

104.

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

RSA-5051-2016 (O&M)

Date of decision:03.02.2017

KIMAT SINGH & ANR

... Appellants

versus

SUKHCHAIN SINGH & ORS

.... Respondents

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA

Present: Ms. Bhupinder Pal Kaur Brar, Advocate,
for the appellants.

HARI PAL VERMA, J.

CM-13125-C-2016

Prayer in the application filed under Section 5 of the Limitation Act is for condonation of delay of 121 days in filing the appeal.

For the reasons stated in the application, same is allowed and the delay of 121 days in filing the appeal is condoned.

RSA-5051-2016

The appellants-plaintiffs have filed the present Regular Second Appeal against the judgment and decree dated 19.02.2016 passed by learned Additional District Judge, Yamuna Nagar at Jagadhri whereby their appeal against the judgment and decree dated 17.02.2012 passed by learned Additional Civil Judge (Senior Division), Yamuna

Nagar at Jagadhri was dismissed.

Briefly stated, the appellants-plaintiffs had filed a suit for declaration claiming therein that their father had migrated from Pakistan to India and in lieu of the properties which he left in Pakistan, he had been allotted properties in India. He had also brought with him other valuables i.e. gold and silver jewellery as well as silver coins from Pakistan. He had purchased one plot and raised construction thereon from the funds acquired out of the Joint Hindu Family properties about 40-45 years back. Thus, the suit property, as detailed in the plaint, is ancestral property of the parties. The respondents-defendants are sons of Gurbachan Singh-brother of the plaintiffs. The other brother of the plaintiffs, namely, Balbir Singh had died 40 years back without leaving any legal heirs. Gurbachan Singh, elder brother of the plaintiffs, was educated person and was looking after the property of Joint Hindu family as well as the business of *maniari* of the family. About 40 years back, Gurbachan Singh intended to go abroad and so he demanded his share from his father. Accordingly, he was given his due share out of the Joint Hindu family property by the father of the plaintiffs and he went to England and settled there. In this manner, the properties left in India were, thus, given to the appellants-plaintiffs and they continued to live there with their families. The father of the plaintiffs died 35 years back and their mother also died about 30 years back and thus, the plaintiffs are residing in the house, in question, for the last 40 years and treated themselves as owners of the house. The respondents-defendants or their father never claimed any right over the

house, in question. However, 9 years back, the father of the respondents-defendants died and even thereafter, the respondents-defendants admitted the appellants-plaintiffs as owners of the house, in question. It is further pleaded in the plaint that one Kamal Nain who was residing in the neighbourhood of the plaintiffs, had got his son married with the sister-in-law of defendant No.2 and he started having evil eyes on the house, in question. He instigated the respondents-defendants to claim the house, in question, being their ancestral property. In this manner, defendants No.1 and 2 visited India on 10.07.2004 and started claiming their right in the house, in question. They threatened to dispossess the appellants-plaintiffs forcibly and to alienate the suit property and refused to admit the claim of the plaintiffs. Thus, the suit for declaration and injunction was filed.

Defendants No.2 to 4 were proceeded against ex parte during trial and defendant No.1 contested the suit and filed written statement through his power of attorney, namely, Alam Singh, taking various preliminary objections including concealment of material facts and the suit being barred under Section 10 CPC. However on merits, he denied that the suit property is ancestral property of the Joint Hindu family or that the plaintiffs are in possession of the suit property as owners. He pleaded that the plot, in question, was purchased by Gurbachan Singh vide registered sale deed dated 10.05.1977 (Ex.D2) and he raised construction over it from its own funds. He alleged that all the brothers were living separate much prior to the purchase of the

plot, in question, by Gurbachan Singh. He denied that Gurbachan Singh was supported by giving any property or money. He further pleaded that defendant No.1 is in actual physical possession of the house through his attorney Alam Singh, who was appointed as attorney in July, 2004 while defendant No.1 had left for UK. Thus, the plaintiffs have no right, title or interest in the suit property and the defendants are owners of the house, in question.

From the pleadings of the parties, the trial Court framed the following issues:-

- “1. Whether plaintiffs are owners in possession in equal share to the suit property detailed in head note of the plaint? OPP.*
- 2. Whether are entitled to the relief of injunction? OPP*
- 3. Whether the plaintiffs have concealed the true and material facts from the court? OPD*
- 4. Relief.”*

The appellants-plaintiffs, who have claimed the suit property as ancestral property, could not lead any evidence to prove this fact. There was no evidence that Lachhman Singh had left any property in Pakistan. On the other hand, defendant No.1 has proved copy of sale deed Ex.D2 which clearly shows that the plot over which the house in question was constructed, was purchased by Gurbachan Singh from his own funds. The sale deed Ex.D2 is a registered document and carries presumption of correctness. Since the plaintiffs could not rebut the sale deed by leading any evidence and could not establish possession over the land in dispute, the trial Court, vide

Aggrieved against the said judgment and decree dated 17.02.2012, the appellants-plaintiffs preferred an appeal which was also dismissed vide judgment and decree dated 19.02.2016 with the following observations:-

“At the outset, it must be mentioned that there is nothing on record to show that Lachhman Singh had left any property in Pakistan and was allotted any property in India in lieu of the property left by him in Pakistan. There is no evidence that he had brought any silver or gold jewellery or coins from Pakistan and he had purchased the plot in question and raised construction over it from gold and silver brought by him from Pakistan. On the other hand, defendant no.1 has produced and proved copy of sale deed Ex.D2, which clearly shows that the plot over which the house in question has been constructed, was purchased by Gurbachan Singh from his own funds. The said sale deed Ex.D2 is a registered document and thus, carries presumption of genuineness. The boundaries given in the sale deed matches with the boundaries shown in the plot, which shows that it is the same plot, which was purchased by Gurbachan Singh vide sale deed Ex.D2. As per the plaintiffs, they are residing in the house in question for the last 40 years and Gurbachan Singh and his sons had shifted to UK for the last several years and thus, they have become owners in possession of the suit property by way of adverse possession. To prove their possession, the plaintiffs have examined DW1 Dr. Abdul Haddi, PW2 Dilbag and the plaintiff Bali Singh as PW3 and produced Surjit Kaur as PW5. However, except bald oral testimony of these witnesses, there is no cogent and clinching evidence on record to prove the possession of the plaintiffs over the suit property. The plaintiffs have even not mentioned the number of the plot. Even, the witnesses PW1 and PW2 have failed to prove the boundaries and description of the house in question and they have admitted that plaintiff Kimat Singh is residing some where else. These witnesses are describing another house as the house of Gurbachan Singh, but they are not disclosing the boundaries of the said house also. PW2 had rather admitted that the plaintiffs are residing some where else for the last 4-

5 years. The plaintiff Bali Ram has admitted that he had sold two houses besides the house in question. In the circumstances, learned trial Court rightly disbelieved the testimony of the plaintiffs and their witnesses and also rightly held that the defendants are owner in possession of the suit property, which is being looked after by attorney of defendant no.1. Since the plaintiffs have failed to prove their possession over the suit property, the question of their becoming owners of the same by way of adverse possession does not arise at all. Moreover, plea of adverse possession can be made a ground of defence only. Hence, learned trial court has rightly dismissed the suit of the plaintiff. I find no infirmity or illegality in the findings recorded by learned trial court on issues no.1 to 3 and I affirm the same.”

It is in the aforesaid circumstances, the appellants have filed the present regular second appeal.

Learned counsel for the appellants has formulated the following substantial questions of law:-

- “(i) Whether the impugned judgment and decree dated 19.2.2016 passed by the Ld. Additional District Judge, Yamuna Nagar at Jagadhri and the impugned judgment and decree dated 17.2.2012 passed by the Ld. Addl. Civil Judge (Sr.Divn.) Yamuna Nagar at Jagadhri are liable to be set aside and the suit of the appellants-plaintiffs deserve to be allowed?*
- (ii) Whether the Lower Appellate Court is justified in rejecting the application for additional evidence by the plaintiff-appellant even when the evidence sought to be placed on record was very material to the decision of the case?*
- (iii) Whether both the courts below are justified to rely upon the photocopies of power of attorney Ex.D1 and sale deed Ex.D2 in dismissing the suit of the plaintiff-appellant?*
- (iv) Whether by dismissing the suit of the appellant grave injustice has been caused to the appellant?*
- (v) Whether the appeal deserves to be allowed in terms of the prayer made?”*

Learned counsel for the appellants has argued that the courts below have committed grave error while dismissing the suit of the appellants-plaintiffs. The courts below have erred in deciding the issue No.1 i.e. Whether appellants-plaintiffs are owners in possession to the suit property or not? The respondent-defendant No.1 has pleaded that he is in actual physical possession of the house/suit property through his attorney-Alam singh, who was appointed attorney in July, 2004 while defendant No.1 had left for UK. However, respondent-defendant's own witnesses have deposed otherwise. The appellants are the actual owners in possession of the suit property for the last 60 years. The defendant/respondent No.1 in this case appeared through Alam Singh-his alleged special power of attorney, alleged to have been executed on 20.07.2004 whereas the original special power of attorney was not placed on the file.

I have heard learned counsel for the appellants.

There is a categorical finding on fact that the property, in question, was not ancestral property, rather was purchased by defendant No.1 from his own resources. Similarly, the appellants-plaintiffs have also failed to establish that they were in possession over the house, in question. Though efforts were made by the plaintiffs to prove their possession by examining PW1-Dr. Abdul Haddi, PW2-Dilbag Singh, plaintiff-Bali Singh as PW3 and PW5-Surjit Kaur, but except bald oral testimony of these witnesses, no such cogent and clinching evidence has been placed on record which may establish the

possession of the appellants-plaintiffs on the suit property. PW1 and PW2 even have failed to prove the boundaries and description of the house in question. The case of the appellants-plaintiffs is also liable to be dismissed as even these witnesses have admitted that the plaintiff No.1-Kamat Singh is residing somewhere else.

Thus, no substantial question of law arises in the present regular second appeal.

In view of concurrent finding on facts by the courts below, this Court does not find any cause for interference in the present regular second appeal and the same is, accordingly, dismissed.

(HARI PAL VERMA)
JUDGE

03.02.2017
sanjeev

Whether speaking/reasoned? Yes/No
Whether reportable? Yes/No