

RSA No. 1520 of 1988 (O&M)

-1-

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

**315**

**(1)**

RSA No. 1520 of 1988 (O&M)

Date of Decision: January 19, 2016

Harbans Kaur (since deceased) through LRs

-Appellant

Versus

Chiman Singh & anr.

-Respondents

**(2)**

RSA No. 1521 of 1988 (O&M)

Date of Decision: January 19, 2016

Harbans Kaur and anr.

-Appellants

Versus

Sukhwinder Kaur & Ors.

-Respondents

**CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH**

Present: Mr. T. S. Sidhu, Advocate for  
Mr. Vikas Singh, Advocate  
for the appellant(s).

Mr. Ashok Jindal, Advocate and  
Mr. Kashmir Singh, Advocate  
for the respondents.

**RAJ MOHAN SINGH, J.**

{1}. Vide this common judgment, two appeals i.e. RSA No. 1520 of 1988 titled as “Harbans Kaur (since deceased) through Lrs vs. Chiman Singh and anr.” and RSA No.1521 of 1988 titled as “Harbans Kaur and anr. vs. Sukhwinder Kaur & Ors.” are being decided.

{2}. Facts for disposal are being taken from RSA No. 1520 of 1988 titled as “Harbans Kaur (since deceased) through Lrs vs. Chiman Singh and anr.” which are as under:-

{3}. Plaintiff has filed this Regular Second Appeal against the judgment and decree dated 17.12.1987 passed by Additional District Judge, Barnala whereby the appeal filed by plaintiff-appellant was allowed and civil suit No.119 of 17.02.1983 was decreed for declaration to the effect that they are owners in possession of land measuring 2 Kanals 16 Marlas and defendants-respondents were restrained from dispossessing the

same and from interfering in the possession of plaintiff-appellant.

Accordingly, civil suit No.202 dated 05.03.1984 was allowed and suit filed by Harbans Kaur for possession was dismissed.

{4}. Plaintiff-appellant filed a suit for possession in respect of 1 Kanal 3 Marlas of land comprised in Khasra No.1717/1(1-1) and Khasra No.1717/2(0-2) as per jamabandi for the year 1979-80 as per the details given in the plaint. Plaintiff alleged that she was owner of the land bearing Khasra No.1717/1(1-1) and Khasra No.1717/2(1-15) out of which land bearing Khasra No.1717/2min (1-13) was sold to Gurcharan Singh father of the defendants. In this way, plaintiff remained owner in possession of rest of the land comprised in Khasra No.1717/1 and Khasra No.1717/2min. Plaintiff alleged that the defendants had encroached upon the land illegally one year prior to filing of the suit without having any right for the same.

{5}. Defendants contested the suit on all counts taking objections regarding mis-joinder, non-joinder, limitation and estoppel. Defendants claimed that their father Gurcharan Singh

had purchased land measuring 1 Kanal 14 Marlas comprised of Khasra No.215//2 (2-17) on 09.09.1964. From the date of execution of sale deed, father of the defendants came into possession of the land comprised in Khasra No.215//2(2-17). During consolidation, Khasra No.215//2 was bifurcated into two parts i.e. Khasra No.1717/1 (1-1) and Khasra No.1717/2 (1-15) i.e. 2 Kanals 16 Marlas and defendants remained in possession of the same where they had raised boundary wall and also constructed a kotha since for the last 15/16 years. Defendants also pleaded that they had also installed tubewell in the suit land. Plaintiff had no objection to the aforesaid construction. They staked their claim on ownership of land measuring 1 Kanal 14 Marlas on the basis of purchase and qua remaining area on the basis of adverse possession.

{6}. After filing replication, parties went to trial on following issues:-

{1}. Whether the plaintiff is owner of the property in dispute, as alleged? OPP.

{2}. Whether the suit of the plaintiff is bad for non joinder and mis joinder of necessary parties? OPD.

{3}. Whether the defendants have become the owner of the property in dispute by way of adverse possession? OPD.

{4}. Whether the defendants have raised any construction on the site in dispute? If so, its effect? OPD.

{5}. Whether the suit of the plaintiff is not within limitation? OPD.

{6}. Whether the present suit is liable to be stayed as alleged in the preliminary objection No.6? OPD.

{7}. Relief.

{7}. Trial Court took up issues No.1 and 3 jointly and held the same in favour of the plaintiff and against the defendants.

Issue No.2 was also held in favour of the plaintiff. Issues No.4, 5

and 6 were also decided in favour of the plaintiff and the suit was decreed. Plaintiff was held entitled to recover the possession of 1 Kanal 2 Marlas of land comprised in Khasra No.1717/1(1-1) and 1 Marla out of the land bearing Khasra No.1717/2(1-15). Defendants were held entitled to remain in possession of land measuring 1 Kanal 14 Marlas on the basis of sale deed Ex.P1 and not in respect of 1 Kanal 15 Marlas as recorded in Jamabandi Ex.P4 for the year 1979-80. In this way, decree for possession in respect of land measuring 1 Kanal 2 Marlas comprised in Khasra No.1717/1 (1-1) and Khasra No.1717/2 (0-1) was passed by the trial Court vide judgment and decree dated 15.09.1986.

{8}. Simultaneously, civil suit No.119 of 17.02.1983 filed by Sukhwinder kaur d/o Gurcharan Singh, Chiman Singh and Surjit Singh sons of Gurcharan Singh against Harbans Kaur was also in progress. In that suit, plaintiff claimed declaration and injunction in respect of suit land. Said suit was dismissed by the trial Court, however, they were held to be owner in possession of 1 Kanal 14 Marlas of land on the basis of purchase vide judgment and decree

dated 29.11.1985 passed by Additional Senior Sub Judge, Barnala.

{9}. Against both the judgments and decrees i.e.

15.09.1986 and 29.11.1985, two appeals were filed before the lower Appellate Court. Both were clubbed together and were decided vide common judgment and decree dated 17.12.1987.

The appeal filed by appellant in civil suit No.119 of 17.02.1983 was allowed and a declaration to the effect that plaintiffs therein were held owners in possession of land measuring 2 Kanal 16 Marlas and defendant was restrained from dispossessing them in the suit land. The appeal filed in civil suit No.202 of 05.03.1984 was allowed and the suit filed by Harbans Kaur for possession was dismissed. That is, how, two appeals i.e. RSA No.1520 of 1988 and RSA No.1521 of 1988 came to be filed in this Court.

{10}. On 28.08.2008, following substantial questions of law were sought to be formulated:-

{1}. Whether the lower Appellate Court has misread the evidence on record while giving

finding regarding adverse possession?

{2}. Whether the lower Appellate Court has committed patent error while giving finding regarding adverse possession?

{3}. Whether the lower Appellate Court had no jurisdiction to give finding of adverse possession there being no pleading regarding ingredients of adverse possession and in absence of any evidence and issue?

{4}. Whether the lower Appellate Court committed patent error in not meeting reasons of trial Court?

{11}. On 07.01.2015, this Court while considering the substantial questions of law only considered question No.(3) to be a substantial question of law and other questions were scored out of the list. Now, only question No.(3) is to be considered for deciding the appeal on merits.

{12}. I have heard learned counsel for both the parties and

have also perused the record.

{13}. Admittedly, father of defendants namely Gurcharan Singh purchased 1 Kanal 14 Marlas of land by way of sale deed dated 09.09.1964 Ex.P1 out of total 2 Kanals 17 Marlas of land comprised in Khasra No.215//2. During consolidation, Khasra No.1717(2-16) was allotted in lieu of land measuring 2 Kanals 17 Marlas comprised in Khasra No.215//2. Father of the defendants took possession of the entire land including the land which was not sold to him. The entries in Khasra Girdawari Ex.P6 from Sauni 1964 continued upto Sauni 1968 showing Gurcharan Singh to be Gair Marusi. Gurcharan Singh was recorded to be in possession of Khasra No.1717(2-16) as Gair Marusi from Sauni 1972 to Sauni 1982 according to Khasra Girdawari Ex.P8 to Ex.P10. Khasra No.1717 was bifurcated into two parts i.e. Khasra No.1717/1(1-1) and 1717/2(1-15) and were recorded as such in Sauni 1980 to Sauni 1982. In Hari 1983 and Sauni 1983, name of plaintiff Harbans Kaur was recorded to be in possession over Khasra No.1717/1(1-1) vide order of the Additional Director

Consolidation, Chandigarh in view of rapat No.24 dated 08.02.1983. Again from crop of Hari 1984 to 1985, defendants were recorded to be in possession in respect of Khasra No.1717/1 and also in Khasra No.1717/2. Mutation No.6794 was sanctioned on the basis of sale deed made in favour of Gurcharan Singh by the plaintiff. In Sauni 1985 to Hari 1986, defendants were recorded to be in possession of the land in question as Gair Marusi.

{14}. The substantial questions of law as poised for consideration before this Court are whether the findings recorded in respect of adverse possession by the lower Appellate Court are sustainable in law or not. Jamabandies for the year 1974-75 and 1979-80 Ex.P3 and Ex.P4 proved the title of the plaintiff and possession of the defendants over the suit land. Father of the defendants was recorded to be Gair Marusi for the first time in crop Sauni 1965, but the continuity was broken in favour of plaintiff in crop Hari 1968 to Hari 1970. From crop Sauni 1970 to Hari 1975, Gurcharan Singh continued in column of possession

and thereafter, names of the defendants continued till crop Sauna 1982. For the first time, Gurcharan Singh was recorded to be in possession of Khasra No.1717 (2-16) as Gair Marusi on account of sale for the crop Sauni 1970 and that entries continued upto Hari 1975 and again for the crop Sauni 1975 to Hari 1980. The title based on plea of adverse possession has to be tested on the strength of maxim "*nec vi, nec clam, nec precario.*"

{15}. A mere possession or permissive possession does not demonstrate spectrum of adverse possession. For claiming adverse possession, the defendants must prove that their possession is "*nec vi, nec clam, nec precario,*" i.e. peaceful, open and continuous. The possession should be actual, open, notorious, exclusive and continuous for the required time as provided in law. The necessary ingredients of adverse possession as enumerated in **2004 (2) RCR (Civil) 702 titled as Karnataka Board Wakf Vs. Government of India** are that the adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. A party claiming adverse

possession must prove that his possession is “nec vi, nec clam, nec precario” i.e. peaceful, open and continuous and it should be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the original owner and is actual, visible, exclusive, hostile and continued over the statutory period.

{16}. Plea of adverse possession is not a pure question of law, rather it is a mixed question of law and facts. A person who claims adverse possession, must show; (a) On what date, he came into possession? (b) What was the nature of his possession? (c) Whether the factum of possession was known to other party? (d) How long his possession had continued? (e) His possession was open and undisturbed.

{17}. Plea of adverse possession has no equities rather this right has some instinct of piratical rights. The person has to plead from what date his possession became adverse, and he must disclose the necessary ingredients in his pleadings. The written statements filed by respondents are totally silent. There is no

foundation on the aspect of adverse possession pleaded by the defendants in their written statement, therefore, the plea having been taken for the first time in arguments cannot be termed as a legal plea which can be raised at any stage. As earlier mentioned that plea of adverse possession is a mixed question of law and facts and therefore, it cannot be held to be a pure question of law.

{18}. Apparently, plea of adverse possession cannot be answered in favour of the defendants for more than one reason.

Firstly, the ingredients of adverse possession as discussed aforesaid are not satisfied in terms of its continuity and hostility.

Secondly, as per sale deed dated 09.09.1964, father of the defendants only purchased 1 Kanal 14 Marlas of land out of total 2 Kanal 16 Marlas. The sale was of share only and there was no partition effected between the parties. In this way, the father of the defendants only purchased share in the joint land and became co-sharer in Khasra No.215//2. In the absence of any plea of partition, plea of adverse possession cannot be advanced nor it can be appreciated because possession of one of the co-sharer

would be deemed to be possession on behalf of all the co-sharers in respect of each and every parcel of land till the same is separated by means of partition by metes and bounds. No evidence of partition has come forth on record, therefore such a plea in the light of concept of co-sharership cannot be entertained. Moreover, no evidence has come on record in the context of showing that the possession of defendants was hostile to the title of the plaintiff in respect of suit land. Since, no partition was pleaded by the plaintiff, therefore, in order to maintain the suit for possession, plaintiff was obligated to ear-mark specific portion of the land to which she was entitled for possession.

{19}. The pleadings of the parties on the factum of partition are conspicuously silent, therefore, even if plea of partition is ruled out from consideration in the context of adverse possession in favour of defendants, still the possession of the defendants cannot be appreciated to have culminated in a title based on adverse possession. For holding this proposition, document viz Ex.P2 i.e. Order dated 07.01.1976 passed by Additional Director

Consolidation, Punjab, Chandigarh is relevant to be quoted. The aforesaid order was passed on the petition filed by plaintiff Harbans Kaur under Section 42 of the Consolidation Act, contending that she had sold 1 Kanal 14 Marlas of land out of Khasra No.215//2 to Gurcharan Singh. Out of total 2 Kanals 16 Marlas, area measuring 1 Kanal 2 Marlas be deducted from Gurcharan Singh and be given to her. The prayer was made in the context that after the consolidation, entire area of old Khasra No.215//2 was shown in favour of Gurcharan Singh. The Director Consolidation after considering the rival pleas appreciated the controversy that the entire Khasra No.1717 to the extent of 2 Kanals 16 Marlas was recorded in the name of respondents and, therefore they were shown in excess of their entitlement on the basis of sale deed. The competent authority vide order dated 07.01.1976 deducted an area to the extent of 1 Kanal 2 Marlas from the respondents Gurcharan Singh and appreciated the fact that the irregularity committed at the time of compilation of record, the area to the extent of 1 Kanal 14 Marlas sold to the

respondents was held justified and the excess area to the tune of 1 Kanal 2 Marlas (in the order, it was shown 1 Kanal 1 Marla towards north side of the plot) was excluded from the entitlement of Gurcharan Singh and was given to the plaintiff. In this way, the entitlement of the plaintiff was acknowledged by the authority on the ground that in consolidation, error was crept in recording the entire land in favour of Gurcharan Singh. The error was rectified vide order dated 07.01.1976 and that order became final for want of challenge by the respondents at any subsequent stage.

{20}. The filing of civil suit on 05.03.1984 by the plaintiff for possession cannot be presumed to be barred by any limitation and plea of adverse possession raised by the defendants-respondents cannot be appreciated firstly on account of intermitent possession prior to consolidation and absence of fulfilling of ingredients after consolidation and even after the order of rectification dated 07.01.1976 Ex.P2 which had attained finality between the parties.

{21}. In view of aforesaid, this Court is of the view that plea

of adverse possession in favour of respondents is not well founded. Ingredients of adverse possession are not attracted. The filing of suit for possession for an ear-mark portion in order dated 07.01.1976 is maintainable. The plea of adverse possession pre-supposes vesting of title in favour of the plaintiff. Entries in the revenue record are not proved to be continuous entries. Moreover, mere possession is not sufficient to hold plea of adverse possession in favour of the respondents. Purchase of share in 1964 brought Gurcharan Singh in the capacity of co-sharer with the plaintiff. In the absence of any partition, this status subsisted during consolidation also, when share crept in the record while showing Gurcharan Singh to be in possession of entire suit land to the extent of 2 Kanal 16 Marlas, which prompted the plaintiff to file petition No.1532 of 22.11.1974 before the Additional Director Consolidation. The error in record was rectified and defined portion in the suit land i.e. 1 Kanal 1 Marla (North) was ear-mark for the plaintiff vide order dated 07.01.1976. Although order was passed in favour of both the parties and

attained finality as none of the parties assailed the same in any form.

{22}. In view of aforesaid, plea of adverse possession cannot be answered in favour of the respondents.

{23}. Having considered the substantial question as poised before this Court in favour of the appellant, this Court is of the considered view that the findings recorded by the trial Court though slightly with different reasoning, but in considered opinion of this Court are based on proper reading of evidence. The suit filed by the plaintiff deserves to be decreed. Accordingly, appeal is accepted, impugned judgment and decree passed by lower Appellate Court is set aside and that of trial Court is upheld.

**January 19, 2016**

*Jyoti Y.*

**(RAJ MOHAN SINGH)  
JUDGE**