

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

RSA No. 344 of 2015 (O&M)

Date of decision: November 16, 2015

Gurdev Singh and others

...Appellants

Versus

Harbans Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE K. KANNAN

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?**

Present: Mr. Gourav Jain, Advocate,
for the appellants.

Mr. Rakesh Gupta, Advocate,
for the respondents.

K. KANNAN, J. (Oral)

1. Notice of motion.
2. Mr. Rakesh Gupta, Advocate, accepts notice on behalf of the respondents.
3. The appeal is brought by the defendants who resisted an action for recovery of possession on two grounds: One, that there has been exchange of the property with the plaintiffs and that the defendants had put up construction in the property and second, that the defendants were holding the same in their possession for more than 45 years, adversely to the plaintiffs' interest.
4. The trial court decreed the suit finding that the plaintiff's right

was admitted and the defendants were pleading a case of exchange and if it was not proved, the plaintiffs are bound to succeed. At the appellate court, the, court also observed that the ingredients of adverse possession of the commencement of possession and its continuity has not been established in the manner required under law and confirmed the judgment of the trial court.

5. Learned counsel appearing on behalf of the defendants/appellants states that the suit is barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure (for short '**the Code**'). The contention is that the same very plaintiffs filed a suit for injunction claiming themselves to be in possession originally and during the pendency itself they filed the present suit for recovery of possession. Having filed a suit for injunction, if they had not pressed for recovery in the said suit itself, the claim was barred under Order 2 Rule 2 of the Code. I would hold this argument to be baseless, for, Rule 2 Order 2 of the Code merely requires a suit to include whole of the claim in respect of which there was a cause of action. The omission to sue for one of the reliefs which sub-rule 3 indicates is that which a person is entitled to ask in the very same suit. If they were filing a suit for injunction on an assertion that they were in possession and brought another suit on a plea that the defendants are in possession having trespassed in their property and put up construction, there was no question of Order 2 Rule 2 or sub clause 3 applying in such a case. If the plaintiffs' suit for injunction itself has been dismissed, there was no scope for a similar result to follow also in a suit for recovery of possession.

6. In this case, when the suit for recovery of possession was made,

the defendants were pleading for a case of exchange and they failed. A case of exchange is an aspect of admission of right of another party in respect of the property and if such a plea failed, then the case could survive only if they could establish their adverse holding. The learned counsel for the appellants would argue that there was not even an issue for adverse possession, though there was pleading for the same. I have examined the trial court judgment which has framed an issue of whether the plaintiffs' claim for recovery of possession is barred by limitation. Adverse possession is an issue of limitation covered under Articles 64 and 65 of the Limitation Act and if the trial court had framed such an issue and cast the burden on the defendants, it was the duty of the defendants to prove the same.

7. Learned counsel would further state that the defendants' possession for the last 20 years has been admitted in the course of cross-examination of the plaintiffs. This admission, in my view, cannot help the defendants because in the earlier suit for injunction filed by the same plaintiffs, the defendants had filed a counter claim in respect of the property claiming adverse possession. When the suit for injunction was dismissed, the court was also dismissing the counter claim for the relief of adverse holding by the defendants. That judgment had become final between the parties. If the defendants had not themselves preferred an appeal against the dismissal of the counter claim, they would be barred by principle of res-judicata in taking up such a plea. The counter claim is referred to under Order 8 Rule 6A of the Code as in the nature of a plaint and Order 8 Rule 6G of the Code laid lays that rules relating to written statement will apply.

Consequently, if the written contains a counter claim, the plaintiffs are bound to file a reply, which will be in the nature of written statement and if the plaintiffs even make a default to file reply, the defendants would have the benefit in the same way as the plaintiffs would have, if in a normal suit, the defendants would remain ex-parte. All the trapping of pleadings as plaintiffs and defendants would stand reversed in case of counter claim and consequently, if a counter claim is dismissed, the finding that the defendants had not proved title by adverse possession, it would obtain finality and the defendants would be even barred from setting up such a claim in the written statement without preferring an appeal against the judgment which dismissed their counter claim.

8. I have traversed beyond what was considered by the courts below as regards the effect of dismissal of the counter claim only because the plaintiffs did not make disclosure themselves about the counter claim and Mr. Rakesh Gupta, Advocate, who accepted notice on behalf of the respondents, brings out the said fact and also the fact that the defendants were actually pleading for exchange of the property with the plaintiff, which they failed to prove and therefore, even the issue of adverse possession cannot be sustained.

9. There is no merit at all in the appeal and the point of law which which is involved is against the appellants. The second appeal is dismissed.

November 16, 2015
prem

(K.KANNAN)
JUDGE