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

**RSA-3842-2013 (O&M)
Date of Decision: 07-01-2016**

VIJAY KALIA AND ANR.

.....Appellants

Vs.

KASHMIRI LAL AND OTHERS

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. H.S. Thiara, Advocate
for the appellants.

Mr. Vikas Suri, Advocate
For the respondent No.1.

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

RAJ MOHAN SINGH, J.

1) Defendants are in second appeal against the concurrent judgment and decree passed by the Courts below.

2) Plaintiff filed a suit for mandatory injunction against the defendants on the ground that he has purchased 1 kanal 2 marlas plot from its previous owners namely Swaran Singh and

Bhagat Singh @ Bhagta sons of Kartar Singh vide registered sale deed dated 19.9.1997. After the purchase, plaintiff got sanctioned site plan from Municipal Committee, Phagwara and raised construction thereupon. The site plan was duly sanctioned and intimation was conveyed to the plaintiff vide memo no.1101 dated 29.1.1976 and thereafter, plaintiff raised construction after arranging funds from different sources. Since the plaintiff was residing in Delhi and was serving in Times of India and was unable to manage the property, therefore, he appointed defendant no.1 his real brother as attorney vide power of attorney dated 22.12.1981 for the purpose of looking after and manage the property. The said power of attorney was subsequently cancelled on 6.4.1999 and intimation was given to the defendants. Before execution of power of attorney in favour of defendant no.1, he was orally requested to look after the property.

3) Defendant No.1 misused the power of attorney and himself occupied the building comprising of residential portion as shown in green colour on the ground floor ABCD. The defendants also occupied the ground floor and part shown in red and converted into manufacturing area and got installed machineries in it. Defendant started manufacturing goods in the name of proprietorship concerned as Kalia Industries.

Defendant No.2 is the proprietor of the said concern. This thing

was done without the consent of the plaintiff and defendant No.1 also mortgaged the property in favour of Punjab National Bank at Phagwara in order to raise loan of Rs.70,000/- and also executed mortgage deed in favour of the Bank. When the plaintiff came to know about the mortgage, he obtained revenue record from the Patwari on 27.11.2002.

4) The amount of loan has been paid and defendant numbers 1 and 2 got the clearance certificate from the Bank on 30.6.2003 by means of compromise with the Bank. Since the plaintiff was residing in Delhi, he could not know about the misdeeds of the defendant no.1. The defendants have also installed big generator set of 65 KV capacity and is causing noise and vibration in the building and also created air pollution in the locality which is not an industrial area. Defendants also installed an electric connection of 62.75 KW in the building.

5) The defendants were not competent to install such machinery in the building owned by the plaintiff nor they could get the electric connection or to start manufacturing unit without knowledge and consent of the plaintiff. Defendants adversely utilized the property to the disadvantage of the plaintiff. Plaintiff is in possession of the portion on the first floor in yellow colour. Plaintiff is entitled to seek possession of the property and stoppage of the manufacturing unit and shifting of the factory

from the premise. Defendants did not pay any heed to the claim of the plaintiffs, hence present suit came to be filed.

6) Defendants No.1 and 2 contested the suit on all fronts and besides taking plea of locus, maintainability of the suit has also been questioned besides the Court fee affixed on the plaint. Defendants also pleaded that the plaintiff is estopped by his own act and conduct. Defendant No.1 claimed himself to be owner of the property having purchased the same from his own funds. He started service of travelling sales representative at Phagwara in the year 1965. In the year 1972, defendant No.1 started his own factory at Phagwara and he required the property in question for running his own factory. Father of defendant No.1 died in 1968. Plaintiff was doing service in the newspaper 'Times of India' in Delhi. Relationship of plaintiff with defendant No.1 was cordial. Defendant No.1 treated the plaintiff just like his father. At that time, defendant No.1 made his mind to purchase the property from Bhagat Singh and Swaran Singh and he himself entered into agreement to sell with Swaran Singh and Bhagat Singh, however, defendant No.1 called the plaintiff from Delhi being elder brother at the time of registration of sale deed. Defendant No.1 paid the whole consideration but produced the plaintiff before the Sub Registrar for execution and registration of the sale deed and i.e. how the sale deed was executed in the name of the plaintiff.

7) Defendant No.1 alleged that he had raised the whole of the construction over the property from his own funds. Nothing was spent by the plaintiff. Site plan was got sanctioned by him from the Municipal Committee Phagwara. However, property was purchased in the name of the plaintiff, therefore, site plan was sanctioned in the name of the plaintiff. Defendant No.1 got installed electric connection in the premises in the name of his mother Pushpavati and plaintiff has given the attorney to defendant No.1 as he was owner in possession of the property. Defendant No.1 is running the factory in dispute and has also installed power connection in the premises for running the industry.

8) Defendant further alleged that plaintiff has retired from service in July 1993 and came to Phagwara. He started living in rented house and lived there for 3 years. The defendant No.1 has raised construction on the first floor of the property of the residence of the plaintiff which was completed in the year 1996. The plaintiff started living in the said premises on the first floor in the month of September 1996. Plaintiff has no concern about the suit property as he is not owner of the same.

9) Defendants have also claimed alternate plea that they have become owner by adverse possession because possession of defendant no.1 is existing for the last more than 12 years and he is in hostile and adverse possession of the property to the

knowledge of the plaintiff and that has repugnant to title of the defendant no.1 over the suit land. Defendants no.3 and 4 have also filed their joint written statement and contested the suit.

10) After filing of replication trial Court framed the following issues on the basis of pleadings of the parties:-

1) Whether the plaintiff is owner of the suit property? OPP

2) Whether plaintiff is entitled to the mandatory injunction as prayed for? OPP

3) Whether in the alternative plaintiff is entitled to recover possession of the building mark ABCD in the site plan? OPP

4) Whether plaintiff has no locus-standi to file the present suit? OPD

5) Whether the suit is not maintainable in the present form? OPD.

6) Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD

7) Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD

7A) Whether the defendant has become the owner in possession of the suit property by way of adverse possession? OPD.

8) Relief.

11) Thereafter, both the parties led their evidence. Trial Court dealt with issue no.1 to 3 and 7A jointly to hold that the sale deed dated 19.9.1975, Ex.P1 reveals that the sale deed was executed for consideration. The sale deed was executed by Swaran Singh after receiving sale consideration of Rs.26,400/-.

Defendant no.1 -Vijay Kalia was himself as an attesting witness

of said sale deed. At the time of execution of sale deed, plaintiff was working in Times of India. Plaintiff himself has appeared as PW5 and proved the original sale deed Ex.P1, site plan Ex.P2 which was duly sanctioned by the Municipal Committee, Phagwara. A letter of sanction Ex.P3, defendant no.1 was appointed as attorney vide deed Ex.P4 but the same was cancelled on 6.4.1999 vide cancellation deed Ex.P5. The trial Court held the aforesaid issues in favour of the plaintiffs and against the defendants and issue no.7A has also been decided against the defendants and in favour of the plaintiffs. Issues No.4, 6 and 7 were not pressed. Issue No.5 was also decided against the defendants and suit was ultimately decreed.

12) The defendants remained unsuccessful in the first appeal before the lower appellate Court who dismissed the same vide judgment and decree dated 7.12.2012. Hence, the present appeal came to be filed in this Court.

13) I have considered the arguments raised at the bar and have also perused the material with due assistance of the learned counsel for the parties.

14) Admittedly, plaintiff was residing in Delhi and was unable to look after the suit property and he appointed his brother vide attorney dated 22.12.1981 which was later on cancelled on 6.4.1999. The defendants installed generator set in the property in dispute without consent of the plaintiff. In illegal installation of

the generator set in the premises resulted in imposition of fine by the Electricity Board upon the defendants. They deposited the fine and thereafter, electricity connection was restored. The defendants also mortgaged the property of the plaintiff and raised a loan which they cleared only in 2003. They installed the machinery without the consent of the plaintiffs.

15) Misuse of the premises is proved on record. Admittedly, vide sale deed 19.9.1975, Kashmiri Lal, plaintiff purchased the property vide sale deed Ex.P1. Plaintiff examined Mohinder Pal as PW1, who has proved the estimate cost dated 24.7.1976, Ex.P7 and Clerk Raj Kumar, PW2 from the office of Municipal Committee who has proved on record Ex.P2 and Dalip Singh Rawat, witness, PW4 from Times of India who has deposed that loan was taken by the plaintiff from Times of India Group, even though the record has been destroyed as it pertained to more than 10 years, the factum of availing loan by the plaintiff has been proved by the testimony of Dalip Singh Rawat, PW4. The plaintiff himself appeared as PW5. PW6 and PW7 are the witnesses who have proved the record of Improvement Trust of the year 1976. The site plan was sanctioned in the name of the plaintiff. The sale deed is also in the name of the plaintiff.

16) Plaintiff started his career as Librarian in the year 1954 at a salary of Rs.240/- per month which was subsequently

enhanced to Rs.400/- in the year 1961. Thereafter, he got job in the 'Times of India' and his salary was raised to Rs.400 per month. In the year 1975, his salary was Rs.3000/- per month. Defendant No.1 while appearing in witness box as DW5 has stated that his career of travelling sales representative started in the year 1965 and he started running his own business in the year 1972 but in order to prove his assertion, he did not place any document on the record in respect of starting of his business in the year 1972 nor any record in respect of sale of articles, sale tax returns, books of accounts, any other material, whereas his own witness DW2, Tarsem Lal has stated on oath that defendant no.1 started his business in the year 1988. The assessment order in which he has shown that he has purchased the property for a sum of Rs.26,400/-, has not been proved with reference to income tax return which he had filed in the year 1972. No such document has been placed on record to show that he had spent money towards the purchase of the property in question. On the other hand, documents on record show that plaintiff has purchased the property by dint of registered sale deed. After sanctioning of site plan, construction has been raised. Even the witness of the defendant DW6 has admitted that construction was raised in the property in the year 1975- 1976. The findings recorded by both the Courts are factual findings based on appreciation of evidence. These findings cannot be said to be perverse in nature.

17) The defendant on the other hand, has taken plea of adverse possession which in itself precedes that he has admitted ownership of the plaintiff over the suit land. Plea of adverse possession has to be proved on certain parameters i.e. since when the possession of the plaintiff became adverse. 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.

18) The possession should be actual, open, notorious, exclusive and continuous for the required time as provided in law. The ingredients of adverse possession as enumerated in ***Karnataka Board Wakf Versus Government of India 2004 (2) RCR (Civil) 720*** are that the adverse possession is hostile possession by claiming, asserting hostile title in denial of the title of the true owner. A party claiming adverse possession must prove that his possession is peaceful, open and continuous and 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.

19) 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.

20) Plea of adverse possession has no equities rather this right has some instinct of piratical right. The person has to plead from what date his possession became adverse and also he must disclose other necessary ingredients in his pleadings. On the aforesaid aspect, the case of the defendant is totally silent and in a way he has admitted the ownership of the plaintiff by taking this plea, therefore, the plea of the defendant on the basis of adverse possession has to fail for want of aforesaid ingredients and taking up of this plea itself amounts to admission of title of the plaintiff, therefore, by no stretch of imagination, the evidence on record satisfies the ingredients of adverse possession in favour of the defendants. Rather the case of the plaintiff is proved to the hilt on the basis of un rebuttable evidence proving his title by virtue of registered sale deed, sanctioning of site plan in the record of the Municipal Committee and thereafter construction on the site. Mere long possession of the defendants

on the suit land did not relate in any interference of title in favour of the defendants.

21) In considered opinion of this Court the findings of facts recorded by the Courts below, cannot be said to be perverse in nature or the result of misreading of evidence. Both the Courts have rightly appreciated the evidence on record while coming to the conclusion that the suit of the plaintiff is worth acceptance. The question of law as formulated by the appellant in para no.7 of grounds of appeal, cannot be entertained inasmuch as that both the Courts below have recorded firm finding of facts on due appreciation of evidence on record and their cannot be reappreciation of evidence in second appeal. The ownership of the plaintiff has been proved with reference to documentary evidence. Plea of adverse possession has not been established on the touchstone of requirement in the context of maxim “nec vi, nec clam, nec precario” as discussed in the preceding para. Long possession over the suit land, even if presumed for more than 12 years, does not yield in adverse possession and suit is maintainable. Question no.2 is accordingly decided in favour of the plaintiff.

22) Mere living away from the place of the suit property and allowing the misuse of the premises by the defendant without consent of the plaintiff does not give any actionable right in favour of the defendant. At the most, defendants were in

possession of the property as custodian of the plaintiff and their possession was permissive in nature. Question no.3 is not a question of law much less substantial question of law and therefore, it does not arise at all. Question no.4 does not arise in the present context vis-à-vis the litigation between plaintiffs and the defendants. No such evidence has come on record debarring the plaintiff from claiming the suit property from the defendants on the strength of evidence on record. Taking up the plea of adverse possession by the defendants itself amounts to acceptance of ownership of the plaintiff. Once the ingredients of adverse possession are not satisfied, the suit of the plaintiff is bound to succeed. Taking totality of stock of entire facts and circumstances on record, I am of the view that this appeal does not carry any substance and the same is accordingly dismissed.

23) Along with this appeal CM-10399-2015 for condonation of delay has been moved, seeking condonation of 154 days in filing the appeal. Since the appeal has been dismissed on merits, therefore, this Court does not feel it appropriate to pass any order on the application for condonation of delay. The CM-12134-C-2013 seeking interim protection is also decided accordingly, having rendered infructuous.

07-01-2016
SwarnjitS

(RAJ MOHAN SINGH)
JUDGE