

**(1991) 04 GAU CK 0022**  
**In the Gauhati High Court**  
**Case No : Second Appeal No. 104 of 1984**

|                                |    |            |
|--------------------------------|----|------------|
| Bapuram Dutta and Another      |    | APPELLANT  |
|                                | Vs |            |
| Smt. Himeswari Bora and Others |    | RESPONDENT |

**Date of Decision :** 04-04-1991

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100, 101  
Limitation Act, 1963 — Article 64, 65

**Citation :** AIR 1992 Guw 4

**Hon'ble Judges :** S.N. Phukan, J

**Bench :** Single Bench

**Advocate :** S.N. Mehdi and C. Choudhury, for the Appellant; P.G. Barua, D. Goswami, A.K. Phukan, A.K. Sarma and R. Baruah, for the Respondent

**Final Decision :** Allowed

## Judgement

S.N. Phukan, J.—This second appeal is by plaintiffs.

2. The following facts are not disputed. Late Api Dutta died leaving behind four sons, namely-Late Bauputi, Late Kon, Late Bhakti and Late Narayan. Late Narayan died leaving behind two sons, namely-- Bapuram and Shishuram and they are the plaintiffs in the present suit. The eldest son Late Baputi died leaving behind one son Jogai, who was the original defendant in this suit and after his death his sons and daughters have been impleaded as defendants. Kon died leaving behind his widow Bhedau and they had no children. The son Bhakti died unmarried. The land of the original owner Late Api Dutta were divided amongst his four sons. The present dispute relates to share of his second son Late Kon and the area of land was 17 Bighas 2 Katha 5 Lechas. After the death of Bhedau, the present plaintiffs claimed 9 Bigha 1 Katha 8 Lechas which is the suit land. The original defendant Late Jogai, son of late Baputi, got 8 Bigha 0 Katha 17 Lechas as his share of the land belonging to Late Kon and this land is not in present dispute and no claim has been preferred by plaintiffs in respect of this land. As stated above, the present dispute is in respect of 9 Bigha I Katha 8 Lechas. According to

plaintiffs they inherited this land as their share from Late Kon after the death of his wife Late Bhedau.

3. During the lifetime of Bhedau she got her name mutated after the death of her husband Kon in respect of share of Kon measuring 17 Bigha 2 Katha 5 Lechas. Subsequently, in the year 1941 Late Jogai and the present plaintiffs also got their names mutated for their respective shares they inherited from late Bhedau. According to the plaintiffs while mutating their names in respect of share of the land inherited from Late Kon, in the revenue record there was some mistake which came to the notice only in the year 1963. Thereafter they filed a petition for correction before the Assistant Settlement Officer which was allowed. Plaintiffs have alleged that they were in possession of the land by paying land revenue and on 18-1-1954 Late Jogai, the original defendant purchased 4 Bigha 1 Katha 2 Lechas of land out of the present suit land at Rs. 1,300/- by a registered sale deed and also obtained possession. On the same day Late Jagai executed another deed to re-transfer the above land to the plaintiffs on payment of the said sum of Rs. 1,300/- within a period of two years. In respect of the remaining area of the land which they inherited from Late Kon, the plaintiffs have alleged that Late Jogai took his land on Adhi basis from the plaintiffs and he was duly delivering Adhi share of crops to the plaintiffs. The plaintiffs offered Rs. 1,300/- to Late Jogai for the land sold but he refused to accept the amount and thereafter plaintiffs obtained a decree in Title Suit No. 56 of 1961, which was affirmed by the appellate Court. On 4-4-1964 Jogai accepted the said amount of Rs. 1,300/- through Court and resold the land measuring 4 Bigha 1 Katha 2 Lechas to the plaintiffs with delivery of possession. It has been alleged that during the last settlement operation Late Jogai in conspiracy with Mandal, i.e. Revenue Staff, got the said land (4 B. 1 K. 2L.) mutated in his name in the revenue record showing that it was acquired by purchase and in respect of remaining area of the land as Adhiar. Jogai also stopped payment of the share of crops to the plaintiffs and refused plaintiffs to take possession of the suit land. Hence, this suit for declaration of title and recovery of possession and also for cancellation of mutation in revenue record.

4. The original defendant filed a short written statement denying the title of the plaintiffs over the suit land. It was also pleaded that the suit was barred u/s 53A of the Transfer of Property Act and that the Court had no jurisdiction as the value of the land was much more. According to original defendant, plaintiffs being involved in a dacoity case were in need of money and accordingly sold the land to the original defendant. The original defendant also claimed title over the land on the basis of the gift deed executed by the Late Bhedau, wife of late Kon.

5. The original defendant pleaded that the suit was barred by limitation and that he was in possession of the suit land as legal heir of Late Bhedau.

6. The learned trial Court framed as many as six issues and decreed the suit in respect of 4 Bigha, 1 Katha, 2 Lechas of land which was re-purchased by the plaintiffs and for which a decree was obtained by the plaintiffs in Title Suit No.

56/61, but dismissed the suit in respect of remaining area of the land out of the total area of 9 Bigha 1 Katha 8 Lechas for which the suit was laid. As stated above, in respect of remaining area for which no decree was granted the case of the plaintiffs was that original defendant took the land on adhi basis. The appeal filed by the present plaintiffs was dismissed by the impugned judgment and decree.

7. The first point urged by Mr. Baruah, learned counsel for the respondents is that the findings of the learned Court below that the suit is barred by limitation and that the defendants acquired title by adverse possession are questions of fact and binding on this Court in the second appeal. In reply, Mr. Medhi, learned counsel for the appellant has urged that these are mixed questions of law and facts and accordingly this Court can enter into the matter. In this connection, learned counsel for both the parties have placed reliance on various decisions.

8. In *Jogendra v. Rajendra Nath*, AIR 1922 Cal 54 a Division Bench of that Court had occasion to consider this question and it was held that the question of adverse possession is mixed question of fact and law. According to the learned Judges, the facts found by the Judge must, of course, be accepted, but the conclusion drawn from them, namely, whether possession was adverse or not, is a question of law and can be considered by the Court. It may be stated that the above decision was rendered in a second appeal.

9. In *Smt. Prafulla Nalini Bhowmick v. Sri Dajendra Garoo* AIR 1968 Tri 5 following the above law laid down by the Calcutta High Court it was held that the question of adverse possession is a mixed question of fact and law and the facts found by the lower appellate Court may be accepted, but the conclusion drawn as to whether there was adverse possession or not being a question of law can be examined by the High Court in Second Appeal.

10. A Division Bench of this Court in *Pratap Chandra Biswas v. Union of India* AIR 1956 Asa 85 in a case relating to Arbitration Act observed that it was not possible for the Court to decide the questions without first deciding whether objections under the Arbitration Act raised regarding validity of the award were put in within time or not. The Court held that this question, viz. the question of limitation is not purely one of law, but mixed question of law and the fact.

11. The Apex Court also in *Banarsi Das Vs. Seth Kanshi Ram and Others*, at paragraph 15 held that the question of limitation was not one purely of law but was a mixed question of fact and law.

12. I am in respectful agreement with the law laid down by the Calcutta High Court and also by the learned Judicial Commissioner, Tripura. Following the decision of Apex Court in *Banarasi Das* (supra) and the above two decisions of Calcutta High Court and learned Judicial Commissioner, Tripura, I hold that the question of adverse possession is a mixed question of law and fact. I further told that the facts found by the courts below must be accepted by this Court in a second appeal, but the conclusion drawn from the accepted facts i.e. whether the

possession was adverse or not can be considered by this Court as this is a question of law. Therefore, I am unable to accept the contention of Mr. Baruah.

13. It is not disputed that the alleged gift deed executed by Late Bhedau in favour of original defendant was not a registered one and as such this gift deed cannot be used in evidence except for collateral purpose. That being the position, the plea of the original defendant that he acquired title by the above gift deed is not at all tenable in law.

14. Mr. Mehdi has urged that the present plaintiffs and the original defendant and subsequently his legal heirs being the legal representatives of Late Kon and Late Bhedau both are entitled to inherit the share as Kon and Bhedau died without leaving behind any children. This point is not at all disputed. As the basis of title of the defendant, viz. the gift deed, is not legally admissible in evidence the defendant did not acquire any title on the strength of the said gift deed. So only question remains to be considered is whether that the defendants acquired title by right of adverse possession. It may be stated that the learned Court below came to the finding of adverse possession merely on the basis of length of possession of land by the defendants.

15. Mr. Mehdi, learned counsel for the appellants has urged that as both the parties were co-heirs in respect of the suit land the question of adverse possession cannot arise as possession of one co-heir is also the possession of other co-heirs.

16. In AIR 1944 24 (Privy Council) at page 26(d) it was held that until something is done which amounts to an ouster of one of the heirs, the possession of one is considered to be the possession of all.

17. In *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, relaying on the decision of Privy Council in *Secretary of (1934) 66 MLJ 134* (Privy Council) held that the ordinary classical requirement of adverse possession is that the possession required should be *nec vi nec clam nec precario*. In other words, the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. Their Lordship further held that it is well settled in law 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 as possession of one co-heir is considered, in law, as possession of all co-heirs, and when one co-heir is found to be in possession of properties, it is presumed to be on the basis of joint title. It was also held that 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 also laid down 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.

18. In *Maharajadhiraj of Burdwan, Udaychand Mahatab Chand Vs. Subodh Gopal and Others*, at Paragraph 11, it was held that once it is held that a person is a co-owner of the land in question, his possession, however, long it might be unless it is adverse to the other co-owners cannot confer on him any right.

19. Attention was also drawn to the decision of the Apex Court in *Smt. Chandrakantaben Modi and Narendra Jayantilal Modi Vs. Vadilal Sapalal Modi and Others*, On perusal of the decision I am of the opinion that the ratio laid down is not very much relevant for present purpose except the fact that the Apex Court rejected the argument for adverse possession actual possession is necessary and mere constructive possession is not sufficient.

20. It is difficult to formulate a compact definition of adverse possession to cover all possible cases. Since in the case in hand the question of adverse possession is regarding co-heirs I shall confine myself to the law on this aspect. From the ratio laid down in the above decisions by the Privy Council and the Apex Court, the law regarding adverse possession vis-a-vis co-heirs is well settled, namely; the possession of one co-heir is considered in law as possession of all co-heirs and 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. For adverse possession 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, and it is not enough only to show by the co-heir, who claims adverse possession that he is in sole possession and enjoyment of the property.

21. Coming to the case in hand, I find the learned Court below did not at all consider this aspect of adverse possession between coheirs. The suit was dismissed merely on the ground that the original defendants and his legal representatives were in possession of the land for more than the statutory period of 12 years.

22. As this matter is pending since 1965 and in view of the admitted facts let me examine the case in hand as the question of adverse possession is a mixed question of facts and law. In the present case, the learned Court below found that the original defendant thereafter the present defendants were in possession of the land beyond the period of limitation. It is also not disputed by the parties that they were co-heirs in respect of entire suit land and that a part of the land was first purchased by the original defendant with a condition to re-transfer the land to the plaintiffs. The plaintiffs thereafter purchased the land through Court. Though on the strength of possession for long time the Court decreed part of the land and not the other part, which was re-purchased, but no reason has been given.

23. From the above facts which are binding on this Court let me examine whether the question of adverse possession, which is a question of law, was

rightly decided by the learned Court below.

24. The case of the original defendant was that he acquired title by the gift deed and as the gift deed was not registered the original defendant did not acquire any valid title. Possession of the entire land by the original defendant and subsequently his legal representative was also possession of the plaintiffs who were admittedly the co-heirs of the land, both the parties being legal heirs of Late Kon and Late Bhadue. Except possession there is absolutely no evidence and for that matter no finding that the original defendant subsequently his legal representatives openly asserted their hostile title. On the other hand, the fact that the defendant purchased a part of the land for which suit was decreed clearly shows that the original defendant admitted the title of the plaintiffs over the suit land. These facts are sufficient to come to the conclusion that rejection of the claim of the plaintiffs in respect of the remaining area of the land by both the learned courts below is erroneous in law and the said finding is liable to be set aside.

25. I may add that the learned courts below were influenced by the statement in the gift deed that the original defendant was adopted as her son by late Bhedau. But this fact was not pleaded in the written statement. As no amount of evidence cannot be looked into if the facts are not pleaded in the pleadings, taking into consideration of this fact is also erroneous in law inasmuch as in the written statement it was not pleaded that original defendant was adopted as son by Late Bhedau.

In the result I find merit in the second appeal and is allowed. Accordingly, the suit is decreed for the entire land measuring 9 Bigha 1 Katha 8 Lechas by setting aside the part of the judgments and decrees of the courts below in respect of the land for which no decree was passed. Parties to bear their own costs.