

RSA No.1360 of 2011(O&M)

1

Sr. No. 101

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

RSA No.1360 of 2011(O&M)

Date of decision: 12.12.2017

Harcharan Singh and others

.....Appellants

versus

Jaswinder Singh and others

.....Respondents

RSA No. 1382 of 2011(O&M)

Harcharan Singh and others

.....Appellants

versus

Jaswinder Singh and others

.....Respondents

Coram: Hon'ble Mr. Justice Rajbir Sehrawat

Present: Mr. Jatinder Singla, Advocate
for the appellants.

Mr. R.S.Dhaliwal, Advocate
for the respondents.

Rajbir Sehrawat, J.(Oral)

This order shall dispose of two appeals namely, RSA No. 1360 of 2011 and RSA No. 1382 of 2011 arising from the common judgment passed by the lower Appellate Court.

Both these appeals have been filed by the plaintiffs in the original suit. RSA No. 1360 of 2011 has been filed by him against the decree of counter claim filed by the defendant seeking possession of the suit land, which was decreed by both the Courts below. RSA No. 1382 of 2011 has been filed by him challenging the judgment and decree passed by both the Courts below whereby his suit for declaration as owner and for

permanent injunction was dismissed.

For convenience, the parties herein would be referred as the plaintiff and the defendant as they were described in the original suit.

The brief facts of the case are that the suit was originally filed by Balbir Singh, the father of the plaintiffs, who entered the suit on the death of their father, claiming that he was owner in possession of the suit property as described in the head note of the plaint. He claimed the ownership on the basis of adverse possession for the last 50 years. Still further it was claimed that the father of the defendants had executed mortgage deed dated 24.05.1982 in favour of the plaintiff Balbir Singh and had delivered the possession of the suit property. Since then the plaintiff has been in possession of the same as mortgager. It was further pleaded that now the defendants, in connivance with each other; are threatened to dispossess the plaintiff forcibly and illegally. Therefore, the suit for declaration as owner and for injunction against the defendants, restraining them from interfering in possession, was filed by the plaintiff. Though originally suit was filed claiming adverse possession, however, later on suit was amended by the plaintiffs claiming that they are the owner of the suit property in their own right being legal heirs of their father. The amendment was allowed.

Upon notice being issued, defendants No. 2 and 3 appeared and filed written statement. Besides taking routine preliminary objections, the defendants pleaded that mortgage is forged and fabricated transaction. On merit it was denied that plaintiff is owner in possession of the suit property. Adverse possession of the plaintiff was denied. It was also denied that Mohinder Singh was out of country for the past 50 years as mentioned in the

plaint and he visited in India in 1982 and executed the mortgage deed in favour of Balbir Singh. It was further pleaded that the plaintiff took forcible possession of the suit property on 07.04.1997, by taking benefit of an injunction order passed by the Court. The other averments of the plaint were also denied. After amendment of the plaint, the amended written statement was also filed by defendants No. 2 and 3.

Defendant No. 3 also filed a counter claim for possession of the land measuring 24 bigha 6 biswas, the suit property, on the ground that she is the owner as the co-sharer in the suit land, as detailed in the counter claim. It was further pleaded that possession of the plaintiff is as of a trespasser since he entered into possession of the suit land forcibly on 07.04.1997; under the garb of an injunction order. It was further claimed that plaintiff had no concern qua the suit property.

Parties led their respective evidence.

After considering the evidence of the parties, the Trial Court dismissed the suit filed by the plaintiff and decreed the counter claim filed by defendant No. 3. Aggrieved against this judgment and decree, the plaintiff filed two appeals before the lower Appellate Court.

At the time of pendency of the appeal before the lower Appellate Court, the plaintiff filed an application under Order 6 Rule 17 of the CPC, for the amendment of the plaint. In the amendment application it was pleaded that the father of the plaintiffs had purchased the property in the same khewat vide sale deed No. 5083 dated 13.02.1989, registered at the office of Joint Sub-Registrar, Dhuri and that this fact finds mention in the copy of the jamabandi; already on record as Ex:PX/A. However, the lower Appellate Court dismissed both the appeals filed by the plaintiffs. So

far as the application for amendment filed by the plaintiffs before the lower Appellate Court is concerned, although it was entertained and some interlocutory orders, mentioned on the file were passed. However, this was not finally decided by the lower Appellate Court.

While dismissing the appeals filed by the plaintiffs, the lower Appellate Court recorded that the original mortgage deed has not been produced in evidence, despite permission to lead secondary evidence. Nothing was stated by the plaintiff or the witnesses regarding this mortgage. Regarding the plea of adverse possession, the lower Appellate Court recorded that in the jamabandi for the year 1994-1995, Ex:PX/A Balbir Singh was recorded as gair marusi; in possession of the suit property under Mohinder Singh. This entry is made on the basis of some report dated 20.04.1993. However, the report dated 20.04.1993 has not been brought on record. Otherwise, also since the plaintiff claimed to be a mortgagee, therefore, he cannot sustain the plea of adverse possession. Hence it was held that the possession of the plaintiff was that of the trespasser. Therefore, it was held that Balbir Singh or his legal heirs have no lawful possession over the suit property. Having failed to establish their entitlement to remain in possession. They have no right to remain in possession. Since Ranjit Kaur, defendant No. 3 is the daughter of Mohinder Singh and as such inherited his estate, being one of his natural heirs, as such she was held entitled to have the possession of the suit property. Accordingly, the appeals filed by the appellants were dismissed and the counter claim allowed in favour of defendant No. 3 was upheld by the lower Appellate court also.

Aggrieved against the judgments and decrees, the present two

appeals have been filed.

While arguing the case, learned counsel for the appellants has submitted that he had moved an application for amendment of his plaint before the lower Appellate Court. However, although the lower Appellate Court entertained that application and issued notice to the other side, but thereafter the application has not been taken up by the lower Appellate court. Resultantly, although the appeals have been finally dismissed by the lower Appellate Court but his application for amendment of the plaint has been left undecided. It is his submission that in such a situation, the judgment and decree passed by the Court below stood vitiated. To support his arguments the learned counsel placed reliance on the judgment of the Karnataka High Court reported in **2013 ILR (Karnataka) 2553** titled as ***Shri Kedari Mashnu Garav and another vs. Shri Pandurang Mashnu Gurav and others***. Still further learned counsel relies upon another judgment of this Court reported in **AIR 2005 Punjab And Haryana 263** titled as ***Ashok Kumar vs. Surinder Kumar*** to contend that if an application moved for additional evidence was left undecided by the lower Appellate Court, while the appeal is finally decided, the same would result in miscarriage of justice. Accordingly, learned counsel submits that the plaintiffs deserve to be heard qua their plea of purchase of the suit property by their father. Hence it is prayed that case be remanded to the Trial Court for adjudication about the claim of the plaintiff regarding purchase of the suit land through the sale deed. Learned counsel for the appellants further submits that even if their claim regarding title, qua exact property mentioned in the head note of the plaint, is not found to be substantiated, still the sale deed would show that they have become the co-sharer in the property in the same khewat with the

defendants. Therefore, the counter claim of the defendants for possession of the suit property could not have been allowed against them; for the reason that suit for possession against the co-sharers is not maintainable unless the suit for partition is filed by the co-sharer seeking possession. It is his submission that it is well established law that possession of the one co-sharer is deemed to be the possession of all the co-sharers. Hence it is submitted by learned counsel; that the counter claim of the defendant could not have been decreed by the Trial Court.

On the other hand, learned counsel for the respondent/defendants have submitted that the appellant is adopting only dilatory tactics to retain the possession of the suit property as long as he can. So far as the sale deed claimed by the plaintiff is concerned, learned counsel for the respondent is unable to comment upon the same; since this has not become part of the evidence on file of the case. Hence, dismissal of the both the appeals is prayed for.

Having heard learned counsel for the parties and perusing the record with their able assistance, this Court is of the considered opinion that the submission made by learned counsel for the appellant deserves to be sustained. A perusal of the file shows that lower Appellate Court did entertain the application moved by the present appellant. Notice in the application was issued by the lower Appellate Court. Thereafter, the defendant had taken even time to file reply to the application. Thereafter, the application was fixed for consideration for orders. However, subsequently, it appears that by inadvertent mistake; the lower Appellate Court lost track of the application and adjourned the main appeals itself for argument. Resultantly, ultimately, the judgment is passed only on the

appeals. The application filed by the plaintiffs; for amendment of suit remained undecided. In view of these facts, the reliance of the learned counsel for the appellants upon the judgments mentioned above is well founded. Since the application moved by the plaintiff related to their title based upon recognised mode of transfer of title, as reflected in the sale deed, therefore, non-decision of the application by the lower Appellate Court would definitely lead to miscarriage of justice. Hence, unless the application was decided; the final order on the appeal could not have been passed by the lower Appellate Court. The matter would have been different if the lower Appellate Court would have decided the application; even alongwith appeal. However, in the present case the application moved by the plaintiffs have been left undecided, leaving the claim of the plaintiffs to be totally unconsidered by the Court. Hence the appeals deserve to be accepted and the case deserves to be remanded for consideration of application.

In normal circumstances, if the judgment and decree of the lower Appellate Court are found to be perverse and case is remanded then the remand is to be made to the lower Appellate Court only. However, in the present case since the application pertains to the amendment of the suit, therefore, if permitted, the same would also require the evidence to be led by the parties. Hence, it would be appropriate if the matter is remanded to the Trial Court for re-appreciation of the matter by considering the application moved by the appellants for amendment of the suit.

Accordingly, the judgments and decrees passed by the Courts below are set aside. The case is remanded to the Trial Court for consideration of the application for amendment moved by the plaintiffs and

to re-appreciate the matter accordingly.

Needless to say that if the Trial Court decides to allow the application, then, parties would be given opportunities to lead the evidence on the point of sale deed claimed by the plaintiffs. But if the application is rejected by the Trial Court then it would be entitled to retain the findings already recorded by it. Therefore, it is clarified that this Court is not expressing any opinion on the merits of the case or qua the alleged sale deed claimed by the plaintiffs. This would be entirely within the preview of the consideration by the Trial Court.

Accordingly, the present appeals are allowed. The matter is remanded to the Trial Court in the above said terms.

Trial Court is further directed to conclude the Trial and decision of the case within 8 months from the date the parties appear before it. Parties are directed to appear before the Trial Court on 16.01.2018. Record of the case be sent back to the Trial Court.

12th December, 2017

Shivani Kaushik

**[Rajbir Sehrawat]
Judge**

Whether speaking/reasoned *Yes*

Whether Reportable *Yes*