

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.1551 of 1995 (O&M)

Date of Decision: March 28, 2018

Notified Area Committee, Machhiwara & another

...Appellants

Versus

Dev Raj & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.S.K.Singla, Advocate,
for the appellants.

None for the respondents.

AMIT RAWAL, J.

Plaintiff-Notified Area Committee is in Regular Second Appeal against the judgment and decree dated 3.12.1994 rendered by the Additional District Judge, Ludhiana, whereby appeal preferred by the defendants, while setting-aside the judgment and decree dated 31.10.1986 rendered by the Subordinate Judge IInd Class, Samrala, whereby the suit for possession of Shop No.69 filed by the appellant-plaintiffs, had been decreed, has been allowed.

The facts as emanated from the pleadings of the parties are that the Notified Area Committee, Machhiwara (for short "Committee"), through its Executive Officer, instituted the suit for possession of Shop No.69 situated at Kohara Road and for recovery of ₹7424/- on account of use and occupation of the shop at a monthly rent of ₹100/- w.e.f. 1.7.1978 to 31.10.1983 along with interest @ 6% against Dev Raj and Amritsaria Mal, being represented through legal representatives on the allegations that area of 1 kanal 13 marlas comprised in Khewat No.942, Khatauni No.1334,

Rect.No.107/2/3, situated in Village Machhiwara was initially owned by Gram Panchayat, Machhiwara. The aforementioned land was leased out at a monthly rent of ₹40/- for a period of twenty years vide resolution dated 8.4.1972 to Amritsaria Mal-defendant No.2, who constructed the shops on the land, but undertook to deliver back the vacant possession of the land to the Gram Panchayat after removing the malba.

The shops were leased out by defendant No.2 to different tenants. He gave the shop in dispute out of those shops to defendant No.1- Dev Raj, but on 8.4.1978 he offered to deliver back the possession of eleven shops to Gram Panchayat before the expiry of the lease period on the condition that he be allowed to retain two shops free of rent for a period of ten years. The Gram Panchayat vide resolution Nos.5 to 7 dated 24.4.1978 accepted the request and resolved that Shop No.64 and one godown be allowed to be retained at a monthly rent of ₹50/-, but other shops including the disputed one be vacated and delivered back. The Gram Panchayat thereafter entered into possession of all the shops including the disputed one, except one shop and godown, which were allowed.

Defendant No.1, who was earlier tenant in the disputed shop of Amritsaria Mal-defendant No.2, attorned to the Gram Panchayat and had been paying rent of ₹100/- per month. The Gram Panchayat was dissolved vide notification dated 4.11.1978 and the Committee came into existence. Defendant No.1 also become the tenant of the Committee by operation of law in respect of the disputed shop. Defendant No.1 failed to pay rent of the disputed shop, necessitating the Committee to file an application under Section 7 of the Public Premises Land (Eviction & Rent Recovery) Act, 1973 before the Collector. The said application was dismissed vide order

dated 29.11.1982 on the premise that there was relationship of landlord and tenant between the parties. The possession of defendant No.1 was unauthorised and of a trespasser. It is in this background of the matter, the possession has been sought.

The aforementioned suit was contested by defendant No.1 by raising all the possible preliminary objections regarding maintainability, locus-standi, suit barred by principle of *res judicata*, time barred and non-vesting of the property in favour of the Committee. On merits, it was denied that the disputed shop was taken by the defendant from Amritsaria Mal-defendant No.2 and rather emphatically stated that the shop was constructed by Dev Raj himself, which belonged to the Wakf Board and is in its possession for the last over thirty years. Defendant No.2 did not contest the claim, rather admitted the case of the Committee.

The trial Court, on the basis of the aforementioned pleadings, framed the following issues:-

- “1. *Whether the land described in para No.1 of the plaint was leased out to defendant No.2 by the Gram Panchayat?*
OPP
2. *Whether after taking this land on lease the shop in dispute was constructed upon the same by defendant No.2?*
OPP
3. *Whether the shop in dispute was leased out to defendant No.1 by defendant No.2? OPP*
4. *Whether defendant No.2, offered to deliver back the possession of the shop in dispute to the Gram Panchayat and his offer was duly accepted. If so, to what effect? OPP*
5. *Whether defendant No.1 attorn his tenancy to the Gram Panchayat? OPP*
6. *Whether the plaintiff committee has locus standi to file the present suit? OPP*

7. *Whether the shop in dispute was constructed by defendant No.1 himself about 13 years back and he is in possession since then? OPD*

8. *Whether defendant No.1 has become owner of the shop in dispute by adverse possession? OPD-1*

9. *Whether the suit is not maintainable as alleged in para No.1 of the preliminary objections of the written statement of defendant No.1? OPD-1*

10. *Whether the suit is within limitation? OPP*

11. *Whether the suit is barred by the principle of the resjudicata? OPD*

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

13. *Whether the suit property has not been correctly described by the plaintiff? If so, to what effect? OPD*

14. *Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP*

15. *Whether defendant No.1 is estopped from denying the title of the plaintiffs by his act and conduct? OPP*

16. *Whether any rent is due from defendant No.11 if so how much? OPP*

17. *Whether the shop in dispute is situated in Killa No.107//2/3, if not to what effect? OPP*

18. *Relief."*

The trial Court, on the basis of the evidence brought on record, decreed the suit on the premise that the entries Ex.P33 and Ex.P34 relating to the year 1978 issued by the Gram Panchayat in favour of Des Raj were a clear proof of the fact that defendant No.1 had attorned the tenancy in favour of the plaintiffs, for, had been paying rent. It also found that the property was leased out to defendant No.2 by the Gram Panchayat and, therefore, there was no dispute with regard to the identity. It also found that defendant No.2 had earlier filed a suit against the plaintiffs and vide

judgment Ex.P40, it came on record that the disputed shop was constructed by defendant No.2, i.e., Amritsaria Mal, i.e., after the land was leased out to him by the Gram Panchayat. Defendant No.2 had relinquished his right, title and interest in the shop in dispute in favour of the Gram Panchayat in lieu of the compensation, which the Gram Panchayat had agreed to pay. Before relinquishment, the possession of the shop was with defendant No.2, who rented out the same to defendant No.1 at a monthly rent of ₹100/-. Defendant No.1 had attorned the tenancy in favour of the plaintiffs. The appeal preferred before the Lower Appellate Court by the defendants had been accepted on the ground that the receipts had not been proved by bringing on record the register of the Panchayat as they were produced through the testimony of V.K.Beri PW-1, who had not scribed the receipts as Parkash Nahar PW-4, who was the Panch of the Gram Panchayat in the year 1972, admitted that none of the receipts bore his signatures and rent was never paid in his presence by defendant No.1 to the Gram Panchayat. It is in these circumstances, the present appeal has been filed.

Mr.S.K.Singla, learned counsel representing the appellant-plaintiffs, in support of the memorandum of appeal, has raised the following submissions:-

- a) The judgment and decree of the Lower Appellate Court is wholly erroneous and perverse as there has been misdirection and misreading of the documentary evidence, for, Ex.P45 and Ex.P47 proved the situation and location of the shop, which was leased out along with the khasra numbers;
- b) Ex.D1 and Ex.D2 did not support the case of the defendants. On the other hand, record of the Panchayat which

had not been disputed nor any objection was raised to the admissibility of the documents, could be disbelieved by the Lower Appellate Court;

c) Amritsaria Mal, predecessor-in-interest of respondents No.2 to 10 leased out the shop and the payment of rent had been proved through the receipts, yet the Lower Appellate Court reversed the findings ignoring the fact that defendant No.1 had taken the plea of adverse possession. Plea of adverse possession tantamounts to proving the ownership;

d) Defendant No.1 failed to prove on record as to how and in what manner the shop was constructed out of his own funds or land belonged to the Wakf Board and, thus, urged this Court for setting-aside the impugned judgment and decree.

Contesting respondent No.1, who had appeared before the trial Court, had been served through mother as per the report dated 6.2.2018. This Court vide order dated 8.2.2018 had already noted that respondent No.1 Dev Raj had already been served, who was contesting respondent and there was no representation despite service. Even when the case was taken up, there was service on respondent No.1. No body has appeared. Appeal is of 1995. Accordingly, I proceed to decide the appeal on merits.

I have heard the learned counsel for the appellant-plaintiffs, appraised the paper book and of the view that the findings of the Lower Appellate Court are not sustainable, for, it had failed to advert to refer the copy of jamabandi (Ex.P38) in the entire judgment, which reflected the proof of ownership in favour of the Committee.

The trial Court, while rendering finding on issue No.4,

categorically held that documents Ex.P28, Ex.P31 and Ex.P2 showed that defendant No.2 Amritsaria Mal had offered to deliver back the possession of the shop in dispute to the Gram Panchayat, which was accepted. The aforementioned documents are not the resolutions and the decision taken by the erstwhile Gram Panchayat and on promulgation of the Committee and vesting of the property in the Committee, the appellant-plaintiffs became owner of the land and that fact has been proved through jamabandi Ex.P38. The Lower Appellate Court has also not referred to Ex.P40, i.e., civil suit filed by Amritsaria Mal-defendant No.2 against the plaintiffs, where it had been proved that the possession of the shop had been delivered by defendant No.2 to the plaintiffs of other shops than the shop in dispute.

The mere ground of not proving the receipts regarding the tenancy created in favour of Amritsaria Mal would not be a ground for non-suiting the plaintiffs, for, no objection was raised with regard to the exhibition of the documents. Lower Appellate Court has also ignored the fact that the defendants had taken the plea of adverse possession. Such plea regardless of the fact that the other party had not been able to prove the possession and ownership, tantamounts to admitting the ownership. However, in the instant case, the ownership has been proved on record vide jamabandi Ex.P38. Defendant No.1 had also failed to bring on record any evidence to show that the construction of the disputed shop was raised by him or the same belonged to the Wakf Board. In other words, the onus to prove the specific averment in the plaint had not been discharged. Defendant No.1 had to allege only as per the averments in written statement. His status was of a trespasser. In such circumstances, relief of possession had been sought invoking the jurisdiction of the trial Court under Section 9

of the Civil Procedure Code.

The findings of the Lower Appellate Court in Paragraph 22 of the judgment that the plaintiff-Committee had not been able to prove the ownership of the disputed shop is wholly perverse and erroneous. Non-advertance to a document, thus, a perversity.

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 and decision thereof could be without framing the substantial questions of law. 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.

As an upshot of my aforementioned findings, the impugned judgment and decree of the Lower Appellate Court is set-aside. Suit is decreed. Resultantly, appeal stands allowed.

March 28, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No