
(2019) 08 UK CK 0068

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 520, 521 Of 2015

Parmeshari Bai & Others

APPELLANT

Vs

State Of Uttarakhand & Others

RESPONDENT

Date of Decision : 07-08-2019

Acts Referred:

Uttar Pradesh Zamindari Abolition And Land Reforms Act, 1950 — Section 129, 156, 156(2), 157, 165, 171, 209, 210, 229B
Government Grants Act, 1895 — Section 2, 3
Transfer Of Property Act, 1882 — Section 105
Limitation Act, 1963 — Section 65

Citation : (2019) 08 UK CK 0068

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : M.S. Bhandari, Narain Dutt, Sudhir Kumar

Final Decision : Allowed

Judgement

Sharad Kumar Sharma, J

1. Before venturing into the vitalities of the arguments extended by the learned counsel for the parties to the writ petition, it becomes essential for this Court to precisely deal with the factual backdrop under which the present writ petition has arisen. The facts of the case are that the property, which is a subject matter of consideration in the proceedings under Section 229B, i.e. in a Suit for declaration of title under the Zamindari Abolition Act of 1950, constituted of Khasra No. 118B having an area of 1.455 hectares, Khasra No. 113 having an area of 1.657 hectares and Khasra No. 118A having an area of 0.051 hectares, that means total area in dispute would be 3.163 hectares, which was lying in village Jogipura, Tehsil Bajpur, District Udham Singh Nagar. Hereinafter the property described aforesaid would be called as the property in dispute.

2. Admittedly, the parties to the writ petition or in the proceedings of the Suit for declaration of right have a following common family tree, i.e. one Mr. Mohrari

Ram was succeeded by his three sons Dharam Chandra, Darshan Ram and Hakam Chandra. The eldest son Dharam Chand was succeeded by three sons Hukum Chand, Milkha Ram and Kashmir Chand (the plaintiff to the Suit under Section 229 B). Since the successors of Darshan Ram are not the parties to the proceedings, hence, the details are not being discussed hereunder. The third son Hakam Chand, who was defendant no. 3 to the Suit, is said to have met with the sad demise on 4.01.2012 and he was succeeded by Parmeshwari Bai and Sandeep Kumar, who are the defendants/petitioners to the present writ petition.

3. Although in the connected writ petition the factual controversy in Writ Petition No. 521 of 2015 'Darshan Ram vs. State of Uttarakhand and Others' involves identical facts and consideration of the same preposition of law. Hence, they are being decided together. Here in this writ petition only distinction is the claim of right by the petitioner, who too belongs to the same family clan.

4. These are two writ petitions involving a common question of law and with a slight deviation in facts, though the claim of declaration of rights in relation to the property (which is different) in both the writ petitions flows from the same family clan and blood relations as detailed in the judgment. The only distinction in Writ Petition No. 521 of 2015 'Darshan Ram vs. State of U.P.' is that he too happens to be the second son of Mohrari Ram, who too claims protection of his right of declaration of ownership and title in relation to a different set of property, over which the title was claimed by another son of Mr. Dharam Chandra namely Milakhraj in relation to the property described in the plaint as Khasra No. 75A/0-519 hectares, 75B/1-D12 hectare Khasra No. 77/2/0 area 0.063 hectares, i.e. having a total area of 2.787 hectares over which the plaintiff claim of declaration of title as Shreni 1ka Kashtkar was based on adverse possession claiming to be yet again based on creation of lease hold rights for cultivation created for a period of one year. Rest of the principle of law and facts are common in both the cases. Hence, they are being dealt together.

5. As per the plaint allegations, it was contended by the plaintiff/respondent no. 3 of Writ Petition No. 520 of 2015, who belonged to the same family clan being son of Dharam Chandra and who are the heirs having their source of descendants from common ancestor Mohrari Ram being son of Dharam Chandra contended that the property in question was handed over to him for agricultural activities by his predecessors and since he has continued to utilize the same for cultivation purposes for a period of over more than 20 years, he would be acquiring his right to be declared as a Bhumidhar, i.e. of Class Shreni 1ka as defined under Section 129 of the Zamindari Abolition Act on the basis of adverse possession. Meaning thereby, the facts which stands admitted by the plaintiffs are:

(i) He belongs to same family clan with common ancestor.

(ii) He was given possession over disputed land to cultivate.

6. The issue though stands settled by various authorities, which are relied with

by the counsels and in each case as it involves an adjudication, in the present writ petition, is to the effect as to whether a member of a family belonging to the same family clan can claim a declaration of his rights and title over a piece of land or any immovable property occupied by him or them by way of an adverse possession, which had been momentarily given for agriculture purpose.

7. According to the plaint allegations, it was the case of the plaintiff Khasmir Chand that he had been placed in possession of the properties in dispute as described in the plaint, by virtue of a lease, which was executed by its recorded owner, who was his predecessor owner on the ground that the lease was granted to him initially by recorded owner late Mr. Mohrari Ram for a period of one year only for undertaking agricultural activity over the disputed land in question. It was the case of the plaintiff that even after the expiry of the said term, executed in his behalf on the basis of the lease, the plaintiff continued to occupy the aforesaid property for a period over more than 20 years and, as a consequence thereto, he had claimed his right by virtue of an adverse possession over the disputed land and sought a decree of declaration of their right by invoking Section 229B, on the ground of adverse possession.

8. It is an admitted case of the plaintiff (respondent herein) that the lease, which was executed in his favour in 1984, for carrying on the agricultural activities as a consequence of which the possession was handed over to him and since it was exclusively only for one year and because of the fact that the defendants/petitioners have not made any effort to take back the possession from the respondent/plaintiff, they since being in a continuous and hostile possession of the property in question for a period over 20 years he contended that his claim for declaration of his title and right by invoking Section 229B on the basis of adverse possession has matured and consequently, he deserved to be declared as an owner of the property in question.

9. At this stage it would be pertinent to mention that as far as the claim for declaration is concerned, which was sought for in the Suit filed before the Assistant Collector, being Suit No. 22/03 of 2003-04 'Kashmir Chand vs. State of Uttaranchal and Others', Khasra No. 113 and Khasra No. 118A were the land, which were claimed by the plaintiff to be the land which was leased out to the petitioners, out of which the property lying in Khasra No. 113 was the land, which was leased under the provisions of the Government Grant Act, but so far as the land lying in Khasra No. 118B is concerned, that was a land which was a self acquired property of the family of the petitioners and thus if at all if the provisions under Section 229B for claiming a right by virtue of an adverse possession could be sustainable under law, it would only relate back to the property, which actually belonged to the defendants, i.e. Khasra No. 118 A and not the properties which was found to be part and parcel of the lease executed under the Government Grants Act, i.e. Khasra No. 113, and for the reason that the property, which was covered under the provisions of the Government Grant Act it has to be governed by the tenor of its lease as per the provisions contained

under Section 2 and 3 of the Government Grants Act, and since the land being a State land, no individual would be having a right over it, hence, there cannot be any claim with regards to adverse possession in relation to the land vested with the State Government in view of the judgments reported in 2013(2)UD 381 'Gurudwara Sahib vs. Gram Panchayat Village Sirthala & Another'. Paragraph 3, 5 & 7 of the judgment are quoted hereinbelow:

"3. The appellant claims ownership by adverse possession on the ground that it is in possession of the land in dispute for sufficiently long period which fact has been established and, therefore, his suit could not be dismissed. We, however, find that this relief of declaration has been denied on the ground that suit for such a prayer was not maintainable inasmuch as declaration to this effect on the basis of adverse possession cannot be sought and the plea of adverse possession is available only as a defence to the defendant.

5. In so far as first issue is concerned, it was decided in favour of the plaintiff returning the findings that the appellant was in adverse possession of the suit property since 13.4.1952 as this fact had been proved by plethora of documentary evidence produced by the appellant. However, while deciding the second issue, the court opined that no declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword. The learned Civil Judge relied upon the judgment of the Punjab and Haryana High Court in Gurudwara Sahib Sannuali vs. State of Punjab PLR page 756 and thus, decided the issue against the plaintiff. Issue No.3 was also, in the same vein, decided against the appellant. In so far as issue no.4 pertaining to relief of injunction is concerned, the learned Civil Judge held that as long uninterrupted possession of the appellant was established, the appellant was entitled to the decree of injunction and the respondents were restraining from dispossessing the appellant forcibly and illegally from the suit land and also restrained from damaging the building of Gurudwara Sahib. Issue No.5 was decided against the respondent on the ground that no evidence was led to show how the suit was not maintainable in the present form. While granting relief, the learned Civil Judge partly decreed the suit holding as under:

"It is held that plaintiff is in adverse possession over the suit property since 13.4.1952 and defendants are restrained from dispossessing the plaintiff forcibly and illegally from the suit property and further restrained from damaging the building of Gurudwara Sahib except according to due process of law. As discussed above, the remaining relief as sought by the plaintiff is dismissed.

Decree sheet be prepared. File be consigned to the record room."

7. In the Second Appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into

ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

Further paragraph 45,46 & 49 of the judgment reported in 2012(115) 349 'State of Haryana vs. Mukesh Kumar' is quoted hereunder:

"45. It is our bounden duty and obligation to ascertain the intention of the Parliament while interpreting the law. Law and Justice, more often than not, happily coincide only rarely we find serious conflict. The archaic law of adverse possession is one such. A serious re-look is absolutely imperative in the larger interest of the people.

46. Adverse possession allows a trespasser - a person guilty of a tort, or even a crime, in the eyes of law - to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible.

49. It is indeed a very disturbing and dangerous trend. In our considered view, it must be arrested without further loss of time in the larger public interest. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case."

10. The plaintiff/respondent submitted that owing to the fact that even after the expiry of the period of one year, he still continued to occupy the property, hence his right over the property in dispute stands matured by adverse possession and thus, he deserved to be declared as owner of the property in question. The said claim of the plaintiff/respondent was objected by the defendant (petitioner herein) from the view point that as far as the relationship between the petitioner and the respondents are concerned, in accordance with their family hierarchy of succession provided under Section 171 of U.P.Z.A. & L.R. Act is not disputed. It is not disputed that they belonged to the same family clan. The only question, which now comes for consideration for this Court is that what would be the effect, when a property is leased out to a member of a family and as to whether after the lapse of the statutory period provided under the Limitation Act. The occupant, who admittedly happens to be relative or close family member would acquire the ownership or title making him entitled for a decree of declaration of his ownership over the property in question on basis of adverse possession, which is otherwise governed by the personal law of succession.

11. In the Suit in question, the notices were issued to the defendants and the defendant, who had put in appearance, had in the written statement as filed by them their case of the defendant/petitioner was that the disputed property, i.e. Khasra 118B, 113 and 118A, since out of the said land it is admitted by the defendant in the written statement that the two plots, which have been referred

therein, has been leased to them under the Government Grant Act, the defendants/petitioners contended that no right would accrue to the plaintiffs/respondents over the said property in question by adverse possession because since he came in possession was the property by virtue of the lease executed under the Government Grants Act in favour of their predecessor containing its own stipulations, and the remaining land was on lease only for the period of one year only and even if he continued to occupy the property after the expiry of the aforesaid period and has remained in occupation of the property, it would not confer upon him any title because his occupation over the property for a sufficient long time even after the expiry of the period of lease could only be treated as to be an encroachment on the ancestral land, which was made under the lease for agricultural purposes by the petitioners' predecessor and was continued for a sufficient long period thereafter, but it will not create a title by adverse possession as claimed by the plaintiff/respondent.

12. In such an eventuality, in the cases where the relationship inter se between the plaintiffs and defendants is not denied and further when it has not been denied that as far as the Khasra No. 118 B is concerned, i.e. a property belonging to the defendants/petitioners is recorded in revenue records with him, hence, no right would accrue of any nature, whatsoever, in favour of the plaintiff/respondent, who was claiming declaration of title over the property. The Court of Assistant Collector, 1st Class, by virtue of the judgment dated 14.06.2007 rightly dismissed the plaint of the plaintiffs/respondents holding thereof that he cannot claim his right over the property in question by way of a declaration under Section 229B, when it is foundationed upon his theory of adverse possession over the property belonging to the defendants/petitioners. This dismissal of Suit on 14.06.2007, was put to challenge by the plaintiff in a Z.A. Appeal being Z.A. Appeal No. 178 of 2006-07 New No. 8/2010-11 'Kashmir Chand vs. State of Uttarakhand & Others'.

13. The said Appeal as preferred by the present respondent as against the dismissal of the Suit came up for consideration before the Court of Additional Commissioner, Kumaon Division, in Z.A. Appeal No. 178 of 2006-07/08-2010-11 and the Appeal thus preferred has been allowed by the First Appellate Court by the judgment dated 28.02.2013 and consequently, the judgment of the Trial court dated 15.06.2007 passed by the Assistant Collector, I Class, in the Suit in question was set aside, resulting into the declaration of title of the plaintiff on the basis of claim of adverse possession.

14. The said appellate court's judgment dated 28.02.2013 was challenged by the plaintiffs/respondents by preferring a Second Appeal before the Board of Revenue being Second Appeal No. 14 of 2013-14. The Second Appeal in question has been dismissed by the impugned order passed by the member Board of Revenue vide its impugned judgment dated 01.11.2014. It is this order of dismissal of Second Appeal of the defendants/petitioners, which has been put to challenge before this Court.

15. Reverting back to the finding, which has been recorded by the Appellate Court while allowing the Appeal, it is the finding which has been recorded therein that the right of declaration of the petitioners would be confined to Khasra No. 118B only since having an area of 1.455 hectares. As far as the remaining land is concerned, since the same being not vested under the ownership of the predecessor of the present respondent, no right would accrue to them. Even otherwise also and logically if the claim of adverse possession is sought for by the respondent by filing a Suit under Section 229B in relation to the property, which admittedly belongs to the relatives, who are falling from the same family clan, it is settled law that no declaration of title could be sought for in relation to the holding which has been permitted to be occupied by the plaintiffs, who admittedly happens to be one of the relatives by way of an adverse possession.

16. In support thereof, the learned counsel for the petitioners has placed reliance on a judgment rendered by learned Single Judge of Allahabad High court 'Chandrapati & Others vs. Gunnu & Others' reported in AWC 1986 709 and particularly, a reference is made to paragraph 8 of the said judgment, which provides that no right in relation to the property could be claimed by a party in relation to the property which belongs to the co-tenure holder, who is belonging to the same family clan, irrespective of the length of possession of the property in question. Paragraph 8 of the said judgment is quoted hereunder:

"8. Third contention raised on behalf of the applicants is that due to their possession over the disputed land as co-tenure holder, their claim should be accepted as co-tenure holder on the basis of adverse possession because co tenancy could be acquired by adverse possession also In my opinion, the applicants' father was a relation of the contesting opposite parties and he was looking after the interest of the contesting opposite parties whose father was away from the village. Therefore, even if the applicants' father continued in possession over the disputed land for more than statutory period, he could not be permitted to acquire any right on the basis of adverse and continuous possession. It will be a sad day when a relation and caretaker would be permitted to acquire right in the property of the persons who were under his care on the basis of adverse possession. In my opinion, all the contentions raised on behalf of the applicants fail and the judgment sought to be reviewed does not suffer from any patent error of law, therefore, the review application deserves dismissal."

17. Even otherwise, this Court is of the view it will be giving a very unethical message to the society, where nobody would trust his relatives even in crises, where a fear germinates of rival claim over property by adverse possession, and too when it belongs to the relative, the trust in the society with relatives will gradually vanish.

18. The basic ratio of the Allahabad High Court's judgment was to the effect that even if the possession has continued beyond the statutory period as provided under the law of Limitation Act, for claiming a right by adverse possession, it

could only exceed or could be claimed by a person, who is in a hostile possession and not in possession as a relative belonging to the same family clan or a blood relation.

19. In a judgment of Vasantiben Prahladji Nayak and Others vs. Somnath Muljibhai Nayak and Others' reported in (2004) 3 SCC 376 in its paragraph 5, 6 & 7 it has held as under:

"5. We do not find merit in the above argument advanced on behalf of the appellants. In the case of Ram Kisto Mandal and Anr. v. Dhankisto Mandal (supra), it has been held by this Court that the right of the reversioner to recover possession of the property within twelve years from the death of the widow is not only based on provisions of the limitation act but on the principles of Hindu Law and the general principles that the right of a reversioner is in the nature of spes successions (estate in expectancy) and such reversioner does not trace his title through the widow. Under the common law, there are two types of estates namely, estates in possession and estates in expectancy. Estates in remainder/reversion are estates in expectancy as opposed to estates in possession. Consequently, adverse possession against a life-tenant will not bar the reversionary/remainder from succeeding to the estate on the demise of the life-tenant. This is the reason for enacting explanation (a) to Article 65 of the said Act, which has no application to the facts of this case.

6. At this stage, it is important to bear in mind that partition is really a process by which a joint enjoyment of the property is transformed into an enjoyment severally. In the case of partition, each co-sharer has an antecedent title and, therefore, there is no conferment of a new title. (See Transfer of Property Act by Mulla 9th Edition Page 77). In the circumstances, the appellants cannot be heard to say that they became the owners of the property only when the partition deed was executed on 29th November, 1965. Lastly, the facts above-mentioned show that the appellants had asserted not only their own possession, they had also asserted the possession of Prahladji (husband of appellant No. 1 and father of remaining appellants) prior to his death. In the case of Hanamgowda v. Irgowda reported in [AIR 1925 Bom. 9], it has been held that in cases of adverse possession, the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but it commences from the date when the defendants' possession became adverse. Therefore, in the present case, the starting point of limitation for adverse possession cannot be taken as 29th November, 1965 and one has to take the date when the respondents' possession became adverse. For all the above reasons, there is no merit in the above arguments advanced on behalf of the appellants.

7. Shri Ramesh Singh, learned counsel appearing on behalf of the appellants next contended that in the present case the respondents have failed to prove the ouster along with other three circumstances, namely, hostile intention; long and uninterrupted possession; and exercise of the right of exclusive ownership openly and to the knowledge of the owner. We do not find any merit in this argument. It

is correct to say that the defendants have to prove three elements mentioned above to establish ouster in cases involving claim of adverse possession. However, in the present case, there is a concurrent finding of fact recorded by the courts below to the effect that the respondents are in possession of the suit land from 1935 or in any event from 1941; that they have paid revenue cess from 1940; that they have paid property taxes; that their names were recorded in the revenue records and they were granted permission by the panchayat to construct compound wall. Moreover, in her deposition before the trial Court, appellant No. 1 had deposed that her husband had died six years prior to the institution of suit; that the suit land was in possession of her father-in-law and after his death it came in possession of Prahlad (husband); that during the life time of Prahlad, the defendants had told Prahlad to allow them to construct a building on the land which he refused and that the respondents constructed the compound wall without their permission. In view of the above concurrent findings of fact recorded by the courts below on the issue of adverse possession, we do not see any reason to interfere in the matter."

20. The Appellate Court while reversing the judgment of the Court of Assistant Collector, I Class, while dismissing the Suit by the judgment dated 14.06.2007 had interpreted the effect of the implications as if it was being interpreted under the light of the provisions contained under Section 165 of the Zamindari Abolition Act, which provides that any lease, which is made in relation to a holding or a part thereof in contravention to the provisions contained under Sections 156 and 157 shall be treated as to be void and thus the Appellate Court has held that the lease of one year, which was granted to the plaintiff/respondent by his predecessor to cultivate the land by its owner, would be barred by the provisions contained under Section 165 to be read in with Section 157 of the Zamindari Abolition Act because letting out of an agricultural land as contemplated under Section 156, which bars letting out of a land except to the exemptions, which has been provided under Section 156. The inter se play of Section 156 and 157 to be read with Section 165 in the case at hand this Court is of the view that the aforesaid provisions will not come into play for the purposes of reversing the judgment dated 14.06.2007, as rendered by the Assistant Collector, because the aforesaid provisions, which creates a restriction in letting out of a land would be attracted only in those cases where it is a lease, which is covered in accordance with the provisions contained under Transfer of Property Act and that is why under Section 156 sub-section (2) has specifically remarked that the term lease as contained under the U.P.Z.A.&L.R. Act would have its expression and the meaning as it has been assigned under Section 105 of the Transfer of Property Act. The leases under Section 105 of the Transfer of Property Act would mean the leases, which are executed by the Bhumidhar or the tenure holder of the land in the interest of a person, who is not falling from the same family clan and who does not derive or could have sought his right by virtue of the succession as contemplated under Section 171 of the Zamindari Abolition Act. Section 105 of the Transfer of Property Act is quoted hereunder:

"105. Lease defined.-A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lessor, lessee, premium and rent defined.-The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

21. Sections 156, 157 and 165 of U.P.Z.A. & L.R. Act are also quoted hereinbelow:

"156. Letting of land. - [(1) No bhumidhar [* * *] or asami shall let for any period whatsoever any land comprised in his holding except-

(a) in the cases provided for in Section 157; or

(b) to a recognized educational institution for a purpose connected with instruction in agriculture, horticulture or animal husbandry.]

(2) In this Chapter the word "Lease" and its cognate expression have the meaning assigned to them in the Transfer of Property Act, 1882 (IV of 1882).

157. Leased by a disabled person. - (1) A bhumidhar or an asami holding the land in lieu of maintenance under [Section 11] who is-

[(a) an unmarried woman or if married, divorced or separated from her husband or whose husband suffers from any of the disqualifications mentioned in Clause (c) or (d) or a widow;

(b) a minor whose father suffers from any of the disqualifications mentioned in Clause (c) or (d) or has died; and]

(c) a lunatic or an idiot;

(d) a person incapable of cultivating by reason of blindness or other physical infirmity;

[(e) prosecuting studies in a [recognised educational institution] and does not exceed 25 years in age and whose father suffers from any of the disqualifications mentioned in Clause (c) or (d) or has died];

(f) in the Military, Naval or Air Service of the Indian Dominion; or

(g) under detention or imprisonment; may let the whole or any part of his holding :

Provided that in the case of a holding held jointly by more persons than one, but one or more of them but not all are subject to the disabilities mentioned in Clauses (a) to (g), the person or persons may let out his or their share in the holding.

165. Effects of lease in contravention of Section 157. - [Where a bhumidhar has let out his holding or any part thereof in contravention of the provisions of Section 156 or Section 157] the lessee will, notwithstanding anything contained in any law or contract or document of lease, become and be deemed to be-

(a) [where the total area of the land held by him together with the land held by his family including the land, if any, let out to him or any member of his family, does not exceed twelve and a half acres, [bhumidhar with non-transferable rights] thereof; and]

(b) where the total area as aforesaid exceeds [twelve and a half acres], a purchaser thereof and the provisions of Sections 154 and 163 shall *mutatis mutandis* apply."

22. Hence, in the given set of circumstances of the present case the expression of lease utilized by the plaintiff/respondent to have been executed in his favour by the tenure holder for a period of one year and his continuance in possession for a period beyond that prescribed under the lease for a period of over 20 years, is not to be read as to be a normal leases, which are executed in terms of Section 156 of Zamindari Abolition Act to be read with Section 105 of the Transfer of Property Act.

23. In order to widely appreciate controversy pertaining to the creation of a right by virtue of an adverse possession in relation to the property, which has been leased to a family member, the right from an adverse possession will not be created in favour of the lessee, who admittedly belongs to the same family clan.

24. The aforesaid ratio as settled by the Hon'ble Apex court it exclusively denounces a creation of a right of title in relation to a land, which has been in possession of a family member beyond the limited period, who has got a blood relationship, if the claim is raised by virtue of an adverse possession, the same would not be sustainable.

25. An identical expression on the preposition of law has been made recently by the Hon'ble Apex Court in a judgment reported in 2018(1) SCC 574 'Nanjegowda alias Gowda (Dead) by legal representatives & Another vs. Ramegowda'. Paragraph 19 of the said judgment is quoted hereunder:

"19. In our opinion, the stand taken by the defendants was wholly inconsistent. They first set up a plea of adverse possession but it was rightly held not proved. The defendants, however, did not challenge this finding in the second appeal, which became final. Even otherwise, the plea of adverse possession was wholly misconceived and untenable. It is a settled law that there can be no adverse possession among the members of one family for want of any animus among them over the land belonging to their family."

26. It yet again it has been held that a right over a property belonging to the same family clan, if it's possession is handed over by virtue of any mode recognized under law not being a transfer on payment of consideration that

means that it is not a conveyance of the property, it will not grant any right or title to the person in possession in relation to the property on the basis of a claim for adverse possession. The said ratio is propounded on the backdrop that in a harmonious human society and practically the conditions, which are prevailing amongst Indian community, normally the property belonging to one of the family members, if it is handed over to another family member by virtue of as a matter of fact of trust, which is being reposed on account of the relationship, if that trust is permitted to be shattered by the person by claiming a right or title by virtue of an adverse possession over a property belonging to a blood relation, which has been handed over, it would be de hors to the basic social principles of a civilized society, and hence, no right by virtue of adverse possession can be claimed in relation to a property belonging to a family member belonging to the same family clan, which has given in possession due to the trust amongst the family members, with a confidence that property would be safeguarded by the family member.

27. The similar view has been expressed in a judgment reported in 2016(4) SCC 434 'Nagabhushannamal (D) vs. C. Chandikeswaralingam'. A reference may be had to paragraph 21 to 24, which are quoted hereunder:

"21. The other main defense in the suit is ouster and limitation. Ouster is a weak defense in a suit for partition of family property and it is strong if the defendant is able to establish consistent and open assertion of denial of title, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of the other co-owner.

22. This court in Syed Shah Ghulam Ghouse Mohiuddin and others v. Syed Shah Ahmed Mohiuddin Kamisul Quadri and Ors[5] held that possession of one co-owner is presumed to be on behalf of all co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. It was further held that there has to be open denial of title to the parties who are entitled to it by excluding and ousting them.

23. A three judge bench of this court in P.Lakshmi Reddy v. R.Lakshmi Reddy[6], while examining the necessary conditions for applicability of doctrine of ouster to the shares of co-owners, held as follows:

"4. Now, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario. (See Secretary of State for India v. Debendra Lal Khan [(1933) LR 61 IA 78, 82]). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See Radhamoni Debi v. Collector of Khulna [(1900) LR 27 IA 136, 140]). But it is well- settled 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. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The 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. (See *Cores v. Appuhamy* [(1912) AC 230]). It is a settled rule of law 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. This does not necessarily mean that there must be an express demand by one and denial by the other."

24. This Court in *Vidya Devi v. Prem Prakash*[7] held that:

"28. '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." "

28. It has also been propounded almost on an identical principle that there cannot be a claim of right of title or ownership of a property belonging to blood relation by virtue of an adverse possession. Even the earlier precedents as reported in AIR 1957 SC 314 '*P. Lakshmi Reddy vs. L. Lakshmi Reddy*'. In Paragraph 4 of it has held that there cannot be an adverse possession in relation to a property, which is belonging to a co-tenure holder or a family member and, hence, no declaratory rights in relation to the said property can be claimed by the person in whose favour the possession was handed over by the co-tenure holder or the blood relation. A reference may be had to paragraph 4 of the said judgment, which is quoted hereunder:

"Now, the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario*. (See *Secretary of State for India v. Debendra Lal Khan*(1)). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See, *Radhamoni Debi v. Collector of Khulna*(2)). But it is well-settled 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. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to

be on the basis of joint title. The coheir 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. (See *Cores v. Appuhamy*(3)). It is a settled rule of law 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. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai v. Jeevarathnammal* quotes, apparently with approval, a passage from *Culley v. Deod Taylerson* which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur". (See also *Govindrao v. Rajabai*). It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

29. In response to it, the learned counsel for the plaintiff/respondent, who was claiming his right in relation to the property by virtue of an adverse possession, has submitted that the theory of adverse possession can always be propounded and claimed amongst the co-tenure holders in view of the ratio, on which he has placed reliance on the basis of the judgment reported in AIR 1957 SC 314 '*P. Lakshmi Reddy vs. L. Lakshmi Reddy*'. Learned counsel for the plaintiffs/respondents had made reference to paragraph 7 of the said judgment, which was dealing with the circumstances where it was considering the impact of limitation, which cannot be treated to have begun to run against a person unless at the time when the person is legally in a possession to vindicate a cause in relation to a title based on the law of limitation, i.e. a claim of a right by an adverse possession in favour of a person that implies to only actual and legal possession, which has been given over to a third person, who is neither heir nor a family member having a blood relationship. Paragraph 7 is quoted hereunder:

"7. The matter may be looked at from another point of view. It is well-settled that limitation cannot begin to run against a person unless at the time that person is legally in a position to vindicate his title by action. In *Mitra's Tagore Law Lectures on Limitation and Prescription* (6th Ed.) Vol.1, Lecture VI, at p. 159, quoting from *Angell on Limitation*, this Principle is stated in the following terms:

"An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him who was in possession. (*Angell*,

sections 390 and 398) . It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action which constitutes adverse possession."

Consonant with this principle the commencement of adverse possession, in favour of a person, implies that person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with the requisite animus. In the leading case of *Agency Company v. Short*(1) the Privy Council points out that there is discontinuance of adverse possession when possession has been abandoned and gives as the reason therefor, at p. 798, as follows:

" There is no one against whom he (the rightful owner) can bring his action."

It is clearly implied therein that adverse possession cannot commence without actual possession which can furnish cause of action. This principle has been also explained in *Dwijendra Narain Roy v. Joges Chandra De*(2) at p. 609 by Mookerjee J. as follows :

The substance of the matter is that time runs when the cause of action accrues, and a. cause of action accrues, when there is in existence a person who can (1) (1888) 13 App. Cas. 793(2) A.I.R. 1924 Cal. 600, sue and another who can be sued..... The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief. The statute (of limitation) does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result."

In the present case, the co-heirs out of possession such as the plaintiff and the second defendant were not obliged to bring a suit for possession against Hanimi Reddy until such time as Hanimi Reddy obtained actual possession. Indeed during the time when the Receiver was in possession, obviously, they could not sue him for possession to vindicate their title. Nor were they obliged during that time to file a futile suit for possession either against Hanimi Reddy or against the defendants in Hanimi Reddy's suit when neither of them was in possession. It appears to us, therefore, that the adverse possession of Hanimi Reddy, if any, as against his co-heirs could not commence when the Receiver was in possession. It follows that assuming that the possession of Hanimi Reddy from January 20, 1930, was in fact adverse and amounted to ouster of the co-heirs such adverse possession was not adequate in time by October 23, 1941, the date of suit, to displace the title of the plaintiff. It follows that the plaintiff respondent before us is entitled to the decree which he has obtained and that the decision of the High

Court is, in our view, correct, though on different grounds. It may be mentioned that objection has been raised on behalf of the respondents before us that the question" of tacking on Receiver's possession was not in issue in the lower Courts and should not be allowed to be raised here. In the view we have taken it is unnecessary to deal with this objection."

30. A reference is also made by the learned counsel for the plaintiff/respondent for deriving his rights by adverse possession despite of admitting a relationship of being the family member belonging to the same family clan in view of the ratio propounded in AIR 1954 SC 337 'Wuntakal Yalpi Chenabasavana Gowd vs. Rao Bahadur Y. Mahabaleshwarappa & Another'.

31. A reference to the said judgment was particularly in view of the ratio as propounded in paragraph 9 and 10 of the said judgment, it was the case which was dealing with the situation where a possession of a co-sharer was being claimed on the basis of an adverse possession as against the other co-sharer as a result of the ouster of the co-sharer and uninterrupted possession over the property. This Court on considering the ratio relied in the light of the said judgment will not be applicable, as, there is a distinction between this Court thinks the interpretation of the term 'co-sharer' and a 'blood relationship' are altogether different and distinct from the view that even a person who is not in blood relation can be a co-sharer of the property and who can claim a right by virtue of an adverse possession being a co-sharer as against other co-sharer of the property to whom if the exclusive possession is being handed over by the other co-sharer, who not related to him, but the same preposition or the principles as enunciated in the said judgment will not be attracted for the reason that it was dealing with altogether a different set of circumstances where the plaintiff to the said Suit claimed establishment of his title of half of the share of the property in dispute and there was a claim for the recovery of possession of the same after its partition. Still Court thinks to clear that analogy drawn reference to paragraph 9 and 10 of the said judgment is essential, which is quoted hereunder:

"9. Once it is held that the, possession of a co-sharer has become adverse to the other co-sharer as a result of ouster, the mere assertion of his joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such manner as it was possible to do. It may also check the running of time if the co-sharer who is in exclusive possession acknowledges the title of his coowner or discontinues his exclusive possession of the property. On the materials on the record, none of these things seems to have been proved in the present case. Resumption of physical possession or re-entry upon the property was absolutely out of the question, as the property was in the possession of a lessee. The lease, it should be noted, was executed in 1926 and we have two rent receipts of the years 1927 and 1932 respectively by v which Nagana acknowledged receipt of

rents on behalf of his infant son in terms of the lease deed. The rent suit in 1934 was also brought by him in his capacity as guardian of defendant No. 1 and the document Exhibit D-3 by which the decree in that suit was discharged and a receipt was given in advance for all the subsequent rents point definitely to the conclusion that the entire rent for the whole period of 12 years was paid to and was accepted on behalf of Chenabasavana and Nagana neither received any portion of it nor laid any claim to the same. During the whole period of the lease and up to the present day the minor is admittedly in possession of the property and no act or conduct on his part has been proved either within the period of limitation or even after that which might be regarded as an acknowledgment of the title of his father as co-owner. In our opinion the fact that the father who had allowed himself to be dispossessed by his son exhibited later on his animus to treat the property as the joint property of himself and his son cannot arrest the running of adverse possession in favour of the son. A mere mental act on the part of the person dispossessed unaccompanied by any change of possession cannot affect the continuity of adverse possession of the disseisor.

10. The view taken by the High Court probably rests on the supposition that as, it was the father, who, acting on behalf of his son, asserted the exclusive title of the son to the property in denial of his own rights, it was open to the father again if he so chose to resile from that position and make a fresh declaration that property was not the sole property of the son but belonged to him as well; and this subsequent act would annul the consequences of his previous act. This reasoning does not appear to us to be sound. The father's acts in connection with the lease were entirely in his capacity as guardian of his son. In the eye of the law they were the acts of the son, but the creation of the mortgage in 1935 was not the act of the father on behalf of his son, it was the personal act of the father himself qua co-proprietor of the son and the interest of one being adverse to the other such acts could not be held to be acts of the son performed through the father. It is extremely doubtful whether qua guardian the father could make such declaration at all. Any change of intention on the part of the guardian can be brought home to the minor through the guardian alone and the minor can react to it again only through the guardian. It may be proper in such cases for the father to renounce his guardianship before he could assert any right of his own against his ward; but it is not necessary for us to go into that question, as the mortgage in this case was made by the father not as guardian of the minor at all. It was no more than a declaration, by a person who was dispossessed by his co-sharer, of his joint title to the property and as has been already pointed out, as it did not involve any change of possession it did not affect the adverse possession of the disseisor. In our opinion therefore the view taken by the learned Judges of the High Court is not proper and cannot be sustained. The result is that the appeal is allowed; the judgment and decree of the High Court are set aside and those of the District Judge restored. The appellant will have his costs in all the Courts."

32. In the said case the right, which was being claimed by the plaintiff was being

generated on the basis of the father, who is acting on behalf of the son, has asserted an exclusive title of the son over the property in denial of his own rights. Hence, it was a dispute where the father could have chosen to resile from his rights over the property and making fresh declaration of the ownership. Hence, the said judgment in view of the facts, which has been considered in paragraph 9 and 10 is not attracted in the present case.

33. Learned counsel for the plaintiff/respondent has made a reference to a judgment reported in 1971(1) SCC 597 'Syed Shah Ghulam Ghouse Mohiuddin vs. Syed Shah Shmed Mohiuddin Kamisul Quari (Died) by Irs. & Others'. The ratio propounded therein will yet again not apply to settle a claim over a property by adverse possession despite of being a blood relation. This Court is of the view that it was the case, which was emanating from the local revenue laws as applicable in the State of Andhra Pradesh and was not consider the wide law of claim of right by a blood relation by way of adverse possession and particularly governing the creation of rights amongst the muslim community in relation to a right of succession, which was flowing from muslim law, in the said case, was applicable where a right was being claimed as to be holding a right of tenancy in common, which was determined on the basis of the implications of the Mohammedan law. The said judgment though has dealt with the concept of adverse possession where possession by co-owner made in his favour by another co-owner was emanating from a contract of an agreement creating a lease holds rights by a minor to the property. That engages altogether a distinct fact and effect of lease of a property executed by a minor. The question which was under consideration in the said judgment was as to whether a minor under the Mohammedan law could have excluded a right in relation to a holding by executing a contract in favour of person claiming rights over the property and what would be its implication if the contract executed by the minor itself was void from the time of its inception. This ratio would not deal with the ratio on which we are scrutinizing the controversy, pertaining to determination of right amongst blood relation, claimed on basis of adverse possession. There is much legal difference in a claim being a co-sharer and claim between blood relation by applying theory of adverse possession.

34. The said distinction of the principles of adverse possession as dealt in the said judgment could be drawn from the prepositions as being laid down in paragraph 20 of the said judgment because under the Mohammedan law the doctrine of partition is not applicable because the heirs are held out to be a tenants in common and there is an automatic succession of every fraction of the property or part of the estate of a deceased Mohammedan. Paragraph 20 of the judgment is quoted hereinbelow:

"The cause of action for partition of properties is said to be a perpetually recurring one" See *Monsharam Chakravarty & Ors. v. Gonesh Chandra Chakravarty & Ors.* (2). In Mohammedan Law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the

deceased Muslim succeed to the definite fraction of every part of his estate. The share,,, of heirs under Mohamedan Law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and bounds in accordance with the specific share of each heir being already determined by the law.

In the present case the suit is for partition of properties which were by consent of parties treated as Dargah and Khankah but which were later discovered to be Matrooka properties in fact and therefore the declaration in the award and the decree on the award that those were Dargah and Khankah properties cannot stand and the entire partition is to be lie-opened by reason of fraud in the earlier proceedings."

35. The said judgment will also not lie in the present case as it was based upon the consideration of altogether a different circumstances, wherein, a right to succeed a property was being claimed on the basis of an award, which was rendered without any consent by way of a mutual settlement, which is not the case at hand and, hence, the same will have no applicability in the present set of circumstances.

36. Another principle, which would be relevant to be considered as it has been dealt in 1995(4) SCC 496 'Vidya Devi alias Vidyavati (Dead) by Lrs. Vs. Prem Prakash & Others', which was emanating from the tenancy and land laws arising out of the Delhi Land Reforms Act of 1954, wherein, the question was pertaining to the Suit for partition of a joint holding by a co-bhumidhar and the question involved was as to whether the said Suit for partition will have any implications as far as the period of limitation is prescribed for the plea of acquisition of the title over the property by adverse possession by co-sharer under Delhi Land Reforms Act, wherein, it has been held out that the theory of adverse possession is not available to the bhumidhar against whom such suit is filed who belongs to be the co-bhumidhar of the land in question. A reference may be had to paragraph 27, 28 and 34 of the said judgment, which too has denounced that a co-tenure holder or a family member of the property cannot claim a right over the same by way of an adverse possession, despite of the fact that the principles of limitation as contained under Article 65 of the Limitation Act would be creating a right over the property, but the said principle of creation of land hold rights by applying law of limitation to claim right by adverse possession, the same will not apply where a claim of a right and its mutuality is foundationed on the basis of the expiry of the period of limitation, which is claimed on the basis of an adverse possession, but not as against the blood relationship or a co-tenure holder. The said principle has been widely dealt with in paragraph 5 to 7 of the said judgment, which is quoted hereunder:

"6. 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 imougnd 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 defendants title to the holding and referring the same to Civil Court for its finding under section 186(1) of the DL Act.

7. 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."

37. None of the proposition as dealt above will apply in the present case.

38. The arguments as extended by the learned counsel for the plaintiffs/respondents claiming his right by virtue of an adverse possession on the expiry of the period of limitation is also to be considered from the view point that a perfection of right or a title over the property by adverse possession will not succeed in the absence of a proof that the claim of an adverse possession is based upon a proof of title being asserted upon on the basis of there being a hostile possession to the knowledge of the respondent, who does not happen to be a family member or blood relation. In this regard a reference may be had to the contents of the paragraph 12 of the judgment reported in 1996(7) SCC 436 'Meethiyan Sidhiqu vs. Muhammed Kunju Pareeth Kutty & Others', which is quoted hereunder:

"12. It is, therefore, clear from the above facts that unless there is a specific plea and proof that the appellant had disclaimed his right and asserted hostile title and possession to the knowledge of the respondent within the statutory period and the latter acquiesced to it, he cannot succeed to have it established that he perfected his right by prescription. The High Court has taken the fact that there is neither a plea nor proof in this behalf. We cannot find any infirmity in this finding. Under these circumstances, the finding that the appellant has perfected his title by prescription is clearly illegal. In this case we are concerned only with the validity of the sale in respect of the share of the respondent-plaintiff and not of the share of the mother."

39. It is altogether dealing with different facts and circumstances, which is distinct to the case at hand and it would not apply in the instant case.

40. The argument of the learned counsel for the respondents is also not acceptable in view of yet another ratio, which has been laid down by the Hon'ble Apex Court in the judgment reported in 2006(11) SCC 600 'Govindammal vs. R. Perumal chettiar & Others', on which reliance has been claimed by him to determine his title by adverse possession despite admitting the fact of being a

blood relation. In paragraph 8, 10, 13 & 15, wherein, the Hon'ble Apex Court has widely held that the property given on the basis of a lease or a mortgaged to another co-sharer that in itself does not amount to an establishment of an adverse possession, that means being adverse to the interest of the other person, who has handed over the possession in Trust and in good faith by virtue of executing a document of lease or mortgage. The same is quoted hereunder:

"8. The defendants in order to oust the claim of the plaintiff took definite plea of adverse possession hostile to the interest of the plaintiff to her knowledge and led evidence to show that a notice was sent by the plaintiff on 2.11.1955 in which she claimed that she was not given any income from the properties of Raju Naidu. Though the plaintiff appeared in the witness box as P.W.1, she denied to have sent any such notice. It is alleged that the notice was sent through the Advocate but no such advocate was produced by the defendants. However, the defendants sent a reply to that notice. But the original notice alleged to have been sent by the plaintiff was produced as Ex.B 3 but no advocate was produced to prove that notice. P.W.1 has categorically denied to have sent any such notice and she also deposed that after the death of her husband, Raju Naidu, she was thrown out of the house. Though after the death of her husband, for some time she was given income from the properties but thereafter the defendants stopped payment of the income arising out of the properties. She also admitted that some of the properties were usufructuary mortgage. After some time she came to know that certain properties were being sold. Therefore, she woke up in 1979 and filed the present suit. Unfortunately, the plea of the defendants succeeded before the High Court that the notice, Ex.B 3 was given in 1955 and no suit was filed till 1979. Therefore, the High Court took the view that her right in the properties got extinguished because of adverse possession as she gave notice in 1955 and did not take possession of the properties till 1979. Therefore, it was apparent that the possession by Defendant No.3 was hostile to her interest. We regret to say that this finding arrived at does not appear to be correct one. In fact after filing of the suit the notice, Ex.B 3 which she did not pursue any further, her right cannot be extinguished. Though she has denied issuance of such notice through Advocate but that is not sufficient to defeat the claim of the widow. This was only an infructuous circumstance that when she was thrown out of the house she could not pursue her legal remedy by filing the suit but when she found that the properties were being sold by the step sons, and it came to her knowledge, therefore, she woke up to file the suit for asserting her claim. There is no denial that she was the legally married wife of the deceased. This has been proved, established and accepted by all the three courts despite the fact that the plea of falsity of the marriage was raised by the step sons. Once it is established that she was the legally married wife of Raju Naidu she automatically she claims her share in the property from the estate of Raju Naidu by way of survivorship. Just because a notice was issued and she did not pursue the same that does not extinguish the claim of the plaintiff thereby giving a handle in the hands of the step sons by way of adverse possession. In order to prove adverse

possession something more is required. Once it is accepted that she was the legally married wife of Raju Naidu then her right to claim partition and share in the property stands out and that cannot be defeated by the plea of ouster or adverse possession. In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case. In the present case, it is the widow who has been thrown out and she has been moving from pillar to post. The relief cannot be denied to her just because she sent notice claiming partition of the properties and she did not file any suit thereafter and the steps sons were holding the properties adversely and hostile to her knowledge. It was the joint property of Raju Naidu and it shall devolve by way of survivorship i.e. two sons and his wife as the daughter has already given up her share in the property. Therefore, in order to oust one of the co-sharers only on the basis of the so called notice cannot be deemed to be sufficient to come to a conclusion of adverse possession or extinguishing her rights. In this connection, our attention has been invited to an earliest decision in the case of Hardit Singh & Ors. V. Gurmukh Singh & Ors. [AIR 1918 PC 1] wherein it has been held as under :

" If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more , must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The evidence of actual user is not sufficient to establish abandonment or exclusion."

10. In the case of Mohaideen Abdul Kadir & Ors. V. Mohammad Mahaideen Umma & Ors. reported in ILR [1970] 2 Mad. 636 their Lordships held that no hard and fast rule can be laid down. But the following relevant factors may be taken into consideration : (i) exclusive possession and perception of profits for well over the period prescribed by the law of limitation ; (ii) dealings by the party in possession treating the properties as exclusively belonging to him; (iii) the means of the excluded co-sharer of knowing that his title has been denied by the co-owner in possession. There may be cases, where, owing to long lapse of time, it may not be possible for the co- owner in possession to adduce evidence as to when the ouster commenced and how it was brought home to the knowledge of the excluded co-owner. In such a case the law will presume ouster as an explanation of the long peaceful possession of the co-owner in possession. In order to maintain the person in such possession the law presumes a lawful origin of the possession. Therefore, no hard and fast rule can be laid down from which it can be inferred that any co-sharer has ousted his co-sharer. That will depend upon facts of each case. Simply long possession is not a factor to oust a co-sharer but something more positive is required to be done. There must be a

hostile open possession denial and repudiation of the rights of other co-owners and this denial or repudiation must be brought home to the co-owners. Simply because a co-sharer gave notice claiming partition of the suit properties and possession and did not pursue the matter further, that will not be sufficient to show that the co-sharer has lost his/her right. In the present case, it is only when 'B' schedule property was being sold by two brothers then alone the plaintiff woke up to realise that the step sons were not interested to give her share in the property and she rushed to file the suit. Therefore, by no stretch of imagination it can be inferred in the present case that the plaintiff had lost her right to claim partition and share in the property.

13. In the case of *Mohammad Baqar & Ors. V. Naim-un-Nisa Bibi & Ors.* reported in AIR 1956 SC 548 it was observed that under the law possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession and exclusion and ouster following thereon for the statutory period. There can be no question of ouster, if there is participation in the profits to any degree. In the case of *Md. Mohammad Ali (dead) by LRs v. Jagadish Kalita & Ors.* reported in (2004) 1 SCC 271 this Court examined a series of decisions on the question of adverse possession and after extracting the legal propositions from various decisions, their Lordships concluded that long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a constructive trustee of other co-sharer and the right of a person or his predecessors-in-interest is deemed to have been protected by the trustees.

15. In the case of *Nirmal Chandra Das and Ors. V. Mohitosh Das & Ors.* reported in AIR 1936 Calcutta 106 their Lordships observed that in order to succeed on the ground of ouster, the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. Their Lordships further observed that there can be no adverse possession by one co-sharer as against others until there is an ouster or exclusion; and the possession of a co-sharer becomes adverse to the other co-sharer from the moment there is ouster. Therefore, what is ouster and what is adverse to the interest of the claimant depends upon each case. In this case, a plea was raised that certain properties were usufructuary mortgage. But that was not in a manner to show that these properties are adverse to the interest of the plaintiff. It was only when 'B' schedule properties were sought to be sold and it came to the knowledge of the plaintiff that her step sons were not interested in partition of the property and giving her share, she filed the suit in the year 1979. Therefore, for the first time in 1979 she came to know that adverse possession is being sought to be established and her interest in 'B' schedule properties is sought to be sold by her step sons. But in any case, just because she gave a notice and she did not pursue the same, on that basis no adverse inference can be drawn and she cannot be ousted on that count by way of adverse possession."

41. In view of the aforesaid rival contentions of the parties to the writ petition, it becomes an in evitable preposition that though under Section 210 of the Zamindari Abolition Act to be read with Section 209, it does contemplate granting of a right to a bhumidhari on the basis of an adverse possession after the expiry of the period of limitation for taking an action of eviction against the occupant, but the said provision would always be reasonably read in relation to where the right by adverse possession is claimed by a person, who is an outsider, a stranger to the family, who is placed in possession of the property by the recorded owner and the recorded owner has not taken an action within the period of limitation as provided under the law for getting over the possession of the property in question. It was not perceiving a right over the property by a blood relation claiming right or title by taking the benefit of limitation.

42. Thus, in view of the aforesaid ratio as laid down by the Hon'ble Apex Court, this Court is of the view that no right by virtue of an adverse possession can be claimed by a co-owner or a family member of the property. The judgments impugned cannot be sustained for the reason that the Appellate court as well as the Second Appellate Court had recorded its finding by traveling beyond the finding of facts and even the pleading raised by the respective parties regarding their foundation of claim of right over the property and the case of the respective parties herein by holding thereof that the property would be treated to be a property belonging to the State Government though when admittedly it is the case of both the parties that the rights in relation to the property in question has flown in their favour since belonging to the same family clan. Hence, carving out a new case by the Appellate Court while reversing the judgment of the Assistant Collector dismissing the Suit of a claim by adverse possession would amount to traveling beyond the pleadings of the parties, who were claiming the right and title over the property by an adverse possession.

43. Consequently, the writ petition is allowed. The impugned orders passed by the First Appellate Court dated 28.02.2013 and by the Second Appellate Court dated 01.11.2014 rendered in First Appeal No. 178 of 2006-07 and Second Appeal No. 14 of 2013/14 respectively are hereby quashed.