

**Khinya Ram Vs. Uma Ram and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/952651](http://sooperkanoon.com/952651)

**Court :** Rajasthan

**Decided On :** Jan-13-2012

**Judge :** A.M. Sapre & Dinesh Maheshwari

**Appeal No. :** D.B. CIVIL SPECIAL APPEAL (WRIT) NO. 244 of 2003

**Appellant :** Khinya Ram

**Respondent :** Uma Ram and Others

**Judgement :**

Dinesh Maheshwari, J.

This intra-court appeal by the defendant in a revenue suit for division of holdings is directed against the order dated 14.11.2002 as passed by the learned Single Judge of this Court in CWP No.5695/1994.

By the impugned order, the learned Single Judge allowed the writ petition and in consequence, while setting aside the order passed by the Board of Revenue for Rajasthan, Ajmer ('the Board'/'the Board of Revenue') as second appellate court, decreed the suit filed by the plaintiff-respondent No.1 and passed the preliminary decree for partition in his favour alongwith the respondent No.5 Girdhari to the extent of 1/3rd share in the suit property. The concluding paragraph of impugned order reads as under:-



land bearing khasra No.66 and khasra No.106 at village Bachhasar, Tehsil Bikaner. So far the present matter is concerned, it now remains confined only with the land bearing khasra No.66 inasmuch as the learned counsel for the parties submit ad idem that the dispute regarding the land bearing khasra No.106 has already been settled.

The plaintiff Uma Ram had claimed the right in the suit land while alleging the same to be the ancestral property. So far the land in question bearing khasra No.66 is concerned, the contesting defendants pleaded that it were not an ancestral property. It was submitted that the same had been taken by Khairaj and Magha Ram (Ss/o Toda Ram) from the Jagirdars and they acquired khatedari rights over the same. The contesting defendants further pleaded that Magha Ram died in Svt.Year 2007 and was survived by Khairaj who took a loan of Rs.500/- from the defendant Khinya Ram (appellant herein) that remained unpaid; and that possession of the land comprised in khasra No.66 was given to him (Khinya Ram) in lieu of the amount so advanced. The appellant contended that he alone had been cultivating the land of khasra No.66 from Svt. Year 2012 and that the plaintiff had no concern with this land. The defendant-appellant also took a plea of adverse possession in relation to this land of khasra No.66.

The learned Trial Court framed necessary issues and after taking evidence proceeded to determine the issues in its judgment dated 19.10.1982. In relation to the land in question, the learned Trial Court found that though the same was recorded in Jambandi for Svt. Year 2033-34 in the name of all the parties but in the earlier record, it was recorded in the name of Magha and Khairaj (Ss/o of Toda Ram). The learned Trial Court further found that the plaintiff Uma Ram himself admitted that the land of khasra No.66 had been in the possession of the defendant Khinya Ram after the demise of Khairaj; and that Khairaj had expired 17-18 years back. The learned Trial Court also held that defendant Khinya Ram had perfected his right over the land in question of khasra No.66 by way of adverse possession; and that the plaintiff was not entitled to seek its division. So far khasra No.106 is concerned, the learned Trial Court found that the sisters of the plaintiff, Mst.Jethi and Mst.Sunder, were the necessary parties and in their absence the plaintiff was not entitled to get any share in khasra No.106. The Trial

Court, accordingly, dismissed the suit.

Being aggrieved of the judgment and decree of the Trial Court, the plaintiff Uma Ram preferred an appeal before the Revenue Appellate Authority, Bikaner ('the RAA'). The learned RAA referred, inter alia, to the statement of the plaintiff PW-1 to the effect that after demise of Magha Ram and Khairaj, the defendant Khinya Ram had been forcibly cultivating the land of khasra No.66; and came to the conclusion that the defendant Khinya Ram had been openly in possession of land of khasra No.66 in exclusion of other co-tenants. The RAA, therefore, held that the defendant Khinya Ram had perfected his title by adverse possession over the land of khasra No.66 and this land was not available for division amongst the co-sharers. So far as khasra No.106 is concerned, the learned RAA came to the conclusion that Mst.Sunder and Mst.Jethi were necessary parties in whose absence the suit for partition could not be decreed. The learned RAA, however, ordered that the suit should not fail for want of necessary parties and that Mst.Sunder and Mst.Jethi should be impleaded as parties; and issued direction to the Trial Court to decide the case in respect of khasra No.106 after impleading Mst.Sunder and Mst.Jethi.

The plaintiff Uma Ram preferred a second appeal against the order dated 25.06.1983 so passed by the RAA before the Board. This second appeal was decided by the Board on 30.11.1991. The Board, with reference to the evidence on record, confirmed the findings of the subordinate Courts regarding adverse possession in relation to khasra No.66; and in relation to the land of khasra No.106 found that the RAA had rightly remanded the matter for hearing the necessary parties i.e., the sisters of the plaintiff. Against the aforesaid order passed by the Board, the plaintiff Uma Ram filed the writ petition out of which this intra-court appeal arises.

The learned Single Judge allowed the writ petition and while setting aside the findings relating to adverse possession of the defendant over the suit land bearing khasra No.66 held on its reversal that the plaintiff had inherited 1/3rd share in the suit land alongwith Girdhari on the death of two sons of Toda Ram. Accordingly, the learned Single Judge partly decreed the plaintiff's suit to the extent of his 1/3rd

share and passed a preliminary decree for partition giving rise to this intra-court appeal by one of the defendant i.e., Khinya Ram son of Khuma Ram.

Assailing the order so passed by the learned Single Judge, the learned counsel for the appellant has contended that the plaintiff-respondent No.1 Uma Ram cannot claim any right in the land in question as he cannot be said to be a co-sharer in the property of the sons of Toda Ram. It is submitted that the respondent No.1 Uma Ram is the grandson of the brother of Toda Ram whereas the appellant Khinya Ram is son of brother of Toda Ram; and as per Section 8 of the Hindu Succession Act, 1956 ('the Act of 1956'), the appellant, falling in Entry-IV (1) of Class-II of the Schedule (brother's son) was entitled to succeed the property in question whereas the grandson of the brother (i.e., brother's son's son), not falling in any of the entries in the said Schedule, cannot claim any share as a successor of Toda Ram. It is submitted that the learned Single Judge has not examined the matter as per the provisions of the Act of 1956. Per contra, the learned counsel for the respondents has duly supported the order impugned.

After having heard the learned counsel for the parties and having perused the record, we are of opinion that the matter deserves re-consideration by the Board for several reasons.

It is noticed that in regard to land of khasra No.66, the subordinate revenue Courts proceeded to record the finding on adverse possession with reference to a part of the statement of the plaintiff but, it appears that the entire record with reference to the pleadings and the relevant principles of law has not been examined. A plea of adverse possession requires conclusive proof to sustain because if accepted, it extinguishes the title of real owner and vests it in favour of person who sets up a title adverse to real owner. Heavy burden lies on a person who sets up a plea of adverse possession against a true owner. In cases amongst the family members, it is difficult to set up such plea by one co-owner as against other because an element of hostility as between the co-owner is usually missing. In the absence of any partition, it is deemed that everyone is in possession of the land on behalf of others and no one is in its exclusive possession to the exclusion of other co-owner. Of course, we are not pronouncing finally on the plea of adverse

possession but at the same time, we are not approving the findings in this regard whether by the Board of Revenue or by the learned Single Judge. We are of opinion that the Board of Revenue ought to examine the entire record with reference to law applicable before arriving at a finding on the plea of adverse possession.

Moreover, the question about entitlement of the plaintiff Uma Ram to the property in question with reference to the family pedigree and his standing in the line of descent and distance of degree of relationship with khatedar also appear requiring proper consideration.

It becomes clear on a look at the family tree that Natha had 4 sons, namely Jeewan, Ram Chandra, Khuma Ram and Toda Ram. The learned Trial Court has indicated in its judgment dated 19.10.1982 that the land in question as comprised in khasra No.66 was earlier recorded in the name of Magha and Khairaj (Ss/o Toda Ram). The learned Single Judge though has proceeded to set aside the finding on adverse possession with reference to the pleadings of the contesting defendant but thereafter, it appears that the question regarding land of khasra No.66 and khasra No.106 got mixed as is noticeable from the following passage (at page 6 of the order impugned):-

“In the land of khasra No.106 the appellate court has rightly come to the conclusion that this land belonged to Todaram whose two sons have also passed away without leaving any heir, therefore, this land should have been partitioned between the remaining three brothers or their scion.”

We are unable to approve of the aforesaid observations because in relation to land of khasra No.106, it had not been the case of either of the parties that it belonged to Toda Ram. The aforesaid observations were presumably made for the land of khasra No.66 but then, again, it is difficult to find a categorical finding of the subordinate Courts that land of khasra No.66 belonged to Toda Ram.

Apart from the above, and even if it be assumed that land of khasra No.66 belonged to Toda Ram, the question of succession thereafter appears not to have been considered with reference to the relative position of the parties in the family

pedigree. Of course, it is on record that Toda Ram left behind two sons Khairaj and Magha Ram and they passed away without leaving any Class I heir but there are several factors requiring consideration, including the basic question as to which son of Toda Ram died when and what was the position of the family at the time of their demise? It could not have been assumed without further probe into the matter that the land should have been partitioned amongst the remaining three brothers. It may be pointed out that in relation to Khairaj, the position of the appellant Khinya Ram is that of father's brother's son whereas that of the plaintiff Uma Ram is of father's brother's son's son. The right of succession in their relation ought to have been considered with reference to Section 8 and so also Sections 11, 12 and 13 of the Act of 1956. All these aspects have not gone into the consideration of the Board of Revenue either.

In the aforesaid view of the matter, it appears in the fitness of things and in propriety that the entire matter be remanded to the Board of Revenue for consideration afresh.

As the matter is being restored to the file of the Board of Revenue for re-consideration, it is made clear that we have only indicated the points and aspects required to be taken into consideration but we have not expressed any final opinion on any of the questions and aspects involved. It shall be expected of the Board of Revenue to examine the record with reference to law applicable while keeping in view the observations herein and then to decide the appeal in accordance with law.

Accordingly, this appeal is partly allowed to the extent indicated above and the impugned orders dated 14.11.2002 as passed in CWP No.5695/1994 and dated 30.11.1991 as passed by the Board of Revenue in Appeal (Decree) No.219/83/TA/Bikaner are set aside. The said appeal shall stand restored to its number for re-consideration by the Board of Revenue in accordance with law. The parties through their counsel shall stand at notice to appear before the Board on 29.02.2012. No order as to costs of this appeal.