant) and Pothanna (Plaintiff). Defendants 2 and 3 are the sons of the 1st defendant. Bhojanna had also one daughter, Jakkala Posani w/o Buchanna. The son-in-law of the ancestor Logeti Bakkanna, by name, Gaddam Yerranna, had one Son, Gaddam Bhojanna and his son's name is also Gaddam Pothanna (PW2). Gaddam Bhojanna had another Son, by name, Isthari.

11.4 I have carefully evaluated the oral and documentary evidence. From the evidence brought on record, the following facts and aspects are discernable: 'Land of an extent of Ac.14.18 guntas in Sy.no.67 was a Government poramboke covered with bushes and trees and was like a forest. Three persons, namely, Bakkanna [paternal grandfather of the plaintiff and the 1st defendant], his son-in-law, Gaddam Yerranna, and Gaddam Bhojanna, son of Yerranna, cleared the said land year after year over a period of time and made it fit for cultivation and took 1/3rd share each out of it. After the death of Bakkanna, the ancestor, his son, Bhojanna, that is, the father of the plaintiff and the 1st defendant, inherited the said land as his brother-Linganna, went in illatom. After the deaths of Bhojanna and Bakkanna, Bhojanna's Sons, that is, the plaintiff and the 1st defendant, inherited his 1/3rd share, that is, Ac.4.33 guntas in Sy.No.67/A of Savergaon village.' That is how the plaintiff claims a half-share in the suit land. However, the case of the 1st defendant is that Logeti Bhojanna, the father of the 1st defendant and the plaintiff, had no agricultural land and that the suit land is the exclusive self acquired property of the 1st defendant and that he has purchased the suit land from its owner-PW2 and that the suit land is not a Government land. Dealing, in detail, with the evidence it is to be noted that exhibit A2, which appears to be the earliest document, is a copy of khasra pahani of the year 1951 in respect of the land in Sy.no.67. In column no.(10) of this pahani, it is recorded as 'Sarkari'. Therefore, this document reflects that the land in Sy.no.67 is a Government land. However, as already noted, the name of PW2 appears as 'Khatedar' (Pattedar). In this document, in the column pertaining to 'kabzadar' (possessor), the names of Yerranna, Logeti Bakkanna and one Elpeddi Rami Reddy are mentioned. Hence, this document *ex facie* supports the case of the plaintiff. Thus, in this document, the name of Logeti Bakkanna appears. The name of the 1st defendant is Bakkanna; and, the name of his paternal grandfather is also Bakkanna. Further, the name of the father of elder

Bakkanna (grandfather) is not known, as there is no evidence on the said aspect as rightly observed by the trial Court. Therefore, a doubt arises as to whether the name in exhibit A1 is that of the grandfather-Bakkanna or that of the 1st defendant, who is his namesake. In exhibit B42, B43, and B6, which are certified copies of pahanies respectively of the years 1952, 1953 and 1954, in the column related to 'cultivator', the names of Bakkanna, Yerranna and Lachanna are mentioned. Again, a doubt arises as to whether the said name is that of the 1st defendant-Bakkanna or that of the grandfather-Bakkanna. In exhibits B7 and B8, the copies of pahanies respectively for the years 1954-55 and 1958-59, the name of Logeti Bakkanna is recorded as 'Shikmidar'. It is undisputed that this word is relatable to pattedar having title or person in joint possession with the pattedar or a person who acquired land as per regulations in force. In both these documents, the name of Logeti Bakkanna S/o Bhojanna as Khabzadar (possessor) was mentioned in respect of the land of an extent of Ac.4.33 guntas in survey number 67/A; and, it was further mentioned as 'Varseek' (inheritance). No doubt, exhibit A1, the khasra pahani of the year 1954-55, bears the name of the 1st defendant, Logeti Bakkanna S/o Bhojanna. Thus, till 1954, merely the name of Logeti Bakkanna was recorded in the records without mentioning his father's name; however, in exhibit A1 of the year 1954-55 (referred to supra), the name of Logeti Bakkanna, S/o Bhojanna, that is, the name of the 1st defendant, was recorded by specifically mentioning his father's name. His name was mentioned as 'kabzadar' of the land in Sy.no.67/A admeasuring Ac.4.33 guntas, that is, the suit land. In exhibits A1, B7 and B8, the word 'Varseek' meaning 'inheritance' also appears in column pertaining to 'swadheenapu vidham' (manner of possession). At this stage itself, it is apt to note that in view of the entries supra, the contention of the 1st defendant that he acquired the land by purchase from Gaddam Pothanna appears to be *ex facie* unacceptable. Admittedly, name of one Yerranna, who is the son-in-law of ancestor Bakkanna, also appears in respect of the Ac.14.18

guntas. As noted three persons originally came into possession of the said total extent of land and brought it under cultivation after clearing the wild-growth. Yerranna's name also appears as 'Shikmidar'. The 1st defendant also admitted in his evidence that Yerranna has also got land in the said Sy.No.67. PW2-Gaddam Pothanna has also land in the said survey number is undisputed. Originally, names of Gaddam Pothanna, Gaddam Yerranna and Logeti Bakkanna were recorded in the records in respect of the said large extent of land in Sy.no.67. The contention of the 1st defendant is this: 'Since name of Gaddam Pothanna appeared in the record, the contention of the 1st defendant that he purchased the land from Gaddam Pothanna is highly probable.' The 1st defendant also deposed that Yerranna purchased the land in Sy.no.67 from PW2-Gaddam Pothanna. The plaintiff contends that this development in the evidence of DW1 is made to explain away the entries in the records, which are contrary to the case of the defendants, and as it was originally the case of the 1st defendant that PW2-Gaddam Pothanna is the owner of the entire land. It is not in dispute that the father of the plaintiff and the 1st defendant by name Pochanna died in or about the year 1945. Therefore, there was no occasion to mention his name in the records prepared thereafter. However, there is sufficient record to come to a safe conclusion that the suit land of an extent of Ac.4.33 guntas in Sy.No.67/ A devolved by inheritance and that it is originally a part of Ac.14.18 guntas in Sy.no.67, which is originally a Government land. Though it is the case of the 1st defendant that he purchased the suit land from Gaddam Pothanna about 40 years prior to the filing of the written statement, the 1st defendant admittedly has no title deed like a sale deed in his name evidencing the said purchase. The revenue records also do not bear an entry showing that the possession or ownership is by acquisition or purchase. On the contrary they show mode of acquisition/ possession as 'inheritance'. However, the 1st defendant-DW1 deposed that after purchase of the suit land from PW2, the Tahasildar, implemented his name as pattedar, owner and possessor and

that his father is only a farm servant without any agricultural land and that the residential house left by the father became his exclusive property on payment of value of half share of the plaintiff in the said house. However, the plaintiff is not claiming a share in that house, as according to him, he allowed it to be enjoyed by the 1st defendant as he is having children. But, PW2, Gaddam Pothanna, an important witness did not support the case of the defendants 1 to 3. PW2 deposed that Logeti Bhojanna (the father of the plaintiff and the 1st defendant) was the owner and possessor of the suit land and that after his death, his sons, i.e., the plaintiff and the 1st defendant inherited the said land and that Gaddam Yerranna's land in Sy.no.67 was acquired by the Government for providing houses to the weaker sections. Therefore, the improved defence during the course of trial to the effect that PW2 also sold land to Yerranna does not stand the test of scrutiny. In fact, the 1st defendant in his pleaded defence did not give the details with regard to purchase of suit land like the date of purchase and the consideration. He did not file the order of the Tahasildar, if any, passed before implementation of the sale transaction in his favour. As rightly contended by the plaintiff, since the records evidence the fact that the devolution/ possession is by inheritance and that the land is originally a 'sarkari land' and that as DW1's name appears as a 'Shikmidar', and as the name of the 1st defendant was for the first time mentioned in the khasra pahani in the year 1954-55 and not before and as he is the elder of the two brothers, the mere mention of the name of the 1st defendant alone in the records of the later years is not sufficient to accept the plea of the 1st defendant.

11.5 To clear the doubt as to whether the name-Bakkanna alone mentioned in the above documents of earlier years relates to the 1st defendant or the grandfather who are of the same name, it is necessary to further carefully scan the evidence. The question is as to the approximate alleged year of purchase of the suit land by the 1st defendant as the contention of the 1st defendant is that he purchased the suit land from Gaddam Pothanna, about 40 years ago, as

per his pleading in the written statement. It is to be reiterated that PW2 did not support the case of DW1 having appeared as a witness on the side of the plaintiff. For the first time the 1st defendant (DW1) stated in his evidence that one year prior to police action, which took place in the year 1948, he secured a job in Railways and that he used to get Rs.200/- as monthly salary and that he worked for six years in the Railways and saved Rs.6000/- during that time and that he got an amount of Rs.2000/- towards service benefits at the time of leaving the job and that he purchased the suit land for Rs.1000/- from out of the service benefits received by him. So, from his evidence, it is possible to say that he joined the job in Railways in the year 1947 or so and that he left the job in the year 1953 or so after working for six years. Therefore, it is obvious that he came into picture only in the year 1953 or 1954. But, as already noted, the name of Bakkanna finds place in the pahani of the year 1951, which is the earliest document. If his case that he purchased the property in the year 1953 or 1954 is to be true, there is no possibility for appearance of his name in the records of the year 1951. Therefore, it can safely be held that the name of Bakkanna in the records of the earlier years undoubtedly refers to Logeti Bakkanna, the grandfather of the 1st defendant and the plaintiff. Since the name of the said Bakkanna appears in respect of the land of which the suit land is a part, even by the year 1951, it follows that the suit land is an ancestral joint family land. As a result, it is obvious that the contention that the 1st defendant acquired the suit land by purchase is improbable and does not stand the test of scrutiny, more particularly, as the revenue entries show that the acquisition/possession is by means of inheritance and that the land is a Sarkari land. On such detailed scrutiny of the evidence and on applying the test of preponderance of probabilities, this Court finds that the suit land is joint family property of the plaintiff and the 1st defendant and that, therefore, the plaintiff is entitled to seek partition and claim a half share in the suit land. The point is accordingly answered.

12. POINT No.2:

12.1 On this issue of adverse possession, the pleaded case of the 1st defendant is this: 'The 1st defendant is the exclusive owner and pattedar of the suit land. The plaintiff has no right or interest over the suit land. He has no right to claim any share in the suit land. The 1st defendant is cultivating the suit land openly, publicly, uninterruptedly since the time of his purchase as owner of the same. The plaintiff left for his wife's village immediately after his marriage. No one had made any claim or objected to his title over the suit land at any time. Even if it can be said that the plaintiff had any rights over the suit land, the same were lost, as the 1st defendant has been cultivating the suit land openly, publicly and adversely, as owner thereof.' The 1st defendant's defence, therefore, is that he perfected title to the suit land by adverse possession. Per contra, the case of the plaintiff is that since the plaintiff is the elder of the family and is managing the property, his name appeared in the records and that though he left for Tantholi village after his marriage, yet, he is receiving his share of net profits in cash and kind and that he received the profits till the year 1993-1994 and that when he asked for his half share of profits, on 26.02.1991, the 1st defendant denied to give a share with a *mala fide* intention and that the plaintiff came to know that the defendants 1 to 3 are negotiating to sell the suit land to defendant no.4 and that his demand for partition was refused and therefore, the suit for partition was brought immediately thereafter. It is pertinent to note that the plea of adverse possession is a bald and a vague plea and is not coupled with the plea of 'ouster'.

12.2 Before proceeding further with the discussion on this point, it is apposite to refer to the legal position obtaining.

The ordinary classical requirement of adverse possession is that it should be nec vi; nec clam; nec precario. [See Secretary of State for India v. Debendra Lal Khan::[(1933) L.R. 61 I.S. 78]. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. [See: Radhamoni Debi v. Collector of Khulna::(1900) L.R. 2 Ind.Ap 136].

In Ibramsa Rowther (minor) and others v. S.K.Meerasa Rowther and others [AIR 1972 MADRAS 467], the Madras High Court pointed out that there is a distinction between adverse possession as between strangers and ouster and exclusion of co-owners. This decision was relied upon in support of the contention that ouster in suitable cases can be presumed from non participation in the profits of the land for a long period of time and it was contended on behalf of the 1st defendant that there is no participation of the plaintiff in the profits for a long time. In the considered view of this Court, this is not a case where 'ouster' is pleaded. When 'ouster' is pleaded and there is weak evidence, 'ouster' in suitable cases can be presumed from non participation in the profits of land for a long period of time affecting different generations. But, in the case on hand, the plaintiff brought the suit against his own brother, who is pleading adverse possession without a whisper about 'ouster'. Be that as it may.

“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. Nirmal Chander and Anr. :: [1984]2SCP287) .

In Ezaz Ali v. Special Manager, Court of Wards [AIR 1935 PC 53] it was observed as under: “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.”

It is also 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. [See: P. Lakshmi Reddy vs. L. Lakshmi Reddy:: (AIR1957SC314)].

In Karbalai Begum v. Mohd. Sayeed and Anr.: [1981]1SCR863, the law has been stated by the Supreme Court in the following terms:

"....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..."

In Darshan Singh and Ors. v. Gujjar Singh (Dead) by LRs. and Ors.: [2002]1SCR91, it is stated :

"...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."

"In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying

the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.”

12.3 Further, 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 does not amount to ouster so as to give title by prescription. A co-sharer in possession, as is well settled, becomes a constructive trustee of other co-sharer, who is not in possession of the properties, and the right of the said co-sharer not in possession would thus be deemed to be protected by the trustee. However, '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. [See: Md. Mohammad Ali (Dead) by Lrs. vs. Sri Jagadish Kalita and Ors.: (2004)1SCC271]

12.4 Reverting to the facts of the instant case, in the instant case as no partition by metes and bounds took place, the defendants/ appellants herein were bound to plead and prove ouster of the plaintiff from the property in question. The vague and isolated plea of adverse possession bereft of 'plea of ouster' set up by them as reproduced herein before, does not meet the requirements of law. The 1st defendant only pleaded that he is a purchaser of the suit land and exclusive owner and the said plea is not accepted for the reasons recorded under point no.1 supra. The law is well settled that in a suit for partition, even when one of the sharers takes a plea of adverse possession coupled with ouster, the burden, which is heavy, lies upon such sharer and the

said plea must contain all the necessary details and shall be established by cogent and convincing evidence. There was no pleading of 'ouster' as required under facts and in law or evidence in support thereof. Even otherwise, any amount of evidence without a foundation in the pleading is of no avail to the defendants. Accordingly, this Court finds that the contention of the 1st defendant that he perfected title by means of adverse possession in respect of the suit lands is without merit. The point is accordingly answered against the appellants.

13. Before taking up the next point, it is necessary to advert to one more following aspect in view of the contentions of the defendants.

'Admittedly, the plaintiff and his two sons earlier filed a suit in O.S.no.35 of 1994 on the file of the Court of the learned Junior Civil Judge, Adilabad, against the 1st defendant seeking the very same relief of partition in respect of the very same land, which is the subject matter of the instant suit; that earlier suit was dismissed, on 25.03.1996; and, later, the present suit is once again brought for partition of the very same land.' The copy of the legal notice earlier got issued on behalf of the plaintiff, the copy of the reply legal notice, the certified copy of the plaint and the certified copy of the written statement in the said former suit were exhibited respectively as exhibits B1 to B4. The plaint that was called for from the former suit was marked as exhibit C1. The advocate who issued the legal notice under exhibit B1 on behalf of the plaintiff was examined as DW3. Exhibit B5 is the certified copy of the order, dated 25.03.1996, passed in the former suit. The said order discloses that the suit was dismissed for default as the counsel for the plaintiffs reported no instructions and that the plaintiffs were absent on the day that the suit was dismissed for default. Therefore, the defendants contend that in view of the provisions of Sections 9 and 12 of the Code, the present suit in respect of the same land for the same relief on the same cause of action is not maintainable.

They also submit that under Order IX Rule 9 of the Code also, the present suit is not maintainable. The above stated provisions of law read as under:

Section 9. Courts to try all civil suits unless barred:- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation I: - A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II:- For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.

Section 12. Bar to further suit:- Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Order IX Rule 9: Decree against plaintiff by default bars fresh suit:- (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfied the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

However, learned counsel for the plaintiff would contend as follows: 'The former suit was not heard and disposed of on merits. The principle enshrined in the doctrine of *res judicata* is not applicable. The earlier suit was filed mistakenly in a Court, which lacked jurisdiction. As long as the property remained joint, the cause of action to seek partition continues to be available

to the plaintiff. There is no partition of the suit land by metes and bounds. Hence, the present suit is maintainable and is not barred under facts and in law.' Reliance on a decision reported in Manohar Lal Behari Lal v. Onkar Das alias Omkar Dass and Ors.¹, in support of the contention that the bar does not apply to a suit for partition, where the cause of action is a continuous cause of action. In the well considered view of this Court, so long as the property is in joint possession of the sharers and the joint tenancy continues and the property remains joint without partition by metes and bounds, the cause of action to seek partition inures in the sharers till partition takes place. Therefore, this Court finds that the mere dismissal of the former suit by the Junior Civil Court for default, does not bar the present suit for partition. Accordingly, this Court holds that the suit is maintainable.

14. Point No.3:

As a sequel to the aforestated findings of this Court on points 1 and 2 supra, it is to be held that the contention of the appellants/ defendants that the decree and judgment of the trial court are unsustainable under facts and in law is without merit and is liable for rejection. In a case of this nature where the issue is with regard to partition of immovable property in which one party claims the property as a joint family inherited property and the other as his exclusive property, the documentary evidence takes precedence over the oral evidence. On carefully evaluating the oral and documentary evidence and after going through the judgment of the trial Court, this Court, for the reasons assigned in this judgment, finds itself in agreement with the findings recorded by the trial Court on the issues settled and accordingly holds that the trial Court is justified in decreeing the suit of the plaintiff. In that view of the matter, the well considered judgment of the trial Court brooks no interference. For the aforestated reasoned finding recorded on the points 1 and 2 supra, this

¹ AIR 1959 Punjab 252

Court finds that the appeal suit is without merit is liable for dismissal. Point is accordingly answered against the appellants/ defendants.

15. POINT No.4:

In the result, the appeal suit is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

01.03.2018
KL/ RAR

M. SEETHARAMA MURTI, J

