

as Ex.DW6/A and the endorsement of Sub Registrar as Ex.DW6/B. The witness also stood firm the test of cross examination. Dilawar Singh stepped into witness box as DW7 and tendered his duly sworn affidavit as Ex.DW7/A wherein he reiterated the contents of written statement in totality and also proved *jambandi* for the year 2000-01 Ex.D7 and Mutation No.2379 as Mark A. He also admitted that his grand father Khushia died on 07.01.2004 and was more than 100 years of age. The execution of Will has been proved by overwhelming evidence.

13. Learned counsel for the appellant has contended that Khushia was more than 100 years of age and therefore, he should be presumed to be mentally unfit and feeble in understanding things. No medical evidence has come forth on record at the instance of the plaintiff, indicating that the mental state of health of Khushia was not good, rather, as per evidence of defendants particularly DW7 Dilawar Singh, Khushia was of sound health and he died after about 3 years of execution of Will in question. Will is meant to be dislodge someone from natural course of succession in respect of property. The ground of disinheritance of the appellant cannot be treated to be a ground to presume that the Will is shrouded by any suspicious circumstance. Reference can be made to ***Mahesh Kumar (dead) through LRs Vs. Vinod Kumar 2012(2) RCR (Civil) 493.***

14. Since Diwan Chand has pre-deceased Khushia, therefore, Section 109 of Indian Succession Act will override Section 105 of the Act and the bequest shall not lapse but shall take effect as if the death of the legatee has happened immediately after the death of the testator. No substantial question of law has been pleaded nor the same is found to have been involved in view of proved facts on record.

15. The judgments and decrees of the Courts below are neither found to be the result of misreading of evidence nor having suffered with any perversity of any kind. The findings recorded by the Courts below are based on proper appreciation of evidence. Re-appreciation in second appeal is not permissible. Resultantly, I do not find any substance in this appeal and the same is accordingly dismissed in limine.

Appeal dismissed.

PUNJAB AND HARYANA HIGH COURT

Before: Amit Rawal, J.

RSA No.2155 of 2009 (O&M)

Decided on: 02.11.2015

Hukam Singh and others

Appellants

Versus

M/s Rajdhani Land and Finance and others

Respondents

Present: Mr. Vikas Behl, Senior Advocate with Mr. N.K.Vadhera,
Advocate for the appellants.

Mr. Arun Jain, Senior Advocate with Mr. Kushagra
Mahajan, Advocate for the respondents.

A. Limitation Act, 1963 (36 of 1963), Section 27 -- Adverse possession – If plea of adverse possession is raised, it must be hostile possession, denial and repudiation of other co-owners and same should be established by convincing evidence -- Mere possession of a co-sharer cannot assert as a right and claim ouster -- Plaintiff have not been able to deny the specific averments made in the written statement – If pleadings have not been effectively denied, the party asserting a particular fact, has to discharge the burden by leading direct and cogent evidence – Defendant was held to be exclusive possession of the suit land and was also held to be co-sharer in the suit land to the extent of 1/4th share – It is sufficient to prove the plea of ouster -- Plaintiff was in the knowledge of the aforementioned fact but did not make any effort to take possession throughout almost for 12 years – 25 houses existing in aforementioned khasra number -- Ouster by way of adverse possession vis-à-vis other cosharers proved.

(Para 21-27)

B. Code of Civil Procedure, 1908 (V of 1908), Order 1 Rule 9 -- Suit for partition – Non-joinder of necessary party -- All co-sharers were not made party – Effect of -- Contention that in a suit for partition, only head of the family is to be impleaded as party is not acceptable -- Suit is not maintainable on the ground of non-joinder of proper and necessary party -- It was obligatory on the part of the plaintiff to ascertain the ownership of the respective shares while filing the suit for partition, and then claim separate possession by way of partition through metes and bounds.

(Para 31)

Cases referred:

1. Gulzari vs. Zile Singh 2014(1) PLR 380.
2. Yashpal and others vs. Babu Manohar Sharma 1991(1) CurLJ 95.
3. Jahangirji and others vs. K. Kumar 2012(3) CivC 783.
4. Kanakarathanammai vs. V.S.Loganatha Mudaliar and another 1965 AIR (SC) 271.
5. Dhan Kaur (Died) through LRs vs. Shamsher Singh and others 2005(3) R.C.R. (Civil) 672.
6. Narendra Kante vs. Anuradha Kante and others 2010(2) SCC 77.
7. Sajjadanashin Sayed Md. B.E.Edr (D) by LRs. vs. Musa Dadabhai Ummer and others 2000(1) CivCC 712.
8. Isher Singh vs. Sarwan Singh and others 1965 AIR (SC) 948.
9. Des Raj and others vs. Bhagat Ram (Dead) by LRs and others 2007(2) R.C.R. (Civil) 581.
10. Ishwardas vs. The State of M.P and others 1979 AIR (SC) 551.
11. Amarendra Komalam and another vs. Usha Sinha and another 2005(3) Civil Court Cases 228 (S.C.).
12. Laxmishankar Harishankar Bhatt vs. Vashram Vasta 1994(1) Civil Court Cases 437 (S.C.).
13. Lal Singh vs. Ajit Singh and another 2009(3) R.C.R.(Civil) 650.

14. Govindammal vs. R.Perumal Chettiar and others 2007(3) R.C.R.(Civil) 569.
15. Md. Mohammad Ali (Dead) by LRs vs. Sri Jagadish Kalita and others 2004 (1) R.C.R.(Civil) 682.
16. M. Arthur Paul Ratna Raju vs. Gudese Garaline Augusta Bhushanabai 1999(2) R.C.R.(Civil) 577.
17. Balagouda Alagouda Patil and others vs. Babasaheb Ramagouda Patil 1999(1) Civil Court Cases 489 (Karnataka).
18. Chalasani Seetharama Swamy vs. Chintapalli Ramachandra Rao 1994(2) Civil Court Cases 663 (A.P.).
19. Sunkamma vs. H. Ramayya Reddy & others 2003 (3) Civil Court Cases 589 (Karnataka).
20. Ajmer Singh vs. Dharam Singh 2006(2) R.C.R.(Civil) 541.

JUDGMENT

AMIT RAWAL J. –

1. This Regular Second Appeal is at the instance of the defendants/legal representatives against the judgment and decree dated 27.02.2009 of the lower Appellate Court, whereby, the suit of the respondent-plaintiff seeking possession by way of partition, has been decreed. In essence, judgment and decree dated 16.11.2006 of the Additional Civil Judge (Senior Division), Faridabad, dismissing the suit, has been reversed.

2. The following substantial questions of law, in my opinion, which are required to be determined by this Court, arise:-

- i) *Whether without there being any pleadings qua res judicata and estoppel and without any issue being framed, the lower Appellate Court could hold that the findings of the earlier suit would operate as estoppels against the defendant-appellants?*
- ii) *Whether the defendant-appellants, being cosharers, had become owners by way of adverse possession by proving ouster of other co-sharers?*
- iii) *Whether the suit filed by plaintiff-respondent No.1 was beyond limitation?*
- iv) *Whether the suit of plaintiff-respondent No.1 was bad for mis-joinder and non-joinder of necessary parties?*

3. In order to answer the aforementioned substantial questions of law, it would be apt to give little preface of the matter.

4. Respondent/plaintiff–M/s Rajdhani Land & Finance through Madhu Gupta – Sole Proprietor, sought the possession of the suit land measuring 1 bigha 6 biswas pukhta to the extent of 3/4th share comprised in khasra no.1644, khata No.498, khewat no.217 situated in village Anangpur, Tehsil and District Faridabad by way of partition through metes and bounds. Plaintiff was recorded as owner to the extent of ½ share of the suit land as per jamabandi for the year 1976-77 and aks-sijra. Besides this, he purchased 1/4th share of the suit land from Jagmal Singh son of Shri Sibba vide registered sale deed

dated 11.09.1972, who was also recorded as owner/co-sharer of suit land to the extent of 1/4th share, thus, plaintiff became owner/co-sharer in possession of the suit land to the extent of 3/4th share and the defendants were owners/co-sharers to the extent of 1/4th share only.

5. It has been further averred that though quite some time back, the suit land had come within abadi of village Anangpur and is surrounded by residential and commercial establishment and thus, has been converted into urban property. Prior to the filing of aforementioned suit on 02.12.1997, a similar suit seeking partition of the land was filed against the father of the defendants, namely, Devi Sahai, but since he had already died, therefore, after suffering a statement that he wanted to withdraw the suit with liberty to file fresh one vide order dated 14.10.1997 had withdrawn the same but no liberty was granted to file fresh suit.

6. The aforementioned suit was contested by the defendants by filing joint written statement raising as many as 14 preliminary objections, vis-à-vis, non-maintainability, having been filed with a motive to harass the defendants being counter blast to earlier suit bearing No.435 of 1978 filed on 14.09.1978, which was decreed on 25.05.1984 in favour of Devi Sahai and appeal filed by the plaintiff was dismissed by the then District Judge, Faridabad on 19.10.1985. The suit was hopelessly barred by time as the plaintiff did not have any interest, title, share/possession in khasra No.1644 and the houses and shops constructed on the said khasra number was in the knowledge of the plaintiff from 20.10.1985. The entries in the jamabandi for the year 1976-77 and khasra No.1644, had already been declared wrong, null and void vide judgment and decree dated 25.05.1984.

7. It was also stated that S/Sh. Devi Sahai, Jagmal, Khem Chand and Ram Sarup, father of Parkash, Gian Chand and Mal Chand were joint owners in equal shares of land bearing khewat No.217 khatuni no.498 khasra no.1644(1-6), 1645(1-7), 1646(1-0), 1647(0-10), 1650(0-18), 1651(1-0) and 1652(1-3) total 8 bighas 2 biswas pukhta before 1939-40. The other co-shares, namely, Jagmal, Khem Chand and Ram Swarup, father of Shri Parkash Gian Chand, Mal Chand excluded khasra no.1644 (1 bigha 6 biswas pukhta) from the joint holding and exclusively gave it to Sh. Devi Sahai father of the defendant before 1939-40 and since then the said khasra No.1644 was exclusively in possession of late Shri Devi Sahai and after his death, in possession of defendants. In essence, the aforementioned khasra number was in possession of Devi Sahai before his death and the defendants, after his death, have become the exclusive owners. After his death, the defendants raised the construction, on the said khasra number and not on the land lying vacant, except 2 biswas of land, which was covered in public road, yet the respondent-plaintiff had purchased the shares of the aforementioned persons and claimed 3/4th share. It was further stated that the defendants were not bound by alleged sale deed executed in favour of the respondent-plaintiff by other co-sharers in respect of khasra number 1644.

8. The other khasra numbers 1645 to 1652 had already been acquired by the Haryana Urban Development Authority (HUDA) for the establishment of Sector 37, Faridabad and M/s Rajdhani Land and Finance had taken away the shares of compensation of late Shri Jagmal, Khem Chand, Parkash, Gian Chand and Mal Chand.

9. Narinder Singh had transferred his share in khasra no.1644 to his sons, who were not arrayed as party. The total area measuring 1 bigha 6 biswas of the said khasra No.1644, though was acquired by the Land Acquisition Collector, HUDA but was got released by filing civil writ petition.

10. The aforementioned averments were controverted by filing replication. However, the story with regard to raising of construction and as well as receiving of compensation qua other khasra numbers was not emphatically denied except by stating therein that contents of paragraph 11 of the written statement were wrong and denied. Even paragraph 7 of the written statement was not emphatically denied, except in a vague and evasive manner. In other words, the alleged averment with regard to exclusive owner w.e.f. 25.10.1985 was not emphatically denied, much less, explained.

11. Since the parties were at variance, the trial Court, on the basis of the aforementioned averments, framed eight issues, including the issue of relief.

12. The respondent-plaintiff, namely, Madhu Sudan Gupta, examined himself as PW-1 and PW-2-Rajiv Gupta and tendered documents Ex.P4 to Ex.P6 whereas, defendants placed on record documents Ex.D1 to Ex.D15 and examined as many as five witnesses.

13. The trial Court, on the basis of the aforementioned evidence, found that the suit was hopelessly barred by limitation by holding, by taking aid of provisions of Section 3 of the Limitation Act, taking into consideration judgment dated 19.10.1985, whereby, the appeal, filed against judgment and decree rendered in the suit bearing No.435 of 1978 titled as Devi Sahai and others Versus M/s Rajdhani Land & Finance and others, was dismissed, whereas, present suit had been filed in December, 1997, i.e., after a lapse of 12 years, i.e., on 20.10.1997 and also non-suited the plaintiff on the ground that suit was bad for non-joinder of necessary parties as sons of Narinder Singh, on the basis of the transfer of share of Narinder Singh in khasra no.1644 acquired title and share in the property, were not impleaded as parties.

14. The lower Appellate Court reversed the finding of the trial Court. In essence, decreed the suit.

15. Mr. Vikas Behl, learned Senior Advocate assisted by Mr.N.K.Vadehra, Advocate, in support of his grounds of appeal, raised the following submissions to urge that judgment and decree of the lower Appellate Court is not only perverse but erroneous:-

- i) The trial Court has erroneously held that the defendants could not take the aid of previous judgment and decree whereby, the suit was decreed in favour of Devi Sahai, inasmuch as in the said judgment, there was a finding that Devi Sahai was owner/co-sharer in the suit land to the extent of $\frac{1}{2}$ share and therefore, the appellant-defendants have been prevented to object to the application doctrine of akin to *res judicata*.
- ii) The suit was exclusively time barred. In essence, limitation cannot be allowed to be arrested. Once it was in the notice of the respondent-plaintiff that appellant-defendants were in continuous, open and hostile possession from 25.10.1985, no steps were taken to seek partition. In essence, even assuming for the sake of arguments, the finding (qua co-sharers) in earlier

litigation would be hit by res judicata, but the fact remains that ouster of other co-sharers have been proved and therefore, the status of the respondent-plaintiff seeking partition in the month of December 1997 was no longer of co-sharer, in essence, appellant-defendants have become owners by way of adverse possession.

- 3) The respondent-plaintiff cannot be permitted to take the plea of res judicata as in order to prove and take the aid of provisions, pleadings of the previously instituted suit are an essential requirement of law to form an opinion, whether the matter in issue in the previously instituted/decided suit was directly and substantially applied in the present suit or not.
- 4) The appellant-defendants have never taken the compensation vis-à-vis acquisition of land of other khasra numbers except khasra number 1644 and this fact has been admitted by PW1-Madan Gupta Sudan. Neither the respondent-plaintiff challenged the notification acquiring the land vis-à-vis khasra no.1644 which was pursued by the defendants by filing writ petition bearing No.3387 of 1987 and the same was released from the acquisition as per the decision rendered vide order dated 10.07.2001 (Annexure A-3).
- 5) The trial Court did not grant the permission for withdrawal of the previously instituted suit and therefore, in the absence of the permission, the present suit for partition was not maintainable. The previous suit for partition was filed on 28.04.1997 and the same was withdrawn on 14.10.1997, therefore, the provisions of Order 23 Rules 1, 3 and 4 CPC would come into play. In support of his aforesaid contention, Mr. Behl, cited the judgments of this Court in **Gulzari vs. Zile Singh 2014(1) PLR 380** and **Yashpal and others vs. Babu Manohar Sharma 1991(1) CurLJ 95**.
- 6) Children of Narinder Singh, who had transferred their shares vide Ex.D10 dated 10.8.1994, have neither challenged the same nor impleaded as party. In support of his argument, he relied upon the following judgments of Hon'ble Andhra Pradesh High Court and Supreme Court of India:-

- a) **Jahangirji and others vs. K. Kumar 2012(3) CivC 783;**
- b) **Kanakarathanammai vs. V.S.Loganatha Mudaliar and another 1965 AIR (SC) 271.**

7). In the judgment and decree dated 20.05.1984, it has unequivocally been admitted that Devi Sahai was in exclusive possession of the entire khasra no.1644, total land measuring 1 bigha 6 biswas and, thus, finding that Devi Sahai was co-sharer in the suit land to the extent of ½ share cannot be read against the defendants as the same was obituary. In support of his aforesaid argument, he relied upon the following judgments of various Courts:-

- a) **Dhan Kaur (Died) through LRs vs. Shamsher Singh and others 2005(3) R.C.R. (Civil) 672**

- b) **Narendra Kante vs. Anuradha Kante and others 2010(2) SCC 77.**
- c) **Sajjadanashin Sayed Md. B.E.Edr (D) by LRs. vs. Musa Dadabhai Ummer and others 2000(1) CivCC 712;**
- d) **Isher Singh vs. Sarwan Singh and others 1965 AIR (SC) 948.**

It is settled law that co-owner can claim the plea of adverse possession by proving ouster. In support of the aforementioned argument, he relied upon the judgment of the Hon'ble Supreme Court in **Des Raj and others vs. Bhagat Ram (Dead) by LRs and others 2007(2) R.C.R. (Civil) 581.**

16. Mr. Arun Jain, learned Senior Advocate assisted by Mr.Kushagra Mahajan, Advocate raised the following submissions:-

- i) in the judgment and decree dated 20.05.1984, respondent-plaintiff had 3/4th share and Devi Sahai 1/4th share. Vide Ex.D2, Devi Sahai, categorically deposed that he was co-sharer and not in exclusive possession.
- ii) There is no limitation to seek partition.
- iii) Defendants cannot be permitted to raise the plea of ownership regarding suit land by setting up plea of ouster for the reason that in the present judgment, there is already a finding that Devi Sahai was co-sharer to the extent of ½ share. In support of his aforementioned arguments, relied upon the following judgments:-
 - a) **Ishwardas vs. The State of M.P and others 1979 AIR (SC) 551;**
 - b) **Amarendra Komalam and another vs. Usha Sinha and another 2005(3) Civil Court Cases 228 (S.C.) and**
 - c) **Laxmishankar Harishankar Bhatt vs. Vashram Vasta 1994(1) Civil Court Cases 437 (S.C.)**

In order to constitute a matter with regard to res judicata, certain conditions are required to be satisfied:-

- A). The matter directly and substantially in issue in the subsequent suit for issue must be the same matter which was directly and substantially in issue in the former suit;
- B) The former suit must have been a suit between the same parties or between parties under whom they or any of them has a claim;
- C) The parties must have litigated under the same title in the former suit;
- D) The Court, which decided the former suit, must be a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised; and
- E) The matter directly and substantially in *issue* in the subsequent suit must have been heard and finally decided

by the Court in the first suit.

- F) Since all these factors are completely vague in the present suit, therefore, the appellant-defendants are estopped to raise plea. The suit is not hit by the provisions of Order 23 Rules 1, 3 and 4 CPC, on the ground that while withdrawing the suit, the respondent-plaintiff had categorically stated that he intends to withdraw the suit with liberty to file fresh one but the Court had not granted the liberty to file a fresh suit. In support of this contention, relied upon the judgment rendered by this Court in **Lal Singh vs. Ajit Singh and another 2009(3) R.C.R.(Civil) 650.**
- G) The defendants are prevented to take plea of ouster as they have failed to prove that the possession was hostile, open and animus possendi as the pleadings, as to when and from which particular date the possession has become adverse qua other co-sharers are conspicuously wanting and in support of his contention, relied upon the following judgments:-
- i) **Govindammal vs. R.Perumal Chettiar and others 2007(3) R.C.R.(Civil) 569;**
 - ii) **Md. Mohammad Ali (Dead) by LRs vs. Sri Jagadish Kalita and others 2004(1) R.C.R.(Civil) 682 and**
 - iii) **M. Arthur Paul Ratna Raju vs. Gudese Garaline Augusta Bhushanabai 1999(2) R.C.R.(Civil) 577.**
- H) The suit cannot be said to be dismissed for want of impleadment of proper and necessary parties, i.e., sons of Narinder Singh as in a suit for partition, only head of family are impleaded and thus, Narinder Singh had been impleaded.

In support of his aforementioned contention, he relied upon the following case law:-

- i) **Balagouda Alagouda Patil and others vs. Babasaheb Ramagouda Patil 1999(1) Civil Court Cases 489 (Karnataka);**
- ii) **Chalasani Seetharama Swamy vs. Chintapalli Ramachandra Rao 1994(2) Civil Court Cases 663 (A.P.);**
- iii) **Sunkamma vs. H. Ramayya Reddy & others 2003 (3) Civil Court Cases 589 (Karnataka).**

Thus, he submits that the aforesaid substantial questions of law arise, much less, there is no illegality and perversity in the finding rendered by the lower Appellate Court and therefore, appeal deserves to be dismissed.

17. Mr. Behl, in rebuttal, submits that the lower Appellate Court has not reversed the finding rendered by the trial Court to the fact that other co-owners had surrendered/excluded khasra No.1644 (1 bigha 6 biswas pukhta) from the joint holding and exclusively gave it to Shri Devi Sahai, father of defendants before 1939-40.

18. It is settled law that as per provisions of Section 123 of the Punjab Land Revenue Act 1887, where the parties failed to seek affirmation of private partition, much less, parties failed to do so, if otherwise, had been proved on record. The said plea cannot be negated only for the reasons that revenue record does not reflect the factum of private partition.

19. In support of his aforesaid contention, relied upon the judgment of judgment of this Court in **Ajmer Singh vs. Dharam Singh 2006(2) R.C.R.(Civil) 541.**

20. The finding rendered in the judgment and decree dated 20.05.1984, vis-à-vis ownership cannot be taken as res judicata. The respondent-plaintiff has been failed to deny the finding rendered in paragraphs 7 and 12 with regard to setting up of the date of adverse possession and also drawn attention of this Court to paragraphs 31 and 35 of the aforementioned judgment and decree to contend that the suit is *ex facie* was time barred as Devi Sahai was already exclusive owner of khasra No.1644.

21. I have heard learned counsel for the parties and appraised the impugned judgments and decrees of the Courts below, as well as, record of the lower Appellate Court, case law cited and am of the view that appeal deserved to be allowed.

22. Defendants in paragraphs 7 and 11 of the written statement vehemently set up a plea of adverse possession that Shri Devi Sahai before his death and the defendants after his death were in continuous, hostile possession of the land w.e.f. 20.10.1985 and raised construction. It would be apt to reproduce paragraphs 7 and 11 of the preliminary objections:-

"7. That the suit is hopelessly barred by time. After the decision of the appeal on 19.10.1985 the defendants told to M/s Rajdhani Land & Finance that they have got no right, title or interest and share in khasra no.1644 situated in Anangpur Dairy, Haryana Border, Faridabad and they are the absolute owners and in possession of khasra No.1644 measuring 1 bigha 6 biswas pukhta situated in village Anangpur Dairy, Haryana Border, Faridabad and the houses and shops built/constructed on the said khasra number. This exclusion became known to M/s Rajdhani Land & Finance from 20.10.1985. According to law the suit for partition can be filed within 12 years from the date the exclusion became known to M/s Rajdhani Land & Finance i.e from 20th of October, 1985. The present suit has been filed by plaintiff according to the verification on the plaint on 20th of November, 1997 i.e after a period of more than 12 years from 20.10.1985.

11. That the land of khasra no. 1645 to 1652 has already been acquired by HUDA for the establishment of Sector 37, Faridabad and M/s Rajdhani Land and Finance has taken away the shares of compensation of late Shri Jagmal, Khem Chand, Parkash, Gian Chand and Mal Chand. On this ground also M/s Rajdhani Land and Finance have no right, title or interest."

Paragraphs 7 and 11 of the Replication read thus:-

"7. P.O No.7 is also wrong and denied. It is wrong to say that the suit is hopelessly barred by time. It is totally wrong to say that defendants ever told M/s Rajdhani Land & Finance that plaintiff has got no right, title or

interest and share in khasra No.1644 situated in Anangpur Dairy, Haryana Border. It is totally wrong to say that defendants are the absolute owners and in possession of khasra no.1644 measuring 1 bigha 6 biswas pukhta situated in village Anangpur Dairy, Haryana Border, Faridabad. It is totally wrong to say that defendants have ever become exclusive owners of the land in suit, as alleged. It is also wrong to say that said exclusion has ever become known to the plaintiff as alleged by the defendants. It is also wrong to say that the suit is time-barred.

11. P.O.No.11 is also wrong and denied."

23. There is no dispute to the ratio decidendi culled out by the Hon'ble Supreme Court and by other Courts in order to prove the adverse possession, it is essential and necessary to ascertain whether such plea was raised and if so raised, there must be hostile possession, denial and repudiation of other co-owners and same should be established by convincing evidence. In essence, mere possession of a co-sharer cannot assert as a right and claim ouster. The respondent-plaintiff have not been able to deny the specific averments made in the written statement, rather reply has been evasive and vague.

24. It is settled law that where pleadings have not been effectively denied, the party asserting a particular fact, has to discharge the burden by leading direct and cogent evidence, but however, in the instant case, it has unequivocally admitted that Devi Sahai was in exclusive possession of the suit land w.e.f. 20.10.1985, whereas, the instant suit had been filed in December, 1997. The appellant-defendants have been in continuous possession of the entire khasra No.1644 measuring 1 bigha 6 biswas and this fact has been noticed by the trial Court in the judgment and decree dated 25.05.1984 (Ex.D2 and Ex.D3). The relevant paragraphs 16, 17, 31 and 35 read thus:-

"16. Mahinder Singh son of plaintiff Devi Singh has appeared as PW5. He is also attorney of the plaintiff (Ex.P-8) Devi Sahai. He had deposed that earlier khasra number 1644 to 1652 were joint of the co-sharers including his father but now khasra no.1644 in exclusive possession of his father. At lease the parties are none in aspect the nature of the property as being, joint at one point of time. They also not at issue with the respect to the share held by the co-sharers. It is admitted that defendant No.4, plaintiff and defendant No.2 were having 1/4th share each and that defendants No.5 to 7 were having 1/4th each are jointly in the total land. The case of the plaintiff is that in 1939 a portion took place wherein in the land in suit in addition to khasra no.1652 come to be in his exclusive possession as owners. So it has been stated by Mahinder Singh PW-5. It may be pointed here that the case of exclusive ownership resting with the plaintiffs as one plaintiff is only with respect of khasra no.1644 khasra no.1652 being in the exclusive in possession of the plaintiff has been introduced by Mahinder Singh PW-5 in his deposition.

17. However, he admits no writing regarding the aid partition was made and no such information was sent to the revenue authorities. He is also not having any personal knowledge of the partition and thus, his deposition in this regard is quite hearsay.

31. It is abundantly clear from the jamabandi is right from the year 1939-40 (Ex.P7) 1945-46 (Ex.P6) 1966-67 (Ex.P5) and 1961-62 (Ex.P4)

that the plaintiff continues to be in possession of the suit land exclusively though as a co-owner. No doubt the possession of the plaintiff enters for other co-sharers but it cannot be disputed and denied that the possession of the plaintiff in fact cannot be said to be possession in fact of other co-owner though this may mean possession of other co-sharer in law. It would also be evident from khasra girdawari in 1977-78 (Ex.P2) at a sudden change with regard to possession of the suit land is there. The impugned entry was so entered in jamabandi for the year 1976-77 (Ex.P1) from khasra girdhawari of kharif 1969 to Rabi 1970. The plaintiff is shown to be in exclusive possession of the suit land. It is however, categorically deposed by Manohar Lal Patwari Halqua PW-1 who had brought the relevant record that khasra girdhawari entries immediately before drawing of jamabandi for the year 1976-77 are in favour of plaintiff Devi Singh as co-sharer and that he has been shown to be in exclusive possession of the suit land. In these situation there is no material what so ever coming on record to show that how the change in the impugned khasra girdhawari Ex.P2 and jamabandi (Ex.P1) took place. This witness has however specifically deposed that there is no other on record on the file to show the basis of such change in the entries. No notice of the person already in possession is showing to have been issued, thus, adversely effecting the rights of the plaintiff prejudicating his case.

35. From the discussion as above, the plaintiff is held to be in exclusive possession of the suit land. He is also held to be a co-sharer in the suit land to the extent of 1/4th share in the suit land thus these issues are decided in favour of the plaintiff and against the defendants."

25. The aforementioned finding, in my view, is sufficient to prove the plea of ouster. The respondent-plaintiff was in the knowledge of the aforementioned fact but did not make any effort to take possession throughout almost for 12 years, but choose to file the suit for partition.

26. There is another aspect of the matter. It has been admitted by Madhu Sudan Gupta that he has taken possession with regard to other khasra numbers and not with regard to khasra No.1644. The acquisition of khasra number 1644 was challenged by the defendants and they succeeded in getting the land released vide order dated 10.07.2001 (Annexure A-3).

27. It is a matter of record that 25 houses existing in aforementioned khasra number. Thus, aforementioned facts, in my view, proved ouster by way of adverse possession vis-à-vis other cosharers.

28. No doubt, the pleadings of the previous litigation being not placed on record, which is essential requirement of law to take the aid to prove the plea of res judicata. From the perusal of the judgment, it is evident that Devi Sahai had been proved on record as co-sharer. Since I have already rendered a finding that respondent-plaintiffs have not taken any steps to take the possession of their shares right from the judgment and decree dated 25.05.1984 and the defendants have not only prove possession, but hostility and ouster which has been proved as construction over a period of time has been raised but the same was not objected to. Moreover, Devi Sahai had already been proved in exclusive possession.

29. Keeping in view the case law cited that plaintiff cannot be permitted to

take plea of res judicata, is hereby repelled and rejected. Devi Sahai, though as per the judgment and decree dated 25.05.1984, was held to be co-sharer to the extent of $\frac{1}{2}$ share, i.e., share has been converted in other share, i.e., $\frac{3}{4}$ of other cosharers/ owners has been converted in exclusive possession by efflux of time.

30. I am in agreement with the case law cited by Mr. Jain that, once the party while withdrawing the suit, had candidly stated that he wants to file afresh one and the said factum had not been noticed by the Court while granting such permission, subsequent suit had not been filed as per provisions of Section 23, Rules 1, 3 and 4 CPC as the permission is inherent and implied, therefore, the contention of Mr. Behl by relying upon the judgments in **Syed Mohd. Sallie Labbis's case (supra)** and **Bhagwan Singh's case (supra)**, is not applicable to the facts of the present case, is hereby repelled.

31. I am not in agreement with the contention of Mr. Jain, that in a suit for partition, only head of the family is to be impleaded as party. Once through Ex.D10, it has been proved on record, much less, objection was also taken, that respondent-plaintiff did not take any steps to implead sons of Narinder Singh, they acquired share in the aforementioned land. Therefore, in my view, the suit was not maintainable on the ground of non-joinder of proper and necessary party. The case law cited by Mr. Jain, would not apply to the facts and circumstances of the present case. It was obligatory on the part of the respondent-plaintiff to ascertain the ownership of the respective shares while filing the suit for partition, and then claim separate possession by way of partition through metes and bounds.

32. Defendants have been proved in possession of khasra No.1644 as per judgment and decree dated 25.05.1984 and the suit was filed in the year 1997 was barred by 12 years and few months.

33. I have already given a finding that defendants have been able to prove plea of adverse possession by proving ouster of respondent-plaintiff as gathered from the judgment and decree dated 25.05.1983 (Ex.D2 and Ex.D3), as well as direct and cogent evidence, i.e., revenue record Ex.D11, Ex.D13, Ex.D14.

34. The lower Appellate Court, in my view has not taken into consideration the aforementioned documentary evidence, much less, provisions of Article 65 of the Limitation Act, as well as, case law and judgment and decree dated 25.05.1984 (Ex.D2 and Ex.D3), wherein it has been held that defendants were in exclusive possession of khasra No.1644 since 1939, much less, w.e.f. 20.10.1985, therefore, in my view, the judgment and decree of the lower Appellate Court suffers from illegality, much less, perversity and the same is hereby set aside.

35. In view of what has been observed above, substantial questions of law (ii) and (iii) are answered in favour of the defendant-appellants and against them and (i) in favour of the respondent-plaintiff.

36. Accordingly, the appeal is allowed.

Appeal allowed.
