

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.332 of 2007Judgment reserved on: 4-10-2019Judgment delivered on: 24-10-2019

Smt. Sukhman, D/o Late Jairam Rajwar, Wd/o Late Ransai, Aged about 63 years, R/o Village Kailashpur, Tahsil Sonhat, District Koriya (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Subaso, D/o Late Dheersai, W/o Lalsai, Aged about 53 years, R/o Village Sardi, Tahsil Baikunthpur, District Koriya (C.G.)
2. Rambai, D/o Dheersai, W/o Bhagwan Das, Aged about 45 years, R/o Village Kushha, Tahsil Sonhat, District Koriya (C.G.)
3. Mangali Bai, D/o Dheersai, W/o Sitaram, Aged about 49 years, R/o Village Budar, Tahsil Sonhat, District Koriya (C.G.)
4. Nanki Bai, D/o Dheersai, W/o Roopsai, Aged about 47 years, R/o Village Cher, Tahsil Baikunthpur, District Koriya (C.G.)
5. Bihora Bai, D/o Dheersai, W/o Jheeturam, Aged about 45 years, R/o Village Badwar, Tahsil Sonhat, District Koriya (C.G.)
6. Prembai, D/o Dheersai, W/o Manuram, Aged about 43 years, R/o Village Odari, Police Station & Tahsil Sonhat, District Koriya (C.G.)
7. Nandu, S/o Late Ransai, Aged about 38 years, R/o Village Ghughra, Tahsil Sonhat, District Koriya (C.G.)
8. State of Chhattisgarh, Through its Collector, Koriya, Baikunthpur, District Koriya (C.G.)

(Defendants)
---- Respondents

For Appellant: Mr. Anurag Singh, Advocate.

For Respondents No.1 to 6: -

Mr. Prakash Tiwari and Mr. Palash Tiwari, Advocates.

For Respondent No.8 / State: -

Mr. Sanjeev Kumar Agrawal, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V Judgment

1. This appeal preferred by the plaintiff (appellant herein) was admitted for hearing on the following substantial questions of law: -

“(i) Whether the learned Court below wrongly interpreted the law that the cause of action accrued for the daughter appellant/plaintiff from the date of mutation instead from the date of claiming partition?

(ii) Whether the reasons assigned by the appellate Court can be held to be legal while upsetting the order of the trial Court?”

(Parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The suit property ad-measuring 10.38 acres of land at Village Ghughra, Tahsil Kailashpur, District Koriya was originally held by one Jairam. Jairam had one daughter namely, Sukhman – the plaintiff herein and one son Dheersai. Defendants No.1 to 6 are daughters of Dheersai and defendant No.7 is said to be the adopted son of Dheersai. The suit property was the self-acquired property of Jairam said to be succeeded jointly by Dheersai – son and the plaintiff herein – daughter, after death of Jairam in the year 1969. The plaintiff filed suit claiming that the suit property being the self-acquired property of her father, she is entitled for half share in the property and the defendants being daughters and son of Dheersai, are also entitled for half share in the property. It was further pleaded that after death of Jairam, Dheersai got his name mutated in the revenue records by order dated 13-12-1974 which is null and void. It was further alleged by the plaintiff that after death of Sawango Bai – wife of Dheersai, in December, 2002, the defendants refused to give share to her, then she decided to file suit on 4-1-2003 in which the defendants filed their written statement

and stated that the plaintiff is not entitled for any share in the suit property and the suit is barred by limitation.

3. The trial Court upon consideration of oral and documentary evidence on record held that the plaintiff is title holder of the suit land and entitled for half share in the suit property and negated the plea of limitation holding that after death of Dheersai and Sawango Bai, cause of action arose in favour of the plaintiff to file suit. Questioning that judgment & decree, defendants No.1 to 6 preferred first appeal under Section 96 of the CPC in which the first appellate Court set aside the judgment & decree of the trial Court mainly on the ground of limitation holding that the suit is barred by limitation, as the name of Dheersai was exclusively recorded in the revenue records on 13-12-1974 and the plaintiff ought to have filed suit within three years from that date or 12 years from that date, as such, no cause of action had arisen in the year 2002 after death of Sawango Bai in December, 2002, therefore, the suit is hopelessly barred by limitation, against which this second appeal has been preferred by the plaintiff in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.
4. Mr. Anurag Singh, learned counsel for the plaintiff, would submit that the suit property was admittedly, joint family property of Dheersai and the plaintiff herein and after death of Dheersai in the year 1982 and that of his wife Sawango Bai in December, 2002, when the defendants refused to give share to the plaintiff, then only, the plaintiff filed suit on 4-1-2003 which cannot be said to be barred by limitation and within three years from the date of refusal by the

defendants to give share to her, she decided to file suit and ultimately filed suit, therefore, the judgment & decree of the first appellate Court deserve to be set-aside and that of the trial Court deserve to be restored.

5. On the other hand, Mr. Palash Tiwari, learned counsel for defendants No.1 to 6, would support the judgment & decree of the first appellate Court and would submit that though the name of father of the defendants was exclusively recorded in the revenue records in the year 1974 and though the plaintiff objected to it, but the plaintiff allowed his name to be continued and only filed suit on 4-1-2003 which was hopelessly barred by limitation and which has rightly been held so by the first appellate Court, as such, the finding of the first appellate Court is a well-reasoned finding and no exception can be taken by the plaintiff in that regard, as the suit was rightly held to be barred by limitation disclosing no cause of action for filing of suit, as it was not filed within three years from the date of mutation of the name of defendants' father in the revenue record and as such, the appeal deserves to be dismissed with cost.
6. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the record with utmost circumspection.
7. The suit property was originally held by Jairam. The plaintiff is daughter of Jairam and defendants No.1 to 6 are daughters of Jairam's son. The trial Court has held that the plaintiff being the daughter would be entitled for half share in the property left by her father Jairam which the first appellate Court also did not reverse, but held that she has extinguished her share in the suit property, as

the plea of ouster has been established by the defendants and the suit is barred by limitation and on those findings the suit of the plaintiff has been dismissed by the first appellate Court.

8. The first question would be, whether the plaintiff though has right of share and partition in the property left by her father as claimed by her and found established by the two Courts below, she has extinguished her share by the plea of ouster held to be established by defendants No.1 to 6?
9. The first appellate Court has held that Jairam – original holder and the plaintiff's father died in the year 1969 and on 13-12-1974, name of Dheersai – Jairam's son and the plaintiff's brother, came to be recorded in the revenue records despite overruling the objection of the plaintiff and the plaintiff did not prefer any suit within three years from the date of mutation or within 12 years, as the case may be, and Dheersai also died in the year 1982 and even in the lifetime of Dheersai's wife Sawango Bai, the plaintiff did not seek any partition in the suit property and thereby the plaintiff remained ousted from the suit property for last more than 12 years, as her brother's name (Dheersai) stood recorded on 13-12-1974 and therefore on the death of Sawango Bai, the plaintiff cannot seek partition neither having cause of action nor having limitation for filing the instant suit of partition and thereby allowed the appeal and set-aside the decree of the trial Court.
10. Now, the question is, whether defendants No.1 to 6 have established the plea of ouster by remaining in possession from the date of mutation i.e. 13-12-1974 till the date of institution of suit?
11. It is well settled law that possession of the land by a co-owner

however long it might be cannot confer on him any right unless it is adverse to other co-owners. Once it is held that he is a co-owner of the lands in question, his possession however long it might be unless it is adverse to the other co-owners cannot confer on him any right.

12. The Supreme Court in the matter of Jai Singh and others v. Gurmej Singh¹ has laid down the principles relating to the inter se rights and liabilities of co-sharers and held as under: -

“9. It is to be noted that the subsequent Full Bench judgment in *Bhartu v. Ram Sarup*² the earlier decision in *Lachhman Singh v. Pritam Chand*³ was distinguished on facts. The principles relating to the inter-se rights and liabilities of co-sharers are as follows:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate

1 (2009) 15 SCC 747

2 1981 PLJ 204

3 AIR 1970 P&H 304

parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.”

13. Likewise, the Supreme Court in the matter of **Govindammal v. R.**

Perumal Chettiar and others⁴ has held that to prove ouster and adverse possession against a co-owner the following relevant factors may be taken into consideration: (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. It was further held that in order to oust by way of adverse possession, one has to lead definite evidence to show the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case.

14. The Supreme Court in the matter of **Nagabhushanammal (Dead)**

by Legal Representatives v. C. Chandikeswaralingam⁵ has held that ouster is a weak defence in a suit for partition of family property and it is strong, if the defendant is able to establish consistent and open assertion of denial of title, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of the other co-owner, and relied upon the earlier three decisions by observing as under: -

“22. This Court in *Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul Quadri*⁶ held that (SCC p. 605, para 18) possession of

4 (2006) 11 SCC 600

5 (2016) 4 SCC 434

6 (1971) 1 SCC 597

one co-owner is presumed to be on behalf of all 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. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

23. A three-Judge Bench of this Court in *P. Lakshmi Reddy v. L. Lakshmi Reddy*⁷, while examining the necessary conditions for applicability of doctrine of ouster to the shares of co-owners, held as follows: (AIR pp. 317-18, para 4)

“4. Now, the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario*. (See *Secy. of State for India in Council v. Debendra Lal Khan*⁸, IA p. 82). 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*⁹, IA p. 140.) But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Corea v. Appuhamy*¹⁰.) 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. This does not necessarily mean that there must be an express demand by one and denial by the other.”

24. This Court in *Vidya Devi v. Prem Prakash*¹¹ held that: (SCC p. 505, para 28)

“28. ‘Ouster’ does not mean actual driving out of the co-sharer from the property. It will, however,

⁷ AIR 1957 SC 314

⁸ 1933 SCC OnLine PC 65 : (1933-34) 61 IA 78

⁹ 1900 SCC OnLine PC 4 : (1899-1900) 27 IA 136

¹⁰ 1912 AC 230 (PC)

¹¹ (1995) 4 SCC 496

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.”

15. Similarly, in the matter of Jatina Khatoon and others v. S.K.

Najeeb (Dead) Through Legal Representatives and others¹², it

has been held by the Supreme Court that mere non-participation in rent and profit of land of a co-sharer does not amount to ouster so as to be given title by adverse possession, relying upon its earlier decision in the matter of Karbalai Begum v. Mohd. Sayeed¹³.

16. Similarly, in the matter of Darshan Singh and others v. Gujjar

Singh (Dead) by LRs. and others¹⁴, the Supreme Court has held

that mere mutation in revenue records in favour of one co-sharer does not amount to ouster unless there is a clear declaration denying title of the other co-sharers and in the normal course possession by one co-sharer of property belonging to several co-sharers will be deemed to be possession on behalf of the others. It was further held in paragraph 9 of the report as under: -

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

12 (2018) 11 SCC 717

13 (1980) 4 SCC 396

14 (2002) 2 SCC 62

denied.”

17. Reverting to the facts of the present case in light of the principles of law for establishing the plea of ouster as held by the Supreme Court in Govindammal (supra), in the considered opinion of this Court, in order to non-suit the plaintiff on the plea of ouster, the plea of ouster has to be pleaded strictly in line with the decision rendered by Their Lordships of the Supreme Court in Govindammal (supra) and it must be pleaded, (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 and that too by leading definite evidence.
18. In the case in hand, a careful perusal of the written statement filed by defendants No.1 to 6 would show that no such plea of ouster expressly has been taken except pleading that after death of Jairam in the year 1969, the name of Dheersai came to be recorded on 13-12-1974 and when Dheersai died in the year 1982, the plaintiff kept mum and did not express her intention to get the suit land partitioned and defendants No.1 to 6 are regularly paying land revenue and therefore the plaintiff has extinguished her right over the suit land.
19. In the considered opinion of this Court, defendants No.1 to 6 have failed to plead the plea of ouster except claiming that they are in exclusive possession of the suit land and the suit land has been mutated in the name of their predecessor-in-title i.e. Dheersai, it

would not per se establish the plea of ouster, as they have neither pleaded nor established the hostile animus to the knowledge of the plaintiff. Likewise, mere mutation in the revenue records in the name of Dheersai being the eldest son is a usual act in the Chhattisgarh villages, as he being the eldest son is considered as lambardar and his name is recorded on behalf of all the co-sharers as per the prevailing State Revenue Law.

20. The Supreme Court in **Darshan Singh** (supra) has already held that mere mutation in revenue records in favour of one co-sharer does not amount to ouster unless there is a clear declaration denying title of the other co-sharers and in the normal course, possession by one co-sharer of the property belonging to several co-sharers will be deemed to be possession on behalf of the others. Therefore, mutation, if any, in the name of Dheersai after the death of Jairam – original holder and the plaintiff's father, will not give any semblance of title to the defendants, as their exclusive possession over the suit land is referable to possession on behalf of all other co-sharers including the plaintiff who is not in possession. As such, by mere mutation in revenue records, the plea of ouster cannot be said to be established, as entry in the revenue records neither confers any title in whose favour the name is recorded nor extinguishes any title on the basis of omission in revenue records, as the object of making entry in the revenue record is only for fiscal purposes of collecting revenue against the lands held. Therefore, the first appellate Court is absolutely unjustified in holding that the defendants have established the plea of ouster and thereby the plaintiff has lost her title over the suit land. This finding is set-aside.

21. Now, the question of limitation comes in, as the first appellate Court dismissed the suit by granting the appeal holding that the suit is barred by the provisions of the Indian Limitation Act, 1963.
22. Admittedly and undisputedly, the legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature. {See **Vidya Devi** (supra).}
23. Separation from the joint family involving severance in status with all its legal consequences is quite distinct from the de facto division into specific shares of the joint property. One is a matter of individual decision, the desire to sever himself and enjoy his hitherto undefined and unspecified share separately from the others; whilst the other a natural resultant from his decision is the division and separation of his share which may be arrived at either by private agreement or by arbitration appointed by the parties or in the last resort by the court. One should not confuse the severance of status, with the allotment of shares. Therefore, a division in status takes place when a member expresses his intention to become separate unequivocally and unambiguously, and makes it known to other members of the family from whom he seeks to separate. The process of communication may vary in the circumstances of each particular case. The filing of a suit for

partition is clear expression of such an intention. A decree may be necessary for working out the results of severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not. (See **Nanak Chand and others v. Chander Kishore and others**¹⁵.)

24. Partition in its larger sense consists in a division by which the share of each coparcener with respect to all or any of the joint property is fixed, and once the shares are defined. The partition in the sense of severance or disruption of the family is complete, but after 'the shares are so ascertained', the parties might elect either to have 'a partition of their shares by metes and bounds' or continue to live together and 'enjoy their property in common as before'.

25. The joint ownership turns into possession and enjoyment in common until the physical partition takes place according to the shares standing at the date of severance of status. In the matter of **Raghunath Das v. Gokal Chand and another**¹⁶ it has been held by Their Lordships of the Supreme Court that a suit for such physical partition is governed by Article 120 of the Limitation Act, 1908 (Article 113 of the Act of 1963) and such a suit under Article 113 of the Act of 1963 is to be brought within three years from the time when the right to sue accrues. The crucial question in such cases is, when a right to sue accrues. There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or, at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

15 AIR 1982 Delhi 520

16 AIR 1958 SC 827

26. In the matter of Mst. Rukhma Bai v. Lala Laxminarayan and others¹⁷, Their Lordships of the Supreme Court dealing with Article 120 of the Limitation Act which is of the year 1908 (9 of 1908), now it is Article 113 of the new Limitation Act, have held that the right to sue under Article 120 accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said, right.
27. Reverting finally to the facts of the present case, it is quite vivid that the plaintiff is admittedly and undisputedly, entitled for share in the property left by her father Jairam which both the Courts below have already held, but the first appellate Court non-suited the plaintiff on the ground of plea of ouster having been established which this Court has already negated in the foregoing paragraphs holding that the plea of ouster has neither been pleaded nor established and the plea of limitation which the first appellate Court has also held against the plaintiff, in the considered opinion of this Court, cannot be put a seal of approval, as after the death of Dheersai's wife – Sawango Bai, the plaintiff asserted her title and share in the suit property left by her father, then she was expressly denied partition in the suit property and then the cause of action accrued in her favour for which she had successfully filed suit on 4-1-2003 and

17 AIR 1960 SC 335

which is within three years from the date from which she was declined share in the suit property, which she is otherwise entitled to. Therefore, the first appellate Court is absolutely unjustified in holding that the suit filed by the plaintiff was beyond the period of limitation.

28. In view of the aforesaid analysis, judgment & decree passed by the first appellate Court is set-aside and that of the trial Court is restored. The substantial questions of law are answered accordingly and the second appeal is allowed leaving the parties to bear their own cost(s).

29. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge