

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

CO 1024 of 2023

Leena Sarkar (Khamroi) & Ors.
Vs.
Subhas Khamroi & Ors.

Mr. Oishik Chatterjee
... For the petitioners

1. Challenge in this revisional application is the order dated 17th January, 2023 passed in connection with Title Suit No.90 of 2007 wherein the learned Civil Judge (Senior Division), Sealdah allowed an application under Order I Rule 10 of the Code of Civil Procedure (in short, CPC) by allowing the petitioners namely, Subhas Khamroi and Chaitali Khamroi to be the parties to the suit as the defendant nos.2 and 3.

2. Mr. Oishik Chatterjee, learned counsel appearing on behalf of the petitioners, by referring to the application under Order I Rule 10 of the CPC, has submitted that both the petitioners i.e., Subhas Khamroi and Chaitali Khamroi, were the relatives of the plaintiffs and they cannot be the parties to a partition suit.

3. Mr. Chatterjee has further contended that the opposite parties claimed their right over the subject land of the partition suit. Paragraph 5 of the application under Order I Rule 10 of the CPC runs as follows:-

“5. That it is submitted that the applicants having maintained their uninterrupted possession in the said 2nd floor’s flat at the said premises since 1st January, 1967 continuously beyond any objection from any person including the plaintiff and defendant, the applicants since having acquired lawful right, title and interest in the said 2nd floor’s flat at the said premises by way of adverse possession and as such the applicants have filed the instant application for becoming a party defendant to this suit for establishing their lawful right over the suit property for the ends of justice otherwise the petitioner will suffer irreparable loss and injury.”

4. It is further contended that the learned Judge also observed that according to the application under Order I Rule 10 of the CPC, the petitioners are not co-owners of the suit property, rather they intent to protect their interest over the property by way of adverse possession.

5. In support of the contention, learned counsel appearing on behalf of the petitioners has relied on a case of **Mallikarjunaiah v. Nanjaiah & Ors.** reported in **(2019) 15 SCC 756**, particularly, paragraphs 18, 19, 20 and 22 which run as follows:-

“18. What is “adverse possession” and on whom the burden of proof lies and what should be the approach of the courts while dealing with such plea have been the subject-matter of a large number of cases of this Court.

19. In *T. Anjanappa & Ors. vs. Somalingappa & Anr.*, (2006) 7 SCC 570, this Court held that mere possession, howsoever long it may be, does not

necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owners' title.

20. Relying upon the aforesaid decision, this Court again in *Chatti Konati Rao & Ors. vs. Palle Venkata Subba Rao*, (2010) 14 SCC 316 in para 14 held as under:

“14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter.”

22. First, it is not in dispute that the appellant - plaintiff was the owner of the entire land including the suit land, i.e., encroached portion, which was alleged to be in possession of the respondents-defendants. In other words, the respondents-

defendants have admitted the ownership of the appellant-plaintiff over the entire land including the suit land by setting up the plea of adverse possession over it; second, the burden to prove the adverse possession was on the respondents-defendants because it was they who had set up this plea; third, the respondents-defendants, in our view, failed to discharge this burden; fourth, there was no element of either adversity or/and hostility between two co-owners/brothers because in a dispute of this nature where both the parties are related to each other, the possession of one is regarded to be the possession of other unless the facts show otherwise; fifth, the respondents-defendants failed to adduce any evidence to prove that they were asserting their right of ownership over the entire land or the suit land or its part openly and to the knowledge of the appellant-plaintiff continuously for a period of more than 12 years; sixth, it is a settled principle of law that mere continuous possession howsoever long it may have been qua its true owner is not enough to sustain the plea of adverse possession unless it is further proved that such possession was open, hostile, exclusive and with the assertion of ownership right over the property to the knowledge of its true owner. Such is not the case here. Seventh, this was a case where both the parties were not aware as to how much land was in exclusive possession of each. In other words, here is a case where both the parties to the suit did not know as to how much land was in the exclusive possession of the appellant-plaintiff and how much land was in possession of the respondents-defendants. It was only when the appellant-plaintiff got the suit land measured through the Revenue Department in the year 1983, he came to know that some portion of the

land, which had fallen to his share was in possession of the respondents-defendants.”

Analysis:

6. It is not disputed that the Title Suit No.90 of 2007 was filed with a prayer for partition of the land in between the petitioners and the opposite party no.3 and in that suit opposite party nos.1 and 2 filed one application under Order I Rule 10 of the CPC with a prayer for adding party to the suit which was considered by the learned Trial Judge and allowed on following ground:-

“That the petitioners claimed themselves as lawful occupiers of the suit premises through adverse possession though they are not the co-owners of the subject property.”

7. Tone and tenor of the order impugned in this revisional application is that the learned Judge invoked the provision of Order I Rule 10 of the CPC in view of the averments of the petition where petitioners claimed adverse possession over the subject property.

8. On careful perusal of the entire application under Order I Rule 10 of the CPC, I do not find any single word claiming right over the subject property through adverse possession, save and except uninterrupted and continuous possession. The two words “uninterrupted” and “continuous” do not necessarily denote adverse possession over any property unless and until hostile

possession is claimed adversely against the real owner. It is pertinent to mention here that the petitioners of the application under Order I Rule 10 of the CPC are not the co-owners of the property and they are the relatives of the plaintiffs and, accordingly, they were allowed to occupy a flat in the subject property.

9. In **Mallikarjunaiah** (supra), the Hon'ble Apex Court noted down a ratio that law of adverse possession cannot be applied where parties are related to each other in absence of any adversity or hostility between the relatives. To constitute an adverse possession, the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner.

10. In the case at hand, there is nothing mentioned about being in continuous possession which is in publicity and in extent so as to show that it is adverse to the true owner. Nowhere in the application under Order I Rule 10 of the CPC, it is stated that the possession of the petitioners was open and hostile enough so that it is known by the true owner. However, in this case, opposite party nos.1 and 2 took out an application under Order I Rule 10 of the CPC with a prayer for adding them as party to the partition suit having no title over the property, save and except plea of adverse possession and that too a possession of a flat of their relatives.

11. Considering all facts and circumstances, I am sorry to subscribe to the view of the learned Trial Judge that the petitioners of the application under Order I Rule 10 of the CPC were necessary parties to the suit.

12. In the aforesaid view of the matter, the order dated 17th January, 2023 passed in connection with Title Suit No.90 of 2007 stands set aside.

13. Interim order, if there be any, stands vacated.

14. Learned Trial Judge is requested to proceed with the suit.

15. With the aforesaid observation, the revisional application stands disposed of.

16. All parties shall act on the basis of a server copy of this order duly downloaded from the official website of this Court.

17. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Bibhas Ranjan De, J.)