

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

RSA No.599 of 1996 (O&M)

Date of decision:24.04.2018

Babu Lal and another

... Appellants

Vs.

Ibrahim and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Rahul Jain, Advocate
for the appellants.

Mr. Sachin Mittal, Advocate
for respondents No.1 to 3.

AMIT RAWAL J. (Oral)

The appellant-plaintiffs are in Regular Second Appeal against the concurrent findings facts and law, whereby, suit for possession, vide judgment and decree dated 23.07.1993 has been dismissed by the trial Court and appeal laid before the Lower Appellate Court, vide judgment and decree dated 28.11.1995 had also been dismissed.

The appellant-plaintiffs instituted a suit for possession against the respondent-defendants on the premise that predecessor-in-interest of the plaintiffs were the mortgagee in possession, whereas predecessors of the defendants were the mortgagors of the suit land measuring 61 kanals 7 marlas situated within the revenue estate of village Rithora Tehsil Nuh as per the description given in para 1 of the plaint for the last more than 90

years. The plaintiffs have been residing away from the village and the defendants were cultivating the land as tenants. In the absence of the plaintiffs, defendant No.3 alongwith Chhanga Ram (father of defendants No.1 and 2) filed a civil suit titled as Chhanga Ram etc. Vs. Khairati etc. and obtained a decree dated 01.03.1975. The said decree was obtained by fraud. In fact, the suit land was never redeemed nor any mortgage amount was ever paid to the plaintiffs or their predecessors. Defendants No.1 to 3 knew that plaintiffs and their predecessors were the mortgagees in possession under whom the defendants were cultivating the land as tenant, had already become the absolute and full owner of the suit land on expiry of period of redemption.

The suit was contested by the defendants on the premise that suit was barred by law of limitation as decree was passed on 01.03.1975, whereas, suit was instituted on 24.05.1986. Neither the decree had been challenged nor relief of declaration was sought. The plaintiffs in the previous suit were duly served and therefore, the decree was legal and binding upon the plaintiffs.

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

- “1. Whether the predecessor of the plaintiffs were the mortgagees in possession of the suit property? OPP*
- 2. Whether the decree dated 1.3.75 is illegal, void and the result of fraud and mis-representation and is liable to be set aside and cancelled? OPP*

3. *Whether the suit is bad for non-joinder of necessary parties? OPD*
4. *Whether the plaintiffs have no locus standi to file the present suit? OPD*
5. *Whether the suit is not within time? OPD*
6. *Whether the suit is barred by principles of resjudicata? OPD*
7. *Relief.”*

The plaintiffs examined Sarup Chand Mohrar Patwari as PW1 and tendered the documents as Ex.P1 to Ex.P19, Mark A, Mark B and Mark C. On the other hand, defendants did not adduce any evidence.

The trial Court on the basis of examination of excerpt Ex.P1 found that suit land remained in possession of the defendants and their predecessors, for, they had become the owners by virtue of decree and dismissed the suit. The Lower Appellate Court in appeal affirmed the findings.

Mr. Rahul Jain, learned counsel for the appellant-plaintiffs submitted that claim in the suit was laid on the premise that decree dated 01.03.1975 was obtained by playing fraud upon the predecessors in interest of the plaintiffs as plaintiffs were not living in the village, and on acquiring the knowledge, the suit was filed, therefore, the plea of limitation could not have been taken. Even otherwise, the defendants were recorded as tenants of the plaintiffs and nor did they redeem the property. The appellants in the absence of redemption had become the owners by efflux of time, therefore,

the suit was liable to be decreed.

Per contra, Mr. Sachin Mittal, learned counsel for respondents No.1 to 3 submitted that simpliciter suit for possession in the absence of relief of declaration challenging the decree dated 01.03.1975 was not maintainable. Conceded case of the appellants was that they were not in possession of the suit land. Once the mortgagee was not in possession, the suit for possession was not maintainable and declaration could not have been laid for claiming the right in the property on the premise of acquiring ownership by efflux of time.

In support of his contention, relied upon the judgment rendered by this Court in **Bawa Ram Nath Singh Vs. Babu Ram (deceased) and Mohan Lal (deceased) and others 1987(1) PLR 62** and urged this Court for dismissal of the appeal.

I have heard the learned counsel for the parties, appraised the judgments and decrees of both the Courts below and of the view that there is no force and merit in the submissions of Mr. Jain, for, simpliciter suit for possession while mortgagee being not in possession was not maintainable. The aforementioned view of mine is derived from paragraphs 15 to 17 of the judgment rendered by this Court in Bawa Ram Nath Singh's case (supra) which read as under:-

“15. The plaintiffs in para No. 7 have stated that defendants took illegal possession from them recently. It has not been specified that on which date the defendants took possession. In para No. 9 of the plaint the plaintiffs have mentioned that

cause of action arose on 1st January, 1969, when the plaintiffs became owners of the land in dispute and about two years earlier when the defendants took illegal possession of the suit land. As noticed earlier, no Khasra Girdawri has been produced on the file to show that the plaintiffs were in actual possession of any part of the land prior to 2 years of the filing of the suit. The suit was filed on 20th July, 1971. The plaintiff examined D.W. Maha Singh lambardar, who has stated that he was realising land revenue from Jawala Singh and Pakhar Singh and that the defendants had never been in possession of the suit land. It was suggested to him that Jawala Singh and Pakhar Singh were cultivating the land owned by Ram Nath Singh. The witness had denied the suggestion. P.W. 2 Pakhar and P.W. 3 Sansar Singh have stated that the suit land was being cultivated by the former and Jawala Singh. Babu Ram plaintiff also appeared in the witness-box as P.W. 5 to support the plaint allegations. This evidence can be hardly relied upon. The plaintiffs have not filed this suit for possession of any particular Khasra number. The suit is for possession of 13 Kanals 3 Marlas being 36/240th share of 92 Kanals 1 Marla. The Plaintiffs are not claiming ownership of any specific part of the suit land. Therefore, it is not understood how the disputed land was being cultivated by Pakhar Singh and Jawala Singh.

16. There is another aspect of the case. As noticed earlier, the name of the mortgagee Hans Raj son of Gonda Ram had been removed from the revenue papers. His name did not find mention in jamabandis for the years 1941-42 and 1945-46. His name as well as the name of Babu Ram were entered in jamabandi for the year 1965-1966. That entry has been held to be invalid. Therefore, on the basis of those wrong entries in the jamabandi the plaintiffs cannot be held to be mortgagees to the suit land. As noticed earlier, they have not been found to be in possession of any part of the land since the mortgage was created.

17. As the possession had not been delivered to the mortgagors, the suit was governed by Articles 63(b) of the Limitation Act, 1908, terminus quo being Jeth, Samvat 1941 B.K. After the expiry of the period of limitation the right of the mortgagees to recover the possession of the mortgaged property was extinguished in view of Section 28 of the Act. Thus they ceased to be mortgagees”

From the plain and simple reading of the plaint, it is evident that the plaintiffs had only filed a suit for possession and no relief of declaration challenging the decree dated 01.03.1975 was sought. The suit was filed in the year 1986, whereas, the decree was of 01.03.1975. The excerpt Ex.P1 proved on record that defendants had been in possession of the suit property as owners. The plaintiffs were required to challenge the

decree by claiming the relief of declaration. In my view, it is too late in a day to put clock back while granting the liberty to the plaintiffs for amendment of the suit.

In view of the aforementioned observations, I do not find any illegality and perversity in the findings rendered by both the Courts below which are based upon the appreciation of oral and documentary evidence, much less no substantial question of law arises for adjudication of the present appeal.

No other argument has been raised.

Resultantly, the appeal stands dismissed.

(AMIT RAWAL)
JUDGE

April 24, 2018
savita

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