

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

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RSA 1796 of 2013 (O&M)
Date of decision: 15.02.2016

Lakhwinder Singh

..... Petitioner

Versus

Bimla Devi and others

.....Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

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Present: Mr. M S Sindhu, Advocate
for the appellant

Mr. Gurbir Singh Dhillon, Advocate
for respondents No. 1 and 2

Mr. Sunil Sihag-respondent No. 3 in person

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

Rekha Mittal, J.

The present appeal has been directed against the judgment and decree dated 24.12.2012 passed by the Additional District Judge, Sirsa, dismissing the appeal filed by Lakhwinder Singh-appellant against the judgment and decree dated 23.03.2010 passed by the Civil Judge (Junior Division) Sirsa, whereby the suit filed by the plaintiff/appellant was dismissed and the counter claim preferred by the respondents has been allowed.

The facts, in brief, are that the plaintiff/appellant filed a suit for

declaration of ownership in possession of the suit land claiming that Ram Sarup, the erstwhile owner of the suit land, entered into an agreement of sale dated 13.02.1989 for a sum of Rs.10,000.00, out of which Rs.8,000.00 were paid as earnest money and balance amount of Rs.2,000.00 was agreed to be paid at the time of execution of sale deed on 12.02.1990. The agreement was scribed by Virender Kumar, Deed Writer duly signed by Ram Sarup, Reshma and Lakhwinder Singh-appellant. Possession of land was delivered to the appellant on the date of agreement. On 12.02.1990, the appellant requested for execution of sale deed on payment of balance sale consideration but Ram Sarup refused to execute the same. The appellant always remained ready and willing to perform his part of the agreement but Ram Sarup committed a breach thereof.

Ram Sarup died in the year 1996 and the land was transferred in the name of Bimla Devi, widow, Krishan Kumar and Sunil Kumar sons of Ram Sarup vide mutation No.9828 sanctioned on 31.03.1997. The appellant also claimed his ownership of the suit land on the basis of adverse possession with the plea that he is in continuous, peaceful and hostile possession of the suit land for the past more than 12 years.

The respondents filed the written statement, seriously contested claim of the appellant. They have denied that Ram Sarup executed the agreement in question. The appellant forcibly occupied the suit property two years back, demarcation was got conducted from Halqa Kanungo and the appellant was found in unauthorized possession of the suit land. They filed counter claim for possession of the suit land, being owner thereof.

The appellant filed replication, reiterated his stand taken in the plaint, denied the allegations raised in the counter claim while re-asserting that he has become owner of the suit land on the basis of adverse possession.

The controversy between the parties led to framing of following issues by the learned trial Court:-

- 1) Whether an agreement to sell qua the suit property was executed between the plaintiff and Ram Sarup on 13.02.1989? OPP*
- 2) Whether plaintiff has become the owner of the suit property by way of adverse possession? OPP*
- 3) Whether plaintiff is entitled for a decree of declaration, as prayed for with consequential relief of permanent injunction? OPD*
- 4) Whether defendants are entitled to get back the possession of the suit property from the plaintiff? OPD*
- 5) Whether suit of the plaintiff is not maintainable in the present form? OPD*
- 6) Relief.*

The learned trial Court permitted the parties to adduce evidence in support of their respective claims.

Lakhwinder Singh-appellant examined himself as PW1, Harbhajan Singh (PW2), Jeet Ram (PW3) and tendered into evidence the documents Ex.P1 to P7 and Mark 1 and 2. During appeal, he was allowed to examine three witnesses by way of additional evidence namely, Virender Kumar (PW4), Deed Writer, Mohan Lal (PW5) and Darshan Lal (PW6).

To rebut evidence of the appellant, the respondents/counter claimants examined Hari Ram (DW2) and one of the respondents, Sunil Kumar appeared as DW1. They also tendered into evidence the documents Ex.D1 to D7.

The learned trial Court, after bestowing its thoughtful consideration to the rival submissions made by counsel for the parties in the light of materials on record, answered issues No. 1 and 2 against the appellant and as a result, the suit filed by Lakhwinder Singh was ordered to be dismissed.

Feeling aggrieved against the judgment and decree passed by the trial Court, Lakhwinder Singh filed an appeal but remained unsuccessful.

Still feeling dissatisfied, the present appeal has been preferred by the appellant.

The substantial questions of law which arise for adjudication are:-

- (i) Whether the appellant is entitled to protect his possession of suit land under Section 53-A of the Transfer of Property Act, 1882 (in short, TPA) on the premise that he received possession of suit land from Shri Ram Sarup in part performance of agreement to sell dated 13.02.1989?*
- (ii) Whether the appellant has become owner of the suit land by way of adverse possession?*

Counsel for the appellant has submitted that Shri Ram Sarup executed an agreement to sell dated 13.02.1989 but failed to execute and register the sale deed despite the appellant being always ready and willing

to perform his part of the agreement. It is further argued that the appellant examined Virender Kumar, Deed Writer (PW4), Mohan Lal (PW5) and Darshan Lal (PW6) to prove that the agreement (Ex.P8) was executed by Shri Ram Sarup and possession of the suit land was delivered to him on the basis of said agreement. It is further argued that as the appellant received possession of the suit land in part performance of the agreement dated 13.02.1989, he is entitled to protect his possession.

Counsel for the appellant, in the alternative has submitted that the appellant has become owner of the suit land by way of adverse possession, as his possession over the suit land is open, continuous and adverse since 1987, more than 12 years from the date of institution of suit. It is further argued that the learned appellate Court in Para 22 of the judgment has held that the appellant could raise plea of adverse possession in rebuttal of the counter claim but he did not file any reply to the counter claim is contrary to record. It is argued with vehemence that as the appellate Court did not consider his reply to the counter claim available on record, it shows that the judgment passed by the Court in appeal is the result of non-application of mind and failure to consider his reply to the counter claim.

Counsel for respondents No. 1 and 2 as well as respondent No. 3 (in person), on the contrary, have supported the judgments passed by the Courts below with the submissions that the appellant did not adduce any evidence before the trial Court to prove the agreement to sell dated 13.02.1989. He himself appeared in the witness box and examined two witnesses to establish his claim that he is in possession of the suit land since

1987 and has become owner thereof on the basis of adverse possession. It is for the first time before the Court in appeal, the appellant adduced evidence (additional) to prove the alleged agreement dated 13.02.1989. The Court in appeal has rightly discarded the agreement, in view of its observations made in Para 20 of the judgment. According to counsel, as soon as plea of the appellant in regard to agreement to sell is rejected, no such plea, though not raised in the plaint, that he is entitled to protect his possession in part performance of the agreement under Section 53-A of TPA is available.

The claim of the appellant that he has become owner of the suit land on the basis of adverse possession is not tenable as the appellant has raised mutually destructive and contradictory pleas. On the one hand, he has claimed that possession was delivered to him under the agreement dated 13.02.1989 but on the contrary, he has raised plea of adverse possession setting up a hostile title in his favour. It is further argued that neither plea of the appellant that he came in possession of the suit land on the basis of agreement to sell in 1989 nor his plea raised during course of evidence that he came in possession in 1987 gets substantiated from the revenue record as the respondents have been recorded to be in possession of the suit land in the jamabandis upto to the years 1997-98 and it is for the first time in the jamabandi for the year 2002-2003 (Mark P5), the appellant has been shown to be in possession.

I have heard counsel for the parties and perused the records, particularly the judgments passed by the Courts below.

The appellant, admittedly, did not adduce any evidence before

the trial Court to prove the agreement to sell dated 13.02.1989 on the basis whereof he claimed himself to be owner in possession of the suit property. In the plaint, he has also raised a plea of ownership on the basis of adverse possession but plea of adverse possession is not available to a plaintiff that can only be used as a shield and not as a sword. In this context, reference can be made to judgment of Hon'ble the Supreme Court of India ***Gurudwara Sahib v. Gram Panchayat Village Sirthala and another 2013 (4) R.C.R. (Civil) 703.***

Virender Kumar, Deed Writer has admitted during cross examination that he did not know the parties as well as witnesses personally, therefore, his testimony is not relevant to prove that the agreement was executed by Shri Ram Sarup. The other two witnesses Mohan Lal and Darshan Lal have deposed that the agreement Ex.P8 was executed by Shri Ram Sarup. The Court in appeal has noticed in Para 20 of the judgment that in the agreement, Ram Sarup has been described as son of Arjun and Reshma has been recorded as his sister. On the contrary, Arjun was the maternal grandfather of Ram Sarup and Reshma was his mother. It has been held by the Court that had the agreement been read over to Shri Ram Sarup, he would have pointed out these patent errors. Further, it could have been clearly mentioned that Reshma had already passed away in 1984, prior to execution of the agreement.

Counsel for the appellant is not in a position to explain that had the agreement been executed by Shri Ram Sarup after admitting its contents to be correct, where was the occasion for the aforesaid serious discrepancies

to be there in the agreement. This apart, it is an admitted position that the appellant did not file a suit seeking specific performance of the agreement despite the alleged refusal of Shri Ram Sarup to execute the sale deed. The failure of the appellant to file a suit for specific performance either during life time of Ram Sarup who died in 1996 or later speaks a lot that the agreement was not a bona fide genuine document, set up by the appellant after death of Ram Sarup to claim ownership of the suit land though otherwise, an agreement to sell does not create any title in favour of the proposed vendee. In this view of the matter, I do not find any error much less illegality in the findings of the Court that the appellant has failed to establish his claim on the basis of agreement dated 13.02.1989. As the appellant has failed to prove that the agreement was executed by Shri Ram Sarup, as a natural corollary, plea of the appellant that he is entitled to protect his possession in part performance of the agreement falls to the ground.

This brings the Court to the plea of adverse possession raised in the alternative. No doubt, plea of adverse possession can be raised by a litigant in the alternative. The respondents filed a counter claim in regard to possession of the suit land, thus, the appellant was competent to raise plea of adverse possession in his defence. The observation by the appellate Court that the appellant did not file reply to counter claim is erroneous and contrary to record. The appellant, to establish his plea of adverse possession, examined himself, Harbhajan Singh (PW2), Jeet Ram (PW3).

They deposed that the appellant came in possession of the suit land in the

year 1987 and he constructed his *dhani* in a part of suit land in the year 1987. The statement of the appellant in regard to his possession since 1987 is pleadings and contradicts his clear admission in the plaint that possession was delivered to him in pursuance of the agreement dated 13.02.1989 by Shri Ram Sarup. The entire evidence led by the appellant to prove that he raised construction in a part of the suit land in 1987 is liable to be ignored for want of pleadings. The existence of a *dhani* in the suit land since the year 1987, in no circumstances, can lend credence to plea of hostile title set up by the appellant.

Indisputably, the appellant asserted in the plaint and replication that he came in possession of the suit land in the year 1989 and the possession was under the agreement dated 13.02.1989, hence permissive one. That being so, it was incumbent upon him to allege and prove as to when his possession became adverse. There is no plea raised by the appellant as to the starting point from which the period of 12 years is to be reckoned for the purpose of adverse possession. On the contrary, counsel for the appellant has not disputed that in the *jamabandi*, the appellant was recorded to be in possession for the first time in 2002-2003. There is no evidence/material on record to prove that he set up a hostile title against the true owner, twelve years prior to institution of the suit. Above all, he has failed to adduce satisfactory much less cogent and convincing evidence either in regard to the date on which he entered into possession much less 12 years before the suit was filed. Analysed from any angle, there is no material on record to hold that the appellant has become owner of the suit

land on the basis of adverse possession.

As an upshot of the aforesaid discussion, the questions formulated hereinbefore are answered against the appellant and in favour of the respondents.

Resultantly, the appeal fails and is dismissed with costs.

(Rekha Mittal)
Judge

15.02.2016
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