CASE NO.:
Appeal (civil) 12450 of 1996

PETITIONER:
Md. Mohammad Ali (Dead) By LRs.

RESPONDENT:
Sri Jagadish Kalita & Ors.

DATE OF JUDGMENT: 07/10/2003

BENCH:
Ashok Bhan & S.B. Sinha.

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

This appeal is directed against a judgment and decree dated 20.5.1991 passed by Gauhati High Court dismissing the Second Appeal preferred by the appellant herein.

BACKGROUND FACT

Md. Sadagar Sheikh was the original owner of the suit premises. He transferred the same to Gayaram Kalita and Kashiram Kalita. The premises in suit, thus, owned and possessed by the said Gayaram Kalita and Kashiram Kalita, who were brothers. By reason of a registered deed of partition dated 1.12.1938, the structures standing on the land in suit being holding Nos.522 and 523 of the Nalbari Municipality were divided into half and half, each measuring 5 = lechas. Prafulla Kalita, son of Gayaram Kalita, allegedly, amalgamated both the said holdings and got them registered in his name as holding No. 121 in the records of Nalbari Municipality. Holding No. 522 was sold and portion of holding No. 523 was leased out in favour of the respondent No. 3 by Prafulla Kalita.

Upon the death of Md. Sadagar Sheikh, however, his sons got the lands mutated in their favour in mutation case No. 414/70-71 in terms of an order of the Sub Divisional Officer of the Nalbari Municipality.

By reason of a registered deed of sale dated 28.11.1972, the defendants Nos. 7, 8 & 9 transferred their possessory rights in holding No. 523 including the house to the appellant for valuable consideration. On or about 24.9.1977, the legal representatives of Md. Sadagar Sheikh, being defendant Nos. 10, 11 & 12 transferred their right, title and interest in old holding No. 523 to the appellant herein on receipt of the consideration of a sum of Rs. 5000/-. Upon purchase of the suit premises in the manner aforementioned, the appellant herein called upon the respondent No. 3 to pay rent to him which was denied.

LEGAL PROCEEDINGS ;

Although the name of the plaintiff was initially mutated in Nalbari Municipality, the same was cancelled by an order dated 26.9.1977. The taxes deposited by the plaintiff were directed to be refunded. As the respondent No. 3 did not pay rent to the appellant, he filed a money suit for recovery of arrears of rent being No. 83 of 1978 in the Court of Munsif which was dismissed. An appeal preferred thereagainst by the appellant was also dismissed. In view of the fact

that the name of the appellant was not ultimately mutated in the records of the Municipality as also in view of dismissal of the said money suit, the suit was filed wherein the appellant prayed for the following reliefs :

"(i) For a decree for declaration of right, title and interest of plaintiff over the suit land and the house standing thereon.

(ii) A decree may also be passed against the defendant No. 4 for ejectment from the suit house by removing its goods and articles therefrom and also a decree for mesne profit of Rs. 4350.00 against defendant No. 4.

(iii) A decree for issuing precept to the Nalbari Municipal Board for mutating the name of the plaintiff on holding No. 121 (kha) the suit house.

(iv) The cost of the suit may be decreed against the contesting defendants.

(v) Any other relief to which the plaintiff is entitled to may also be decreed."

In the said suit, there were three sets of defendants. The first set being defendants No. 1, 2, 3, 5 & 6 were the legal heirs and representatives of late Prafulla Kalita. The second set being defendants No. 7, 8 & 9 were the legal heirs and representatives of late Kashi Ram Kalita and the third set being defendants No. 10, 11 & 12 were the legal heirs and representatives of late Md. Sadagar Sheikh. The defendant No. 4 (Respondent no.3 herein) was a cooperative society which was inducted as a tenant by Prafulla Kalita. In the said suit the contesting respondents herein inter alia raised a plea of adverse possession alleging :

"That right of adverse possession had accrued upon the predecessor-interest, and these defendant, as these defendants and their predecessor interest, had their peaceful and uninterrupted possession for more than 40 years, adversely to the interest of defendant No. 10, 11, 12 and their predecessor interest."

They further set up a plea that the suit house was not actually partitioned by metes and bounds by and between the Kalita brothers nor separate physical possession thereof was effected and in fact Kashiram Kalita and Gayaram Kalita orally gifted the said plot to Prafulla Kalita and since then he had been in exclusive and peaceful possession thereof as owner.

The learned Trial Court in view of the rival contentions aforesaid, inter alia, framed the following issues:

"3. Whether the plaintiff has right, title and interest over the suit land as well as the house thereon?

4. Whether there exists a relationship of

landlord and tenant in between the plaintiff and the defendant No. 4. If so, whether the plaintiff is entitled to the rent legally due by the defendant No. 4?

5. Whether the suit land together with the house was originally gifted by late Gaya Ram and Kashi Ram to late Prafulla Kalita as alleged in the W.S.?"

The Trial Court decreed the said suit whereagainst Jagdish Kalita, Dipak Kalita and the Secretary of the Cooperative Society preferred appeal in the Court of District Judge, Nalbari which was marked as T.A. No. 69 of 1986. The first appeallate Court upon consideration of the materials on record held that the appellants therein could not prove the factum of oral gift. It was, however, observed:

"But it may so happen that some sort of mutual arrangement took place as Gaya Ram and Kashi Ram left Nalbari for Lumding in quest of their fortune."

The first Appellate Court furthermore held that the burden lay heavily on the plaintiff to prove his title and possession within 12 years since before the date of filing of the suit. The learned Court of first appeal invoked the principle of 'caveat emptor' and opined:

"First he purchased the suit holding. Then he inquired about the title and found that it was recorded in the name of Prafulla. The plaintiff dared to plunge in the cross currents of legal intricacies. But he could not swim across and then he sank. The suit is hit by Article 65 of the Limitation Act. Hence all these three issues are decided against the plaintiff."

As regard Issue No. 4 it was held that the appellant was not entitled to claim any rent from respondent No. 3 herein.

On a second appeal filed by the appellant herein the High Court by its judgment and decree dated 20th May, 1991 dismissed the same holding:

"The learned District Judge having found that Prafulla did not share the rent with prof. Defendants 7, 8 and 9 it cannot be said that these defendants were still co-sharers. Mr. T.S. Deka, learned counsel for the respondents has shown from the records that by Exhibits 12 and 13 Kashiram paid Municipal taxes only upto the year 1945 and this is not disputed by Mr. Sarma. There was, therefore, an open ouster by Prafulla since 1950. The plaintiff brought the suit in 1979. The case relied on by Mr. Sarma does not apply to the facts of the instant case. The learned District Judge, therefore, was perfectly correct in holding that plaintiff's suit was barred by Schedule 65 of the Limitation Act."

(Emphasis supplied)

The appellant is, thus, before us.

This Court by an order dated 16.8.1986 directed the appellant to bring the plaint and written statement filed by the parties on records so as to enable it to decide whether plea of adverse possession taken by the respondent is sustainable. Pursuant thereto and in furtherance thereof the appellants have filed copies of plaint and the written statement.

SUBMISSIONS :

Mr. Mehta, learned counsel appearing on behalf of the appellant would submit that the parties hereto admittedly been co-sharers, the first appellate court as also the High Court have committed a manifest error in dismissing the suit holding that the respondents perfected their title by adverse possession, although the contesting respondents did not raise any plea nor proved ouster of other co-sharers.

Mr. Amlan Kumar Ghosh, learned counsel appearing on behalf of the respondents, on the other hand, would support the judgment of the High Court contending that having regard to the fact that the plaintiff lost in Money suit No. 83 of 1978 in the Court of Munsif, the question of title could not have been permitted to be reagitated. The said issue, the learned counsel would contend, was barred under the principles of res judicata. The learned counsel would submit that having regard to the fact that the respondent no.1 alone having all along been possessing the suit premises by payment of rent to the municipal authorities, must be held to have acquired title by adverse possession.

LEGAL PRINCIPLES RELATING TO OUSTER AND ADVERSE POSSESSION :

The fact of the matter, as noticed hereinbefore, is not much in dispute. If it be held that the two brothers Gayaram Kalita and Kashiram Kalita partitioned the properties in question; the heirs and legal representatives of Gayaram Kalita ceased to have any right, title and interest in respect of the share held by Kashiram Kalita. The defendants No. 7, 8 & 9 had, therefore, a transferable title, unless the same became extinguished.

On the other hand, if no partition by meets and bounds took place, the respondents herein were bound to plead and prove ouster of the plaintiff and/ or his predecessors' interest from the land in question. For the said purpose, it was obligatory on the part of the respondents herein to specifically plead and prove as to since when their possession became adverse to the other co-sharers. Moreover, if the possession of Prafulla Kalita was permissive or he obtained the same pursuant to some sort of arrangement as had been observed by the High Court, the plea of adverse possession would fail.

Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a constructive trustee of other co-sharer and the right of the appellant and/or his predecessors in interest would, thus, be deemed to be protected by the trustee. As noticed hereinbefore, the respondents in

their written statement raised a plea of adverse possession only against the third set of the defendants. A plea of adverse possession set up by the respondents, as reproduced hereinbefore, do not meet the requirements of law also in proving ouster of a co-sharer. But in the event, the heirs and legal representatives of Gayaram Kalita and Kashiram Kalita partitioned their properties by meets and bounds, they would cease to be co-sharers in which event a plea of adverse possession as contra distinguished from the plea of ouster could be raised. The courts in a given situation may on reading of the written statement in its entirety come to the conclusion that a proper plea of adverse possession has been raised if requisite allegations therefor exist. In the event the plaintiff proves his title, he need not prove that he was in possession within 12 years from the date of filing of suit. If he fails to prove his title, the suit fails.

By reason of Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Art. 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.

For the purpose of proving adverse possession/ ouster the defendant must also prove animus possidendi.

However, in the event, the case of the defendant was that the predecessors in interest of the plaintiff ceased to be his co-sharers for any reason whatsoever, it was not necessary for them to raise a plea of ouster. We may further observe that in a proper case the court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession have been raised in the written statement or not which can also be gathered from the cumulative effect of the averments made therein.

The respondents herein, as noticed hereinbefore, has failed to raise any plea of ouster. No finding has been arrived at by the High Court as to from which date they began to possess adversely against the plaintiff or his predecessors in interest. Mere non-payment of rents and taxes may be one of the factors for proving adverse possession but cannot be said to be the sole factor. The High Court has not assigned any reason as to how there had been an open ouster by Prafulla Kalita since 1950.

Furthermore, the first appellate court applied a wrong principle of law in relation to interpretation of Article 65 of the Limitation Act, 1963. The High Court fell into the same error.

Possession of a property belonging to several co-sharers by one co-sharer, it is trite, 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 records in the name of one co-sharers would not amount to ouster unless there is a clear declaration that the title of the other co-sharers was denied and disputed. No such finding has been arrived at by the High Court.

In the instant case, the dispute between the parties as regard

mutation of the name of the appellant was finally decided, as noticed hereinbefore, only on 26.9.1977. The Money Suit filed by him was also dismissed by the Appellate Court on 19.5.1979. The appellant instituted title suit on 24.10.1979. In that view of the matter, the question of the respondents acquiring title by ouster of the appellant on the basis of the order of the Municipal Authorities in the mutation proceedings does not arise.

So far as submission of Mr. Ghosh to the effect that the decision in the money suit shall operate as res judicata is stated to be rejected.

In the aforementioned suit, the only issue which could be raised and determined was as to whether respondent No. 3 was a tenant of the plaintiff. As the plaintiff or his predecessors in interest failed to show that respondent No. 4 was inducted by them, his claim for arrears of rent was rejected but the Court while determining the said issue could not have gone into a pure question of title as well as the question as to whether the respondents herein acquired title by adverse possession.

SOME CASE LAWS ON THE QUESTION OF OUSTER/ADVERSE POSSESSION :

In Karbalai Begum vs. Mohd. Sayeed and Another [(1980) 4 SCC 396], the law has been stated by this Court in the following terms :

"...It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession..."

In Annasaheb Bapusaheb Patil and Others etc. etc. Vs. Balwant alias Balasaheb Babusaheb Patil (Dead) by LRs. and Heirs and Others etc.etc. [(1995) 2 SCC 543], this Court held:
"15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another’s title. One who holds possession on behalf of another, does not by mere denial of that other’s title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all."

In Vidya Devi alias Vidya Vati (Dead) by LRs. Vs. Prem Prakash and Others [(1995) 4 SCC 496] this Court upon referring to a large number of decisions observed:

"27...it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in P. Lakshmi Reddy case which has since been followed in Mohd. Zainulabudeen v. Sayed Ahmed Mohideen.

28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."

Yet again in Darshan Singh and Others Vs. Gujjar Singh (Dead) by LRs. and Others [(2002) 2 SCC 62], it is stated :

"...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."

It has further been observed that :

"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 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 records 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."

QUESTIONS OVERLOOKED BY THE HIGH COURT :

The proposition of law relating to ouster of a co-sharer vis-'-vis adverse possession had been overlooked by the High Court. There are also certain other aspects of the matter which could not be overlooked and probably would require closer examination by the High Court.

The High Court while determining the question should have formulated substantial questions of law in terms of Section 100 of the Code of Civil Procedure, 1908. In absence of formulation of such substantial questions of law, probably the High Court committed the errors as pointed out hereinbefore.

Prima facie the questions of law which arise for consideration are:

(i) Whether the registered deed of partition was acted upon so as to cause disruption of the joint family?
(ii) Whether the amalgamation of holding Nos. 522 and 523 as one holding being holding no. 121 at the instance of Prafulla Kalita was to the knowledge of the heirs and legal representatives of Gayaram Kalita or the third set of the defendants and, if the answer to the aforementioned question is

in affirmative, whether Prafulla Kalita started possessing the entire house standing on the plot in question being holding No. 522 and 523 exclusively pursuant to or in furtherance of the said order; or such possession was referable only to some adjustment or permission of the heirs of Gayaram Kalita?
(iii) What was nature and extent of right transferred to the appellant by the heirs of Kashiram Kalita? (Such a question arises as the appellants in their list of dates stated that only possessory rights were transferred.)

(iv) Whether the plaintiff derived any right title and interest in relation to the suit property by reason of deed of sale executed by the heirs of Md. Sadagar Sheikh?

(v) If Md. Sadagar Sheikh had transferred his entire right, title and interest in favour of two brothers by reason of the aforementioned deed of sale, under what circumstances the names of defendants No. 10, 11 & 12 were mutated in the records of Nalbari Municipality in the year 1971.

These questions were required to be considered upon by the Trial Court as also the Court of first Appeal so as to arrive at a correct decision. However, we hasten to add that we have ourselves not gone into the materials on record and thus have recorded our tentative opinion on the basis of the judgment of the High Court and the Court of Appeal. It would, thus, be open to the High Court to consider the matter on its own merit.

CONCLUSION :

We are, therefore, of the opinion that the matter should be considered afresh by the High Court which may proceed to decide the matter on framing proper substantial questions of law arising in the second appeal. The judgment of the High Court is, therefore, set aside.

This appeal is allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.