

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

**R.S.A No.2651 of 2012 (O&M)
Date of decision : 18.10.2016**

Sandeep and others

..... Appellants

Versus

Fateh Singh and others

..... Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr.Arun Jain, Sr. Advocate
with Mr. Arnav Sood, Advocate
for the appellants.

Mr. Anil Kshetarpal, Sr. Advocate
with Mr. Rohit Nagpal, Advocate
for respondent no.1.

DARSHAN SINGH,J

The present appeal has been preferred against the judgment and decree dated 07.03.2012 passed by the learned Additional District Judge, Jind, whereby the appeal filed by the appellants-plaintiffs against the judgment and decree dated 27.09.2010 passed by the learned Additional Civil Judge (Sr. Division), Jind, has been dismissed.

2. Appellants-plaintiffs have filed the suit for declaration to the effect that they are owner in exclusive possession of the suit land measuring 268 Kanals 16 Marlas out of 442 Kanal 18 Marlas detailed and described in the head note of the plaint situated in the revenue estate of

village Dahola, Tehsil and District Jind. Defendants have no right, title, interest or connection with the aforesaid land. They are only the owner in possession of the remaining land measuring 174 Kanals 02 Marlas out of the total land measuring 442 Kanals 18 Mralas. Appellants-plaintiffs also challenged the revenue entries including mutation no. 3747. They also sought the declaration that defendant no.1-Fateh Singh is not the son of Mam Kaur, widow of Udmi Ram and is not entitled for inheritance of the estate of Mam Kaur qua the aforesaid land. In the consequential relief, they also sought the decree for permanent injunction restraining defendant no.1 from interfering into their peaceful and cultivating established physical possession and also restraining him from alienating the suit land in any manner.

3. As per averments in the plaint, plaintiffs and defendants are the collaterals and descendants of common ancestor namely Phullu. Phullu had three sons namely Jahria, Hamira and Ram Rattan. Udmi Ram was the original owner of the entire suit land. After his death, the land in question was mutated in favour of Mam Kaur vide mutation no. 1444 dated 12.05.1944. In the later jamabandi entries, the name has been entered as Mam Kaur. Out of the wedlock of Udmi Ram and Mam Kaur, no issue was born. To avoid any dispute between the collaterals, Udmi Ram somewhere between 1920-30 put the parties and their predecessors-in-interest in exclusive possession of the suit land to the extent of their share as Malkan without Malkana. They were given full rights to use the land as owner, but the ownership was not changed in their name in the revenue record. Since then, the plaintiffs are coming into exclusive

possession of the suit land as mentioned in the head note of the plaint. Said Udmi Ram died in the year 1944. The plaintiffs remained in possession of the suit land without any interruption. After the death of Udmi Ram, mutation was sanctioned in favour of Maa Kaur on 12.05.1944 at Sr. No. 1444. In the later jamabandi entries, the name was mentioned as Smt. Mam Kaur. She used to live separately, but was served by all the collaterals. As the suit land was under the possession of the parties given by Udmi Ram, Smt. Maa Kaur in consultation and with the consent of all the collaterals with her free will executed a registered Will dated 06.08.1962 in favour of 18 persons mentioned in para no. 4 of the plaint, who were already in exclusive possession of the suit land. Said Will was executed by Mam Kaur in the presence of Dhan Singh Sarpanch, Ratia Lambardar and Chandgi Lambardar of village Dahola. After the death of Mam Kaur, none of the parties bothered to get the mutation entered and sanctioned in their favour according to the Will or otherwise on the basis of natural succession. Defendant no.1-Fateh Singh raised the disputed and attempted to get mutation no. 3747 entered and sanctioned in his favour, which was declared disputed. It is further pleaded that defendant no.1-Fateh Singh is not the son of Mam Kaur, widow of Udmi Ram. The name of the mother of Fateh Singh may be Maa Kaur, who was not the same lady who was the widow of Udmi Ram. Maa Kaur @ Mam Kaur had no issue at the time of death of Udmi Ram. That was the reason due to which Udmi Ram gave the land to his collaterals in his lifetime. If Fateh Singh would have been the son of Mam Kaur, then there was no need for her to execute the registered Will.

Mam Kaur died on 07.05.1982. but, Fateh Singh did not get the mutation entered for about 20 years. Plaintiffs-appellants further pleaded that if defendant no.1 claims to be the owner of the suit land being the son of Mam Maur, then the plaintiffs have become the owners of the suit land by way of adverse possession. Appellants-plaintiffs claimed to be the owner in exclusive possession of the suit land on the alternative ground of adverse possession in addition to the Will allegedly executed by Mam Kaur. Hence the suit.

4. Defendant no.1-Fateh Singh contested the suit on the grounds *inter alia* that the plaintiffs have been throughout admitting Smt. Mam Kaur-deceased to be the owner of the suit land. Mam Kaur-deceased was his mother. After the death of her previous husband Beg Raj, she married Udmi Ram residents of the same village and the cousin brother of Beg Raj. At that time, he was a small child and were brought up by Udmi Ram and Mam Kaur. Plaintiffs have got no right to inherit the disputed property as collaterals in the presence of defendant no1, who is the sole legal heir of Mam Kaur-deceased being her son. He further pleaded that deceased-Mam Kaur never executed any Will in favour of anybody. He also controverted the claim of the appellants-plaintiffs acquiring title to the suit property by adverse possession and pleaded that some persons used to cultivate the land due to '*Bhaibandi*' with the permission of Udmi Ram and later on with the permission of Mam Kaur. They have always been admitting defendant no.1 to be owner of the suit land. With these pleas, he pleaded for dismissal of the suit.

5. Along with the written statement, defendant no.1 also filed

the counter claim on the grounds *inter alia* that the plaintiffs have no legal right to retain the possession of the suit land which was permissive. They were just licensees. They have also refused to pay even the Batai etc to defendant no.1 and had started claiming ownership by way of Will, which has not seen the light of the day. He being owner of the entire land is entitled to the possession and *mesne* profit. The land is very fertile and can be given on lease at the rate of Rs. 10,000/- per acre per annum. Thus, he prayed for a decree of possession of the suit land measuring 241 Kanals 4 Marlas detailed and described in the head note of the plaint and also claimed the *mesne* profits at the rate of Rs.10,000/- per acre per annum from the date of suit till the date of delivery of possession.

6. Defendants no. 2, 3, 4, 6 and 8 also filed the written statement supporting the stand of defendant no.1.

7. Appellants-plaintiffs filed the replication as well as reply to the counter claim controverted all the pleas raised therein.

8. From the pleadings of the parties, the following issues were framed by the learned trial Court vide order dated 04.09.2006:-

1. Whether plaintiffs are owners in possession over the land measuring 268 Kanas 16 Marlas and defendants are owner in possession over the land measuring 174 Kanals 2 Marlas per their share mentioned in the head note of the plaint?OPP
2. If issue no.1 is proved in affirmative, whether revenue record contrary to the same is liable to be declared illegal, null and void?OPP
3. Whether Smt. Mam Kaur widow of Udmi executed a registered Will dated 06.08.1962? if so its effect?OPP
4. Whether defendant no.1 is son of Smt. Mam Kaur widow of Udmi and is entitled to inherit the estate left by her alleged latae mother?OPD1
5. Whether the suit is not maintainable in the present form?OPD
6. Whether suit is bad for misjoinder and nonjoinder of necessary parties?OPD
7. Whether plaintiffs are estopped from filing present suit by their own acts and conduct?OPD
8. Whether plaintiffs do not have any locus standi to file and

- maintain the present suit?OPD
9. Whether plaintiffs have concealed material facts from the court and therefore they are not entitled to any relief?OPD
 10. Whether plaintiffs do not have any cause of action?OPD
 11. Whether suit has not been properly valued for the purpose of court fee and jurisdiction?OPD
 12. Whether defendant no.1 is entitled to a decree for possession regarding the land subject matter of counter claim on various grounds taken therein?OPD-1
 13. Whether civil court has no jurisdiction to entertain and try the counter claim?OPP
 14. Whether counter claim is barred by limitation?OPP
 15. Relief.

9. On appreciating the evidence on record and the contentions raised by learned counsel for the parties, the learned trial Court dismissed the suit filed by the appellants-plaintiffs with costs, whereas the counter claim filed by defendant no.1-Fateh Singh was decreed with costs. Defendant-respondent no.1-Fateh Singh was held entitled to the possession of the suit land. Plaintiffs-appellants were also directed to pay the *mesne* profits at the rate of Rs.10,000/- per acre per annum from the date of filing the suit till the delivery of possession to defendant no.1.

10. Aggrieved with the aforesaid judgment and decree dated 27.09.2010, appellants-plaintiffs preferred the appeal. The same has also been dismissed by the learned Additional District Judge, Jind, vide impugned judgment and decree dated 07.03.2012. Hence this Regular Second Appeal.

11. I have heard Mr. Arun Jain, Senior Advocate with Mr. Arnav Sood, Advocate, learned counsel for the appellants, Mr. Anil Kshetarpal, Senior Advocate with Mr. Rohit Nagpal, Advocate, learned counsel for the respondent no.1 and have meticulously gone through the record of the case.

12. Initiating the arguments, learned counsel for the appellants

contended that Udmi Ram was the original owner of the suit land. Udmi Ram died in the year 1944. During his lifetime, somewhere in the year 1920-30, he handed over the separate portions of the suit land to his collaterals. Since then, they are in physical and cultivating possession of the suit land as owners without paying any Batai/rent. After the death of Udmi Ram, mutation no. 1444 dated 12.05.1944 was sanctioned in favour of Mam Kaur, his widow with respect to the suit land. He contended that no child was born from the wedlock of Udmi Ram and Mam Kaur. So, Mam Kaur executed and got registered Will dated 06.08.1962 in favour of the appellants. The said Will was deposited by her in the office of Sub-Registrar, Kaithal, which is evident from the Indexes Ex.P-1 and Ex.P-2. He contended that the execution of the Will by Mam Kaur is proved from the statement of PW-2 Vijay Singh and PW-3 Karam Singh who were the witness to the Will. Thus, he contended that plaintiffs-appellants have become the owners of the suit land on the basis of Will.

13. In the alternative, learned senior counsel for the appellants contended that appellants are in possession of the suit land right from the year 1925, which is evident from the revenue record. So, they are in possession for more than 90 years. Their possession was open, hostile, continuous and uninterrupted. So, they have become the owner of the suit property by way of adverse possession.

14. He further contended that Udmi Ram and Mam Kaur had abandoned the property in dispute in favour of the appellants. Appellants are in possession of the suit property for the last more than 90 years. The circumstances of the case establishes that it was a clear case of

abandonment of the suit property by the owners of the land as they do not made any effort to recover any '*Batai*'. They have not even received compensation for damage to the crops granted by the Government. They never sought to evict the appellants-plaintiffs from the suit property. Thus, he contended that the abandonment of the right, title or interest in the suit property by the owners of the land is fully established. Resultantly, appellants have become the owners of the suit property. To support his contentions, he relied upon cases **Man Singh and others Vs. Telu and others AIR 1967 Punjab 252** and **Kirpa and others Vs. Dharma and others 2006(3) PLR 613**. Thus, he contended that as the plaintiffs-appellants have become the owners of the suit property, so defendant no.1-Fateh Singh had no right to claim the possession thereof.

15. He further contended that learned trial Court has awarded the *mesne* profit in an illegal manner. No issue was framed with respect to the *mesne* profit. No enquiry was conducted by the learned trial Court as required under Order 20 Rule 12 of the Code of Civil Procedure, 1908 (for short C.P.C.). In the absence of enquiry under Order 20 Rule 12 CPC, the *mesne* profit cannot be granted. To support his contentions, he relied upon cases **Ganpati Madhav Sawant (dead) thr. His Lrs Vs. Dattur Madhav Sawant 2008(2) LJR 129** and **D.N.Kalia Vs. R.N.Kalia, R.F.A No. 72 of 2008, decided on 21.02.2011(Delhi High Court)**.

16. He further contended that in the counter claim, defendant-respondent no.1-Fateh Singh has alleged that no *batai* was paid. Meaning thereby, he has admitting the appellants to be tenants over the suit

property, so the civil Court has no jurisdiction to pass a decree for possession of the agriculture land against a tenant. Thus, he pleaded that the judgments and decrees passed by the learned Courts below are erroneous.

17. On the other hand, learned senior counsel for the respondent-defendant no.1 contended that the appellants-plaintiffs are claiming ownership to the suit property on the basis of the Will allegedly executed by Mam Kaur. He contended that the Will dated 06.08.1962 is not proved at all as no such Will has been brought on record. Mere production of the indexes of the register of the Sub-Registrar will not prove the execution of the Will. PW-2 Vijay Singh and PW-3 Karam Singh were not the attesting witness of the Will even as per the case of the plaintiffs. Thus, he contended that the existence and execution of any such Will is not proved.

18. He further contended that it is the admitted case of the appellants that they came into permissive possession of the suit property as the land was given to them by Udmi Ram, so their possession was permissive. Howsoever long it may be, the permissive possession cannot become the adverse possession. Thus, he contended that even the plea of adverse possession is not established.

19. He further contended that the plea regarding abandonment is totally beyond pleadings. No such plea has been raised by appellants in the plaint. Moreover, the owners of the suit land have been always claiming themselves to be the owner. Appellants have not raised any objection about the mutation of inheritance which was sanctioned in

favour of Mam Kaur. So, the plea of abandonment is also not proved.

20. He contended that defendant-respondent no.1-Fateh Singh being the son of Mam Kaur was her only legal heir. So, he has been rightly held to be entitled to recover the possession of the suit property by the learned Courts below. He further contended that there is a specific plea in the counter claim with respect to the *mesne* profits. So, the parties were fully aware about the controversy. The omission to frame the issue by the learned trial Court is no ground the held the claim of *mesne* profit illegal. He further contended that the learned trial Court has assessed the *mesne* profit on the basis of the evidence brought on record, which amounts to enquiry and there is no illegality in the grant of *mesne* profit. Thus, he pleaded that the judgments/decrees passed by the learned Courts below does not call for any interference by this Court.

21. I have duly considered the aforesaid contentions.

22. Appellants-plaintiffs are claiming title to the suit property firstly on the basis of the registered Will dated 06.08.1962 allegedly executed by Mam Kaur in their favour. In the alternative, they had claimed the ownership of the suit property by way of adverse possession. They have also claimed that the owners of the land had abandoned the title.

23. Admittedly, the original Will dated 06.08.1962 or the copy thereof has not been brought on record. Appellants-plaintiffs have moved an application for seeking permission to lead secondary evidence to prove the Will dated 06.08.1962. The said application was allowed by the learned trial Court vide order dated 11.12.2006. But, in the secondary

evidence, plaintiffs have only examined PW-1 Jagdish Garg, Head Registration Clerk, D.C. Office, Kaithal. He had only produce the indexes of the register of the Wills from 02.01.1962 to 31.12.1962 (copy Ex.P-1) and has categorically stated that he could not produce the record with respect to the Will dated 06.08.1962 as the same was not available in their office nor any entry with respect to the said Will was available in the record. So, only the index of the register of the Wills has been produced in evidence by the appellants-plaintiffs.

24. It is settled principle of law that the valid execution of the Will has to be proved in accordance with the provisions of Section 68 of the Indian Evidence Act read with Section 63 of the Indian Succession Act, 1925. But, no such evidence has been brought on record by the appellants. Even, as per the case of appellants-plaintiffs, the said Will was witnessed by Dhan Singh Sarpanch, Ratia Lambardar and Chandgi Lambardar, but, none of them have been produced in the witness box by the plaintiffs. Appellants-plaintiffs have also pleaded in the plaint that at the time of execution of the Will by deceased-Mam Kaur, Vijay Singh, Sajjan and Inder (plaintiffs) were present. This stand of appellants-plaintiffs is contradicted from their stand in Civil Writ Petition no. 3419 of 2002 in the said Writ Petition, it was the stand of the petitioner-Sube Singh, one of the plaintiff that he came to know about the said will when he was searching the old documents of his father in October 2001 and at that time he came across the original receipt of the Will. Thus, as per the stand in the Writ Petition, Sube Singh one of the plaintiff came to know about the Will in October 2001. But, in the plaint, it has been pleaded that

plaintiff-Vijay Singh, Sajjan and Inder were also present at the time of execution of the Will. If that would have been so, appellants-plaintiffs would have the knowledge of the Will from the very beginning. The pleadings in Civil Writ Petition 3419 of 2002 ruled out the presence of PW-2-Vijay Singh at the time of execution of the Will. Moreover, he has admitted in the cross-examination that he has never seen the Will till date, which further negates his presence at the time of execution of the Will.

25. Appellants-plaintiffs have also examined PW-3-Karam Singh to prove the Will. But, he has also stated in the cross-examination that he has not seen that Will. Thus, the presence of both these witnesses examined by the plaintiffs at the time of execution of the alleged Will is not proved. As already mentioned, none of the attesting witness namely Dhan Singh Sarpanch, Ratia Lambardar and Chandgi Lambardar have been produced in the witness box by the plaintiff.

26. The indexes Ex.P-1 and P-2 brought on record by the appellants-plaintiffs simply shows that a Will was submitted by Mam Kaur, widow of Udmi Ram for registration. The said Will was of three pages. Apart from this, these indexes does not convey any information. These indexes do not show as to who was the beneficiary of the Will and the property bequeathed by the said Will. These indexes do not prove the valid execution of the said Will. It does not show as to what was the state of mind of the testator at the time of execution of the Will. Indexes Ex.P-1 and P-2 cannot establish the execution of the alleged Will dated 06.08.1962 by deceased-Mam Kaur when the appellants-plaintiffs have not brought on record the original Will dated 06.08.1962 or the copy

thereof and none of the attesting witness thereof has been examined. So, appellants-plaintiffs have failed to establish that deceased-Mam Kaur had executed unregistered Will dated 06.08.1962 in their favour bequeathing the suit property.

27. In the alternative, appellants-plaintiffs have also claimed the title to the suit property on the basis of adverse possession. The adverse possession is a hostile possession by clearly asserting hostile title in denial to the title of the true owner. The said possession must be adequate in continuity, to the knowledge of the true owner and it must start with a wrongful disposition of the rightful owner. A person claiming adverse possession has to show on which date he came into possession, what was the nature of his possession, whether the factum of his possession was known to the true owner, how long his possession continued and whether his possession was open and undisturbed. It is further the settled principle of law that a person pleading adverse possession has no equities in his favour as he is trying to defeat the title of the true owner. The Hon'ble Apex Court in case **Karnataka Board of Wakf Vs. Government of India and Ors. 2004(2) R.C.R (Civil) 702** has laid down as under:-

“In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must 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 rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : **S M Karim v. Bibi Sakinal AIR 1964 SC 1254**, **Parsinni v. Sukhi(1993) 4 SCC 375** and **D N Venkatarayappa v. State of Karnataka(1997) 7 SCC 567**). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should 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 the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (**Dr. Mahesh Chand Sharma v. Raj Kumari Sharma(1996) 8 SCC 128**).

28. Again in case **Hemaji Waghaji Jat Versus Bhikhabhai Khengarbhai Harijan, 2008(4) RCR (Civil) 401**, the Hon'ble Apex Court has laid down that law of adverse possession which cause an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. It was further laid down in this case that there must be evidence when the possession became adverse. So, that the starting point of limitation against the affected party can be ascertained. The Hon'ble Apex Court in case **P.T. Munichikkanna Reddy & Ors vs Revamma And Ors 2007(2) R.C.R (Civil) 847** has laid down that mere possession for howsoever length of time does not result in converting the permissive possession into adverse.

29. In the instant case, it is the categoric stand of the appellants-plaintiffs that Udmi Ram, the original owner of the land somewhere in

the year 1920-30 had put the parties and their predecessors-in-interest in possession of the suit property. PW-2 Vijay Singh one of the plaintiff has also stated in the cross-examination that they are cultivating the suit land with their consent in Bhaibandi. Udmi Ram had given the land to them. The aforesaid pleadings and evidence clearly shows that the possession of appellants-plaintiffs was permissive from the very beginning. They have not pleaded at all that they entered into the possession of the suit land with wrongful disposition of Udmi Ram, the true owner. They have also not pleaded as to when their permissive possession converted into adverse possession and in which manner. Even, in the revenue record, they have been shown to be in possession of the suit land in Bhaibandi or Gair Marusi. Their possession in the revenue record at no point of time has been reflected as adverse (Mukhalfana). Thus, appellants-plaintiffs have not been able to establish the ingredients of the adverse possession.

30. Moreover, it is the settled principle of law that the suit for declaration claiming ownership on the basis of adverse possession is not maintainable as the plea of adverse possession is available only as a defence. It cannot be used as a sword. This Court in case **Bhim Singh and others Vs. Zile Singh and others 2006(3) R.C.R (Civil) 97** has laid down as under:-

“Under Article 64 of the Limitation Act, as 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."

31. Similar ratio of law has been reiterated by Coordinate Benches of this Court in cases **Joginder Kaur Vs. Gurbachan Kaur and others 2013(6) R.C.R (Civil) 685** and **Suresh and others Vs. Parveen Kumar and another 2012(4) R.C.R (Civil) 163**. The Hon'ble Apex Court also in case **Gurdwara Sahib Vs. Gram Panchayat village Sirthala and another (2014) 1 Supreme Court Cases 669** has laid down as under:-

"There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

Thus, in view of the consistent ratio of law laid down in the cases referred above, the plaintiffs cannot claim declaration that they

have become owner of the suit land on the basis of adverse possession.

32. Appellants-plaintiffs have also claimed the title to the suit property on the plea that the true owner had abandoned the title of the suit property. This plea raised by appellants deserves outright rejection as no such plea has been raised by them in the plaint. It is the settled principle of law that the pleadings are the foundations in the civil litigation. Any plea beyond pleading cannot be taken into consideration. Appellants-plaintiffs have nowhere pleaded that the true owners have abandoned the title of the suit property in their favour.

33. Even, on merits the plea regarding abandonment is not established. In order to constitute abandonment on the part of the true owner, there should be a complete ouster. In the instant case Udmi Ram was the owner of the suit property in his lifetime and after his death the mutation of inheritance was sanctioned in favour of Mam Kaur, his widow. If Udmi Ram had abandoned the title of the suit property in favour of the plaintiff, they could have claimed the change of revenue entries qua ownership in their favour. They have also not objected to the sanctioning of mutation of inheritance in favour of Mam Kaur on the death of Udmi Ram. Mere long and exclusive possession by the appellants-plaintiffs will not constitute abandonment of title by the owners i.e. Udmi Ram, Mam Kaur and defendant-respondent no.1.

34. As already mentioned, appellants-plaintiffs are themselves admitting Mam Kaur to be the owner of the suit property. They are alleging that they have become the owners of the suit property on the basis of Will dated 06.08.1962 executed by Mam Kaur in their favour.

Once they are admitting Mam Kaur to be the owner of the suit property, who has died on 07.05.1982 so, the plea raised by plaintiffs regarding abandonment of title by Udmi Ram has no legs to stand. The cases relied upon by learned counsel for the appellants on this issue are quite distinguishable on facts particularly when there is no plea of abandonment in the plaint. So, appellants-plaintiffs cannot claim themselves to be the owner of the suit property by way of abandonment of title.

35. Learned Courts below on the basis of appreciation of evidence available on record had returned the concurrent finding that defendant-respondent no.1-Fateh Singh is the son of Mam Kaur from her previous marriage with Beg Raj. This concurrent finding of fact has not been even challenged at the time of arguments by learned counsel for the appellants. So, defendant-respondent no.1-Fateh Singh being the son of Mam Kaur is entitled to inherit her estate i.e. the suit land by virtue of Section 15 of the Hindu Succession Act, 1956 and resultantly, was entitled to the possession of the suit property on the basis of his title as appellants have failed to establish their claim to the suit property on the basis of the Will, adverse possession and abandonment.

36. It is settled principle of law that the Court cannot make out a new case. It is neither the case of the appellants-plaintiffs nor defendant no.-1 that appellants-plaintiffs are in possession of the suit property as tenants. Tenancy is unilateral contract and is always established by agreements between the parties. Mere mentioning of word 'Batai' in the counter claim is no ground to conclude that defendant-respondent no.1

has admitted appellants-plaintiffs to be the tenants over the suit land. In order to construe the intent and substance of the pleadings, the entire plaint/written statement/counter claim has to be taken into consideration. In the instant case, in the counter claim, defendant-respondent no.1 has categorically mentioned that appellants-plaintiffs are in permissive possession of the suit property as licensee. As already mentioned, it is also not the case of the plaintiffs that they are tenants over the suit property, rather they are claiming themselves to be the owners of the suit property. The word '*Batai*' could have been used in layman's language even for the use and occupation charges or the license fees. Thus, it cannot be argued that the civil Court has no jurisdiction to pass the decree for possession.

37. Learned counsel for the appellants has also pleaded that the learned Courts below have wrongly awarded the *mesne* profit. In the counter claim defendant-respondent no.1 has specifically claimed the *mesne* profit at the rate of Rs.10,000/- per acre per annum from the date of filing the suit till the delivery of actual possession to him. The said pleading has also been controverted in the reply to the counter claim and it has been pleaded that rent of lease in the Village is less than Rs.5000/- according to the quality of the land. So, both the parties were fully aware about the relief of *mesne* profit claimed by defendant-respondent no.1. In these circumstances, the omission to frame the issue is immaterial.

38. In the counter claim, the prayer of the defendant-respondent no.1 is to grant a decree of possession. As per Order 20 Rule 12 CPC, where a suit is filed for recovery of possession of immovable property

and for rent or *mesne* profit, the Court may pass a decree for possession of the property as well as for recovery of rent and *mesne* profit. It can also direct an enquiry to ascertain the rent or *mesne* profit from the date of institution of the suit till the delivery of possession. The purpose of holding the enquiry is to ascertain the reasonable rate of *mesne* profit. No specific form of enquiry has been prescribed in the provisions of Order 20 Rule 12 CPC. The Court can even ascertain the rate of *mesne* profit on the basis of evidence/material brought on record. That will also amount to an enquiry to ascertain the rate or *mesne* profit.

39. In the instant case, PW-2 Vijay Singh one of the plaintiff has stated in the cross-examination that the value of one acre of land in their village is Rs. 10 lacs as the outsiders have started purchasing the land. He further admitted that one acre of land gives 30-40 mounds yield of wheat crop. He further stated that the rate of wheat is Rs. 1000/- per qtl and one acre of land produce the crop worth Rs.30,000/-40,000/-. He further stated that now a days one acre of land can be leased out for a sum of Rs. 15,000/- in their village. PW-3 Karam Singh has also admitted in the cross-examination that the disputed land is canal irrigated and good quality of land, which gives produce from 10,000/- to 12,000/- per acre. Defendant-respondent no.1-Fateh Singh has also categorically deposed in his affidavit Ex.DW7/A that the annual lease of this land is minimum Rs. 10,000/-, the land is canal irrigated and is of good quality and gives good produce. So, this evidence has come on record on the basis of which the learned trial Court has awarded *mesne* profit at the rate of Rs. 10,000/- per acre from the date of filing the suit till the delivery of possession.

40. Thus, keeping in view of my aforesaid discussion, appellants-plaintiffs have failed to establish their title qua the suit property. Consequently, defendant-respondent no.1-Fateh Singh is entitled for the possession of the suit property being the only legal heir of Mam Kaur. He is also entitled for the *mesne* profit as determined by the learned Courts below. Thus, I have no reason to differ with the concurrent findings recorded by the learned Courts below as these findings do not suffer from any perversity or legal infirmity.

41. Thus, no question of law, much less the substantial question of law, arises in the present appeal.

42. Therefore, the present appeal being devoid of merits, is hereby dismissed with no orders as to costs.

October 18, 2016

s.khan

(DARSHAN SINGH)
JUDGE

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No