

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

RSA No.901 of 1991 (O&M)

Date of decision:06.12.2018

Mehar Singh (dead) through LRs and others

... Appellants

Vs.

Chuni Lal and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Sushil Saini, Advocate for
Mr. I.D.Singla, Advocate
for the appellants.

Mr. Sanjiv Manrai, Senior Advocate with
Mr. Abhimanyu, Advocate
for the respondents.

AMIT RAWAL J. (Oral)

The present appeal at the instance of the appellant-plaintiffs is directed against the judgment and decree of the Lower Appellate Court, whereby, plaintiffs in the suit claimed declaration as owners to the extent of 2/3rd share in land bearing kheat no.43, khatoni no.93, khasra no.9R/8-9-12-13/1-19-20 total measuring 36 kanals 4 marlas situated in the revenue estate of village Sokalgarh H.B.255, Tehsil Pathankot District Gurdaspur on the premise that plaintiff no.1 and his brothers Kesar Singh and Waryam Singh were owners in possession of land measuring 36 kanals 4 marlas. The plaintiffs are successors in interest of Waryam Singh. After death of Kesar Singh and Waryam Singh, status of the plaintiffs in respect of suit land remained joint but later on, plaintiffs acquired the knowledge that Kesar

Singh had sold his share to the defendants vide sale deed dated 15.04.1965.

The defendants contested the suit and claimed themselves to be exclusive owners by virtue of sale deed dated 15.04.1965 where it was recited that Kesar Singh had sold the share which has fallen to his share and in alternative, the plea of adverse possession, continuous possession, exclusive, notorious, was also taken. It was alleged that there had been complete ouster of the plaintiffs from the suit land since 15.04.1965 as the respondent-plaintiffs were resident of Maharashtra. The electric connection was also obtained in the name of defendant no.1

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether the plaintiff Mehar Singh was co-owner in possession of suit land with Kesar Singh and Waryam Singh and 1/3rd share in the suit land?OPP
2. Whether the plaintiffs no.2 and 3 are the legal heirs of Waryam Singh?OPP
3. Whether the plaintiffs are the owners to the extent of 2/3rd share of the suit land?OPP
4. Whether the plaintiffs are entitled to the joint possession of the suit land?OPP
5. Whether Kesar Singh alone was the owner of the suit land and he has sold the same to defendants on the basis of sale deed dated 5.4.1965. If so, its effect?OPD
6. If issue no.5 is not proved, whether the defendants have

become owners of the suit land by adverse possession?OPD

7. Whether the suit is barred by time?OPD

8. Whether the plaintiffs are estopped by their act and conduct from filing the present suit?OPD

9. Whether the suit is bad for non-joinder of Dalip Singh Ramesh Singh and Suresh Singh?OPD

10. Relief.”

The trial Court after noticing the revenue record conferred the status to defendants, purchasers from Kesar Singh, co-owner and decreed the suit by rejecting the plea of adverse possession.

The defendants in appeal have been successful by setting aside the judgment and decree of the trial Court on account of adverse possession

Mr. Sushil Saini, learned counsel appearing on behalf of the appellants submitted that judgment and decree of the Lower Appellate Court suffers from illegality and perversity as the respondent-defendants miserably failed to prove ouster with effect from 15.04.1965 as there was no partition amongst the co-sharers, i.e. Kesar Singh, Waryam Singh and Mehar Singh. The jamabandi for the year 1963-64, Ex.P2 is the testimony of the same. The recital in the sale deed was a self serving statement as it was unilateral act of the vendor i.e. Kesar Singh as there was no partition amongst the co-sharers nor the same was reflected in the revenue record. The jamabandis post sale deed also reflected the joint ownership. Adverse possession has to be from the specific date and to the knowledge of whole world and in the absence of the same, possession of each and every inch of

land at the hands of other co-sharer is as the trustee of co-sharer who had actually been in physical possession and thus, urged this Court for setting aside the judgment and decree under challenge.

Mr.Sanjiv Manrai, learned senior counsel assisted by Mr. Abhimanyu, Advocate appearing on behalf of the respondents supported the judgment and decree of the Lower Appellate Court by submitting that in view of the law laid down by the Hon'ble Supreme Court in **Parsinni (dead) by LRs vs. Sukhi 1993(3) RRR 681**, the co-sharer can always take the plea of adverse possession by proving ouster. In other words, there is no bar for the co-sharer to take the plea of adverse possession. The animus possidendi had been proved to the hilt as the revenue record reflected the exclusive possession of the defendants who have purchased the share of Kesar Singh as the possession of entire property was with them.

I have heard the learned counsel for the parties, appraised the judgments and decrees of the Courts below and of the view that there is force and merit in the submissions of Mr.Saini and the appeal is liable to be allowed on account of the following reasons:-

The Hon'ble Supreme Court in the judgment cited by Mr. Manrai, no doubt has held that co-sharer can always take the plea of ouster but for proving the same, is not so simple as heavy onus lies upon assertor. Except the entry in the revenue record, no other overt act has been proved or established.

In **Ram Nagina Rai and another vs. Deo Kumar Rai (deceased) by LRs and another 2018(5) RCR (Civil) 398**, an occasion arose before the Hon'ble Supreme Court where one of the party had claimed ownership on the basis of adverse possession. In paragraphs 11, 12 and 13, laid down as under:-

“11. Thus, it is important to assess whether such intention to dispossess is apparent to the actual owner or not. The intention of the adverse user must be communicated at least impliedly to the actual owner of the property. His hostile attitude should be open to the knowledge of the real owner. It follows that the intention and possession of the adverse possessor must be hostile enough to give rise to a reasonable notice to the actual owner.

12. Applying the test of nec vi, nec clam, nec precario i.e., 'without force, without secrecy, without permission' as an established test for finding adverse possession, we find that the defendants have not proved their possession to be adverse to that of the real owner inasmuch as they entered into possession as licensees to begin with and there is nothing on record to show as to when the permissive possession became adverse to the interest of the real owner. 'Animus possidendi' is one of the ingredients of adverse possession, and unless the person possessing the property has the requisite hostile animus, the

period of prescription does not commence. Virtually, the defendants are required to prove the possession to be adequate in continuity, adequate in publicity and to adequately show that their possession is adverse to that of the true owner. It must start with wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

The physical fact of exclusion, possession and animus possidendi to hold as owner, in exclusion to the actual owner, are the most important factors to prove adverse possession.

A person pleading adverse possession has no equities in his favour. Since he is trying to take away the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession.

13. It is an established position of law that insofar as Articles 64 and 65 of the [Limitation Act](#) are concerned, once a party proves its title, the onus of proof would be on the other party to prove the claim of title by adverse possession. In this case, it is an admitted fact that the ownership of the said suit property rests with the plaintiffs. In this given scenario, it is our considered view that the defendants have not proved the onus of adverse possession against the plaintiffs.”

However, the defendants miserably failed to establish the

ingredients of adverse possession, therefore, in my view, the Lower Appellate Court abdicated in granting the ownership. The sale deed could have been only confined to the share of Kesar Singh. The revenue record brought on record did not reflect the partition amongst the co-sharers. Once the khewat was joint and in the absence of ouster, decree of partition granted by the trial Court is most appropriate one.

This Court while admitting the appeal vide order dated 24.04.1991 restrained the respondents from alienating the suit property. The interim order dated 24.04.1991 stands vacated.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article

372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

The judgment and decree of the Lower Appellate Court is hereby set aside and that of trial Court is restored.

The regular second appeal is allowed.

(AMIT RAWAL)
JUDGE

December 06, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No