
(1996) 01 AP CK 0007

Andhra Pradesh High Court

Case No: Appeal No. 734 of 1991

Khader Nawaz Khan

APPELLANT

Vs

Habib Khatoon and Others

RESPONDENT

Date of Decision: Jan. 25, 1996

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 96

Citation: (1996) 2 ALT 336

Hon'ble Judges: S.V. Maruthi, J

Bench: Single Bench

Advocate: M.V.S. Suresh Kumar, for the Appellant; Gopal Govind Naik, for Respondent Nos. 1 to 7, 11 and 13 and Satyanarayana Rao, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S.V. Maruthi, J.

This appeal arises out of a Judgment in suit O.S.No. 471 of 1987. The plaintiff is the appellant. The suit was filed for partition and allotment of 1/4th share in Survey No. 210/6, 7, 8 and new Survey Nos. 41 to 43, and measuring Ac.49-24 gts. situated at Kokapet village. The facts in brief as stated in the plaint are as follows:

2. The original owner and pattadar of survey Nos. 41 to 43 situated at Kokapet village was Qamaruddin Ali Khan. These lands were agricultural lands. One Khader Hussain Khan purchased the property covered by the said survey numbers from Qamaruddin Ali Khan. The said Khader Hussain Khan cultivated the land and enjoyed the same as absolute owner. He died in 1352 Fasli. He left behind him his real sister, Shahzadi Bee and two step brothers, Feroz Khan and Khadar Nawaz Khan. After the death of Khader Hussain Khan, Shahzadi Bee., Feroz Khan and Khadar Nawaz Khan were in joint possession of the property as the heirs of Khader Hussain Khan. Sucession certificate was granted in favour of all the three persons

and patta was granted in the name of Feroz Khan, who was the elder member of the family, Feroz Khan died between 1977-78, leaving behind him defendants 1 to 9, who are the widow, sons and daughters. After the death of Feroz Khan, the plaintiff viz., Khadar Nawaz Khan and defendants 1 to 11, legal representatives of Shahzadi Bee, were in joint possession and enjoyment of the plaint schedule property. Defendant 12, who is a stranger, was creating some documents to deprive the rights of the plaintiff and the other sharers. Since there were differences among the family members and since it was difficult for them to continue in joint possession, the plaintiff demanded the partition of the suit property. But, the defendants did not comply with his request. Finally on 15-11-1987, they refused to partition the suit schedule properties. Therefore, the present suit was filed for partition of Ac.49-24 gts. and allotment of 1/4th share. The suit properties are matrooka properties.

3. Defendants No. 10 and 11 are the sons of Shahzadi Bee. Defendants 1 to 9 filed a memo adopting the written statement of Defendant 11. Defendant 11 filed a written statement supporting the case of the plaintiff. Defendant 12 filed a written statement contending that the suit property is not the joint property of the plaintiff and Feroz Khan and Shahzadi Bee and the suit was filed by the plaintiff in collusion with Defendants 1 to 11. He denied the other allegations made in the plaint. He further stated that the suit schedule lands were purchased by late Khader Hussain Khan from one Qamaruddin Ali Khan for a valid consideration under a registered sale deed dated 23 Arban 1344 Fasli and he was in exclusive possession and enjoyment of the said land, till his death in 1357 Fasli. After his death, his brother, Feroz Khan, who is the husband of defendant 1 and father of defendants 2 to 9 became the owner of the suit schedule land by virtue of the succession certificate bearing No. 812 of 1357 Fasli issued by the Director of Settlements, has been in continuous and exclusive possession of the suit land paying land revenue. The late Feroz Khan perfected his title of the said lands by being in exclusive possession and enjoyment as an exclusive owner for over the statutory period. One J.H. Krishna Murthy, claiming to be the general power of the attorney holder of late Nawab Nasrat Jung-I, started interfering with the peaceful possession and enjoyment of the lands by late Feroz Khan. Defendant 12 also denied the title of Feroz Khan. Feroz Khan gave a complaint against Krishna Murthy to the police. Since the police did not take any action, Late Feroz Khan initiated proceedings u/s 145 Cr.P.C. apprehending breach of peace before the Revenue Divisional Officer. The Revenue Divisional Officer dropped the proceedings holding that there was no breach of peace. late Feroz Khan instituted a suit O.S.No. 31 /66 on the file of III Additional Judge, City Civil Court, Hyderabad, against Krishna Murthy and others seeking relief of declaration and injunction. The suit was later on transferred to V Additional Judge, City Civil Court, Hyderabad, and was re-numbered as O.S.No. 512 of 1973. After the institution of the suit, late Feroz Khan entered into an agreement with defendant No. 12 agreeing to sell the entire extent of land covered by Survey Nos. 42 and 43 and a portion of Survey No. 41 to this defendant, pursuant to which a registered sale

deed in respect of entire Survey No. 42 and a portion of S.No. 41 was executed on 4-10-1969, after receiving the sale consideration. He was impleaded as 2nd plaintiff in the suit O.S.No. 512 of 1973. Since Krishna Murthy was threatening to dispossess this defendant and Late Feroz Khan, they again instituted proceedings u/s 145 Cr.P.C. before the Revenue Divisional Officer who held that Krishna Murthy was in possession of the properties. Therefore, this defendant and late Feroz Khan amended the plaint in O.S.No. 512 of 1973. Feroz Khan, who was in need of money, offered to sell the entire extent of Ac. 18-25 gts. covered by Survey No. 43 and executed an agreement of sale on 23-3-1973. The consideration agreed was Rs. 575/- per acre and Rs. 5000/- for the sheds which were in existence and a sum of Rs. 8000/- was received. Since the suit O.S.No. 512 of 1973 was pending, it was agreed that the sale deed should be executed in respect of Survey No. 43 within two months from the date of disposal of O.S.No. 512 of 1973. That suit was decided in favour of late Feroz Khan holding that he alone had title and possession of the suit schedule property. It was also held that they are entitled to recover possession of the land from Krishna Murthy. The decree was dated 30-6-1976. Krishna Murthy filed an appeal in CCCA No. 142 of 1976. During the pendency of that appeal, Feroz Khan died on 22-1-1978 and his legal representatives viz. widow and children were brought on record. During the pendency of the appeal, the legal representatives of Feroz Khan tried to alienate the property. But, this defendant could not get the agreement executed in his favour on account of the fact that the sale deed was to be executed within two months from the final disposal of O.S.No. 512 of 1973. He, therefore, filed a suit O.S.No. 164 of 1981 on the file of the V Additional Judge, City Civil Court, for permanent injunction restraining the defendants 1 to 9 from selling or otherwise disposing of the land covered by Survey No. 43 of Kokapet village to anyone else other than this defendant. The Trial Court decreed the suit. An appeal filed against the Judgment in that suit was dismissed on 27-11-1984. The appeal filed by Krishna Murthy in CCCA No. 142 of 1976 was also dismissed by this Court on 11-12-85. After the dismissal of the appeal on 11-12-85, this defendant issued a notice to defendants No. 1 to 9 calling upon them to execute and register a sale deed in his favour in respect of the land covered by an agreement of sale dated 23-3-1973. Since defendants 1 to 9 did not comply with the demand of this defendant, this defendant had to file O.S.No. 150 of 1986 on the file of Munsif Magistrate West, R.R. District, against Defendants 1 to 9 for specific performance of the agreement of sale dated 23-3-1973 in respect of Ac. 18-25 gts. in Survey No. 43 of Kokapet village. This defendant, after disposal of CGCA No. 142 of 1976, filed E.P. No. 88 of 1986 on the file of the Principal Sub-Judge R.R. District, for delivery of the land covered by Survey No. 41 to 42 of Kokapet village. The said E.P. was filed along with defendants 1 to 9. In the E.P., the possession of the land was delivered on 19-6-1986. Defendant No. 12 in his written statement also contended that O.S.No. 150 of 1986 was also decreed on 2-11-1987 in his favour directing the defendants 1 to 9 to execute the sale deed. The plaintiff was not in possession of suit schedule lands at any time and he never claimed any title or interest in the said lands, though

the litigation was pending between this defendant and Feroz Khan on one side and Krishna Murthy on the other side. He never attempted to impleaded himself as a party in any of the legal proceedings.

4. On the basis of the above pleadings, the following issues were settled for trial.

(1) Whether the plaintiff has got a right and possession in respect of the suit land.

(2) Whether plaintiff is entitled for partition of suit properties as prayed for?

(3) Whether the succession was granted in favour of the plaintiff and 2 others as alleged in Para 2 of the plaint?

(4) Whether Feroz Khan was in exclusive possession of the suit properties as exclusive property he perfected his title in respect of the suit property?

(5) Whether the suit land divided among defendants 1 to 9 and defendant 12, as stated in para 5(9) of W.S. of defendant 12 by way of sale of suit land?

(6) Whether suit is barred by limitation?

(7) Whether the Court fee paid is sufficient?

(8) To what relief?

5. The plaintiff, in support of his case, examined three witnesses and marked four documents A-1 to A-4. The defendant examined himself and marked Exs. B-1 to B-30. On the basis of the material, the learned Judge dismissed the suit for partition on the ground that the late Feroz Khan was in exclusive possession of the plaint schedule property. In support of his finding, the learned Judge relied on the finding in CCCA No. 142/76, wherein it was held that Feroz Khan was the pattadar and possessor of the suit property and there was no finding that the plaintiffs D-1 to D-11 and Feroz Khan were joint pattedars of the suit land; the plaintiff has not filed any document to show that the plaintiff and the defendants are in joint possession of the suit schedule lands; and that he admitted in the cross-examination that he along with the legal representatives of late Feroz Khan and his sister are living separately; that when he was confronted with the litigation between late Feroz Khan and the defendant No. 12 against Krishna Murthy, he expressed ignorance. He also did not file any declaration before the ceiling authority, Special Deputy Collector u/s 8(1) of the Urban Land Ceiling Act, the defendants filed Ex.B-1 which is the certified copy of the plaint in O.S.No. 10 of 1967 wherein late Feroz Khan and Shrihari filed a suit against Krishna Murthy for declaration and injunction and as per the plaint copy, late Feroz Khan and Srihari were claiming the suit land. Ex.B-2 is the agreement of sale executed by late Feroz Khan in favour of defendant 12. Ex.B-4 is the document under which delivery of property was effected on 3-10-1969 to defendant 12. Ex.B-6 is the certified copy of the faisal patti for the year 1970 under which defendant No. 12 purchased the property from Feroz Khan and mutation was effected in favour of defendant No. 12 Ex.B-7 is the pahani pathrika for the year

1970-71 under which the name of defendant 12 was mutated. Ex.B-11 is the order passed by the Land Reforms Tribunal, dated 29-10-1975. Ex.B-23 is the Khasra Pahani for the year 1954-55 wherein Feroz Khan was mentioned as pattadar and possessor of the suit land. Ex.B-24 is the certified copy of the Faisal Patti in which the legal representatives of Feroz Khan were recorded as the pattadars after the death of Feroz Khan. Ex.B-24 is the pahani pathrika for the year 1980-81. In view of the documentary evidence produced by the defendant, the learned Judge held that late Feroz Khan was the exclusive pattadar and possessor of the suit schedule property. He had also taken into account the succession certificate that was granted in the year 1357 Fasli by the Director of Settlements in favour of Feroz Khan and various other proceedings initiated by Feroz Khan and held that late Feroz Khan was the exclusive owner and pattadar of the suit schedule property. He also held that the suit property was delivered to the defendant No. 12 on 19-6-1986 and the suit was barred by limitation. The learned Judge also held that in view of the subsequent transaction entered into by late Feroz Khan with the defendant 12 and also in view of the dealings with the third parties by filing regular suits, he should be considered as the exclusive owner of the property. In view of the finding that he is the exclusive owner of the property, the plaintiff's claim for partition was dismissed. Aggrieved by the said Judgment, the present appeal is filed by the plaintiff. The question that arises for consideration in this appeal is whether the learned Judge is right in holding that late Feroz Khan was the exclusive owner of the plaint schedule property? If he is not the exclusive owner, the appellant is entitled for partition, as the possession of late Feroz Khan is possession on behalf of the appellant being a co-owner.

6. It is not disputed that the original owner of the property is one Qamaruddin Ali Khan and from him, Khader Hussain Khan purchased the same. The appellant late Feroz Khan and Shahzadi Bee are the step brother and sister of Khader Hussain Khan. It is also not disputed that the properties are matrooka properties. It is also not disputed that Khader Hussain Khan died as a bachelor leaving behind him Shahzadi Bee, his sister and step brothers, Feroz Khan and the appellant Khadar Nawaz Khan. After the death of Khader Hussain Khan, the only heirs are late Feroz Khan and Khadar Nawaz Khan, i.e. the appellant and Shahzadi Bee. It is also not disputed that the suit properties being matrooka properties, under Muslim Laws, the property devolves on all the three heirs of Khader Hussain Khan, viz. Shahzadi Bee, Feroz Khan and Khadar Nawaz Khan. When once the properties devolved on these three persons; who are the successors of Khader Hussain Khan, they are entitled to claim from out of the property equal shares in accordance with Muslim Law and they are co-owners of the property. It is not disputed that when a co-heir is found to be in possession of the properties, it is presumed to be on behalf of the other co-owners and joint title and the possession of one co-heir is to be considered in Law as possession of all the co-heirs. The co-heir in possession cannot render his possession adverse to the other co-heirs not in possession. Therefore, on the death

of Khadar Hussain Khan, Late Feroz Khan, Khadar Nawaz Khan, the appellant, Shahzadi Bee, who succeeded as co-heirs, are entitled to joint possession and even assuming that Feroz Khan was in possession of the property, his possession is on behalf of Shahazadi Bee and Khadar Nawaz Khan, who are the co-heirs co-owners along with him. At this stage, it is relevant to refer Ex. A-2 which was relied on in the Judgment in CCCA No. 142 of 1976 filed by Krishna Murthy against late Feroz Khan and the 1st respondent. In this appeal, a reference was made to the succession certificate granted to late Feroz Khan and Shahzadi Bee, the appellant i.e. Khadar Nawaz Khan.

7. The relevant portion has been marked as Ex.A-2 in the present suit. It reads: "letter No. 745 dated 7th Tir 1356 Fasli shows that the succession for three survey numbers was sanctioned in the name of the plaintiff. His younger brother Khadar Nawaz Khan and sister Shahzadi Bee are shown as co-sharers (Shikami)." From a reading of Ex.A-2, it is clear that the possession obtained under Muslim Law was recognised by granting succession certificate in favour of all the three co-heirs.

8. The learned Judge, forgetting the legal position obtained under the Muslim Law and relying on various documents, held that late Feroz Khan was the exclusive possessor and pattadar of the suit land. The documents on which he relied are Ex.B-7, Pahani Phatrika for the year 1970-71, Ex. B-23 Khasra Pahani for the year 1954-55, Ex.B-24 certified copy of Faisal Patti, Ex.B-25 certified copy of Pahani Pathrika and Ex.B-26 to B-29 certified copies of Pahani Pathrikas. On the basis of various entries made in the revenue records, the learned Judge held that late Feroz Khan was in exclusive possession of the property. It is true that in all the entries in the revenue records, late Feroz Khan and his legal representatives and the respondents were shown as the possessors of the land. However, they are only entries made in the revenue records, in other words, these are the entries relating to mutation proceedings effected on the death of the original owner and also on the death of Feroz Khan and after purchase by the defendant No. 12. In *Nirman Singh v.Thakur Lal Rudra Partab Narain Singh and Ors.* AIR 1926 U.P.C. 100, the effect of mutation proceedings in the revenue records was considered, it was observed :

"... that the proceedings for the mutation of names are judicial proceedings in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind, as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid."

It was also observed :

". . . . if that means that Lal Bahdur Singh set up a claim to be sole proprietary owner of this estate, entitled to an interest in which his brothers had no claim, then these

revenue authorities had no jurisdiction to pronounce upon the validity of such a claim, and from these orders it would appear they did not attempt to do so. It is, in their Lordship's view, perfectly clear that the orders already referred to did not effect and were not intended or designed to effect proprio vigore an exclusion of the plaintiff from all interest in the property of the joint family of which they were members."

In other words, according to the learned Judges, mutation proceedings do not confer any title if no such title is there, but they are only evidence of possession. It cannot also take away title if there is one. The effect of mutation proceedings is only for the purpose of collecting revenue by identifying person who is in occupation of the property. If the above propositions are applied to the facts of the present case, the possession of Feroz Khan (Late) was established, but as pointed out in the earlier paragraphs, the learned Judge held that the late Feroz Khan was the exclusive owner relying only on the mutation proceedings effected from time to time and the said conclusion is wrong. The fact remains that the appellant and late Feroz Khan and the sister of Khader Hussain Khan are the legal heirs of Khader Hussain Khan and they are entitled to the joint possession of the properties in accordance with the shares under the Muslim law. Therefore, the fact that mutation was effected in the name of Feroz Khan does not affect the interest of the appellant in the property and does not disentitle him or deprive him of his share in the property. Therefore, by virtue of mutation proceedings effected in favour of Feroz Khan, the interest of the appellant cannot be taken away.

9. However, late Feroz Khan, being a co-owner filed a suit against Krishna Murthy, who was interfering with his possession. He also executed agreements of sale and also registered sale deeds in favour of the respondent No. 12. The question, therefore, is whether the conduct of the late Feroz Khan amounted to ouster of the rights of the appellant. Before considering the issue, it is relevant to refer to some of the observations made by the Supreme Court in [P. Lakshmi Reddy Vs. L. Lakshmi Reddy](#). It was a case of joint family under Hindu Law and the question that arose whether a co-owner can set up a title by adverse possession against another co-owner. In that context, it was held:

"... But it is well settled that in order to establish adverse possession of one co-heir as against another 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 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 co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heir's title. 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. It was also held :

"The burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

The next decision to be considered in this context is [Syed Shah Ghulam Ghouse Mohiuddin and Others Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri \(Died\) by Lrs. and Others](#), . It was held:

"... Possession of one co-owner is presumed to be possession of all the co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them."

10. In other words, the possession of a co-owner being the possession on behalf of the other co-owners, to establish ouster or adverse possession, there should 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. It does not require an express demand by one and the denial by the other. The denial of title of co-owners and the possession is in hostility to exclusion of the other co-owners.

11. Therefore, the question is whether the alienations made by late Feroz Khan in favour of the respondents and the prosecution of various suits against third parties establish open assertion of hostile title to the knowledge of the appellant. In my view, it does not. The prosecution of various proceedings by late Feroz Khan, being a co-owner, is for the benefit of the other co-owners as he is in possession on behalf of the other co-owners. Therefore, the fact that late Feroz Khan filed suits and executed agreements of sale does not establish assertion of hostile title to the knowledge of the appellant. There is absolutely no evidence that the appellant is aware of the proceedings initiated in various Courts and agreement of sale. Further, as pointed in *Nirman Singh v. Thakur Lal Rudra Partab Narain Singh and Ors.* (1 supra), it does not require any express demand by the appellant, questioning the transactions executed by late Feroz Khan and denial by him. Therefore, the fact that the appellant did not raise any objection or did not participate in various proceedings or did not participate in executing various sale deeds in favour of the respondent does not oust him from being the co-owner and co-heir of the property belonging to Khader Hussain Khan. If one there is no assertion of hostile title to the knowledge of the appellant, the appellant continues to be co-heir and continues to be in joint possession of the plaint schedule property along with late Feroz Khan and after his death, along with the heirs of late Feroz Khan. If he is in joint possession,

he is entitled to partition of his share in the plaint schedule property.

12. The issue can also be considered from another angle. It is not the case of the respondents that the possession of late Feroz Khan is adverse to the interest of the appellant and that the appellant is ousted from the possession of the property. The relevant pleading in the written statement filed by the respondents reads as follows:

"..The said Feroz Khan also perfected his title to the said land by being in exclusive possession and enjoyment as an exclusive owner for over the statutory period."

13. As pointed out in the earlier paragraphs, the exclusive ownership is based on various mutation proceedings effected from time to time. As I have already pointed, the mutation proceedings cannot deprive the title and interest vested in the appellant. They only indicate the possession of the person whose name is mutated. The fact that he was in possession does not amount to conferring title on him to the exclusion of appellant's rights. Further, there is no pleading that the appellant was ousted from possession and no evidence evidencing that the appellant was ousted from the possession of the plaint schedule property was adduced. Therefore, in the absence of pleading and proof of evidence establishing that the appellant was ousted, the appellant cannot be deprived of his rights in respect of the plaint schedule property under the Muslim Law and the possession of late Feroz Khan shall be deemed to be possession on behalf of the appellant. Not only that, there has to be open denial of title to the parties who are entitled to it by excluding and ousting them. There is no proof of open denial of title of the appellant by the 1st respondent and his predecessor in title late Feroz Khan. There is no evidence of assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the appellant so as to constitute ouster. As pointed out earlier, there is no plea nor proof by evidence.

14. It is true that the appellant has stated that they are living separately with late Feroz Khan and Shahzadi Bee. The fact that they are living separately does not disentitle him from claiming a share of the property as the property devolved on him in accordance with Muslim Law. On the other hand, there was the evidence of P.W.2, Abdul Mazid Khan, whose father had worked as a watchman under late Feroz Khan. He stated that his father had worked in the suit land and there were mango trees and kaju trees and the usufruct of the trees was shared by the appellant and the defendants. This fact indicates that the appellant and the late Feroz Khan and his heirs were enjoying the property jointly.

15. In view of the above discussion, the appellant being one of the co-heirs, Khader Hussain Khan, is entitled to seek partition of the property. The suit is accordingly decreed and appeal is allowed with costs.