

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No.11 of 2003**

1. Baratu S/o Baishakhu Aged About 35 Years R/o Mahkoni, Tahsil Bilaigarh, District Raipur Chhattisgarh
 2. Bhog Singh S/o Baishakhu Aged About 43 Years R/o Mahkoni, Tahsil Bilaigarh, District Raipur Chhattisgarh
 3. Jageshar S/o Baishakhu Aged About 40 Years R/o Mahkoni, Tahsil Bilaigarh, District Raipur Chhattisgarh
- Appellants**

Versus

1. Karamu (Dead) Through Lrs. Nil
 - 1.1 - Lakhan Lal S/o Karamu Aged About 35 Years R/o Belari, Tahsil Kasdol, District Raipur Chhattisgarh. (Now District Baloda Bazar), District : Balodabazar-Bhathapara, Chhattisgarh
 - 1.2 - Shyam Kumari D/o Karamu Aged About 31 Years R/o Tanod, Tahsil Pamgarh, District Janjgir Champa Chhattisgarh
 2. Bhago Bai D/o Dharmu Aged About 40 Years R/o Belari, Tahsil Kasdol, District Raipur, District : Raipur, Chhattisgarh
 3. Bhagwantin D/o Dharmu Aged About 37 Years R/o Belari, Tahsil Kasdol, District Raipur, District : Raipur, Chhattisgarh
 4. Tirith (Dead) As Per Honble Court Order Dated 25.02.2009.
 5. Khorbahara S/o Dharmu Aged About 25 Years R/o Belari, Tahsil Kasdol, District Raipur, District : Raipur, Chhattisgarh
 6. State Of Chhattisgarh Through Collector, Raipur, District : Raipur, Chhattisgarh
- Respondents**

For Appellants/Plaintiffs	:	Mr. H.V. Sharma, Advocate
For Respondent/State	:	Mr. Ankur Kashyap, Panel Lawyer

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order on Board****12/02/2020**

Heard.

1. This appeal is directed against impugned judgment and decree dated

13.11.2002 passed by the First Additional District Judge, Baloda Bazar in Civil Suit No.1-A/2002, whereby, the learned Lower Appellate Court, reversing judgment and decree of the Trial Court has dismissed the plaintiff's suit as barred by limitation.

2. The appellants/plaintiffs filed a suit seeking decree of declaration, partition and separate possession on pleadings *inter alia* that the property described in Schedule-A and Scheduled-B of the plaint are the ancestral properties of the plaintiffs and defendants described in family tree. According to the plaintiffs, two sons of Nanki, namely, Rajaram and Sidar Singh were entitled to equal share. After death of Rajaram, Baishakhu was entitled to half of the share in the entire ancestral property and remaining half of the share belonged to Sidar Singh (ancestor of defendants). Further, pleading was that after death of Rajaram, his widow and minor son Baishakhu were shunted out of the house whereafter, Baishakhu and his mother went to village Navagaon where Baishakhu engaged in agriculture activity. After Baishakhu attained majority and married, he came to Village Bilari and claimed partition, on which, they were assured that in times, respective share would be allotted and the shares have also been identified and in the meantime, share in the agriculture produce would also be given. After death of Baishakhu, his sons/plaintiffs went to defendants and defendants kept on satisfying them by giving share in the agriculture produce and assuring that partition, later on, would be done. Further, pleading was that in May, 1991, when the plaintiffs sought partition stating that now the plaintiffs also intend to engage in agriculture activity, the defendants specifically denied partition which led to filing of the suit by the plaintiffs.

3. In the written statement, though, defendants did not deny the pleadings that the property in dispute, comprised both in Schedule-A and schedule-B was ancestral property, that the parties were related to each other as described in the family tree as contained in para 2 of the plaint, that the parties are governed by Hindu Law of succession of Mitakshra school as pleaded in para 3 and also that Baishakhu and Sidar Singh are entitled to equal share in the property as pleaded in para 4 of the plaint, however, the defendants' case was that the plaintiffs' suit is barred by limitation because the defendants have been cultivating the property since long and the suit has been brought after a very long period about 30 to 35 years. Learned Trial Court framed issues as

below :

वाद प्रश्न	निष्कर्ष
1. क्या वादीगण अनुसूची 'अ' में दर्शाई गई विवादित भूमि के आधे हिस्से के भू स्वामी घोषित किये जाने के अधिकारी है ?	हाँ
2. क्या अनुसूची 'ब' में दर्शाई गई विवादित भूमि वादीगण व प्रतिवादीगण की पैतृक संपत्ति है ?	हाँ
3. क्या वादीगण विवादित भूमि का बटवारा कराकर उसका आधा हिस्सा प्राप्त करने का अधिकारी है ?	हाँ
4. क्या वादीगण का वाद समयावधि के बाहर है ?	हाँ
5. सहायता एवं व्यय	वादीगण का वाद सव्यय डिक्री दिया गया।

4. On the basis of the evidence oral and documentary led by the respective parties, learned Trial Court recorded finding in favour of the plaintiffs that the property in dispute at described in Schedule-A and Schedule-B is the ancestral property, in which, the plaintiffs are entitled to equal share along with the defendants.

5. Aggrieved by the impugned judgment and decree of the Trial Court, respondents/defendants preferred an appeal. Learned Lower Appellate Court reversed the judgment and decree passed by the Trial Court mainly on the finding that the plaintiffs have failed to prove that the property is ancestral one, defendants have been cultivating the property since long and it is a case of ouster of appellants co-owners and further that though Baishakhu demanded his share, it was denied long back, therefore, suit ought to be brought which is 3 years of such denial as provided in Article 65 of the Limitation Act. Learned Lower Appellate Court also recorded that the plaintiffs' suit could not be decreed in respect of property described in Schedule-B as no specific relief in that regard was prayed for.

6. This appeal was admitted on following substantial question of law :

“Whether the First Appellate Court was justified in holding the suit for partition by the co-sharers as barred by law of limitation particularly on factual premise that the defendants had admitted in their written statement that they are the owners of half share of the property and in the absence of pleadings and proof regarding the ouster from the joint family property, they could have perfected their title by adverse possession over the co-parcenary

property ? ”

7. Learned counsel for the appellants argued that the judgment passed by Learned Lower Appellate Court is perverse as the findings have been recorded ignoring admission on the part of the defendants that the property is ancestral one, that Baishakhu and Sidar Singh are entitled to equal share in the property and also ignoring the admission with regard to relationship of the parties, as described in the family tree in para 2 of the plaint. He would further argue that there was absolutely no pleadings of ouster, much less, any evidence led by the defendants. Further, defendants not only in their pleadings but also in the written statement and in their evidence, came out with the case that throughout they have been giving plaintiffs' share of agriculture produce therefore, such pleadings and evidence is completely contrary to any hypothesis of ouster. Therefore, only on the basis of possession, defendants could not perfect any title treating their possession to be adverse to that of the plaintiffs. In support of his submission, learned counsel for the appellants places reliance upon the judgment of the Supreme Court in the cases of **Smt. Sarla Dixit and another V. Balwant Yadav and others, AIR 1996 SC 1274 and Bachhaj Nahar V. Nilima Mandal and others, AIR 2009 SC 1103.**

8. There is no representation made by respondents even though the case was taken up in the second round for final hearing.

9. The plaintiffs' came out with the case that the property in dispute described in two schedules A & B is the ancestral property. Initially, when the suit was filed, averment was made in para 1 that the property described in schedule-A is ancestral property. Later on, an amendment was also made incorporating other parties which stood in the name of defendants No.2 & 3 described under schedule-B, claiming that property also to be ancestral property. That amendment was allowed by the trial Court vide its order dated 24.04.1993. The respondents/defendants in their written statement admitted the pleadings made in para 1 of the plaint. It is relevant to note that amendment was allowed on 24.04.1993 and the written statement was filed on 13.09.1993.

10. The plaintiffs also pleaded in para 2 of the plaint that the name of Baishakhu/father of plaintiffs and Sidar Singh/father of defendants was recorded in *Mishal Bandobast* records of 1927-1928 and also described the

family tree. This was also not disputed and the respondents-defendants admitted this pleading.

11. The pleadings in para 3 that the parties are Hindu and governed by *Mitakshra* school of Banaras Branch of Hindu Law was also admitted.

12. Importantly, the pleadings made in para 4 of the plaint that Baishakhu and Sidar Singh both are entitled to equal share in the disputed property was also not disputed, though, in the written statement, other pleadings of para 4 that Baishakhu and his mother were thrown out of the house was disputed.

13. That being the admitted position, the property was clearly an ancestral property on defendants own admission. Learned Lower Appellate Court, however, perversely recorded in para 12 of its judgment that the plaintiffs have failed to prove that the property was ancestral one.

14. Further, learned Lower Appellate Court has also completely misdirected itself in recording a finding with regard to title of the parties on the basis of entries made in the revenue records. It is trite law that entries in the revenue records neither create nor abolish title in respect of the property.

15. In the entire written statement, there is no plea of ouster whatsoever. On the contrary, in the written statement, it has been stated that the plaintiffs were given their share of agriculture produce. Not only this, in the evidence led by the defendants, there is no evidence of ouster as such.

16. In the absence of there being any plea of ouster, much less, any evidence led in that behalf and on the contrary, the defendants themselves pleadings that they had given share of agriculture produce to the plaintiffs, learned Lower Appellate Court was wholly unjustified in law in holding that present is a case of ouster.

17. The possession of the defendants over the suit property would therefore, be treated to be possession not only of the defendants but also constructive possession of the plaintiffs in respect of property in dispute which admittedly was joint family property of Baishakhu and Sidar Singh and later on, after death of Baishakhu and Sidar Singh, devolved upon their

successors, namely, plaintiffs and defendants.

18. Learned Lower Appellate Court has recorded a finding that as the claim of partition made by Baishakhu was denied by defendants, the plaintiffs were required to file suit within period of three years from such denial. This finding recorded by the Learned Lower Appellate Court in paragraph 17 of the judgment is factually incorrect and perverse. The plaintiffs pleadings as contained in para 5 is that when their father Baishakhu attained majority and went to meet defendants claiming his share, the defendants gave him assurance that partition would be done at an appropriate stage and till the time, his share of agriculture produce would be given to him. In para 6, it was pleaded that after death of Baishakhu when the plaintiff went to defendants, again they were given assurance. In para 7 of the plaint, it was pleaded that when in the month of May, 1991 plaintiff again requested defendants to effect partition, the defendants denied claim of the plaintiff for partition. Thus, according to the plaintiff, when Baishakhu went to meet defendant, there was an assurance and no denial. After death of Baishakhu, plaintiffs went to meet defendant for the first time, again there was no denial of their title and claim but only on assurance. It was only in May, 1991 as pleaded in the plaint, that denial first took place.

19. In the written statement, the averment made in paras 5,6 & 7 have been denied. Jageshwar (PW1) has deposed in para 2 of his evidence that when Baishakhu went to claim his share, defendants gave him assurance and started giving him his share of agriculture produce. He has further deposed that after death of Baishakhu, when they went to meet defendants claiming their share, defendants denied. In the cross-examination, it has been elicited that these witnesses had claimed partition in 1990. He has further stated that even after the death of his father i.e. after death of Baishakhu, the defendants were giving their share of agriculture produce for two years but thereafter, they stopped giving. Further, in his cross-examination, it has been also elicited that for about 5 years, the defendants were sharing agriculture produce. Thus, from the evidence of this witness, it is proved that even after death of Baishakhu, share of agriculture produce was being given to the plaintiffs for few years and then defendants stopped giving their share.

20. According to Saheb Lal (PW2) also, the defendants were not giving

share of agriculture produce to the plaintiff since last 10-12 years.

21. Karmuram (DW-1) has stated that no claim for partition was made. The other witness Balakram (DW2) also states that the plaintiff did not claim for partition. These two witnesses have stated that the agriculture lands are being cultivated by defendants.

22. It would thus be seen that even though, there is an evidence to the effect that the property in dispute was being cultivated by defendants sing long, there is neither any pleadings nor any evidence of ouster of the plaintiffs from the joint family property, which was an ancestral one. Further, the evidence also proves that according to the plaintiffs, denial on the part of the plaintiff's case was made for the first time in the year 1991 and not before that. According to defendants, no such claim was made. In either of the case, it cannot be said that when Baishakhu came to defendants to claim his share long before filing of the suit, the claim was denied. The finding in this regard recorded by learned Family Court is therefore, perverse as there is no evidence of Baishakhu approaching the defendants long before filing of the suit and denial of claim by defendants. The denial as per the pleadings and evidence took place for the first time in the year 1990-91.

23. Learned Lower Appellate Court proceeded on erroneous assumption of law that the possession of co-sharer is adverse to the title and interest of the plaintiffs in respect of the suit property. In the absence of there being any pleadings and evidence of ouster, the plaintiff-co-owner cannot be non-suited on the ground that the defendants' possession in the property is adverse to the plaintiffs title and by long continuous such adverse possession is perfected into title of the defendants in respect of the plaintiffs share in the joint family property which happened to be their ancestral property.

24. In one of the earliest decision, the Supreme Court in the case of **P. Lakshmi Reddy V. L. Lakshmi Reddy, AIR 1957 SC 314**. It was held :

“4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See Secretary of State for [India v. Debendra Lal Khan](#), 61 Ind App 78 at p 82: (AIR 1934 PC 23 at p.25) (A). 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](#), 27 Ind App 136 at p.140

(PC) (B). 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 coheir 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*, 1912 AC 230 (C)). 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. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in [N. Varada Pillai v. Jeevarathnammal](#), AIR 1919 PC 44 at p.47(D) quotes, apparently with approval, a passage from *Culley v. Deod Taylerson*, (1840) 3 P & D 539 : 52 RR 566 (E) which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur". (See also *Govindrao v. Rajabai*, AIR 1931 PC 48 (F)). It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

25. The said legal position has been stated and re-stated in the cases of **P. Lakshmi Reddy (supra)**, **Shambhu Prasad Singh V. Most. Phool Kumari and others**, AIR 1971 SC 1337, **Smt. Sarla Dixit and another v. Balwant Yadav and others**, AIR 1996 SC 1274 and **M. Arthur Paul Ratna Raju and others V. Gudese Garaline Augusta Bhushanabai and another**, AIR 1999 SC 2633. The legal position therefore is that in a matter of claim for share in property by co-owner, the other owners are not entitled to oppose the claim on the ground of they being in possession for long period unless it is established by convincing evidence that the plaintiff-co-owner has been ousted from the disputed property. There has to be specific pleadings and clinching evidence with regard to ouster. In the present case, neither there is any pleading nor any evidence of ouster.

26. The impugned judgment passed by the Learned Lower Appellate Court is clearly contrary to settled legal position. The possession of the respondents/defendants could not be said to be adverse to that of the plaintiffs and on that basis, it could not be held that the plaintiffs' suit is barred by limitation merely because the defendants have been enjoying possession of the property since long.

27. In the result, question of law framed is answered in the manner that the learned Lower Appellate Court was wholly unjustified in holding suit for partition as barred by limitation.

28. The appeal succeeds and is allowed. Impugned judgment and decree passed by the learned Lower Appellate Court is set aside and that of the trial Court is restored.

29. The Appellate decree be accordingly drawn.

30. The parties shall bear their respective costs.

Sd/-

(Manindra Mohan Shrivastava)
Judge