

## Ram Swaroop and Another Vs Smt. Mahendru and Others

**Court:** High Court of Himachal Pradesh

**Date of Decision:** Jan. 7, 1997

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 23 Rule 1

Himachal Pradesh Courts Act, 1976 â€” Section 21

Hindu Widows Remarriage Act, 1856 â€” Section 1, 2

**Citation:** (1997) 2 ShimLC 14

**Hon'ble Judges:** R.L. Khurana, J

**Bench:** Single Bench

**Advocate:** Bhupender Gupta, for the Appellant; Anand Sharma and Tarlok Ghauhan, for the Respondent

**Final Decision:** Dismissed

### Judgement

R.L. Khurana, J.

The Appellants, hereinafter referred to as the Defendants, have directed the present regular second appeal against the judgment and decree dated 20-12-1986 of the learned District Judge, Solan reversing the judgment and decree dated 6-7-1970 of the then Senior

Sub-Judge, Mahasu.

2. The subject matter of the dispute between the parties is the landed property and shop premises detailed in the plaint and hereinafter referred to

is the property in dispute.

3. One Shri Krishan Dutt, the predecessor-in-interest of the present Respondents, hereinafter referred to as the Plaintiff, claimed himself to be the

joint owner of the property in dispute to the extent of 1/3rd share and as such entitled to get the same partitioned by metes and bounds. It was

pleaded that an application for partition of the landed property was made by the deceased Plaintiff Krishan Dutt before the Assistant Collector 1st

Grade, Solan, wherein the Defendants raised a question of title. The Assistant Collector accordingly directed the Plaintiff to get a declaration of his

title from a competent civil court. A suit for declaration, partition, and rendition of accounts was, therefore, filed, being civil suit No. 62/1 of 1968

on the files of the then Senior Sub-Judge, Mahasu.

4. The Defendants while resisting the suit pleaded that out of the property in dispute, land measuring 63 Bighas 6 Biswas was previously owned by

one Kanshi Ram to the extent of 2/3rd share, while the remaining one third share was owned jointly by S/Shri Bala Ram, Mansha Ram and Mathu

Ram. They were in separate possession of the land in accordance with their respective shares in terms of a family partition. Kanshi Ram died about

32 years before the suit. His estate was inherited by his widow Smt. Gangi. After one year of the death of Kanshi Ram, his widow Smt. Gangi

contracted a second customary marriage with Bala Ram and she relinquished all her rights and interest in the estate of her deceased husband

Kanshi Ram in favour of her second husband Bala Ram. Since then Shri Bala Ram has been coming in exclusive possession of the estate of the

deceased Kanshi Ram as owner thereof. The Defendants who are the legal heirs of the said Bala Ram succeeded to the said estate of Kanshi Ram

as well as the share of Bala Ram in the joint khata. The Plaintiff has no right, title or interest in the estate of deceased Kanshi Ram. He had only

1/9th share in the joint khata and was in separate possession thereof. The remaining 8/9th share have all along been in exclusive possession of the

Defendant and their predecessors-in-interest. It was further pleaded that the Plaintiff was estopped from claiming repartition of the property in

dispute in view of the earlier family partition. In so far as shop premises are concerned, it was averred that the same were constructed by Bala

Ram, father of the Defendants, at his own costs about 20 years before the suit and the Plaintiff has no right or interest therein. In the alternative, the

case of the Defendants was that they have become the owners qua the share of the Plaintiff by virtue of their adverse possession.

5. On the basis of pleadings, the parties were put to trial on the following issues:

1. Whether the Plaintiff is in joint possession of the property in dispute? O.P.P. (objected)
2. Whether the Plaintiff has 1/3rd share in the property in dispute? O.P.P.
3. Whether the Defendants have become owners by adverse possession as alleged? O.P.D.
4. Whether there has been any private partition, if so, when and what is the effect? O.P.D.
5. Whether the Plaintiff is estopped by his acts and conduct? O.P.D.
6. Whether the suit is barred by limitation? O.P.D.
7. Whether the suit has been properly valued for purposes of court fee, in case No. 1 is held against the Plaintiff? O.P.D.
8. What is the effect of the previous litigation between Defendants' father Bala Ram and the Plaintiff? O.P.P.
9. Relief.

6. The learned trial Court decided issues No. 1, 2 and 4 against the Plaintiffs and in favour of the Defendants. It was held that there had been a

private partition between the parties and the Plaintiff is not in joint possession of the property in dispute. It was further held that the Plaintiff did not

have 1/3rd share in the property in dispute. Under issue No. 6 the Plaintiff was held to be estopped by the acts and conduct of his parents. Under

issue No. 3 the Defendants were found to have become owners by way of adverse possession. Issue No 7 was found in favour of the Plaintiffs and

the suit was held to have been properly valued for purposes of court fee and jurisdiction. Under issue No. 8, the previous litigation which was

withdrawn with liberty to file a fresh suit, was held to have no effect on the rights of the parties. Consequent upon such findings the suit of the

Plaintiffs came to be dismissed by the learned trial Court vide judgment and decree dated 6-7-1970.

7. The judgment and decree of the trial Court was assailed by the Plaintiffs by way of a regular first appeal being R.F.A. No. 14 of 1970 before

this Court. However, consequent upon the amendment of Section 21 of the Himachal Pradesh Courts Act, 1976 whereby the pecuniary

jurisdiction of the District Judges in respect of appeals against the judgment and decrees was raised, the said appeal filed by the Plaintiffs came to

be transferred to the files of District Judge, Solan, vide order dated 17-7-1980. The appeal then came to be registered at No. 92-S/13 of 1980 on

the files of the learned District Judge, Solan.

8. The learned District Judge, vide the impugned judgment and decree dated 20-12-1986 has allowed the appeal, set aside the judgment and

decree dated 6-7-1970 of the learned trial Court and granted a decree in favour of the Plaintiffs declaring them to be joint owners to the extent of

1/3rd share in the land in dispute and they were entitled to get their share separated through partition

9. Feeling aggrieved by the impugned judgment and decree of the Id. first appellate Court, the Defendant have come up before this court by way

of the present regular second appeal seeking reversal of the judgment and decree of the first appellate Court and restoration of the judgment and

decree of the learned trial Court.

10. The following is the admitted pedigree table showing the relationship between the parties:

Ram Datt

\_\_\_\_\_

|

\_\_\_\_\_

|||

Thachu Sahibu Balak Ram

|||

|| Palak Ram

Luru Ram \_\_\_\_\_ |

|||

| Ram Saran Chana Ganga Ram

| (died issueless) (died issueless) |

||

| Kanshi Ram ~ Smt. Gangi (widow)

---

|||

Mathu Mansa Ram Bala Ram ~ Smt. Gangi

alias | Smf. Mathra

Ram Mast | |

|||

Shibi Krishan Dutt |

(daughter) (plaintiff) |

deceased |

||

Succeeded by |

present plaintiff |

|

|

---

|||||

Savitri Rama Somawati Indra Shanti Jai Datt Ram Swarup

(defendants 1 and 2)

11. There is no denying that Kanshi Ram had 2/3rd share in the property in dispute. His widow was Smt. Gangi. She had inherited the estate of

her deceased husband as a limited owner. There is also no controversy between the parties that Smt Gangi after the death of her husband Kanshi

Ram, had contracted a second marriage with Bala Ram, the father of the Defendants.

12. Ex P-15 is the copy of mutation No. 303 dated 17-1-1949 vide which consequent upon the marriage of Smt. Gangi, the estate of her

deceased husband came to be mutated in favour of the Plaintiff, father of the Defendants and Mathu alias Mast Ram in equal shares, that is, to the

extent of 1/3rd share each The note appended to this mutation records that the appeal filed against the order dated 17-1-1949 by Bala Ram the

father of the Defendants was dismissed on 5-6-1950.

13. The question thus arising for consideration is what is the effect of the remarriage of Smt. Gangi with Bala Ram, the father of the Defendants in

so far as the estate of deceased Kanshi Ram is concerned?

14. According to the Defendants Smt. Gangi had transferred all her rights, title and interest in the estate of deceased Kanshi Ram inherited by her

as a widow, in favour of Bala Ram vide document Ex. PX. Since after such remarriage and execution of Ex. PX, Bala Ram came into possession

of the estate of deceased Kanshi Ram as owner thereof. Mansha Ram, the father of the Plaintiff had appended his signatures to Ex. PX as a

witness. Ex. PX records both the factum of remarriage of Smt. Gangi with Bala Ram and the transfer of her rights, interests and title in the estate of

deceased Kanshi Ram, in favour of Bala Ram.

15. On the other hand, as per the Plaintiffs, consequent upon her remarriage with Bala Ram. Smt. Gangi lost all her rights, title and interest in the

estate of her deceased husband Kanshi Ram. Such estate was succeeded by the Plaintiff, father of Defendants and Mast Ram in equal shares and

that mutation Ex. P-25 was rightly sanctioned.

16. Be it stated that the mutation Ex. P-15 never came to be challenged by Bala Ram, father of the Defendants in any other manner, except by

way of an appeal which, as stated above, was dismissed on 5-6-1950. The matter, thereafter, rested there.

17. The property in dispute forms part of the area of erstwhile Bhagad State. It is not disputed that the provisions of Hindu Widows Remarriage

Act, 1856 came to be enforced in this area with effect from 1-1-1950 vide The Merged States (Laws) Act, 1949.

18. The suit out of which the present appeal has arisen, was filed on 17-8-1968 Kanshi Ram is stated to have died about 32 years before that. In

other words, Kanshi Ram died sometime in the year 1946-47. She appears to have remarried Bala Ram on 8th Posh 1988 B.K. as is evident

from the recitals made in Ex. PX. Therefore, the remarriage of Smt. Gangi with Bala Ram took place before the provisions of the Hindu Widows

Remarriage Act, 1956, were made applicable to the then Bhagad State.

Section 1 of the Hindu Widows" Remarriage Act, 1856 provides for legalisation of marriage of Hindu Widows solemnized before the coming into

force of the Act. It provides:

No marriage contracted between Hindus shall be invalid and the issue of no such marriage shall be illegitimate by reason of the woman having her

previously married or betrothed to Anr. person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the

contrary notwithstanding.

Though it is the case of neither party, however, the illegality if any attached to the remarriage of Smt Gangi with Bala Ram stood removed u/s 1 of

the Hindu Widows' Remarriage Act, 1856 on its having come into force in the Bhagad State with effect from 1-1-1950.

19. Section 2 of the Hindu Widows' Remarriage Act, 1856, further provides that all rights and interest which a widow may have in the property of

her deceased husband shall cease upon her remarriage. Section 2 reads:

2 Rights of widow in deceased husband's property to cease on her remarriage. All rights and interests which any widow may have in her deceased

husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary

disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with do power of alienating the

same, shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled

to the property on her death, shall thereupon succeed to the same.

20. In *Mussadi Vs. Mt. Chando and Others*, , the points for determination were whether Mt Chando remarried one Tulsi after the death of her

husband Malagar and if so, whether she could claim partition of the share of her previous husband, Malagar. It was held that Mst. Chando after

the death of her husband Malagar had contracted a second marriage with Tulsi. It was further held that consequent upon such remarriage Mt.

Chando, u/s 2 of the Hindu Widows' Remarriage Act, 1856 had lost all her rights and interests possessed by her in the property of her deceased

husband, Malagar. She was therefore, held to be not entitled to claim partition of the share of her deceased husband.

21. The High Court of Calcutta in *Mahomed Umar and Anr. v. Mt. Man Koer and Ors.* AIR 1918 Cal 609, has held that a Hindu widow on her

remarriage, although such remarriage is permissible and legal according to the custom of the caste to which she belongs, forfeits her interest in the

property allotted to her by a family arrangement and it would make no difference in her position whether Section 2 of the Hindu Widows'

Remarriage Act, 1856 does or does not apply to her case since that section has not introduced any change in the Hindu Law so far as it relates to

the forfeiture of widow's interest on her remarriage.

22. Similarly, in *Suraj Jote Kuer v. Attar Kumari* AIR 1922 Pat 378 , it has been held that both under Hindu law and by the enactment of 1856, a

Hindu widow loses her estate on remarriage. It was further held that it may be that certain classes of Hindu recognizes widow remarriage either by

custom or as a tenet of their sect but even where this is so, it would be necessary to establish affirmatively that this recognition carries with it the

right to retain the deceased husband's estate, for to do so is against both the general rule of Hindu law and against the provisions of the Statute. To

the same effect, it has been held in Rama Appa Patil Vs. Sakhu Dattu Gharal, ; Rup Raut and Another Vs. Basudeo Raut and Another, .

23. In the present case as well, immediately upon her remarriage with Bala Ram, Smt. Gangi lost all her rights, title and interest in the estate of her

deceased husband Kanshi Ram She, therefore, could not have transferred such rights, title and interest in favour of Bala Ram. As such Ex. PX

would not confer any right, title or interest on Bala Ram, the father of the Defendants The mutation Ex. P-15, therefore, rightly came to be

sanctioned in favour of the Plaintiff, Bala Ram and Mast Ram being the only legal heirs of deceased Kanshi Ram on Smt Gangi having contracted a

second marriage with Bala Ram. The first appellate Court has thus rightly held the Plaintiff to be a joint owner to the extent of 1/3rd share.

The learned Counsel for the Defendants has contended that the document Ex. PX is signed by the father of the Plaintiff whereby it was agreed that

the estate of deceased Kanshi Ram would vest in Bala Ram, therefore, the Plaintiff is estopped from disputing the correctness thereof.

24. It is significant to note that this document in so far as it relates to transfer of estate of deceased Kanshi Ram in favour of Bala Ram is

concerned, docs not appear to have been given effect to As stated above, the mutation of inheritance (Ex. P-15) qua the estate of deceased

Kanshi Ram consequent upon remarriage of Smt Gangi with Bala Ram came to be sanctioned on 17-1-1949 in favour of Bala Ram, Mast Ram

and the Plaintiff in equal shares. The appeal preferred by Bala Ram against such sanctioning of the mutation was dismissed on 5-6-1950.

Thereafter, the said Bala Ram, father of the Defendants, had filed a suit, being suit No. 57/1 on 20-4-1955 before the Sub-Judge, Solan, seeking a

declaration that he was the owner and in possession of the estate of deceased Kanshi Ram by way of inheritance. Ex. P-8 is the copy of the plaint

of such suit. This suit was dismissed on 27 6-1958 vide judgment Ex. P-12. On appeal having being preferred by the present Defendants, Smt

Gangi and other legal heirs of Bala Ram, they were permitted to withdraw the suit under Order 23, Rule 1, CPC with liberty to bring a fresh suit on

the same cause of action. Admittedly, no fresh suit was filed by the Defendant nor any other action was taken by them. They raised a question of

title only when the Plaintiff applied for the partition of the joint khata.

25. The fact that the document Ex. PX was not given effect to and mutation of inheritance Ex P-15 qua the estate of deceased Kanshi Ram was

accepted by the parties, can be inferred from the following circumstances appearing in evidence coming on record:

(a) The Plaintiff Krishan Dutt and the Defendants had sold land measuring 10 Biswas out of khasra No. 41 jointly in favour of Madan Lal and Ors.

on 14-11-1966 as is evident from mutation Ex. PW 2/K sanctioned on 16-5-1967;

(b) The parties exchanged their joint land with Madan Lal and other vide mutation copy of which is Ex PW 2/H sanctioned on 28-2-1969;

(c) Vide mutations Ex. PW 2/C, PW 2/D, PW 2/E and PW 2/F proprietary rights were conferred on the tenants in respect of joint land belonging

to the parties;

(d) Mast Ram, the brother of Bala Ram, who had 1/3rd share in the joint khata had given his share to Bala Ram under a will. Mutation Ex PW 9/B

was sanctioned on 6 11-1950 in this regard.

26. The acts and conduct of the Defendants and their father Bala Ram after the execution of Ex. PX go to show that the parties agreed not to

abide by the terms of Ex. PX relating to transfer of estate of deceased Kanshi Ram by Smt. Gangi in favour of Bala Ram. The Defendants are thus

estopped from questioning the title of the Plaintiffs.

Another plea raised on behalf of the Defendants is that there has been a private partition between the parties. A number of documents alleged to

have been entered into between the parties were referred to during the course of hearing. Suffice to say that none of these documents pertained to

the partition of the entire joint khata. They relate only to the inherited properties of Luru Ram and Budh Ram. Secondly, the instances, quoted

above, show that the parties have been treating the land in dispute as joint till 1969-70. Therefore, the learned first appellate Court has rightly held

that there has been no private partition and the land continues to be joint. The mere fact that the parties are being recorded in exclusive possession

of separate parcels of land will not mean that there has been some partition. Joint owners by way of an arrangement amongst themselves can be in

exclusive hissedari possession of a particular parcel of land out of the joint khata. It is well established that a joint owner can validly transfer a

specific land in favour of a vendee, which is in his exclusive hissedari possession, provided such land does not exceed his total share in the joint

khata. Therefore, the fact that specific khasra Nos. were sold by the Plaintiff out of the joint khata will not per se prove that there has been a

private partition.

27. Ex. R-1 and R-2 are the copies of the sale deeds whereby specific khasra Nos. were sold by the Defendants out of the joint khata. It has been

specifically mentioned in these sale deeds that the khasra Nos. conveyed were within the share of the Defendants. It is not that the said khasra Nos



had come to the Defendants consequent upon some family partition. There is no denying that the alleged family partition was never given effect to

by way of its incorporation in the revenue record. The khata continues to be reflected as joint of the parties in the relevant revenue record till date.

28. The Defendants have not been able to establish their adverse possession over the estate of the deceased Kanshi Ram. The evidence coming on

record rather goes to show that the parties are in joint possession of the same. Admittedly, the parties are co-sharers. It is well established that

there can be adverse possession against a co-sharer when there is an ouster of the co-owner and the co-owner denies his title to the knowledge of

him and openly asserts his own title. Mere exclusive possession or non-participation in the profits does not amount to ouster of the co-sharer.

29. In view of the fact that the land in dispute is joint of the parties and there has been denial of title of the Plaintiff only during the partition

proceedings, the present suit cannot be said to be beyond limitation. The same has been filed within time.

30. Consequently, there is no merit in the present appeal and the same is accordingly dismissed. The judgment and decree of the first appellate

Court are affirmed. Parties are left to bear their own costs.