

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CR No.980 of 2016 (O&M)

Date of decision:11.07.2016

Varinder Kaur Garcha and others

... Petitioners

Vs.

Arvinder Pal Singh Sibia and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Anand Chhibbar, Senior Advocate with
Mr. Gaurav Mankotia, Advocate
for the petitioners.

Mr. P.S.Thiara, Advocate
for the respondents.

AMIT RAWAL J.

Petitioner/defendants No.1 to 3 are aggrieved of the impugned order dated 15.01.2016 (Annexure P-1), whereby, their application filed by invoking the provisions of Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as 'CPC') seeking amendment of the written statement, has been rejected.

Mr.Anand Chhibbar, learned Senior Counsel assisted by Mr.Gaurav Mankotia, Advocate appearing on behalf of the petitioners submits that initially they had filed a civil suit claiming declaration of ownership on the basis of adverse possession. The said suit was decreed vide ex parte judgment and decree dated 16.10.2006. In those proceedings, the defendants therein, i.e., Mohinder Kaur Sibia and Parkash Kaur moved

an application under Order 9 Rule 13 of the CPC which was allowed vide order dated 10.8.2005. Thereafter, the aforementioned persons moved another application under Order 7 Rule 11 of the CPC and the same was allowed on 07.12.2015, in essence, the judgment and decree asserting the right of ownership by way of adverse possession was set aside. The instant suit, i.e., civil suit no.192 of 2008 claiming declaration that plaintiffs and defendants No.7 to 10 being joint owners-in-possession of the house situated in Gurdev Nagar, Ludhiana, part of khasra number and further declaration with regard to the sale deed etc. was instituted on 21.07.2008. Written statement dated 30.07.2009 was filed on behalf of petitioner/defendants No.1 to 3. The cause of action arose to move an application under Order 6 Rule 17 of the CPC immediately after dismissal of the suit on account of allowing of the application being filed under Order 7 Rule 11 of the CPC, which was filed on 15.12.2015, with promptitude. The trial Court has erroneously dismissed the application holding that it was not conforming to the provisions of Order 6 Rule 17 of the CPC, i.e., “despite exercise of due diligence”, the petitioners could not incorporate the plea of adverse possession owing to the facts narrated above. The trial Court has further gone to arena of surmises and conjectures holding that plea of adverse possession has already been taken which is a factual error. In fact, the filing of the previous suit claiming ownership on the basis of the adverse possession ingredients could not be proved in affirmative. The plea of animus possidendi, continuous and adverse possession knowledge to the whole world, much less, to the plaintiffs, is/was required to be pleaded as the plea of adverse possession has to be taken as defence as per the

provisions of Article 65 of the Limitation Act, 1963 (hereinafter referred to as '1963 Act'). The previous suit was not as per the provisions of Section 27 of 1963 Act. The strict rigors of Order 6 Rule 17 of the CPC providing the expression “that amendment cannot be allowed as the trial had begun” would not be an impediment as the amendment sought would fall within the expression “*despite exercise of due diligence*” as the petitioners were hopeful that application under Order 7 Rule 11 of the CPC would be dismissed. In support of his aforementioned contention, he relies upon paragraph 8 of the judgment of the Hon'ble Supreme Court rendered in **Baldev Singh and others vs. Manohar Singh and another AIR 2006 SC 2832** and thus, urges this Court for setting aside of the impugned order.

Per contra, Mr. P.S.Thiara, learned counsel appearing on behalf of the respondents submits that if the amendment is allowed, it would tantamount to de novo of the trial. He has drawn the attention of this Court to the un-amended written statement to contend that plea of adverse possession had already been taken and therefore, the application at the belated stage is nothing but an adoption of delaying tactics, which cannot be allowed to be perpetuated as the suit is of 2008 and the petitioners are bent to protract the adjudication of the suit. It would cause undue hardship to the plaintiffs who have already been examined and cross-examined by the defendants.

The factum of adverse possession at the time of filing of the written statement in the year 2009 was well within the knowledge of the petitioners. The order of the trial Court is perfectly legal and justified as it did not determine the merits of the case while deciding the application

under Order 6 Rule 17 of the CPC. In support of his aforementioned contention, he relies upon the judgment of the Hon'ble Supreme Court rendered in **Ajendraprasadji N. Pande & another vs. Swami Keshavprakeshdasji N. & others 2007 (1) R.C.R.(Civil) 481** to contend that proviso of Rule 17 of the CPC prohibits the amendment of the pleadings when the trial had commenced and the trial is deemed to commence when the issues are settled or the case is set down for recording of the evidence. Further relies upon the judgments of this Court, as well as, of Delhi High rendered in **Rajbir Singh and others vs. Tejinder Singh and others 2015(3) R.C.R.(Civil) 221; Ram Niwas vs. Daya Nand and others 2015(5) R.C.R(Civil) 692; Mukesh Gulati vs. Suraj Prakash Chauhan and others 2015 (225) DLT 7 and Ishwar Singh and another vs. Sanjiv Kumar and others 2012(4) Law Herald 3074**. The amendment sought to be allowed tantamount to reopening of the trial and filling up of lacuna and thus, urges this Court for affirming the findings rendered by the trial Court.

I have heard learned counsel for the parties and appraised the paper book.

It would be apt to reproduce the proposed amendment sought to be incorporated which reads thus:-

“12. That the suit filed by the plaintiff is liable to be dismissed for the reason that the defendant No.1 Varinder Kaur has become owner of suit property by way of adverse possession. In fact, initially the suit property was the ownership of Puran Singh son of Gurdas Singh to the extent of 711-1/9 sq. yards.

He sold the same to Mohinder Kaur and Parkash Kaur vide sale deed dated 25.08.1965 bearing wasika no.2598 dated 16.11.1965 to the extent of ½ share each. Similarly, adjoining property measuring 355.5/9 sq. yards which was earlier the ownership of Inder Mohan Singh to the extent of 1/3rd share and GPA Guriqbal Singh to the extent of 1/3 share and GPA Surjit Singh Grewal to the extent of 1/3 share and they sold the property vide sale deed dated 09.08.1965 wasika no.2316 dated 02.11.1965 in favour of said Mohinder Kaur and Parkash Kaur to the extent of ½ share each. Thus, they became owners of total property measuring 1066-6/9 sq. yards. Although the said persons Mohinder Kaur and Parkash Kaur were owners but they never treated themselves as owners and since the date of purchase of property, it was understood by them that the above said property i.e. construction portion and plot, is the ownership of Satwinder Pal Singh Garcha, husband of defendant no.1 and father Joginder Singh, who had in fact purchased the said property in the names of Mohinder Kaur and Parkash Kaur from their own funds. The house was also named as Sibia Cottage from the caste of their husband as they were already married and taken their due share in their respective marriages and were residing in their in-laws house. The suit property is in exclusive possession of defendant no.1 and her family through Satwinder Pal Singh Garcha husband of defendant no.1, since its purchase. The defendant no.1

Virinder Kaur and her family continuously remained in possession of the suit property without any interruption from any quarter much less Mohinder Kaur and Parkash Kaur etc and their possession is more than statutory period of 12 years to the knowledge of Mohinder Kaur and Parkash Kaur, which was matured into ownership by way of adverse possession. The defendant no.1 and her family has been using the said property as owners to the knowledge of real owners and their possession is adverse, hostile, continuous, uninterrupted and unchallenged and has matured into adverse possession as it has been hostile and open to the knowledge of owners. The possession of defendant no.1 is expressly and impliedly in denial of the title of true owners who have never objected to treat the suit property by the defendant no.1 and her family as owners. The defendant no.1 has done many overt acts to the knowledge of Mohinder Kaur and Parkash Kaur, by treating the suit property as her ownership. In the year 1989, husband of defendant no.1 Satwinder Pal Singh Garcha changed the name of the property from Sibias to Billos and he started fast food corner in the name and style of M/s Billos Fast Food to the knowledge of Mohinder Kaur and Parkash Kaur. Many documents like passport, telephone connection, insurance of household goods, affidavit of Balwant Kaur mother for herself and on behalf of Mohinder Kaur and Parkash Kaur shows possession of defendant no.1 over the suit property as owner.

Mohinder Kaur and Parkash Kaur also admitted the defendant no.1 as owner while making application for certificate u/s 230 (1) of the Income Tax Act. Some litigation also took place in the competent court of law wherein the defendant no.1 and her husband Satwinder Pal Singh Garcha had shown them as owner. Construction over the suit property was also raised by the defendant no.1 and her husband. As such, the defendant no.1 has become owner of suit property by way of adverse possession and the present suit filed by the plaintiff is liable to be dismissed.

3. *That similar facts may also be allowed to be added at the end of para no.7 on merits of the written statement.*

4. *That the said amendment is necessary for proper and effective adjudication of the case. Moreover, the amendment is the result of subsequent situation arose on account of allowing of applications under Order 9 Rule 13 CPC and as such, said plea could not be taken earlier when written statement was filed by the defendants no.1 to.3.”*

It is a matter of record that petitioner-defendants have yet to lead the evidence. Even cross examination of the plaintiffs' evidence would not matter much as the defendants have already led the evidence qua adverse possession. In case, the amendment is allowed, the plaintiffs have right to rebut the same, much less, cross examine the witnesses. The ratio decidendi culled out by the Hon'ble Supreme Court in paragraph 8 of Baldev Singh's case (supra) is squarely applicable to the facts and

circumstances of the present case. For the sake of brevity, paragraph 8 reads thus:-

“Keeping this principle in mind, let us now consider the provisions relating to amendment of pleadings. Order 6 Rule 17 of the Code of Civil Procedure deals with amendment of pleadings which provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. A bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the Court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 of the CPC it cannot be doubted that wide power and unfettered discretion has been conferred on the Court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the Court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the Court shall allow amendment of pleadings if it finds that delay in disposal of Suit can be avoided and that the suit can be disposed of expeditiously. By the Code of Civil Procedure (Amendment) Act, 2002 a proviso has been added to Order 6 Rule 17 which restricts the Courts from permitting an amendment to be allowed in the pleadings either of the parties, if at the time of filing an application for amendment, the trial has already commenced. However, Court may allow amendment if it is satisfied that in spite of due diligence, the party could not have raised the matter before the

commencement of trial. So far as proviso to Order 6 Rule 17 of the Code of Civil Procedure is concerned, we shall deal with it later.”

It is a matter of record that previous suit was not based as per the provisions of Section 27 of 1963 Act and the defence sought to be incorporated by amendment is in consonance with the provisions of Article 65 of 1963 Act. Both the parties shall have right to lead evidence to support their respective defences enabling the Court to adjudicate the lis in accordance with law, much less, preponderance of the evidence. I am of the view that the trial Court has not noticed the aforementioned fact and has heavily blamed the petitioners in prolonging the adjudication of the suit. It is a matter of fact that defendants have yet to lead evidence. In my view, the amendment does not tantamount to withdrawing of the admission, much less, setting up of new plea which tantamount to de novo of trial. At the best, the trial Court shall frame an additional issue, onus of which will be upon the defendants.

The facts narrated above would leave no manner of doubt that petitioners were hopeful of dismissal of the application under Order 7 Rule 11 of the CPC vis-a-vis decree dated 16.10.2006, but the same having been allowed on 07.12.2015, the application under Order 6 Rule 17 of the CPC was moved on 15.12.2015. The facts narrated above, would also show that the amendment sought is falling within the proviso of Order 6 Rule 17 of the CPC, if the amendment aforementioned could not be pleaded with the expression “despite exercise of due diligence”. In the un-amended written statement, there was a passing reference with regard to filing of the suit on the basis of adverse possession and decretal of the same. It is settled law

that plea of adverse possession cannot be taken in affirmative but only as defence.

For the foregoing reasons, much less, in the wake of the findings rendered above, I am of the view that impugned order is not sustainable in the eyes of law and the same is hereby set aside. The application filed under Order 6 Rule 17 of CPC is allowed. The trial Court shall give an opportunity to the petitioners to file the amended written statement and thereafter, shall frame an additional issue and proceed further with the trial in accordance with law.

Accordingly, revision petition stands allowed, subject to payment of costs of ₹10,000/- which shall be condition precedent.

(AMIT RAWAL)
JUDGE

July 11, 2016
savita