

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

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RSA No. 2021 of 2010 (O&M)

Date of Decision: January 06, 2016

Balwant Kaur and Ors.

-Appellants

Versus

Kartar Singh and Anr.

-Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Amit Mehta, Advocate
for the appellants.

Respondents No.1 and 2 already exparte.

RAJ MOHAN SINGH, J.

{1}. Plaintiffs are in second appeal against judgment and decree dated 09.12.2008 passed by Additional District Judge, Mansa whereby the appeal preferred by defendants against judgment and decree dated 06.10.2007 passed by Civil Judge (Sr. Divn) Mansa was partly accepted.

{2}. Plaintiffs Balwant Kaur and others filed suit for possession and permanent injunction against Kartar Singh and Sukhdev Singh in respect of house bounded with specific dimensions sold by defendant No.2 in favour of defendant No.1

vide registered sale deed dated 17.12.1999 and for permanent injunction restraining defendant No.1 from alienating the suit land.

{3}. Defendants contested the suit on all counts. Defendants pleaded that plaintiffs Balwant Kaur and Surjit Kaur had filed a suit against Mahinder Singh- plaintiff No.3 and the present property was not included in that suit. Defendant No.1 was in possession of the property for more than 20 years prior to date of execution of sale deed and in alternative, defendant No.1 took the plea that he has become owner by way of adverse possession as his possession was without any payment of rent and he had raised construction after demolishing the old structure by incurring heavy expenses. Defendants also claimed special cost and the suit was claimed to be hit by Section 44 of the Indian Evidence Act as the registered documents could only be challenged on the ground of fraud and not otherwise. Defendant No.2 executed the sale deed as an attorney of defendant No.3.

{4}. On merits, the ownership of Hardam Singh has not been admitted. It has been alleged that Hardam Singh was father of plaintiff No.3 and he executed a Will dated 05.05.1983 in favour of plaintiff No.3. Even, if ownership of Hardam Singh is proved, Mahinder Singh became owner of the property by virtue

of said Will. Mahinder Singh is married to daughter of defendant No.2 who is living in Malaysia. Mahinder Singh appointed defendant No.2 as his attorney to sell the house and Mahinder Singh had received total sale consideration from defendant No.1 through his wife and daughter.

{5}. Plaintiffs alleged that suit property was owned by Hardam Singh who died on 25.10.1984. Hardam Singh was father of the plaintiffs. Harnek Kaur became owner of the property and she became owner alongwith plaintiffs in equal shares after the death of Hardam Singh. There was no legal representative of Hardam Singh. Harnek Kaur widow of Hardam Singh also died and plaintiffs being daughters and son became owners of the property. Defendant No.2 was in possession of the property and in order to cause loss to the plaintiffs, he executed sale deed dated 17.12.1999 in favour of defendant No.1 to which he had no right. Defendant No.1 forcibly took possession of the house in the absence of the plaintiffs in an unlawful manner. Defendant No.2 and plaintiff Mahinder Singh were not the absolute owners of the property.

{6}. After filing replication, trial Court framed the following issues:-

{1}. Whether the plaintiffs are entitled to decree for possession as prayed for? OPP.

{2}. Whether the plaintiffs are entitled to permanent injunction, as prayed for? OPP.

{3}. Whether the suit is not maintainable in present form? OPD.

{4}. Whether suit is barred under Order 2 Rule 2 CPC? OPD.

{5}. Whether the suit is hit by Section 44 of Indian Evidence Act, as alleged in para No.5 of the written statement? OPD.

{6}. Whether defendant No.1 is owner of the house by virtue of adverse possession in alternative as pleaded in para No.3 of the legal objections of written statement? OPD.

{7}. Whether defendant No.2 has been wrongly arrayed in the suit as prayed? OPD.

{8}. Whether Hardam Singh had executed a legal and valid registered Will No.28 dated 05.05.1983, in favour of Mohinder Singh, his son? OPD.

{9}. Relief.

{7}. Both the parties led evidence. Trial Court discussed issues No.1 and 8 jointly and decided issue No.1 in favour of the plaintiffs and issue No.8 against the defendants. Under issue

No.2, trial Court held the plaintiffs to be entitled to permanent injunction thereby restraining defendant No.1 from alienating the suit land. Issues No.3 to 7 were decided against the defendants and suit was decreed.

{8}. Feeling aggrieved against the judgment and decree dated 06.10.2007 passed by Civil Judge (Sr. Divn), Mansa, defendant Kartar Singh filed appeal before the lower Appellate Court. Lower Appellate Court took cognizance of the fact that even if plaintiff no.3 is proved to be having 1/3rd share in the house, then the sale deed to that extent was to be declared valid. Trial Court set aside the sale deed Ex.D1 without disbelieving the sale deed to be executed by plaintiff No.3 in favour of defendant No.2 and without deciding that plaintiff No.3 has really instituted the suit through plaintiff No.1. Plaintiff No.1 is not duly constituted attorney of plaintiffs No.2 and 3. Lower Appellate Court discarded the Will dated 05.05.1983 and held the same to be illegal and void on the basis of earlier suit decided on 08.09.1995 by the trial Court wherein suit of the plaintiffs No.1 and 2 was decreed, appeal was dismissed by the lower Appellate Court and even Regular Second Appeal No.1172 of 1999 Ex.P6 was dismissed by this Court on 12.10.1999. Unregistered Will allegedly executed by Hardam Singh was set aside. The factum of Will has been discarded in

the present suit on the basis of earlier litigation and, therefore, matter qua Will cannot be re-agitated in the present suit. Resultantly, lower Appellate Court also endorsed the findings of the trial Court under issue No.8. Plaintiff No.3 knowing fully well about the previous litigation sold the land through his attorney defendant No.2 in favour of defendant No.1. Mahinder Singh-plaintiff No.3 was owner of the 1/3rd share of the property. The sale deed dated 17.12.1999 Ex.D1 was assailed in the present suit within a period of 3 years from the sale deed itself. The ingredients of adverse possession in favour of defendant No.1 cannot be proved on the touchstone of maxim "*nec vi, nec clam, nec precario*."

{9}. 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.

{10}. 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.

{11}. 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. Since the written statement 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.

{12}. In view of aforesaid, defendant No.1 cannot claim benefit on account of adverse possession and plaintiff No.3 cannot claim legality of sale deed in view of earlier decision dated 08.09.1995 wherein the Will allegedly executed by Hardam Singh was discarded by the trial Court and that decision was affirmed right upto Regular Second Appeal when the same was dismissed by the High Court on 12.10.1999 Ex.P6 on record. Lower Appellate Court decreed the suit of the plaintiffs to the extent of 2/3rd of the share of the property belonging to plaintiffs No.1 and 2 and also held them entitled for permanent injunction thereby restraining defendant No.1 from alienating suit land to the extent of 2/3rd share of the plaintiffs No.1 and 2.

{13}. So far as share of plaintiff No.3 to the extent of 1/3rd share in the property is concerned, the sale deed was held to be valid and the decree of the trial Court to that extent was modified by the lower Appellate Court. Mahinder Singh is found to have executed General Power of Attorney in favour of his father-in-law defendant No.2 who executed sale deed in favour of defendant No.1.

{14}. I have heard the arguments raised by learned counsel

for the appellants.

{15}. The defendants have not rebutted the evidence of the plaintiff by leading any such cogent evidence. The defendants closed the evidence after tendering copy of sale deed dated 17.12.1999 Ex.D1 and Power of Attorney of Mahinder Singh. Power of Attorneys have not been proved in accordance with law. Power of Attorneys Ex.P1 and Ex.P2 have to be read keeping in view the relationship between the plaintiffs. In view of para No.3 of the attorney, authorization has been made in favour of plaintiff No.1 who have dealings with the lands. Further recital in the form of para No.5, authorized him to appear and represent the case in Court of law and in terms of para No.26, necessary authorization has been made to do all other acts. On the other hand, sale deed Ex.D1 does not confer any title in favour of defendant No.1 executed by defendant No.2 because no such authorization has been proved on record in terms of attorney of plaintiff No.3 in favour of defendant No.2. Plaintiff No.3 himself has joined with the plaintiffs before the trial Court as well as before this Court as one of the appellant. Defendant No.2 happened to be father-in-law of plaintiff No.3 and he sold away the property in favour of defendant No.1 without any authority of law. After notice of motion in the present appeal, none appeared on behalf of respondent despite due service and, therefore, they

were proceeded ex parte vide order dated 18.08.2011. Since, there was no lawful authority with defendant No.2 to sell the land in favour of defendant No.1, therefore, in considered opinion of this Court, even the relief to the extent of 1/3rd share belonging to plaintiff No.3 has been wrongly given to defendant No.1. The substantial questions as formulated in para No.6 of the appeal do arise. The findings recorded by the lower Appellate Court to the extent of 1/3rd share belonging to plaintiff No.3 are proved to be perverse and not legally sustainable. Power of Attorney cannot be held to be valid document when the executor of the same i.e. plaintiff No.3 has denied it and has joined hands with plaintiffs No.1 and 2 even before the trial Court as well as before the High Court in Regular Second Appeal. In the absence of proving due execution of alleged Power of Attorney in favour of defendant No.2, no such findings could have been recorded by the lower Appellate Court to the extent of holding the sale deed to be valid qua 1/3rd share belonging to plaintiff No.3. Question No.3 as formulated does not arise in as much as that plaintiff No.3 always remained with plaintiffs No.1 and 2 before the trial Court and has also joined plaintiffs No.1 and 2 in the present appeal. In the absence of any valid authority in favour of defendant No.2, the sale deed dated 17.12.1999 has to be declared invalid, illegal and not binding on the rights of the

plaintiff in totality.

{16}. Having considered the issue in the aforesaid manner, I am of the view that the impugned judgment and decree passed by lower Appellate Court is required to be modified, decreeing the suit in toto thereby declaring the sale deed dated 17.12.1999 to be wholly illegal and not binding upon the rights of the plaintiffs. The appeal is allowed and suit of the plaintiffs is decreed in toto with costs throughout.

January 06, 2016

Jyoti Y.

**(RAJ MOHAN SINGH)
JUDGE**