

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

RSA-288-1987

Date of decision : 27.04.2017

Ram Sarup and another (since deceased), represented through their LR's

... Appellants

Versus

Ran Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Jaivir Yadav, Advocate
for the appellants.

None for the respondents.

AMOL RATTAN SINGH, J.

1. This is the second appeal of the two defendants after the suit instituted against them by the present respondents was decreed in their favour by the learned Sub Judge 2nd Class, Kaithal and the first appeal filed by the present appellants was dismissed by the learned Additional District Judge, Kurukshetra.

The facts of the case, as taken from the judgments of the learned Courts below, are that the respondents-plaintiffs (some of whom have died) had instituted the suit seeking possession of the suit property, which is stated to be a "gair mumkin" house contained in Rect.no.233, khewat no.14 min (as per the 'jamabandi', i.e. Record of Rights, for the year 1970-71), in village Mundri, Tehsil Kaithal.

It was contended that one Rama Nand son of Tarlok Singh had been 'Lambardar' of the village and was immediately related to some of the plaintiffs being their brother, and was a close kinsman to the rest of the

plaintiffs (8 in number). The said Rama Nand had, during his tenure as Lambardar, allowed the Chowkidar of the village, Ami Lal son of Badana, to reside in the house, i.e. the suit property, taking him to be his 'employee' and that for that purpose Rama Nand had taken the consent of the plaintiffs. After the death of Rama Nand, a co-sharer in the property, Hari Singh, became the Lambardar and he too allowed Ami Lal to reside in said house, after taking the consent of the plaintiffs.

It was further alleged that Ami Lal had died 6 to 7 years before the institution the suit and after his death the plaintiffs came in possession of the house but the defendants, claiming to be the transferees of the suit property from one Manphool son of Moman, had taken unauthorised possession of the house about 2 months earlier, with the said Manphool having no right, title or interest in the suit property, as he could pass on to the defendants, Ram Sarup and Amar Singh, who are father and son, respectively (now represented by their LRs). Hence, it was contended that the plaintiffs all being co-owners of the suit property, are entitled to possession of the same and consequently the suit was instituted on 24.03.1978.

2. Upon notice being issued to them, the defendants appeared and filed a written statement denying the title of the plaintiffs and contending that the property was in possession of Ami Lal prior to the consolidation of holdings in the village and that Ami Lal bequeathed the said property to the aforesaid Manphool who was his "Dohat Jamai" (grand daughters' husband). The said bequeathment was stated to have been made vide a will dated 21.09.1970, in which other property of Ami Lal was also bequeathed to Manphool.

A mutation qua the suit property is also stated to have been entered in favour of Manphool on the basis of the aforesaid will, after the death of Ami Lal and thereafter, Manphool had sold the property to the appellant-defendant no.1, Ram Saroop vide a sale deed dated 02.12.1971 and had also handed over possession to him.

As per the defendants, the plaintiffs had never been in possession of the property within 12 years of the filing of the suit and as such, the suit was time barred and further, Hari Singh son of Wazir Singh had filed a suit seeking permanent injunction against defendant no.2, Amar Singh, father of appellant-defendant no.1, qua the very same property, which was dismissed as withdrawn on 05.06.1978, i.e. about 2 ½ months after the filing of the present suit and as such the current suit was barred on that ground too.

Yet further, it was contended that Hari Singh not having been impleaded as a party to the suit, there was also a non-joinder of a necessary party.

It was next contended that Ami Lal was never put in possession of the house by either Rama Nand or Hari Singh with the consent of the plaintiffs and as a matter of fact, Ami Lal was never an employee of Rama Nand but had continued to be in possession of the property for more than 12 years.

3. On the aforesaid pleadings, the following issues were framed by the learned trial Court:-

“1. Whether the plaintiffs are the co-owners of the suit property?OPP

2. Whether the suit property is a part of Khasra no.233?OPP

3. *Whether the plaintiff and Rama Nand are related to each other as alleged in para 4 of the plaint?OPP*

4. *Whether Ami Lal was a licensee under Rama Nand deceased and then under Hari Singh as alleged in para 5 of the plaint?OPP*

5. *Whether the plaintiffs have been in possession of the suit property since the death of Ami Lal?OPP*

6. *Whether Manphool was the successor in interest of Ami Lal and has sold away the property to defendant no.1?OPD*

7. *Whether Hari Singh is a necessary party to the suit?OPD*

8. *Whether the suit is barred under the law as alleged in para 2 of the written statement?OPD*

9. *Whether Ami Lal executed a valid will in favour of Manphool?OPD*

10. *Whether the suit is time barred as the plaintiffs have not been in possession of the suit property within 12 years of the filing of the suit?OPD*

11. *Relief.”*

4. By way of evidence, the plaintiffs relied upon jamabandis for the years 1970-71, 1960-61, 1940-41 and 1975-76. They also tendered in evidence two pedigree tables.

In support of these documents and their contentions in the plaint, they examined two witnesses, of whom the first was plaintiff no.9, Dhian Singh and the other one Bhagu, whose house was stated to be adjacent to the suit property.

The defendants, other than tendering various documents in evidence, including a jamabandi for the year 1965-66, examined as many as 9 witnesses, with defendant no.1, Ram Saroop, testifying as DW7.

5. After having appraised the evidence and having considered the pleadings and arguments addressed before him, the learned Sub Judge recorded findings as given hereinafter.

6. On the Ist issue of whether the plaintiffs are the co-owners of the suit property, it was held on the basis of revenue record produced right from the 1940-41, that the plaintiffs were duly recorded as co-sharers in the column of ownership in such record and consequently that issue was decided in their favour.

Issue no.2, of whether the suit property was a part of khasra no.233, was found to be factually so and was accordingly also decided in favour of the plaintiffs.

The relationship of the plaintiffs with Rama Nand, the Lambardar who is stated to have initially allowed Ami Lal to have occupied the suit property was also found to be established in terms of the pedigree tables Exs.P2 and P3, and the testimony of the witnesses. Accordingly, the third issue was also decided in favour of the plaintiffs.

7. On the important issue of whether Ami Lal was a licensee under Rama Nand and then Hari Singh as contended in the plaint, the learned Sub Judge found that Ami Lal had indeed taken the house in dispute from Rama Nand for the sole purpose of residing therein, as he was the village Chowkidar, with Rama Nand being the Lambardar, Ami Lal having come to work and to settle in village Mundri from another village.

From the testimony of PW1 (plaintiff no.9) Dhian Singh, it was also found that though in his cross-examination, Dhian Singh had stated that Ami Lal had come to the village after 1947, Exs. DW and P4 were jamabandies for the year 1940-41 wherein, as per the trial Court, Ami Lal

was shown to be in possession of the suit property. Hence it was held that he being in possession of the suit property prior to 1947, the contention of the defendants that possession of the house was given to Ami Lal by Rama Nand after 1947, could not be believed.

Hence as regards the 4th issue, it was held that it was not proved that Ami Lal was a licensee first under Rama Nand and thereafter under Hari Singh and consequently, that issue was decided against the plaintiffs and in favour of the defendants.

8. As regards issue no.5, as to whether the plaintiffs had been in possession of the suit property since the death of Ami Lal, it was found that PW2 had testified to the effect that his house is adjacent to the property in dispute, of which Rama Nand was in possession, who had delivered such possession to Ami Lal and after the death of Ami Lal, the area has been flooded with water and therefore the suit property remained vacant for 4 to 5 years, after which Ram Saroop (appellant-defendant no.1) took over possession. As per this witness, Ami Lals' "Dohat Jamai" had never been in possession of the suit property, though he used to reside with Ami Lal, who had also executed a power of attorney in his favour.

However, the learned Sub Judge found that other than this testimony of PW2, there was no evidence led to show that the plaintiffs had ever come into possession of the suit property after Ami Lal was given such possession by Rama Nand.

It was further found that Ami Lals' possession continued to be reflected in the jamabandi for the year 1970-71 (Ex.P1) and thereafter, as per the sale deed Ex.DD, dated 02.12.1971, the aforesaid Manphool had sold the property to the appellant-defendant Ram Saroop for a consideration

of ₹2000/-, with a recital in the document to the effect that Manphool was in possession of the property.

The khasra girdawari for the year 1975-76 also showed that Manphool was in possession of the property, with the jamabandi for the year 1965-66 showing Ami Lal in possession of it.

On the basis of the aforesaid documentary evidence and the testimonies of the defence witnesses it was held that after the death of Ami Lal, Manphool remained in possession of the property who thereafter sold it to the appellant-defendant no.1 and as such, the plaintiffs had never actually come to its possession.

This conclusion was also drawn by the learned Sub Judge, from the contrary statement made by PWs1 and 2, in as much as, though PW2 had deposed that the suit property remained flooded after the death of Ami Lal and therefore vacant, plaintiff no.9 (PW1) testified that he took possession of the property and had put fodder in it.

Consequently, issue no.5 was also decided against the respondents-plaintiffs, as was issue no.4.

9. The issues relating to the status of Manphool, as successor in interest of Ami Lal, on the basis of a will executed by Ami Lal, i.e. issues no.6 & 9, were taken up together and as regards issue no.9, on the validity of the will executed by Ami Lal in favour of Manphool, that was decided in favour of the appellants-defendants to the effect that the will (Ex.D.O.) was duly proved by one of its attesting witnesses, DW8, Phullu, as also by its scribe, Bhagwan Dass, DW9.

However, having held as above, the learned Sub Judge recorded a finding that though vide the aforesaid will, Ami Lal had

bequeathed all his moveable and immovable properties in favour of Manphool, he could not be held to have become the owner of the suit property by way of adverse possession, as it was nowhere stated in the will that he had bequeathed only possessory rights or that he had become the owner of the property by way of adverse possession.

Consequently, despite having held issue no.4 against the respondents-plaintiffs, to the effect that Ami Lal was not a licensee under Rama Nand and Hari Singh (or, by extension, of the plaintiffs), yet while deciding issue no.6, the learned Sub Judge held that Manphool could not be held to be the successor in interest of Ami Lal qua the suit property, Ami Lals' own title to it never having perfected into ownership by way of adverse possession and therefore, despite the will in Manphools' favour, Manphool also had no right or title to the suit property to further sell it to appellant-defendant no.1.

10. The 8th issue framed being whether the suit itself was barred on the principle of res judicata, it was found by the learned Civil Judge that Ex.DE was the copy of the plaint filed in civil suit no.488 of 1978, instituted by Hari Singh, against appellant-defendant no.2 Amar Singh (father of appellant-defendant no.1 Ram Saroop), in reply to which Amar Singh had duly filed a written statement and eventually that suit was dismissed as withdrawn.

However, in the current lis, other than Amar Singh, the parties were entirely different and in fact appellant-defendant no.1 Ram Saroop was not claiming title to the suit property under his father but wholly independently on the basis of the sale deed in his favour by Manphool.

Consequently that issue was also decided against the present appellants (defendants).

11. On the issue of limitation (issue no.10), the Sub Judge recorded a finding that after the death of Rama Nand, who had put Ami Lal in possession of the house, Hari Singh became the Lambardar of the village who allowed Ami Lal to continue to be in possession as contended by the plaintiffs, but the defendants had contended that Ami Lal had in fact been in possession as owner of the suit property. As regards the possession, it also having been held while deciding issue no.5 that the plaintiffs were not in possession of the suit property, it was held that it would not be Article 64 of the Schedule to Limitation Act 1963 that would be applicable but Article 65 thereof. This was held to be so because the plaintiffs never having been in possession of the suit property, their claim could only be held to be on the basis of title (which stood established from the revenue record, with issue no.1 having been accordingly decided).

It was further held that the possession of the defendants (appellants herein) could only have been held to be adverse from the date that they took possession of the suit property by virtue of the sale deed dated 02.12.1971 and as such, a period of 12 years not having elapsed from that date till the date of institution of the suit in 1978, the suit could not be held to be time barred.

The contention of counsel for the appellants-defendants to the effect that since Ami Lal was shown to be in possession of the suit property since 1940-41, even as per the revenue record, the defendants would be his successors in interest, with Ami Lals' ownership having been perfected by way of adverse possession, was rejected by that Court.

This was held to be so by the learned Sub Judge on the ground that none of the jamabandis showed Ami Lal to be in adverse possession and even though he was not paying any rent, he was still only a tenant. It was, further, again reiterated that Ami Lal, even in his will, had not stated that he had become the owner of the suit property by way of adverse possession and had remained silent over it. Thus with “open, hostile, notorious” possession not proved even of Ami Lal, it was held that neither had he become the owner of the suit property, nor had he passed on such ownership to Manphool and consequently, with Manphool also having no right to sell it, adverse possession of the appellants-defendants could only be taken to be from the time that they came into possession of the suit property, after purchasing it in 1971.

Hence, that being only 6 to 7 years prior to the filing of the suit, the institution thereof could not be held to be beyond limitation.

12. On the aforesaid reasoning, the suit of the plaintiffs, seeking possession of the property which they were proved to be co-owners of, was decreed in their favour vide the impugned judgment dated 30.03.1983.

13. In first appeal, the primary argument raised being that Ami Lal had become owner of the property by way of adverse possession, he having been shown to be in possession of it since 1940-41 in terms of the jamabandi Ex.DN, that issue was considered first of all by the lower appellate Court.

The counter argument of learned counsel for the respondents-plaintiffs before that Court was that, firstly, the plea of adverse possession had in fact been withdrawn by the appellants-defendants vide their application dated 23.11.1982 and therefore no specific issue on adverse

possession was framed by the trial Court.

Secondly, it is seen to be pointed out before the first appellate Court by the counsel for the respondents-plaintiffs, that in fact Ex.DN was a jamabandi for the year 1960-61 and not for the year 1940-41 and the year reflected on the jamabandi was being wrongly read by the trial Court. In view of the above, the lower appellate Court specifically summoned the original jamabandi for the year 1940-41 through the Moharrir Patwari (as recorded in the judgment of that Court). A finding was specifically recorded by that Court thereafter that in the said jamabandi, i.e. for the year 1940-41, “the ownership of Ami Lal is not recorded with respect to the land in question” and therefore, a mistake had been made by the appellants.

It needs to be noticed here that the context of what is stated to that effect in paragraph 8 of the judgment of the lower appellate Court, would show that, that Court actually wrongly recorded the word “ownership”, instead of the word “possession”, in the context of Ami Lal qua the suit land and actually what is obviously meant was that Ami Lal was not recorded to be in possession of the suit property in the year 1940-41. In fact immediately after the aforesaid line it has been held that even “if the appellant's predecessor-in-interest Ami Lal came in possession of the property in 1960-61 as claimed by the respondents, then the question of any adverse possession in favour of the appellants did not arise nor could have they become the owners of the property by way of adverse possession nor there could be a question of the execution of a will”.

Hence it is very obvious that the Court intended to write that Ami Lal was not shown in possession as per the jamabandi for the year 1940-41. It has been seen by this Court, that though in Ex.DN, in the

column of cultivation (column no.6), Ami Lal is shown to be in possession of the suit property, with the said exhibit shown to be the jamabandi for the year 1940-41, Ex.P4 is also shown to be a jamabandi for the year 1940-41, in which the owners are shown to be in possession, in the cultivation column (column no.5 in EX.P4). The word used in the said column of cultivation is written in Urdu (Persian), as “Maqbooza Malkan”.

14. Hence, after verifying from the original jamabandi, it was held by the first appellate Court that the first time that Ami Lal could be shown to be in actual possession of the suit property, was as per the jamabandi for the year 1960-61 and even as per the testimony of appellant-defendant no.1, while testifying as DW7, Ami Lal had passed away in the year 1970. Hence at the time of his death he could not be held to be in possession of the suit property for a continuous period of 12 years and therefore he could not have executed a will on the basis of a perfected title of ownership in favour of Manphool.

However, the learned first appellate Court agreed with the contention on behalf of the appellants-defendants to the effect that Ami Lal could not also be held to be a tenant as was held by the trial Court. In fact, it was further held by the first appellate Court, that issue no.4 had been erroneously decided by the learned Sub Judge and Ami Lal should actually have been held to be a licensee of the suit property under Rama Nand and then Hari Singh.

This was held to be so in view of the fact that actual control of the property continued with the real owners, with Ami Lal shown to be in possession in the jamabandi for the year 1960-61, as also for the year 1975-76, though in the latter years he was admittedly not alive.

After coming to the aforesaid findings of fact, it was held that there was much difference between a licensee and a tenant and Ami Lal's possession could not have matured into ownership on the basis of adverse possession and further, the appellants-defendants had in any case not pleaded adverse possession.

Thus, as regards the findings on issues no.1, 2, 3 & 5, those of the trial Court were upheld by the Ist appellate Court, but the finding on issue no.4 was reversed, effectively holding that Ami Lal was a licensee on the suit property.

This was further held to be so by the lower appellate Court, while considering issue no.6, i.e. whether Manphool had become a successor in interest of Ami Lal and on that basis, had sold the property to the appellants-defendants.

It was recorded by that Court that Ami Lal was a mere Chowkidar of the village, with the Lambardar allowing him to stay in his premises for the convenience of Ami Lal and as such, he could not be declared to have become the owner by way of adverse possession and consequently could not pass on any title in the property to Manphool by way of his will.

An argument having been raised that the appellants having taken a loan from the government to repair the house, with DW1 Kesar Chand having supported that contention, that was also found to be of no help to the appellants, in view of the fact that with their vendor, Manphool, himself having no title to the property, any sale made by him to the appellants would be meaningless.

15. On the aforesaid findings, the judgment and decree of the

learned Sub Judge were upheld, except as regards issue no.4, which was also decided by the lower appellate Court in favour of the appellants.

Consequently, the first appeal filed by the present appellants-defendants, was dismissed.

16. It needs to be noticed at this stage that when this second appeal was instituted before this Court, it had been admitted on February 03, 1987, with an interim order to the effect that “dispossession is stayed till further orders”.

A perusal of the interim orders passed after that shows that it first came up for hearing thereafter only on 29.07.2011, on which date “actual date notices” were ordered to be issued to those respondents as had not appeared, for 26.09.2011, with respondents no.5 to 9 duly represented by their counsel before this Court on 29.07.2011, but obviously for the reason that learned counsel who had filed the appeal having ceased to be an Advocate a long time ago (having at that time been appointed as an Additional District and Sessions Judge), none had appeared even for the appellants on 29.07.2011 and 26.09.2011.

Thereafter, learned counsel for the appellants (Mr.Jaivir Yadav), has duly appeared for them but with only respondents no.5 to 9 represented before this Court, with their counsel too not having appeared after 30.06.2014. As regards respondents no.1 to 5, a perusal of the order sheet shows that though the legal representatives of the appellants were duly impleaded vide order dated 24.07.2013, respondents no.1 to 4 have never been represented despite service being complete on them also, as per the reports of the Registry of this Court since 27.06.2014.

17. Thus, Mr. Yadav, learned counsel for the appellants now

submitted that the following questions of law arise for consideration of this Court, in this second appeal:-

“(i) Whether the learned lower appellate Court has wrongly decided the issue no.4 against the appellants and in favour of the respondent/defendant by reversing the well reasoned findings recorded by learned trial Court?

(ii) Whether the learned courts below have erred in deciding issue no.10 regarding limitation by wrongly interpreting the provisions of Article 65 of Limitation Act?

(iii) Whether the courts below have wrongly decided the factum of possession by misreading and not properly considering the document Ex.DN as well as the execution of the Will Ex.DO from which the appellants derive the title from Manphool. The possession of Ami Lal was proved on record since 1940-41. Findings to the contrary are the result of mis-reading of the oral as well as documentary evidence and as such are perverse?”

18. Mr. Yadav, first submitted that there is a factual error in the reading of the jamabandi for the year 1940-41, as, even from the record of the Courts below, it can be seen that Ex.DN is a copy of the jamabandi for that year, on the basis of which, though it is written in Urdu, the learned Sub Judge had recorded that Ami Lal was in possession of the suit property. Hence, learned counsel contended that the learned lower appellate Court has wholly erroneously reversed that finding to hold that Ami Lal came in possession for the first time in the year 196-61.

Mr.Yadav further contended that once Ami Lal was shown to be in possession since 1940-41, then the contention of the plaintiffs to the effect that he was put in possession of the suit property only by Rama Nand and thereafter continued in such possession by the permission of Rama

Nands' successor and co-sharer Hari Singh, was a wholly false averment made by the plaintiffs and consequently, the learned Sub Judge, though also having decreed the suit of the plaintiffs, had recorded a correct finding on issue no.4 to the effect that Ami Lal was not a licensee under either Rama Nand or Hari Singh.

Learned counsel therefore contended that the questions of law at serials no.(i) and (iii) (as have been reproduced hereinabove), would need to be answered in favour of the appellants-defendants.

He further pointed to the fact that in the said jamabandi, Ami Lal was found to have been a “ghair marusi” who was not paying any rent (bila lagan) and therefore would be deemed to be in adverse possession.

Mr.Yadav next submitted that consequently, even the second question of law would have to be answered in favour of the appellants in view of the fact that Ami Lal having continued to be in possession since at least 1940-41 till the time of his death in 1970, the suit instituted in the year 1978 was well beyond the limitation contained in Article 65 of the Schedule to the Limitation Act. Therefore, in fact, Ami Lal had perfected his title of ownership in the suit property.

19. Having considered the aforesaid arguments of learned counsel for the appellants, as also the judgment of the Courts below, I find myself unable to agree with the arguments raised by Mr. Yadav, though he has very empathetically argued on the same.

20. Coming first to the 3rd question of law framed, as to whether the factum of possession of the late Ami Lal, was wrongly interpreted by the learned Sub-Judge or by the learned first appellate court, with the former Court finding that he had been in possession of the suit property since the

year 1940-41, as per the jamabandi Ex. DN, but the latter Court having come to a specific finding that the said document was actually not proved to be a true jamabandi for the year 1940-41.

As already discussed, the finding of the learned appellate court to that effect was on the basis of the fact that the original jamabandi had been summoned by it from the Collector through the '*Moharriar Patwari*', whose name is given in the judgment as Harbans Singh (though not a witness). Upon a perusal of the original jamabandi for the year 1940-41, it was found by the learned lower appellate Court that it did not reflect Ami Lal to be in possession of the suit property.

A copy of the said jamabandi is seen to be certified by the Patwari on 05.03.1982, (though without any stamp), and is exhibited as Ex.P4. In fact Ex.P5, also of the same date, is seen to be a jamabandi of the year 1960-61, reflecting Ami Lal to be in possession of the suit property.

It also needs to be noticed that the jamabandi for the year 1940-41, as was exhibited by the defendants as Ex. DN, is also stated to be certified by the Patwari (again without any stamp), on 28.03.1978. Thus, in Ex. DN, Ami Lal is shown to be in possession, whereas in Ex. P-4, a jamabandi again certified by Patwari to be of the year 1940-41, the owners of the land are shown to be in possession (*Makbuza Malkan*). In such a situation, this Court would definitely follow the finding of fact recorded by the lower appellate Court on the basis of the original record stated, in the judgment itself, to have been summoned by that Court, wherein it was shown to be reflected that it was the owners who were in possession, in the jamabandi for the year 1940-41.

21. Having said that, it also needs to be noticed that in the jamabandi for the year 1960-61 (Ex. P-5 led in evidence by the respondents-plaintiffs), in which Ami Lal is undoubtedly shown to be in possession in column no. 09 thereof, he is shown to be in such possession by way of previous possession (*Sabqa Qabza*).

Though the aforesaid jamabandis are written in Persian (Urdu), the same have been got read also by the translator in the Registry, which reading bears out the above.

Obviously, therefore, Ami Lal came into possession prior to 1960 but in which year it is not clear, as the revenue record for the years between 1940-41 to 1960-61 was not led in evidence by either party. Hence, whether he came into possession immediately before 1960, or was also shown to be in possession in the previous jamabandis for the years 1945-46, 1950-51 and 1955-56, is not known.

22. The question therefore is, as to whether Ami Lal can be stated to have perfected his title by way of adverse possession so as to be able to pass on such title by a Will, to his grand-daughters' husband, i.e. to Manphool, thereby making the latter the owner of the property who would therefore be within his right to sell it to the respondents-plaintiffs.

In fact, this question would be intricately linked to the status of Ami Chand in the property, i.e. whether he was a tenant as held by the learned Sub-Judge, or a licensee as held by the first Appellate Court, or being neither, he was a person actually in adverse or any other kind of possession of the suit property.

23. Having agreed with the lower appellate court, that the jamabandi exhibited as Ex.DN does not reflect the correct position qua

possession, it being proved before that court by production of the original jamabandi of 1940-41, then at best Ami Lal can be held to be in possession of the suit property for some time before 1960-61, as in that *jamabandi* he is shown to be in possession by way of *Sabqa Qubza* (former possession). Even presuming that such possession was from 1958 or before, it needs again to be repeated here that perfection of a title of ownership by way of adverse possession needs to be specifically proved by showing such possession to be open and hostile to the true owner of the property, from a date which must be specifically proved to be more than 12 years before the institution of the suit by the plaintiff who seeks to take possession on the basis of his title to the property.

Thus, even if for the sake of arguments, it is to be taken that the plea of adverse possession was not specifically given up, though it obvious actually was in view of the specific deletion of that plea in the last amended written statement, as would be seen further, even then, it not having been specifically proved that the possession of Ami Lal was existent more than 12 years prior to his death in 1970 and as to at what point, if any, such possession became hostile to the true owners, it cannot be held that he had perfected his title by way of adverse possession so as to pass it on to his grand-daughters' husband, by way of a will. This is further more so in view of the fact that he did not specifically refer to the suit property as being in his ownership, even in the will, as found by the Courts below.

24. As regards the will Ex.DO, both the Courts below have actually held in favour of the appellants-defendants, to the effect that the will was validly executed by Ami Lal in favour of Manphool, but even on the basis of such will the suit property would not stand transferred to Manphool, Ami

Lal's title itself not having perfected into ownership.

A reading of the will from the record, i.e. Ex.DO, also bears out what the learned Courts below have held; that there is no specific mention of any property in the entire will dated 21.09.1970, with the recital being that all property of the testator, situated in village Mundri, was being bequeathed to Manphool. Thus, the rationale behind the reasoning being that the house specifically in question has not been referred to at all even in the will, it cannot be accepted to be a property of the testator, even in his own mind.

25. Yet further, in any case, the issue of Ami Lal being in possession of the suit property since 1940-41 would only be of importance if the appellants-defendants had taken a plea of adverse possession in their pleadings.

26. It would therefore be necessary to first examine whether what was held by the learned first appellate Court, to the effect that the plea of adverse possession was abandoned by the appellants-defendants, is a correct finding or not, which would be necessary to be determined even in the context of all three questions of law framed hereinabove.

27. It has specifically been found by the learned lower appellate Court that vide an application dated 23.11.1982, the said plea had been specifically withdrawn by the appellants-defendants and therefore, no issue in that regard had been framed.

A perusal of the record of the Court of the learned Sub Judge, shows that the said application dated 23.11.1982 is very much on record, seeking an amendment of the written statement, in which paragraph 2 reads as follows:-

“That the defendants in their written statement have inadvertently not taken the plea that the suit of the plaintiffs as framed is barred by limitation and have rather wrongly taken the plea that Amin Lal s/o Badana s/o Tunhia r/o village Mundhri had become the owner by adverse possession.”

Thereafter, the application goes on to state that para 2 be allowed to be amended to read as follows:-

“2. That para 2 of the plaint is wrong and denied. The plaintiffs are not the owners of the suit property nor they have been in possession of the same at any time within 12 years of the filing of the suit. In fact the suit property was in possession of Amin Lal s/o Badana s/o Tunhia, Ex.Chowkidar of village Munari since before the consolidation of holdings held in village Mundhri. The said Amin Lal bequeathed the said property along with his other properties to Manphul s/o Moman alias Sadhu, who was the 'Dohat Janwai' of the said Amin Lal, vide a will dated 21.9.70 and mutation of the same was duly attested in favour of said Manphul after the death of Amin Lal. The said Manphul then sold the property in suit to defendant no.1 vide sale deed dated 2.12.71 and handed over the possession also to him. The possession of the defdt. no.1 is hence lawful and defdt. no.2 is living with defendant no.1 being his father.”

The application further goes on to state that Hari Singh son of Wazir Singh, who is shown in the pedigree table in paragraph 4 of the plaint, not having been impleaded in the suit, it (the suit) cannot be decided finally, especially as Hari Singh had earlier instituted a suit himself, which was withdrawn on 05.06.1978.

Lastly, a preliminary objection was sought to be added in the

“Pre-objection no.1. That the suit is barred by time as the plaintiffs have never been in possession of the suit property within 12 years of the filing of the suit.”

28. The aforesaid application was opposed by the respondents-plaintiffs on the ground that the written statement could not be allowed to be amended 4 years after the suit had been filed.

However, it is further seen from the record that vide a detailed order dated 26.11.1982, the amendment had been allowed subject to payment of costs of Rs.100/-, by the learned Sub Judge.

In the said order, that Court first noticed that the plea of the defendants was that they inadvertently had not taken the plea of limitation and “a wrong plea that Ami Lal, son of, Badana, son of, Tunhia has become the owner of the land in dispute by way of adverse possession”, had been taken, and therefore, the written statement was sought to be amended. Thereafter, noticing that one of the grounds taken by the counsel for the plaintiffs to oppose the amendment was that a new case was sought to be set up, that argument was rejected by that Court, holding that, firstly, the defendant was at liberty to take even inconsistent pleas and in any case to set up an alternative plea.

Thereafter, the order of the Sub-Judge notices the argument of plaintiffs' counsel that the earlier plea was that Ami Lal had become owner by way of adverse possession, which amounted to an admission out of which the defendants cannot be allowed to get out by way of a new written statement.

The Court went on to hold that the case of the plaintiffs was that they are owners of the suit land and that Rama Nand had put Ami Lal

a licensee. Hence, in view of the basic stand of the plaintiffs, it was held by that Court that the plea taken by the defendants in the original written statement could not be considered to be any admission by them (meaning thereby that since they had taken a specific plea of adverse possession, that would not amount to an admission that Ami Lal had been put into possession by Rama Nand).

Simply holding as above, without elaborating specifically as to whether the plea of adverse possession had been abandoned or not, the amendment was allowed.

29. It also needs to be noticed here that the written statement was earlier also allowed to be amended vide an order dated 26.04.1982, despite the fact that another application for amendment had been dismissed on 10.04.1982. The amendment allowed on 26.04.1982 was to the effect that a plea, that the aforesaid Manphool had inherited the suit property by virtue of a will of Ami Lal, was permitted to be taken.

That amendment having been allowed, it is seen that the amended written statement dated 17.04.1982 specifically takes a plea in paragraph 2 thereof, that Ami Lal had become an owner of the property by way of “adverse possession from the times immemorial”. Thereafter, it had been stated that the suit property had been purchased by the defendants from its owner, Manphool, successor-in-interest of Ami Lal.

To the contrary, paragraph 2 of the written statement dated 23.11.1982 (available at page 177 of the record of learned Sub-Judge), abrogates the plea of adverse possession and states that the plaintiffs are not the owners of the suit property nor have they been in possession thereof at any time within 12 years of the filing of the suit. The paragraph further goes

on to state that the property was in possession of Ami Lal since before consolidation of holdings and that he had bequeathed it to Manphool, from whom it was purchased by the defendants, vide a sale deed dated 02.12.1971.

30. Thus, very obviously, the 'conscious plea' of adverse possession taken in the written statement dated 17.04.1982 was abrogated in the written statement dated 23.11.1982.

On the other hand, a plea of limitation of 12 years was taken, which otherwise in a suit for possession by an owner on the basis of his title to the suit property, would only be a plea taken in terms of Article 65 of the Schedule to the Limitation Act, to the effect that the suit was barred by limitation, the defendants having been in adverse possession of the suit property for more than 12 years. To that extent of course, it must be stated that the plea taken would not seem to be an abandonment of the plea of adverse possession. However, with adverse possession being a plea which must be taken specifically and thereafter, such possession, open and hostile to the true owner, specifically proved, the finding of the learned lower appellate Court to the effect that the plea had actually been abandoned, is to be accepted as a correct finding, with that plea specifically removed by the defendants themselves in the last amended written statement, such plea earlier having been specifically taken in the first amended written statement dated 17.04.1982.

31. Consequently, with the plea of adverse possession completely given up by the appellants-defendants, the issue of any limitation to seek possession of a property on the basis of a title, would not come in at all, even in terms of Article 65 of the Schedule to the Limitation Act, which

stipulates the time after which the period of limitation to file such a suit, seeking possession on the basis of a title, would run out, is 12 years after the possession of the defendants becomes adverse to the plaintiffs.

Hence, with their being no plea of adverse possession taken at all, there is no limitation to seek possession of any property on the basis of the title thereto of the plaintiffs, provided of course that the plaintiffs can prove such title.

32. In the present case, the ownership of the suit property by the plaintiffs and their co-sharers having been well proved before the Courts below, on the basis of revenue record and actually such ownership not doubted even by the appellants-defendants, except to state that Ami Lal, Manphool and they themselves had thereafter become the owners, essentially on an argument raised with regard to the ownership of Ami Lal, the issue on limitation, i.e. issue no.10 before the learned lower Court, cannot be held to have been decided erroneously.

Consequently, the question of law at (ii) as regards limitation in filing the suit, is also answered against the appellants-defendants.

33. It is also necessary to again reiterate that though the contention of the appellants-defendants is to the effect that they had come in possession of the suit property not on the basis of adverse possession but on the basis of title passed on to them vide a sale deed dated 02.12.1971 (Ex.DD), the courts below have not erred, in the opinion of this Court, in holding that no title could have been passed on even by way of sale by Manphool, when he himself could not have acquired such title on the basis of any will of Ami Lal, even though execution of the will itself was proved, because Ami Lal himself had not come into ownership of the suit property.

Therefore, the only method by which Ami Lal could have come into the ownership of the suit property being by way of adverse possession and that plea having been specifically given up, title to the suit property could not have passed either to Ami Lal or to Manphool, or eventually to the appellants-defendants.

Otherwise also, even if one ignores for the sake of argument, the fact that the plea of adverse possession was given up (which, of course, cannot be ignored), I see no error in the findings of the Courts below, that Ami Lal having come in possession thereof only in the year 1960-61 and that too under the licence given to him by one of the co-sharers, i.e. Rama Nand and thereafter another co-sharer Hari Singh, the question of adverse possession in any case would not arise.

34. Coming last to the first question of law framed, i.e. as to whether issue no.4 was erroneously decided by the lower appellate Court, it having been correctly decided by the learned Sub Judge, as regards whether Ami Lal was a licensee in the suit property or not, first under Rama Nand and then under Hari Singh.

As seen, Ami Lal is shown in the revenue record to be in possession from sometime before 1960-61 onwards, without payment of any rent. It was the specific averment of the respondents-plaintiffs in their plaint, that he was in such possession by virtue of having been given a place to live in at that point of time by Rama Nand and thereafter by Hari Singh. The said contention was duly supported by the testimony of the witnesses examined by the plaintiffs.

Again undoubtedly, Ami Lal is not shown in the column of ownership of the jamabandi.

Thus, even if it is presumed that the testimonies of the oral witnesses are to be discarded, they simply having testified in support of the plaintiffs, being their witnesses, very obviously Ami Lal was not a tenant in the suit property, with no tenancy having ever been reflected either in the revenue record or even proved in any manner by the appellants-defendants.

Undoubtedly, Ami Lal is shown to be in possession “ghair marusi” and by way of “sabqa qabza” in the revenue record.

Very often, though the term “ghair marusi” is simply accepted as a term synonymous with tenancy, however, the Glossary of Judicial and Revenue Terms by H.H.Wilson, describes it to be “not holding by hereditary descent; a tenant or farmer; not inherited; acquired”.

Thus, the term can be used either for a tenant, or in respect of any person in possession of a property otherwise than by hereditary 'descent'.

If of course, the description in the revenue record is to the effect that the person in possession of the suit property is a “ghair marusi mazara”, he can be taken to be a tenant.

No such citation has been found by this court in the revenue record exhibited before the courts below.

Hence, with no tenancy proved and the plea of adverse possession having been given up and in any case not specifically proved, Manphool too cannot be held to have held the property as an owner or a tenant.

To go a step further, even Manphools' own sole possession was only after Ami Lals' death in 1970 till 02.12.1971, after which the defendants were shown to have come into possession, with the suit of the

plaintiffs filed on 24.03.1978.

35. Consequently, the first question of law also has to be answered against the appellants-defendants, to the effect that the learned lower appellate Court did not err in reversing the findings of the learned Sub Judge on issue no. 4 either, at least to the extent that neither Ami Lal nor Manphool were tenants in the property. Thus, with Manphool in any case not being a licensee or a tenant but definitely not in adverse possession for anywhere near 12 years, and with Ami Lals' status as a licensee of Ram Nand and Hari Singh not specifically proved to have been converted into an occupant by adverse possession for a period of more than 12 years, the first question of law also has to be decided against the appellants.

36. In view of the discussion hereinabove, I find no reason to interfere with the judgments and decrees issued by the lower Courts and consequently this appeal is dismissed, but in the circumstances with no order as to costs.

Again, this Court needs to appreciate the assistance rendered by Mr. Jaivir Yadav, learned counsel for the appellant, in meticulously going through the record of the Courts below.

(AMOL RATTAN SINGH)
JUDGE

April 27, 2017.

Davinder Kumar

Whether speaking / reasoned

Yes/No

Whether reportable

Yes/No