Krishan and ors. Vs. Krishanoo and ors.

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SooperKanoon Citation : sooperkanoon.com/889577

Court : Himachal Pradesh

Decided On : Mar-13-1985

Reported in : AIR1985HP103

Judge : H.S. Thakur and; V.P. Bhatnagar, JJ.

Acts : Limitation Act, 1963 - Schedule - Articles 64 and 65

Appeal No. : L.P.A. No. 9 of 1974

Appellant : Krishan and ors.

Respondent : Krishanoo and ors.

Advocate for Def. : Devinder Gupta, Adv.

Advocate for Pet/Ap. : Chhabil Dass, Adv.

Disposition : Appeal dismissed

Judgement :

H.S. Thakur, J.

1. This Letters Patent Appeal is directed against the decree and (contd. on col. 2)judgment of the learned single Judge dated Nov. 9, 1973, who affirmed the decree and judgment passed by the learned Additional District Judge.

2. A few facts relevant to decide this appeal may be stated. The land in dispute is one fourth share in Khasra Nos. 35, 38, 2/2, 3, 4, 53/2, 57, 58/2, 39, 45 and 52 measuring 43 bighas and 2 biswas situated in village Bamta. In order to understand this case, it is necessary to set out the genealogical table which gives the relationship of the' parties and to make certain observations :

Balku

|

_____|_____

| | |

Kahna Jalam Jagta

| | |

| Masadi |

_____| (died issueless) |

| | |

Kalia Bhola |

| (Mst. Phini |

| widow) |

| |

_____|_____ _____|_____

| | | | |

Lobhi Negi Gopal Jiwanoo Sardaroo Budhoo

(Deft.6) (Deft.5) (Deft. 4) (died issueless) | (Deft.1)

|

_____|_____

| |

Jagarnath Anantia

(Deft. 2) (Deft. 3)

3. Smt. Phini deceased made a gift of her one-fourth share in the above land in favour of Krishanoo Ram plaintiff. The plaintiff applied to the revenue authorities for the partition of his one-fourth share. S/Shri Budhu, Jagarnathu and Anantia (defendants Nos. 1 to 3) opposed the application. Consequently, the plaintiff was directed by an order dated 31-1-1962 to get his title determined from a civil court. The plaintiff accordingly filed the suit for a declaration to the effect that he is the owner of one-fourth share of the land in dispute and is entitled lo separate his share by partition.

4. The defendants Nos. 1 to 3 resisted the suit. Numerous contentions were raised by them but were not pressed except for the contention that Smt. Phini the donor had ceased to be the owner of one-fourth share of which she had made a gift in favour of the plaintiff, due to the adverse possession of defendants 1 to 3. The trial Court, however, dismissed the suit of the plaintiff. The plaintiff preferred an appeal before the learned District Judge and the learned Additional District Judge accepted the appeal and decreed the suit of the plaintiff holding that Smt. Phini continued to be a co-sharer in the land in dispute when she made the gift in favour of the plaintiff.

5. Aggrieved by the said decree and judgment passed by the learned Additional District. Judge, the defendants preferred a second appeal before the High Court. The learned single Judge, however, dismissed the appeal of the defendants on Nov. 9, 1973, and affirmed the decree and judgment passed by the first appellate Court. The learned single Judge after considering the documentary and other evidence on record, came to the conclusion that the defendants had not perfected their title to the property in dispute by adverse possession.

6. Aggrieved by the judgment passed bythe single Judge, affirming the decree andjudgment passed by the first appellate Court,the defendants have filed this Letters PatentAppeal.

7. As pointed out earlier above, the only contention that has been pressed before us by Mr. Chhabil Dass, learned counsel for the defendants, is that since Smt. Phini the donor had lost her title in the property in dispute and the defendants had perfected their title by adverse possession, the plaintiff had no right to claim partition in the said property. The learned counsel has stressed that no doubt Smt. Phini, the donor, was a co-owner of the property in suit but the defendants had been in the exclusive possession of the said property in village Bamta and had perfected their title by adverse possession. It is emphasised that ouster from possession and benefits from the land amount to adverse possession. It is also pointed out that the exclusive possession of the defendants was hostile to the donor Smt. Phini and the gift made by her in favour of the plaintiff was ineffective. The learned counsel has referred to certain decisions in support of his contention. He has referred to a decision in Mahomed Hassan v. Sohara, AIR 1924 Lah 389. In this judgment, while placing reliance on a previous judgment, the learned Judge has observed that the mere retention by the revenue authorities of the names of the co-sharers, after the overt act had been done, did not prevent limitation from running against them and that even a decree in their favour, unaccompanied by actual effective assertion of their rights would not help them. The next decision to which our attention has been drawn is in Ude Singh v. Chittar, AIR 1936 Lah 994. in this case, there were four brothers and one of the brothers separated from the other brothers and the remaining three held their land jointly. The separated brother was recorded as in possession of one-fourth share in the ancestral property. Thereafter, the branch of one of the brothers was represented by a widow of his son but she was not shown in actual possession of her share whereas it was shown in possession of one of the brothers named Kishan Chand. A partition took place thereafter between the three brothers. However, the share of the widow was entered in possession of Kishan Chand's branch. The land was shown in joint possession of the widow and Kishan Chand but in fact the widow was not in actual possession. The question of adverse possession was pressed in this case. Under the circumstances, the learned Judge observed as under :

'.....The position in 1906 was this that though the property was in actual possession of Kishen Chand's descendants, the descendants of Ram Saran and Bishen Chand also were entitled to shares in it, but it cannot be said that Kishen Chand's heirs held the property as co-sharers on behalf of the descendants of Ram Saran and Bishen Chand. The rule, therefore, that possession of one co-sharer must be deemed to be permissive and on behalf of the other co-sharers has no application to the facts of this case. The case appears to be analogous to possession by one heir of a deceased Muhammadan, who has died leaving a number of heirs; in such a case the possession of the heir, who is in possession of the property of the deceased, cannot be held to be in a representative capacity but must be deemed to be in his own right and the other heirs must come to Court within the prescribed time in order to succeed in getting possession of their shares. They cannot succeed merely by alleging that one heir, who is in possession of the estate, was in such possession in a representative capacity; they must prove the representative nature of possession.'

8. The learned counsel for the appellant has also referred to certain other decisions, but it is not necessary to refer to all of them. Reference may, however, be made to the decision in P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314. In this judgment, the elements of adverse possession have been elaborated. Para 4 of the judgment may be extracted for a ready reference :

'4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nee clam nec precario. (See Secretary of State for India v. Debendra Lal Khan, 61 Ind. App. 78 at p. 82: AIR 1934 PC23 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, (1900) 27 Ind. App. 136 at p. 148 (PC) (B)). But it is well settled that in order to establish adverse possession of one co-sharer as against another it is not enough to show that one out. of them is in sole possession and enjoyment of the profits, or 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 coheir 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)). 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 w rong 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, apparemly with approval, a passage from Culley v. Deod Taylerson, (1840) 3 P. & D. 539 : 52 RR 566 (E) which indicates that such 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.'

9. As pointed out earlier above, a number of decisions have been referred to on behalf of the appellants on the question of adverse possession but it is hardly necessary to notice all of them. The material observations on the point of adverse possession have been extracted in P. Lakshmi Reddy's case (AIR 1957 SC 314) (supra). At the same time, it is hardly necessary to refer to such numerous decisions as the question whether on given facts and circumstances a case of ouster can legitimately be raised depends entirely upon the circumstances of each case and it is not possible to lay down any inflexible rule of law that an ouster must be presumed where a co-owner has been in sole enjoyment of the property for a long time. In determining this question, however, certain well-settled principles must be borne in mind. One of the principles, which is equally well settled, is that possession is never considered adverse so long as it can refer to a lawful title, the possession of one co-owner, who is entitled as such co-owner to be in possession

of the property, must be referred to be adverse to theother co-owners.

10. It is not disputed by the parties that the predecessor-in-interest of the plaintiff was not in possession of the land since a long time. The present suit is not for possession but merely for declaration of title. Section 129 of the Himachal Pradesh Land Revenue Act provides for the disposal of questions as to title in any of the property of which partition is sought. In the instant case also, the plaintiff filed a suit as a co-sharer claiming partition and has sued for declaration of his title. The learned single Judge placing reliance on a judgment in Mt. Lachhmi Bai v. Mt. Hondi Bat, AIR 1914 Lah 61 has observed that a suit to determine a question of title arising out of partition proceedings under Section 117 of Act No. 17 of 1887 is not like an ordinary declaratory suit under Section 42 of the Specific Relief Act and no order beyond a declaration of title 'can he obtained in it. It may be pointed out that even the defendants have not taken up any objection in their written statement that such a suit was not maintainable.

11. The only point that is to be determined in the case in hand is whether the exclusive possession of the contesting defendants is adverse to the plaintiff and his predecessor-in-interest. It is pointed out by the learned single Judge that reference can conveniently be made to Ex.PW. 4/A and Ex. P. W. 3/A, which are the two statements regarding the payment of compensation consequent to the acquisition of the land comprised in Khasra Nos. 53, 58, 60 and 31 which are also the subject matter of the suit. The acquisition was made in connection with the construction of the Bhakra Dam Project and the compensation was paid to Smt. Phini to the extent of one-fourth share. This happened during the year 1957. The legitimate inference that can be drawn from such a course of events is that the title of the predecessor-in-interest of the plaintiff was not denied by the contesting defendants. Under the circumstances, the ouster of the predecessor-in-interest of the plaintiff cannot be inferred. As such, the plaintiff could bring a suit at any time when his title in the property was threatened, It is apparent that in the instant case, the right of the plaintiff was denied for the first time when partition was sought. In order to make out a case of ouster, there must be a clear refusal to allow the other co-owner to participate in the enjoyment of the property. Where, however, there has been neither an open denial of title nor any ouster to the knowledge of the co-

owner intended to be ousted, it cannot be said that the possession of the co-owner claiming adverse possession creates a title by prescription.

12. The learned counsel for the defendants has pointed out that the defendants had been mortgaging the land and had been doing acts openly to the knowledge of the predecessor-in-interest of the plaintiff whereby it could be presumed that they were the exclusive owners of the property. Of course, there is evidence on the record about a small piece of land having been mortgaged by the defendants out of this joint property but one act of mortgage would not amount to ouster of the plaintiffs predecessor-in-interest. Otherwise also, there is no complete prohibition if a co-sharer in exclusive possession sells or mortgages a part of the joint land because that share can be adjusted at the time of partition against the share of the alienating party. As such, this single action does not amount to ouster, It is contended by the learned counsel for the appellants that where the claimant co-owner has not been in participation of rents and profits for a long time, under such a situation considering the circumstances, a presumption that there has been an ouster is a good presumption and, if such ouster is established for over 12 years, the right of the ousted co-owner to possession or partition of property is barred. There is no dispute about this proposition of law. However, in the instant case, the predecessor in-interest of the plaintiff got compensation of the joint land acquired under the Land Acquisition Act during the year 1957 which negatives the assertion of ouster.

13. It is emphasised on behalf of the defendants that they were in exclusive possession of the land for over a long period and the adverse possession can be legitimately inferred. Even assuming that the defendants have been in possession for a long time does not mean that they have been in adverse possession. It is settled rule of law that as between co-owners 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 an ouster. A co-owner in possession cannot render his possession adverse to the other co-owner not in possession, merely by any secret hostile animus on his part to the other co-owner's title. It is in evidence that the plaintiff and his predecessor-in-interest were cultivating the tenancy land at village Sungal and the defendants were cultivating

the land at village Bamta. This appears to be a mutual arrangement. Such an arrangement cannot ripen into the adverse possession.

14. It may be pointed out that the learned single Judge allowed the defendants to adduce additional evidence under Order 11, Rule 27, C.P.C. considering such evidence to be material for the determination of the dispute. The additional documentary evidence is a copy of 'Missal Hakiat' in which Kahna is recorded as an occupancy tenant under the Raja and thereafter his sons Bhola and Kaila were so recorded under Mian Ishwar Singh and Mohinder Singh sons of Mian Sohan-Singh, who it appears, became the owners later on. According to the jamabandi for the year 1956-57, Smt. Phini the predecessor-in-interest of the plaintiff is recorded as the occupancy tenant to the extent of one-half share, whereas Gopal Negi and Lobhi sons of Kaila are recorded as occupancy tenants of the other one-half share under Ishwar Singh and Mohinder Singh. In the jamabandi for the year 1963-64, the same entry has been repeated.

15. The learned counsel for the defendants has also laid stress on the order of mutation Ex.PZ and has pointed out that at the time of the attestation of the mutation dated 7-2-1989 BK, an assertion was made for the deletion of the name of Bhola, husband of Smt. Phini. from the record-of-rights and, as such, it has to be inferred that there was an ouster of his right. We have perused the said mutation. There is no finding given on this point by the revenue officer. On the contrary, (he name of Bhola continued to appear in the revenue records and his name was not deleted till his lifetime. As such, the contention cannot he sustained. In fact, theopposite party had to establish the ouster by cogent evidence which they have failed to do.

16. While concluding, it may be pointed out that the learned District Judge as also the learned single Judge have concluded after considering the evidence on record that the alleged ouster and claim of adverse possession have not been established. Such a finding should not ordinarily be disturbed in a Letters Patent Appeal and we refrain from reversing the same. In fact, we are fully satisfied that the evidence on this point has been properly considered and appreciated.

17. For the foregoing reasons, there is no alternative but to dismiss this Letters Patent Appeal. Consequently, the appeal is dismissed but the parties are left to bear their own costs.