

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.450 of 2003

1. Lunja, S/o Judum Kumhar, aged about 50 years.

2. Jaiprakash, S/o Lunja Kumhar, aged about 30 years,

Both R/o Village Bijadih, Tehsil Samri, District Surguja, C.G.

(Plaintiffs)

---- Appellants

Versus

1. Smt. Bugad, D/o Late Bhikhu, R/o Village Bijadih, Tehsil Kusmi,
Distt. Surguja, C.G.

2. Chandan, S/o Dembu Kumhar, aged about 60 years.

3. Mankumari, D/o Bhikhu Kumhar, aged about 48 years.

4. Bhonder, D/o Bhikhu Kumhar, aged about 45 years.

5. Lalki, D/o Bhikhu Kumhar, aged about 40 years.

6. Indar, D/o Dhuman Kumhar, aged about 42 years.

7. Bundur, D/o Dhuman Kumhar, aged about 40 years.

8. Fulmet, D/o Dhuman Kumhar, aged about 36 years.

9. Bachwa, D/o Dhuman Kumhar, aged about 30 years.

10. Khuni, D/o Late Janki, aged about 21 years.

11. Dhoni, D/o Late Janki, aged about 19 years.

All R/o Village Bijadih, Tehsil Samri, Distt. Surguja, C.G.

12. The State of Chhattisgarh, through Collector, Surguja, Ambikapur,
C.G.

(Defendants)

---- Respondents

For Appellants: Mr. A.K. Prasad, Advocate.

For Respondents No.1 to 11: -

Mr. Sushil Dubey, Advocate.

For Respondent No.12 / State: -
Mr. Vimlesh Bajpai, Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

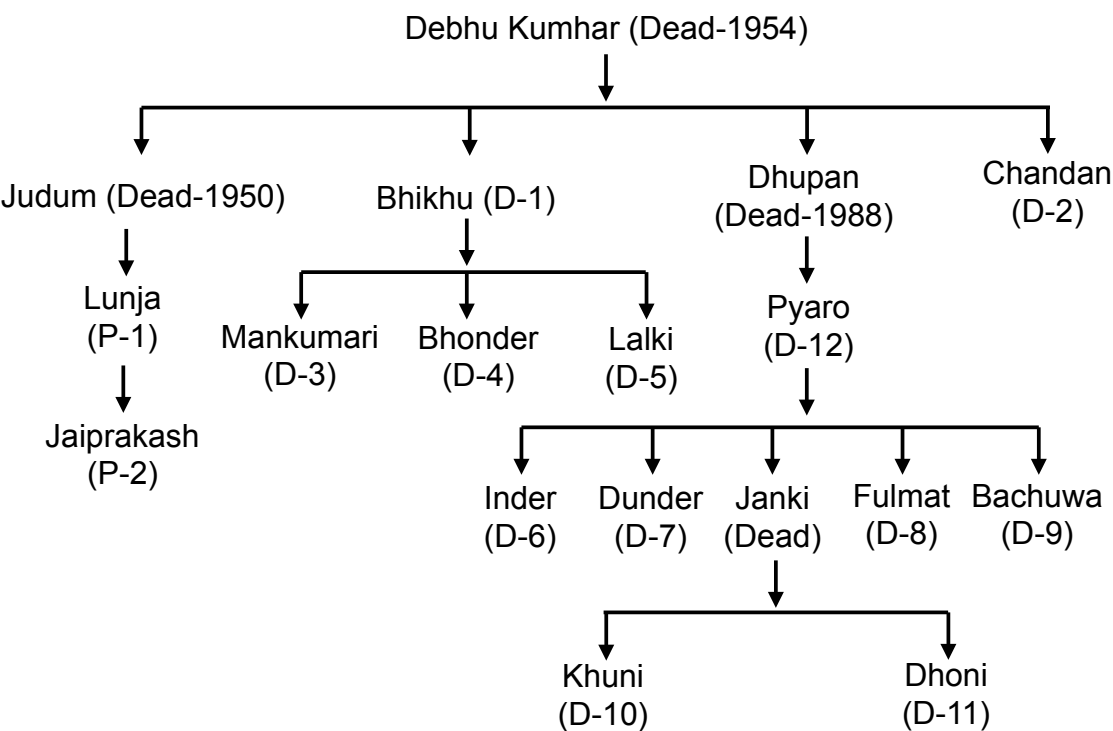
24/01/2019

1. The appeal was admitted by formulating the following substantial question of law: -

“Whether both the Courts below have committed illegality by dismissing the suit and appeal on the ground of limitation in absence of pleading of ouster?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court.)

2. Two plaintiffs filed suit for partition and separate possession with following genealogical tree demonstrating the relationship among parties: -



3. The main relief claimed by the plaintiffs was that they are members

of Kumhar Hindu caste and the suit property mentioned in Schedules A, B, C & D is the joint family property, it was held by their father Judum with Bhikhu, Dhupan & Chandan and the property was the self-acquired property of Debhu Kumhar which the defendants denied and stated that they have perfected their title by adverse possession as they are in possession since 1954 and they have also got their names mutated and they are in possession since then.

4. The trial Court after appreciating oral and documentary evidence on record held that the plaintiffs are entitled for $\frac{1}{4}$ th share in the property shown in Schedules A & B and not entitled for any share in the property shown in Schedules C & D, however, dismissed the suit that the suit is barred by limitation under Article 65 read with Article 110 of the Limitation Act, 1963, as they were ousted from their possession. The appeal preferred by the plaintiffs remained unsuccessful leading to filing of second appeal in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.
5. Mr. A.K. Prasad, learned counsel appearing for the appellants/ plaintiffs, would submit that the plaintiffs' suit was for partition and possession and both the Courts below have concurrently committed legal error in dismissing the suit and further having held that the suit property was joint family property and the plaintiffs are entitled for $\frac{1}{4}$ th share in the property shown in Schedules A & B on the ground to be barred by limitation i.e. by Article 65 read with Article 110 of

the Limitation Act, as the property being the joint family property and possession of one co-owner is deemed to be possession of all co-owners / co-sharers and unless the plea of ouster is raised and established, the suit could not have been dismissed by both the Courts below without there being the plea of ouster established by raising proper pleading and leading evidence, as such, the judgments & decrees passed by both the Courts below deserve to be set-aside.

6. Mr. Sushil Dubey, learned counsel appearing for the defendants/ respondents No.1 to 11, would support the impugned decree passed by the two Courts below and invited my attention to the finding recorded by the trial Court in paragraphs 22 to 26 holding the suit to be barred by limitation.
7. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also perused the records of both the Courts below with utmost circumspection.
8. Undisputedly, two plaintiffs brought the suit for partition of their share claiming $\frac{1}{4}^{\text{th}}$ share in the suit property mentioned in Schedules A, B, C & D of the plaint holding the suit property to be the joint family property of their predecessor-in-title along with the predecessor-in-title of the defendants i.e. Bhikhu, Dhupan & Chandan in which the trial Court held the property to be joint family property as no partition has been taken place and further held the plaintiffs to be entitled only for $\frac{1}{4}^{\text{th}}$ share in the suit property Schedules A & B, but held that they are not entitled for any share in

the property shown in Schedules C & D, as that was the self-acquired property of Bhikhu, Dhupan & Chandan, as such, the plaintiffs have been held entitled for ¼th share in the suit property by way of partition in the suit for partition filed by the plaintiffs. But, both the Courts below have dismissed the suit on the ground that the suit is barred by Article 65 read with Article 110 of the Limitation Act, as the plaintiffs are out of possession of the suit land and the defendants have perfected their title by adverse possession.

9. Article 65 of the Limitation Act, 1963 states as under: -

	Description of suit	Period of limitation	Time from which period begins to run
65.	For possession of immovable property or any interest therein based on title. <i>Explanation.</i>—For the purposes of this article— (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be falls into possession; (b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) where the suit is by a purchaser at a sale in	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

	execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		
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10. From a careful perusal of the above-stated provision of law, it is quite vivid that when the suit is based on title for possession, once the title is established on the basis of relevant document and other evidence, unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited.
11. The Supreme Court in the matter of **Saroop Singh v. Banto and others**¹ 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-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse

1 (2005) 8 SCC 330

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](#)².)

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*³, SCC para 21.)”

12. This view has been approved and followed by the Supreme Court in the matter of **M. Durai v. Muthu and others**⁴ 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.”

13. 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

2 (2004) 3 SCC 376

3 (2004) 1 SCC 271

4 (2007) 3 SCC 114

adverse possession.

14. In the matter of Maharaja Srischandra Nandy and others v. Baijnath Jugal Kishore (Firm)⁵, 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.

15. It has been held in the matter of Secy. of State for India in Council v. Debendra Lal Khan⁶ that the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario*.

16. In the matter of S.M. Karim v. Mst. Bibi Sakina⁷, 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. ...”

17. In the matter of Annasaheb Bapusaheb Patil and others v. Balwant alias Balasaheb Babusaheb Patil (dead) by Lrs. & heirs etc.⁸, 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

5 AIR 1935 Privy Council 36

6 AIR 1934 Privy Council 23

7 AIR 1964 SC 1254

8 AIR 1995 SC 895

real owner and amounted to a denial of his title to the 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.”

18. In the matter of Karnataka Board of Wakf v. Government of India and others⁹, 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*¹⁰.]”

19. Thereafter, in the matter of Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and others¹¹, the Supreme Court

9 (2004) 10 SCC 779

10 (1996) 8 SCC 128

11 (2009) 16 SCC 517

emphasized the need for fresh look regarding the law on adverse 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.”

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

Galla Jani Kamma alias Nacharamma¹², 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

12 2008 AIR SCW 5682

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."

21. In the matter of **State of Haryana v. Mukesh Kumar and others**¹³, 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

13 (2011) 10 SCC 404

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.”

22. In the matter of Tribhuvanshankar v. Amrutlal¹⁴, 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*¹⁵.

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

14 (2014) 2 SCC 788

15 (2007) 6 SCC 59

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](#).”

23. In this case, both the Courts below have reached to the conclusion that the plaintiffs are entitled for $\frac{1}{4}$ th share in the suit property and on the basis of adverse possession, the suit has been dismissed.

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 Singh¹⁶ 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*¹⁷ the earlier decision in *Lachhman Singh v. Pritam Chand*¹⁸ 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

16 (2009) 15 SCC 747

17 1981 PLJ 204

18 AIR 1970 P&H 304

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 others¹⁹ 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 that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of

19 (2006) 11 SCC 600

each case.

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

by Legal Representatives v. C. Chandikeswaralingam²⁰

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*²¹ 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*²², 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*²³, 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*²⁴, 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

20 (2016) 4 SCC 434

21 (1971) 1 SCC 597

22 AIR 1957 SC 314

23 1933 SCC OnLine PC 65 : (1933-34) 61 IA 78

24 1900 SCC OnLine PC 4 : (1899-1900) 27 IA 136

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*²⁵.) 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*²⁶ 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. Najeer (Dead) Through Legal Representatives and others²⁷, 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

25 1912 AC 230 (PC)

26 (1995) 4 SCC 496

27 (2018) 11 SCC 717

decision in the matter of Karbalai Begum v. Mohd. Sayeed²⁸.

29. Similarly, in the matter of Darshan Singh and others v. Gujjar Singh (Dead) by LRs. and others²⁹, 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 facts of the present case in light of the principles of law laid down qua the plea of adverse possession by ouster in the above-stated judgments rendered by Their Lordships of the Supreme Court, it is quite vivid that in the instant case, the defendants have taken the plea of adverse possession halfheartedly by simply stating that the plaintiffs did not assert any title over the suit land right from the year 1954 till the date of institution of suit and neither claimed any title nor made any dispute with regard to the suit land and allowed the defendants to get their names mutated in the revenue records and further allowed division

28 (1980) 4 SCC 396

29 (2002) 2 SCC 62

of holdings in the relevant revenue records as per convenience of the defendants and the defendants are in possession right from 1954 and therefore they have become title holders by remaining in possession for long time which has been accepted by the two Courts below. The defendants have taken the following plea of adverse possession and ouster of the plaintiff, in the written statement as under: -

(25) यह कि वादी लुन्जा 1954 से वाद संस्थान के दिनांक तक यदि भूमि पर कभी-भी अपना हक व्यक्त नहीं किया और न ही कोई विवाद उत्पन्न किया इतना ही नहीं तो भीखू, चंदन एवं धूपन के वारिसानों को प्रतिवादी क्रमांक-5 से 12 तक के नाम पर भूमि का विभाजन होकर नामांतरण हो जाने एवं खाता विभाजित हो जाने तक वादीगण की ओर से किसी भी प्रकार से कोई विवाद उत्पन्न नहीं किया गया । इस प्रकार प्रतिवादीगण एक मात्र भूमिस्वामी होकर सन् 1954 से वाद भूमि पर काबिज काश्त चले आ रहे हैं और वाद भूमि के खुले एवं मुक्त स्वामित्व का अधिपत्यधारी होकर स्वत्वाधिकारी हो चुके हैं ।

31. In the considered opinion of this Court, as held earlier, mere mutation in the revenue records and not asserting title over the suit land would not amount to ouster so as to give title by adverse possession to the defendants particularly when there is no pleading of ouster raised, except that the suit lands have been mutated in their names and there is division of holdings in the name of the defendants and they are in possession of the suit land for long time since 1954. It is already held that possession of joint property by one co-owner is in the eye of law, possession of all even if one is actually out of possession and 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.

32. Therefore, the findings recorded by the two Courts below holding that the defendants have proved the plea of ouster so as to give title by adverse possession is perverse and contrary to the records and the decree to that extent holding the suit to be barred by Article 65 of the Limitation Act deserves to be and is accordingly set aside. It is held that the plaintiffs' suit was within the period of limitation and the plaintiffs are entitled for ½ share of the suit land shown in Schedules A & B annexed to the plaint.

33. The second appeal is consequently, allowed to the extent indicated herein-above leaving the parties to bear their own cost(s). The substantial question of law is answered accordingly.

34. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge