

(1991) 03 MP CK 0044
In the Madhya Pradesh High Court
Case No : S.A. No. 502 of 1977

Gayanabai and Others

APPELLANT

Vs

Mayaram

RESPONDENT

Date of Decision : 16-03-1991

Acts Referred:

Citation : (1991) JLJ 544

Hon'ble Judges : M.W. Deo, J

Bench : Single Bench

Advocate : S.D. Sanghi and N.K. Sanghi, for the Appellant; R.G. Waghmare and R.R Waghmare, for the Respondent

Final Decision : Dismissed

Judgement

M.W. Deo, J.—This is Defendants" second appeal against the judgment and decree of the appellate Court which had reversed the dismissal of the suit by the trial Court.

2. The major facts which are not in dispute may be stated thus; Nihala, Khushal and Dayaram were three brOrs. . They separated and the ancestral property was divided by metes and bounds. Nihalal died in the year 1939, his" wife having predeceased him. Nihala"s son Sikdar died three years later in 1942, issueless.

3. It is not in dispute that the property which had come to the share of Nihala and had devolved upon his son Sikdar came to the ownership of his remaining two brOrs. Khushal and Dayaram on the death of Sikdar.

4. Khushal died in 1953 and Dayaram died in 1944. Plaintiff Mayaram is the son of Khushal. Mayaram was aged about 7-8 years at the time of death of his father Khushal in 1953.

5. On the death of Nihalal and his son Sikdar, their obsequies were performed by Dayaram who incurred all the expenses. Khushal, the father of Plaintiff Mayaram, did not share the expenses of Nukta (expenses for obsequies) of Nihala and

Sikdar.

6. It is thus undisputed that Khushal and Dayaram, the two brOrs. , were entitled to half share in the property left by Nihala and Sikdar on the death of the latter. Khushal, however, it is alleged in the plaint paragraphs 7 and 8, allowed Dayaram and his widow Gayanabai to enjoy the property of Nihala towards half the expenses of Nukta which Dayaram had incurred. It would be proper to reproduce paragraphs 7 and 8 of the plaint in Hindi as the words expressed therein convey certain meaning which it would be difficult to render in English. They run thus:

7- lhxnkj ejus ds ckn mldk o mlds cki fugkyk dk uqDrk n;kjke us fd;k o lhxнку ds dCts dh tk;nkn uqDrs [kpsZ vnbkZ isVs yh o [kq?ky us Hkh mijksDr dkj.kksa ls fugkyk dh tk;nkn esa dk mldk vk/ks fgLls dk miHkksx uqDrs ds [kpsZ isVs n;kjke dks ysus fn;k o blh dkj.k ls n;kjke ds e`r gksus ds ckn izfroknh ua- 1 Inj tk;nkn dk miHkksx ys jgh gSA [kq?kyk ejk rc oknh djhc 7&8 lky dk vKku Fkk mldks laHkkyus okyk dksbZ ugha FkkA blfy, oknh ;g ?ksHkkjke firk ckyk ds ;gka ugkj[ksM+h jgus x;k o oknh dh ogh laHkky djrk jgk og djhc 3 lky gq, rc oknh fQj ls lkaxoh jgus dks vk;k gSA

8- izfroknh ua- 1 ;g lhxnkj ds tk;nkn esa vk/ks fgLls dh vf/kdkjh gSA oknh ds firk us izfroknh ua- 1 ds ifr dks o izfroknh ua- 1 o mlds firk lhxnkj ds uqDrs ds [kpsZ isVs lhxnkj ds tk;nkn eas mlds fgLls dh tk;nkn dk miHkksx ysus fn;kA izfroknh ua- 1 o oknh ;g lhxnkj ds tk;nkn esa lgHkxh gksus ls izfroknh ua- 1 ;g lgHkxh bl gd ls Hkh Inj tk;nkn dk miHkksx ysrs vk jgh gSA

7. Thus, according to Mayaram, Plaintiff, he came of age in or about 1965. He filed the suit for partition on 24.1.1964 contending inter alia that his father Khushal and uncle Dayaram owned moiety in the property left by Nihala and Sikdar and, therefore, Dayaram and after his death in 1944 his widow Gayanabai continued to possess the property towards the expenses of Nukta and also as co-owners. Gayanabai had half share in the property so has the Plaintiff Mayaram. In the meanwhile, Gayanabai sold away part of the property left by Nihala to Narayan (Defendant No. 2) by registered sale-deed dated 9.8.62. Mayaram, therefore, claims partition of his half share in the property left by Nihala and Sikdar which is in the hands of Gayanabai and Narayan. It may be stated that both Gayanabai and Narayan are dead and their LR's are on record. Mayaram also claims that Gayanabai removed 28 tin-sheets from the house of Nihala and, therefore, claims Rs. 250/- as half the share of the price thereof. Mayaram also claims mesne profits at the rate of Rs. 500/- per year.

8. It is undisputed that purchaser Narayan sails in the same boat as Gayanabai, his vendor.

9. Apart from other incidental disputes which were raised, the controversy at the stage of this second appeal is limited and may be stated thus. According to Defendants Appellants, on the death of Sikdar the property came into possession of Dayaram and after his death in the year 1945 it came into possession of

Gayanabai and both of them held the property adversely to Khushal as well as his son Mayaram the Plaintiff. According to the Appellants by 1964 the Defendants had perfected their title to the suit property by adverse possession and consequently, the title of Narayan under the sale-deed was also covered by title arising out of adverse possession in favour of Gayanabai. It was further argued that the claim of Mayaram for partition is barred by time as it is regarding the price of half the tin-sheets removed from the house of Nihala. The claim to mesne profits was also denied.

10. Learned Counsel for the Appellants first of all propounded the law relating to adverse possession and then canvassed the case of the Appellants on facts in the light thereof. The law may be stated as follows:

Normally in the case of tenants in common, one co-heir is deemed to be in possession of the undivided property on behalf of all other co-heirs *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*. However, in view of the case reported in AIR 1919 PC 44 at page 47, column (2) a clear non-participation in the rents and profits of said joint property for long time may give rise to inference of exclusion by such co-owner. Again all co-heirs are deemed to be in possession on behalf of all of them unless ouster is pleaded and proved (AIR 1957 SC at p. 318). To the same effect is the law laid down that normally possession of one co-heir shall be deemed to be on behalf of all Ors. and possession howsoever long will not ripen into adverse possession unless exclusion or ouster of one co-owner is shown and proved either by express words or by inference arising out of conduct of parties including long *Ishak Ali Vs. Mst. Unnasbi Porthahin and Others*,). In the case of 1987 J LJ 159 an unregistered surrender deed was executed and possession under such unregistered deed on account of its illegality was held to be adverse to the executant.

11. The substance of the aforesaid decisions may be formulated as follows: (i) in the case of co-heirs or tenants in common possession of one over the joint property shall be deemed to be possession on behalf of all other co-heirs; (ii) it is for the party claiming adverse possession to plead and prove the acts and omissions which should lead to an inference of exclusion or ouster of other co-heirs; (iii) exclusion or ouster may be inferred from conduct of parties including acts and acquiescences which will depend on facts and circumstances of each case; and (iv) when circumstances in which a person was put in possession are known, the question of presumption as to the nature of possession becomes least important.

12. Considering the facts in hand in the light of the law stated above, it is undisputed that Sikdar died in 1942 when succession opened to his property (which is the suit property) leaving Khushal (father of the Plaintiff) and Dayaram as the two surviving co-heirs. It was argued for the Appellants that it is in evidence that it was only Dayaram who in fact incurred the expenses of nukta of Nihala and Sikdar because Khushal, being short of means did not contribute towards it. It was further contended that the plaint para 7 itself averred that

Dayaram and after him Gayanabai came into possession of the suit property in lieu of share of expenses of Nukta due from Khushal. It was, therefore, argued that the entry over the suit property of Dayaram and continuance of possession thereof after Dayaram by Gayanabai since 1944, was an act of possession as of right in lieu of expenses of Nukta and, therefore, adverse to the other co-heirs of Khushal and after his death in 1953 adverse to his minor son Mayaram, the Plaintiff.

13. The contention has to be appreciated on the understanding of averments in paragraphs 7 and 8 of the plaint as to the condition of mind of Dayaram and Gayanabai so as to consider animus of adversity towards the other co-heirs.

14. The words " tk;nkn uqDrs ds [kpsZ isVs yh " appearing in the beginning of para 7 cannot be read in isolation and will have to be read together with the latter allegation in the paragraph to the effect tk;nkn esa dj mlds vk/ks fgLLs ij miHkksx uqDrs ds [kpsZ isVs n;kjke dks yus fn;k as also the expression in para 8 of the plaint to the effect (Emphasis supplied). The Word was argued by the learned Counsel for the Appellants to mean "in lieu of while having regard to the meaning it conveys in the local parlance it should mean "towards". Thus, the whole tenor of viewing at the act of taking possession of the nature of possession undergoes a radical change. If the possession was given "in lieu of expenses, it may indicate abandonment of right by the party which gave possession; on the other hand, if the word oknh ds fir k ?[kq?ky? us izfroknh ua- 1 ?xSukckbZ? ds ifr ?n;kjke? dks fldnkj ds uqDrs ds [kpsZ isVs fldnkj ds tk;nkn esa mlds fgLLs dh tk;nkn dk miHkksx ysus fn;k is understood to mean "towards", then the transaction does not come to an end and the sense conveyed is that the possession is given towards satisfying the liability of payment of expenses of Nukta without abandonment of title to the property of which possession is given.

15. The aforesaid meaning of the word isVs has to be so understood in view of the further allegation in the plaint that n;kjke dks miHkksx ysus fn;k . In this expression the word miHkksx cannot be equated with abandonment or surrender or giving away of the property, but is to be limited to mean to permit enjoyment of property. This interpretation becomes inescapable in view of the words ysus fn;k which follows the word miHkksx . The pleadings made in paragraphs 7 and 8 of the plaint appear to be advisedly worded to convey and mean that the Appellants were allowed to enjoy the possession of the land or in other words to enjoy the usufruct of the land so as to meet the share of expenses of Nukta which Khushal or his minor son, the Plaintiff ought to have morally paid. I am to say should have morally paid because the learned Counsel for the Respondent had sought to raise the issue that under the erstwhile Holkar Laws, there was a ban on expenses of Nukta and as such it could not create a legal liability to pay.

16. It is in the light of the aforesaid pleadings that the evidence of Gayanabai, examined on commission, as also the relevant two witnesses of the Plaintiff Gokul (PW-2) and Ratan (PW-3) has to be appreciated. Plaintiff Mayaram (PW-1) was naturally a minor and could hardly shed meaningful light on the question.

17. It is to be noted that as against the aforesaid pleadings of the Plaintiff about the nature of possession, the defence of Gayanabai was that the land was in fact surrendered or abandoned by Khushal as averred in para 6 of special pleadings.

18. It has to be born in mind that as against the case that the possession of the land was given to Dayaram in lieu of the expenses, it is in evidence and is not disputed that the land of Sikdar who died and of which the possession is in question, was already in possession of Dayaram and Gayanabai inasmuch as Sikdr was a blind person and was living under the umbrella of Dayaram and Gayanabai. It is, therefore, not a case of handing over of possession in lieu of a thing. On the other hand it is a case of continuance of possession in a different legal character namely to the exclusion of the other co-heirs or by the ouster of other co-heirs. Such was not the clear defence pleaded in the special pleadings.

19. In the statement of Gayanabai the two relevant sentences uttered by her in rural tone are rks og ?[kq?ky? cksyk fd eSa ysrk nsrk dqN ughaa A ;g ckr Hkh dgh Fkh fd tc ns?axk rc ys?axk. This statement of Khushal deposed by Gayanabai does not really convey abandonment by Khushal of his title to the right as a co-heir; but in typical rural tone conveys that Khushal did not have money to share the expenses of Nukta at that time and, therefore, he did not thought it morally fit to keep the property and hence allowed Dayaram, who had incurred all the expenses of Nukta to enjoy the property towards the expenses of Nukta which Khushal could have shared. The expression "he would take when he would give" clearly indicates that he would take the property back when he would be satisfied that he had paid all his share of expenses of Nukta.

20. It is here that the evidence of Gokul (PW-2) and Ratan (PW-3) becomes pertinent. Both these witnesses were present at the time of Nukta and deposed that Khushal said that the field should continue to be in possession of Gayanabai towards half expenses of Nukta. One sentence in the statement of Ratan (PW-3) in the colloquial language (one has to admire that the evidence has been recorded almost in the words of the witnesses) clinches the whole issue. The sentence is that Khushal said that uqDrs ds [kpZ ikus esa n;kjke [ksr [kk;s . These words reasonably convey the idea that the fields were given to Dayaram to enjoy the crops of the field in order to meet the expenses of Nukta and that negatives a ease of either surrender or abandonment by Khushal.

21. In view of the fact that Mayaram was just a minor at the time of death of Khushal and in the back-drop of the rural scenerio, discussed above, under which the happening took place, it is very difficult to accept a pleading of either exclusion or ouster by Dayaram or his widow Gayanabai of Khushal or his son Mayaram (Plaintiff) from the suit property while holding possession over it.

22. Consequently I am in agreement with the learned trial Court that ouster or exclusion has not been proved and, therefore, there was no question of adverse possession or bar of limitation to the suit including right to half of the number of tin-sheets alleged to have been removed by Gayanabai because her possession

over them would also be deemed, in the eye of law, to be on behalf of co-heir Mayaram.

23. Before parting with the appeal it is necessary to point out that Gayanabai has sold away a part of the suit property to Narayan. The learned trial Court, therefore, while partitioning the suit property will bear in mind the question of adjusting equities by allotting, if possible, the property sold to Narayan to the share of Gayanabai.

24. In the result the appeal fails and is dismissed with costs. Counsel's fee as per schedule, if certified.