

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No. 2561 of 1985 (O&M)

Date of decision: 8.4.2015

Vijay Bhawar and others

... Appellants

VS

Ajaib Singh (deceased) through LR

... Respondent

Coram: Hon'ble Mr. Justice Rajesh Bindal

Present: Mr. Prem Nath Aggarwal, Advocate, for the appellants.

Mr. S. C. Nagpal, Advocate, for the respondent.

Rajesh Bindal, J.

The defendants are in appeal against the concurrent findings of fact recorded by both the Court below whereby the suit filed by the plaintiff for declaration to the extent that he has become owner in possession of the suit land on the basis of adverse possession, was decreed.

Briefly, the facts are that the suit was filed by the respondent-plaintiff seeking a declaration that he had become owner of the land measuring 23 kanals 6 marlas being in possession thereof since 1922. The claim was contested by the appellants pleading that as per the revenue record, they are the owners of the property and the plaintiff was tenant under the predecessors of the defendants-appellants. The plea was also raised regarding non maintainability of the suit on various grounds. The trial Court decreed the suit. The appeal filed by appellant no. 1 was dismissed by the learned Lower Appellate Court. The respondent was declared to be owner of the suit property by way of adverse possession. The present appeal has been filed by the defendants.

When the case was taken up for hearing on 26.8.2013, the following substantial questions of law were framed for determination by this Court:-

“i) Whether the plaintiff is competent to seek for declaration of the property by adverse possession or whether the same is available only to a defendant to plead

as a source of title?

ii) Whether the plaintiff is not estopped from setting up adverse claim against the owner of the property without actual surrender to landlord and re-entry in the light of Section 116 of the Evidence Act?”

The arguments were heard and the judgment was reserved on 26.8.2013.

The learned Single Judge of this Court vide order dated 11.9.2013, referred the matter for consideration by a Larger Bench for considering various judgments on the issue pertaining to declaration sought by the plaintiff as owner on the basis of adverse possession. The matter was heard by a Division Bench and the reference was answered vide order dated 8.12.2014 opining that no declaration can be sought by a plaintiff with regard to ownership on the basis of adverse possession, as such a plea is available only to the defendant.

Learned counsel for the appellants submitted that as in the suit filed by the respondent/ plaintiff, the relief was for declaration as owner on the basis of adverse possession and it has been opined by the Division Bench of this Court that such a relief cannot be claimed by a plaintiff, as this plea is available only to a defendant, hence, the suit filed by the respondent/plaintiff deserves to be dismissed, while accepting the appeal.

On the other hand, learned counsel for the respondent submitted that no specific plea having been raised by the appellants in the written statement filed regarding non-maintainability of the suit on this ground, such a plea is not available at this stage. He further submitted that there is finding already recorded that the respondent is in possession of the property and plea of adverse possession is available to a defendant. Even for seeking possession, the appellants will have to file a suit, in which plea of adverse possession will be available to the respondent, hence, to avoid multiplicity of litigation, the matter be decided here.

Heard learned counsel for the parties and perused the paper book.

As already noticed above, this Court had framed two issues arising out of appeal. Main being regarding maintainability of the suit filed by the plaintiff claiming declaration as owner on the basis of adverse

possession. The issue was referred to Division Bench for consideration. Vide order dated 8.12.2014, the reference was answered holding that no declaration can be sought by a plaintiff claiming ownership on the basis of adverse possession, as such a plea is available only to the defendant. Relevant paras thereof are extracted below:-

14. Thus, a short but a significant question that arises is, whether on an extinguishment of such a right of a true owner in the property, a right accrues or is conferred on the adverse possessor to enable him to claim relief under Section 34 of the Specific Relief Act. To our minds, the answer is NO. In our opinion, Section 27 and Article 65 have to be read in conjunction and not in isolation. An isolated reading of Section 27 may not bring to fore the real and full meaning of the phrase “right to such property shall be extinguished”. A conjoint reading of both, the Section as well as the Article, clearly postulate that a suit for possession based on title can be filed within twelve years from the date when the possession of the defendant became adverse to the plaintiff and if any such suit is not filed within such prescribed period, right of such person to the property shall be extinguished. Evidently, the right of such person to obtain possession has been extinguished but his right to the property has not been. The right to a property and right to regain possession of the same are two different things. The Hon'ble Apex Court in ***Tribhuvanshankar's case*** (supra) has clearly mandated that Section 28 of the Limitation Act, 1963, merely declares when does the right of a person out of possession is extinguished, but this provision does not confer any title on the person who has been in adverse possession for a certain period. There is no law which provides for 'conferral of title' as such on a person who has been in adverse possession for whatever length of time. When it is said that the person in adverse possession 'has perfected his title', it only means this. It does not mean that it

confers ownership or title on the adverse possessor. If that is so, then the question arises whether the adverse possessor who has not been conferred any right in the property, contrary to the true owner who's right to seek possession stood extinguished, can file a suit under Section 34 of the Specific Relief Act to declare him owner of the property on the basis of adverse possession ? Section 34 of the Specific Relief Act reads as under :-

“34. Discretion of court as to declaration of status or right – Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

All what the afore reproduced provision envisage is that a person, who is entitled to any right as to any property, may institute a suit against any person denying or interested to deny his title to such property to declare his title in the property. But as indicated above, adverse possessor has no title or ownership in the property. In fact, the whole concept of adverse possession is in denial of title. It does not contemplate acquisition of title by prescription. He has right to remain in possession of the property, if his possession is adverse to the true owner, who is not entitled to take possession of the property after the prescribed limit under Article 65 of the Limitation Act, 1963. If a suit is filed by the adverse possessor under Section 34 of the Specific Relief Act, the court will not examine whether the right of the defendant is within the

period of limitation or whether it has extinguished. The court will examine whether the plaintiff who filed suit on the basis of adverse possession has any title to the property. Therefore, just because the plaintiff filed the suit denying title of the defendant and setting up his own title on the basis of adverse possession, the court would not decide, whether the defendant had lost his right to regain possession of the property. In our opinion, Section 27 of the Limitation Act, 1963, though extinguishes the right of a person to gain possession of the property, if he had failed to file the suit within twelve years specified under Article 65 of the Act, but this Section and the Article does not, on the extinguishment of such right vest title in favour of the adverse possessor to file any such suit under Section 34 of the Specific Relief Act. He has to establish his own right, tile to the suit property. In our view, the adverse possessor having no right in the property cannot maintain a suit under Section 34 of the Specific Relief Act. There may not be any case wherein the title can be set up or declared based on merely adverse possession. In our view, a suit merely based on adverse possession or to call it a title by adverse possession is not maintainable. Such a defence is open to the defendant by virtue of Article 65 of the Limitation Act, 1963 to set up against the owner seeking the relief of possession based on title against a person in adverse possession. Declaration of title presupposes that a title or ownership exist in the plaintiff, but if a person neither has the ownership nor title, what declaration can he ask for.

15. In view of the above, in none of the judgments cited by learned counsel for the respondent (plaintiff), the proposition of law was directly in issue. Thus, we are of the opinion that no declaration can be sought by a plaintiff with regard to ownership on the basis of adverse possession as such plea is available only to defendant.

Besides the opinion of the Division Bench of this Court, the issue was considered by Hon'ble the Supreme Court in Gurudwara Sahib vs Gram Panchayat Village Sirthala and another 2013 (4) R.C.R. (Civil) 703, wherein it was opined that declaration cannot be sought by a plaintiff to the effect that the adverse possession has matured into ownership. It can only be used as a weapon of defence. Relevant para thereof is extracted below:-

“7. In the Second Appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable. There cannot be any quarrel to this extent the judgments of the Courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/ defence.”

Considering the opinion expressed by the Division Bench of this Court in the case in hand and the judgment of Hon'ble the Supreme Court in Gurudwara Sahib's case (supra), as referred to above, opining that a suit filed for declaration claiming ownership on the basis of adverse possession is not maintainable, the question no. 1, referred to above, is answered in negative holding that the plaintiff is not competent to seek declaration as owner of the property by way of adverse possession, as such a plea is available only to a defendant. Once the suit itself was not maintainable, no other issue is required for consideration.

Accordingly, while accepting the appeal and setting aside the judgments and decrees of both the Courts below, the suit filed by the respondent-plaintiff is dismissed with costs throughout.

8.4.2015
vs

(Rajesh Bindal)
Judge

(Refer to Reporter)