

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**RSA No. 2432 of 2008 (O&M)
Decided on: 16.11.2017****Darbara Singh and Ors.****.....appellants****versus****Nihal Kaur Thr. LRs.****.....Respondent****CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT****Present:** Mr. Amit Jain, Advocate
for the appellantss.Mr. Kanwaljit Singh, Sr. Advocate with
Mr. Abhishek Bajaj, Advocate
for the respondent.*********RAJBIR SEHRAWAT, JUDGE (ORAL)**

This is the second appeal filed by defendant No.1 in this suit challenging the concurrent findings, judgments and decrees passed by the Courts below, whereby decree for possession of the land measuring 68 kanals 1 marla was passed in favour of plaintiff-Nihal Kaur.

For the purpose of the present appeal, the parties would be referred as plaintiff and the defendant, as they were referred to in the original suit.

The brief facts of this case are that plaintiff-Nihal Kaur, who is the mother of the defendant No.1, filed this suit for possession of land measuring 68 kanals 1 marla; as fully described in the head note of the plaint. It was claimed that the plaintiff had become the owner in possession of the land in question by way of decree dated 28.08.1985. It was further claimed that the decree had emerged from a family settlement. After the decree, the plaintiff had become the owner in possession of the suit land.

However, since she was residing at another village, therefore, she permitted

her son, defendant No.1, to cultivate the suit land. It was further pleaded that after the harvesting of the previous crop the plaintiff requested her son, defendant No.1, to hand over the possession of the suit land to her, but the defendant No.1 and his sons did not agree. The possession of defendants over the suit land is illegal and is of a trespasser. Therefore, it was claimed that the plaintiff is entitled to get the possession of the suit land back from defendant No.1 and his sons.

On notice, defendant No.1 appeared and filed written statement. Besides taking routine preliminary objections, defendant No.1 claimed that the defendants are in continuous and hostile possession of the suit land. Therefore, the defendants have become owner of the suit land by way of adverse possession. It was further pleaded that the plaintiff herself has never cultivated the suit land. Still further, it was claimed that the possession of defendant No.1 is not illegal nor is the same as a trespasser. Still further, the ownership of the plaintiff was denied. It was further pleaded that the plaintiff never asked to vacate the suit land, therefore, she has no cause of action. Defendants No.2 and 3 though filed written statement but got themselves proceeded ex parte, and they chose not to contest the suit.

Parties led their evidence.

After appreciating the evidence, and hearing the parties, the trial Court decreed the suit filed by the plaintiff and recorded a finding that the suit land has come to the ownership and possession of the plaintiff by a valid Court decree Ex.-P6. Still further, the trial Court held that there had been a family settlement between the parties and on the basis of that family settlement only the plaintiff had got the suit land mentioned in the decree

Ex.P6. On the basis of the same family settlement, defendant No.1 also had

got separate land in the same village through another Court decrees Ex.P9 and P10, proved on the record of the case. Therefore, the trial Court has held that the plaintiff is owner of the suit property.

So far as, the handing over the possession of the suit land by the plaintiff to defendant No.1 is concerned, the trial Court recorded a finding that defendant No.1 has tried to deny the ownership of the plaintiff by taking plea of adverse possession. However, he has miserably failed to prove the adverse possession before the Court. The trial Court also recorded that in the process, defendant No.1 has also admitted the ownership of the plaintiff over the suit land. The trial Court further held that the Jamabandi placed on record as Ex.P3 shows the plaintiff to be in possession of her share of the land and defendant No.1 is shown to be in possession of his share of land. Hence, it was held by the trial court that defendant No.1 was only in permissive possession of the suit land. The plaintiff is entitled to take back the possession of the suit land from the defendants. So far as the plea of defendant No.1 regarding being co-sharer in the suit land as per the revenue Jamabandi is concerned, the trial Court recorded a finding that the family settlement has been claimed by both the sides. Defendant No.1 has taken substantial benefit under the same family settlement and has got the land exclusively, out of the land, which was earlier held by his father. In view of this, the suit filed by the plaintiff was decreed and the claim of the defendants was not accepted by the trial Court.

Aggrieved against the judgment and decree passed by the trial Court, the defendants filed the appeal before the lower Appellate Court. However, the lower Appellate Court also dismissed the appeal filed by the defendants.

While dismissing the appeal, the lower Appellate Court recorded a

finding that the very fact that the plaintiff has tried to claim adverse possession shows that he admits the exclusive ownership of the plaintiff. As per the evidence also, it was held by the lower Appellate Court that the decree dated 28.08.1985 Ex.P6 shows that the plaintiff has become the exclusive owner in possession of the suit land. The Court further held that after the death of Veer Singh, the husband of Nihal Kaur and father of defendant No.1, there had been a family settlement. Under that family settlement, defendant No.1 had also got 130 kanals 18 marlas of land and in his favour also, a decree dated 12.08.1985, Ex.P10 was suffered. This made him also the exclusive owner in possession of some land under the same family settlement, under which the plaintiff became the owner in possession of the suit land through decree Ex.P6. So far as the possession is concerned, the lower Appellate Court held that defendant No.1 himself has admitted in witness box, as DW-2, that he is cultivating the land on behalf of his mother, i.e., the plaintiff in the present suit. Therefore, the lower Appellate Court held that defendant No.1 has admitted that he was in permissive possession of the suit land. Hence, he is liable to vacate the same, as and when, required by the plaintiff. Therefore, the lower Appellate Court held that there is no perversity in the judgment and decree passed by the trial Court.

While arguing the present appeal the counsel for the appellants has submitted that an intervening fact has taken place since the plaintiff-Nihal Kaur has since expired. He further submits that on account of death of Nihal Kaur, who was the plaintiff and was the mother of defendant No.1 the defendant No.1 has become her legal heir and he is also entitled to succeed the estate of Nihal Kaur. Therefore, according to the counsel for

the appellants, the present suit has been rendered infructuous. His

submission is that with the death of the plaintiff, appellants No.1 has also become entitled to succeed the estate of plaintiff, therefore, he has become co-sharer with the other legal heirs of plaintiff-Niha Kaur. Therefore, the suit for possession can no more survive against him; being co-sharer in suit land. If the other legal heirs want to avail their remedies, they can, at the best, file a suit for partition. The next contention of the learned counsel for the appellants is that Jamabandi of the year 1997-98 Ex.P-13 shows the land in village Beer Bholu Wala to be the joint holding of all the co-sharers. Therefore, the suit for possession simpliciter, otherwise also, would not be maintainable qua the suit property. The next argument of the counsel is that the appellants have become owner of the suit land by way of adverse possession since the Khasra Girdawaris have been corrected in his name regarding the suit land since the year 1991, during the pendency of the suit.

On the other hand, learned counsel for the respondent has argued that so far as the question of legal heirs is concerned, this Court had called the report from the trial Court regarding the status of the parties as legal heirs of the plaintiff. Since there was a Will executed by Nihal Kaur in favour of other son namely Baldev Singh, therefore, the matter was referred to the trial Court for determination of the validity of the Will, so as to ascertain whether Baldev Singh is the exclusive legal heir of plaintiff-Nihal Kaur or not. It is submitted by him that the report has since come and it has been held in that report that the Will has been duly proved by examining the attesting witnesses and the scribe, therefore, Baldev Singh is held to be the only legal representative of the plaintiff-Nihal Kaur. It is his further submission that vide order dated 17.02.2014, the Court has put its seal on finality on the status of Baldev Singh, as the only legal representative of plaintiff-Nihal Kaur, for the purpose of this appeal. Therefore, this appeal

cannot be termed as infructuous by the appellants merely because the plaintiff-Nihal Kaur has expired. The appeal would still survive and son Baldev Singh, who has been impleaded as respondent now is entitled to prosecute the present appeal. The second argument raised by the learned counsel for the respondent is that DW-2, who is none else but the appellant himself has admitted in cross-examination that he has been cultivating land on behalf of his mother and only his mother Nihal Kaur had given him this land measuring about 8 acres for cultivation. Still further, it is argued by the learned counsel for the respondent that the change of Khasra Girdawari is totally irrelevant for the purpose of the present appeal, since the correction of the same was sought, and has been made during the pendency of the present suit only. Still further, the counsel has submitted that all the arguments, which are now being raised by the learned counsel for the appellants, have not been raised before the lower Appellate Court, since the lower Appellate Court has already recorded that no other argument raised before it. Hence, he cannot be permitted to raise these arguments in second appeal. Still further, counsel submits that so far as the status of the land is concerned, the defendant No.1 in his cross-examination himself has said that he does not know, whether the suit land is part of joint holding or not. Still further, learned counsel for the respondent submits that the decree shows that after family settlement, the parties were given specific khasra numbers and were put in possession of specific khasra numbers only, as has been admitted by defendant No.1 himself, in his cross-examination. Therefore, if any entry continues showing the land to be joint, that is irrelevant and is liable to be ignored. Learned counsel also submits that in other proceedings, the wife of defendant No.1 had separately challenged the decree Ex.P6 by way of separate suit. However, that suit has been

dismissed and appeal has also been dismissed right upto this Court in RSA No.3523 of 2009, although this is not part of the present proceedings, being subsequent event. Hence the partition of joint holding and exclusive ownership of possession of parties over specific khasra numbes have been rightly proved.

After hearing learned counsel of the parties and perusing the record with their able assistance, this Court is of the considered opinion that the argument of the learned counsel for the appellants are not worth sustaining. So far as the argument of the learned counsel for the appellants that present proceedings have been rendered infructuous is concerned, it deserves to be noticed that this Court had sought a specific report from the trial Court regarding the status of the legal representative of Nihal Kaur; as claimed through a Will. The legal status of that legal representative has duly been affirmed by the order of this Court dated 17.02.2004. Hence, for the purpose of the present appeal there is a duly constituted respondent to prosecute the appeal; as legal heir of the plaintiff and to sustain the relief, which was originally claimed by the plaintiff. Therefore the appeal has not been rendered infructuous.

The next argument of the learned counsel for the appellants that the status of the land is still joint as per the Jamabandi of the year 1997-1998 and it has not been partitioned is concerned, the same is liable to be rejected outrightly. The Jamabandi only reflected the record of rights. It is not a mode of transfer of title between the parties. The title between the parties is taken care of by the transaction of transfer, which in this case happens to be the decree of the Court, Ex.P-6. The decree Ex.P-6 specifically shows that the plaintiff was declared to be exclusive owner in possession of specified

based on the basis of family settlement, under which defendant No.1/appellant herein had also got the land through another decree Ex.P10. Therefore, merely because the family settlement, as reflected in the decree of the court, is not incorporated in the revenue record, that does not mean that the land is still having a joint character. It is well-settled that even the intention of the parties to sever the jointness of status is sufficient to break the presumption of the jointness of the property. In the present case, there is specific instrument of transfer of the title, qua specific land, in favour of the plaintiff, therefore, by any means, it can not be said that the land was, any more, the joint holding between the parties.

Otherwise also the defendant has raised a plea of adverse possession. This shows that he admits the fact that ownership of suit land was taken out of the purview of the jointness and it was specifically given to the plaintiff in this case. Otherwise also the defendant himself has admitted in cross-examination that he is cultivating the land on behalf of his mother only. Still further, he has stated in the cross-examination that he does not know whether the land is still joint or not; in its ownership and possession. This also shows that the defendant very well knows that the land has been partitioned by way of family settlement, which is reflected through the two decrees; one in favour of plaintiff and other in favour of defendant No.1. It also shows the permissive possession of defendant No.1 under his mother. Therefore, the Courts have rightly recorded the findings that the plaintiff is entitled to take back the possession from defendant No.1.

So far as the plea of adverse possession is concerned, there is no perversity in the findings recorded by the courts below that the defendants have failed to prove the adverse possession over the suit property. The

claim of defendant No.1 qua adverse possession, is based upon change of

khasra Girdawaris. However this change has been effected during the pendency of the present suit only. Therefore, the same cannot be taken into consideration to the prejudice of the status of the plaintiff. Otherwise also, even if khasra Girdawari is taken into consideration, this does not satisfy the requirement and ingredients of the adverse possession against the plaintiff.

No other argument is raised.

In view of the above, the present appeal fails and the same is dismissed being devoid of any merits.

Since the main appeal has been decided, therefore, no further orders are required in the pending applications.

CMs are disposed of as such.

16th November, 2017

Manju

[RAJBIR SEHRAWAT]
JUDGE

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No