

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Regular Second Appeal No.3865 of 2014 (O & M)

Date of Decision: *December 11, 2015*

Ganesh Dass

..... APPELLANT

VERSUS

Jit Raj & others

..... RESPONDENT(S)

. . .

CORAM: **HON'BLE MR. JUSTICE JASPAL SINGH**

. . .

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. K.S. Sra, Advocate, for the appellant.

. . .

Jaspal Singh, J

1. The instant appeal has been preferred by Ganesh Dass, being aggrieved against judgment & decree dated June 9, 2011 passed by the trial court, which has been further affirmed vide judgment and decree dated March 22, 2014 rendered by the first appellate court.

2. Brief facts of the case are that Shaillo Ram, father of appellant, filed a suit for declaration to the effect that he is

owner in possession by adverse possession of premises consisting of a house and its courtyard bounded with walls, forming part of Khasra No.22R/3/1, Khewat No.36, Khatauni No.70, as entered in Jamabandi for the year 2000-01, situated in village Bhimpur, Pathankot. Permanent injunction was also sought against the defendant restraining him from interfering in the possession of plaintiff over the suit premises and from forcibly raising any construction over it. During pendency of the suit, plaintiff died and the case was pursued by his legal heirs. Appellant is one of the legal heirs of plaintiff.

3. Defendant contested the suit by filing written statement raising preliminary objections that plaintiff has suppressed material facts from the court. Plaintiff is not in possession of the suit property. Suit of the plaintiff is not maintainable. On merits, it was submitted that plaintiff and defendant are residents of same village. The plaintiff(s) has no concern with the suit property and rather, defendant is owner in possession of the same.

4. From the pleadings of parties, following issues were framed by the trial court:-

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

2. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP

3. Whether the plaintiff has not come to the court with clean hands? OPD

4. Whether the suit is not maintainable in the present form? OPD

5. Relief.

5. Parties led their respective evidence in order to substantiate their claim. After hearing learned counsel for the parties and on appraisal of evidence available on file, the suit filed by the plaintiff(s) was dismissed with costs. Feeling aggrieved, an appeal was preferred by the legal heirs of plaintiff, however, the same was also dismissed by the first appellate court.

6. In these backdrop of facts, the instant appeal has been instituted by Ganesh Dass, one of the legal heirs of plaintiff, challenging the judgments & decrees rendered by the courts below.

7. While assailing the impugned judgments & decrees, it has been contended by learned counsel for the appellant that impugned judgments and decrees passed by both the courts below are not in consonance with the evidence available on record and settled canons of law. Appellant – plaintiff is in possession of the property in dispute since 1948.

The possession of plaintiff is hostile, actual, notorious, to the knowledge of defendant(s) and it has matured into title. Hence, the plaintiff has become owner by way of adverse possession.

8. It has further been contended by learned counsel for the appellant that neither proper issues have been framed by the trial court arising out of pleadings of the parties nor proper opportunity of being heard and to produce the evidence has been afforded by both the courts below. Moreover, the suit is also legally maintainable for declaration of ownership on the basis of adverse possession which has been illegally dismissed by learned trial court.

9. This Court has given an anxious thought to the aforesaid submissions made by learned counsel for the appellant and have perused the record.

10. First of all, coming to the contention of learned counsel for the appellant that proper issues have not been framed by learned trial court, this Court does not find any merit. The trial court has specifically framed an issue as to whether the plaintiff is entitled to the decree for declaration as well as for permanent injunction. It is well settled proposition of law that if parties are aware that what they have to face in the trial and they led their evidence accordingly, merely non-framing of a

particular issue would not be fatal. In this context, we can have a reference to the pronouncement of Madhya Pradesh High Court captioned as Durg Singh Vs. Mahesh Singh, AIR 2004 MP 146.

11. So far as another contention with regard to non-affording of ample opportunity to adduce evidence is concerned, a perusal of the record reveals that after framing of the issues on January 16, 2006, case was listed for evidence of the plaintiff/appellant. After availing 22 opportunities within a span of approximately 4 years & 19 months, the plaintiff(s) closed their evidence by suffering a statement in the court. Here, it would also be not out of place to mention that after the closure of evidence, no application seeking additional evidence has also been filed by the plaintiff(s), either before the trial court or before the lower appellate court for the reasons best known to them.

12. As regards the maintainability, suit is not legally maintained. The weapon of adverse possession can only be used as a defence and not as a sword. Legally, the plea of adverse possession is only available in defence. In case Jasbir Singh & others vs. Municipal Committee Kharar, 2015(1) RCR Civil 702 while relying upon another authority titled as Gurudwara

Sahib vs. Gram Panchayat Village Sirthala, 2013(4) RCR (Civil)

703, it has been held that suit for declaration on the basis of possession is not maintainable. Similar observation was made by this Court in case Bhim Singh & others vs. Zile Singh & others, 2006(3) RCR (Civil) 97, wherein it was held:-

“11. Under Article 64 of the Limitation Act, a suit for possession of immovable property by a plaintiff, who while in possession of the property had been dispossessed from such possession, when such suit is based on previous possession and not based on title, can be filed within 12 years from the date of dispossession. Under Article 65 of the Limitation Act, a suit for possession of immovable property or any interest therein based on title, can be filed by a person claiming title within 12 years. The limitation under this Article commences from the date when the possession of the defendant becomes adverse to the plaintiff. In these circumstances, it is apparent that to contest a suit for possession, filed by a person on the basis of his title, a plea of adverse possession can be taken by a defendant who is in hostile, continuous and open possession, to the knowledge of the true owner, if such a person has remained in possession for a period of 12 years. It, thus, naturally has to be inferred that plea of adverse possession is a defence available only to a defendant. This conclusion of mine is further strengthened from the language used in Article 65, wherein, in column 3 it has been specifically mentioned “when the possession of the defendant becomes adverse to the plaintiff.” Thus, a perusal of the aforesaid Article 65 shows that the plea is available only to a defendant against a plaintiff. In these circumstances, natural inference must follow that when such a plea of adverse possession is only available to a defendant, then no declaration can be sought by a plaintiff with regard to his ownership on the basis of an adverse possession.”

13. A glance at the aforesaid observation makes it crystal clear that suit seeking declaration for having become owner of the suit property by way of adverse possession itself is not maintainable. A person in adverse possession can only raise such plea by way of defence and not by way of an offence by filing suit.

14. Adverting to the facts of the case in hand, this Court does not find any infirmity, illegality or impropriety in the

findings recorded by learned trial court and upheld by the lower appellate court, rather, this Court is of the considered view that same are absolutely in consonance with the evidence as well as legal proposition applicable to the facts & circumstances of the case in hand.

15. In the light of what has been discussed above, this court does not find any merit in the instant appeal and the same is dismissed, however, leaving the parties to bear their own costs.

December 11, 2015

avin

**(Jaspal Singh)
Judge**