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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

K.M. JOSEPH; HRISHIKESH ROY, JJ.

CIVIL APPEAL NO(S).2652-2654 OF 2013; February 09, 2022

B. R. PATIL *v.* **TULSA Y. SAWKAR & ORS.**

Code of Civil Procedure, 1908 - Order II Rule 2,3 - Joinder of causes of action - Order II Rule 3 does not compel a plaintiff to join two or more causes of action in a single suit. The failure to join together all claims arising from a cause of action will be visited with consequences proclaimed in Order II Rule 2 - The Code of Civil Procedure indeed permits a plaintiff to join causes of action but it does not compel a plaintiff to do so. (Para 16, 17)

Code of Civil Procedure, 1908 - Order I Rule 3 - Non-joining of necessary parties is fatal. (Para 18)

Partition - The law looks with disfavor upon properties being partitioned partially. The principle that there cannot be a partial partition is not an absolute one. It admits of exceptions. (Para 10)

Partition - Properties not in the possession of co-sharers/coparceners being omitted cannot result in a suit for the partition of the properties which are in their possession being rejected. (Para 11)

Partition - ouster - The possession of a co-owner however long it may be, hardly by itself, will constitute ouster. In the case of a co-owner, it is presumed that he possesses the property on behalf of the entire body of co-owners. Even non-participation of rent and profits by itself need not amount to ouster. The proof of the ingredients of adverse possession are undoubtedly indispensable even in a plea of ouster. However, there is the additional requirement in the case of ouster that the elements of adverse possession must be shown to have been made known to the co-owner. This is apparently for the reason that the possession of a co-owner is treated as possession of other co-owners. While it may be true that it may not be necessary to actually drive out the co-owner from the property - Mere continuance in the possession of a co-owner does not suffice to set up a plea of ouster. The possession of the co-owner will also be referable to lawful title. (Para 24)

Partition - it is not the law that a co-owner cannot acquire his own independent or separate properties. (Para 29)

For Appellant(s) Mr. Salim A. Inamdar, Adv. Mr. Rabin Majumder, AOR

For Respondent(s) Mr. S. N. Bhat, Sr. Adv. Mr. D. P. Chaturvedi, Adv. Mr. Tarun Kumar Thakur, Adv. Ms. Parvati Bhat, Adv. Ms. Anuradha Mutatkar, AOR

J U D G M E N T

K. M. JOSEPH, J.

1. The first defendant in O.S. No.7944 of 2003 in the Court of Additional City Civil Judge at Bangalore is the appellant before us. The said suit was filed by his sister as the first plaintiff and his sister- in-law as the second plaintiff. The reliefs sought read as follows: -

"(1)(a) For partition and separate possession of their 1/5th share each, in the suit schedule items 1 to 3 properties by metes and bounds and 1/5th share each, in the sale proceeds of items 4 & 5 of the suit schedule properties, after their sale.

(b) a direction to the 1st defendant to render accounts of the rentals received by him, from item no. 1 and 3 of the suit schedule properties from 1983 onwards till the date of suit and for partition of 1/5th share of each plaintiff, in the said rentals.

(c) For an enquiry into the rentals to be received by the 1st defendant from suit items 1 & 3 during the pendency of the suit and for partition of 1/5th share of each plaintiff, and

(d) for mesne profit from the date of preliminary decree, till date of delivery of the 1/5th share of each plaintiff, and

(e) for such other relief or reliefs as this Hon'ble Court deems fit to grant to the plaintiffs in the facts and circumstances of the case.

(2) For Perpetual injunction restraining the 1st defendant from interfering with the peaceful possession and enjoyment of 1st floor of item no. 3 of the suit schedule property and to park the car in the premises of the item No. 3 by the 2nd plaintiff."

2. The Trial Court partly decreed the suit. It granted prohibitory injunction in favour of the second plaintiff.

ORDER

"The suit is decreed in part.

The claim of plaintiff for partition and separate possession of their alleged 1/5th share each and other consequential reliefs as prayed in Paras (b) to (d) is dismissed.

The reliefs claimed by defendant No. 1, defendant No. 2 and defendant No. 3 are disallowed.

The claim of plaintiff No. 2 for the relief of injunction is granted in the following terms:

Defendant No. 1, his men, agents etc., are directed not to interfere with peaceful possession and enjoyment of 1st floor of item No. 3 of the suit schedule by plaintiff no. 2 and her right to park the car in the premises of Item No. 3 till the division in the estate of the joint family takes place by metes and bounds, in accordance with law.

In the circumstances of the case, parties are left to bear their own costs.

Dictated to the Judgment Writer, transcribed by her, corrected and then pronounced by me in open court this the 9th day of July, 2005.

(I.S. Antin)

XXII Addl. City Civil Judge,

Bangalore"

3. Feeling aggrieved by the aforesaid judgment, three separate appeals have been generated. RFA No.1503/2005 was filed by the appellant. RFA No.1296/2005 was filed by the plaintiffs whereas RFA No.1369/2005 was filed by the second defendant in the suit. By the impugned judgment, the High Court has allowed the appeal filed by the plaintiffs and the second defendant and dismissed the appeal filed by the first defendant. Resultantly, the High Court has decreed the suit in the following manner: -

"33. Accordingly, the judgment dated 08.07.2005 passed by the XXII Addl. City Civil Judge, Bangalore in O.S. No.7944/2003 in respect of partition of suit schedule properties, is set aside. The appeals are allowed insofar as partition of item Nos. 1 to 4 of plaint schedule properties. The suit for partition of item No.5 of the plaint schedule property is dismissed.

34. The plaintiff Nos.1 and 2 and defendant Nos.1 to 3 who are legal heirs of the deceased R. M. Patil are entitled for 1/5th share each in item Nos.1 to 4 of the suit schedule properties which were acquired by R.M.Patil during his lifetime. Insofar as item No.5 i.e., library books purchased and maintained by late R. M. Patil during his lifetime is concerned, the plaintiffs have averred in the plaint that the value of the library books is about Rs.1 lakh and it was purchased about 30 years back, but no documentary evidence are produced to show the total value of the library/law books, therefore, the plaintiffs are in no way concerned with the library books. Therefore item No.5 is treated as valueless. Since the first defendant was working as junior under his father till his death i.e., 1975 and is continuing his legal profession, he is entitled to retain the library books with him.

Draw the decree accordingly. No order as to costs."

4. We heard Mr. Salim A. Inamdar, learned counsel appearing for the appellant and we also heard Mr. S. N. Bhat, learned senior counsel who appears on behalf of the plaintiffs, second defendant and also the legal representatives of the deceased third defendant.

5. Learned counsel for the appellant would address the following submissions before us: -

He would submit that this is a case where the suit is liable to be dismissed on the ground that there was non-joinder of necessary parties. It is equally bad for the reason that the plaintiffs have not scheduled all the properties which should have been included for the purpose of partition. He would further submit that the Plaint Schedule Properties were actually purchased out of the Joint Family funds. These three submissions find their foundation with the following facts. It is pointed out that admittedly one *Shri Marigowda Patil*, had two sons, namely, *Shri R. M. Patil* and *Shri Ningana Gowda Patil. Shri R. M. Patil* had three sons and two daughters. The first plaintiff is one of the daughters. So is the third defendant. The second plaintiff is the daughter-in-law of Shri R. M. Patil being married to his son late Shri Vijay R. Patil. The first defendant is another son. So is the second defendant. There were Joint Family Properties belonging to the joint family which consisted of the grandfather of the appellant Shri Marigowda Patil and his two sons. Those properties yielded sufficient income and it is utilizing the same that the plaint schedule properties were purchased. That apart, those properties should have been reflected in the plaint schedule and the entire properties should have been made available for the Court to make a decree which is valid in law. Necessarily the inevitable consequence is that the suit would fail for non-joinder of the brother of the appellant's father (*Shri R.M. Patil)* who was the other co-owner/coparcener who is conspicuous on the party array by his absence. Next, the learned counsel would point out that at any rate the appellant is entitled to Plaint Schedule Property Item No.3. He points it out to be a house. He would contend that he is in the exclusive possession of the house. He relies on evidence in the form of Notice issued in June, 1991 and he submits that it decisively proves that the appellant has acquired title by ouster at any rate in regard to item No.3. He has been in exclusive possession of the said house. He does not have any other house. Apart from being illegal it is inequitable to throw the appellant out on the street. He would point out that all the other siblings have houses of their own. Next, he would point out that the appellant in his written statement has included certain properties in the schedule, which stand in the name of family members which he claimed were purchased with funds of the joint family. Though the written statement alludes to properties being properties which stood in the name of the husbands of appellant's sisters what he presses before us is his claim in regard to item Nos. 2 and 3 relating to properties standing in the name of defendant No.2. He would submit that the Trial Court has correctly found that these properties must be treated as properties of the coparcenary. This was part of the reasoning which impelled the Court to dismiss the suit insofar as

it related to the relief of partition. He took us to the finding of the High Court over turning the said finding and he would complain that the findings are insupportable with reference to the evidence on record. He would point out that there was evidence as to the extent of ancestral property which was noted by the Trial Court but no challenge to the same was laid in the appeals filed by the respondents. He would finally conclude by pointing out that both in law and equity this Court may pass an Order which reaches justice to the appellant and an equitable allocation of the properties at any rate for which this Court is adequately equipped under Article 142 of the Constitution of India.

6. Per contra, Mr. S. N. Bhat, learned senior counsel would contend that as far as the alleged Joint Family Properties which existed and adverted to by the learned counsel for the appellant is concerned, the cause of action for the present suit is the opening up of the succession upon the death of the father of the appellant, Shri R. M. Patil on 19.10.1977. The suit in other words is instituted only for the purpose of claiming and establishing the rights over the separate self acquired properties of Shri R. M. Patil. He would also take us through the pleadings and evidence to contend that there is no basis in the complaint that Joint Family Properties had being excluded. Therefore, he contends that on that basis there is no occasion also to implead the other branch referred to by the appellant in the suit. He would contend that all that is required to be found is whether the plaint schedule properties are the self acquired properties of *Shri R. M. Patil*. As far as this question is concerned, the pleadings and evidence on record clearly warranted the conclusion arrived at and the relief which has been granted by the impugned judgment. In regard to ouster, he would first of all point out that the pleading of the first appellant itself is one of partial ouster, which in law is incapable of extinguishing the title which the principle of ouster seeks to allow and achieve. He would further contend that actually the building in question consists of two floors. The appellant is only in possession of the Ground Floor. He harnesses the finding of the Trial Court itself that the second plaintiff was in possession of the First Floor and he draws our attention to the decree passed by the Trial Court itself which is one of prohibitory injunction in favour of the second plaintiff in regard to the First Floor. He further contends that the very prayer of the appellant in his written statement was that he be declared entitled to 1/4th share in the Plaint Schedule Properties which takes in item No.3 which means that he is admitting title of the co-owners except the first plaintiff which is impermissible in law. Regarding the contention of the learned counsel for the appellant that non-

impleadment of the other branch, may prejudice public interest, he would submit that it is a theoretical proposition and it has no application in the facts of this case. The properties in question which are alleged to exist have not been established in the evidence and it may not lie in the mouth of the appellant to voice this complaint. As regards item Nos. 2 and 3, standing in the name of the second defendant which the appellant claimed should also be partitioned, he would point out that the finding of the Trial Court in favour of the appellant stands correctly overturned by the High Court even though the findings could have been better couched. He points out that the second defendant was indeed employed and had sufficient funds and the Trial Court was mainly guided by Exhibit D-75 which having regard to its date (17.08.1982) and the sum involved Rs.11,330/- and the circumstances which led to it would be sufficient to rob it of the value which was otherwise attached to it by the Trial Court.

FINDINGS

1) WHETHER SUIT MUST FAIL ON ACCOUNT OF NON-INCLUSION OF CERTAIN PROPERTIES AND NON-JOINDER?

7. We have already noticed the genealogy of the parties in the manner, we have referred to above. Undoubtedly, the grand parent of the parties was one Shri Marigowda Patil. He had two sons. There is no dispute regarding this. In the plaint, it is true that that the plaintiffs have, no doubt, stated that Shri Marigowda Patil had another son who remained an agriculturist. It is the further plea of the plaintiffs that Shri Marigowda Patil had a bit of landed property which was sufficient to eke out his livelihood. He left the landed property to the other son who remained an agriculturist. It is the further case and which is not open to dispute also that *Shri R. M. Patil* was got educated and he obtained a Degree of Law and started practicing and later *Shri R. M. Patil* became a Public Prosecutor and he resigned the post and he entered into politics. He became a successful politician and became a Cabinet Minister holding various portfolios. These facts are, in fact, not in dispute. The only point to be considered under the first head of complaint of the appellant is about the non-inclusion of the property of which there is a faint reference in the plaint, namely, that *Shri Marigowda Patil* had a bit of landed property and it was left to the other son. The appellant would lay store by the deposition given by one of the witnesses for the plaintiffs, namely, PW-3. He has indeed stated as follows: -

"4. I do not know the extent and also the Survey Number of the land given by R. M. Patil to his elder brother. The above said land is black soil land and they used to grow cotton,

jawar and wheat. I do not know how much income they were getting from the said agricultural property. R. M. Patil informed me about the land given to his brother. I was visiting R.M. Patil frequently as I was residing in Dharwad. Even after, he settled down at Bangalore also I used to visit his house frequently. I visited him for about 20 times when he was in Bangalore. I have not seen the deed of partition entered into between R.M.Patil and his brother."

8. The appellant, no doubt, in his evidence has crystallized the extent in somewhat greater detail by stating that the property involved, which was Joint Family Property, was about 46 acres of Agricultural Land.

9. It is not in dispute that the land which is alluded to is Agricultural Land. It is highly relevant to notice, however, what the appellant has deposed in this regard: -

"5. Since 33 years I have been practicing as an Advocate. My Advocate prepared the written statement on my instructions, it is true that in my written statement have claimed that myself is a kartha of family and looking after the plaint schedule property as Kartha of the family. It is true that during the lifetime of my father, my father was looking after the plaint schedule property. It is true that I have not produced any document in respect of the property referred to at para-2 of my affidavit. I am having the documents pertains to the property referred to in my affidavit. I have got RR extracts, Khata extracts of those lands standing in the name of Ninganagowda Patil. There is no difficulty for me to produce the said documents before the Court. There are 12 Sy. Nos. The total extent of said Sy. Nos. is 44 acres. I cannot give the boundaries of the above property. It is true that I have claimed 1/4th share in the plaint schedule properties. I have not sought for any share in the properties mentioned in my affidavit evidence."

(Emphasis supplied)

10. This is the state of the pleading and evidence in support of the existence of the property other than what has been scheduled by the plaintiffs and for which partition is sought. It is true that the law looks with disfavor upon properties being partitioned partially. The principle that there cannot be a partial partition is not an absolute one. It admits of exceptions. In *Mayne's* 'Treatise on Hindu Law & Usage' 17th Edition, Paragraph 487, reads as follows:

"487. Partition suit should embrace all property – Every suit for a partition should ordinarily embrace all joint properties. But this is not an inelastic rule which admits circumstances of a particular case or the interests of justice so require. Such a suit, however, may be confined to a division of property which is available at the time for an actual division and not merely for a division of status. Ordinarily a suit for partial partition does not lie. But, a suit for partial partition will lie when the portion omitted is not in the possession of coparceners and may consequently be deemed not to be really available for partition, as for instance, where part of the family property is in in the possession of a mortgagee or lessee, or is an impartible Zamindari, or held jointly with strangers to the family who have

no interest in the family partition. So also, partial partition by suit is allowed where different portions of property lie in different jurisdictions, or are out of British India. When an item of property is not admitted by all the parties to the suit to be their joint property and it is contended by some of them that it belongs to an outsider, then a suit for partition of joint property excluding such item does not become legally incompetent of any rule against partial partition."

11. In the facts of this case having noticed the state of the pleadings and the evidence, we are of the view that the interest of justice lies in rejecting the appellant's contention. The appellant has not been able to clearly establish the exact extent or identity of the property available by way of ancestral property. Despite claiming to having documents relating to the properties and admitting to having no difficulty to produce them, he does not produce them. He is unable to even give the boundaries. It is obvious that he does not claim to be in possession of the said properties even if it be as a co-owner on the basis that it is ancestral property. His evidence discloses that in reality and on the ground these properties could not be said to be actually available for the parties to the present suit to lay claims over them. Properties not in the possession of co-sharers/coparceners being omitted cannot result in a suit for the partition of the properties which are in their possession being rejected.

12. The case that is set up by the plaintiffs and which is sought to be drawn upon by the appellant is that the grandfather of the appellant had two sons, including his father and since there was this extent of property which is spoken by and since that is not included, it would be contrary to public interest also to deprive the other sharer in the joint family, namely, the brother of the appellant's father an opportunity to appear in the suit and establish that the plaint schedule properties were acquired with the help of joint family funds in which they also had a share. We must notice that while it is true, there is no document produced by which it can be established that there was a partition by which the properties stood allotted to the father's brother of the first appellant. The case which has been set up apparently is more of the nature of an arrangement between the parties by which the appellant's grandfather allotted the property to his other son (appellant's uncle). DW3, who is the 2nd defendant, speaks of a relinquishment by his father.

13. There is the uneducated brother of appellant's father who was into agriculture who was given the property in question and the appellant's father went on to become a successful advocate and pursued with success also a career in politics. It may have so happened that the said property which is targeted by the appellant may be property in which Sh*. R.M. Patil* has abandoned his rights. We would not wish to go further into this matter,

noticing the aspect of the matter already discussed. Therefore, this appears to be a case where finally before the Court, there is dearth of material to establish both the extent and the identity of the so-called joint family property which is not included in the plaint. Interestingly, the other branch has not come forward with any complaint despite the fact that this is a litigation of the year which commenced in the year 2003. No doubt, they have not been made parties and we need not make any observation in this regard. If the finding that the plaint schedule properties are the separate properties of R.M. Patil is invulnerable that would conclusively rule out the need to implead the appellant's uncle or his successor in interest. Suffice it to say in the facts of this case, we do not think that the appellant should be permitted to persuade us to non-suit the plaintiffs on this ground.

14. Yet another aspect which we cannot overlook is that the plaintiffs have proceeded to institute the suit on a particular cause of action. As pointed out by Mr. S. N. Bhat, learned senior counsel, the appellant could not have brought the present suit till the year, 1977 when Sh. R. M. Patil was alive. This is for the reason that the cause of action for the present suit is based on the rights of the plaintiff to the separate and self acquired properties of *Sh. R. M. Patil*. The parties do not have any birth right in the said properties and they could not have brought a suit based on such a right. The cause of action arose therefore only upon his death and on the basis of intestate succession plaintiffs have brought the present suit. A suit for partition in regard to ancestral property/joint family property on the other hand would be premised on birth right.

15. In this regard we may notice two aspects. Order II Rule 3 of the Code of Civil Procedure, 1908 reads as follows:

"3. JOINDER OF CAUSES OF ACTION. -

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit."

16. Order I Rule 3 speaks about the persons who may be made parties. Interpreting these rules, this Court in ***Iswar Bhai C. Patel alias Bachu Bhai Patel v. Harihar Behera and Another,*** **AIR 1999 SC 1341** held *inter alia* as follows:

"14. These two provisions, namely, Order 1 Rule 3 and Order 2 Rule 3 if read together indicate that the question of joinder of parties also involves the joinder of causes of action. The simple principle is that a person is made a party in a suit because there is a cause of action against him and when causes of action are joined, the parties are also joined."

On the cause of action in this case, there is no warrant to complain against the non-impleadment of the appellant's uncle or his successors in interest. We may also point out that Order II Rule 3 does not compel a plaintiff to join two or more causes of action in a single suit. The failure to join together all claims arising from a cause of action will be visited with consequences proclaimed in Order II Rule 2. Order II Rule 3 permits the plaintiff to join together different causes of action. No doubt it is a different matter that if there is a misjoinder of causes of action, the power of the court as also the right of the parties to object are to be dealt with in accordance with law which is well settled.

17. The Code of Civil Procedure indeed permits a plaintiff to join causes of action but it does not compel a plaintiff to do so. The consequences of not joining all claims arising from a cause of action may be fatal to a plaintiff and we are not in this case to predicate for what would happen in a future litigation. That would at any rate not advance the case of the appellant. Hence for all these reasons, we are of the view that contention of the appellant, must fail.

18. We have no quarrel with the proposition that the non-joining of necessary parties is fatal but in the facts of this case, on the cause of action which is projected in the plaint and the schedule of properties which has been made by the plaintiffs, we would not think that the non-joinder of the uncle of the appellant or his legal representatives would imperil the suit filed by the plaintiffs.

2. WHETHER PLAINT SCHEDULE PROPERTIES ARE SEPARATE PROPERTIES OF SHRI. R.M. PATIL?

19. The next question is whether the plaint schedule properties must be found to be the self acquired and separate properties of *Shri R. M. Patil*. In this regard, we must notice the pleadings first in the plaint. It is stated, inter alia, in paragraph 4 as follows:-

"4. The Suit Schedule properties at item no.1 house property at Dharwar, item no.2 a site situated at Dharwar, item No.3 a house property consisting of ground and first floor situated at Palace Orchards at Bangalore, Item No.4, the fiat car and item No.5 the library worth rs.1 Lakh, were acquired by him (herein after referred to as "Suit Schedule Properties" for brevity). They are self acquired properties, originally belonged to Late R.M. Patil S/o Marigowda."

The answer to this pleading is found in paragraph 6 of the appellant's Written Statement, which reads as follows: -

"6. This defendant submits that the allegations made in paragraphs 2 to 8 of the plaint is admitted."

20. Thus, the specific allegation that the plaint schedule properties were self-acquired properties of R.M. Patil, was not only not denied but it is admitted expressly. If that were not enough the defendant when it came to adducing evidence has fortified the plaintiffs in their case that the plaint schedule properties were separate properties and he deposed as follows: -

"6. It is true that Ninganagowda and his children are not concerned to the suit schedule property. It is true that suit schedule properties are the self acquired properties of R. M. Patil. The title deeds in respect of the suit schedule properties stand in the name of R.M.Patil. It is true that after the demise of my father, I gave an affidavit before the revenue authorities seeking chance of entries in the name of myself, my brothers, my mother and my sisters. It is true that the document which I am seeking now is the certified copy of the letter addresses by me to the Revenue Officer, Dharwad. The same is marked as Ex. P45. It is true that suit schedule Item No. 3 was allotted to my father by the CITB and my father paid the sale price towards the same. It is true that by obtaining loan my father constructed the house in the above said property. It is not true to suggest that my father discharged the above said debt out of joint earnings. We discharged the said debt in the year 1975…"

The learned counsel for the appellant made an attempt to persuade us to hold that the sentence that the properties were the self-acquired properties of his father may be viewed in context and isolated piece of deposition should not overwhelm a large body of deposition which exists otherwise. His deposition that Ningengowda and his children are not concerned to the suit property is fatal to the appellant case that their absence in the party array is fatal to the plaintiffs claim. It further establishes beyond doubt that the next sentence is an admission which cannot be said to be a mistake or capable of being explained away. We would not think that we should permit the appellant to do that. This is for the reason that the appellant had clearly admitted that the plaint schedule properties were the self-acquired properties which belonged to *Sh. R.M. Patil.* The appellant, admittedly, is an Advocate.

OUSTER

21. The next contention raised is one of ouster. In ***P. Lakshmi Reddy v. L. Lakshmi Reddy*, AIR 1957 SC 314** it is held inter alia 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*, 61 Ind App 78 at P 82 (AIR 1934 PC 23 at p.25) (A). 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, 27 Ind App 136 at p.140 (PC)(B). 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 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 derogation of the other co-heir's title. (See Corea V. Appuhamy, 1912 AC 230 (C). 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, AIR 1919 PC 44 at p. 47 (D) quotes, apparently with approval a passage from Culley v. Deod Taylerson, (1840) 3 P & D 539; 52 RR 566 (E) which indicates that such a situation may well lead to an inference of ouster "if other circumstances concur". (See also Govindrao v. Rajabai, AIR 1931 PC 48 (F) It may be further mentioned that it is well-settled that the burden of making out ouster is one the person claiming to displace the lawful title of a co-heir by his adverse possession."

22. In regard to ouster, we may also notice the following decision of this Court.

23. In ***Md. Mohammad Ali (dead) by lrs. v. Jagadish Kalita and Others*, (2004) 1 SCC 271** the court *inter alia* held as follows:

"31. In *Vidya Devi* v. *Prem Prakash* [(1995) 4 SCC 496] this Court upon referring to a large number of decisions observed: (SCC p. 505, paras 27-28)

"*27*. … It will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in *P. Lakshmi Reddy case* [*P. Lakshmi Reddy* v. *L. Lakshmi Reddy*, AIR 1957 SC 314] which has since been followed in *Mohd. Zainulabudeen* v. *Sayed Ahmed Mohideen* [(1990) 1 SCC 345].

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."

32. Yet again in *Darshan Singh* v. *Gujjar Singh* [(2002) 2 SCC 62] it is stated: (SCC pp. 65-66, para 7)

"It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers."

It has further been observed that: (SCC p. 66, para 9)

"*9*. In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

24. The possession of a co-owner however long it may be, hardly by itself, will constitute ouster. In the case of a co-owner, it is presumed that he possesses the property on behalf of the entire body of co-owners. Even non-participation of rent and profits by itself need not amount to ouster. The proof of the ingredients of adverse possession are undoubtedly indispensable even in a plea of ouster. However, there is the additional requirement in the case of ouster that the elements of adverse possession must be shown to have been made known to the co-owner. This is apparently for the reason that the possession of a co-owner is treated as possession of other co-owners. While it may be true that it may not be necessary to actually drive out the co-owner from the property as noticed in ***Mohd. Zainulabudeen (since deceased) by lrs. v. Sayed Ahmed Mohideen and Others*****, (1990) 1 SCC 345** mere continuance in the possession of a co-owner does not suffice to set up a plea of ouster. The possession of the co-owner will also be referable to lawful title. The possession of the appellant even of the ground floor of the building on the land in question, was entirely in accord with his right as a co-owner.

25. It is in this regard we may first notice the very nature of the plea taken by the appellant. It reads as follows: -

"10. It is submitted that the plaintiff No. 1 wrote a letter dated 20.06.1991 demanding partition of the suit schedule properties. This defendant replied on 29th June 1991 denying her claim in un-ambiguous terms. Thereafter the plaintiff No. 1 kept quite till the filing of the present suit. Thereafter it is submitted that the plaintiff No. 1 is ousted from the joint-family and she has no right to demand the partition by bringing the present suit.

It is submitted that being the position the plaintiff No. 1 is not in joint possession as alleged in the plaint. Therefore, the plaintiff No. 1 has to pay court fee under section 35(1) of the K.C.F. & S.V. Act, 1958. Similarly, the plaintiff No. 2 not being a member of the joint family she also has to pay the court fee under Section 35(1) of the K.C.F. & S.V. Act, 1958."

26. Therefore, the appellant has taken up the plea curiously that in view of the correspondence between the first plaintiff and the appellant and the delay with which the suit was filed, the first plaintiff had no right to demand the partition. This stand is further fortified by the prayer in the written statement that the appellant may be allotted 1/4th share which means appellant intended to exclude by the plea of ouster only the first plaintiff.

We are afraid that a plea by which a co-owner seeks to only partially oust one co-owner as such does not commend itself to us. As pointed out by Mr. S. N. Bhat, learned senior counsel for the appellant the other co-owners do not dispute the title of the first plaintiff. The appellant curiously does set up exclusive title in himself as he is claiming 1/4th share thereby admitting the title of the other four siblings. The inconsistency and the dichotomy undermines the case of ouster as one of the body of co-owners cannot oust another whose title is not disputed by others and, what is more, their title is admitted by the co-owner, who sets up a plea of ouster. In such circumstances, we do not think that even the plea is one which is tenable in law. That apart what is actually relied on is a letter which is the reply of the appellant to the letter sent by the Ist plaintiff. A letter dated 20.06.1991 is written by the first plaintiff to the appellant and the reply which is the sheet anchor of the appellant's case is dated 20.06.1991. The latter letter, inter alia, reads as follows: -

"4. It is indeed the height of your (if I may say so your husband's) imagination to suddenly wake up to say that you entitled to a share in the joint family properties. As your are very well aware, the three properties referred to in your notice all along formed part of the H.U.F. properties of our father and his elder brother Sri N.M. Patil. You are very well aware of the nucleus for all the acquisitions of the property was the H.U.F. lands measuring 44 acres situated in vasan village in Nargud Taluk of Dharwar District. Though members of the family late acquired properties in their own names, our late father and uncle all along treated the properties as family properties. There has been no severance of the H.U.F. status at any time. Even during the lifetime of our late father at no point of time did he chose to see severance and all along treated the three properties as part of the H.U.F. properties. You are very well aware of this factual position.

5. As you are aware, the family has spent large amounts to settle you in life and more particularly for your marriage and gifted you with jewels and other articles during the marriage to the best of the family's abilities. Yet, in 1972 you, as was your want, demanded from our father, a car for your husband who was then only a Munsiff and yet had adopted ways of aristocracy which he could ill afford and our late father at great strain

to himself gifted you with a Flat Car. Again, soon after our father's death in 1977, you had the heart and face to demand a partition even when the family was still in mourning and our mother to satiate your greed again gave you her jewels to the exclusion of your only other sister Smt. Kasha, who is happily settled now in the United Stated. The demand for your so-called share which you had raised, through you are not entitled to the same, in the interest of peace, you were given all the jewels of our mother. As you are aware none of the brothers raised any objections to the same at any time and your agreed to accept the jewels in full and final settlement and not to repeat any further claims. It is strange that 14 years after our father's death you not chose to unsettled your settled claim.

7. Hence, there is no question of your being entitled to any partition. You are not entitled to any share in the properties as claimed. At any rate, you have been expressly excluded after the death of our father by the gift of mother's jewels to you in satisfaction of your claims, though not sustainable."

27. The very essence of adverse possession and therefore ouster lies in a party setting up a hostile title in himself. The possession of a co-owner is ordinarily on his behalf and also on behalf of the entire body of the co-owners. In the case of an ouster, the co-owner must indeed have the hostile animus. He must assert a title which is not referable to lawful title. Though the learned counsel for the appellant points out that this possession started prior to 1977 in that the appellant was residing with his father in item No.3 house from somewhere in the early seventies and he continued to reside after his father's death in the year 1977, when Shri R.M. Patil died in the year 1977, his possession in 1977, was clearly referable to lawful title as a co-owner entitled to inherit under Section 8 of the Hindu Succession Act, 1956. Obviously, he cannot be permitted to set up adverse possession or ouster in the year 1977. As far as the letter which is addressed in 1991 and reply to the letter and suit being beyond 12 years from the date of his reply, again we are of the view that he cannot be permitted to succeed for more reasons than one. In the first place, we have already noticed that this is a case where he is setting up ouster qua only one of the co-owners. Secondly, as it turns out contrary to the submission of the appellant, Mr. S. N. Bhat, learned senior counsel for the respondents points out the appellant was not in exclusive possession of the entire property. The appellant was in possession as even found by the Trial Court only of the Ground Floor. The second plaintiff is found to be in possession of the First Floor and what is more a decree stands granted by the Trial Court in her favour. In fact, even the perusal of the letter relied upon by him in the year 1991 which we have referred to, does not as such reflect the assertion of the hostile title different from that of a co-owner. In substance, what is sought to be stated is that the first plaintiff who is his sister had been given property including jewellery and therefore she does

not have a right. He does not proclaim himself to be the absolute owner of the property in his own right.

28. We may additionally notice that the Trial Court has also framed an additional issue No.2, on 'partial ouster' as it were and answered the issue against the appellant. Therefore, this is a case where the appellant has against him concurrent findings of two Courts and in this appeal which is generated by special leave, we are not released from the trammels of Article 136 in the matter of overturning such findings and we cannot certainly classify the findings in this regard in the totality of facts to be such a finding that warrants it being upset.

EXCLUSION OF ITEMS 2 AND 3 SCHEDULED IN WRITTEN STATEMENT. ARE THEY SEPARATE PROPERTIES OF THE SECOND DEFENDANT?

29. The next question which is raised relates to the non-inclusion of the properties standing in the name of second defendant that is item Nos.2 and 3 in the schedule to the written statement of the appellant. As far as this contention is concerned, again we do not think that there is merit in the case of the appellant. Admittedly, the second defendant was educated and became an Engineer. He was employed. What really has weighed with the Trial Court is the fact that in view of departure from his obligations under a bond, a suit was filed and decreed against the second defendant who discharged his liability under D-75 dated 17.08.1982 in a sum of Rs.11,330/-. We must notice that item No.2 scheduled in the written statement was purchased in the year 1976. The property consists of a plot and it was allotted to the second defendant for a total sum of Rs.9,800/- in the year 1976. D-75 is in the year 1982. Defendant No.2 has given evidence about the fact that the amounts have been paid by him from his own resources by virtue of his employment in India. It is not as if amount was paid in lumpsum. As regards item No.3 in the written statement, it is a flat purchased in the year 1998. This is much after D-75 which is dated 17.08.1982. The 2nd defendant has deposed of working abroad. The 2nd defendant has spoken about item No.3 being purchased for a sum of Rs.16 lakhs. Having regard to his qualifications, we do not think that the appellant can fault the reversal of the finding though it may be true that the High Court has not dealt with it in a more elaborate manner. In this regard, we may notice that the Trial Court has proceeded on the basis that since *Sh. R.M. Patil* was earning as a successful lawyer and he became a successful Politician as well, the second defendant being a coparcener, item 2 and 3 should also be included. Even

proceeding on the basis that there was a joint family consisting of *Sh. R. M. Patil* and his sons, it is not the law that a co-owner cannot acquire his own independent or separate properties. In such circumstances, we find there is no merit in this argument as well.

IS THE IMPUGNED JUDGMENT INEQUITABLE?

30. Coming to the equity of the matters, the complaint of the appellant is that the appellant is a Senior Citizen and aged about 80 years and while the other siblings have their own properties and only the appellant would be most adversely affected and he will be on the streets. We must notice that the appeals are only maintained against the preliminary decree by which shares have been declared. Therefore, we do not see any reason for us to go into the question about the allotment of properties which is a matter to be gone into in the final decree proceedings. As to what is to be actual division of the properties, it is for the appellant to raise such contentions as are available in this regard.

31. Therefore, we see no merit in the appeals. The appeals will stand dismissed. Parties are left to bear their respective costs.

32. Pending application(s), if any, stands disposed of.
