

(1953) 09 P&H CK 0007
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 616 of 1952

Mst. Charan Kaur

APPELLANT

Vs

Hari Singh and Another

RESPONDENT

Date of Decision : 10-09-1953

Acts Referred:

Limitation Act, 1908 — Article 142 , 144

Citation : AIR 1954 P&H 124

Hon'ble Judges : Kapur, J

Bench : Single Bench

Advocate : A.C. Hoshiarpuri, for the Appellant; P.C. Pandit, for the Respondent

Final Decision : Dismissed

Judgement

Kapur, J.—This is a defendant's appeal against an appellate decree of the Senior Subordinate Judge of Hoshiarpur dated 27-6-1952 confirming the decree of the trial Court decreeing the plaintiff's suit.

2. This case is a painful demonstration of pettifogging on the part of lawyers and utter incapacity on the part of Judges who have handled this case at various stages. Matters which were absolutely simple were made complicated and delays which were caused have brought the whole system into contempt.

3. Sunder Singh and Jowala Singh are two brothers. Mst. Charan Kaur the defendant in the present case is the wife of Jowala Singh who made a gift in favour of his wife of his half share of 64 "Kanals", 6 "marlas" of land which was owned by him and Sunder Singh jointly. Sometime earlier in 1929 Sunder Singh made a simple mortgage of his share of the property to Hari Singh the plaintiff. In 1934 Jowala, Singh successfully applied for insolvency and the land which he had gifted to his wife Mst. Charan Kaur was sold by the Official Receiver to Pir Bakhsh. According to Mr. Hoshiarpuri an application was made on 23-10-1935 by Mst. Charan Kaur objecting to the sale but these objections were dismissed on 4-11-1935. Neither the application nor the order are on the file.

The Official Receiver has made a statement to this effect on what basis I do not know. By another document dated 24-6-1937 a compromise was arrived at between Mst. Charan Kaur and the Official Receiver whereby Mst. Charan Kaur agreed to pay Rs. 2,500/- and if she did not pay her objections would stand dismissed. As was to be expected she did not make this payment and on 24-8-1937 she applied for permission to sell the land but this application was dismissed and the appeal against this order was dismissed on 4-2-1938. A document Ex. p. 5 dated 20-5-1938 shows that possession had been taken by Pir Bakhsh. This is denied by Mr. Hoshiarpuri and perhaps he is right.

4. On 27-3-1940 Hart Singh obtained a decree for possession on the basis of the contract in his mortgage deed. This decree was "ex parte" and was against Sunder Singh and Mst. Charan Kaur. On 13-12-1940 symbolical possession was delivered in execution of the decree which is evidenced by Ex. P. 15 but in this application Mst. Charan Kaur does not seem to have been a party.

5. The Senior Subordinate Judge has found that no adverse possession has been made out because such possession if any could not have started before August 1937 and the possession of a co-sharer is not adverse to that of the other co-sharer and a definite ouster if any could not have started before 1942-43 when Mst. Charan Kaur refused to give possession of the land and the entry in the "Jsmabandi" which followed this was "billa leggan bavaja nah chhorne cahza" (without payment of rent on account of refusal to give possession).

6. The adverse possession of the defendant is negatived by many factors in this case. In the first place the compromise of 24-6-1937 by which she agreed to pay Rs. 2,500/- was an admission of title of the Official Receiver and that would put an end to the adverse possession if any existed before. Then there is the decree for possession followed by symbolical possession. Such symbolical possession has been held to be sufficient to interrupt adverse possession. In a long line of decisions it has been held that taking symbolical possession in pursuance of a decree for possession amounts to actual possession and interrupts the running of time in favour of the asserter of adverse possession. There are a large number of cases quoted in paragraph 65 of Chitale's Limitation Act, Vol. III, under Arts. 142 and 144. No case has been cited before me and I do not know of any, where merely because the execution has been against one of the two Judgment-debtors taking of symbolical possession has not interrupted adverse possession.

7. And finally there is the question of co-sharership. No doubt Jowala Singh had made a gift in favour of his wife and the gift was of specific properties which were in his possession, but that would make the donee as much a co-sharer as the original donor was. This is supported by a rule laid down by Sir Shadl Lal C. J. and Abdul Qadir J. in -- "Mam Raj v. Chhotu" AIR 1933 Lah 763 (1) (A), where the rule stated was:

"There can be no adverse possession by one co-owner against another co-owner, and that the same principle applies to the case of a transferee from a co-owner:

vide "inter alia." -- Subah Lal Vs. Fateh Mohamad

I am in respectful agreement with this dictum of Sir Shadi Lal which in my opinion would apply to the facts of this case but as against this Mr. Hoshiarpuri has relied on three cases.

(8) Firstly, there as the Lahore case decided by Jai Lal J., -- "Ibrahim v. Ali Muhammad" AIR 1930 Lah 214 (C). That was a case where the sale was not of his own share by the co-sharer but of the whole property and possession had been taken of the whole property by the transferee. It is not necessary for me to say whether the rule laid down in that case is a correct one but it is distinguishable on the facts and is not applicable to this case. The next cases relied on by Mr. Hoshiarpuri is the Bombay judgment of Tyabji J. in -- Fakirappa Babappa Yaligar Vs. Rudrappa Rachappa Deshnur, That was a case where a member of a joint Hindu family had sold his share to an outsider and adverse possession was held to have been made out against the other co-parceners. Whatever else they may be a stranger can never become a co-parcener because co-parcenary can only subsist between members of a joint Hindu family & therefore the proposition that possession of one co-parcener is the possession of all for purposes of limitation, is inapplicable as between a purchaser and the other co- parcener, see -- "Ram Lakhi v. Durga Charan Sen" 11 Cal 680 (E) and -- Murajalli Munia Goundan Vs. Ramasami Chetti and Others, But a case decided by Almond A. J. C, in -- "Sher Mohd. Nawab Khan v. Mst. Aimna Bibi" AIR 1937 Pesh 69 (G), supports the contention of Mr. Hoshiarpuri. With very great respect I would say that this judgment does not lay down correct law. For reasons that I have given I would hold that the judgment and decree of the Court below are correct and this appeal would therefore be dismissed with costs.