

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.648 of 1986

Date of Decision: 06.03.2017

Raju

...Appellant

Vs.

Amar Singh (since deceased) through his LRs

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Jaivir Yadav, Advocate
for the appellant.

Mr. O.P. Sharma, Advocate,
for the respondent.

Amol Rattan Singh, J.

This second appeal has been filed by the plaintiff after his suit seeking a declaration to the effect that the *ex parte* decree dated 21.03.1975 passed by the learned Sub-Judge Ist Class, Mahendergarh, in favour of respondent no.1 (defendant no.1 in the current *lis*), against respondent-defendant no.2, qua the suit land, be declared to be null and void and not binding on the rights of the appellant-plaintiff.

2. The facts of the case, as taken from the judgments of the learned Courts below, are that respondent-defendant no.1 Amar Singh (hereinafter to be referred to as defendant no.1), had alleged in his suit that he had purchased khasra no.119, measuring 5 bigha 18 biswa on 01.03.1952 from defendant no.2 Mangal, for a sale consideration of Rs.2000/-, which sale deed, as per the present appellant-plaintiff (Raju son of Rugha), was a 'fictitious' one because defendant no.2 (Mangal son of Jee Ram), had no share left in the said khewat,

as he had already sold off his share in that land.

Defendant no.1, Amar Singh, on the basis of the said sale deed, had earlier filed Civil Suit no. 271 of 05.11.1964, seeking possession of the land, which was dismissed on 14.02.1966, holding that he was not entitled to take possession of any part of the suit land in that case because the present plaintiff had already purchased the suit land earlier, in 1951 and because the suit had become time barred.

3. Thus, it was alleged by the present appellant-plaintiff in this *lis*, that the *ex parte* decree dated 21.03.1975, passed in a suit in which he was not a party, was obtained by concealing the aforesaid facts, i.e. the existence of a previous decree dated 14.02.1966 and therefore, the decree dated 21.03.1975 was liable to be declared to be null and void.

On the aforesaid pleadings, the present appellant-plaintiff instituted his suit on 29.05.1975, before the learned Sub-Judge Ist Class, Mahendergarh.

4. Upon notice issued, defendant no.1 filed his written statement, contending that he had purchased khasra no.119 measuring 5 bighas and 18 biswas from defendant no.2 for a sum of Rs.2000/- and that he being an illiterate and “rural man”, the plaintiff and defendant no.2 had defrauded him. He admitted that khasra no.119 had already been purchased by plaintiff Raju from the khewat in question, which was not brought to his (defendants') knowledge.

The filing of the earlier civil suit and its dismissal by the Sub-Judge Ist Class was admitted; however, it was further contended that an appeal having been filed against that judgment (dated 14.02.1966), the learned Additional District Judge, Gurgaon, in his judgment dated

25.01.1967, had held that he (respondent-defendant no.1 herein, Amar Singh) was entitled to have some other land of defendant no.2 and that he could file a separate suit for that purpose.

Defendant no. 1 further contended in his written statement, that the plaintiff had no locus standi to file the present suit, which was not maintainable and in fact, had been filed only to harass him, due to the strained relations between him and the plaintiff.

5. No written statement is seen to have been filed by defendant no.2, Mangal, but a replication having been filed to the written statement of defendant no.1, by the plaintiff, the following issues were framed by the learned Sub-Judge:-

- “1. Whether the decree dated 31.03.1975 titled as Amar Singh v. Mangal is liable to be set aside?
2. Whether the suit is not maintainable on the ground of principle of resjudicata?
3. Whether the defendant no.1 is entitled for possession of the suit land on the basis of the sale deed as alleged in para no.1 of written statement.
- 3-A. Whether the plaintiff has no locus standi to file the suit?
OPD
- 3-B. Whether Mangal was in possession of the land in suit at the time of institution of the suit in which impugned decree dated 21.03.1975 was passed and if not to what effect?
OPD
4. Relief.”

It is to be noticed that issues no.3-A and 3-B were actually framed by the learned first appellate Court, upon the suit having initially been dismissed and an appeal having been filed by the plaintiff, with the suit thereafter remanded to the learned Sub-Judge, with the aforesaid issues no.3-

A and 3-B framed by the appellate Court.

6. Upon remand of the case and de-novo hearing, issues No.1 and 3-A were taken up together by the learned Sub-Judge, who found from the deposition of PW1, Patwari Shiri Ram, that defendant no.2, Mangal, was a co-sharer to the extent of 15/256th share in the joint khewat and that he had sold off 177 kanals and 1 marla of land and was in possession of only 4 kanals. The plaintiff in his testimony had deposed that he had purchased khasra no.119 from one Hari Ram, a co-sharer of the khewat and thereafter, defendant no.1, Amar Singh, had purchased the same khasra number fraudulently from defendant no.2.

It was further found by the learned Sub-Judge that Civil Suit No.271/1964, instituted by defendant no.1, seeking possession of khasra no.119 on the basis of the sale deed dated 01.03.1952, had in fact been dismissed on 14.02.1966, as per a judgment, Ex.P3, from which it was revealed that in fact during consolidation proceedings, khasra nos.44/25(8-0), 45/21/1(4-16), 46/1 (8-0), 2(3-4), 47/5/2 (5-12), 345 (0-3) had been allotted in lieu of the original khasra no.119. In the judgment dated 14.02.1966, it had been found that since this land had earlier been purchased by the plaintiff from Hari Ram, also a co-sharer, defendant no.1 was held to be not entitled to the relief of possession, which finding was affirmed in appeal by the learned first appellate Court in that *lis*, vide its judgment and decree dated 25.01.1967, Ex.P5. However, liberty had been granted to defendant no.1 (plaintiff in the earlier suit) to seek his remedy by bringing a separate suit against defendant no.2 for possession of alternative land, or for recovery of the price of the land, paid in terms of the sale deed dated 01.03.1952.

It was thus, pursuant to such liberty, that Civil Suit

No.346/20.09.1974 had been filed by defendant no.1 against defendant no.2, for obtaining possession of alternative land measuring 30 kanals and 2 marlas, which was the suit land in the present *lis*, as had been fully described in the plaint.

7. It was further found that the decree dated 21.03.1975, passed in Civil Suit No.346/20.09.1974, in favour of defendant no.1, was in respect of land that was different to the land which had been subject matter of the judgment dated 14.02.1966.

It was therefore held that the plaintiff could not show that the suit land was not within the competence of defendant no.2 to be sold to defendant no.1, in terms of the sale deed dated 01.03.1952 (and the judgment of the appellate Court in the previous *lis*, dated 25.10.1967-Ex.P5).

8. Further holding that the plaintiff not having shown his *locus qua* the suit land in question in the current *lis*, even presuming that defendant no.2 had sold land in excess of the share held by him, the plaintiff had no right to the suit land in any case, he not having stated in his plaint, that he was a co-sharer in the khewat.

The partition decree (Sanad), Ex.P7, led by way of evidence, was also held to be not acceptable in evidence, it being beyond the pleadings of the plaintiff.

Hence, holding that defendant no.1 was within his right to file a suit seeking possession of alternative land against defendant no.2, in terms of the liberty granted to him vide the decree dated 25.10.1967, the decree dated 21.03.1975 was also held to be a valid decree in favour of defendant no.1.

It was further held that the land that was subject matter of the suit in the present *lis* being different from the land that was subject matter of the

judgment dated 14.02.1966 (and 25.10.1967), there was also no question of *resjudicata* operating against the defendant (in the suit leading to the decree dated 21.03.1975).

9. Issue No.3-B, with regard to possession of the suit land, was decided by the learned Sub-Judge holding that defendant no.2, Mangal, was in possession of the suit land through his tenant, Shiri Ram, *gair marusi*, as revealed from the *jamabandi* for the year 1971-72. Hence, the suit that led to the decree passed on 21.03.1975, having been instituted on 20.09.1974, that was was the relevant date to determine possession, which in terms of the aforesaid *jamabandi*, stood proved to be that of defendant no.2, through his tenant.

10. On the aforesaid reasoning, the suit of the present appellant (plaintiff) was dismissed.

11. The appellant challenged the aforesaid judgment and decree by filing a first appeal before the Additional District Judge, Narnaul.

That Court, while noticing the contentions made in the pleadings of the parties, recorded that the sale of land in favour of plaintiff-appellant Raju Ram, by his co-sharer Hari Ram, was by virtue of a registered sale deed dated 25.07.1951.

It was also noticed that defendant no.2, Mangal, having died on 20.12.1976, i.e. during the pendency of the civil suit, the first appeal (in the current *lis*) had only been filed against defendant no.1 Amar Singh.

An application having been filed to lead additional evidence before the first appellate Court, that was allowed and a mutation of inheritance in favour of the plaintiff after the death of Mangal, was taken on record as Ex.PX, with entries in the *jamabandi* for the year 1980-81, being

allowed as Ex.PY and a khasra girdawari in respect of the suit land measuring 30 kanals and 2 marlas, for the seasons kharif 1982 to rabi 1984, also being taken on record as Ex.PZ.

In rebuttal to the aforesaid evidence, defendant Amar Singh tendered a copy of a judgment dated 05.06.1977 as Ex.DA, a copy of another judgment dated 19.04.1979 as Ex.DB, both of which were noticed to be in respect of partition proceedings. A copy of a *jamabandi* for the year 1981 was taken on record as Ex.DC and a *jamabandi* for the year 1971-72 was also exhibited as Ex.DD before the first appellate Court.

12. That Court further noticed an argument made on behalf of the appellant-plaintiff, to the effect that PW1 Shiri Ram, Patwari, had testified that out of the total land holding measuring 133 kanals and 15 marlas in the joint khewat, Mangal had already transferred 117 kanals and 1 marla and actually, under his own self-cultivation, there were only 4 kanals. Possession of the plaintiff over the suit land, as per the report dated 11.09.1976 (Ex.P8), of a Local Commissioner appointed, was also referred to before the lower appellate Court, as noticed in its judgment, alongwith the fact that as per the plaintiff, *jamabandi* Ex.PY and khasra girdawari Ex.PZ, also showed his (appellant-plaintiffs') cultivation as a co-sharer over the suit land.

13. Upon appraisal of the evidence and consideration of the arguments raised before it, the learned first appellate Court came to the conclusion that as regards the question of limitation pertaining to the earlier suit of 1964, that was correctly decided by the trial Court in that case, in favour of the appellant, because he had been in exclusive possession of the land. However, it was further held that defendant Amar Singh had become a co-owner in the land to the extent of the share transferred to him by 2nd

defendant Mangal, even though the specific khasra number that had been alienated by Mangal had already been earlier purchased by the appellant from Hari Ram. This was held to be so on the ground that Mangal had an alienable interest more than what he transferred out of the joint khewat in favour of defendant Amar Singh and as such, Amar Singh was fully entitled to take possession of some other piece of land as was in possession of his vendor (Mangal). In fact, that was the right recognised by the appellate Court in the earlier *lis*, as per its judgment dated 25.10.1967, as even the trial Court in that *lis*, vide its judgment dated 14.02.1966, had not specifically brushed aside the claim of Amar Singh, but had declined relief to him qua the specific khasra numbers that he sought possession of.

It was further held that it was clear from the details of the 'alienations' given in the *jamabandies*, as also from the deposition of the Patwari, PW1, that Mangal was still owner to the extent of about 17 kanals in that very khewat (even after the alienations made, including the alienation made in favour of defendant Amar Singh by Mangal).

In fact, even as per the mutation of inheritance relied upon by the appellant by way of additional evidence, Ex.PX, the first appellate Court found that a total land of 18 kanals and 10 marlas was mutated in favour of the appellant after the death of Mangal (in 1976). Hence, with Mangal being owner of 18 kanals and 10 marlas of land, it was held that defendant Amar Singh was very much within his right to sue Mangal for possession of land in lieu of the area originally purchased by him from Mangal.

14. Having recorded a finding as above, it was held that the trial Court had not erred in dismissing the suit of the appellant, by which he sought to have the earlier decree dated 21.03.1975 declared to be null and void, by

which decree defendant Amar Singh had been granted possession of land belonging to Mangal, in lieu of specific khasra numbers that were transferred to him vide the sale deed dated 01.03.1952.

15. Coming to the issue of actual possession of Mangal over the suit land at the relevant time, the first appellate Court held that even that issue had been correctly decided by the trial Court, as it was evident from the *jamabandi* for the year 1971-72 (Ex.DD) that the suit land was under cultivation of Mangal either directly or indirectly, i.e. through his tenant. Thus, the earlier suit instituted by Amar Singh against Mangal having been so instituted in the year 1974 (leading to the decree dated 21.03.1975), the relevant *jamabandi* entries for proving possession were not the ones of the year 1981-82 but those of the year 1971-72. For the very same reason, the report of the Local Commissioner, dated 11.09.1976 (Ex.P8), was also held to be insignificant.

16. On the aforesaid findings, the first appeal filed by the present appellant-plaintiff was dismissed by the lower appellate Court.

17. Before this Court, the legal representatives of the appellant and defendant now stand substituted in their place, they both having died in the meanwhile.

(Though vide C.M.A. No.1858-C of 2014, both, substitution of the appellant, Raju Ram, with his legal representative, i.e. his daughter Laxmi, was sought, as also restoration of the appeal, it having been dismissed in default and as having abated, vide order dated 02.07.2013, the order passed by this Court, while allowing the application on 12.02.2014, does not specifically state that the appellants' LR is allowed to be substituted in his place. The order simply states that the "C.M. is allowed. The case is restored back to its

original number. Be posted as per roster.”

However, since the application was allowed and there is not seen to be any opposition from counsel for the respondent, to the daughter of the appellant being substituted in his place as his legal representative, after the appellants' death, nothing further need be said on that issue).

18. Vide CM No.2169-C of 2016, the following substantial questions of law, as are contended to be arising in this appeal, were framed by learned counsel for the appellant:-

- “i) Whether the learned Courts below have committed patent illegality in not considering that the issue of limitation which had already been decided against respondent/defendant No.1 in earlier case Ex.P3, could not have been re-opened in a subsequent suit decided vide Ex.P4. Even otherwise the said suit was clearly barred by law of limitation?
- ii) Whether the learned Courts below have committed patent legal error in misreading and misconstruing the evidence of plaintiff/appellant with specific reference to PW1 and Mutation Ex.PX, Ex.DD, Ex.P2 & P4 as well as Ex.P8 (report of local commissioner) in ascertaining the share/land of Mangal defendant falling to his share after excluding transfers/allegations made him out of his total share to the extent of 15/256 in the joint khewat?
- iii) Whether the learned Courts below have committed patent legal error in decreeing the suit for possession Ex.P4 instead of joint possession, without ascertaining the quantum of land got in succession by the appellant-plaintiff from Mangal, a co-sharer?
- iv) Whether the impugned judgments are based on conjectures & surmises and are perverse?”

19. No serious dispute as regards the question of law framed

hereinabove, has been raised on behalf of learned counsel for the respondent and this Court also finds that the first three questions of law would actually arise in this appeal, though the 4th question above is of course only a “formal question” framed. Consequently, it is discarded.

20. Addressing arguments before this Court, Mr. Jaivir Yadav, learned counsel for the appellant, at the outset submitted that the appellant and the late Mangal, i.e. defendant no.2 in the suit, were collaterals, both having descended from one Mam Raj and in fact they were first cousins to each other, their fathers, Rugha and Jee Ram respectively, being brothers.

Similarly, though the issue of being collaterals does not actually arise in this *lis*, however, for the record, Mr. Yadav further submitted that the vendor, Hari Ram, from whom the appellant-plaintiff had purchased the land in 1951, (as was later sold by Mangal to respondent-defendant Amar Singh), was also an uncle of the appellant and Mangal, i.e. Hari Ram was a second cousin to the fathers of the appellant and defendant no.2 Mangal, he (Hari Ram) also being a grand-son of the aforesaid Mam Raj.

Hence, Mr. Yadav submitted that the history of how the khewat was a joint khewat, lies in the aforesaid background, with the original owner of the entire khewat originally being Mam Raj.

21. Reiterating the facts as have already been detailed hereinabove, with regard to the two sale deeds dated 25.07.1951 and 01.03.1952, and the filing of the earlier Civil Suit No.271/1964 by Amar Singh, and it having been dismissed with an appeal preferred by him culminating in the judgment and decree dated 25.10.1967 (Ex.P5), Mr. Yadav submitted that the subject matter of that suit was khasra nos.44/25, 45/21/1, 46/1 and 46/2, 47/5/2 as also khasra no.345, total measuring 29 kanals and 15 marlas, as can be seen from a

copy of the said judgment, Ex.P3. These khasra numbers, Mr. Yadav submitted, were substituted in lieu of the original khasra no.119 measuring 5 bighas and 18 biswas.

22. Mr. Yadav further submitted that the findings of the Courts below are wholly perverse, inasmuch as, the learned Additional District Judge, in paragraph 19 of his judgment, has erroneously held that Mangal had alienable interest much more than the area transferred by him in favour of Amar Singh, out of the joint khewat.

He submitted that vide the decree dated 21.03.1975, as is subject matter of challenge in this *lis*, 30 kanals and 2 marlas of land have been ordered to be given possession of to respondent Amar Singh from the share of Mangal, defendant no.2, which were comprised in Khasra nos.45/9 min. (4 kanals and 0 marlas), 52/7/1 (2 kanals 2 marlas), 52/14 (8 kanals), 52/15 (8 kanals) and 52/16 (8 kanals). However, the learned Courts below have nowhere discussed as to how Mangal continued to be owner of such a large chunk of land, he having actually only 18 kanals and 10 marlas existing in his ownership, which were mutated in favour of the appellant Raju Ram upon the death of Mangal, by way of inheritance, as can be seen from the mutation entered, vide Ex.PX. He further submitted that out of the total land holding of 2313 kanals and 14 marlas, Mangals' share was 15/256th, which comes to 135 kanals and 8 marlas.

It was further contended by Mr. Yadav that it was even admitted by defendant Amar Singh in his testimony as DW1, that Mangal had sold 117 kanals and 1 marlas as can be seen from his cross-examination. Thus, what was left with Mangal, even as per the admitted case of respondent Amar Singh, was 18 kanals and 8 marlas. Though in his testimony he stated that

Mangal was the owner of 136 or 137 kanals, even so, Mr. Yadav submitted, that after the sale of 117 kanals and 1 marla, the land remaining to the share of Mangal would not be 30 kanals and 2 marlas.

Learned counsel further pointed to paragraph 23 of the judgment of the lower appellate Court, in which the *jamabandi* for the year 1971-72 has been referred to, i.e. Ex.DD. He submitted that the said *jamabandi* also shows that respondent Mangal was not owner in possession of more than 18 kanals and 10 marlas of land and as such, the question of more than that much land being transferred to respondent Amar Singh would not arise.

23. Mr. Yadav next argued that in any case, the respondent could not have been granted exclusive possession of any specific khasra numbers vide the decree impugned in the suit dated 21.03.1975, the land holding being joint upto that point of time.

He next submitted that the suit leading to the aforesaid decree dated 21.03.1975 was also time barred, it having been filed on 20.09.1974, the land having been sold by Mangal on 01.03.1952, which had already been sold to the appellant-plaintiff on 25.07.1951, as held in the decrees dated 14.02.1966 and 25.10.1967.

This, as per learned counsel, would be further so because in the decree dated 14.02.1966, the suit instituted on 05.11.1964 was held to be time barred, which finding was not reversed even by the appellate Court in that *lis*, vide the aforesaid decree dated 25.10.1967. Respondent Amar Singh had only been given liberty to seek alternate land from his vendor, i.e. defendant no.2 Mangal, or file a suit for recovery of the consideration. Even thereafter, Amar Singh having remained silent from 1967 till 1974, he was barred from filing a fresh suit on that cause of action also, in the year 1974.

24. Mr. Yadav next submitted that DW2, also named Amar Singh (not the respondent defendant), also testified that Shiri Ram (tenant of Mangal) had died 14 to 15 years earlier (to the date of the deposition of DW2) and as such he had died in the year 1965-66. That being so, Mr. Yadav submitted that the report of the Local Commissioner, i.e. the Naib Tehsildar, Ex.P8, to the effect that appellant Raju was in possession of this very land on 11.09.1976, could not have been held to be a piece of evidence not worthy of credence, simply because the suit had been filed about two years earlier to that date. The contention of Mr. Yadav thus is that Shiri Rams' death having been proved 15 years earlier and the appellant-plaintiff having been found to be in possession of the very same land of Mangal in 1976, he would be deemed to have been in possession throughout the period in between also.

He further submitted that the subsequent statement of DW2, that three years earlier Mangal was in possession of the land, i.e. in 1977, was not supported by any document, because the *jamabandi* for the year 1971-72 (Ex.DD before the first appellate Court) did not show that to be so. Shiri Ram was shown to be in possession as a *gair marusi* under Mangal, shareholder. Hence, he submitted that actually even the *jamabandi* erroneously reflected Shiri Ram in possession, with him having actually died in the year 1965-66. The same land, thereafter, devolved upon the appellant, upon the death of Mangal in 1976, duly reflected in the khasra girdawari for the year 1982 (Ex.PZ).

Consequently, Mr. Yadav submitted, that Amar Singh having filed a suit for possession in 1974, leading to the decree dated 21.03.1975, impleading therein only his vendor Mangal, and Mangal not being in such possession, the decree in any case was not binding upon the appellant-

plaintiff, he being in possession of the suit land.

25. In response to the aforesaid arguments, Mr. O.P. Sharma, learned counsel appearing for the respondent first submitted that the dispute is only qua khasra no.119, admittedly sold to the respondent-defendant Amar Singh after it had been sold to the appellant-plaintiff. He submitted that the earlier suit filed in the year 1964 by respondent Amar Singh, against his vendor Mangal and the present appellant-plaintiff Raju and others, was erroneously dismissed by the learned Sub-Judge, all the parties to the *lis* being co-sharers of the suit land. Hence, as one co-sharer cannot claim any particular parcel of land against another co-sharer, what should have been held in that suit was that upon partition, the extent of the land sold to the appellant-plaintiff in the present *lis*, i.e. Raju, as also that sold to respondent-defendant Amar Singh, in 1951 and 1952 respectively, should have been directed to be determined in partition proceedings and allotment of specific khasra numbers to be made to them accordingly. However, since that decree has become final after the appeal had also been dismissed, granting liberty to Amar Singh to seek alternate land from Mangal, learned counsel expressed his inability to make good his argument any further on that count.

However, he submitted that once liberty had been granted by the appellate Court to Amar Singh to seek possession of alternate land from Mangal, or to seek recovery of the consideration amount paid by him, the second suit instituted by Mangal in 1974, leading to the decree dated 21.03.1975, was very much maintainable and had been correctly decreed.

26. Mr. Sharma next submitted that admittedly what was purchased by the appellant-plaintiff from Hari Ram, in khasra no.119, was subsequently consolidated into khasra nos.24//25, 45/21/1, 46/1, 47/5/2 and 345, total

measuring 29 kanals and 15 marlas, which already stood adjudicated upon in the earlier suit instituted by respondent Amar Singh on 05.11.1964. Hence, the second suit instituted by Amar Singh in 1974, leading to the decree dated 21.03.1975, being in respect of wholly different khasra numbers, i.e. nos.45/9, 52/7/1, 52/14, 52/15 and 52/16, measuring 30 kanals and 2 marlas in all, the said khasra numbers had no relationship to the land owned by the appellant-plaintiff. Hence, Mr. Sharma submitted that the Courts below had correctly held that the appellant-plaintiff had no locus standi to file a suit in respect of these khasra numbers.

On the land being in possession of the appellant-plaintiff in 1971-72, Mr. Sharma refuted the contention of Mr. Yadav, learned counsel for the appellant, by pointing to the *jamabandi* for the year 1971-72 (Exs.P1 and DD), wherein Shiri Ram is undoubtedly reflected as being in possession of khasra nos.52//7/1, 52//14, 15 and 16 under the co-sharer/owner, Mangal. He submitted that simply because DW2 had testified that one Shiri Ram had died 15-16 years ago, it could not be accepted at face value that it was same Shiri Ram who was the tenant of Mangal, there also being a co-sharer by that name in khasra no.24//25.

27. As regards the report of the Tehsildar (Local Commissioner), Ex.P8, Mr. Sharma pointed to the fact that respondent Amar Singh was not shown to be present at the spot and as such, no reliance could be placed on the said report of the Local Commissioner, it being a wholly one sided report. In any case, he submitted that the Local Commissioner not having been examined as a witness, no reliance can be placed on that report. Hence, learned counsel submitted that with the revenue record, i.e. *jamabandi*, duly showing Mangal to be in possession himself in khasra no.45//9 to the extent

of 4 kanals and in possession through his tenant Shiri Ram, in the remaining part of the suit land, the Courts below have not erred in holding that he was in such possession on the date of the filing of the suit by Amar Singh against Mangal in 1974. In fact, the appellant had only challenged the decree dated 21.03.1975 because he being the legal heir of Mangal, was now being deprived of the land that Mangal had sold to respondent Amar Singh, which otherwise would have fallen to the appellant by way of inheritance, if not sold (to Amar Singh).

28. Mr. Sharma next submitted that the testimony of the Patwari, PW1, to the effect that Mangal had sold 117 kanals and 1 marla of land out of 133 kanals and 15 marlas, nowhere suggests that the said 117 kanals did not include land sold by Mangal to respondent-defendant Amar Singh. Thus, land possessed by Mangal, at the time of institution of the suit by respondent-defendant Amar Singh on 20.09.1974, was more than what was decreed to Amar Singh, i.e. 30 kanals and 2 marlas, vide the impugned decree dated 21.03.1975. Only because possession had not been transferred, pursuant to the sale dated 01.03.1952, ownership of the appellant was not reflected and therefore, it could not be held that Mangal was not actually in possession of land including that sold by him to respondent Amar Singh in 1952.

29. Lastly, Mr. Sharma submitted that the aforesaid being the correct position as regards ownership of the land, even on the basis of the two sale deeds dated 25.07.1951 and 01.03.1952, in favour of the appellant and the respondent respectively, no prejudice was caused to the appellant, because if he applied for partition even now, each of these two co-sharers would be allotted specific parcels of land in terms of their ownership.

30. In rebuttal, Mr. Yadav submitted that as regards the testimony of

DW2, with regard to the death of Shiri Ram 15-16 years earlier, in the context of the present *lis*, he could only have been referring to the tenant of Mangal, as reference to any other Shiri Ram would be wholly meaningless.

On the contention that the report of the Local Commissioner, Ex.P8, not having been signed by the respondent, Mr. Yadav submitted that no objection to the report was made to the Court after it had been submitted.

31. As regards the contention of Mr. Sharma on the 117 kanals and 1 marla alienated by Mangal, as per the testimony of the Patwari, PW1, Mr. Yadav pointed to the testimony of respondent Amar Singh himself, as DW1, admitting therein, in his cross-examination, that Mangal had sold about 117 kanals of land. Mr. Yadav further pointed to the fact that Rect. No.52 consists of various khasra numbers other than ones which were in dispute and therefore, no partition having taken place, Amar Singh could not have sought possession of such khasra numbers in the suit leading to the decree in his favour on 21.03.1975.

32. Having considered the arguments of learned counsel hereinabove, as also the judgments of the learned Courts below, what emerges first of all is that the suit instituted by respondent Amar Singh on 05.11.1964, Ex.P3 before the learned Sub-Judge in the present *lis*, was one in which he had arrayed 15 defendants, including the present appellant Raju Ram and defendant no.2 in the suit in the current *lis*, i.e. Mangal. In that suit, Amar Singh sought possession of land comprised in khasra nos.44/25, 45/21/1, 46/1 and 46/2, 47/5/2 as also khasra no.345, total measuring 29 kanals and 15 marlas, as per the *jamabandi* for the year 1962-63. That suit for possession having been dismissed on the ground that the suit land, (which was the land 'substituted' in consolidation proceedings in lieu of khasra no.119 comprising

5 bighas and 18 biswas), already stood sold in favour of the appellant-plaintiff herein (Raju), prior to the sale deed in favour of Amar Singh, i.e. the plaintiff in Civil Suit No.271 of 05.11.1964. Undoubtedly, learned counsel for the appellant herein is correct that even the issue of limitation was decided against the present respondent, in that *lis*. However, despite that, while dismissing the appeal filed by the present respondent (plaintiff in that *lis*), the learned appellate Court had given liberty to respondent Amar Singh to seek his remedy against Mangal for possession of any alternative land or for the recovery of the price of the land for him. The decree of the learned appellate Court in that case is dated 25.10.1967, (Ex.P5 in the record of the courts below), and attained finality with the liberty granted to the respondent herein never having been challenged.

Respondent Amar Singh having thereafter instituted Civil Suit no.346 on 20.09.1974, against Mangal, seeking possession of alternate land falling in khewat no.66, khatoni no.120, killa no.45/9 (4-0) and in khewat no.66, khatoni no.121, khasra nos. 52//7/1, (2-2), 14(8-0), 15(8-0) and 16(8-0), in all measuring 30 kanals and 2 marlas, as per the *jamabandi* for the year 1971-72, it is obvious that the land which he sought possession of in the second suit was wholly different from the land which he sought possession of in the first suit which had been dismissed. Hence, the second suit was filed seeking possession of alternate land, in terms of the judgment of the appellate Court in Civil Suit no.271 instituted in 1964, though in the second suit he sought possession of 7 marlas more land than he had in the first suit.

33. I find myself in agreement with learned counsel for the respondent, that with the present plaintiff-appellant having already succeeded against the respondent qua the land purchased by him (plaintiff-Raju) in 1951,

that sale deed being prior in time to that in favour of the respondent, the appellant could have no grievance qua the alternate land that the respondent sought possession of from his vendor, Mangal, on the basis of the sale deed executed by Mangal in his favour in 1952.

However, even having said that, what cannot be lost sight of and what has been admitted by both learned counsel for the parties is that the khewat continues to be a joint khewat despite some partition proceedings having been finalized earlier at the instance of some shareholders, leading to the present appellant filing Civil Suit no.84 of 29.04.1975 (Ex.DA), impleading therein various persons other than the present respondent, Amar Singh and defendant no.2, Mangal. However, since both learned counsel have stated that partition is still to take place, that fact is obviously not in dispute.

34. It needs to be stated here that respondent no.2 could not have actually filed any partition proceedings prior to having been declared entitled to any land in the ownership of Mangal, thereby entering the khewat as a co-sharer. That declaration effectively having been granted to him, even though in a suit for possession instituted by him earlier, by the decree of the appellate Court that was seized of the appeal in Civil Suit no.271 of 05.11.1964 (Appeal No.592/1966 before the learned Additional District Judge, Gurgaon-Ex.P5), his remedy was to seek to institute the suit leading to the decree dated 21.03.1975, as that was the only remedy granted to him in the earlier decree of 25.10.1967. That liberty granted to the respondent, not having been challenged by the present appellant in any second appeal before this Court, obviously, the decree dated 25.10.1967 became final.

Thus, a situation has arisen wherein without the suit property having been partitioned, possession of alternate land with specific khasra

numbers, has been decreed in favour of the respondent, just as the appellant was held entitled to specific khasra numbers vide the decrees dated 14.02.1966 and 25.10.1967.

35. In the opinion of this Court, if appellant Raju was held to be purchaser of specific khasra numbers in un-partitioned suit land, vide the decree dated 14.02.1966, on the basis of the earlier sale deed dated 25.07.1951, then as long as the respondent has not been granted land in excess of what was alienated by Mangal, such decree also, dated 21.03.1975, cannot be held to be erroneous *inter se* the two parties herein, each being given possession of what they had purchased vide the sale deeds dated 25.07.1951 and 01.03.1952 respectively.

The only question is whether Mangal, on the date that Civil Suit No.346 was instituted on 20.09.1974, was actually in possession of 30 kanals and 2 marlas of land as have been decreed in favour of the respondent. However, though that may impinge upon the rights of some other shareholder, though with none having challenged the decree dated 21.03.1975, that would not impinge upon the rights of the appellant, he already having been granted the entire land that he had purchased from Mangal, vide the decrees dated 14.02.1966 and 25.01.1967.

36. The appellant is obviously actually aggrieved of the decree dated 21.03.1975, only because he is stated to be the legal heir of Mangal and after Mangals' death in 1976 has inherited his estate. Thus, any land of Mangal decreed in favour of the respondent herein, naturally reduces the holding that would otherwise devolve upon the appellant. However, legally, the respondent has a prior right to Mangals' land up-to the extent of what he purchased from Mangal vide the sale deed dated 01.03.1952, the appellant-

plaintiffs' claim qua his sale deed of 1951 already having been satisfied, as already said.

If, of course, any other shareholder in the joint khewat had instituted any proceedings to the effect that Mangal had already sold to him/her the suit land as is subject matter of this *lis* (as is also subject matter of the suit leading to the decree dated 21.03.1975), that would have been a different matter. However, with no other person, or even the appellant-plaintiff himself, laying claim to the suit land on the basis of any sale deed of such land in their favour by Mangal, the plaintiff in any case, can have no claim thereto only because he is the legal heir of Mangal.

Again, there is no doubt that in a joint khewat, specific khewat numbers cannot be sold off till an actual partition takes place of such khewat as per the respective shares of the shareholders therein. However, in the present situation, where undoubtedly the appellant-plaintiff himself purchased specific khasra numbers from Mangal, vide the sale deed dated 25.07.1951, and in fact that was the reason that respondent-Amar Singhs' first suit was dismissed on 14.02.1966, it would not lie with the appellant to state that a decree of possession of specific khasra numbers could not have been passed in favour of the respondent.

If of course in the decree dated 14.02.1966, Ex. P-3, or in that dated 25.10.1967, anything had been observed to that effect, the matter may again have been different. However, a perusal of the relief clause in the decree of 1966 specifically shows that respondent-Amar Singh had been refused even a decree of joint possession in the khewat qua the khasra numbers that the appellant-plaintiff had purchased vide the sale deed in his favour of the year 1951, i.e. the suit land in that *lis*. Hence, if the respondent was not

entitled to a decree of joint possession along with the appellant-plaintiff in the specific khasra numbers of the joint khewat purchased by the appellant in 1951, then on the same principle the appellant cannot claim that, at best, respondent Amar Singh is now entitled to only a decree of joint possession of the specific khasra numbers decreed in his favour as an alternate to the land sold to him by Mangal, vide sale deed dated 01.03.1952. It needs to be again stated here that no other co-sharer is seen to have raised any challenge to the decree of possession of specific khasra numbers of the joint khewat in favour of Amar Singh, vide the judgment and decree dated 21.03.1975.

Hence, the appellant cannot ask for something which he himself opposed in the suit leading to the decree dated 14.02.1966.

37. Undoubtedly, there can be no denial that on first principles itself, and as is well settled, each co-sharer of a land holding is deemed to be in possession of each and every square inch of such holding, till it is partitioned and the shares are divided by metes and bounds in favour of each such co-sharer. However, that principle has to apply equally to all shareholders and cannot apply piece-meal in favour of some and against some. Thus, if the plaintiff could be held to be in possession of, and continue to remain in possession of, the land which was purchased by him by specific khasra numbers vide the sale deed dated 25.07.1951, then to repeat yet again, there would be no reason to deny the respondent also the same benefit qua alternate land of Mangal, by specific khasra numbers, to compensate him for the land sold to him by Mangal, vide the sale deed dated 01.03.1952, which was in any case a liberty given to him by the appellate Court in the first *lis*, vide the decree of that Court dated 25.10.1967.

38. Having held as above, the second and third questions of law

framed in this appeal, are answered to the effect, respectively, that neither have the courts below committed any patent legal error in misreading or misconstruing the evidence, nor has a legal error been committed in decreeing the suit of the respondent, vide the judgment dated 21.03.1975, Ex. P-4, in his favour, instead of only decreeing the suit to the extent of joint possession.

39. Coming then to the first question of law framed, as to whether the courts below have committed a patent illegality in not considering that the issue of limitation had already been decided in the suit decreed on 14.02.1966, Ex. P-3, and therefore, the said question could not have been reopened in the subsequent suit decreed in favour of the respondent on 21.03.1975, Ex. P-4; or whether the suit filed by Amar Singh on 20.09.1974, leading to the decree dated 21.03.1975, was *per se* barred by limitation.

40. Undoubtedly, as already noticed, the learned Sub-Judge seized of Civil Suit No.271 of 05.11.1964, held that suit to be beyond limitation, on the ground that the present appellant, Raju, having taken actual possession on 21.10.1952, of the land that he had purchased from Hari Ram on 25.07.1951, the suit was instituted beyond 12 years of that date. In the decree dated 14.02.1966, it was also observed that even if it were to be held, (as contended by Amar Singh in that suit), that Raju was in unauthorised occupation of the land that was subject matter of that suit, then in any case Raju would have become owner thereof by way of adverse possession. This is other than the fact that on merits itself, it was held that Rajus' sale deed being prior in time to that of Amar Singh, the former had a prior right over the suit land over and above the latter. In fact, nothing has been shown to this Court that the present appellant actually ever took a plea of adverse possession in Civil Suit no.271 of 1964. Of course, even had that plea been taken that still does not alter the

fact that the decree dated 25.10.1967, giving liberty to Amar Singh to file a suit for possession of alternate land, was never challenged.

41. In the suit filed on 20.09.1974 by Amar Singh, arraigning Mangal as the sole defendant therein, the contention of Amar Singh was that as a matter of fact Mangal had earlier delivered possession of the suit land to him, i.e. the same suit land as is the subject matter of the present *lis*, but had re-entered into possession two to three months prior to the suit being instituted. Mangal not having put in appearance in that suit, in response to the notice issued, an *ex parte* decree in favour of Amar Singh was passed. Hence, no plea of adverse possession was raised by Mangal.

It is to be seen that even in the present *lis*, the appellant-plaintiff herein, i.e. Raju, is not seen to have taken any plea that the decree dated 21.03.1975 be set aside on the ground that Mangal had become owner of the suit land by way of adverse possession. Of course, as the plaintiff in the present *lis*, the appellant could not have taken the plea that he himself had become owner by way of adverse possession, however, there is no plea even shown to be taken to the effect that had he (the appellant Raju) been impleaded as a defendant in Civil Suit No.346 dated 20.09.1974, he would have taken that plea, being in possession of the suit land for more than 12 years prior to the filing of the suit by Amar Singh.

That being so, and respondent-defendant Amar Singh having sought possession of the suit land on the basis of title claimed by him on the basis of the sale deed dated 01.03.1952, read with the decree of the learned appellate Court in the first *lis*, dated 25.10.1967, there would be no limitation to seeking such possession on the basis of his title, unless the defendant set up a case of adverse possession to the effect that he had been in such possession,

open and hostile to the knowledge of the plaintiff, for more than 12 years prior to the date of institution of the suit.

42. Though, in the present *lis*, in respect of issue no.3-B, the question of possession of Mangal over the suit land was contested by the present appellant, to the effect that it was not he (Mangal) who was in possession of the suit land but in fact it was the appellant-plaintiff Raju who was in such possession, however, that issue has also been decided by the courts below against the appellant, holding that as per the '*jamabandi*' for the year 1971-72, which was the relevant revenue record to see the position of possession at the time of filing of civil suit no. 346 on 20.09.1974, Mangal was shown to be in possession of the suit land through his tenant, Shiri Ram.

Mr. Yadav had of course submitted, in this appeal, that DW-2 had testified that Shiri Ram tenant had actually died 14 to 15 years earlier, i.e. sometime in the years 1965-66. However, other than that solitary statement of DW-2, no evidence is seen to be led or discussed in respect of the death of Shiri Ram, or to show that as on 20.09.1974 the appellant was in possession of the suit land that is subject matter of the current *lis*. Though a report of the Local Commissioner, dated 11.09.1976 (Ex. P-8), is to the effect that the appellant, Raju, was in possession of the suit land on that date, however, that date being about 02 years after the date that Civil Suit No. 346 was instituted by respondent-Amar Singh, possession on 11.09.1976 would not be relevant to decide issue 3-B.

Therefore, as regards the issue of limitation, in any case no plea of adverse possession of the suit land having been raised by the present appellant-plaintiff, even to the effect that had he been impleaded as a respondent in Civil Suit No. 34 dated 20.09.1974 that plea would have been

available to him, and with his possession over the land not shown on 20.09.1974, it cannot be said that the suit instituted on that date (20.09.1974), by respondent-Amar Singh, was barred by limitation.

43. As regards Mr. Yadavs' contention that the judgment in Civil Suit no. 371 of 05.11.1964 having held that suit itself to be time barred and that judgment having become final, the plea cannot be accepted, in view of the fact that the said judgment and decree was challenged by respondent-Amar Singh leading to the decree dated 25.10.1967, by which even though the appeal itself was dismissed, Amar Singh was given liberty to seek possession of alternative land of Mangal. Hence, firstly, there actually being no limitation of time period in which a suit for possession based on the title of the plaintiff can be filed, unless a plea of adverse possession is taken by the defendant, however, even purely factually in relation to the decree dated 14.02.1966, that finding stood overruled in the appeal filed against the decree itself, even without specifically holding that such issue had been incorrectly decided, but by virtue of the liberty given to the respondent to file a separate suit seeking possession of alternate land from Mangal.

44. Consequently, as regards the first question of law to be determined by this Court in this appeal, it is held that the suit instituted by respondent Amar Singh on 20.09.1974, was not beyond limitation.

45. It needs mention that the issue of whether the appellant-plaintiff was in actual possession of the suit land on 20.09.1974, would also be relatable to an issue as to whether he was a necessary party to have been impleaded in Civil Suit No. 346 instituted on that date (if the appellant was in possession of the suit land of that date). The issue of possession having been held in favour of the respondent-defendant (Amar Singh), holding that it was

Mangal through his tenant Shiri Ram who was in possession of most of the suit land, with his personal possession being over 04 kanals, with no part of the land possessed on 20.09.1974 by the appellant-plaintiff, obviously, the appellant-plaintiff cannot be held to be a necessary party in Civil Suit No. 346, decided on 21.03.1975, he neither being in possession, nor being owner of the suit land in any case on that date.

46. Consequently, having held as above, this appeal has to fail and is therefore dismissed, but with no order as to costs.

Before parting with the case, this Court needs to express its sincere gratitude to Mr. Jaivir Yadav, learned counsel for the appellant, in culling out and marshalling the facts from the old record, it being an appeal of the year 1986.

March 06, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes
2. Whether reportable?	Yes