

458

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

RSA-4130-1999

Date of decision : 28.02.2018

Sukh Nandan (deceased through LRs)

... Appellant(s)

Versus

Het Ram and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Amit Jain, Advocate
for the appellant(s).

Mr. M.S. Rana, Advocate for
Mr. Ashish Kapoor, Advocate
for the respondents.

AMIT RAWAL, J. (ORAL)

The appellant-plaintiff is aggrieved of the judgment and decree dated 21.08.1999 rendered by the lower Appellate Court, whereby the appeal preferred by the defendants against the judgment and decree dated 30.11.1994 of the trial Court, which had decreed the suit for possession of the suit property, has been allowed, in essence, the suit was dismissed.

It would be apt to give preface of the matter before adverting to the rival contention of learned counsel for the parties.

The appellant-plaintiff instituted the suit, aforementioned, on the premise that he was the owner of the residential Gait marked by letters ABEGHFCD in the site plan (Ex.P-1) as per the measurement and boundaries given hereinbelow:

“Measurement : AG = 63 feet : GH = 58 Feet, HD = 60

feet DA 52 feet;

Boundaries

North - Property of Todar

South Thoroughfare

East Property of Tejram

West Property of Jaggannath;

situated within the *abadi deh* of village Bhagola Tehsil Palwal, District Faridabad. It was averred that the suit property was lying open and the defendants in connivance with each other, encroached upon the portion marked by letters BCEF and EFHG as shown in red colour in the site plan (Ex.P1) by installing *bongas & bitoras* and threatened to dispossess the plaintiff from the portion marked by letter ABCD i.e. the remaining portion of the suit property illegally and forcibly. It is, in this background of the matter, the possession and injunction was sought.

Defendant No.2 was proceeded ex parte, whereas defendant No.1 contested the aforementioned suit by taking plea of limitation, estoppel etc., and on merits, it was submitted that the property marked as GHML in the site plan (Ex.D-1) was owned and possessed of defendant No.1 and the property marked by letters EFGH in the site plan Ex.D1 was already in possession of the plaintiff as owner thereof, therefore, the plaintiff had nothing to do with the property in dispute. The boundaries and the measurement of the suit property mentioned in para No.1 of the plaint were not correct as there had been a long litigation with regard to the partition, wherein civil appeal no.31 of 05.10.1976, it was held that the plaintiff had no share in the properties of the defendant which had already been partitioned. The father of the parties had executed the Will dated 20.04.1970 bequeathing his property in equal share in favour of his sons.

The plaintiff had received ₹400/- from the defendants and he had no right, title and interest, in the suit property and prayed for dismissal of the suit.

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

- “1. Whether the plaintiff is owner of residential gait described in para No.1 of the plaint? OPP.*
- 2. Whether the defendants have encroached upon portion shown by letters ABEF of said residential gait on 20.05.1987? OPP*
- 3. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP*
- 4. Whether the plaintiff has no locus standi to file the present suit? OPD*
- 5. Whether the suit is within limitation? OPD*
- 6. Whether the plaintiff has no cause of action to file the present suit? OPD.*
- 7. Whether the plaintiff is estopped by his own conduct and acquiescence from filing the present suit? OPD.*
- 8. Whether the suit has not been properly valued for the purposes of court fees and jurisdiction? OPD*
- 9. Relief.*

The plaintiff in support of his evidence brought on record the judgment dated 05.10.1976 (Ex.PX) and decree (Ex.PY). He himself appeared as PW-2. The site plan (Ex.P1) was proved through PW-1 Subhash Chand, Draftsman. Harnnarain son of Teekam appeared as PW-3 and proved (Ex.P-2) copy of rough site plan filed in civil suit No.294 of 1971 titled as “Sukhnandan V/s Het Ram Goswara No.52 photostat copy of the same was Ex.PW3/1.

Defendant Het Ram while appearing as DW-4 stated that the length of his gait is 54' and breath is 21', which is bounded as under:-

*“East Gait of Durga Parsahd
West Gait of plaintiff
North Todar
South Thorough fare”*

The trial Court on the basis of the preponderance of the evidence decreed the suit, but the defendant No.1 preferred the appeal before the lower Appellate Court. During the pendency of the appeal, the defendants moved an application for amendment of the written statement by setting up the plea of adverse possession as well as fact that the property possession of which was sought, had been purchased vide unregistered sale deed dated 03.05.1967. It is, in that background, the lower Appellate Court while framing the following issue, sought the report of the trial Court:-

“Issue No.8-A

Whether appellant/defendant Het Ram has become owner of the suit land by way of adverse possession as alleged? OPD.”

The trial Court gave its report dated 04.03.1999 in favour of the plaintiff holding that Het Ram did not lead evidence with regard to the plea of adverse possession. The lower Appellate Court allowed the appeal on the premise that the site plan (Ex.PW-3/1), produced in the previous appeal dated 05.10.1976 viz-a-viz (Ex.P-1) in the present suit, were quite different since the identity of the property was in dispute, in essence, the suit was dismissed. It is, in this background, the present regular second appeal has been filed.

Mr. Amit Jain, learned counsel appearing on behalf of the appellant-plaintiff submitted that the lower Appellate Court has committed illegality and perversity in not noticing a very vital fact that once the defendants had set up a plea of adverse possession by causing an

amendment in the written statement and issue No.8-A had been framed, the identity of the property was not in dispute. The site plan (Ex.P1) in the present case and Ex.D1 was also not in dispute. In fact, there was some misreading of the site plan (Ex.PW-3/1) viz-a-viz Ex.P1, if turned 90° the description was the same. This is what has been held by the trial Court. The defendants did not come forward to lead evidence in support of issue No.8-A, thus, failed to prove the plea of adverse possession. In this conspectus of the matter, the suit was required to be decreed, thus, urges this Court for setting aside the judgment and decree, under challenge, by formulating the substantial questions of law as drawn in the memorandum of appeal.

Mr. M.S. Rana, Advocate for Mr. Ashish Kapoor, learned counsel appearing on behalf of the respondents submitted that the judgment and decree of the lower Appellate Court is perfectly legal and justified and do not call for interference as the same is based upon the preponderance of the evidence. The plaintiff miserably failed to prove the identity of the property and therefore, the suit for possession could not be decreed. It is a settled law that the onus to prove the identity of the property in a suit for possession always lies upon the plaintiff. Having failed to do so, the lower Appellate Court has rightly dismissed the suit, thus, urges this Court for dismissal of the appeal.

I have heard the learned counsel for the parties and appraised the paper book.

The trial Court in its report dated 04.03.1999 after noticing the evidence led by the appellant-plaintiff gave the following finding:-

“In view of the submissions made by Ld. Counsels for both the

parties and on perusal of averments of the witnesses as well as the citations cited by Ld. Counsel on behalf of the plaintiff myself submit a report that Het Ram did not come in the witness box to prove his case. No cogent and convincing evidence is placed on file to prove the adverse possession on the suit land. The report is enclosed with the file. The parties/counsel are directed to appear in the Ld. Court of Addl. District Judge, Faridabad on 9.3.999 at 10.00 a.m. sharp.”

The lower Appellate Court, in my view, has committed illegality and abdication in not noticing the fact that once the defendants had set up a plea for adverse possession, the identity of the encroached property, which was in alleged possession, was not in dispute. Once the defendants failed to prove the plea of adverse possession, it tantamounts to admitting the ownership of the plaintiff. The only question which was required to be pondered upon by the lower Appellate Court was whether there was any encroachment or not. The lower Appellate Court also remained oblivious of the fact that the descriptions of the boundaries given in Ex.P-1 and Ex.D1 were identical, which has not been controverted by the counsel representing the respective parties, even I have also gone through record and seen both the reports, which are identical in nature, therefore, there was no occasion for the lower Appellate Court to lay focus on the site plan (Ex.PW-3/1) part of the judgment dated 05.10.1976 (Ex.PX) and decree (Ex.PY), even the boundaries (Ex.PW-3/1) if seen on 90°, identification and description is identical.

The trial Court while examining both site plans gave the following finding:-

"It is ample clear from the perusal of both the site plan Ex.P1 and PX PW3/1 that the persons whose property are situated

adjacent to the suit property are the same but direction in both the site plans are different. As such there is a technical mistake which has been committed by the Draftsman, who prepared site plan Ex.PW3/1. Due to which direction of Ex.PW-3/1 and Ex.P-1 do not tally with each other. Justice should not be denied on the basis of suchlike technical mistake which has occurred in the instant case.”

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 V/s. 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 substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. 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.

Keeping in view the aforementioned reasons, the judgment and

decree of the lower Appellate Court is suffered from the illegality and perversity and the same is hereby set aside and that of the trial Court is restored, in essence, the suit is decreed.

Resultantly, the the regular second appeal is allowed.

	(AMIT RAWAL)
	JUDGE
	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No