

Mool Chand and Another Vs. Sri. Gopal

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Court : Allahabad

Decided On : Apr-16-1999

Reported in : 1999(2)AWC1677

Judge : Sudhir Narain, J.

Appeal No. : Second Appeal No. 54 of 1999

Appellant : Mool Chand and Another

Respondent : Sri. Gopal

Advocate for Def. : R. Asthana, Adv.

Advocate for Pet/Ap. : R.R. Srivahare, Adv.

Judgement :

Sudhir Narain, J.

1. This appeal is directed against the Judgment and decree passed by the trial court and the appellate order affirming the said judgment in appeal.

2. The plaintiff-respondent filed suit for partition of one half share in the disputed house on the allegation that Nanhku Lal had two sons, namely, Ram Lal and Sunder Lal. Sri Gopal, the plaintiff, is the son of Ram Lal. Mool Chand is son of Sunder Lal. He alleged that both of them have equal shares in the house in

dispute. The defendant-appellants contested the suit denying the relationship as alleged by the plaintiff. They stated that the plaintiff's mother was married to one Nand Ram in Farrukhabad and the plaintiff was son of Nand Ram. Jilur Rehman Khan Zamindar was the owner of the land. He had given the land to Sunder Lal for residence. He constructed kachcha hut for residence and after the death of his father, the defendants constructed pucca room and they are residing there as owners. The plaintiff never resided nor was in its possession. The trial court recorded a finding that the plaintiff proved pedigree as alleged by him and he was co-sharer to the extent of half share in the property in dispute. The defendant-appellants preferred an appeal against the said judgment and the appellate court has affirmed the judgment in appeal giving rise to this Second Appeal.

3. The main thrust of the submission of the learned counsel for the appellant is that the plaintiff was never in possession of the property in dispute and the appellants acquired the rights by adverse possession. He has placed reliance upon various documents showing that the name of appellant No. 1 was recorded in municipal records and he was paying house and water tax. He filed voters list indicating that plaintiff-respondent was recorded as voter showing his address at Mohalla Tareen. Bahadurganj whereas the property was situated at Mohalla Wedujal Awwal. The mere fact that the name of the plaintiff-respondent was not recorded in municipal record itself is not conclusive to prove that the appellants were in adverse possession over the property in dispute. The appellate court has recorded finding that from the evidence on the record, it was clear that even if a pucca room was constructed as alleged by appellant No. 1, both the parties resided in the said house. There is paper No. 22/C showing that since 1936, Ram Lal and his brother Sunder Lal both were residing jointly in another Mohalla and it was also clear that they jointly constructed the house and were living jointly. The parties had two houses. One in Katlya Tola and another in Wedujal. Both the houses were mortgaged jointly by Sunder Lal and Ram Lal on 28.10.1936. When joint mortgage was executed by them, the disputed house could not be exclusively owned by Sunder Lal. The possession of one of the co-sharers of the property is also on behalf of another co-owner unless it is proved that the other co-owner in possession has been ousted by the other co-owner.

4. There is distinction between adverse possession as against stranger and adverse possession as against co-owner. In the case of adverse possession as against stranger. It is sufficient that the adverse possession is overt and without any attempt of concealment. When the adverse possession is open, visible and notorious. If the owner remains ignorant and indifferent, he cannot complain regarding the nature of possession by the person claiming adverse possession. In the case of adverse possession as against co-owner. It must be proved that the other co-owner has ousted him openly denying his title and to the knowledge of the other co-owner. The possession of a co-owner is otherwise possession of all the co-owners. The Court has to consider various factors to find out as to whether a co-owner was ousted by the other co-owner. In *Mohd. Baqar and others v. Naim-un-Nisa Bibi and others* : AIR 1956 SC548 , it was held that under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period. In *P. Lakshmi Reddy v. L. Lakshmi Reddy* : 1995(5)SCALE509 , dealing with the question of ouster, the Court laid down the following principle on the basis of which a Court can infer the ouster of a co-owner :

'Now, the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario*. See *Secretary of State of India v. Debendra Lal Khan* . The possession required must be adequate in continuity, in publicity and in extent show that it is possession adverse to the competitor. See *Radhamoni Debi Collector of Khulna*, 27 Ind App 136p. 140 (PC) (B). But it is well-settled that in order to establish adverse possession of one co-heir as against 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 coheir 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).'

5. In *Ibransa Rowther (minor) and others v. S. K. Meerasa Rowther and others* : AIR1972 Mad467 , the Court laid down principle to draw distinction between adverse possession as against stranger and ouster of a co-owner where various factors were to be taken into account before an ouster can be established. 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. The burden of proving ouster is on the person claiming to displace the lawful title proved by a co-owner. He has to prove something more than the ingredients which are required to prove adverse possession.

6. The appellants submitted the documents to prove that he was recorded in municipal record. He was paying house and water tax and was in possession of the property in dispute while the plaintiff was residing in some other house. This fact was not itself sufficient to establish that the plaintiff was ousted from the possession to the exclusion of his propriety rights in the disputed property.

7. The next submission of the learned counsel for the appellants is that the appellants had filed an application for amendment of the plaint during the pendency of the appeal but it was wrongly rejected on the ground that it was filed at a belated stage. The appellants had filed written statement denying the relationship as alleged by the plaintiff and during the pendency of the appeal, he wanted to introduce certain new facts. If the appellants had knowledge of those facts and that required additional evidence to be taken on the record, the Court considering the facts and circumstances was Justified in rejecting the application. In *Ishwar Das v. State of M. P. and others*, AIR 1979 SC 551, it was held that one of the circumstances which will be taken into consideration before an amendment is granted is in delay in making the application seeking such amendment and if made at the appellate stage, he must indicate the reason why it was not sought in the trial court. There is no prohibition against the appellate court permitting amendment at the appellate stage but all the factors have to be taken into account before allowing such application. The appellate authority, having considered various factors, has rightly rejected the amendment application filed by the appellants to amend their written statement introducing new facts in the case.

8. I do not find any merit in this Second Appeal. It is accordingly dismissed.

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