

(1995) 08 SHI CK 0005

High Court of Himachal Pradesh

Case No: Regular Second Appeal No. 415 of 1993

Jang Bahadur

APPELLANT

Vs

Juthi Devi and Others

RESPONDENT

Date of Decision: Aug. 30, 1995

Citation: (1995) 4 ILR HP 2547

Hon'ble Judges: A.L. Vaidya, J

Bench: Single Bench

Advocate: Ajay Sharma, for the Appellant; P.P. Grewal, for the Respondent

Final Decision: Dismissed

Judgement

A.L. Vaidya, J.

The present appeal has been admitted on the following substantial question of law:

Whether the Plaintiff-Appellant has proved peaceful, hostile and exclusive possession in view of the pleadings and evidence adduced?

2. The facts, giving rise to the present appeal, are that one Amar Singh, father of, Plaintiff, Defendant 1 & 2, and father-in-law of Defendant No. 3 who, being the widow of the pre-deceased son of Amar Singh, was owner of the suit land as described in the plaint. The Plaintiff Jang Bahadur has filed the suit through his next friend and guardian Smt. Uma Devi, his wife, as he has been stated to be insane. It was pleaded that Plaintiff was in exclusive possession of the property owned by his father and Defendant No. 3, the widow of the pre-deceased son of Amar Singh had left the house about 20-25 years before the suit was filed and she was not heard of since then. It was further pleaded that Defendants 1 and 2, after their marriage, never lived with their father Amar Singh and Plaintiff, being in exclusive possession of the estate of the deceased, was entitled to succeed to the same to the exclusion of the Defendants. The mutation of inheritance sanctioned in favour of the parties to the extent of equal shares has been assailed to be bad and not binding on the rights of. the Plaintiff. The Plaintiff, in the alternative, pleaded that he had become the

owner of the estate of deceased Amar Singh by virtue of his continuous adverse possession for more than 12 years.

3. Defendants 1 and 2 contested the suit and they pleaded that parties were joint owners and in joint possession of the land in dispute, as they had inherited the same being the legal heirs of deceased Amar Singh. Various other objections regarding limitation, cause of action, estoppel etc. were also taken by these Defendants. Defendant No. 3 was proceeded ex-parte.

4. Parties were put to trial on the following issues:

1. Whether the suit is within time? OPP.

2. Whether the Plaintiff has no locus-standi and cause of action to file the present suit? OPD.

3. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP.

4. Whether the suit is not maintainable, as Plaintiff and Defendants are joint owner in possession of the suit land? OPD.

5. Whether the suit is barred by conduct and acquiescence of the Plaintiff? OPD.

6. Whether Defendants are not entitled to inherit estate of Amar Singh? OPD.

7. Whether the Plaintiff is of unsound mind, if so, its effect? OPP.

8. Whether mutation of inheritance of deceased Amar Singh, attested in favour of the Defendants, is wrong and liable to be set aside? OPP.

9. Whether Plaintiff is in exclusive possession of the suit land, since the time of his father and continued to be so, after his death? OPP.

9-A. Whether the Defendants never asserted their rights or title to possess the property in dispute, as alleged? If so, its effect? OPP.

9-B. Whether the Plaintiff has become owner of the suit land by way of adverse possession, as alleged? OPP.

10. Relief.

5. Issues 1, 6, 7, 8, 9-A and 9-B were decided against the Plaintiff while issues No. 3 and 9 were found in favour of the Plaintiff. Issues 2, 4 and 5 were also decided against the Defendants. The suit of the Plaintiff was dismissed.

6. The aforesaid judgment and decree were assailed in appeal before the first appellate Court who, after hearing the parties, dismissed the appeal.

7. The aforesaid judgment and decree have been assailed in the present second appeal on various pleas.

8. The sole point which requires determination in the present appeal is regarding the adverse possession claimed by the Plaintiff. In order to appreciate the plea of adverse possession and the evidence examined in this behalf, apart from other aspects, two important aspects to be taken note of in the present case are, namely, (i) the relation between the parties and (ii) Plaintiff being insane having sued through his wife, her next friend.

9. There is no dispute to the proposition that in order to prove possession to be adverse, it has to be established that it was peaceful, open, continuous, hostile, exclusive and to the knowledge of the true owner. The hostile character of the possession can be appreciated from the animus of the person setting up adverse possession.

10. In the present case, mutation of inheritance has been sanctioned in favour of the parties as per Hindu Succession Act. In the case of ouster, which has been pleaded by the Plaintiff, the position is entirely different. The possession of one co-owner is presumed to be on behalf of all the co-owners in view of the unity of title and possession and because of this presumption of joint ownership in the case of co-owners, the law requires to constitute ouster, proof of something more than mere exclusive possession and exclusive receipt of income. Alongwith exclusive possession, there must be a hostile, open denial and an open repudiation of other co-owner's right to the latter's knowledge. The co-owner, as such, in exclusive possession cannot render his possession adverse to the other co-owners merely by any secret, hostile animus on his own part, in derogation of the other-co-owner's title.

11. In the present case, parties are closely related being brother and married sisters and brother's wife. The plea of adverse possession is to be scrutinised in the light of relationship that exists between the parties and where the Plaintiff and the Defendants were close relations, very much more and better and stronger evidence of a positive character is necessary to establish title by prescription and adverse possession in favour of the Plaintiff. With reference to the property of a female living with her husband, the Plaintiff who happens to be a close relative of female, would be deemed to be a manager on behalf of the female until he openly asserted a hostile title to hold on his own behalf. Thus, this aspect of the matter has to be always kept in mind while appreciating the evidence.

12. Learned Counsel for the Appellant, in order to prove the alleged adverse possession, has drawn the attention of this Court to the statement of PW-1 Smt. Uma Devi, the next friend of the Plaintiff, who happens to be his wife. She has tried to support the case of the Plaintiff by stating that Leela Defendant, for the last 35 years, was missing and she did not know whether she was alive or dead. She also added that her father-in-law died about 26 years back and after his death, mutation of inheritance was sanctioned wherein she was not present and according to her, for the last 40 years, the suit land was occupied by her husband and Defendant No.

1 and 2 were married before the marriage of this witness. Regarding adverse possession, she stated that Defendants never asked for any produce from her of the suit land. She also stated that two years after the death of Amar Singh, Defendants No. 1 and 2 had come and they had asked for their share for which the witness had refused to give, as according to the witness, they were in occupation of the suit land. During cross-examination, she stated that she did not know whether their possession was as co-sharer, but thereafter corrected herself by saying voluntarily that it was incorrect to suggest that it was that of a co-sharer and that they were in occupation of the same. She also stated that when Defendants 1 and 2 came to their house asking for their share, she was all alone in the house at that time and she did not remember the year and month of their visit. She also stated that it was correct that all the co-sharers were owners in the suit land, but voluntarily disclosed that she was in occupation of the same. She also stated that when Defendants 1 and 2 came to her asking for their share, her son had shown at that time the revenue record, but then she had not filed the suit. At this stage, the mutation of inheritance sanctioned in favour of the parties on the death of Amar Singh, can be referred. The certified copy of the same on record is Ex. P-2. It was sanctioned in favour of the parties on 5.8.1968 and Smt. Uma widow of the present Plaintiff Jang Bahadur was present when the order of sanction was passed.

13. Ex. P-1 is the certified copy of the jamabandi for the year 1978-79 wherein all the parties have been recorded to be in equal shares as owners in occupation of the suit land. Similar is the entry in Ex. D-1, certified copy of the jamabandi for the year 1989-90. Ex. D-2 is the copy of jamabandi for the year 1975-76. Ex. D-3 is, the copy of khasra girdawari from 12.3.1991 to 20.4.1992, wherein also parties have been recorded to be owners in occupation of the suit land.

14. Learned Counsel for the Plaintiff has tried to take some advantage from the statement of DW-1 Smt. Nanoo Devi, Defendant No. 2 who, during her cross-examination, stated that they, i.e. Defendants, about 19 years back had asked for their share from their brother Jang Bahadur Plaintiff, but their brother refused to give the same. From this statement, it is being inferred that the adverse possession started 19 years back when the Defendants approached the Plaintiff for their share which was refused by him. At first instance, this statement, even if believed, will not carry any legal weight whatsoever in favour of the Plaintiff's case of adverse possession. At the cost of repetition, it may be pointed out that it has been the case of the Plaintiff that Plaintiff Jang Bahadur was insane and was being represented by his wife Uma Devi as the next friend and insane person, even if contacted by his sister had refused to give the share, will not, in any manner be a legal evidence especially when in view of the insanity Jang Bahadur was not in a position to understand and reply to his sisters in the manner he has done. It cannot be said that Plaintiff was insane so far as the present suit was to be filed by his wife as his next friend and that he was sane when the sisters asked from their share from him. The Plaintiff, in this background, cannot be allowed to have his say on both counts. Even

if for arguments sake this statement is taken as it is, it nowhere reflected that what type of share the Defendants asked for their brother, the Plaintiff. Whether they wanted separate possession of their share or whether they wanted the share of the income of the land. Simply, because they asked for share and Plaintiff refused, will not amount to starting point of adverse possession being claimed on behalf of the Plaintiff by his next friend. There is nothing in the statement of the Defendant that the Plaintiff represented at that time that Defendants had no right in the suit land and the Plaintiff claimed himself to be the exclusive owner in possession of the suit land by means of adverse possession. In the absence of such a representation being made by the Plaintiff, adverse possession will not start on the time as stated by this Defendant in her statement. There is no doubt that she stated that Defendants were not in occupation of the suit land after the death of their father. This only signified that their brother was in occupation of the suit land as a co-sharer as has been reflected in the copies of the records of right, wherein all the parties have been recorded to be joint owners of the suit land.

15. The statement of Uma Devi, as referred to above, does not inspire confidence at all, especially when according to her, she refused to give share to the Defendants when they asked for the same from her. This is not stated to be so by DW-1, as discussed above, that Defendants approached Uma Devi for their share. Otherwise also, this PW-1 during cross-examination, very specifically stated that it was correct that in the suit land all the co-sharers were the owners but then, voluntarily stated that she was in occupation of the same. She was admitting the ownership of the other co-sharers, though she was claiming possession herself, which amounted to be the possession on behalf of other co-sharers as well.

16. It may be pointed out here that at the time of sanction of the mutation this Uma Devi was present, though she has denied her presence in those proceedings, but the fact remains that as per Ex. P-2, the mutation of inheritance was sanctioned in the presence of Uma Devi, where she did not raise any objection. At this stage, the other witnesses examined on behalf of the Plaintiff can also be referred. PV/-2 is one Jago Ram, who stated that Plaintiff Jang Bahadur was in occupation of the suit land after the death of his father. He also stated that Defendants never occupied the suit land. He further added that he did not know that the Plaintiff was in occupation as a co-sharer but he was in occupation. This witness does not held the plea of adverse possession taken by the Plaintiff. Pritam Chand is PW-3, who stated that Plaintiff was in occupation of the suit land since long and Defendant's never occupied the suit land. PW-4 is one Partap Chand, who was the Lambardar of the area. He stated that Plaintiff was in occupation of the suit land and he was paying the land revenue through his wife and he has brought the list of the land revenue and according to him, in this list, since 1972 Jang Bahadur has been paying the land revenue. This witness added that parties were the owners of the suit land. He admitted that when there are 5-6 co-sharers, he takes land revenue from only one co-sharer and receipt is issued to that effect.

17. The aforesaid version given by the witnesses, again, will not prove the plea of adverse possession taken by the Plaintiff. The Lambardar has not produced the receipts. Even if for arguments sake the land revenue was paid by the wife of the Plaintiff, it never meant that Plaintiff exclusively was the owner of the suit land. The Lambardar has stated that as per the record, parties were the co-owners of the suit land. Thus, even if Plaintiff is held to be in exclusive occupation of the suit land, his occupation would be on behalf of other co-sharers also and as in the present case, the Plaintiff has failed to establish to have acquired title by way of adverse possession, his suit deserves dismissal.

18. It has been contended on behalf of the Defendants that in a case of present nature, the concurrent findings of fact of adverse possession require no interference under the law by this Court. The submission, put forth, has to be favourably considered, but otherwise also, as discussed above, the question of Plaintiff acquiring title by adverse possession, has not been legally established and two Courts' unanimous findings in this behalf with this background, is not required to be interfered with.

19. In view of the fore-going reasons the present appeal fails, being devoid of any merit, and is accordingly dismissed with costs.

CMP 660 of 1993

20. The stay granted vide order dated 6.7.1995 is vacated.