

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

**RSA No.3855 of 2017 (O&M)
Date of Decision.17.11.2017**

Anil Kumar and another

.....Appellants

Vs

Ashok Katyal and others

.....Respondents

Present: Mr. Balbir Singh Dhull, Advocate
for the appellants.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.(ORAL)

The prayer made in the applications bearing Nos.13430-C and 13431-C of 2017 is twofold viz; (i) preponment of hearing of the matter on the premise that execution application is pending and (ii) for stay of the execution proceedings respectively.

Though the appeal has been preferred against the preliminary decree but the application is bereft of facts and pleadings viz-a-viz any proceedings having been initiated for drawing the final decree. Be that as it may. Owing to urgency of the matter, I accept the prayer for preponement of the hearing of the appeal. Resultantly, the application bearing No.13430-C of 2017 is allowed and the hearing of the appeal is preponed for today itself .

The appellants-defendants are in appeal against the concurrent finding of fact in suit for possession by partition and permanent injunction preferred by the respondents-plaintiffs seeking the following relief:-

“It is further prayed that a preliminary decree for partition be passed declaring the plaintiffs to be joint owners in possession of the suit property on account of their ½ share in the suit property and the defendants be directed to get the property partitioned by metes and bounds.

It is further prayed that final decree may also be passed

by demarcating the respective shares of the plaintiffs and defendants in the suit property by metes and bounds.”

Mr. Sidhu, learned counsel appearing on behalf of the appellants raised only solitary argument that the suit preferred by the plaintiffs with the aforementioned relief was *ex facie* barred by law of limitation as per Article 65 of the Limitation Act, 1963. In other words, he submitted that the defendants have become owner of the property by efflux of time as the respondents-plaintiffs have failed to avail the remedy of seeking possession on the basis of title. The factum of maintainability of the suit was specifically raised and issue No.4 in this regard was also framed.

This Court called upon the counsel for the appellants to refer to any evidence both oral and documentary to establish that the suit was barred by limitation as the trial Court on the aforementioned issue gave the following finding:-

“Issue No.4:

10. Onus to above said issue was on the defendants. However, neither any evidence was led to prove said issue by the defendants nor said issue was pressed by the ld. Counsel for the defendants during the course of arguments. Accordingly, this issue is hereby disposed of being not pressed.”

Learned counsel for the appellants further submitted that the respondents-plaintiffs in the memorandum of the suit had given their address as of Delhi whereas the property is situated in Rohtak. That itself was a sufficient piece of pleadings to establish the ouster. The finding of the learned trial Court on issue No.4 of having not pressed the issue is wholly perverse and illegal, much less, erroneous and the point which was specifically raised in the memorandum of appeal before the lower Appellate Court has also not been addressed in its entirety, as a co-owner can always take up the plea of adverse

possession *viz-a-viz* other co-owners. In support of his contentions, relied upon the judgments of this Court in *Hukam Singh and others Vs. M/s Rajdhani Land and Finance and others 2016(2) RCR (Civil) 369* and *Chuhar Ram and others vs. Hirda through LR and others (2017-1) Vol.CLXXXV 766*.

During the course of arguments, learned counsel appearing for the appellants also submitted that the suit of the plaintiff Nos.1 and 2 was dismissed as withdrawn. As such, *prima facie*, they had accepted the ownership of the appellants-defendants.

I have heard learned counsel for the appellants and appraised the paper book. Before assigning reasons for rejecting the aforementioned arguments, it would be apt to notice that respondents-plaintiffs had preferred the suit for possession as indicated above by partition and permanent injunction on the premise that Vinod Katyal and Chiman Lal were the co-owners and their demised property in the revenue record was recorded as in co-ownership. In this regard, the plaintiffs tendered in evidence Ex.P1 to P8 to establish the jointness of the property. On the contrary, the appellants-defendants except having stepped into the witness box as DW1 and tendering documents Mark A1 and Mark A2 did not place any material to establish the ouster. It is settled law that in a suit for partition seeking separation possession, independent and convincing evidence on the part of the defendant taking up the plea of adverse possession has to be led, much less, proved. No documentary evidence has been placed on record to establish the continuous possession to bring the suit within the parameters of Article 65 of the Limitation Act on having acquired the ownership by efflux of time.

The emphasis laid on the judgment in *Hukam Singh's case* (supra) was a case where the co-owner had established the ouster, as for setting up an ouster, mere exclusive possession by a co-owner would not amount to

adverse possession or ouster. There has to be a convincing evidence on record to establish the same. Having failed to lead any evidence as noticed by the Courts below, I am of the view that the appellants-defendants have not been able to discharge the onus on issue No.4. The factum of ownership in the revenue record has also not been denied. Withdrawal of suit by two other persons would not take away right of other co-owners to seek partition as in suit for partition seeking separate possession, all co-owners are owner of each and every inch of land till it is partitioned in accordance with law.

There is no limitation for setting up the claim on the basis of title unless and until the opposite side i.e. the defendant establishes exclusive possession for continuous period of 12 years by setting up all ingredients of *animus disponendi* and establish possession to the knowledge of whole world including the true owner.

As an upshot of my finding, I do not find any reason to differ with the concurrent finding rendered by both the Courts below whereby the preliminary decree passed by the trial Court has been affirmed by the lower Appellate Court. No ground for interference is made out.

The appeal stands dismissed.

(AMIT RAWAL)
JUDGE

November 17, 2017
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No