

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.1215 of 1998

Order reserved on: 19-2-2019

Order delivered on: 15-4-2019

1. (a) Mahendra Prasad, S/o Late Lokeshwar Prasad, aged about 51 years.

(b) Ambika Prasad, S/o Late Lokeshwar Prasad, aged about 49 years.

(c) Madhusudan, S/o Late Lokeshwar Prasad, aged about 33 years.

(d) Smt. Narayani Bai, Wd/o Lokeshwar Prasad, aged about 70 years.

All R/o Village Ghatlohanga, Tahsil Bastar, Post Office Kachnar, Police Station Jagdalpur, Civil and Revenue District Bastar (C.G.)

(e) Smt. Nirmal, W/o Ganesh Tiwari, D/o Late Lokeshwar Prasad, aged about 50 years.

(f) Smt. Hemlata, W/o Trinath Tiwari, D/o Late Lokeshwar Prasad, aged about 30 years.

(g) Smt. Vijaya Tiwari, W/o Rajendra Tiwari, D/o Late Lokeshwar Prasad, aged about 45 years.

1(e), 1(f) & 1(g) R/o Tokapal, Tahsil, Post Office Tokapal, Police Station Parpa, Revenue and Civil District Bastar (C.G.)

2. Manna Prasad, S/o Gaurinath, aged 34 years, Teacher, Ghatlonga, Tahsil Jagdalpur, District Bastar (C.G.)

3. (a) Devesh, S/o Late Digambar Prasad, aged about 19 years

(b) Bhupendra, S/o Late Digambar Prasad, aged about 15 years (Minor), through natural guardian mother Nem Mani, W/o Late Digambar Prasad,

(c) Ku. Duleshwari, D/o Late Digambar Prasad, aged about 17 years (Minor), through natural guardian mother Nem Mani, W/o Late Digambar Prasad

(d) Smt. Nem Mani, Wd/o Late Digambar Prasad, aged about 37 years,

All R/o Village Ghatlohanga, Tahsil Bastar, Post Office Kachnar,

Police Station Jagdalpur, Civil and Revenue District Bastar (C.G.)

4. Smt. Shyambati, W/o Shri Jagannath Prasad, aged 41 years, R/o Lokapal, Tahsil Jagdalpur, Distt. Bastar (M.P.) (now C.G.)
5. Arun Kumar, S/o Manishankar, aged 30 Years, Tracer, P.W.D. Qrt. No.5, 36 Qtr., Nayamundapara, Jagdalpur.
6. Anil Kumar, S/o Manishankar, aged 22 years, R/o Qtr. No. 5/36 Quarters, Nayamundapara, Jagdalpur.
7. Ghanshyam, S/o Manishankar, aged 20 yrs., Quarter No. 5/36, 36 Quarters, Nayamundapara, Jagdalpur.
8. Smt. Shankuntala, W/o Shyam Tiwari, 27 yrs., R/o Latipara, Kanker, Distt. Kanker.
9. Smt. Jaymani Tiwari (deleted)
10. (a) Aniruddh, S/o Late Romanth, aged about 55 years.
(b) Gajendra, S/o Late Romanth, aged about 48 years.

Both R/o Village Ghatlohanga, Tahsil Bastar, Post Office Kachnar, Police Station Jagdalpur, Civil and Revenue District Bastar (C.G.)

(c) Smt. Sukam @ Leelawati (deleted)

(d) Smt. Leelawati @ Shanti (deleted)

(e) Smt. Kunti Sharma, W/o Late Shail Kumar Sharma, D/o Romnath, aged about 64 years, R/o Mahadev Ghat, Jagdalpur, Tahsil, P.O. & Police Station Jagdalpur, Civil and Revenue District Bastar (C.G.)

(f) Ku. Annpurna Tiwari, D/o Romnath, aged about 54 years.

(g) Smt. Sunita Tiwari, W/o Navratan Tiwari, aged about 40 years.

Both R/o Rajwade, Jagdalpur, Tahsil, P.O. & Police Station Jagdalpur, Civil & Revenue District Bastar (C.G.)

- 11.(a) Vinay Kumar, S/o Late Gopinath, aged about 62 years.

(b) Anant Kumar, S/o Late Gopinath, aged about 55 years.

Both R/o Village Ghatlohanga, Tahsil Bastar, Post Office Kachnar, Police Station Jagdalpur, Civil and Revenue District Bastar (C.G.)

(c) Smt. Jayanti Tiwari, W/o Rajeev Lochan Mishra, aged about 62 years, R/o Uslapur, Bilaspur, P.O. Tahsil, Police Station and Civil & Revenue District Bilaspur (C.G.)

(d) Smt. Anjali Mishra, Wd/o Late Dinesh Mishra, aged about 40

years, R/o Lalbagh, Jagdalpur, Tahsil, Police Station & P.O. Jagdalpur, Civil and Revenue District Bastar (C.G.)

(e) Smt. Anita Tiwari, W/o Ashok Tiwari, aged about 45 years, R/o Dhangaon, Tahsil & Police Station Bemetara, P.O. Andhiyarkhor, Civil and Revenue District Bemetara (C.G.)

(f) Smt. Devika Mishra, W/o Virendra Mishra, aged about 40 years, R/o Vinayak Vihar Colony, Raipur, Tahsil, Post Office, Police Station, Civil & Revenue District Raipur (C.G.)

No.11(c) to 11(f) are daughters of late Gopinath.

12. (a) Smt. Shashi Prabha Tiwari, 54 years, W/o Krishnath Tiwari.

(b) Satish Tiwari, aged 27 yrs.

(c) Govind Tiwari, aged 27 yrs.

(d) Savita Tiwari, aged 23 yrs.

(e) Kabita Tiwari, aged 19 yrs.

12 (b) to (d) are sons and daughters of Late Krishnath Tiwari, all R/o Kumarpara, Jagdalpur, Distt. Bastar (M.P.) (now C.G.)

(Plaintiffs)

---- Appellants

Versus

1. (a) Smt. Somwati (Deleted)

(b) Shiv Prasad (Died) Through Legal Heirs

(i) Smt. Nainmani, W/o Maheshwar Prasad Tiwari, R/o Village Tokapal, P.S. Tokapal, District Bastar (C.G.)

(ii) Smt. Chulmani Dubey, W/o Late Mayashankar Dubey, R/o Village Ghat Lohanga, Tahsil Bastar, District Bastar (C.G.)

(c) Jogeshwar Prasad, S/o Prabhunath Tiwari, aged 46 years, Teacher, R/o Village Kangoli, Tahsil Jagdalpur.

(d) Yogendra Prasad, S/o Prabhunath Tiwari, aged 36 years

(dd) Manmohan Tiwari, S/o Prabhunath Tiwari, aged 34 years

(ddd) Dinesh Prasad Tiwari, S/o Late Prabhu Nath Tiwari, aged about 65 years, C/o Manmohan Tiwari, R/o Village Ghatlohang, Bramhinpara, Post Kachnar, Tahsil Bastar, District Bastar (Jagdalpur) (C.G.)

(e) Balmati Tiwari, D/o Prabhunath Tiwari, dependant aged 48 years

(f) Smt. Shakuntala, W/o Santu Prasad Tiwari, aged 42 yrs., R/o Village Tokapal, Tahsil Jagdalpur, Distt. Bastar (M.P.) (now C.G.)

1(d) and 1(e) R/o Ghatlomga, Tahsil Jagdalpur, Distt. Bastar (M.P.) (now C.G.)

2. Chunnilal (Died) through LRs

(a) Smt. Kamalwati (deleted)

(b) Ramesh Prasad, S/o Late Chunni Lal, aged about 47 years.

(c) Yamuna Prasad, S/o Late Chuni Lal, aged about 35 years.

(d) Ku. Radhamani, D/o Late Chunni Lal, aged about 58 years.

(e) Ku. Neelmani, D/o Late Chunni Lal, aged about 56 years.

All R/o Kotwarpara, Ghatlohanga, Tahsil Bastar, Post Office Kachnar, Police Station Jagdalpur, Civil and Revenue District Bastar

(f) Smt. Vimla, Wd/o Late Balab Prasad, D/o Late Chunni Lal, aged about 59 years,

(g) Smt. Ratna, W/o Lokeshwar, D/o Late Chunni Lal, aged about 52 years,

2(f) & 2(g) R/o Tokapal, Tahsil & Post Office Tokapa, Police Station Parpa, Civil & Revenue District Bastar (C.G.)

(h) Smt. Hemlata, W/o Gangadhar Tiwari, D/o Late Chunni Lal, aged about 51 years, R/o Kotwarpara, Ghatlohanga, Tahsil Bastar, Post Office Kachnar, Police Station Jagdalpur, Civil and Revenue District Bastar (C.G.)

(i) Yashwantin, D/o Late Chunni Lal, aged about 40 years.

(j) Basanti, D/o Late Chunni Lal, aged about 40 years,

2(i) & 2(j) twins Both R/o Village Chitaloor, Tahsil Bakawand, Police Station Nagarnar, P.O. Chitaloor, Civil & Revenue District Bastar (C.G.)

(k) Smt. Pushplata, W/o Narayan Tiwari, aged about 54 years, R/o Village Ghatlohanga, Tahsil Bastar, Post Office Kachnar, Police Station Jagdalpur, Civil and Revenue District Bastar (C.G.)

3. State of M.P. (now State of C.G.), through the Collector, Bastar (M.P.) (now C.G.)

(Defendants)
---- Respondents

For Appellants: Mr. R.N. Jha, Advocate.

For Respondents No.1(a) to (f) and 2(a) to (k):
Mr. Rakesh Thakur, Advocate.
For Respondent No.3 / State: -
Mr. Vimlesh Bajpai, Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

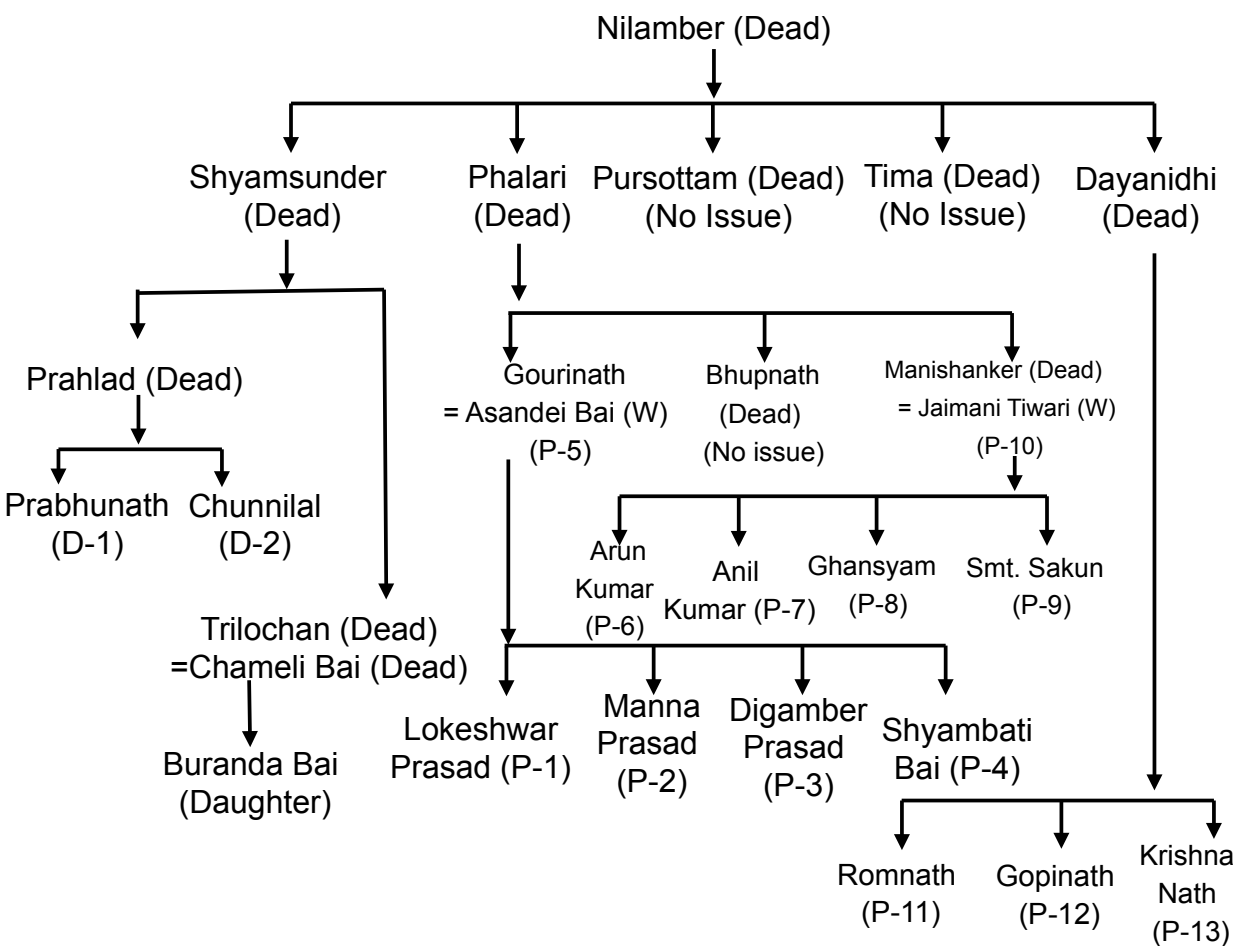
C.A.V. Judgment

1. In this second appeal preferred by the plaintiffs, following substantial question of law has been formulated for determination at the time of admission: -

“Whether after holding in para 16 of the impugned judgment that there was no partition between the parties, the lower appellate Court could legally justified in holding that the defendants/respondents perfected their title over the suit property by adverse possession?”

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

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



3. The suit property was originally held by one Nilamber and he was holding 165.55 acres of land as detailed in Schedule B attached with the plaint in Villages Kudalgaon and Ghatlohanga and the dispute relates to the property shown in Schedule C of the plaint at Village Ghatlohanga - 43.78 acres and at Village Kudalgaon – 9.94 acres, total area 53.72 acres. Nilamber died in the year 1915 leaving behind five sons namely, Shyamsunder, Phalari, Purushottam, Tima and Dayanidhi. His two sons Purushottam and Tima died issue-less. His eldest son Shyamsunder died in on 2-12-1925 and after his death, as per the prevailing revenue law, all the suit lands were mutated in the name of his eldest son Prahlad and Prahlad died on 11-2-1975 leaving 53.72 acres of land as detailed out in Schedule C of the plaint which is admittedly the ancestral property of the parties. This suit has been filed by sons and grandsons of Phalari and Dayanidhi for partition and separate possession against the defendants – sons of Prahlad – successors-in-interest of Shyamsunder stating inter alia that no partition of the suit property has ever taken place between the parties and it continues to be the joint family property of the plaintiffs and the defendants, as such, the plaintiffs are having $\frac{2}{3}$ rd share in the suit property and the defendants are having $\frac{1}{3}$ rd share in the suit property and the plaintiffs are in joint possession of the property shown in Schedule C of the plaint. It was further pleaded that plaintiffs No.2 and 12 went to the defendants in October, 1981 and asked for partition with the defendants, on which they started quarrelling with them and denied their share in the suit property leading to filing of suit for

partition of their $\frac{2}{3}$ rd share in the suit property. By way of amendment, it was pleaded that the Tahsildar, Jagdalpur passed order on 14-2-1949 (Ex.D-24) rejecting the application filed by Dayanidhi and Gaurinath holding the land to be held by Prahlad exclusively, but in Civil Suit No.6A/1955 filed by Prabhunath and Chunnilal against their father Prahlad, son of Shyamsunder, it was pleaded by Prahlad that the property is the joint family property of the parties and as such, the effect of the order, if any, of the Tahsildar has wiped out thereby. After the order of the Tahsildar, parties have amicably settled the dispute and decided not to challenge the order of the Tahsildar before higher forum and the dispute has been settled amicably and the order of the Tahsildar is not binding on them, therefore, the suit be decreed and reliefs as claimed be granted to them.

4. Defendants No.1 & 2 filed their joint written statement denying and controverting the plaint allegation stating inter alia that they have perfected their title by adverse possession and they have already ousted the plaintiffs from the suit land, as by order dated 14-2-1949, the revenue court / Tahsildar clearly held that the defendants are holding the land exclusively ousting the plaintiffs and they have perfected their title by adverse possession and further, in the civil suit decided on 9-5-1964 filed by sons of Prahlad, it is conclusively established that the defendants have already ousted the plaintiffs. In para 11 of the written statement, it was further stated that on all the suit lands, the plaintiffs have already been ousted since 1925 in the lifetime of Prahlad, father of defendants No.1 & 2. The plaintiffs

have constructive notice of the judgment rendered in the civil suit decided on 9-5-1964, but they did not challenge the same, as such, the defendants have perfected their title by way of adverse possession and by way of ouster.

5. The trial Court after appreciating oral and documentary evidence on record has come to a specific finding that the suit property is the ancestral property of the joint family through common ancestor Nilamber and there is no partition between the parties of the suit land, but further held that the defendants have perfected their title by adverse possession. On appeal being preferred, the first appellate Court concurred with the findings of the trial Court holding that the suit property is the joint family property of the parties and the ancestral property and there is no partition among the parties, but further held that the plea of ouster and adverse possession has been pleaded and established and therefore dismissed the appeal. Questioning that judgment & decree, this second appeal has been preferred in which substantial question of law has been framed by this Court for determination which has been set-out in the opening paragraph of this judgment.

6. Mr. R.N. Jha, learned counsel appearing for the appellants / plaintiffs, would submit as under: -

1. There is no specific pleading of ouster and no clinching evidence to establish the plea of ouster has been raised by the defendants except the self-serving statement of Chunnilal (DW-1) – defendant No.2.

2. The order of the Tahsildar dated 14-2-1949 (Ex.D-24) holding

that the defendants have perfected their title by way of adverse possession and the defendants are in exclusive possession of the same ousting the plaintiffs, is beyond the authority and jurisdiction of the revenue court, as the revenue court cannot adjudicate the question of title, therefore that will be of no help to the defendants. Thereafter, it has been specifically pleaded in para 3(b) of the written statement that parties have mutually settled the dispute and decided not to question of the order of the Tahsildar and Gopinath (PW-1) has clearly stated in paragraph 3 of his examination-in-chief and he has not been cross-examined on behalf of the defendants to controvert the said fact which the defendants were obliged to do in view of the law laid down by the Supreme Court in the matter of Muddasani Venkata Narsaiah (D) Th. Lrs. v. Muddasani Sarojana¹ (paragraph 16) which goes to show that the plaintiffs have established the fact that after the order of Tahsildar, parties mutually settled the dispute and decided not to agitate the dispute further.

3. Mere entries in the revenue records in favour of the defendants would per se will not establish the plea of adverse possession, as the defendants have failed to prove that on what date they came in possession, what was the nature of their possession, whether the factum of possession was known to the other side, how long their possession continued and whether the possession was open and undisturbed.

¹ AIR 2016 SC 2250

4. The plea of ouster has not been established as per the law declared by the Supreme Court in the matter of P. Lakshmi Reddy v. L. Lakshmi Reddy² followed by this Court in S.A. No.450/2003 (Lunja and another v. Smt. Bugad and others), decided on 24-1-2019.
5. The judgment & decree passed in Civil Suit No.15A/1963 (Ex.P-6) between Prabhunath and Chunnilal v. Prahlad would not establish the plea of ouster, as the plaintiffs herein were not party to that suit and they were neither actually nor constructively aware of it, therefore, the judgments & decrees of the two Courts below being perverse are liable to be set aside.
7. Mr. Rakesh Thakur, learned counsel for the respondents / defendants, would submit that both the Courts below have concurrently and rightly held that the plea of adverse possession and the plea of ouster have been duly established by the defendants. He would further submit that the order of the Tahsildar Ex.D-24 clearly and conclusively establishes that the defendants are in exclusive possession of the suit land in exclusion of the defendants which is hostile animus followed by the civil suit filed by defendants No.1 & 2 against their father Prahlad decided by judgment & decree dated 9-5-1964 and as such, the pleas of ouster and adverse possession were rightly held to be established by the two Courts below which is neither perverse nor illegal and liable to be upheld. He would also submit that the father of the defendants

² AIR 1957 SC 314

had already sold the part of suit land in favour of Lokeshwar Prasad – plaintiff No.1 vide Ex.D-33 dated 14-11-1972 which goes to show that the defendants were in exclusive possession of the suit land and the plaintiffs have accepted the title of the defendants as such, the appeal deserves to be dismissed with cost(s).

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the record with utmost circumspection.
9. Before proceeding further, it would be appropriate to notice the legal position qua the ripening of title by way of adverse possession.
10. The Supreme Court in the matter of Saroop Singh v. Banto and others³ has held that in the light of Article 65 of the Limitation Act, 1963, the plaintiffs have to prove their title and it is for the defendant to prove title by adverse possession and in terms of Article 65 of the Limitation Act, 1963 starting point of limitation does not commence from the date when the right of ownership arises to the plaintiffs, but commences from the date the defendant's possession becomes adverse. Paragraphs 28, 29 and 30 of the report are as under: -

“28. The statutory provisions of the [Limitation Act](#) have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the [Limitation Act](#), 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the [Limitation Act](#), 1963. In the instant case, plaintiff-

3 (2005) 8 SCC 330

respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed hereinbefore, the first defendant-appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

29. In terms of [Article 65](#) the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See [Vasantiben Prahladi Nayak v. Smonth Muljibhai Nayak](#)⁴.)

30. “*Animus possidendi*” is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See *Mohd. Mohd. Ali v. Jagadish Kalita*⁵, SCC para 21.)”

11. This view has been approved and followed by the Supreme Court in the matter of **M. Durai v. Muthu and others**⁶ and it has been held as under: -

“7. The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-a-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession.”

12. It is well settled law that a mere possession or user or permissive possession does not remotely come near the spectrum of adverse possession. Possession to be adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the possessor perfects his title by

4 (2004) 3 SCC 376

5 (2004) 1 SCC 271

6 (2007) 3 SCC 114

adverse possession.

13. In the matter of Maharaja Srischandra Nandy and others v. Baijnath Jugal Kishore (Firm)⁷, it has been held that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

14. It has been held in the matter of Secy. of State for India in Council v. Debendra Lal Khan⁸ that the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario*.

15. In the matter of S.M. Karim v. Mst. Bibi Sakina⁹, the Supreme Court has ruled that: -

“(5) ... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. ...”

16. In the matter of Annasaheb Bapusaheb Patil and others v. Balwant alias Balasaheb Babusaheb Patil (dead) by Lrs. & heirs etc.¹⁰, the Supreme Court held as under: -

“12. [Article 65](#) of the Schedule to the [Limitation Act, 1963](#) prescribes that for possession of immovable property or any interest therein based on title, the limitation of 12 years begins to run from the date of the defendant's interest becomes adverse to the plaintiff. Adverse possession means a hostile assertion i.e. a possession which is expressly or impliedly in denial of title of the true owner. Under [Article 65](#), burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the

7 AIR 1935 Privy Council 36

8 AIR 1934 Privy Council 23

9 AIR 1964 SC 1254

10 AIR 1995 SC 895

property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed.”

17. In the matter of Karnataka Board of Wakf v. Government of India and others¹¹, the Supreme Court has held that person pleading adverse possession has no equity in his favour. It runs as under: -

“11. ... Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. ... Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [*Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma*¹².]”

18. Thereafter, in the matter of Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and others¹³, the Supreme Court emphasized the need for fresh look regarding the law on adverse

11 (2004) 10 SCC 779

12 (1996) 8 SCC 128

13 (2009) 16 SCC 517

possession by stating as under: -

“32. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

33. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation.

34. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law.”

19. In the matter of Kurella Naga Druva Vidya Bhaskara Rao v.

Galla Jani Kamma alias Nacharamma¹⁴, the Supreme Court held that mere possession for some years by the party would not be sufficient to claim adverse possession. Paragraph 17 of the report states as under: -

“17. The defendant claimed that he had perfected his title by adverse possession by being in open, continuous and hostile possession of the suit property from 1957. He also produced some tax-receipts showing that he has paid the taxes in regard to the suit land. Some tax receipts also showed that he paid the tax on behalf of someone else. After considering the oral and documentary evidence, both the courts have entered a

concurrent finding that the defendant did not establish adverse possession, and that mere possession for some years was not sufficient to claim adverse possession, unless such possession was hostile possession, denying the title of the true owner. The courts have pointed out that if according to defendant, plaintiff was not the true owner, his possession hostile to plaintiff's title will not be sufficient and he had to show that his possession was also hostile to the title and possession of the true owner. After detailed analysis of the oral and documentary evidence, the trial court and High Court also held that the appellant was only managing the properties on behalf of the plaintiff and his occupation was not hostile possession."

20. In the matter of State of Haryana v. Mukesh Kumar and others¹⁵, the Supreme Court held that a serious re-look to the law of adverse possession is absolutely imperative in the larger interest of the people. Paragraphs 43 to 46 of the report read as follows: -

"43. It is our bounden duty and obligation to ascertain the intention of the Parliament while interpreting the law. Law and Justice, more often than not, happily coincide only rarely we find serious conflict. The archaic law of adverse possession is one such. A serious re-look is absolutely imperative in the larger interest of the people.

44. Adverse possession allows a trespasser – a person guilty of a tort, or even a crime, in the eyes of law – to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible. The doctrine of adverse possession has troubled a great many legal minds. We are clearly of the opinion that time has come for change.

45. If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be a total anarchy in the entire country. It is indeed a very disturbing and dangerous trend. In our considered view, it must be arrested without further loss of time in the larger public interest. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or

building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case.

46. In our considered view, there is an urgent need for a fresh look of the entire law on adverse possession. We recommend the Union of India to immediately consider and seriously deliberate either abolition of the law of adverse possession and in the alternate to make suitable amendments in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law.”

21. In the matter of Tribhuvanshankar v. Amrutlal¹⁶, the Supreme Court noticing the earlier decisions in paragraphs 37 and 38 of the report held as under: -

“37. It is to be borne in mind that adverse possession, as a right, does not come in aid solely on the base that the owner loses his right to reclaim the property because of his willful neglect but also on account of the possessor’s constant positive intent to remain in possession. It has been held in *P.T. Munichikkanna Reddy and others v. Revamma and others*¹⁷.

38. Regard being had to the aforesaid concept of adverse possession, it is necessary to understand the basic policy underlying the statutes of limitation. *The Acts* of Limitation fundamentally are principles relating to “repose” or of “peace”. In Halsbury’s Laws of England, Fourth Edition, Volume 28, Para 605 it has been stated thus: -

“605. Policy of the Limitation Acts. – The courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence.”

These principles have been accepted by this Court keeping in view the statutory provisions of the *Indian Limitation Act*.”

16 (2014) 2 SCC 788

17 (2007) 6 SCC 59

22. Turning to the facts of the present case, in the instant case, it is not in dispute that the parties are co-owners of the property in dispute and both the Courts have held that the suit property is the joint family property, that has not been subjected to any partition by any of the means including by metes and bounds. But both the Courts below have dismissed the suit after having held that the parties are co-owners of the suit property, but the defendants have perfected their title by adverse possession, as they have ousted the plaintiffs from the suit property.

23. At this stage, it will be appropriate to consider the law qua the plea of ouster in this regard.

24. 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.

25. The Supreme Court in the matter of Jai Singh and others v. Gurmej Singh¹⁸ 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*¹⁹ the earlier decision in *Lachhman Singh v. Pritam Chand*²⁰ 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.

18 (2009) 15 SCC 747

19 1981 PLJ 204

20 AIR 1970 P&H 304

(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 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.”

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

Perumal Chettiar and others²¹ 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

21 (2006) 11 SCC 600

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.

27. The Supreme Court in the matter of Nagabhushanammal (Dead) by Legal Representatives v. C. Chandikeswaralingam²²

recently 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*²³ held that (SCC p. 605, para 18) possession of 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*²⁴, 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*²⁵, 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.*

22 (2016) 4 SCC 434

23 (1971) 1 SCC 597

24 AIR 1957 SC 314

25 1933 SCC OnLine PC 65 : (1933-34) 61 IA 78

*Collector of Khulna*²⁶, 1A 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*²⁷.) 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*²⁸ 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, 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.”

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

Najeeb (Dead) Through Legal Representatives and others²⁹, 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

26 1900 SCC OnLine PC 4 : (1899-1900) 27 IA 136

27 1912 AC 230 (PC)

28 (1995) 4 SCC 496

29 (2018) 11 SCC 717

as to be given title by adverse possession, relying upon its earlier decision in the matter of Karbalai Begum v. Mohd. Sayeed³⁰.

29. Similarly, in the matter of Darshan Singh and others v. Gujjar Singh (Dead) by LRs. and others³¹, 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 denied.”

30. Reverting to the factual score of the matter after having noticed the legal position qua the principle of adverse possession and the plea of ouster of possession, it is quite vivid that the suit property was originally owned by Nilamber who died leaving five sons namely Shyamsunder, Phalari, Purushottam, Tima and Dayanidhi, out of whom Purushottam and Tima died issue-less. After death of Nilamber – original holder, in 1915, the suit land, as such, devolved upon his three sons jointly namely Shyamsunder, Phalari and Dayanidhi, but the suit land came to be recorded in the revenue record only in the name of his eldest son Shyamsunder as per the

30 (1980) 4 SCC 396

31 (2002) 2 SCC 62

prevailing State Revenue Law and after death of Shyamsunder, the suit land was recorded in the name of his eldest son Prahlad and Prahlad partitioned the suit land among his sons defendant No.1 Prabhunath and defendant No.2 Chunnilal who got their names separately recorded in the revenue records, as per order of the court and as such, they are in possession of the suit land after partition, but the fact remains that the suit property is the joint family property of Shyamsunder, Phalari and Dayanidhi and the plaintiffs are successors-in-interest of Phalari and Dayanidhi, whereas the defendants are successors-in-interest of Shyamsunder. Both the Courts have concurrently recorded finding that the suit property is the joint family property of parties herein.

31. Now, the question of partition comes-in and I have to consider it.

Both the Courts have concurrently recorded a finding that partition has not taken place among the parties, though the suit land is joint family property of the parties and that finding has attained finality, as it has not been questioned by the defendants in the way permissible in law for challenging those findings which are as under: -

15. इस तरह प्रतिवादी/उत्तरवादी चुन्नीलाल और वादी गोपीनाथ के द्वारा प्रस्तुत दस्तावेजों और न्यायालयीन कथन से यह बात प्रमाणित होती है कि वाद भूमि संयुक्त परिवार की संपत्ति थी, जिनका खंडन बिशिष्ट रूप से नहीं हो पाया है और प्रहलाद ने अपने जीवनकाल में ही न्यायलय के आदेशानुसार, वाद भूमि का अपने पुत्रों के बीच में बटवारा कर दिया है। इस तरह वाद भूमि संयुक्त परिवार की पैतृक संपत्ति होना प्रगट हो रहा है।

16. अपीलार्थी गण के द्वारा प्रस्तुत वाद-पत्र और साक्षी गोपीनाथ के कथन से यह प्रगट हो रहा है कि वर्तमान पक्षकारों के मध्य वादग्रस्त संपत्ति के सम्बन्ध में कभी कोई विभाजन नहीं हुआ है। नीलाम्बर की मृत्यु के बाद उसके बड़े लड़के श्यामसुंदर

और श्यामसुंदर के मृत्यु के बाद उसके ज्येष्ठ पुत्र प्रहलाद के नाम पर विवादित भूमि दर्ज हुई। वर्ष 1946-47 में गौरीनाथ तथा दयानिधि और प्रहलाद के बीच राजस्व प्रकरण चला था, जिसमें दिनांक- 14.2.49 को तत्कालीन तहसीलदार ने प्रदर्श डी-24 के आदेशानुसार, प्रहलाद का लगातार पिछले 12 वर्षों से वादग्रस्त भूमि पर कब्जा होना पाया था, और व्यवहार न्यायालय द्वारा गौरीनाथ तथा दयानिधि को अपना हक व स्वत्व निर्णित कराये जाने का निर्देश दिया था। परन्तु कोई भी कभी व्यवहार न्यायालय नहीं गया और उक्त आदेश के विरुद्ध कोई अपील अथवा पुनरीक्षण भी प्रस्तुत नहीं की गई। प्रहलाद की मृत्यु 1975 में होना बताया गया है, उस समय उसके नाम पर 2/3 एकड़ भूमि थी, क्योंकि प्रहलाद और उनके दोनों लड़के प्रभूनाथ और चुन्नीलाल के बीच भूमि का बटवारा हो गया था। उक्त बटवारा तहसील न्यायालय के आदेशानुसार हुआ था और उनका नाम राजस्व अभिलेख बी-1 किश्त बंदी खतौनी और खसरा पाचशाला में भी दर्ज होना प्रदर्श डी-6 से डी-11 तक के दस्तावेजों से प्रगट हो रहा है जिसमें उत्तरवादीगण का नाम सन 70-71 से लगातार, एक मात्र उनके स्वत्व अधिकार के रूप में दावा दिनांक (जुलाई- 1984) तक दर्ज किया गया है जो कि 12 वर्षों से अधिक समय से उनके निर्विवादित शांतिपूर्ण कब्जे को प्रमाणित करता है। इस तरह प्रकरण में प्रस्तुत दस्तावेजों और गवाहों के कथनों से यह बात प्रगट हो रही है कि वर्तमान पक्षकारों के बीच कभी-भी कोई विभाजन संपत्ति के सम्बन्ध में नहीं हुआ है। बल्कि प्रहलाद के जीवन काल में उसके व उसके दोनों पुत्रों के बीच न्यायालय के आदेशानुसार बटवारा हुआ है।

32. The defendants setup a plea of ouster of the plaintiffs from the suit land and perfection of their title by adverse possession which both the Courts have accepted, particularly the first appellate Court has clearly recorded following findings to conclude the plea of ouster of the plaintiffs, which state as under: -

1. The suit land was partitioned between Prahlad (son of Shyamsunder) and his two sons namely Prabhunath – defendant No.1 and Chunnilal – defendant No.2 as per order of the competent court (Ex.P-6) and they are in possession from 1968-69 to 1984 as apparent from the revenue record and the plaintiffs were aware of the above-stated partition, possession and mutation in the names of defendants No.1 & 2, as such, the plea of ouster has been clearly pleaded and

established.

2. The plaintiffs did not question the order Ex.D-24 passed by the revenue court declaring the defendants' adverse possession over the suit land.
33. The question for consideration would be, whether both the Courts below are justified in holding that the defendants have pleaded the plea of ouster rightly and further justified in holding that the defendants have firmly established the plea of ouster after having held that the suit land is the joint family property of the parties and partition has never taken place among the parties in the mode permissible under the law either by the order of the court or by metes and bounds?
34. In order to decide the correctness of the finding so recorded by the two Courts below, it would be appropriate to notice the pleadings made with regard to the plea of ouster. As held by Their Lordships of the Supreme Court in Hemaji Waghaji Jat (supra), the law of adverse possession which ousts an actual and real owner of land on the basis of his inaction within limitation is irrational, illogical and wholly disproportionate, and consequently recommended to the Central Government for urgent need of fresh look regarding the law on adverse possession. Therefore, in order to non-suit the plaintiffs as they have established their joint title on the suit land with no partition with the defendants and joint possession with the defendants but they have been non-suited on the plea of ouster, in the considered opinion of this Court, the plea of ouster has to be pleaded strictly stating in line with the decision rendered by Their

Lordships 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. As such, it would be appropriate to notice the relevant key pleadings with regard to the plea of ouster by the defendants in the instant case. Paragraphs 11, 12, 13, 14 and 15 are key paragraphs in which the plea of adverse possession / the plea of ouster has been taken by the defendants. They state as follows: -

11. नीलांबर की मृत्यु के उपरान्त नीलांबर के नाम की सम्पूर्ण भूमि श्यामसुंदर के नाम पर अंकित हुई। नीलांबर की मृत्यु सन 1915 में हुई। नीलांबर की मृत्यु के उपरांत नीलांबर द्वारा ग्राम घाटलोहंगा एवं कुदालगाँव में छोड़ी गई सम्पूर्ण भूमि पर अकेले श्यामसुंदर ही कब्जे में रहकर उपभोग करता था। नीलांबर के शेष चारो पुत्र श्यामसुंदर के साथ उक्त भूमि के सम्मिलित कब्जे में कभी भी नहीं थे। श्यामसुंदर के नाम पर अंकित ग्राम घाटलोहंगा एवं कुदालगाँव की सम्पूर्ण भूमि प्रतिवादी गण के पिता प्रहलाद के नाम पर अंकित हुई। उक्त सम्पूर्ण भूमि पर प्रतिवादीगण के पिता प्रहलाद के साथ फलारी, पुरषोत्तम, टीमान एवं दयानिधि अथवा इन सबकी संतान कभी भी किसी प्रकार के कब्जे में नहीं रहे। उक्त सम्पूर्ण भूमि पर खुले तौर से, अपने प्रतिकूल स्वत्व एवं अधिकार का इजहार करते हुए स्वयं अपने को ही एकमात्र स्वामी घोषित करते हुए प्रहलाद ने फलारी, पुरषोत्तम, टीमान एवं दयानिधि तथा उन सबकी संतान को उक्त कथित संपत्ति से पूर्णतः निष्कासित कर अलग कर दिया था (ousted)। ग्राम घाटलोहंगा और कुदालगाँव की उक्त सम्पूर्ण भूमि पर सन 1925 से प्रतिवादीगण के पिता प्रहलाद ही अपने आपको उक्त सम्पूर्ण भूमि को अपनी निजी संपत्ति मानते हुए उसका अधिकार पूर्वक उपभोग करते रहे। प्रहलाद द्वारा कभी भी उक्त सम्पूर्ण भूमि पर फलारी, पुरषोत्तम, टीमान एवं दयानिधि को उनकी जानकारी में कभी कोई अधिकार मान्य नहीं किया गया, जिसका उन्हें तथा उनकी सन्तान, वादीगण को भली भांति जानकारी थी।

12. दिनांक 29/7/46 को दयानिधि एवं गौरीनाथ ने तहसीलदार जगदलपुर के न्यायलय में ग्राम घाटलोहंगा एवं कुदालगाँव में प्रहलाद के नाम पर अंकित भूमि का बटवारा की मांग करते हुए प्रहलाद के विरुद्ध आवेदन प्रस्तुत किया गया था, जो

राजस्व प्रकरण क्रमांक 108/VIII-5 सन 1946 के रूप में पंजीबद्ध हुआ था। तहसीलदार जगदलपुर ने अपने आदेश दिनांक 14/2/49 के द्वारा उक्त आवेदन खारिज कर दिया और दयानिधि और गौरीनाथ को सक्षम न्यायलय ने व्यवहार वाद प्रस्तुत करने का निर्देश दिए। तहसीलदार ने अपने आदेश में उल्लेख किया है कि मौजा घाटलोहंगा एवं कुदालगांव की सम्पूर्ण विवादित भूमि पर 12 वर्ष से अधिक अवधि तक प्रतिकूल कब्जा होने के कारण दयानिधि एवं गौरीनाथ का उक्त सम्पूर्ण भूमि पर कोई अधिकार नहीं रहा।

13. नीलाम्बर एवं श्यामसुंदर की मृत्यु के उपरांत प्रहलाद के नाम पर अंकित ग्राम घाटलोहंगा एवं कुदालगांव की सम्पूर्ण भूमि का एकमात्र स्वामी प्रहलाद ही था। और वह ही उक्त सम्पूर्ण भूमि के कब्जे में रहकर उसका उपभोग करते आ रहा था। दोनों ग्राम कि उक्त भूमि पर फ्लारी, पुरषोत्तम, टीमान, दयानिधि तथा वादीगण का किसी प्रकार का अधिकार एवं कब्जा नहीं था। सन 1931-32 के बंदोबस्त के समय उक्त भूमि प्रहलाद के नाम पर अंकित की गयी थी। प्रहलाद एवं उसके दोनों पुत्र प्रतिवादीगण ही उक्त भूमि के सम्मिलित कब्जे में थे।

14. सन 1958 में प्रहलाद एवं प्रतिवादीगण के बीच ग्राम घाटलोहंगा की उक्त भूमि का आपसी बटवारा हो गया था तथा ग्राम कुदालगांव में स्थित भूमि का बटवारा भी प्रहलाद एवं प्रतिवादीगण के बीच न्यायलय व्यवहार न्यायाधीश वर्ग 1, जगदलपुर, द्वारा व्यवहार वाद क्रमांक 15-अ/63 में पारित निर्णय एवं डिक्री दिनांक 9/5/64 के अनुसार हो गया। उक्त बटवारे के अनुसार उक्त दोनों ग्राम की भूमि अतिरिक्त तहसीलदार, जगदलपुर के राजस्व प्रकरण क्रमांक 2/अ-6 /65-66 के अनुसार प्रहलाद, प्रतिवादी क्र० 1 एवं 2 के अलग अलग खाते में उनके नाम पर अंकित की गई। वादीगण को इन सब तथ्यों की पूरी जानकारी थी। उक्त बटवारे के अनुसार प्रतिवादी क्रमांक 1 के नाम पर ग्राम घाटलोहंगा एवं कुदालगांव में क्रमशः 18.92 एकड़ एवं 2 एकड़ भूमि है, जिसके कब्जे में प्रतिवादी क्रमांक 1 है। इसी प्रकार उक्त बटवारे के अनुसार प्रतिवादी क्रमांक 2 के नाम एवं कब्जे में ग्राम घाटलोहंगा एवं कुदालगांव में क्रमशः 21.10 एकड़ एवं 3.10 एकड़ भूमि है।

15. श्यामसुंदर की मृत्यु के उपरांत ग्राम घाटलोहंगा एवं कुदालगांव की सम्पूर्ण विवादित भूमि प्राप्त होने पर प्रहलाद ने वादीगण तथा उनके पूर्वत फ्लारी, पुरषोत्तम, टीमान एवं दयानिधि की, उक्त सम्पूर्ण भूमि पर अपना पृथक पृथक कब्जा कायत रखते हुए तथा उनकी जानकारी में खुले रूप से उस पर अपने प्रतिकूल स्वत्व का इजहार करते हुए, उक्त सम्पूर्ण संपत्ति से पूर्णतः निष्कासित कर दिया। वादीगण एवं उनके पूर्वज फ्लारी, पुरषोत्तम, टीमान एवं दयानिधि सन 1925 से लगातार ग्राम घाटलोहंगा एवं कुदालगांव की उक्त सम्पूर्ण विवादित भूमि के स्वत्व एवं कब्जे से पूर्णतः अलग है। इस प्रकार प्रहलाद एवं उसके उत्तराधिकारी प्रतिवादीगण ने ग्राम घाटलोहंगा एवं कुदालगांव की सम्पूर्ण विवादित भूमि पर सन 1925 से आज तक लगातार खुले रूप से अपने अधिकार के इजहार एवं प्रतिकूल कब्जा द्वारा पूर्ण स्वामित्व अर्जित कर लिया है। वादीगण का उक्त विवादित भूमि पर कोई स्वत्व अथवा अधिकार नहीं है।

35. On a careful perusal of the above-stated pleadings, it would appear that the defendants have pleaded that Nialmber was the original holder and after his death, the property came to be recorded only in the name of Shyamsunder and possession of only Shyamsunder was shown, other four sons of Nilamber never came in possession of the suit land and the suit land came to be recorded in the name of Shyamsunder – predecessor-in-title of the defendants. After death of Shyamsunder, it came to be recorded in the name of defendants' father Prahlad and the plaintiff's predecessor-in-title namely, Phalari, Dayanidhi, Purushottam and Tima or the plaintiffs were never in possession of the suit land. As such, the defendants have ousted the plaintiffs from the suit land, as they continuously enjoyed the suit land. It has also been pleaded that by Ex.D-24 application filed by Dayanidhi and Gaurinath claiming partition was rejected on 14-2-1949 and that was never challenged by the plaintiffs or their predecessor-in-title before the competent court. It was also pleaded that the suit land was partitioned between Prahlad, S/o Shyamsunder and Prahlad's sons – Prabhunath and Chunnilal in a duly constituted suit by judgment & decree dated 9-5-1964 and the plaintiffs were duly aware of that suit and they deemed to have the constructive notice of the same and therefore the defendants have ousted the plaintiffs from the suit land.

36. The plaintiffs herein who are the successors-in-interest of Dayanidhi and Phalari have instituted the suit with respect to the suit land on 16-7-1984 in which the defendants have taken the plea of adverse possession and the plea of ouster and both the Courts have found

established the plea of ouster. In the entire pleading, the defendants have only pleaded that the suit land came to be recorded in the name of Shyamsunder – predecessor-in-title of the defendants and after his death, it came to be recorded in the name of his son Prahlad and pursuant to the decree of the trial Court, the suit property was partitioned between Prahlad and his two sons Prabhunath and Chunnilal – defendants No.1 and 2 respectively. It has also been held concurrently by the two Courts below that the suit property is the joint family property, the defendants are in possession of the joint family property and the plaintiffs are also co-sharers in the suit property, though they are not in possession. Therefore, merely because the defendants are in exclusive possession in exclusion of the plaintiffs, will not per se establish the plea of ouster of possession. As already noticed herein-above, mere possession of the entire joint family property by co-sharer does not necessarily amount to ouster of other co-sharer, as possession of one co-owner is deemed to be the possession on behalf of all. Therefore, it was required to be pleaded and established that possession of co-owner must not only be exclusive but also hostile to the knowledge of the other, when a co-owner openly asserts the title and denies that of the other. Here, the defendants except pleading that they are in exclusive possession of the suit land, the suit lands have been mutated in the names of their predecessors-in-title, they have mutually partitioned the land between them and continuing in possession would not per se establish the plea of ouster, as they have not rather pleaded and

established the hostile animus to the knowledge of the plaintiffs. Likewise, mere mutation in revenue records in favour of Shyamsunder after death of Nilamber 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 the persons as per the prevailing State Revenue Law and he represents the entire joint family property representing the joint title of all the family members and as such, thereafter, the name of Prahlad, his son, came to be recorded in the like capacity. 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 Shyamsunder after the death of Nilamber – original holder and thereafter in the name of his son Prahlad will not give any semblance of title to the defendants, as their possession over the exclusive suit land is referable to possession on behalf of all other co-sharers including the plaintiffs who are 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.

37. Now, coming to the application made by Dayanidhi and Gaurinath – predecessors-in-title of the plaintiffs, the application made on 29-7-1946 seeking and claiming partition over the suit land came to be rejected on 14-2-1949 (Ex.D-24) by the learned Tahsildar by recording as under: -

“6. In view of the facts discussed in foregoing paragraphs my findings are: -

i) Prahlad was separate from the rest of the joint family members including the two applicants.

ii) Though the village Kudalgaon and Ghatlohanga were recorded in his name he was treating the muafi village and the lands as his own share without recognising the right of other members of the joint family including the two applicants.

iii) It is established that Dayanidhi and Gaurinath are out of possession of land both of Ghatlohanga and Kudalgaon for a statutory period of 12 years and above.

In view of the above I am not prepared to disturb the long undisturbed possession of Prahlad from the lands both of mouza Ghatlohanga and Kudalgaon. As the non-applicant Prahlad is in continued possession of the land of the two villages for a period of 12 years and above the claims of the two applicants are barred by limitation under article 44 of the limitation Act the possession being adverse, though the parties being the members of the joint family. I, therefore, reject the application of Dayanidhi and Gaurinath. The parties can bring a Civil Suit in the court of the competent of jurisdiction to establish its claim and on the receipt of the Decree of the court necessary changes can be effected in the land record papers.”

38. A careful perusal of the aforesaid finding would show that the Tahsildar has simply recorded a finding that the property is the joint family property, but Prahlad – predecessor-in-title of the defendants is in possession of the suit land and while rejecting the application filed by Dayanidhi and Gaurinath, the learned Tahsildar directed the

parties to file a suit to establish their claim. This fact has been relied upon as a fact to hold that the learned Tahsildar has held that the defendants' predecessor-in-title had established the plea of adverse possession. This plea has to be rejected for more than one reason. The application so made before the Tahsildar was the application for partition which the revenue court has to make partition upon the holdings, if the title is not disputed. If the title is disputed, the jurisdiction available to the revenue court is to direct the parties to get the title established before the civil court and adjourn the matter enabling the parties to approach the civil court. As such, the revenue court has no authority and jurisdiction to determine the plea of adverse possession of any party to the application, as it is not the province of the revenue court to do so, rather it is the exclusive jurisdiction of the civil court. Apart from this, the fact remains that the plaintiffs' predecessors-in-title have claimed partition over the land suit and it was rejected vide Ex.D-24 and therefore it cannot be held that the defendants' predecessors-in-title remained in possession of the suit land without any protest from the plaintiffs' predecessors-in-title, rather it would be indicative of the fact that they were conscious of the fact that they are also title holders of the suit land and they have share in the suit property and they have not acquiesced the title of the defendants over the suit land, as such, the plea of ouster is also not established in this regard.

39. The next finding recorded by the two Courts below to hold the plea of ouster established, as the suit that was filed by defendants No.1

and 2 against his father Prahlaḁ, who was the son of Shyamsunder, eldest son of Nilamber. It is not in dispute that the suit was only for partition between Prahlaḁ and his two sons – defendants No.1 and 2 in which either of the plaintiffs or their predecessors-in-title were not party to that suit, therefore, they had no actual notice of judgment Ex.P-6 of the said suit which was filed and ultimately, that was decreed in favour of defendants No.1 and 2 and their names came to be recorded in the revenue records. So far as constructive notice is concerned, it was not established except pleading that the plaintiffs were aware of the said judgment & decree. No clinching evidence has been brought on record to hold that the plaintiffs were constructively aware of the said decree so passed in favour of defendants No.1 and 2 in suit filed against their father Prahlaḁ. The judgment rendered by the trial Court in this case between Prahlaḁ and his sons granting decree (Ex.P-6) was a judgment *in personam* and it was not judgment *in rem*.

40. A judgment in rem settles the destiny of the res itself and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence, however, a judgment in personam, although it may concern a res, merely determines the rights of the litigants inter se to the res. The former looks beyond the individual rights of the parties, the latter is directed solely to those rights. (See R. Viswanathan and others v. Rukn-ul-Mulk Syed Abdul Wajid since deceased and others³².)

41. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (See Booz Allen & Hamilton INC v. SBI Home Finance Limited and others³³, para-37.)

42. It was vehemently contended by learned counsel for the respondents / defendants that the plaintiffs did have the constructive notice of the said fact of the suit for partition decreed in favour of defendants No.1 & 2 taking away the rights of the parties. There is no specific pleading and no clinching evidence brought on record to demonstrate the fact of constructive notice to the plaintiffs about the decree so passed by the court between Prahlad and his two sons – the defendants herein, therefore, the plea of constructive notice is hereby rejected and the decision cited by learned counsel for the defendants with regard to constructive notice, in the matter of Rajasthan Housing Board v. New Pink

33 (2011) 5 SCC 532

City Nirman Sahkari Samiti Limited and another³⁴, is of no help to the respondents / defendants.

43. The next contention of learned counsel for the respondents / defendants is that the sale deed dated 14-11-1972 (Ex.D-33) executed by Prahlad in favour of plaintiff No.1 would establish the fact of ouster of the plaintiffs from the suit land. Mere execution of sale deed for some portion of land in favour of one of the plaintiffs would not take away the right of all the plaintiffs which they are otherwise entitled. So the argument based on Ex.D-33 is of no use to the defendants.

44. Similarly, learned counsel for the defendants relied upon a decision of the M.P. High Court in the matter of Chhotelal Babulal and another v. Premlal Girdharilal and others³⁵ in which it has been held that the plaintiff has the knowledge of the hostile activity of the defendant but choose not to react on it and living in the same town and therefore doctrine of ouster would attract. It has already been held that the plea of ouster has not been pleaded and established by the defendants, therefore, the said decision is also of no help to the defendants.

45. Likewise, in the matter of Beharilal s/o Ramlal v. Jagannath s/o Ramlal³⁶ relied upon by learned counsel for the defendants it has been held that adverse possession must be to the knowledge of co-sharer and knowledge of exclusion from joint family property or ouster may be proved directly or inferentially. It has already been

34 (2015) 7 SCC 601

35 1976 M.P.L.J. 562

36 1992 M.P.L.J. 79

held that the plea of ouster has neither been pleaded nor proved, therefore, this judgment is also of no help to the defendants.

46. Similarly, learned counsel for the defendants relied upon a judgment rendered by the Supreme Court in the matter of **Parsinni (Dead) by L.Rs. and others v. Sukhi and others**³⁷ in which it has been held that once adverse possession perfecting title by prescription is established, suit filed thereafter questioning title is barred. This is not the position here.

47. In the considered opinion of this Court, neither there is sufficient pleading with regard to the plea of ouster nor there is any clinching evidence in this regard available on record to establish the plea of ouster by the defendants. Merely on the basis of possession of the defendants which is possession on behalf of all the co-sharers, in absence of hostile animus and on the basis of mutation in the revenue records for a fairly long time, the plea of ouster cannot be said to be established. In consequence, the judgment & decree of both the Courts below to the extent of holding that the defendants have established their plea of adverse possession and the plea of ouster, are set aside. It is declared that the successors-in-interest of Phalari and the successors-in-interest of Dayanidhi – the plaintiffs herein, are entitled for $\frac{1}{3}^{\text{rd}}$ share each in the suit property and the successors-in-interest of Shyamsunder are also entitled for $\frac{1}{3}^{\text{rd}}$ share each in the suit property shown in Schedule 'C' of the plaint. The said schedule be made part of the decree. The concerned revenue authorities are directed to make partition in

37 (1993) Supp. 2 S.C.R. 315

accordance with law, as the suit property is an estate assessed to the payment of revenue to the State Government. The substantial question of law is answered accordingly and the second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

48. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma