

**(1982) 09 AHC CK 0045**  
**In the Allahabad High Court**  
**Case No : Writ Petition No. 5036 of 1972**

Godawari Devi

APPELLANT

Vs

Deputy Director of Consolidation and others

RESPONDENT

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**Date of Decision :** 07-09-1982

**Acts Referred:**

**Citation :** (1982) 09 AHC CK 0045

**Hon'ble Judges :** R.M.Sahai, J

**Final Decision :** Allowed

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## Judgement

R. M. Sahai, J.

Dispute in this petition directed against orders of consolidation authorities centers round correctness of view that partition amongst co sharers should be per capita and not according to shares in the holding,

Admittedly Kedar, Muneshwar and Tarkeshwar were proprietors of Khewat Khata No. 1. The first two transferred their entire share in favor of petitioner on 16.5.1938 and 24.9.1938 respectively. Tarkeshwar transferred both in favor of petitioner and opposite party on 27.3.1939. It has been found by all the consolidation authorities that as a result of these transfers petitioner became co sharer of 5/6th and opposite party of 1/6th. To this extent there is no dispute. But along with proprietary Sir and Khudkasht was also transferred. It is so mentioned in the sale deeds as well. In paragraph 4 of the petition it is stated that as a result of these transfers land in dispute became exproprietary tenancy of vendors and petitioner and opposite party, that is, vendees initiated proceedings for partition of Khata Khewat No, 1 under U. P. Land Revenue Act in consequence of which a Parti was formed for petitioner and opposite party in which lay the plots in dispute in which expropriator tenancy had accrued. Further in 1942 a suit under Section 63 of U. P. Tenancy Act was filed by petitioner and opposite party imp leading vendors for declaration that as vendors had not taken possession of exproprietary plots it became their khudkasht. The suit was decreed and the land in dispute was declared Khudkasht of petitioner and opposite party. It is not

denied in the counter affidavit filed by opposite party. But in paragraph 7 to 11 the details of accrual of expropriary tenancy, formation of separate Khewat Khata 1/1 as there were other proprietors in the Khewat, and admission by vendors in suit under Section 63 that petitioner and opposite party were in possession over land in dispute had been mentioned.

As a result of decree in suit under Section 63 petitioner and opposite party were recorded as coKhudkasht holder since 1942 till notification under Section 4 of U.P, Consolidation of Holdings Act was issued. When basic yearrecords were prepared petitioner and opposite party were shown as cobhumidhar. Opposite party filed an objection under Section 9A (2) of the Act claiming that he was bhuaaidhar of one half. The objection was allowed by Consolidation Officer. He held partition could not be effected in proportion to share in Khewat as claimed by petitioner, as then even those proprietors who had nothing to do with land in dispute shall be entitled to share in proportion to their share in Khewat. It was also held that share in Khudkasht land amongst cosharer shall depend on cultivator possession and only those cosharers could be held entitled to it who were in possession. In furtherance of this principle the Consolidation Officer held that share in Khudkasht should be worked out on basis of per capita. Reliance was placed by him on Rama Kant Singh v. Deputy Director of Consolidation (1965 R.D. 120.), and Dharam Prakash and others v. Deputy Director of Consolidation (1961 R. D. 262.). In appeal and revision the order was maintained, and the findings of consolidation officer were affirmed.

Although Consolidation Officer was justified in observing that amongst proprietors, right to Khudkasht land depends on cultivator possession but he committed manifest error of law in inferring further from it that amongst coKhudkasht holders the share should be determined per capita. The principle is available only in those cases where a proprietor or some of the proprietors bring some land under their cultivation. In such land other proprietors do not get any right merely by virtue of being coproprietors, But it is not of any avail amongst cokhudkasht holder. Not only this even in ancestral Khudkasht the view taken by this Court in Rama Kant's case has not been approved by Supreme Court in Kailash Rai v. Jai Jai Ram(1973 R.D. 183 (S. C)). By the principle that basis of Khudkasht right is cultivation the other proprietors in the Khewat could not get any right. But it could not be stretched further to determine share amongst cosharers on basis of per capita. Moreover the Consolidation Officer did not record any finding nor did he advert to any oral or documentary evidence in order to find out the actual area which was cultivated by petitioner and opposite party. The principle of per capita based on cultivator possession remained unsubstantiated by any material on record.

It may now be considered if the principle of per capita as a matter of law can be sustained. If two co sharers are in possession then their share can be determined either on basis of inheritance or devolution and if it is a case of lease or sale in proportion to the share let out or purchased In absence of any specification of

share partition may be effected on per capita. But where shares are specified or two persons become cosharers in unequal proportion then the other possible way of determining share in excess can be by adverse possession. But the principle of per capita amongst cosharers irrespective of this consideration cannot be accepted.

It is not necessary to decide in this case whether partition amongst co sharers should invariably be determined on Khewat as it has been found that as a result of sale of proprietary interest Sir and Khudkasht also came into possession of petitioner and opposite party and not only a separate Khewat was formed but separate exproprietary holdings was also carved out. In suit filed under Section 63 it was claimed that petitioner and opposite party were joint owners as is clear by averments in the plaint copy of which has been filed as annexure to the counter affidavit. Even in the admission filed in suit of vendors, filed along with counter affidavit, only this much was stated that vendees were in possession over land in dispute since three years. In the revenue records both parties were recorded as co sharers before the date of vesting and cobhumidhar after the date of vesting. In absence of any material it is difficult to agree that they were cosharers of half and half. Normal presumption would be that they held the land in proportion to their respective shares. In other words land in respect of which exproprietary tenancy accrued must have passed in proportion to the share purchased by them, particularly when in the sale deeds it was mentioned that Sir and Khudkasht was also being transferred.

In paragraph 24 of the counter affidavit it is stated that plot Nos. 30/2, 116/1 and 104/5 were not subject matter of suit under Section 63. Learned counsel for opposite party argued that share at least in these plots held to be half and half does not suffer from any error of law. It is difficult to appreciate the argument. The difficulty is the same as in respect of other plots. These plots were also subject matter of sale deeds. Suit under Section 63 was for declaration against vendors. It was not for partition. By declaration ownership was determined. Even if no suit would have been filed position would have remained the same. Therefore share had to be determined on the right or interest held in Khudkasht land on date of vesting. It is not a case where Khudkasht was acquired by bringing some land under cultivation but parties became owners by sale deed.

Even if it is assumed as argued that these plots might have been in possession of tenants who might have surrendered then surrender being in favor of both petitioner and opposite party the share shall relate back to the interest held by parties. Possession of one cosharer is possession of all. Therefore even exclusive possession of one would not have made any difference and the share of parties would depend on proportion to interest in holding unless ouster etc, was established.

In the result this petition succeeds and is allowed. The order passed by Deputy Director of Consolidation is quashed. He shall decide the revision afresh in accordance with law. Parties shall bear their own costs.