

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

BEFORE

**HON'BLE SHRI JUSTICE HIRDESH
ON THE 17th OF JANUARY, 2024**

SECOND APPEAL No. 247 of 2020

BETWEEN:-

1. **SIRAJUDDIN S/O SHRI KUTUBUDDIN, AGED ABOUT 56 YEARS, OCCUPATION: CULTIVATOR, VILLAGE JAINABAD, TAHSIL AND DISTT. BURHANPUR (MADHYA PRADESH)**
2. **SHARIFUDDIN S/O KUTUBUDDIN (DEAD)
SMT. AKBARI BEGUM W/O LATE SHARIFUDDIN,
AGED ABOUT 67 YEARS, OCCUPATION: HOUSEWIFE
VILLAGE JAINBAD TAH. AND DISTT. BURHANPUR
(MADHYA PRADESH)**
3. **JAINUDDIN S/O LATE SHARIFUDDIN, AGED ABOUT 48 YEARS, OCCUPATION: CULTIVATOR, VILLAGE JAINBAD TAH. AND DISTT. BURHANPUR (MADHYA PRADESH)**
4. **ALIMUDDIN @ BHURA S/O LATE SHARIFUDDIN,
AGED ABOUT 45 YEARS, OCCUPATION: CULTIVATOR
VILLAGE JAINBAD TAH. AND DISTT. BURHANPUR
(MADHYA PRADESH)**
5. **MUKHTARUDDIN, S/O LATE SHARIFUDDIN, AGED ABOUT 40 YEARS, OCCUPATION: CULTIVATOR, VILLAGE JAINBAD TAH. AND DISTT. BURHANPUR (MADHYA PRADESH)**
6. **SMT. GOURI W/O SHRI SHEIKH SHAFIQUE PATHAN,
AGED ABOUT 50 YEARS, OCCUPATION: HOUSEWIFE,
R/O NEAR KHAN SHAHWALI, NEAR RAILWAY
QUARTER, DISTRICT KHANDWA (MADHYA
PRADESH)**
7. **SALEEMUDDIN S/O SHRI KUTUBUDDIN, AGED ABOUT 52 YEARS, OCCUPATION: CULTIVATOR, R/O VILLAGE JAINABAD TAH. AND DISTT. BURHANPUR (MADHYA PRADESH)**
8. **AZIZUDDIN S/O SHRI KUTUBUDDIN, AGED ABOUT 51 YEARS, OCCUPATION: CULTIVATOR, R/O VILLAGE JAINABAD TAH. AND DISTT. BURHANPUR (MADHYA PRADESH)**

9. **MUNSHAF BEGUM W/O MAQBOOL HUSSAIN, D/O SHRI KUTUBUDDIN, AGED ABOUT 66 YEARS, OCCUPATION: CULTIVATOR, R/O ANDA BAZAR TAH. AND DISTRICT BURHANPUR (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI Z.M.SHAH - ADVOCATE)

AND

1. **SAIDANI BEGUM, WD/O LATE SHRI DILAWAR HUSSAIN, D/O SHRI NAZMUDDIN, AGED ABOUT 61 YEARS, R/O VILLAGE JAINABAD, TAHSIL AND DISTT. BURHANPUR (MADHYA PRADESH)**
2. **SHAHJAMANI BEGUM WD/O JALALUDDIN (DEAD) SALAUDDIN S/O JALAUDDIN, AGED ABOUT 45 YEARS, R/O VILLAGE JAINABAD TAHSIL AND DISTT. BURHANPUR (MADHYA PRADESH)**
3. **CHIRAGUDDIN S/O JALAUDDIN, AGED ABOUT 45 YEARS, VILLAGE JAINABAD TAHSIL AND DISTT. BURHANPUR (MADHYA PRADESH)**
4. **SHABBIR HUSSAIN S/O JALAUDDIN, AGED ABOUT 40 YEARS, VILLAGE JAINABAD TAHSIL AND DISTT. BURHANPUR (MADHYA PRADESH)**
5. **SALMA BAGUM W/O SHRI IBRAHIM PATHAN, R/O NOOR NAGAR, BEHIND STREET OF POST OFFICE, RAKHIYAL ROAD, NEAR TALAWADI, DISTRICT AHMEDABAD (GUJARAT)**
6. **ZAREENA BAGUM W/O SHRI NAZAM KHAN, RAKHYAL ROAD, NOOR NAGAR, NEAR STREET OF POST OFFICE, AHMEDABAD (GUJARAT)**
7. **AZGARI BEGUM WD/O SAIYED RASHEED, D/O NAZMUDDIN, AGED ABOUT 56 YEARS, VILLAGE JAINABAD TAHSIL AND DISTT. BURHANPUR (MADHYA PRADESH)**
8. **BIBI BEGUM W/O BAJUDDIN, D/O NAZMUDDIN, AGED ABOUT 53 YEARS, R/O NEAR KALI MASJID, NAYA MOHALLA, DISTRICT BURHANPUR (MADHYA PRADESH)**
9. **AKHTARI BEGUM W/O NAJEEM ALI (DEAD)
RUSTAM ALI S/O LATE NAJEEM ALI (DEAD)
THROUGH LRS.
ADIL S/O LATE NAJEEM ALI MUNSHI R/O**

**MACHHALI BAZAR DISTRICT BURHANPUR
(MADHYA PRADESH)**

10. **NADIR S/O LATE NAJEEM ALI MUNSHI, R/O
MACHHALI BAZAR, DISTRICT BURHANPUR
(MADHYA PRADESH)**
11. **KESAN S/O LATE NAJEEM ALI MUNSHI MACHHALI,
R/O MACHHALI BAZAR DISTRICT BURHANPUR
(MADHYA PRADESH)**
12. **NAZMA BI D/O LATE NAJEEM ALI MUNSHI, R/O
MACHHALI BAZAR DISTRICT BURHANPUR
(MADHYA PRADESH)**
13. **AKHTAR HUSSAIN S/O SHRI RIYASAT HUSSAIN,
AGED ABOUT 51 YEARS, R/O AKBARI SARAY ANDA
BAZAR, DISTRICT BURHANPUR (MADHYA
PRADESH)**
14. **HAMID HUSSAIN, S/O SHRI RIYASAT HUSSAIN, AGED
ABOUT 51 YEARS, R/O AKBARI SARAY, ANDA BAZAR,
DISTRICT BURHANPUR (MADHYA PRADESH)**
15. **SMT. SHAHJAHAN BEGUM, D/O SHRI RIYASAT
HUSSAIN W/O SHRI ABDUL RAJJAK, R/O MAHU
DISTT. INDORE (MADHYA PRADESH)**
16. **SMT. SHAMIM BEGUM, D/O SHRI RIYASAT HUSSAIN,
R/O VILLAGE JAINABAD, TAH. AND DISTT.
BURHANPUR (MADHYA PRADESH)**
17. **SMT. CHHOBI BI, D/O SHRI RIYASAT HUSSAIN, W/O
ABDUL PAPA, R/O MAHU DISTT. INDORE (MADHYA
PRADESH)**
18. **HUSNARA W/O SHRI FROZ, AGED ABOUT 46 YEARS,
PURANA TARFEL, LALBAGH, DISTRICT
BURHANPUR (MADHYA PRADESH)**
19. **STATE OF M.P. THROUGH COLLECTOR DISTT.
BURHANPUR (MADHYA PRADESH)**

.....RESPONDENTS

(BY MS.K.C.V.RAO - PANEL LAWYER)

Reserved on : 01.12.2023

Pronounced on: 17.01.2024

This appeal having been heard and reserved for judgment, coming on for pronouncement this day, this Court passed the following:-

JUDGMENT

The present second appeal under section 100 of the Code of Civil Procedure has been filed by the appellants/plaintiffs against judgment and decree dated 30.11.2019 passed by the First Additional District Judge, Burhanpur whereby first appellate Court has upheld the judgment and decree passed by First Civil Judge Class-I, Burhanpur in Civil Suit No.12-A/2014 dismissing the suit of the appellants/plaintiffs seeking relief of declaration of title and permanent injunction by way of adverse possession.

2. Brief facts of the case are that appellants filed a civil suit for declaration and injunction in respect of agricultural land situated over Survey No.487/1, 487/3 & 487/4, area 0.37, 1.50 & 0.37 hectares situated in village Jainabad, District Burhanpur (hereafter referred to as the "suit land"). The suit lands were owned by Kutubuddin and Nazmuddin, who were real brothers. Nazmuddin had given land owned by him to his brother-Kutubuddin by way of Hiba i.e. oral gift. Subsequently, the same was reduced in writing on 21.3.1980. Kutubuddin was in possession of entire land i.e. land of Nazamuddin. Therefore, Kutubuddin became absolute owner of land owned and possessed by both the brothers. Kutubuddin had submitted an application for mutation of his name before the Naib Tahsildar on the basis of oral gift and his name has been mutated. The said order of Naib Tahsildar was challenged by legal representatives of Nazamuddin before the Sub Divisional Officer who set aside the order of Naib Tahsildar. The matter travelled upto Board of Revenue and mutation of Kutubuddin has been rejected. He further submitted that plaintiffs are in continuous and peaceful possession of the suit land, therefore, plaintiffs are owner of the suit land. The plaintiffs ultimately pleaded that respondents had knowledge that plaintiffs/appellants have been in continuous and peaceful possession of more than

12 years, therefore, owner of the suit land on the ground of adverse possession. Accordingly, the appellants/plaintiffs had filed an application for declaration of title over the suit land and permanent injunction against the respondents/defendants.

3. In the instant suit, notices were issued to the respondents, but they remained absent and ultimately the trial Court has declared them *ex parte*. Evidence of appellants/plaintiffs have been recorded by the trial Court, but the trial Court dismissed the suit on the ground that no adverse possession be sought against the co-owners by the owner and the oral gift has not been found valid. The appellants/plaintiffs preferred an appeal against the judgment and decree of the trial Court, which too has been dismissed by the lower appellate Court.

4. Being aggrieved by the judgment and decree of the lower appellate Court the appellants/plaintiffs preferred instant second appeal on the grounds that lower appellate Court grossly erred in dismissing the appeal and affirming the judgment of the trial Court. The judgment and decree passed by courts below are liable to be set aside. The courts below should have seen that appellants perfected their title over the suit land by virtue of adverse possession. The appellants submitted documents and adduced evidence, but courts below erred in holding that decree cannot be passed against co-owner on whose land another co-owner is in possession and it cannot be said to be adverse possession. The courts below failed to pay heed to oral gift deed dated 21.3.1989, when no body had opposed the deed then there was no reason to discard the documents. Hence, it has been prayed to set aside the judgment and decree of the courts below and suit of the appellant be decreed.

5. Heard learned counsel for the parties and perused the record of the trial Court as well as that of the lower appellate Court. The trial Court has found that suit land was not received by the appellants/plaintiffs by way of gift. The trial Court has found that both the parties to be in joint possession of the suit land. It

was not found that appellants/plaintiffs had become owner of the land by way of adverse possession.

6. On perusal of record it is found that it is undisputed that father of the plaintiffs, namely, Kutubuddin filed civil suit before Second Civil Judge Class-II, Burhanpur being Civil Suit No.31-A/1988 and pleaded that Nazmuddin executed an oral gift of his share in favour of Kutubuddin. But, this suit was dismissed by the Second Civil Judge Class, Burhanpur vide judgment and decree dated 31.7.1991. The appeal filed by Kutubuddin against judgment and decree dated 31.7.1991 also stood dismissed. Thereafter, legal heirs of Kutubuddin filed second appeal before High Court being Second Appeal No.690/1999, which too has been dismissed. The judgment of trial Court in C.S.No.31-A/1988 has been exhibited as Exhibit-P/11. The judgment and decree by First Appellate Court is Exhibit-P/12 and that of High Court in Second Appeal No.690/1999 is Exhibit-P/13. Despite above, the appellant filed instant civil suit before the trial Court seeking relief of declaration of title by way of adverse possession.

7. The Apex Court in the case of ***Desh Raj and others Vs. Bhagat Ram (Dead) by L.Rs. and others***, (2007) 9 SCC 641 in paragraph 21 to 28 held as under:-

21. In a case of this nature, where long and continuous possession of the plaintiff-respondent stands admitted, the only question which arose for consideration by the courts below was as to whether the plaintiff had been in possession of the properties in hostile declaration of his title vis-à-vis his co-owners and they were in know thereof.

22. Mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. But the intention on the part of the plaintiff to possess the properties in suit exclusively and not for and on behalf of other co-owners also is evident from the fact that the defendant-appellants themselves had earlier filed two suits. Such suits were filed for

partition. In those suits the defendant-appellants claimed themselves to be co-owners of the plaintiff. A bare perusal of the judgments of the courts below clearly demonstrates that the plaintiff had even therein asserted hostile title claiming ownership in himself. The claim of hostile title by the plaintiff over the suit land, therefore, was, thus, known to the appellants. They allowed the first suit to be dismissed in the year 1977. Another suit was filed in the year 1978 which again was dismissed in the year 1984. It may be true, as has been contended on behalf of the appellants before the courts below, that a co-owner can bring about successive suits for partition as the cause of action therefor would be continuous one. But, it is equally well settled that pendency of a suit does not stop running of "limitation". The very fact that the defendants despite the purported entry made in the revenue settlement record-of-rights in the year 1953 allowed the plaintiff to possess the same exclusively and had not succeeded in their attempt to possess the properties in Village Samleu and/or otherwise enjoy the usufruct thereof, clearly goes to show that even prior to institution of the said suit the plaintiff-respondent had been in hostile possession thereof.

23. Express denial of title was made by the plaintiff-respondent in the said suit in his written statements. The courts, therefore, in the suits filed by the defendant-appellants, were required to determine the issue as to whether the plaintiff-respondent had successfully ousted the defendant-appellants so as to claim title in himself by ouster of his co-owners.

24. In any event the plaintiff made his hostile declaration claiming title for the property at least in his written statement in the suit filed in the year 1968. Thus, at least from 1968 onwards, the plaintiff continued to exclusively possess the suit land with knowledge of the defendant-appellants.

25. The parties went to trial fully knowing their respective cases. The fact that they had been co-owners was not an issue. The parties proceeded to adduce evidences in support of their respective cases. Defendant-

appellants, keeping in view of the fact that they had unsuccessfully been filing suit for partition, were also not prejudiced by reason of purported wrong framing of issue. They knew that their plea for joint possession had been denied. They were, therefore, not misled. They were not prevented from adducing evidence in support of their plea.

26. Article 65 of the Limitation Act, 1963, therefore, would in a case of this nature have its role to play, if not from 1953, but at least from 1968. If that be so, the finding of the High Court that the respondent perfected his title by adverse possession and ouster cannot be said to be vitiated in law.

27. Mr Dash has relied upon a decision of this Court in Saroop Singh v. Banto [(2005) 8 SCC 330] in which one of us was a member. There is no dispute in regard to the proposition of law laid down therein that it was for the plaintiff to prove acquisition of title by adverse possession and ouster cannot be said to be vitiated in law.

28. We are also not oblivious of a recent decision of this Court in Govindammal v. R. Perumal Chettiar [(2006) 11 SCC 600 : (2006) 11 Scale 452] wherein it was held: (SCC p. 606, para 8)

“In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case.”

8. Admittedly, the suit land is recorded in the name of both the parties or their ancestors. It is settled legal position that one co-owner is considered in law to be co-owner unless contrary is proved. On perusal of paragraphs 13, 14 & 15 of the impugned judgment it is clear that lower appellate Court has taken note of settled principle of law that for claiming title by way of adverse possession, it is to be proved that possession was peaceful and uninterrupted. From documents produced by plaintiff it is clear that there is continuous litigation between the parties as

plaint averments reflect that defendants had filed application for partition before revenue authorities. Plaintiffs preferred second appeal in 2009 before Additional Commissioner against partition which is pending. Thus, possession of plaintiff cannot be regarded as peaceful and uninterrupted. It is also clear from Exhibits-P/18 & P/19 that some part of disputed part has been sold by Defendants to Husnaara (Defendant No.11) and mutation in this regard is Exhibit-P/20. The plaintiff also pleaded in plaint with regard to dispute regarding mutation and sale in favour of Husnaara. Thus, title by way of adverse possession has not been found to be established by the court below.

9. Under such circumstances, the judgment and decree passed by the courts below are just and proper and no substantial question of law arises in this appeal.

10. In the result, the second appeal stands dismissed.

**(HIRDESH)
JUDGE**

RM