

In the High Court of Punjab and Haryana at Chandigarh

SAO 53 of 2009 (O&M)

Date of decision: 18.9.2015

Santokh Singh

.....Appellant

Versus

Tarsem Singh

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. K.S.Cheema, Advocate,
for the appellant.

Mr. Shailendra Sharma, Advocate
for the respondent.

1. Whether Reporters of local papers may be allowed to see the judgment ?

2. To be referred to the Reporters or not ?

3. Whether the judgment should be reported in the Digest?

RAJ MOHAN SINGH, J.

1. This is an appeal filed by Santokh Singh, legal representative of Smt.Prakash Devi, defendant in the suit. The suit for declaration was filed by Tarsem Lal to the effect that plaintiff is owner in possession of the suit land, as shown in the plaint. Earlier one Milkhi Ram was in actual peaceful possession of the suit land. After his death, plaintiff inherited the estate of Milkhi Ram on the basis of Will dated 25.2.1969 and thus came into possession of the land in question. Plaintiff is the real grandson of Milkhi Ram and, therefore, inherited the property of Milkhi Ram. Dass Ram son of Milkhi Ram died on

10.4.1971 and, thus, pre-deceased Milkhi Ram, who died on 25.4.1973. The possession of the ancestors of the plaintiff has been claimed to be peaceful, continuous and hostile for the last more than 50 years and even the plaintiff claimed the same to have ripened into adverse possession. Milkhi Ram was living with plaintiff and was joint in mess and residence. Plaintiff served Milkhi Ram till his death. Milkhi Ram on account of love and affection executed Will dated 25.2.1969 in favour of the plaintiff. Plaintiff claimed that the said Will was upheld by the Court in Civil Suit No.326 dated 22.7.1987 titled 'Tarsem Lal vs. Shankri' decided on 13.9.1989. The original Will was produced by the plaintiff in the said suit. Plea of adverse possession was taken by the plaintiff.

2. The suit was contested by the defendant on all customary pleas. It has been denied that the plaintiff is owner or in possession of the suit property. The suit property was claimed to be *shamlat patti Prem Garh hasab rasab khewat and Labu Ram* was proprietor in the village. Prem Garh had the right in *shamlat patti hasab rasab khewat* and as such he was in possession of khasra No. 414 measuring 1 kanal 2 marla as owner. There was no relationship between Dass Ram and Milkhi Ram. Dass Ram was never remains in possession of the land. Status of the plaintiff vis-à-vis the land can never be that of owner in possession. Plaintiff was never in possession so the

question of spending money on the suit property does not arise.

The plaintiff cannot take plea of adverse possession as a weapon of offence against the true owner. Milkhi Ram was not living with the plaintiff nor he was joint in mess and residence. The decision given in previous suit is not binding on the defendant as she was not party to the said litigation.

3. After completion of pleadings, trial Court framed following issues:-

“1. Whether the plaintiff is entitled for declaration to the effect that he is owner in possession of suit land ?

OPP

1-A. Whether the plaintiff has become owner of the disputed property on the basis of adverse possession as prayed for ? OPP

2. Whether the entries for jamabandi for the year 1996-97 showing the defendant in the column of cultivation are wrong ? OPP

3. Whether the plaintiff is entitled for consequential relief for permanent injunction as prayed for ? OPP

4. Whether the plaintiff is entitled for declaration as prayed for ? OPP

5. Whether the suit is not maintainable ? OPP

6. Whether the plaintiff has no locus standi to file the present suit ? OPD

7. Whether the plaintiff is estopped by his act and conduct for filing the present suit ? OPD

8. Whether the defendant Parkash Devi has been wrongly shown to be the wife of Labu Ram ? OPD

9. Whether the site plan attached with the plaint is wrong ? OPD

10. Relief.”

4. Parties led their respective evidence in support of their case.

5. Trial Court took up issues No.1, 1-A, 2, 3 and 4 together and decided the same against the plaintiff, observing that the witness (Plaintiff) produced the certified copy of Will dated 25.2.1969 executed by Milkhi Ram, which is Mark 'A'. PW-1 Darshan Ram supported the version of plaintiff Tarsem Lal. PW-6 Barjinder Mohan Singh, deed writer, deposed that his father Bawa Ram Nath Singh Bedi had been working as deed writer in Hoshiarpur. He died in 1994. He (PW-6) had been working with his father and saw him writing and signing the documents. He claimed himself to be fully conversant with the handwriting of his father. He proved the certified copy of original Will dated 25.2.1969 Ex.PW-6/A bearing entry at Sr.No.190 dated 25.3.1969 of the register maintained by his father as scribe. Case of the plaintiff is that the said Will was duly upheld in civil suit No.326 of 22.7.1987 titled 'Tarsem Lal vs. Shankri

etc., decided on 13.9.1989.

6. On issue No.8 defendant was discharged from the liability to prove the same. Issues No.6, 7 and 9 were not pressed. Issue No.5 was decided in favour of the defendant. Resultantly the suit of the plaintiff was dismissed by the trial Court vide judgment and decree dated 30.10.2006.

7. Feeling aggrieved against the judgment and decree dated 30.10.2006 passed by the trial Court, plaintiff filed appeal before the lower Appellate Court.

8. Before the lower Appellate Court, appellant contended that the trial Court has not framed all the necessary issues and illegally decided the issues jointly, thereby causing material prejudice to the appellant. It has been contended that the trial Court was required to give finding on each issue separately. Lower Appellate Court on the plea of the appellant, has appreciated the contention that the plaintiff inherited the estate of Milkhi Ram through Will dated 25.2.1969. The stand of the defendant as pleaded in the written statement was that the alleged Will is a forged and fabricated document. Since the plaintiff has sought his rights from Milkhi Ram on the basis of Will and it has been denied specifically by the defendant, therefore, an issue has arisen but the trial Court did not frame any issue on the alleged Will. In the written statement, defendant claimed his possession in the capacity of proprietor

and this fact was denied by the plaintiff in the replication. Therefore, issue to this effect was also necessary to be adjudicated. Trial Court decided five issues jointly i.e. issues No.1, 1-A, 2, 3 and 4. Issue No.1-A was in respect of adverse possession and issue No.2 was related to correction of revenue record. Issue No.3 was in the context of relief of injunction. Issues No.4 and 1 were related to declaration. Issues No.6, 7 and 9 were the issues, which were based on appreciation of facts and legal position. According to lower Appellate Court, trial Court should have given findings on each issue on the basis of evidence. Issues No.6, 7 and 9 were not pressed before the trial Court so the trial Court disposed of the same accordingly.

9. Lower Appellate Court framed two additional issues No.10 and 11 to the following effect:-

"10. whether Milkhi Ram executed valid Will on 25.2.1969 in favour of the plaintiff if so its effect ?

OPP

11. Whether the the defendant is in possession of the suit property as that of a proprietary ? OPD"

10. After framing the additional issues, Appellate Court vide judgment dated 26.8.2009, remanded the case to the trial Court with the direction to give findings on all the issues, including additional issues after giving one opportunity to both the parties and decide the case afresh.

Feeling aggrieved against the said judgment, present appeal has been filed by legal representative of the defendant.

11. Learned counsel for the appellant has contended that in the very nature of issues No.1, 1-A, 2, 3 and 4, there is no illegality in giving findings collectively under these issues. Even if these issues are to be separately answered, their findings will be of overlapping nature as the same evidence is required to be appreciated for answering these issues. Issue No.1-A cannot be answered being a right of plaintiff based on adverse possession. Such a proposition cannot be answered as right of adverse possession is a right of defence. Plaintiff cannot set up the plea of adverse possession as a weapon of offence. Remaining issues will arise from the interpretation of same evidence and therefore, the finding recorded by taking these issues altogether cannot be vitiated by any stretch of imagination. Similarly once issues No. 6, 7 and 9 have not been pressed by the defendant, therefore there is no gainsaying in observing that these issues are to be separately decided. Nothing remained to decide in these issues once they were not pressed by the defendant i.e. the person on whom the onus to prove these issues was fixed.

12. Learned counsel for the appellant further states that factum of Will was pleaded by the plaintiff. Both the parties knew case of each other, even application for secondary

evidence in respect of Will was allowed by the trial Court. After such acceptance of application, plaintiff led evidence of PW-6 only despite such grant of prayer of secondary evidence, no evidence was brought on record by the plaintiff to prove the execution of Will. Now after availing such an opportunity of leading secondary evidence if the Will remained to be unproved, lower Appellate Court is not justified in filling the lacuna in the plaintiff's case by framing additional issue on Will.

13. I have considered the submissions made by both the sides on record and have perused the record.

14. Plea of learned counsel for the appellant is that there was no necessity of framing additional issues with regard to Will and possession as the evidence has already been led by the plaintiff on Will in pursuance to acceptance of application for secondary evidence. If despite the fact of this opportunity the evidence is lacking, the lower Appellate Court cannot fill up the lacuna by subsequently framing an issue at appellate stage and remanding the case to the trial Court for a fresh decision after giving opportunity of leading evidence to the parties. Secondly, the lower Appellate Court has remanded the case after framing additional issues. The findings returned on issues Nos.1, 1-A, 2, 3 and 4 may be jointly, but the same have not been set aside by the Appellate Court in any manner, rather it has been observed that the trial Court should have given separate findings under

these issues. A perusal of issues No. 1, 1-A, 2, 3 and 4 shows that overlapping findings are required to be given under these issues. So far as issues No.6, 7 and 9 are concerned, these issues were never pressed by the defendant, therefore, there is no question of returning findings on these issues by separate mechanism.

15. The only factor that has been weighed with the lower Appellate Court is that the case based on Will has not been adequately met by the trial Court by framing relevant issue. Once an application for leading secondary evidence was allowed by the trial Court and in pursuance thereto, plaintiff led evidence of PW-6, son of the scribe, nothing survived thereafter to fill the lacuna by means of framing additional issues. Learned counsel asserted on first principle that the judgment rendered by lower Appellate Court is not justified in totality. Even on second principle if the case is being remanded on additional issues, it was obligatory on the lower Appellate Court to set aside findings of all the issues before making remand of the case. Learned counsel has stuck to the first principle that remand itself is not permissible in view of application for secondary evidence having been allowed by the trial Court and thereafter, plaintiff led evidence to that effect. If still execution of Will could not be proved, no fault can be attributed to the trial Court that the trial Court did not frame any issue on Will and possession. Even

otherwise when both the parties knew case of each other, framing of issue under Order 14 Rule 1 CPC becomes nugatory. Such evidence even without issue could have been appreciated if evidence was led by the plaintiff after acceptance of his application for secondary evidence.

16. In view of aforesaid, in considered opinion of this Court, the judgment dated 26.8.2009 passed by the lower Appellate Court does not stand to reasons . Consequently, this appeal is accepted. Impugned judgment is set aside. Case is remanded to the lower Appellate Court to decide the case on available material on record.

(RAJ MOHAN SINGH)
JUDGE

September 18, 2015
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