

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH

Date of Decision: 19.08.2016  
RSA No.3722 of 2016 (O&M)

Sukhdev Singh

... Appellant

Vs.

Paramjit Kaur and others

... Respondents

**CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH**

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?
3. Whether the order is speaking/reasoned?

Present:- Mr. Ranjivan Singh, Advocate,  
for the appellant.

Mr. Ashok Verma, Advocate,  
for the respondents-caveators.

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**Amol Rattan Singh, J.**

This is the second appeal of the appellant-defendant (hereinafter to be referred to as the defendant) in a suit filed by the respondents-plaintiffs, seeking possession of the suit property, as also a decree of permanent and mandatory injunction against the defendant. The injunction was, of course, in respect of restraining the defendant from interfering in the suit property thereafter, as also from alienating it and from making any change to the property and for paying the respondents-plaintiffs occupation charges for the defendants' unauthorised possession thereof, by way of mesne profits.

2. The case set up by the respondents-plaintiffs, was that the late

husband of first plaintiff (father of plaintiffs No.2 and 3), Tarsem Singh, had purchased plot no.328, Phase 3 B 1, Mohali, from one Bawa Satinder Singh, vide a registered sale deed No.3627 dated 27.12.1984, for a consideration of Rs.35,000/-. As Tarsem Singh was working as a Senior Clerk in the Government owned Punjab Roadways, he applied for a loan to the Director, State Transport, Punjab, for construction of a house on the said plot and a loan of Rs.35,700/- was sanctioned by the Department and released to him in three installments.

Thus, it was contended that Tarsem Singh completed the construction on the suit property with his own income and resources and the house remained in his possession till 1988, after which the defendant, Sukhdev Singh, who is Tarsem Singhs' brother, requested Tarsem Singh to allow him to live in the said house for a short period till Government accommodation was allotted to him. As the defendant was Tarsem Singhs' brother and Tarsem Singhs' wife, Ranjit Kaur, is the sister of the first plaintiff, the defendant was allowed to occupy a portion of the house consisting of two rooms and a kitchen, till Government accommodation was allotted to him. Such accommodation was allotted to the defendant in or about the year 1997, as contended, as per information with the respondents-plaintiffs; but despite that he remained in occupation of the suit property, though he allegedly rented out the Government accommodation even while working as an Inspector with the Punjab Roadways.

Subsequently, the defendant applied for a loan for construction of his own house, which was sanctioned and released to him and as such, it was inferred by the respondents-plaintiffs that he had constructed his own house also.

Tarsem Singh died on 31.01.1997; however, despite repeated requests made by the respondents-plaintiffs, the defendant did not vacate the suit property and instead, started demanding money for vacating the house. The respondents-plaintiffs, i.e. the widow and two children of Tarsem Singh, were stated to be in financial doldrums, with no source of livelihood, though thereafter plaintiff no.1 was given ex-gratia appointment as a Clerk in the Civil Secretariat, Punjab.

3. It was further contended by the respondents-plaintiffs that the suit property continued to be shown to be in the name of Tarsem Singh, in the records of the Greater Mohali Area Development Authority (and presumably before that with its predecessor, the Punjab Urban Development Authority), as the respondents-plaintiffs could only muster up enough funds to apply for a transfer of ownership in the year 2006. Upon the required documents for transfer of the ownership of the property (to the respondents-plaintiffs) having been deposited with the Estate Officer, GMADA on 27.03.2006, the said officer sent a communication dated 11.01.2010 to the respondents-plaintiffs, to get a public notice published in any newspaper (with regard to inviting objections from the general public), and to send a receipt thereof to the office. The said notice was stated to have been published in the newspaper "The Indian Express" dated 02.02.2010 and receipt no.3482 dated 29.01.2010 (issued by the newspaper) was submitted to the Estate Officer.

However, even thereafter, the GMADA authorities did not transfer the house to the respondents-plaintiffs as the defendant filed objections before GMADA to stall the transfer of the house, allegedly in order to prolong his unauthorised possession thereof or to extort money from

the plaintiffs.

4. The respondents-plaintiffs therefore filed Civil Writ Petition No.11704 of 2010, seeking a direction to the GMADA authorities to transfer the ownership in their names, in which petition the defendant was also arrayed as a respondent.

The defendant also filed Civil Writ Petition No.2566 of 2010 in this Court, seeking a direction to the Estate Officer not to change the owner of the house to the name of the respondents-plaintiffs, “and for some other reliefs”.

Both the petitions were decided by this Court vide its order dated 12.01.2011, with a direction to GMADA to transfer the ownership of the house in the name of the plaintiffs within a period of one month from the date of receipt of a certified copy of the aforesaid order. While dismissing the writ petition of the defendant, however, he was given liberty to approach the appropriate forum to establish his right, title or claim in accordance with law. Thereafter, the ownership of the house in question was transferred to the names of the plaintiffs by GMADA and the said transfer was conveyed to them vide a letter dated 27.04.2011, by the Estate Officer.

5. The plaintiffs thereafter issued a legal notice to the defendant on 15.06.2011, asking him to vacate the house in the light of the fact that the ownership of the house had been transferred to them.

The said notice is stated to have been received by the defendant and replied to him through his counsel on 29.06.2011.

In the meanwhile, the defendant also filed Review Application no.133 of 2011, seeking a review of the order of this Court dated 12.01.2011, passed in the writ petitions filed by both the parties, which was also

dismissed vide an order dated 08.04.2011.

6. The defendant also filed a suit for permanent injunction against the plaintiffs and GMADA, allegedly concealing some material facts and making several “wrong averments therein” to which the plaintiffs (defendants No.1 to 3 in that suit) filed their written statement.

The plaintiffs thereafter filed the suit out of which this second appeal arises, seeking the reliefs set out in the plaint as have already been noticed.

7. Upon notice issued to him, the defendant appeared and filed a written statement raising preliminary objections with regard to the maintainability of the suit, further stating that he was the lawful owner and in possession of the suit property and that the plaintiffs, despite seeking recovery of mesne profits of Rs.5,40,000/-, had not affixed proper court fee with the suit. Issues of limitation etc. were also raised.

On merits, the execution of the sale deed of the plot in favour of the late Tarsem Singh was admitted by the defendant but it was stated that the suit property had been purchased jointly by Tarsem Singh and him. It was further contended that the sale deed dated 27.12.1984 was not actually executed by Bawa Satinder Singh himself, but by plaintiff No.1 as holder of a General Power of Attorney executed in her favour by Satinder Singh.

It was also contended that the parties were residing in House No.614, Sector 11-B, Chandigarh, and that the sale deed was executed in favour of Tarsem Singh alone as he was a Government servant and could have easily availed of a loan from his department, but otherwise the plot was purchased from the joint funds of the family. Yet further, it was contended that though Tarsem Singh availed of a loan of Rs.35,700/- from his

department, however for the purchase of the plot the defendant had also given money from his own savings and after selling the jewellery of his wife. The defendant alleged that the construction was not raised by Tarsem Singh but by the defendant himself and Tarsem Singhs' contribution was only to the extent of Rs.35,700/-, which was not sufficient to raise the construction.

Yet further, the written statement contended that Tarsem Singh actually never remained in possession of the suit property and in fact, from the first day, it was in possession of the defendant, who got the construction raised upon it and started residing in it thereafter. It was also claimed that it was in the knowledge of the plaintiffs that the defendant being a joint owner of the property, was in exclusive possession thereof.

8. Other than the above, the defendant also set up a plea that in any case he had also become the owner of the entire suit property by way of adverse possession, having remained in such possession, open, hostile and known to the plaintiffs.

9. The factum of Tarsem Singhs' death on 31.01.1997, that of GMADA not transferring the suit property in the name of the plaintiffs, the pendency and decision of the writ petitions, the filing of the civil suit by the defendant against the plaintiffs were all admitted, though it was contended that GMADA had correctly not transferred the property to the plaintiffs as it was never owned by them.

It was also stated in the defendants' written statement that the plaintiffs in the civil suit filed by him against them, had suffered a statement that they would not dispossess the defendant from the suit property except through due process of law and in view of the aforesaid statement, that civil suit had been withdrawn by the defendant on 23.03.2012.

Lastly, it was contended that the plaintiffs cannot claim any mesne profits from the defendant, having no right to do so.

10. No replication having been filed by the plaintiffs, the following issues were framed by the learned Civil Judge (Junior Division), SAS Nagar Mohali:-

- “1. Whether the plaintiffs are entitled for possession of the suit property as prayed for? OPD
2. Whether the plaintiffs are entitled for mesne profits from the defendant as prayed for? OPP
3. Whether the plaintiffs are entitled for permanent injunction as prayed for? OPP
4. Whether the plaintiffs are entitled for mandatory injunction as prayed for? OPP
5. Whether the suit of the plaintiffs is not maintainable in the present form? OPD
6. Whether the suit of the plaintiffs is barred by time of limitation? OPD
7. Relief.”

11. To prove their case, plaintiff No.1 examined herself as PW1 and deposed in terms of her plaint and proved the order of this Court in the civil writ petition as Ex.P1. They also tendered various documents, including a copy of the writ petition filed by defendant Sukhdev Singh as Ex.P2, copy of an affidavit of Sukhdev Singh as Ex.P3, a copy of a letter written by the Collector, Chandigarh, to the Divisional Manager, Punjab Roadways as Ex.P4, a letter written by the Assistant Estate Officer, Punjab Urban Development Authority, Mohali, to the plaintiffs, as Ex.P5, an agreement, Ex.P6, a copy of a public notice issued by GMADA as Ex.P7. The pleadings of the parties before this Court in the writ petitions, legal notice issued etc.

were also tendered. Six other witnesses were also examined by the plaintiffs, including an official of the Power Corporation, a Bill Clerk in the office of the Water Supply & Sanitation Department, an official from the Punjab Roadways, a Senior Assistant from the House Allotment Committee of the U.T., Chandigarh and a Senior Assistant from GMADA.

12. The defendant examined himself, his wife Ranjit Kaur, one Shukla Sharma, Dilbagh Singh and Narinder Pal Singh, a Superintendent in the office of the GMADA, by way of oral evidence. He also tendered some documentary evidence.

13. As regards the witnesses for the plaintiffs, the first plaintiff-PW2 Ram Singh testified in terms of the plaint, PW3 from the office of the Power Corporation, proved that the electricity connection in the suit property was installed in the name of the first plaintiff and before that in the name of her late husband, Tarsem Singh.

The Clerk from the Water Supply & Department proved an application dated 03.02.2012 filed by the first plaintiff, for change of the water connection, in support of which she attached the papers by which transfer of ownership was effected in her name by GMADA. A copy of the death certificate of Tarsem Singh and his letter written to the SDO concerned, for transfer of the water connection to the name of the first plaintiff, was also annexed with the said application.

The official from the Punjab Roadways, i.e. the department in which both, the plaintiffs' husband as also the defendant worked, proved a file pertaining to a loan obtained by the defendant, for an amount of Rs.35,000/-, for the construction of a 10 marla house in village Hair, Tehsil and District Amritsar. The said loan amount was stated to have been

sanctioned to him.

The Senior Assistant from GMADA (PW7) proved the allotment letter (Ex.P40) as well as conveyance deed (Ex.P41) and various other applications as had been submitted to the said Authority.

14. The first four witnesses for the defendant are stated to have deposed in terms of the written statement, with DWs3 and 4 stating that they were employed in Punjab Roadways and have friendly relations with the husband of the first plaintiff, who told them that the house had been purchased jointly by him and his brother Sukhdev Singh and that the construction was also raised on the strength of joint funds. They further deposed that the salary and other allowances earned by the defendant were handed over to Tarsem Singh a number of times in the presence of these witnesses.

15. The defendants' witness (DW5) from the office of GMADA, testified in support of the record which he brought, including the death certificate of Tarsem Singh, a copy of the ownership of Tarsem Singh, a sale deed in his favour, an affidavit dated 16.12.2005 (of the plaintiff) and an indemnity bond of the same date executed by the plaintiffs, witnessed by one Daljit Singh, as was another affidavit of the first plaintiff.

This witness testified in respect of the aforesaid documents and other formalities fulfilled before transfer of the suit property to the names of the plaintiffs in terms of the order of this Court. He further testified that he could not tell as to whether a person can file an indemnity bond against his own property or not.

16. Upon appraising the aforesaid evidence, the learned Civil Judge found that the last defence witness, i.e. DW5, was examined by the defendant

so as to show that proper procedure was not followed by GMADA to transfer the suit property in favour of the plaintiffs and that even proper indemnity bonds were not furnished before that Authority.

However, it was found by that Court that this issue could not be agitated by the defendant once the suit property stood transferred upon the direction of this Court and the review application filed against that order also having been dismissed.

17. As regards the main plea of the defendant that he had contributed towards the purchase of the suit property and construction raised thereupon, the said plea was found to be one claiming a 'Benami' share in the property.

The cross-examination of the defendant was specifically referred to by the learned Civil Judge, wherein he admitted that Tarsem Singh allowed him to occupy the house in the year 1988, with his consent.

He further stated that Tarsem Singh never asked him to vacate the suit property till his death in the year 1997.

The defendant also could not describe the extent of the jewellery sold by him, for raising funds towards the construction of the house. He is stated to have also admitted that he never got any receipt of any payment, from Tarsem Singh.

The other parts of his cross-examination, with regard to filing a suit to establish his claim to the property, legal notice issued on his behalf by his lawyer, were also referred to by the Court in the impugned judgment, holding that the defendant failed to prove any document on record that he had actually contributed some amount for construction of the suit property.

His wife, DW2, also knew nothing with regard to the background of the

property, the witnesses present at the time of the registration of the sale deed, as to whose name it was executed in and the total sale consideration etc. However, she identified her signatures on her affidavit and stated that her husband had become owner of the suit property by way of adverse possession. She also admitted that the plaintiffs were living in a rented accommodation.

The learned Civil Judge concluded from the above that as a matter of fact, this defence witness did not know anything about the purchase of the suit property, or with regard to the amount allegedly contributed by her husband towards it.

18. It was also held that the defendant had taken contradictory pleas to the extent that on the one hand, he alleged that he had contributed to the founds of the property and had a “Benami” share in his name and at the same time, he contended to have become an owner by way of adverse possession. Both these pleas were held to be mutually contradictory by the learned Civil Judge, inasmuch as, if he claimed a share in the suit property he could not claim adverse possession of it and if he claimed it by way of adverse possession, then he could not claim to have had any legal title by way of having contributed funds towards its purchase and construction.

Thus, finding that the documentary evidence was all in favour of the plaintiffs, even to the extent of electricity and water connections, it was held that the title of the plaintiffs in the suit property duly stood proved.

The loan taken by the defendant towards constructing upon his plot at Amritsar, was also held to be proved.

19. On the issue of mesne profits claimed by the plaintiffs, the learned trial Court held that once the plaintiffs were found to be owners of

the suit property and the defendant therefore was in illegal occupation thereof, the plaintiffs were entitled to mesne profits. However, with no firm evidence led to show that the rental value in the area concerned was Rs.15,000/- per month, as claimed by the plaintiffs, such value was assessed at Rs.2000/- per month by the Court. Consequently, mesne profits @ Rs.2000/- per month, for three years prior to the filing of the suit and during the continuance of the suit, were ordered to be paid to the plaintiffs, within a period of 15 days from the date of that judgment and decree, subject to the payment of court fee by the plaintiffs.

20. On the issue of limitation, it was held that once the plaintiffs were seeking the relief of possession on the basis of title, then there being no limitation provided to institute such a suit, the plea of the suit being beyond limitation was also objected.

Consequently, the suit of the plaintiffs was decreed in their favour, though with a reduced amount of the mesne profits than was prayed for.

21. In the first appeal filed by the appellant-defendant before the learned Additional District Judge, Mohali, that Court, after noticing the facts and considering the judgment of the trial Court, found that the suit property was originally allotted (by the State Authority) to Bawa Satinder Singh vide an allotment letter dated 12.05.1972, and a transfer deed/mutation letter, Ex.P41. In the process of purchasing the suit house from the aforesaid Bawa Satinder Singh, Tarsem Singh had obtained a General Power of Attorney from the latter, in favour of his (Tarsem Singhs') wife Paramjit Kaur-plaintiff No.1, on 20.07.1984, on the basis of which Paramjit Kaur executed a sale deed of the suit house on 27.12.1984, in favour of her husband.

Thereafter, Tarsem Singh applied to the Estate Officer seeking transfer of ownership, which was granted in his name on 30.12.1984, vide a transfer letter, Ex.P45.

It was further found by the lower appellate Court that Tarsem Singh had applied for permission to mortgage the suit plot on 01.10.1985 and thereafter, had moved another application on 29.01.1987, seeking permission to raise construction upon the said plot.

He was sanctioned a loan of Rs.35,700/- from his Department and with that, as also from his own income, he raised a house in the year 1988, uptill when he also remained in possession of the property.

22. It was further found by the learned first appellate Court that admittedly even the defendant had been working with the Government, but was not allotted any government house and as such, he requested his brother to allow him to reside in a part of the suit house, till Government accommodation was allotted to him.

The aforesaid fact, it was found by the appellate Court also, was admitted by Sukhdev Singh-defendant in his cross-examination, where he stated that earlier he and his brother were both residing in House No.614, Sector 11-B, Chandigarh, but thereafter upon his brothers' consent, he moved to the suit property in Mohali.

The inference drawn by that Court from the above admission, was that it was actually by Tarsem Singhs' permission that the defendant and his wife, who is also the sister of the first plaintiff (widow of Tarsem Singh), started actually residing in the suit property.

It was also found by that Court, that this situation continued till the time of Tarsem Singhs' death (by suicide), in the suit property. Thereafter,

when the first plaintiff sought to get the ownership of the property transferred in the name of herself and her two children (all plaintiffs), Sukhdev Singh started filing objections before the Estate Office authorities to stall such transfer. Consequently, the first plaintiff filed CWP No.11704 of 2010 before this Court with Sukhdev Singh also having filed a 'counter petition', seeking, in effect, that the prayer of the plaintiff for transfer of the property was answered against her and his prayer in the writ petition, for injuncting the authorities from making the transfer, was allowed. However, the petition filed by Sukhdev Singh was dismissed, with the review application filed by him also having been dismissed.

23. The learned lower appellate Court also found that Sukhdev Singh had been proclaiming earlier that actually the suit property was purchased with joint family funds, even though it was purchased in the name of Tarsem Singh as he (Tarsem Singh) could obtain a loan easily from his department; yet, when the legal heirs of Tarsem Singh filed the suit for possession against him, the defendant changed his stand, claiming that Tarsem Singh never remained in possession of the suit property from the first day itself and that he (defendant Sukhdev Singh) being in possession thereof and also having raised the construction upon it, became its owner by virtue of such adverse possession, which was open and hostile to the knowledge of the plaintiffs. Other than that, he still took the plea of the property having been purchased “Benami” in the name of Tarsem Singh.

24. After discussing the law laid down by this Court in various judgments, including Kanhi Ram v. Umesh Kumar and another 2013 (1) RCR (Civil) 790, Bhim Singh and others v. Zile Singh and others, 2006 (3) RCR (Civil) 97, Darshan Singh (since deceased) through L.Rs v. Kushat

Ashram (Regd.), Peler Colony Ludhiana 2010 (5) Law Herald 3530 and Jeet Singh (since deceased) through L.Rs v. Molu Ram (since deceased) through L.Rs, 2010(2) RCR (Civil 650, as also the Supreme Court in Hemaji Waghaji Jat v. Bhikhabhai Khenjarbhai Harijan (2009) 16 SCC 517, the learned lower appellate Court came to the conclusion that, in fact, the pleas of “Benami” ownership with allegations of contribution to the suit property, on the one hand, and adverse possession on the other, were mutually destructive pleas, and further, simply by virtue of long possession the defendant could not prove that such possession was adverse, open and hostile to the plaintiffs.

It was further held that even to claim adverse possession on the basis of open hostility to the knowledge of the true owner, it needed to be proved as to when such possession became hostile.

25. The appellate Court thereafter recorded that undoubtedly the defendant was in exclusive possession of the suit house since the year 1986 (actually should be 1988 because prior to that, construction was also not shown to have been made as noticed earlier), but till the date of death of Tarsem Singh on 31.01.1997 the possession was obviously permissive, with the defendant himself having admitted that his brother had allowed him to stay in the house at the time when they were initially residing together in Sector 11-B, Chandigarh.

It was also noticed by that Court that though the first plaintiff admitted to never having lived in the suit house, that was on account of the fact that till the death of her husband, she was residing in the Government accommodation allotted to him and only after his death did she ask the defendant to vacate it, and also applied for transfer of the house in her own

name and that of her children.

It was further noticed by that court that even presuming Rs.35,700/- was not sufficient to construct the house even in the late 1980s, the first plaintiff had stated that the Rs.1,50,000/- that it took to construct it, was done with the contribution from the income of her late husband. In any case, it was found that no evidence whatsoever could be shown by the defendant, that he had contributed in any manner to the purchase of the suit house or construction raised thereupon. Hence, it was further held that in terms of the provisions of the “Benami” Transactions (Prohibition) Act 1988, even a brother could not raise a plea that the suit property was purchased “Benami” in his name, by his brother.

26. Before concluding his judgment, the learned Additional District Judge also noticed that though no objection in that regard had been raised by the Registry of the court, factually the appeal was filed by the appellant with only a court fee of Rs.50/-, even though Rs.1,17,050/- was affixed as court fee by the respondents-plaintiffs at the time when they had filed the suit seeking possession of the property, as also mesne profits. The contention of counsel for the appellant-defendant, to the effect that *ad-valorem* court fee was not payable as the appellant only sought possession of the suit property, was rejected by citing a division Bench judgment of the Madras High Court in **S.S.Durai Pandian & another v. S.S.Pandian** (2012 (5) CTC 610), to the effect that the same fee as was paid at the first instance by the plaintiff, would also be payable by the appellant in the appeal.

Consequently, it was held that the appellant-defendant was liable to pay court fee of Rs.1,17,050/- and that the remaining Rs.1,17,000/- as had not been paid, would be paid by him within one month from the date

of the judgment and decree of the appellate Court, failing which it would recover as arrears of land revenue.

27. On the aforesaid findings, the first appeal filed by the appellant-defendant, was also dismissed.

28. Before this Court, Mr. Ranjivan Singh, learned counsel for the appellant, after reiterating the facts with regard to the purchase of the plot and construction thereupon, Tarsem Singhs' death, the application for transfer of the house made by the respondents-plaintiffs, submitted in terms of the arguments made by the learned counsel for the appellant-defendant before the Courts below, to the effect that actually the plot and house were purchased from the contributed fund of the appellant and his late brother Tarsem Singh and as such, Tarsem Singhs' exclusive ownership of the suit property could not have been decreed by the Courts below, with possession accordingly decreed. Learned counsel also reiterated with stress the fact that admittedly, the appellant has been in possession of the suit property since the year 1988 and the suit having been filed by the respondents-plaintiffs only in the year 2012, it was completely barred by time, in view of the specific plea of adverse possession of more than 12 years having been raised by the appellant-defendant.

29. As regards the first plea, this Court specifically put a query to learned counsel as to whether any evidence at all was led before the Court below to prove in any manner that the appellant had contributed towards the purchase of the plot or/and the construction of the house upon it, to which learned counsel admitted that other than the oral evidence of DWs3 and 4, who were both employees in the Punjab Roadways, there was no documentary evidence led.

30. However, learned counsel stressed on the fact that in any case, even if this Court holds that there was no contribution made by the appellant towards either the purchase of the plot or construction upon it, contrary to the argument raised, the plea of adverse possession needed to be accepted by this Court, 24 years having elapsed between the first occupation of the house by the appellant and the filing of the suit for possession by the respondents-plaintiff. Hence, Mr. Ranjivan Singh submitted that the Courts below had completely erred in rejecting that plea of the appellant.

31. On the other hand, Mr. Ashok Verma, learned counsel for the respondents-plaintiffs, who are on caveat before this court, submitted that right uptill the time that the appellant-defendant filed Civil Writ Petition No.2566 of 2010, his contention was that he was an owner of the suit property, being a contributor towards its purchase and construction, and it was in fact on that basis that he had even sought a direction from this Court in the writ petition, that the Greater Mohali Area Development Authority (GMADA) be restrained from transferring the suit property to the name of the respondents-plaintiffs. Hence, the plea of adverse possession of the property in any case was not available to the appellant, he having contended all along that the possession was wholly based on his own right as a co-owner of the property.

As regards the issue of being a co-sharer, Mr. Verma reiterated that other than the oral testimonies of witnesses, who were obviously friends of the appellant-defendant, no documentary evidence of any kind whatsoever was led by the appellant, to prove that he had made any monetary contribution towards either the purchase of the plot or towards the construction raised thereupon. As such, the oral testimonies of DWs3 and 4

would need to be considered to be wholly self-serving testimonies in favour of the defendant, on account of a friendly relationship with him. In any case, learned counsel submitted, that as per Section 4 of the Benami Transactions (Prohibition) Act 1988, no suit or claim, or any defence in reply to a suit or claim, can be taken on the ground that the suit property was held “Benami” by the person in whose name it actually stands registered.

Hence, Mr. Verma submitted that with neither any documentary proof of any kind of payment towards the suit property, and with a specific bar contained in the aforesaid act, the question of the ownership of appellant-defendant of the suit property, does not arise.

Consequently, it was further contended that both the pleas of the appellant-defendant being without any basis, the Courts below committed no error in decreeing the suit of the respondents-plaintiffs and as such this appeal deserves to be dismissed.

32. Having heard learned counsel for the parties and having considered the impugned judgments and decrees of the Courts below, I find myself wholly unable to agree with the contentions raised on behalf of the appellant.

On the other hand, I agree with the learned counsel for the caveators, that the plea of ownership of the property having been maintained by the appellant even uptill the time that he filed the writ petition aforesaid before this Court, the plea of adverse possession of the appellant at least uptill 2010, i.e. when he filed the aforesaid writ petition, cannot be sustained, his plea then being based upon a right of ownership to the suit land on account of his contribution towards the sale consideration thereof and towards the construction made upon the said property.

Pointing to the judgment of the lower appellate Court to show that it was specifically admitted by the first plaintiff in her testimony that she had been asking the appellant-defendant to vacate the property since 1997 after the death of her husband, learned counsel for the appellant submitted before this Court that this plea factually proved the case of the appellant, that he was in adverse possession of the suit property at least since the year 1997, if not since 1988.

Undoubtedly, there seems to be no manner of any confusion that after the death of Tarsem Singh, the first plaintiff has been asking the appellant to vacate the property. However, her asking him to vacate it and his refusal to do so, does not prove the defence of adverse possession raised by the defendant, in this *lis*. When the defendants' contention was that he was a co-owner of the property and as such he would not vacate in that capacity, the question of adverse possession would not come in, in first place. Even presuming for the sake of argument, that he was raising both pleas right since that time, which has not been shown by the learned counsel for the appellant from any documentary evidence in the form of pleadings before this Court in the writ petition, yet, to repeat even if that were so, the plea of adverse possession would have been mutually destructive of the plea of title to the property on account of the ownership claimed by him, on account of monetary contribution allegedly made towards its purchase and the construction made upon it. The appellant could not have pleaded both things simultaneously, i.e. to claim ownership on the basis of a legitimate right as a contributor to the purchase of the property and conversely, on the ground that he was in open and hostile possession of it, to the knowledge of the true owner thereof.

It is too well establish now, by law fully settled in that regard, that for a plea of adverse possession to succeed, the person raising such plea has to recognise the lawful title of the true owner of the property as such true owner, but yet plead that despite such ownership, he, i.e. the occupier of the property, has been in possession of it which is open and hostile to the knowledge of the true owner, who has taken no steps to take possession of the suit property, for a period of at least 12 years prior to that person raising such a plea in a suit filed by the owner.

In the present case, the appellant not recognising the respondents-plaintiffs as the true owners of the suit property and on the other hand, contending that he was owner thereof, he obviously did not recognize the plaintiffs as its true owners. As such, he was precluded from pleading his ownership by way of prescription or adverse possession for more than 12 years.

34. Again, for the sake of argument, though no such argument had actually been raised, if it is contended that the appellant could have taken the plea of adverse possession qua a half share to the suit property, he claiming to be a co-sharer alongwith his brother, that plea is also not available, for the following reasons.

Firstly, admittedly the property never having been partitioned, even if the appellant had established his ownership to the extent of half a share over it, all co-sharers, till partition of the property, are deemed to be such co-owners over every square inch of the property, to the extent of their shares. Hence, though a co-sharer in exclusive possession of the suit property to the exclusion of the other co-owners thereof, may claim adverse possession qua all such share in the property as is in excess of the share of the person who he is claiming such adverse and hostile possession against, however, in the present case, even that argument would not succeed, even if

any such argument had been raised, as the appellant could never in the first place establish in any manner whatsoever, that he was even a co-sharer in the property, by virtue of any contribution made by him towards its purchase or construction.

Thus, factually, the defendants' possession of it was permissive in any case uptill the time that his brother was alive, and thereafter, with him having raised a plea himself of permissive possession of the property in its entirety, on the basis of his benami ownership of it, till the time that the present suit was filed, he could not suddenly turn around and take a plea wholly contradictory to the one taken by him earlier. The plea so taken then has to be considered as such, from the day he raised such a plea of adverse possession, having abandoned the plea of ownership. In the present case, actually the appellant-defendant never abandoned that plea, even in the present *lis*. Thus, it is a plea wholly contradictory to the plea of his own ownership of the suit property and is, therefore, a mutually destructive plea, in the opinion of this Court.

35. This is, of course, to repeat, other than the reason that as right till the time the respondents-plaintiffs filed the suit, the defendant had been raising the plea of ownership of the property even before the GMADA authorities, as also in the writ petition before this Court, that he was in permissive possession of the property by his own status as the owner/co-owner thereof, the respondents-plaintiffs had initiated proceedings to first get the property transferred to their names from Tarsem Singh and thereafter, having filed a writ petition seeking transfer of the property in their names. Thus they were not sitting idle to enforce their right. It was only when the GMADA officials refused to transfer the property to the names of the plaintiffs, despite directing them to issue an advertisement seeking no

objections from the general public, that the plaintiffs were compelled to file CWP No.11704 of 2010 before this Court seeking a direction that the property be transferred in their names, they being the legal heirs of Tarsem Singh.

After this Court had directed, in the writ petitions in the year 2011, that the property be transferred to the name of the respondents-plaintiffs, they filed the suit in the instant *lis*. Thus, the possession of the appellant having become adverse can only be considered from the year 2011 onwards at best, even if the two pleas for any reason were not to be considered mutually destructive, though as held above, they are so.

Hence, the suit by the respondents-plaintiffs was very much within limitation and the plea of the appellant, of adverse possession of the property for more than 12 years prior to the filing of the suit, is not tenable at all.

Consequently, in any case, viewed from any perspective, in the opinion of this Court, the plea of adverse possession taken by the defendant on the basis of his occupation/possession of the suit property was a wholly untenable plea and the Courts below committed no error in having rejected that contention.

36. This is other than the fact that though even today that plea is legally available to a defendant, the Supreme Court in no uncertain terms has deprecated the existence of such a law, and in *Hemaji Waghaji Jats'* case (supra), has directed the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India, to examine the issue of either abolishing the provision of adverse possession altogether, or making suitable amendments in it, it being a provision which snatches away the legal rights of

the lawful owner of a property. This was so done by their Lordships after discussing the entire history of the doctrine of adverse possession, starting from the 13<sup>th</sup> century in England, spilling over to the first occupation of the United State of America by settlers, and thereafter the provision having found its way, through British rule, in India.

37. As regards the plea of “Benami” taken by the learned counsel for the appellant before this Court and before the Courts below, Sections 3 and 4 of the Act of 1988 read as under:-

“3. Prohibition of benami transactions- (1) No person shall enter into any *benami* transaction.

(2) Nothing in sub-section (1) shall apply to-

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a --

(i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996 (22 of 1996);

(ii) participant as an agent of a depository.

Explanation- The expressions “depository” and “participants” shall have the meanings respectively assigned to them in clause (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996 (22 of 1996).

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.

4. Prohibition of the right to recover property held benami.—(1)

No suit, claim or action to enforce any right in respect of any

property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,—

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”

Hence, nothing in Section 3 of that Act operates in favour of the appellant, and neither does any part of Section 4(3) help him as it was nobodys' case that the suit property was co-parcenary, nor was any plea raised, as it was wholly inapplicable, that the late Tarsem Singh was holding the property as a trustee or a person standing in fiduciary capacity for the appellant.

38. In view of all that has been held hereinabove, the appeal is found to be without merit and is dismissed *in limine*, with costs of Rs.20,000/-.

**August 19, 2016**

*dinesh*

**(AMOL RATTAN SINGH)  
JUDGE**