

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

**SAO No. 49 of 2012 (O&M)
Date of Decision: December 01, 2018.**

Surinder Kumar

.....APPELLANT(s).

VERSUS

Rajesh Kumar and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. J.S. Brar, Advocate
for the appellant (s).

Mr. Harsh Aggarwal, Advocate
for respondent No.4

SURINDER GUPTA, J.

This is appeal against the judgement of Additional District Judge, Sri Muktsar Sahib, whereby appeal filed by respondent No.1 was accepted, judgement and decree of the lower Court was set aside and the case was remanded to the lower Court with direction to take evidence on additional issue 1(d) and decide the case afresh.

Appellant-plaintiff filed suit for declaration to the effect that he is owner of shop bearing No.120 measuring 20'x125' as fully described in the head note of the plaint and also sought possession of the same. As per case of the plaintiff, defendant No.1 Sudarshan Kumar (since deceased) represented by his legal representatives respondents No.1 to 3, 6 to 8 and one Urmila Rani (since deceased) was allotted shop in question by the Administrator, New Mandi Township, Punjab, Chandigarh in public auction on 11.06.1973, which was confirmed on 07.11.1973 and thereafter,

defendant No.1 constructed his shop and started his business. He agreed to sell the shop to plaintiff for a sum of ₹1,95,000/- vide agreement dated 09.06.1989 and received earnest money of ₹20,000/-. It was agreed that sale deed will be executed in favour of plaintiff within 6 months from the execution of the registered sale deed/conveyance deed in favour of Sudershan Kumar by Administrator, which was executed on 26.11.1991. Thereafter, in terms of agreement, he executed registered sale deed of the shop in dispute in favour of plaintiff on 24.03.1993. He also delivered the original conveyance deed issued in favour of plaintiff. The property was in possession of the firm M/s Bhai Narender Singh Sudershan Kumar, which was carrying on business of commission agent. They continued to be in possession of shop in dispute on the yearly rent of ₹20,000/- w.e.f. 25.03.1993 and paid advance rent of ₹40,000/-. The defendant evaded to pay rent from 01.04.1995 onwards on the pretext that defendants No.2 to 4 i.e. Rajesh Kumar, Rakesh Kumar and Anil Kumar sons of Sudarshan Kumar have executed a sale deed of the disputed shop on the basis of family partition, in favour of defendant No.5 Harnirpal Singh. Mutation bearing No.22880, 22880/1 and 22881 were entered on the basis of family partition dated 15.11.1993 and a rapat in this regard was entered on 31.08.1993. Conveyance deed in favour of Sudershan Kumar was registered on 26.11.1991, as such his sons were not authorised to execute any sale deed in favour of defendant No.5 on 10.09.1991.

Defendant No.1 Sudarshan Kumar, filed separate written statement stating therein that he was no longer partner of firm M/s Bhai Narender Singh Sudarshan Kumar. He, however, denied the agreement and

execution of the sale deed by him in favour of plaintiff. It was pleaded that vide family settlement dated 15.02.1990, he relinquished all his rights in the property in favour of his sons. To similar effect is the separate written statement filed by defendants No.2 to 4.

Defendant No.5 in his written statement alleged that he had purchased the suit property from defendants No.2 to 4.

Pleadings of parties led to the framing of issues as follows:-

1. Whether the plaintiff is entitled for declaration, as prayed for? OPP.
2. Whether the shop, in dispute, fell to the share of defendants no.2 to 4, vide memorandum of family partition? OPD
3. Whether the defendant No.5, is a bonafide purchaser of property? OPD
4. Whether the suit of the plaintiff is barred by limitation? OPD
5. Whether the suit of the plaintiff is not maintainable, in the present form? OPD
6. Whether the plaintiff is estopped by his own act and conduct, from tiling the present suit? OPD
7. Whether the plaintiff has no locus standi, to file the present suit? OPD
8. Whether the plaintiff has not come to the court with clean hands? OPD
9. Whether the plaintiff has not properly, valued for the purpose of court fee? OPD
10. Relief.

Following additional issues were framed on 12.09.2011:-

- 1(a) Whether the defendant no.1, took property on 25.3.2003, on rent from defendant no.6, at yearly rent of ₹20,000/-, if so to what effect?OPP

- 1(b) Whether the defendants disclosed the right of tenancy and claimed defendant no.5, as owner of the property, and therefore, forfeited the tenancy rights?OPP
- 1(c) Whether the defendants have denied the tenancy rights, and the defendant no.5, has claimed the ownership rights, and therefore, forfeited the tenancy rights of the property, if so, its effect?OPP

Learned lower Court took issues No.1 to 4, 1(a) to 1 (c), together and recorded the finding on all these issues in favour of plaintiff and against the defendants. The findings on issue No.5 to 9 were also recorded against the defendants.

In appeal, learned Additional District Judge, observed that learned lower Court has not recorded any specific finding on issue No.1(a) to 1 (c) and issue No.3. It was also observed that on the specific pleadings of defendant No.5 that he is in possession of the disputed shop for the last more than 12 years and have become owners of it by way of adverse possession, additional issue No.1(d) was framed as follows:-

“1(d) Whether defendant no.5, is in possession of the suit property from the last more than 12 years i.e. w.e.f. 11.09.91, and his possession is hostile, open, under the colour of title, to the knowledge of all, and sundry. Hence, on the basis of said adverse possession, defendant no.5, has become absolute owner of the property?OPD5”

With the above observation, the judgment of the lower Court was set aside and the case was remanded for fresh decision as per observations in para 27 of the judgment as follows:-

“Therefore, in view of the above said discussion, held by me, in detail, the judgement, and decree, passed by the

trial court, is not sustainable. Hence, the same is set aside, with no order as to costs, and case is remanded back to the trial court, with direction to take the evidence, on additional framed issue 1(d), and then decide the case afresh, by giving specific findings, on each, and every issue. The parties, are directed to appear before the trial court on 22.08.2012.”

Issue No.1(a), 1(b) and 1(c) framed in this case pertain to the tenancy of defendant No.6 and learned Appellate Court had taken note of the findings recorded by learned Civil Judge in para 24, which reads as follows:-

“24. This court is of the firm opinion, that after the execution of the sale deed, mind of Defendant No.1, changed and he took the property, on lease basis, as he was, in occupation and agreed to pay the rent, which was being received by plaintiff, and subsequently, entered into sham transaction of family settlement. The mutation, which, was also not got entered immediately, which is also a cause to suspect, the bonafide of execution of the said family settlement. Accordingly, the defendants no.2 to 4, had no title to convey, through execution of sale deed, in favour of defendant No.5. Hence, no title, was conveyed, in favour of defendant No.5, through the sale deed, executed by defendants no.2 to 4, which is a waste piece of paper.”

On issue No.1(b), learned lower Court has observed that plaintiff is entitled to seek possession on the basis of title and the jurisdiction of Civil Court comes into picture when the tenant claims title over the property. It was further observed that the defendants have

manipulated record, created sham transaction of family settlement and got executed the sale deed dated 10.09.1991. In view of above finding, it was not correct on the part of learned lower appellate Court to state that the findings on issues No.1(a) to 1(c) have not been recorded.

Now, I have a look on the written statement filed by defendant No.5. He had raised plea that he is bona fide purchaser of the suit property and became owner of the shop by way of adverse possession. So far as his plea that he is bona fide purchaser of the property in question, a specific issue was framed in this regard and opportunity was given to lead evidence. However, the lower court has not framed issue that he had also become owner of the suit property by way of adverse possession. Learned first Appellate Court framed additional issue No.1(d) to this effect. Framing of additional issue was no reason to set aside all the other findings recorded by the lower Court on merits. The first Appellate Court could call for the report of the lower Court on this issue and after receiving the report, decide the appeal on merits instead of setting aside all the findings recorded by the lower Court on other issues.

In view of my above discussion, this appeal is partly accepted. Judgment of the first Appellate Court accepting the appeal of respondents No.1 and 2 and setting aside judgment of lower Court, is set aside. However, order of first Appellate Court remanding the case with direction to the lower Court to record the evidence on issue No.1(d) and record the findings on issues No.3 and 1(d), is maintained. The lower Court after recording findings on issue No.3 and 1(d), as per direction of the first Appellate Court, will send its report within a period of six months and after

receipt of the report, first Appellate Court will decide the appeal on merits.

The parties are directed to appear before Additional District Judge, Sri Muktsar Sahib on 17.12.2018.

Learned Additional District Judge will take the file of the appeal on board and proceed with the same as per the observations above.

December 01, 2018.
Sachin M.

(SURINDER GUPTA)
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes/No</i>
<i>Whether Reportable:</i>	<i>Yes/No</i>