

DARSHAN SINGH AND ORS.
v.
GUJJAR SINGH (DEAD) BY LRS. AND ORS.

JANUARY 8, 2002

[V.N. KHARE AND S.N. PHUKAN, JJ.]

Succession—Right of inheritance—Land of two brOrs. in possession of descendants of one brother—Suit by collateral claiming succession to the land—Other brother not heard for 7 years—Date of his death not proved—Descendants got their names mutated after denying the title of collaterals—Suit rejected by Trial Court on the ground of adverse possession—First Appellate Court and High Court granted decree to the extent of estate of the other brother presuming his death on the date of filing of the suit—On appeal—Held, collaterals not entitled to succeed since the descendants had perfected their title after ousting the title of the collaterals and collaterals could not prove the date of death—Adverse Possession.

Adverse Possession—Applicability of—On land in possession of co-sharer—Held, the possession cannot be deemed to be adverse in respect of other co-sharers unless they have been ousted by denying their title.

Evidence Act, 1872—Section 108.

Death of a person—Claim of—Burden to prove—Is on the person who makes such a claim.

Presumption as to death—Exact date of death cannot be presumed—High Court presuming it to be on the date of filing of suit—Contrary to law.

'H' was in possession of the suit land which included share of his brother since he absconded. After death of 'H', wife of a collateral took possession of the land and got it mutated in her name, which was questioned by the adopted son of 'H'. In litigation between the adopted son and the wife of collateral, court decided in favour of the son and the entire land was mutated in his name. After his death, appellants, his grand sons got their names mutated in respect of entire land. Respondent No. 1, a sixth degree collateral of the other brother challenged the mutation unsuccessfully.

A Thereafter Respondent No. 1 filed present suit for declaration that he was entitled to succeed to the land being collateral of 'H' and his brother. There was no pleading or averment regarding death of the brother. Trial Court dismissed the suit holding that the adopted son and his successors were in adverse possession of the land. On appeal, the First Appellate Court granted decree in favour of respondent only in respect of land of the brother holding that the adopted son was entitled to inherit only the land of 'H'; and that since the brother had not been heard for more than 7 years, could be considered to be dead on the date on which the suit was filed; and the plea of adverse possession was rejected. High Court upheld the decision of the First Appellate Court. In Letters Patent Appeal High Court upheld the decree with modification that the land of the brother would be divided between Respondent No. 1 and Respondent Nos. 2 to 7 (other collaterals). Hence this appeal.

Allowing the appeal, the Court

D HELD : 1.1. If a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers. Possession of a property belonging to several co-sharers by one-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.

[96-B-D]

F *Sardar Amar Singh v. Sardarni Shiv Datt Kaur*, AIR (1937) Lahore 890 and *Bashir Ahmad and Ors. v. Parshottam & Ors.*, AIR (1929) Oudh 337, referred to.

G 1.2. On the facts in the case in hand, the appellants have proved that their possession of the land in question is in continuity for more than the statutory period, in publicity and adverse to the brother and his other collaterals and they have perfected their title over the land by adverse possession. It is proved that present appellants got their names mutated after denying the title of collaterals of the brother, including the present appellant. On these facts, it is held that as names of present appellants were mutated in the revenue record after rejecting the claims of plaintiff and other collaterals, there was a clear ouster of other co-sharers of the brother.

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[96-H; 97-A]

2.1. There is no presumption of exact time of death under Section 108 of the Evidence Act, 1872 and the date of death has to be established on evidence by person who claims a right for establishment of which that fact is essential. In the case in hand as respondent No. 1 claimed succession to the estate of the brother and, therefore, the burden was on him to prove the date of death. There is neither any pleading nor an averment by the plaintiff-respondent regarding his date of death. The view that as the brother was not heard for more than 7 years and, therefore, the date of filing of the present suit would be considered as date of the death of the brother is contrary to above provision of law. [95-C-D]

Lal Chand Marwari v. Mahant Ramrup Gir and Anr. AIR (1926) Privy Council 9, referred to.

2.2. The succession of respondent No. 1 to the estate of the brother would open only on his death. As respondent No. 1 could not prove the date of his death, therefore, his succession to his estate did not open on the date of filing of the suit. Therefore, the findings of the appellate courts are not sustainable in law. [95-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5 of 1992.

From the Judgment and Order dated 25.7.79 of the Punjab and Haryana High Court in L.P.A. No. 551 of 1975.

A.K. Goel, Ms. Sheela Goel and P.N. Puri for the Appellants.

A.D. Sikri, Harphool Singh and Sudhir Walia for M.S. Dahiya for the Respondents.

The Judgment of the Court was delivered by

PHUKAN, J. This appeal by special leave is directed against the judgment of the High Court of Punjab and Haryana in Letters Patent Appeal No.551/75.

Briefly stated, the facts are as follows:

Two brOrs., Hira Singh and Jagjit Singh were convicted in a murder case. During their confinement in jail, Jagjit Singh absconded and Hira Singh was granted pardon. After release Hira Singh took possession of the entire land including the share of his brother, Jagjit Singh. Hira Singh died sometime

A in the year 1920 and on his death, one Smt. Har Kaur, wife of a collateral took possession of the land. Rulia Singh, the adopted son of Hira Singh questioned the mutation as well as possession of Har Kaur and, therefore, she filed a suit for declaration that Rulia Singh was not validly adopted by Hira Singh and also sought permanent injunction restraining Rulia Singh from interfering with her possession. The suit was dismissed ultimately by the High Court and the

B land including the share of the Jagjit Singh was mutated in the revenue records in the name of Rulia Singh in 1930 and thereafter he remained in undisturbed possession of the land till his death in 1962. Darshan Singh, Ala Singh and Pritam Singh defendant Nos. 1-3 (appellants in the appeal) grandsons of Rulia Singh through his daughter got their names mutated in respect of the

C land including the share of Jagjit Singh. One Gujjar Singh a sixth-degree collateral of Jagjit Singh challenged the mutation unsuccessfully and thereafter filed the present suit claiming a declaratory decree to the effect that being a collateral of Hira Singh and Jagjit Singh, he was entitled to succeed to the land left behind by them. The suit was dismissed by the trial court. The First

D Appellate Court partly allowed the appeal granting a decree in favour of Gujjar Singh only in respect of land of Jagjit Singh, which was affirmed by the High Court in second appeal. In the present Letters Patent Appeal, decree of the appellate court was upheld with modification to the extent that the land of Jagjit Singh was divided between the plaintiff-Gujjar Singh and other collaterals, who were impleaded as respondent Nos. 2-7. Against the said judgment, the

E parties are before us in this appeal.

All the courts below have held that Rulia Singh was adopted by Hira Singh according to the customary law of Punjab and, therefore, he could under the said custom inherit only the properties of Hira Singh and not the properties of Jagjit Singh, collateral of Hira Singh. On this point there is no

F dispute. The trial court dismissed the suit holding that Rulia Singh and thereafter his successors, the appellants were in adverse possession of the suit land. The First Appellate Court held that according to customary law, Rulia Singh being adopted son of Hira Singh, was entitled to inherit the share of Hira Singh but not of Jagjit Singh and the plea of adverse possession set

G up by the appellants over the land of Jagjit Singh was rejected. As stated earlier, the judgment of the First Appellate Court was upheld by the High Court with modification and accordingly appeal was partly allowed.

The first question, which needs our consideration, is whether plaintiff, Gujjar Singh, a sixth-degree collateral of Jagjit Singh could prove his right to

H inherit land of Jagjit Singh. The First Appellate Court as well as the High

Court held that in the eye of law, Jagjit Singh, who was not being heard for more than 7 years, could be considered to be "dead only on the date on which the present suit was filed." It was also held that the burden of proof regarding the date of death of Jagjit Singh was on the appellants, which could not be discharged.

In Sri Vidya Mandir Education Society (Regd.) v. Malleswaram Sangeetha Sabha and Ors., [1995] Supp. 1 SCC 27, this court considered provisions of Sections 107 and 108 of the Evidence Act and after noticing the decision of the Privy Council in *Lal Chand Marwari v. Mahant Ramrup Gir and Anr.*, AIR (1926) Privy Council 9 held that there is no presumption of exact time of death under Section 108 of the Evidence Act and the date of death has to be established on evidence by person who claims a right for establishment of which that fact is essential. The case in hand as plaintiff claimed succession to the estate of Jagjit Singh, and therefore, the burden was on him to prove the date of death. There is neither any pleading nor an averment by the plaintiff-respondent regarding date of death of Jagjit Singh. The view of the High Court that as Jagjit Singh was not heard for more than 7 years and, therefore, the date of filing of the present suit would be considered as date of death of Jagjit Singh is contrary to above provisions of law.

In view of the settled position of law, the succession of plaintiff-Gujjar Singh to the estate of Jagjit Singh would open only on the death of Jagjit Singh. As plaintiff-Gujjar Singh could not prove the date of death of Jagjit Singh, therefore, his succession to his estate did not open on the date of filing of the suit. We, therefore, hold that the above findings of the appellate courts are not sustainable in law.

The next question which requires our decision is whether Rulia Singh and after his death the present appellants, who were in possession of the land since 1930 and also got their names mutated, have perfected their title by adverse possession over the land of Jagjit Singh. It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers.

Learned counsel appearing for the appellants has placed reliance on the decision of the Lahore High Court in *Sardar Amar Singh v. Sardarni Shiv Datt Kaur*, AIR (1937) Lahore 890. The learned Judge held that removal of the name of the absentee co-sharer from revenue records at the instance of other co-sharers is an overt act amounting to ouster and commences adverse

A possession of the co-sharers in possession, the reason being that removal of the name was done openly and if the absentee co-sharers would have taken an interest in the land, he would not have failed to notice of it in the ordinary course and hence his knowledge of the adverse claim for other co-sharer may be reasonably presumed. In reply, learned counsel for the respondents has placed reliance on a decision in *Bashir Ahmad & Ors. v. Parshottam & Ors.*, AIR (1929) Oudh 337. The learned Single Judge held that if a property belongs to several co-sharers and one co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse to other co-sharers and he must be deemed to be in possession on behalf of all other co-sharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been ouster of other co-sharers. Regarding mutation in the revenue record learned Judge held that mutation in the name of one co-sharer cannot be any indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that title of other co-sharers was denied.

D In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possess the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue record in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.

After the death of Hira Singh, one collateral Smt. Har Kaur got her name mutated and took possession, which was questioned by Rulia Singh. Both the parties were litigating and ultimately the court decided in favour of Rulia Singh, who got possession of the land and his name was mutated in the revenue records. After the death of Rulia Singh, his grandsons the present appellants, also got their names mutated which was challenged unsuccessfully by the plaintiff. Thus, it is proved that present appellants got their names mutated after denying the title of collaterals of Jagjit Singh, including the present appellant. On these facts, we hold that as names of present appellants were mutated in the revenue record after rejecting the claims of plaintiff and other collaterals, there was a clear ouster of other co-sharers of Jagjit Singh.

From the judgment of the trial court, we find that Rulia Singh mortgaged a part of the land and sold some part treating himself as the owner.

H On the facts proved in the case in hand, we are of the view that the

appellants have proved that their possession of the land in question is in continuity for more than the statutory period, in publicity and adverse to the Jagjit Singh and his other collaterals and they have perfected their title over the land by adverse possession. A

We, therefore, find merit in the present appeal and accordingly it is allowed by setting aside the impugned judgment and the judgment of the trial court is restored. Consequently, suit filed by the plaintiff is dismissed. We direct the parties to bear their own costs. B

K.K.T.

Appeal allowed.