

PETITIONER:
VIDYA DEVI @ VIDYA VATI (DEAD) BY L.RS.

Vs.

RESPONDENT:
PREM PRAKASH & ORS.

DATE OF JUDGMENT 10/05/1995

BENCH:
VENKATACHALA N. (J)
BENCH:
VENKATACHALA N. (J)
KULDIP SINGH (J)
AHMAD SAGHIR S. (J)

CITATION:
1995 AIR 1789 1995 SCC (4) 496
JT 1995 (4) 607 1995 SCALE (3) 580

ACT:

HEADNOTE:

JUDGMENT:
THE 10TH DAY OF MAY, 1995

Present:

Hon'ble Mr. Justice Kuldip Singh
Hon'ble Mr. Justice N. Venkatachala
Hon'ble Mr. Justice S. Saghir Ahmad

Mr. Avadh Behari and Mr. R.F. Nariman, Sr. Advs.,
Mr. R.D. Itorora, Mr. Chaman Lal Itorora, Mr. P.H. Parekh,
Mr. S. Fazl, Ms. Lucy and Mr. Uma Datta, Advs. with them for
the apperaing parties.

JUDGMENTS

The following Judgments of the Court were delivered:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 974 OF 1980

Vidya Devi @ Vidya Vati (Dead)
by L.R'S
Versus
Prem Prakash & Ors.

JUDGMENT

VENKATACHALA, J.

Raghunath who had lands comorise in Khasra Nos. 2,5/1 and 6/1 situated in village Macangir, Delhi, as his holding died in the year 1952 leaving behind Vidya Devi alias Vidya Vati, widow of his pre-deceased first son Ram Narain, his second son Dev Raj and his third son Prem Prakash, as his legal heirs to inherit his holding. When in the year 1953-54 a jamabanai of that village was held, entry in the revenue records pertaining to the said holding was changed from the name of Raghunath to the names of Vidya Devi. Dev Raj and Prem Prakash. With the coming into force of the Delhi Land Reforms Act 1954 - the do Act, respecting the area of the lands within which the said holding fell, a declaration having been made as required under that Act and the Rules made thereunder on 1st February, 1958 that the said Vidya

Devi slias Vidya Vati, Dev Raj and Prem Prakash were the co-bhumidars of that holding, they became the co-bhumidars earn entitled to one-third share thereof.

However, on 9th October, 1973 Vidya Devi, filed a suit as plaintiff therein for partition of her one-third share and separate possession in the said holding before the Revenue Assistant, as provided for under sub-section (1) of section 55 of the DL Act against the other co-bhumidhars - Prem Prakash and Dev Raj by impleading them as defendants-1 and 2 respectively in that suit. Defendant-2, Dev Raj did not have any objection for partition and giving separate possession of one-third share out of the said holding to the plaintiff as prayed in the suit, indeed, he also claimed for partition and giving of separate possession of his one-third share in the said holding. But, defendant-1, Prem Prakash contested that suit. In his defence statement, he pleaded inter alia, that he being in exclusive possession of the said holding ever since the year 1953-54, he had perfected his title in respect to the whole of the said holding by adverse possession as against the other co-bhumidhars and, therefore, question of title was involved in the suit reducing the Revenue Assistant to frame an issue thereon and refer the same to Civil Court for obtaining a finding thereon, as required by section 186 of the DL Act. No doubt, the Revenue Assistant, who framed the issues in that suit based on the pleadings therein framed an issue which read thus:

"Whether any question of title is involved in this case which requires any reference to the civil court under section 186 of the DL Act."

But, when that issue was considered by the Revenue Assistant as a preliminary issue, he took the view that no question of title which required to be referred to Civil Court under section 186 of the DL Act for obtaining its finding was involved. However, that view was questioned by defendant-1 by taking the matter in revision before the Financial Commissioner. But, the Financial Commissioner who heard the revision, rejected it by upholding the view of the Revenue Assistant on the said preliminary issue. The reason given by the Financial Commissioner for upholding the view of the Revenue Assistant on the preliminary issue was that the plea of title taken in his defence by defendant-1 was to be deemed as untenable within the meaning of explanation to sub-section (1) of section 186 of the DL Act in that it was solely intended to oust the jurisdiction of the Revenue Assistant in the matter. Defendant-1 filed a writ petition, C.W. No. 691 of 1978 in the Delhi High Court questioning the correctness of the said orders of the Revenue Assistant and the Financial Commissioner rendered on the preliminary issue in the suit. However, the learned Single Judge rejected that writ petition finding no merit in it. Defendant-1 filed an appeal against the order of the learned Single Judge rejecting his writ petition in L.P.A. No. 70 of 1979. The Division Bench of the High Court which heard that L.P.A. took the view that clause (d) of section 67 of the DL Act which provided for extinction of the interest of a bhumidhar in his holding enabled a co-bhumidhar in exclusive possession of such holding for over 12 years to claim his exclusive title for it by adverse possession and hence the aforesaid plea taken in defence by him which related to his own title in the holding to the exclusion of the plaintiff involved a question of title in the suit. Consequently, the Division Bench allowed the L.P.A., quashed the orders of the learned Single Judge, Financial Commissioner and the Revenue Assistant made on the preliminary issue on the question of

title and submit the record to the competent Civil Court on that issue as was required by section 186 (1) of the DL Act. The plaintiff in the suit who was aggrieved against the said order of the Division Bench of the High Court has filed the present Civil Appeal by obtaining special leave.

During the pendency of the appeal, the plaintiff-appellant Vidya Devi having died, her two daughters are brought on record as her L.R's. As Dev Raj, defendant-2 had died during the pendency of the proceedings in the courts below, respondents 2 to 6 in this appeal are brought on record as his L.R's.

We have not only heard the oral arguments of the learned counsel for the contesting parties in this appeal but also have carefully gone through the written submissions filed in this appeal by learned counsel on behalf of their respective parties.

The short question which needs our consideration in this appeal relates to the correctness of the view taken by the Division Bench of the High Court in the impugned judgment as regards the applicability of section 67(d) of the DL Act to the facts of the present case and the direction given to the Revenue Assistant based on that view for framing an issue in the suit on 1st defendant's title to the holding and referring the same to Civil Court for its finding under section 186(1) of the DL Act.

Section 67, insofar it is material, reads :

"Extinction of the interest of a Bhumidhar -
The interest of a Bhumidhar in his holding or any part thereof shall be extinguished -
(a) when he dies intestate leaving no heir entitled to inherit in accordance with the provisions of this Act.

.....
(d) when he has been deprived of possession and his right to recover possession is barred by limitation:
.....

The view expressed by the Division Bench of the High Court as to the applicability of section 67(d) of the DL Act is as follows:

"We are, however, unable to accept Mr. Bhatia's contention that section 67(d) applies only in the case of sole-bhumidhar. There is nothing in the Act which could lead to the conclusion that the words 'interest of a bhumidhar' would not include the interest of a joint or a co-bhumidhar. Just as the interest of a co-bhumidhar would come to an end under section 67(a), when he dies intestate leaving no heir entitled to inherit in accordance with the provisions of the Act, similarly the interest of a co-bhumidhar can be extinguished when he had been deprived of possession and his right to recover possession is barred by limitation. The provisions of section 67(d) clearly postulate extinguishment of interest as a bhumidhar by reason of adverse possession of the land by another party. It is wholly immaterial whether the other person in occupation is a co-bhumidhar or a stranger."

The said view of the Division Bench of the High Court,

which has led it to the conclusion that the plea taken by defendant-1 (respondant herein, involved the question of title of the plaintiff. (deceased appellant), and the same warranted the framing of an issue as to title in the suit and required to be referred to Civil Court for obtaining a finding from it, cannot be upheld for the reasons which we shall presently state.

Sub-section (2) of section 13, which deals with the rights and liabilities of bhumidahars, reads thus:

"13(2), Every person who, after the commencement of this Act, is admitted to land as Bhumidhar or who acquires Bhumidhari rights under any provision of this Act, shall, have all the rights and be subject to all the liabilities conferred on imposed upon Bhumidhars under this Act with effect from the date of admission or acqusition, as the case may be."

When it cannot be disputed that the deceased appellant (palintiff) Vidya Devi, the deceased defendant-2 Dev Raj and respondental (defendantel) Prem Prakash had been admitted to the aforesaid holding of deceased Raghunath on 1st February, 1958 as co-bhumidhars each entitled to one-third share in the holding because of the declaration made under the DL Act and the Rules made thereunder, all of them rights conferred upon them under the above sub-section (2) of section 13 of the DL Act. When sub-section (1) of section 55(1) or the DL Act is seen, it confers right or every co-bhumidhar, the right to sue for partition of his holding, in that it reads:

"55(1). Holding of a Bhumidhar partible-

(1). A Bhumidhar may sue for partition of his holding."

Although section 55(1) of the DL Act enables a bhumidhar to file a suit for partition in respect of his or her holding, that suit has to be filed under the DL Act and prosecuted as provided therefor because of section 185 of the DL Act which reads thus:

"185. Cognizance of suits, etc. under this Act - (1), Except as provided by or under this Act no court other than a court mentioned in column 7 of Schedule 1 shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof.

(2), Except as hereinafter provided no appeal shall lie from an order passed under any of the proceedings mentioned in column 3 of the Schedule aforesaid.

(3). An appeal shall lie from the final order passed by a court mentioned in column 7 on the proceedings mentioned in column 3 to the court or authority mentioned in column 6 thereof.

(4) A second appeal shall lie from the final order passed in an appeal under sub-section (3) to the authority, if any, mentioned against it in column 9 of the Schedule aforesaid."

The Schedule mentioned in sub-section 10 of section 185 of the DL Act, insofar as it concerns a suit for partition which could be filed under sub-section of section 55 of the DL Act. reads thus:

"SCHEDULE 1"

S1. No.	Section of the Act	Description of suit application and other proceed- ings	Period of Limit- ation	Time from which peri- od be- gins	Proper Court fees	Court of orig- inal juris- diction	Court of 1st Appeal	2nd Appeal
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1	2	3	4	5	6	7	8	9
-								
11.	55	Suit for partition of holding of a Bhumidhar	None	None	As in the Court Fees Act, 1870 on land revenue payable.	Reven-ue Assis-tant	Deputy Commn.	..

As seen from entry in Column 4 of Schedule 1 no period of limitation is prescribed for a suit for partition of holding to be filed by a bhumidhar. So also as seen from Column 5, there is no time from which period of limitation begin for such suit. Therefore, when a suit for partition is filed by one co-bhumidhar against his/her co-bhumidhars under sub-section (1) of section 55 of the DL Act before the Revenue Assistant in respect of a common holding of which they are declared as co-bhumidhars under the DL Act read with the Rules made thereunder as provided for at S1. No. 11 of Schedule-1, the co-bhumidhar's against whom such suit as filed is/are not entitled to defend it on the plea that it was barred by period of limitation because of the entries in Columns 4 and 5 therein concerning to such suit which declare that the period of limitation is not fixed for such suit and no period of limitation could begin to run in respect of it.

No doubt, there is scope to contend that a co-bhumidhar can raise the plea of acquisition of exclusive title to joint holding by adverse possession, as a defence in a suit for partition by another co-bhumidhar because of sub-section (1) of section 186 of the DL Act, which reads:

"186. Procedure when question of title is raised-
(1) Notwithstanding anything contained in section 185, if in any suit or proceedings mentioned in column 3 of Schedule 1, a question is raised regarding the title of any party to the land which is the subject, matter of the suit or proceeding and such question is directly and substantially in issue the Court shall, unless the question has already been decided by a competent Court, frame an issue on the question of the title and submit the record to the competent civil court for the decision of that issue only."

But, explanation to sub-section (1) of section 186 of the DL Act since declares that a plea regarding the title to the land which is clearly untenable and intended solely to dust the jurisdiction of the revenue court shall not be deemed to raise a question regarding the title to the land within the meaning of this section, co-bhumidhar a plea of title to the holding raised in defence of suit for partition filed by his/her co-bhumidhars under section 55(1) of the DL Act shall not be such which is clearly untenable and that which is raised solely to oust the jurisdiction of Revenue Court. When we now consider the plea of acquisition of title by adverse possession to the holding of co-bhumidhars raised by defendant-1 (respondent-1 herein), a co-bhumidhar in a suit for partition of that holding by another co-bhumidhar, it becomes wholly and clearly untenable because of the entries in Columns 4 and 5 relating to suit for partition of co-bhumidhar in respect of his holding envisaged at S1.No. 11 to Schedule-1 fixing no period of limitation for such

suit against other co-bhumidhar/s. Thus, when no period of limitation is fixed for filing a suit for partition by co-bhumidhar against his other co-bhumidhars in respect of a joint holding, the question of the other co-bhumidhar acquiring his title to such holding by adverse possession for over 12 years can never arise. If that be so, such plea of perfection of title by adverse possession of a holding by co-bhumidhar against his other co-bhumidhar as defence in the latter's suit for partition can be of no legal consequence. In the said view of the matter, we agree with the learned single Judge of the High Court who held that the explanation to sub-section (1) of section 186 of the DL Act came in the way of defendant-1 (respondent-1 herein) in raising the issue of his title to the holding said to have been acquired by adverse possession and getting it referred by the Revenue Court to Civil Court for decision and disagree with the Division Bench of the High Court which has held that section 67(d) of the DL Act which provides for extinction of bhumidhar's interest in a holding enabled defendant-1 (respondent-1 herein) to take the plea of title by adverse possession in respect of the holding in a suit for partition of such holding filed by a co-bhumidhar.

In the result, we allow this appeal, set aside the judgment of the Division Bench of the High Court in L.P.A. No. 70 of 1979 and restore the orders of the Revenue Assistant, affirmed by the Financial Commissioner and the learned Single Judge of the High Court with costs, which we quantify as Rs.20,000/-. Such cost shall be paid by respondent (defendant-1) to the Legal Representatives of the deceased appellant (plaintiff).

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 974 OF 1980

Vidya Devi @ Vidya Vati (Dead)

Versus

Prem Prakash & Ors.

JUDGMENT

S.Saghir Ahmad, J.

I have carefully gone through the judgment proposed by esteemed brother - Venkatachala, J., but I am unable to agree with the reasons set out therein though, I agree that the appeal be allowed.

I, find it difficult to subscribe to the view taken by my brother that since under the Delhi Land Reforms Act, period of limitation for filing a suit for partition is not prescribed, a co-sharer cannot, particularly in view of Explanation to Sub-section (1) of Section 186, raise the plea of adverse possession.

The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however, does not mean that a co-sharer who is arrayed as a defendant in the suit cannot raise the plea of adverse possession against the co-sharer who has come before the Court as a plaintiff seeking partition of his share in the joint property.

Normally, where the property is joint, co-sharers are

the representatives of each another. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of others joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition.

"Adverse possession" means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. (See: / Gaya Parshad Dikshit Vs. Nirmal Chander and another (AIR 1984 SC 930). The denial of title of the true owner is a sign of adverse possession. In Ezaz Ali Vs. Special Manager, Court of Wards (AIR 1935 PC 53), it was observed:

"The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

Dr. Markby in his treatise "Elements of Law" (Second Edition) has observed that possession "to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. (See also: AIR 1947 PC 15).

It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owners. (See: Maharajadhiraj of Burdhan, Udaychand Mahatab Chand Vs. Subodh Gopal Bose and others AIR 1971 SC 376; P. Lakshmi Reddy Vs. L. Lakshmi Reddy AIR 1957 SC 314; Mohammad Baqar and others Vs. Naim-un-Nisa Bibi & Others AIR 1956 SC 548).

In Karbali Begum Vs. Mohd Sayeed (AIR 1981 SC 77), it was held that a co-sharer in possession of the property would be a constructive trustee on behalf of other co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustee co-sharer.

Certain observations of the Privy Council in Coera Vs. Appuhamy (AIR 1914 PC 243, 245-246) may be quoted below:-

"Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have ensured for the benefit of his co-proprietors. The principle recognised by Wood, V.C. in Thomas Vs. Thomas (1856) 25 LJ Ch 159 (161): 110 RR 107 holds good: 'Possession is never considered adverse if it can be referred to a lawful title'..... His possession was, in law, the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

From the underlined portion extracted above, 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's case (supra) which has since been followed in Mohd. Zain-ul-Abdin

Vs. Syed Ahmad Mohiudding (AIR 1990 SC 507).

"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.

Applying the above principles to the instant case, I must immediately observe that, though under the Delhi Land Reforms Act, a period of limitation is not prescribed for filing a suit for partition, it does not mean that joint owner or, for that matter, a joint tenure-holder cannot set up the plea of acquisition of title by adverse possession against another joint tenure-holder.

Section 186 of the Delhi Land Reforms Act is in pari materia with Section 332 of the U.P. Zamindari Abolition and Land Reforms Act which also provided that if in any suit filed before the Revenue Court, a question was raised regarding the title of any party to the land which is the subject matter of the suit or proceeding, the Court shall frame an issue on the question of title and submit the record to the competent Civil Court for the decision of that issue only. The relevant portion of Explanation appended to Sub-section (1) provides as under:-

"Explanation-(1) a plea regarding the title to the land which is clearly untenable and intended solely to oust the jurisdiction of the revenue court shall not be deemed to raise a question regarding the title to the land within the meaning of this section."

Provisions of Section 186 including the Explanation appended thereto have already been reproduced in the judgment of brother - Venkatachala, J. a perusal of which will indicate that those provisions, as pointed out earlier, are the same as are contained in Section 332 of the U.P. Act. Section 332 has since been deleted by U.P. Act No. XXXVII of 1958 but here in Delhi, the provisions continue to be retained.

Section 186 deals with the procedure when a question of title is raised in any suit or proceeding indicated in the Schedule appended to the Act. If the question is directly and substantially in issue, the Court has no option except to frame an issue on the question of title and submit the record to the competent Civil Court for the decision of that issue only. Explanation appended to Section 186 takes care of the possibility of the provision being abused by litigant who, in order to prolong the proceedings may, for the sake of ousting the jurisdiction of the Revenue Court, plead or raise the question of title. If such question is not bona fide raised and the intention is only to oust the jurisdiction of the Revenue Court, the question of title shall not be deemed to have been raised. It is by the force of legal fiction that such a plea will have to be discarded whether a plea is untenable or not or it was raised with the intention of ousting the jurisdiction of the Court would depend upon the nature of the pleading. Merely because a period of limitation has not been prescribed for a partition suit, would not mean that a plea of adverse possession though raised bona fide, would be untenable on account of

the Explanation appended to Section 186.

It will be noticed that when the Delhi Land Reforms Act, 1954 came into force, Vidya Devi, Dev Raj and Prem Prakash were declared as co-bhumidhars on 1.1.58 on the basis of their possession in 1953-54 as recorded in the revenue entries. As pointed out by this Court in Rana Sheo Ambar Singh Vs. Allahabad Bank (AIR 1961 SC 1790) which was a case under the U.P. Act, bhumidhari rights are new rights created under a statute.

Smt. Vidya Devi was declared co-bhumidhar with Dev Raj and Prem Prakash in 1958 conferring upon her new title and status. Her suit for partition is sought to be resisted by the respondents on the ground of family partition in 1937 and 1952. This plea is clearly untenable, at least for purposes of reference to Civil Court, based as it is on certain alleged pre-1958 events. The suit is also resisted on the ground that they had acquired exclusive title by adverse possession. What, however, emerges from a perusal of the pleadings contained in the written statement filed on behalf of the respondent is that the plea of adverse possession had not been specifically raised by setting out all the requisite ingredients which had necessarily to be pleaded in order to constitute the case of acquisition of title by adverse possession. Unless, the pleadings are complete and all the necessary ingredients to constitute ouster by adverse possession are set out in the written statement, the plea relating to the title of the property in question cannot be said to have been raised and, therefore, there was no occasion to frame any issue on the question of title or to refer it to the Civil Court. The judgment passed by the Delhi High Court cannot be sustained and must, as proposed by esteemed brother - Venkatachala, J. be set aside, though for different reasons, set out above.