Shambhu Prasad Singh

Vs

Mst. Phool Kumari and Others

Civil Appeal No. 1655 of 1966

(J. M. Shelat, V. Bhargava, I. D. Dua JJ)

24.03.1971

JUDGMENT

SHELAT J. -

Two questions arise in this appeal. The first is whether the transaction evidenced by Ex. 1, dated March 20, 1915, was a family arrangement so as to confer on the appellant and his father. Nanhku Prasad, since deceased, title to a half share in the house in dispute. The second is that even if it was so, whether such title became extinguished as a result of adverse possession for the statutory period by Bajinath, the deceased husband of Respondent 1.

2. The parties are near relations. The following genealogy explains the relationship amongst them :

#Rajkumar Singh||--------------------------|----------------|----------|-------------| | | |Lalji Singh Amar Singh Ramji Singh Raghunandas| Reshmi Kuer Patreja Kuer Singh| | | || | | ||-------|-----------| | Nanhku Pd. || | | | Singh || | | | (Plff. No. 1) || | | | | || | | | | |Subha Faujdar Balkeshwar | Shambu Pd. Singh || Kamaldhari---|------------------------------| || | Kamta Prasad| |Sonadhari Girwardhari| |Tarkeshwar Pd. Baijnath Pd.alias Daljit alias Nanu Babu(Deft. No. 2) died in 1948| Phul Kumari Devi| (widow)(Sons of Deft. 2 - Deft. No. 1.Nos. 3 to 7)##

3. There is no dispute that Amar Singh purchased from his own funds under a registered deed, January 20, 1898, the land on which the house in dispute stands. His son, Nanhku, the deceased father of the present appellant, was taken in adoption sometime prior to March 20, 1915, by Ramji Singh and his wife Patreja Kuer as they had no issue, whereupon, Nanhku ceased to have any interest in the properties owned by Amar Singh and his branch. In 1933, Nanhku and the present appellant them a minor, filed Suit No. 33 of 1933, against Sonadhari, Tarkeshwar, Baijnath and Reshmi Kuer (the widow of Amar Singh, wrongly described by the High Court as the Wife of Rajkumar in the genealogy set out in its judgment) in respect of certain properties which had nothing to do with the house in dispute. The written statement filed in that suit was that Nanhku had been paid the price of his share in the house in dispute and that the entire house, consequently, belonged to and was since then in the exclusive possession of the defendants. That suit went up to the High Court when in 1941, a compromise application was filed by the parties settling that suit. But, as the suit had nothing, as aforesaid, to do with the house in dispute, nothing was said about the allegation that Nanhku had been paid off in respect of his interest in that house.

4. In 1949, Nanhku and the appellant filed the instant suit for a declaration of their half-share in the house in dispute. In answer to the suit, the respondents raised three defences : (1) that Nanhku and the appellant derived no interest under Ex. 1, (2) that assuming that they derived such interest, it

was relinquished by them on being paid the price thereof, and (3) that in any event they lost their interest by reason of adverse possession by the respondents. The Trial Court rejected all the three defences raised by the respondents and decreed the suit, holding that Nanhku had acquired one-half share in the said house under Ex. 1. Against that decree, two appeals were filed in the High Court, one by Respondent 1 and the other by some of the other respondents. Those appeals were heard first by a learned single Judge of the High Court. Before the learned single Judge, the finding of the Trial Court that Nanhku and the present appellant had not relinquished their interest in the house on their being paid the price thereof was not disputed. The only questions agitated before the learned single Judge, therefore were whether Nankhu had a half share, that is to say, whether he derived his title to the half share under and by virtue of Ex. 1. and if so, whether he lost it as a result of adverse possession by the respondents.

5. In respect of the first question, the parties urged two conflicting pleas. Nanhku and the appellant contended that Ex. 1 was a family arrangement under which he got half share in the house and that that family arrangement was valid and binding on the parties. The respondents on the other hand, contended that Ex. 1 was only a Ladavi deed, that is, a deed of relinquishment. The argument on behalf of Nanhku and the appellant was that there were outstanding disputes between the different branches of the family of Rajkumar, and those disputes were ultimately settled at the instance of and with the aid of certain family friends resulting in Ex. 1 by way of a family arrangement. Therefore, even if Nanhku and the appellant were not able to show their anterior title to the house, they were entitled under Ex. 1 to a half share therein. The learned single Judge accepted the contention raised by Nanhku and the appellant. His reasoning in this connection was that although the land on which the suit house stood was purchased by Amar Singh out of his own funds, it was purchased in the Furzi name of Lalji, but there was no evidence that Lalji ever admitted to be the Furzidar of Amar Singh. Consequently, though Nanhku, by his adoption, lost all interest in the properties of Amar Singh, yet the fact that in Ex. 1 Amar Singh acknowledged Nanhku having a half share in the house indicated that there was some apprehension in the mind of Amar Singh of a future dispute and that it was such an apprehended dispute which Ex. 1, while dealing with the house, settle. The learned single Judge added that even assuming that there was no existing or apprehended dispute and the settlement was made out of consideration for the peace of the family or preservation of its properties, the settlement would have to be regarded as a family arrangement. Regarding the plea of adverse possession, he upheld the finding of the Trial Court that Nanhku and the appellant had established their acts of possession during the statutory period, and that consequently, the continuity and exclusiveness of the respondent's adverse possession had been disrupted. On these findings, he dismissed the appeals and confirmed the decree passed by the Trial Court.

6. Respondent 1 thereupon filed a Letters Patent Appeal which was heard by a Division Bench of the High Court. The same two questions were reagitated, namely, as to the nature of Ex. 1, and as to the adverse possession. On the first question, the reasoning adopted by the Division Bench was on the following lines :

> (1) that the executants of Ex. 1 formed three conflicting groups. namely -
>
> (a) Suba, Faujdar and Balkeshwar, constituting one group of members of Lalji's branch, being Executants 1 to 3;
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> (b) Raghunandan and his son, Kamaldhari, being Executants 4 and 5 and constituting Raghunandan's branch; and

(c) Amar Singh for himself and as the guardian of Baijnath, of his minor son, Tarkeshwar and Nanhku, who had, as earlier stated, gone to the line of Ramji on his adoption, being Executants 6, 7 and 8;

(2) that the disputes, in settlement of which Ex. 1 was executed by these three groups, were, as its recitals show :

(a) conflicting claims made by the said three sets of executants as to whether they were joint or separate in status, the claim of Executants 1 to 3 being that all the members of Rajkumar's family were still members of an undivided Hindu family, and that therefore, although the properties stood in the names of and were in possession of individual members, they continued to be joint family properties including properties standing in the names of female members, namely, Reshmi and Patreja;

(b) the allegation by Executants 4 and 5 (Raghunandan's branch) that all the four branches of Rajkumar's four sons were separate and yet claiming share in the properties standing in the names of members of Lalji's branch, and

(c) the claim by Executants 6, 7 and 8 (Amar Singh, Sonadhari and Nanhku - by now in the line of Ramji) that the parties were separate in status, and therefore, the properties in the names of the two said females belonged exclusively to them and the members of the other branches had no interest whatsoever in them;

(3) that the Trial Court and the learned single Judge were in error in holding that what Ex. 1 did was to evidence relinquishment by the rest of the members of the family of their claims in properties standing in the names of or in possession of particular members, and there by acknowledging their anterior title in such properties. In fact Nanhku had no such anterior title, nor could he in law have any such title in the house in dispute in view of his having got out of Amar Singh's branch as a result of his adoption by Ramji;

(4) that there was no subsisting or apprehended dispute between Amar Singh and his family, on the one hand, and Nanhku on the other, the latter no having made any claim for a share in the house in dispute, and that therefore, there was no question of preservation of peace or family property, there being nothing on record to show that Nanhku had held out any threat to the family peace or property; therefore there was a total want of mutuality as in consideration of Nanhku getting a half share. Amar Singh got nothing in return and cases of the type of Williams v. Williams, ((1867)(2) Ch A 294) had no application;

(5) that the recitals in Ex. 1 showed that the only dispute which prevailed at the time was "branch-wise" and in that dispute Nanhku did not set up any contest against Amar Singh and his branch and indeed, both of them acted in concert, both claiming that the members of Rajkumar's family were separate and the properties standing in the names of Reshmi and Patreja were their exclusive properties;

(6) that acknowledgment of exclusive title of Amar Singh and Sonadhari (Executants 6 and 7) to certain properties, and likewise acknowledgment of exclusive title of Nanhku (Executants No. 8) to certain other properties set out in Paras 3 and 4 of Ex.

1 were not by way of settlement of any therefore, that part of Ex. 1 could not be regarded as providing any consideration for conferring the half share in the disputed house on Nanhku.

On this reasoning the Division Bench declined to treat Ex. 1 as a family arrangement. The conclusion of the Bench clearly signified that if had relied on two fundamental premises : (1) that there were only three sets of executants, the third set consisting of Executants 6, 7 and 8, and (2) that Amar Singh and Nanhku had acted in concert as there were no conflicting claims by and between them.

7. In view of this conclusion there was no need for the Division Bench to go into the question of adverse possession. However, it decided to do so for the reason that although the finding on the question of adverse possession was concurrent, it had been seriously challenged before it. On this question, the Division Bench firstly relied on the Municipal Assessment Register for 1900-1901. (Ex. D) and the extract from the Demand Register of Patna Municipality for 1915-16, (Ex. E). Ex. D showed the name of Amar Singh as the sole owner of the property. Ex. E mentioned Sonadhari and Baijnath only as the owners of the house as Amar Singh had died soon after Ex. 1 was brought into existence. The Division Bench was impressed by the fact that though only recently, in March 1915, Nanhuk's half share in the house had been acknowledged in Ex. 1 his name was deliberately omitted in Ex. E, which meant that Sonadhari and Baijnath had openly asserted their title to the whole of the house and yet Nanhku took no steps to assert his title. Nor did he at any time pay his share of the municipal taxes and the costs of repairs carried out later on by Baijnath. The Division Bench was also impressed with the fact that even when Baijnath, in his written statement in suit No. 33 of 1933, claimed that Nanhku's share had been paid off and he had since then been in exclusive possession of the entire house, Nanhku took no steps to vindicate his title until he and his son filed the present suit in 1949. The division Bench came to the conclusion that there was not only an assertion of a hostile claim by Baijnath but that that assertion was accompanied by an ouster which remained open and continuous throughout the statutory period. As regards the evidence that Nanhku and sometimes his wife came and stayed in the house, the Division Bench took the view that these were casual visits "in the nature of visits of guests of the defendants", and therefore, did not have effect of interrupting the continuity and the exclusiveness of possession by the respondents. The Bench even observed that the respondents had completed their title by adverse possession long before Baijnath claimed exclusive possession in his said written statement in 1933. In this view, the Division Bench held that Nanhku's title in the house was extinguished by adverse possession. The Division Bench accordingly conclusions of the Division Bench have been challenged before us as incorrect.

8. On the question as to the nature of Ex. 1 a large number of decisions were cited at the bar to show when a transaction can be said to be a family arrangement. It is not necessary to advert to them as most of them have been considered by this Court in its previous decisions, Wherein principles as to when an agreement can properly be regarded as a family arrangement have been set out. Thus, in Pullaiah v. Narasimham, (AIR 1966 SC 1836 : (1967) 1 SCJ 848 : (1967) 2 MLJ (SC) 14) after setting out how Courts in England view family arrangements, Subba Rao, J. (as he then was) observed that the concept of such a family arrangement has also been accepted by Courts in India, adapting the concept to suit the family set-up in this country which is different in many respects from that obtaining in England. After examining some earlier decisions which he characterised as illustrations of how family arrangements were viewed, he summarised the law as to a family arrangement as follows :

"Briefly stated, though conflict of legal claims in praesenti or in future is generally a condition for the validity of a family arrangement it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, Courts will more readily give assent to such an arrangement than to avoid it."

9. Even in England, family arrangements are viewed as arrangement governed by principles which are not applicable to dealings between strangers. The Courts, when deciding the rights of parties under family arrangements, consider what is most for the interest of families and have regard to considerations which in dealings between persons not members of the same family would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objection to the binding effect of family arrangements. [See Halsbury's Laws of England, (3rd Ed.), Vol. 17, p. 215]. Thus, in Williams v. Williams (supra) the Court held that a family arrangement might be such as the Court would uphold although there were no rights in dispute, and if sufficient motive for the arrangement was proved, the Court would not consider the adequacy of consideration. But the question of consideration or mutuality would arise, as Williams' case (supra) shows, when other consideration, such as existing or an apprehended dispute or the question of preservation of property of honour of the family, are absent, so that it is not necessary for a valid family arrangement that there must exist actual competitive claims or disputes likely that the arrangements must be backed by proper consideration. Even disputes likely to arise in future or preservation of family property and honour would be sufficient to uphold as arrangement bona fide made between the members of a family.

10. What actually happens when such a family arrangement is made is explained by Bose, J., in Sahu Madho Das v. Mukund Ram, (1955(2) SCR 22 : AIR 1955 SC 481) in the following words :

> "It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognizing the right of others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary."

He went on to say that this was not the only kind of arrangement which the Courts would uphold, and that they would take the next step of upholding an arrangement under which one set of persons abandons all claims to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to them as gifts pure and simple from him or her or as a conveyance for consideration when consideration is present". In such a kind of arrangement where title in the entire property is acknowledged to reside in only one of them and thereupon that person assigns parts of it to others there would be a transfer by that agreement itself which obviously in such a case would need a registered document. This decision lays down the assumption underlying a family arrangement, namely, of an anterior title and its acknowledgment in one to whom a property or part of it falls

under the arrangement. (See also Rani Mewa Kumar v. Rani Hulas Kuwar). ((1873-1874) LR 1 : IA 157, at 166 : 13 LR 312) Therefore, it is not necessary that there must exist an anterior title sustainable in law in such person which the others acknowledge.

11. The arrangement under challenge has to be considered as a whole for ascertaining whether it was made to allay disputes, existing or apprehended, in the interest of harmony in the family or the preservation of property. It is not necessary that there must exist a dispute, actual or possible in the future, in respect of each and every item of property and amongst all members arrayed one against the other. It would be sufficient if it is shown that there were actual or possible claims and counter-claims by parties in settlement whereof the arrangement as a whole had been arrived at, thereby acknowledging title in one to whom a particular property falls on the assumption (not actual existence in law) that he had an anterior title therein.

12. In the light of these decisions we must now examine Ex. 1 to see if the contention of the appellant that it was a family arrangement is correct or not.

13. The document Ex. 1, after reciting the death of the common ancestor, Rajkumar, his leaving him surviving four sons and the deaths of certain other family members thereafter, reads as follows :

> "Sings of ill feeling developed among us, the executants Nos. 1 to 8, and at the time of survey and settlement operations, dispute in connection with the properties arose. On account of dispute, wrong statements and claim were made. On account of which the names of some of us, the executants were recorded in a wrong manner in the record-of-rights and in the office of the Land Registration Department, in respect of some of the properties having regard to the real state of affairs and title. At the time of the survey and settlement operation, etc., the claims and allegations of us, the executants Nos. 1 to 3, were that we, the executants, are all members of the joint family and the properties standing in the names of a certain member of the family as well as those in the name of certain female member of the family, belong to the joint family. Contrary to this, the claims and allegations, of us executants Nos. 4 to 5 were that all the four sons of Rajkumar Singh became separate and that executants Nos. 1 to 3 always contained to remain separate from the (other) executants and executants Nos. 4 and 5, separate from the (other) executants and executants Nos. 6 to 8 separate from the other executants, but in spite of this allegation of separation, executants Nos. 4 and 5, on account of dispute, made contrary to the real state of affairs with respect to certain properties owned and possessed by executants Nos. 1 to 3, and executants Nos. 6 to 8 also made allegations and claim of separation and it was alleged that executants Nos. 1 to 5 (?) neither had nor have any connection and concern with the properties, which were and are in the names of Mst. Patreja Kuer and Mst. Reshmi Kuer, although no party was member of a joint family, nor was any property joint. At the dispute among us, the executants is contrary to the real state of affairs, and in case the said dispute continues there is apprehension of consideration loss and damage to us, the executants, therefore, on the advice of the well-wishers of the parties and of the respectable person and on the advice of the legal advisers of the parties, as also with a view to set at rest all kinds of dispute, it was settled that all the disputes should be put to an end by executing a deed of agreement by way of a deed of relinquishment of claims (Ladavi) and the property, which a actually owned and possessed by a certain party should be declared to belong to that party exclusively, and as a matter of fact, the family of us, the executants, is separate and the property,

> which stands in the name of a certain person, has been purchased from his or her funds, and in respect of his or her name should continue to remain entered into the Land Registration Department, etc., and the name should be entered if the same is not entered and the other parties totally gave up their claim with respect thereto."

Then follow Paras 1 to 4 in each of which certain properties are set out, and in respect of which, title of each of the four sets of the executants is acknowledged by the rest. Para 4, which relates to properties falling to the share of Nanhku, Executant 8, commences with the declaration by the rest of the executants, including Amar Singh and Sonadhari, that Nanhku, was the adopted son of Ramji and Patreja Kuer, that certain properties set out therein were exclusively acquired by Patreja Kuer and that Nanhku, as the adopted son of Ramji and Patreia Kuer, was exclusively entitled to then on the death of Patreja, and that "we, the executants Nos. 1 to 5, 6 and 7 and the heirs of executant No. 6 neither have nor shall have any claim, title or possession and connection in respect thereof in any manner and on any allegation". Following up the arrangement made in Paras 1 to 4, four schedules giving particulars of properties which were acknowledged to be belonging to the four sets of executants were appended to Ex. 1. As regards two houses, one at Rajipur and the other in dispute, Schedules 3 and 4 both set out a half share in them as belonging to Executants 6 and 7 and the other half as belonging to Executant 8, 8.e., Nanhku, in each of them.

14. As already stated, the fundamental premise on which the Division Bench proceeded to consider Ex. 1 was that there were three sets of executants, namely, those belonging to Lalji's branch, i.e., Executants 1 to 3, those belonging to Raghunandan's branch, i.e., Executants 4 and 5, and the third set consisting of Amar Singh and Sonadhari, Executants 6 and 7, and Nanhku, Executant 8. The second premise on which the Division Bench rested its entire reasoning was that whereas there were disputes between the three sets of executants, there were no disputes between Amar Singh, Sonadhari and Nanhku, that in fact the three of them acted in concert, and that therefore, one half share given to Nanhku in the house in dispute was altogether voluntarily given without any anterior title and without any claim or dispute raised by Nanhku in respect thereof. In our view, both the premises were incorrect rendering the conclusion drawn therefrom untenable.

15. It is true that Amar Singh had in 1898, purchased out of his own moneys the land on which the suit house stands. It is also true that Nanhku was adopted sometime before the execution of Ex. 1, and therefore, on the date of its execution he could not have any valid claim enforceable in law in any property belonging to Amar Singh and his branch. But, as stated earlier, a dispute or a contention, the settlement of which can constitute a family arrangement, need not be one which is actually sustainable in law. The harmony in a family can be unsettled even by competitive and rival claims which cannot be upheld in law. Therefore, if Amar Singh and the other executants or some of them were to challenge, for instance, the factum of the validity of Nanhku's adoption, or if notwithstanding his adoption, Nanhku were to make a claim in properties held by Amar Singh and his branch or if some of the executants were to claim that the family of Rajkumar was still a joint and undivided family or that though the members of the family were separate, the properties held in the individual names of some of them including Reshmi Kuer and Patreja Kuer were joint, there would be sufficient disputes to constitute a settlement of them a family arrangement. A claim, made by Executants 1 to 5 that the properties held by Reshmi Kuer and Patreja Kuer were not their separate properties but were joint family properties, liable to be partitioned amongst all, was bound to affect both Amar Singh and Nanhku. If such a claim were to be persisted and dragged to a Court of Law there is no gainsaying that it would put into jeopardy not only the interests of Amar Singh and Nanhku but also the harmony of the family.

16. The recitals in Ex. 1 clearly show that whereas members of Lalji's Bench were claiming that the family was still joint and undivided, and therefore, they had interest in all the properties irrespective of their standing in the names of particular individuals, Raghunandan and his son claimed that the members of the family were not joint and yet claimed share in all the properties including those standing in the names of Reshmi Kuer and Patreja Kuer. Thus the claims by Executants 1 to 5, were definitely hostile to the interests of Amar Singh to the extent of the properties standing in the name of Reshmi Kuer and of Nankhu to the extent of the properties standing in the name of Patreja Kuer. The claims made by the branches of Lalji and Raghunandan sought to bring all the properties into hotch potch including those held by Reshmi Kuer and Patreja Kuer, thus, affecting the rights of Amar Singh and Nanhku in the different properties and not the same properties. Their interests, therefore, were not identical and there was thus no reason for them to act jointly. Indeed, there was no evidence whatsoever and nothing in Ex. 1 itself to show that they were acting in concert as assumed by the Division Bench.

17. It is true that the recitals in Ex. 1 do not expressly set out any conflict of claims between Amar Singh and Nanhku. Nevertheless, it is significant that in Para 4 of Ex. 1 the executants found it necessary to insert therein a declaration not only by Executants 1 to 5, but also Executants 6 and 7, that Nanhku was the adopted son of Ramji and Patreja Kuer, that on the death of Patreja Kuer he, as such adopted son, was absolutely entitled to the properties set out therein in addition to those which stood in the name of Patreja Kuer. If the adoption of Nanhku was accepted by all and was not made the subject-matter of any doubt or dispute, there was no necessity of including such a declaration and in particular joining Executants 6 and 7 in such a declaration. If Amar Singh and Nanhku were acting in concert why had Amar Singh and his son, Sonadhari as Executants 6 and 7, to be joined as declarants to the adoption of Nanhku Para 4 of Ex. 1 also shows that there were certain bonds and mortgage deed standing in the name of Patreja Kuer which were acquired from out of the personal funds of Ramji. Such a statement had to be acknowledged in Paragraph 4 presumably because rights in those bonds and deeds were not admitted to be the exclusive rights of Patreja. If those rights were to be treated as joint family property, as claimed by Executants 1 to 5, Amar Singh would get a share in them and to that extent his interest must be said to be in conflict with that of Nanhku. A similar result would follow if properties standing in the name of Reshmi Kuer were to be treated as joint family properties. It would not, therefore, be correct to assume that in the disputes amongst the different branches of the family, Nanhku and Amar Singh were acting in concert or that there was no conflict of interest between them. In our judgment, the parties to Ex. 1 arrived at settlement in view of claims and cross-claims by some against the others. Taken as a whole and in the light of the recitals and the statements in the operative part of the document indicating conflicts amongst the members of the family the document represented an arrangement bona fide entered into, for settling existing or at any rate apprehended disputes, and therefore, satisfied the tests of a family arrangement laid down in the decision earlier referred to. In this view Nanhku must be said to have acquired a half share in the house in dispute under Ex. 1.

18. On the question of adverse possession by a co-sharer against another co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessors. Accordingly, if a holder f title proves that he too had been exercising during the currency of his title various acts of possession, then, the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from a person challenging by possession the title which he holds. (See Kutbali Moothavar v. Peringati Kunharankutty). ((1921) 48 IA 395, 404 : AIR 1922 PC 181) As between co-sharers. Therefore, to constitutes adverse

possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of then to the knowledge of the other. (See Lakshmi Reddy v. Lakshmi Reddy (1957 SCR 195, 202 : AIR 1957 SC 314) and also Mohammad Baqar v. Naim-un-Nissa Bibi). (AIR 1956 SC 548) But, once the possession of a co-sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co-share would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such a manner as it was possible to do. (See Wuntakal yulpi Chrnabasavana Gowd v. Y. Mahabaleshwarappa). (1955(1) SCR 131, 138 : AIR 1954 SC) The mere fact that a disossessed co-sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession so as not to extinguish the rights of the dispossessed co-sharer. (See Ammakannu Ammal v. Narayanswami Mudaliar). (AIR 1923 Mad 633 : 17 MLW 629 : 72 IC 635)

19. On this issue, the parties led considerable evidence, oral and documentary. On examination of that evidence, both the Trial Court and the learned single Judge gave a concurrent finding that even if the possession by the respondents was adverse the appellant and his father had done acts of possession at various intervals which were sufficient to interrupt both the continuity and the exclusiveness of possession by the respondents. The Division Bench, however, did not agree with the concurrent finding on a reappraisal of evidence by it. It is not necessary for us to go into the details of that evidence once again as certain facts clearly emerge out of the evidence to prevent the extinguishment of Nankhu's and the appellants title in the property as a result of adverse possession by the respondents.

20. The principal facts which impressed the Division Bench were : (1) that though in the Demand Register of Patna Municipality for 1915-16 (Ex. E) Sonadhari and Baijnath were the only persons named as occupiers Nanhku had not taken steps to include his name, (2) that all throughout it was Sonadhariand Baijnath who paid the municipal taxes and Nanhku at no time paid his share of the taxes or his share in the cost of repairs and laying of a water pipe in the house, and (3) that though in his written statement in suit No. 33 of 1933, Baijnath claimed that he was in exclusive possession of the house as he had paid Nanhku the proportionate price of his share, Nanhku did not take any steps to vindicate his title until he and his son filed the present suit in 1949, by which time the statutory period for adverse possession had already been completed.

21. There was, however, evidence of Nanhku and his wife having stayed on different occasions in the house. But the Division Bench was of the view that such acts of possession were only casual and did not have the effect of interrupting the adverse possession of the respondents.

22. It needs to mention in this connection that Nanhku was all along residing in a village and not in Patna. Therefore, his acts of possession could only be when he came down from his name village for some work to Patna. In 1915-16, when Sonadhari got his name and that of Baijnath entered in the Demand Register (Ex. E) it might be that Nanhku did not know that they had omitted his name. His half share in the house had been acknowledged in Ex. 1 only recently by Amar Singh and Sonadhari as well, Relations between the parties had not yet become unfriendly so as to make Nanhku suspect that his name would be deliberately omitted in the municipal records or that possession by Sonadhari and later on by Baijnath would be treated by them as adverse. Baijnath, no doubt, was using the whole house, but so long as his possession did not amount to ouster his possession would be that of both the co-sharers. If Baijnath used the entire house, except when Nanhku stayed in it during his occasional visits, Nanhku would naturally think that Baijnath should

pay the taxes. It was not the case of the respondents that Baijnath ever demanded a share in the taxes or a share in the cost of repairs and that such a demand was refused by Nanhku. The High Court on these facts was not right in observing that the title of Baijnath was already completed by adverse possession long before Baijnath filed his written statement in 1933, as mere use and enjoyment by him of the house, in the absence of such use amounting to ouster, would not make it adverse possession.

23. It was for the first time that in the written statement filed in 1933, Baijnath openly asserted his title to the whole of the house. Since that assertion was accompanied by the fact that he was in enjoyment of the whole house that act would amount to ouster and adverse possession would commence as from that date. Obviously, the earlier possession could not be tacked on to the subsequent possession because the plea in that very written statement was that Baijnath had paid off the price of Nanhku's share thereby impliedly admitting Nanhku's title to a half share in the house. Suit No. 33 of 1933, in which Baijnath filed the said written statement, was settled in 1941. In the compromise application filed by Nankhu and Baijnath, both of them stated that they were residing in that house. That assertion by Nanhku was never disputed by Baijnath.

But apart from that assertion there was the fact that Nanhku had no other place to reside in Patna. His case was that whenever he visited Patna he used to stay in the house in dispute. Apart from that assertion being natural, his evidence in that connection was corroborated by Prabha Narain, P.W. 4, an Advocate residing in neighbourhood. The Division Bench brushed aside his evidence without giving any adequate reason although it had been accepted by both the Trial Court and the learned single. In the light of this evidence it is not possible to say that all throughout the period from 1933, till the statutory period for adverse possession was completed Nanhku had not stayed in the house at any time. Respondent 1 herself admitted that on suit No. 33 of 1933, being settled, relations between Nanhku and Baijnath became friendly. If that be so, it was natural that Nanhku would stay in the house whenever he visited Patna in 1941 and thereafter.

24. The Municipal Survey khasra (Ex. 2), dated December 19, 1939. mentions Nanhku alongwith Sonadhari and Baijnath as owners of the house Since this entry was made after Baijnath had made a hostile claim to the entire house in the written statement filed in suit No. 33 of 1933, on September 16, 1933, the entry must presumably have been made at the instance of Nanhku. Such an act on his part would be a clear assertion of his title in the house. Under the Bihar and Orissa Municipal Act, 1 of 1920, before such Khasra was finalised it had to be published and objections to it, if any, had to be invited and disposed of. No. objection was ever raised by Baijnath to the said Khasra. It is surprising that Baijnath did not resist the entry in the Khasra although he had made a claim to the whole of the property only three months before the date of Khasra. That indicates that his claim was merely a counterblast against Nanhku's suit.

25. The view of the Division Bench that the occasional putting up by Nanhku and his wife in the disputed house was merely casual and was in the nature of visits as guests of the respondents cannot be accepted. Such stay, however occasional, would not be casual as it was accompanied by an open assertion of his title as evidenced by the Khasra (Ex. 2). It could not also be that he stayed in the house as the guest of the respondents because after be filed the suit in 1933 and until it was settled, his relations with Baijnath could not have been friendly. These acts on the part of Nanhku were ample enough to interrupt the continuity and the exclusiveness of possession by Baijnath.

26. The Division Bench also relied on a sale deed Ex. C), dated October 12, 1933, executed by Baijnath and Tarkeshwar in favour of one Kamalnain Pandey. The High Court appears to have taken

the view that the land sold under Ex. C appertained to or was part of the land on which Amar Singh had put up the disputed house, and that although Baijnath and Tarkeshwar sold part of that land, no objection was taken at any time to such a sale by Nanhku. The recitals in Ex. C show that the land sold under Ex. C was jointly purchased on January 20, 1898, by Amar Singh and one Gajadhar Singh for construction of a house thereon. Amar Singh had a share in the said land to the extent of 1 Katha 15 Dhurs while his co-purchaser had a share of 2 Kathas 15 Dhurs. The tecitals further show that Amar Singh's original intention in purchasing the land was to build a house thereon. He appears to have given up that idea as till this sale took place the land was lying waste and unutilised. It is important to note that this sale was for 1 Katha 10 Dhurs, out of 1 Katha 15 Dhurs which was the share of Amar Singh. This land obviously could not be the land on which the house in dispute wad built, for, if that was so, Baijnath could not have sold away 1 Katha 10 Dhurs out of the total extent of 1 Katha 15 Dhurs to which Amar singh was entitled. The house could not have stood on 5 Dhurs only. Therefore, the land sold under Ex. C was a land different from the one on which the disputed house was situate. This conclusion is also borne out by the description of the sold land in the schedule to Ex. C where its northern boundary is described as follows :

"North : Parti (waste) land thereafter the house of us, the executants."

This description shows that between the disputed house and the land sold under Ex. C there was to the north of it some waste land. The land sold under Ex. C being different land, the High Court was not right in relying on that sale deed to prove adverse possession on the ground that Nanhku never took objection to the said sale. He could not, as this land had nothing to do with the house in dispute. Besides the evidence discussed above, there was other evidence. But the incidents therein described were irrelevant on the question of adverse possession as they took place in 1948 and thereafter, that is to say, a long time after title by adverse possession would have been completed if such adverse possession were to be accepted as established. In view of the evidence discussed above the Division Bench was not justified in interfering with the finding of fact concurrently given by the Trial Court and the learned Single Judge that the adverse possession by Baijnath which commenced from 1933, was sufficiently interrupted by acts of possession by Nanhku, and therefore, his title was not extinguished by adverse possession.

27. In the view we take on both the questions, the appeal must be allowed and the judgment and decree of the Division Bench must be set aside and the judgment and decree passed by the Trial Court and upheld by the learned Single Judge must be restored. The respondent will pay to the appellant his costs all throughout.

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