

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 13th OF FEBRUARY, 2023

MISC. PETITION No. 572 of 2020

BETWEEN:-

**SUBHANSHU SONI S/O SHRI SANTOSH KUMAR
SONI OCCUPATION: AGRICULTURIST R/O
BAJARIA MOHALLA RAJNAGAR TAH.
RAJNAGAR DISTT. CHHATARPUR M.P. (MADHYA
PRADESH)**

....PETITIONER

(BY SHRI J.L.SONI - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH THR.
THE SECRETARY REVENUE DEPT.
MANTRALAYA VALLABH BHAWAN,
BHOPAL M.P. (MADHYA PRADESH)**
- 2. THE COMMISSIONER SAGAR SATAR DVIN.
SAGAR (MADHYA PRADESH)**
- 3. THE SUB DIVISIONAL OFFICER
CHHATARPUR RAJNAGAR DISTT
CHHATARPUR (MADHYA PRADESH)**
- 4. THE TAHSILDAR TEHSILDAR RAJNAGAR
DISTT CHHATARPUR (MADHYA PRADESH)**
- 5. GOVERDHAN GUPTA S/O BADRI PRASAAD
GUPTA VILL. KHAJWA TAH. RAJNAGAR
(MADHYA PRADESH)**
- 6. MITHLA DEVI D/O LATE SHRI BADRI
PRASAAD GUPTA, W/O GOVIND GUPTA @
FADALI GUPTA VILL KHAJWA AT
PRESENT R/O BELATAL TEH. KUPAHADI**

DISTT MAHOBA (UTTAR PRADESH)

7. **HARISHANKAR S/O SHRI AJUDHYA PRASAD RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
8. **KAMTA PRASAD S/O KANHAIYALAL KACHHI RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
9. **BARELAL S/O DHURAM KACHHI RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
10. **KAUSA W/O LATE MURLIDHAR KACHHI RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
11. **SANTOSH S/O LATE MURLIDHAR KACHHI OCCUPATION: MINOR RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
12. **VIPIN S/O LATE MURLIDHAR KACHHI OCCUPATION: MINOR RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
13. **BRIJGOPAL S/O LATE MURLIDHAR KACHHI OCCUPATION: MINOR RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
14. **BHAGWANDAS S/O LATE MURLIDHAR KACHHI OCCUPATION: MINOR THR. THE MOTHER RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
15. **RAJU S/O LATE MURLIDHAR KACHHI RAJNAGAR TAH. RAJNAGAR DISTT CHHATARPUR (MADHYA PRADESH)**
16. **BSANTI D/O LATE MURLIDHAR KACHHI, W/O PYAELAL VILL. UDAYAPURA TAH. RAJNAGAR (MADHYA PRADESH)**
17. **CHINTA D/O LATE MURLIDHAR KACHHI,**

**W/O MANIO KACHI VILL. UDAYAPURA
TAH. RAJNAGAR (MADHYA PRADESH)**

18. **FULA W/O RAMES KACHI VILL.
KHARAUHI TAH. RAJNAGAR (MADHYA
PRADESH)**
19. **PHOOLWATI D/O MURLIDHAR KACHHI
W/O BALGORI KACHHI KHAJAWA TAH.
RAJNAGAR (MADHYA PRADESH)**

.....RESPONDENTS

**(RESPONDENTS NO.1 TO 4/STATE BY MS.SHANTI TIWARI – PANEL LAYWER)
(RESPONDENT NO.5 BY SHRI B.K.MISHRA - ADVOCATE)**

*This petition coming on for admission this day, the court passed
the following:*

ORDER

1. This petition under Article 227 of the Constitution of India has been filed against the order dated 16.1.2020 passed by Addl. Commissioner, Sagar Division Sagar in Case No.473/appeal/A-6/2016-17 by which the appeal filed by the petitioner has been rejected.
2. The undisputed facts are that Badri Prasad was the owner and had 1/16th share in Kharsa Nos.673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, total area 3.997 hectares situated in Mouja Rajnagar, District Chhattarpur.
3. After the death of Badri Prasad the names of respondent no.5 and his mother Kesharbai were recorded. Against the order of mutation, the respondent no.6 Mithiladevi filed an appeal before the S.D.O. Rajnagar, District Chhattarpur. During the pendency of appeal, the respondent no.6 alienated 1.373 hectares to the petitioner and on the basis of the said sale-deed, the name of the petitioner was recorded in the revenue records by order dated 29.3.2016. The respondent no.5

preferred an appeal before the court of S.D.O. Rajnagar which was allowed by order dated 31.1.2017 and mutation of name of the petitioner by order dated 29.3.2016 was set aside. The petitioner being aggrieved by the order passed by the S.D.O. preferred a Second Appeal which has been dismissed by impugned order dated 16.1.2020 passed by the Addl. Commissioner, Sagar Division, Sagar.

4. Challenging the impugned order it is submitted by the counsel for the petitioner that Mithila Devi is one of the legal representative of Badri Prasad and therefore, her name should also have been recorded in the revenue records. However, without any information to the respondent no.6, the names of the respondent no.5 and her mother Kesharbai were recorded in the revenue records. When respondent no.6 Mithila Devi came to know about the said illegal mutation, she preferred an appeal before the S.D.O. Rajnagar District Chhattarpur along with an application under section 5 of the Limitation Act. The said appeal was dismissed by S.D.O. Rajnagar on the ground of limitation. The respondent no.6 preferred an appeal which was allowed and the matter was remanded back. However, in the meanwhile, the name of the petitioner was mutated in the revenue records by Tahsildar by order dated 29.3.2016 as he purchased 1.373 hectares of land from respondent no.6. The said order was challenged by the respondent no.5 and the mutation of the petitioner was set aside and the order has also been affirmed by the Addl. Commissioner. It is submitted that the Addl. Commissioner committed a mistake by holding that respondent no.6 had no right or title after the death of her father Badri Prasad.

5. Per contra, the petition is vehemently opposed by counsel for the respondent no.5. It was submitted by Shri Mishra that father of the respondents no.5 and 6 had died in the year 2002. Appeal was filed after 13 long years. The respondent no.6 was aware of the factum of death of her father. She did not make any application for mutation of her name. Under these circumstances, it is clear that the claim made by the respondent no.6 is barred by limitation and, therefore, the S.D.O. as well as the Addl. Commissioner did not commit any mistake by setting aside the order dated 29.3.2016 passed by the Tahsildar Rajnagar, District Chhatarpur and the name of the petitioner was rightly deleted from the revenue records. It is submitted by the counsel for the respondent no.5 that the period of limitation is provided **under section 5 of the Limitation Act.** He was also unable to point out the ingredients of adverse possession. However he claimed that in case of undivided property of Joint Hindu family each and every co-sharer cannot be treated as in joint possession of the property in dispute. However, the counsel for the respondent no.5 was unable to throw light on the doctrine of *ouster*.
6. Heard learned counsel for the parties.
7. The arguments advanced by counsel by respondent no.5 were shocking. It was the argument by counsel for the respondent no.5 that period of limitation is provided under section 5 of the Limitation Act. Accordingly, he was directed to go through the Limitation Act to find out the provisions under which the period of limitation is provided for different proceedings. Shockingly, he was unable to find out the same. Ultimately, one of the Lawyer sitting in the Court assisted the counsel

for the respondent no.5 by informing that the period of limitation is provided under Articles. However, counsel for the respondent no.5 was all the time reading Article 65 as section 65.

8. Be that whatever it may be.
9. Since the period of limitation for recovery of possession is 12 years, therefore, counsel for the respondent no.5 was requested to argue on the question of adverse possession. Unfortunately, counsel for the respondent no.5 was unable to point out even a single ingredient of the doctrine of adverse possession. However, the counsel for the respondent no.5 was all the time insisting that his all arguments should be considered and should be dealt with. Therefore, he was further directed to argue on the issue as to whether each and every co-sharer of undivided joint Hindu family property can be treated to be in joint possession or not. His submission was that the actual possession has to be seen and not the constructive possession. Accordingly, the counsel for the respondent no.5 was directed to argue on the doctrine of *ouster* and to point out as to whether there is an element of *ouster* in the present case. The counsel for the respondent no.5 kept mum and was not in a position to argue that under what circumstances, the doctrine of *ouster* can be applied against the co-owner/co-sharer. Although this court was not inclined to highlight the level of arguments of counsel for the respondent no.5; but all the time he was insisting that his each and every argument should be considered.
10. The crux of the matter is that the respondent no.6 is the sister of the respondent no.5 and the property in dispute belonged to their father late Badri Prasad. It is also not in dispute that after the death of Badri

Prasad, name of respondent no.5 and his mother Kesharbai were recorded; but, the name of respondent no.6 was not recorded. It is well established principle of law that mutation entry will neither create nor extinguish any right or title. A mutation entry is not a document of title. Merely because the respondent no.6 did not take any step to get her name mutated would not deprive her from her title or share in the property in dispute. Furthermore, Article 65 of the Limitation Act would not apply to the undivided joint Hindu family property. It is well established principle of law that every co-sharer is deemed to be in constructive possession irrespective of the fact as to whether he is in actual possession or not unless and until it is successfully shown by the co-sharer that one of the co-sharer was ousted from the property in dispute or the property was partitioned. There cannot be any animus or hostile possession against a co-sharer. As respondent no.5 cannot claim that he had perfected his title by way of adverse possession, this court is of the considered opinion that the share of the respondent no.6 in the disputed land will never extinguish.

11. It is not the case of respondent no.5 that respondent no.6 was made a party to the mutation proceedings which were started after the death of Badri Prasad. Once the respondent no.6 was not noticed and was not made known about the mutation of name of respondent no.5 along with his mother Kesharbai and as respondent no.6 was living separately in her matrimonial house at a different place then her contention that she was not aware of non-mutation of her name in the revenue records cannot be said to be incorrect or false. Accordingly, the S.D.O.

Rajnagar committed material illegality by dismissing the appeal filed by the respondent no.6 as barred by limitation.

12. Furthermore, the Addl. Commissioner, Sagar Division Sagar has dismissed the appeal in the light of the judgment passed by the Supreme court in the case of **Prakash and others Vs. Phulavati and others**, reported in **(2016)2 SCC 36**, on the ground that since the father of the respondent no.6 had expired before 2005 therefore she had no right or title in the disputed property.
13. The Supreme Court in the case of **Vineeta Sharma Vs. Rakesh Sharma**, reported in **(2020)9 SCC 1**, has overruled the judgment passed by the Supreme Court in the case of Prakash (supra) and has held as under :-

“137. Resultantly, we answer the reference as under:

137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities.

137.2. The rights can be claimed by the daughter born earlier with effect from 9-9-2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9-9-2005.

137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such

female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

137.5. In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (*sic* effected) by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly”.

14. Thus the reasons assigned by the Addl. Commissioner, Sagar Division Sagar also do not hold the field.
15. No other argument is advanced by the counsel for the respondent no.5.
16. Since the respondent no.6 had a share in the property in dispute and as she has alienated 1.373 hectares of land to the petitioner therefore the Tahsildar had rightly recorded the name of the petitioner by order dated 29.3.2016. Accordingly, the order dated 31.1.2017 passed by S.D.O. Rajnagar District Chhattarpur in Case No.51/appeal/2015-16 and order dated 16.1.2020 passed by Addl. Commissionrt Sagar Division Sagar in appeal No.473/appeal/A-6/2016-17 are hereby **set aside**. The order dated 29.3.2016 passed by Tahsildar is restored to its original file.

17. With aforesaid observation the petition is **allowed** with cost of Rs.20,000/- to be deposited by the respondent no.5 in the Registry of this court within a period of one month from today.

(G.S. AHLUWALIA)
JUDGE

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