

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

RSA-1680-2002(O&M)

Date of decision:-11.12.2019

Rura Mal

...Appellant

Versus

Karnail Singh and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Sudeep Mahajan, Advocate
for the appellant.

Mr.Vishal Aggarwal, Advocate
for the respondents.

H.S. MADAAN, J.

In nutshell, facts of the case are that plaintiff – Rura Mal son of Rattan Chand, resident of village Bamial, Tehsil Pathankot, District Gurdaspur, now District Pathankot, had brought a suit against the defendants i.e. Karnail Singh son of Kharkoo and his sons, namely, Swaran Singh, Janak Singh, Narain Singh and Yash Pal Singh, all residents of the same village seeking possession of land

measuring 0 kanal 12 marlas comprised in khasra No.49-R/9/2/2 after removal of every sort of malba besides craving for grant of permanent injunction, as a consequential relief, restraining the defendants No.1 to 5 from raising further construction at the site so as to change its existing position.

As per the version of the plaintiff, he is owner of the suit land as is evident from copy of jamabandi for the year 1989-1990 attached with the plaint; defendant No.1 is having no concern with the suit property but he has illegally and unauthorisedly encroached upon an area of land measuring 0 kanal 12 marlas out of khasra No.49-R/9/2/2 belonging to the plaintiff and in the recent past has raised construction of a shop illegally without any right, title or interest; the plaintiff had got the land demarcated and the Local Commissioner found illegal and unauthorised possession over a piece of land measuring 0 kanal 12 marlas comprised in khasra No.49-R/9/2/2. The plaintiff requested the defendants several times to remove the illegal structure raised by them and to deliver the vacant possession thereof to the plaintiff but to no effect. As such, the plaintiff filed a suit, which was assigned to the Court of Civil Judge(Jr.Divn.), Pathankot.

On getting notice, all the defendants appeared and filed a joint written statement contesting the suit, *inter alia* raising preliminary objections contending that the suit was not maintainable

in the present form; that the suit was time barred; that the act and conduct of plaintiff estopped him from filing the suit; that suit was bad for non-joinder of defendant No.2 to 5; that the defendants had become owners of the suit land being in adverse possession thereof for more than 12 years and that the suit had not been properly valued for the purpose of Court fee and jurisdiction. On merits, all the defendants denied ownership of the plaintiff over the suit land or defendants having encroached upon any part of khasra No.49-R/9/2/2 or having raised construction of shop over there. According to the defendants, the alleged demarcation report dated 14.6.1994 is incorrect, vague and the same is not as per High Court Rules and Orders and instructions issued by Financial Commissioner (Revenue), Punjab; that as a matter of fact the defendant No.1 owns land adjoining to the suit land and is in possession of the same since last many years as owner in possession thereof; the plaintiff has no concern with the same; even if it is proved that the land under possession of defendants is owned by the plaintiff, in that case defendant No.1 has become owner thereof by way of adverse possession being more than 12 years old, continuous, hostile, open, notorious and to the knowledge of all concerned including the plaintiff, as such the defendant No.1 has become owner in possession of the suit land by way of adverse possession. Refuting the remaining assertions in the plaint, the defendants prayed for dismissal of the

suit.

The plaintiff had filed replication controverting the allegations in the written statement whereas reiterating the averments in the plaint.

On the pleadings of the parties, following issues were framed:

1. Whether the plaintiff is owner of the suit land? OPP.
2. Whether the defendant No.1 has illegally encroached upon an area of 12 Mls. from the suit land? OPP.
3. Whether the suit is not maintainable in the present form? OPD.
4. Whether the suit of the plaintiff is barred by limitation? OPD.
5. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD.
6. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD.
7. Whether defendant No.1 has become owner of the portion under his possession by virtue of adverse possession? OPD.
8. Whether the suit is false, frivolous and vexatious? OPD.
9. Whether the defendants are entitled to specific compensatory costs U/S 35-A CPC. If so to what extent? OPD.
10. Whether the suit is not property valued for the purposes of Court fee and jurisdiction? OPD.
11. Whether the plaintiff is entitled to possession of 12 Marlas of

suit land as prayed for? OPP.

12. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP.

13. Relief.

Both the parties led evidence in respect of their respective claims.

After hearing the learned counsel for the parties, the trial Court had decided issues No.1, 2, 11 and 12 in favour of the plaintiff, issue No.7 against the defendants, issues No.3, 4 to 6 and 8 to 10 against the defendants. Resultantly, suit of the plaintiff was decreed with costs for possession of land measuring 0 kanal 12 marlas comprising in portion of khasra No.49-R/9/2/2 situated in the revenue estate of village Bamial as per the jamabandi for the year 1989-90 after removal of every sort of malba as per the report of the Local Commissioner dated 14.6.1994 in demarcation case No.18 decided on 29.6.1994. In addition to that a decree for permanent injunction restraining the defendants from raising further construction over the site in dispute so as to change its existing possession was passed in favour of the plaintiff and against the defendants. This was so done vide judgment and decree dated 7.10.1998.

The defendants felt aggrieved by the said judgment and decree and they had filed an appeal before the Court of District

Judge, Gurdaspur, which was assigned to Additional District Judge, Gurdaspur, who vide judgment and decree dated 17.1.2002 accepted the appeal, set aside the judgment and decree passed by the trial Court and dismissed the suit of the plaintiff.

Now it was turn of the plaintiff to feel dissatisfied and he had filed the present regular second appeal before this Court, notice of which was issued to the respondents, who put in appearance through counsel.

I have heard learned counsel for the parties besides going through the record.

Learned counsel for the appellant/plaintiff has contended that the defendants have encroached upon 12 marlas of land belonging to him having part of khasra No.49-R/9/2/2. They have raised construction of a shop over the encroached portion, which was revealed from the report of Local Commissioner. The trial Court had rightly decreed the suit but that judgment and decree was wrongly upset by learned Additional District Judge, Gurdaspur. That wrong be undone by way of acceptance of the present appeal and judgment of the trial Court be restored.

Whereas, this request is being opposed vehemently by the respondents side.

After hearing learned counsel for the parties and going through the record, I find that no fault can be found with the report of

Local Commissioner, who had carried out the demarcation. Sh.Munni Lal had been deputed to conduct the demarcation as per order of Assistant Collector Second Grade, Bamial. The Local Commissioner had gone to the spot on 14.6.1994 and carried out the demarcation submitting his report Ex.P2, site plan showing the encroached area photocopy Ex.P3. Before going to the spot Sh.Munni Lal, Local Commissioner had issued notice to both the parties. If the defendants had not turned up at the spot despite being informed regarding the date of demarcation, it was their sweet will and now they cannot condemn the demarcation report Ex.P2 for the reason that demarcation had been conducted at their back. The Local Commissioner was required to issue prior notice to both the parties, which he did. He cannot be expected to bring both the parties to the spot forcibly or by persuasion. Therefore, the factor which weighed heavily on the mind of learned Additional District Judge, Gurdaspur was that the demarcation had been conducted in absence of the defendants or their representatives. The Local Commissioner had found two pucca burjis in khasra No.32R/1 and 49R/1/1, whereas another pucca burji was found in area of village Anial. The Local Commissioner with the help of three points had made rectangle of killa No.49R/1/1, 1/2, 1/3, 2, 3/1, 3/2, 4/1, 4/2 and 49/R/5/1,5/2,9/1,9/2,11. The mutation No.2175 dated 27.3.1965 had resulted into by bifurcation of Killa No.49R/9/2 into 9/2/1(7-17) and

9/2/2(1-4) on the basis of Tatima. Therefore, no fault can be found with the approach of the Local Commissioner in doing so.

Though on behalf of learned counsel for the defendants, it has been contended that demarcation had not been carried out strictly in accordance with High Court Rules and Orders and instructions issued by Financial Commissioner (Revenue), Punjab but defendants could not show as to which rule and order and instruction of Financial Commissioner (Revenue), Punjab was deliberately and intentionally violated by the Local Commissioner, who had carried out the demarcation. The observations of the trial Court on such aspect are very proper and appropriate. Relevant para No.9 of the judgment of the trial Court is being reproduced as under:

9. But from the appreciation of the pleadings and evidence led by both the parties, the picture emerges that in the pleadings itself the defendant has stated that the “suit of the plaintiff is liable to be dismissed as defendants are in possession of the suit land since the last more than 12 years. Even if the suit land is found to be the ownership of the plaintiff, the possession of defendants over the suit land referred above is hostile, continuous, open, notorious, uninterrupted and within the knowledge of all concerned including the plaintiff....”

The said pleadings find mention in para No.4 of the

preliminary objections. The suit land has been clearly stated to bear Khasra No.49R/9/2/2 as is evident from the headnote of the plaint. Now to argue that while drafting the written statement, the defendant had in mind of the suit land comprised in Killa No.49R/9/2/1(7 kanal – 17 Marla) suit regarding which was pending in the other Court is of no excuse. The admission recorded by the defendant in the written statement is unequivocal. The perusal of copy of jamabandi Ex.D4 shows that the plaintiff is the owner of the disputed khasra No. and by pleading adverse possession over the disputed land, the defendant by implication has admitted his encroachment over 12 marlas of land out of Killa No.49/9/2/1. Now the suit for possession of the disputed land filed by the plaintiff can fail only if the defendant is able to prove his adverse possession over the disputed land for more than 12 years, continuously, hostile, to the knowledge of the plaintiff but in his examination-in-chief DW2 himself states that the shops were raised 6/7 years ago. The statement of DW2 was recorded on 30.9.97, which means and imply that the shops were constructed in the year 1990-91 and it cannot be said that the alleged adverse possession of defendant No.1 has matured into full-

fledged ownership debarring the plaintiff to sue for possession. Due to unequivocal stand of the defendant taken in written statement that they have become owners of the “disputed land” by adverse possession, clinches the issue that the defendants talk about the land comprised in Killa No.49R/9/2/2 and more precisely shown as encroached area in the site plan Ex.P3. In such a situation, the defendants cannot wriggle out of the admission of having encroached the suit land and thrust responsibility upon the plaintiff to prove the Khasra number borne by the encroached property. Not only the admission of the defendants, even the report of Local Commissioner clearly shows that the demarcation was conducted as per rules. If after the service of the summons, defendant No.1 did not opt to present himself at the time of demarcation, is not sufficient to discard the demarcation report being ex parte. The demarcation report states that the same was conducted from pucca sihadas. The defendants did not get the dispute property demarcated on on their own. As such, it is evident that the suit property forms part of Killa No.49R/9/2/2 and the defendants have encroached upon the same by raising shop thereon and the plaintiff being the owner

thereof is entitled to recover the vacant possession of the same from the defendants. The defendants also cannot raise further construction over the disputed land and the plaintiff is entitled to decree for permanent injunction as prayed for. As such findings on issue Nos.1, 2, 11 and 12 are recorded in favour of the plaintiff where that on issue No.7 against the defendants.

However, learned Additional District Judge, Gurdaspur by erroneous analysis of the legal as well as factual position had wrongly set aside the judgment of the trial Court.

One more plea put forward on behalf of the defendants was that when the land was situated on the boundaries of two villages in cases of such dispute, the demarcation is to be conducted by the officer of the level of Tehsildar. However, even, if such contention is taken at its face value, that does not help the defendants much because in this case the demarcation had been conducted of the land situated at village Bamial and it is not a case where the land of two different villages situated on the boundary had been carried out. Therefore, it cannot be said that demarcation in hand having not been carried out by Tehsildar cannot be taken into consideration. Learned Additional District Judge, Gurdaspur has observed that the Local Commissioner has further reported that 12 marlas of land out of khasra No.49R/9/2/2 is in possession of PWD, B&R Department,

where a metalled road had been constructed but there is no such case of the plaintiff. This fact has also been taken against the plaintiff, which should not have been taken. Nevertheless the passing of the metalled road through khasra No.49R/9/2/2 is a different matter. However, we are to see whether the defendants had encroached upon any part of such khasra number belonging to the plaintiff and as it comes out from the report of Local Commissioner, they have in fact grabbed 12 marlas of land belonging to plaintiff out of khasra No.49R/9/2/2 and then raised construction of shop over it. The judgment passed by Additional District Judge, Gurdaspur is not sustainable since it shows lack of application of mind and inability to properly understand the legal and factual position.

The defendants have also taken up plea of adverse possession, which has been dealt in a proper and appropriate manner by the trial Court. The defendants had failed to prove that they have been in open, continuous, notorious, hostile possession of the site for more than 12 years. Rather it comes out that the shop had been constructed by defendants somewhere in the year 1990-91. The suit had been filed in the year 1994. therefore, the possession of the defendants could not have matured into adverse possession by any stretch of imagination.

Learned counsel for the appellant has referred to various judgments first being **Brijesh Kumar and another Versus Shardabai**

(Dead) by legal representatives, (2019) 9 Supreme Court Cases 369

wherein it was observed that a person pleading adverse possession has no equities in his favour as he is trying to defeat rights of true owner, therefore it is for him to clearly plead and establish all facts necessary to establish adverse possession. It was further observed in the judgment that mere possession does not ripen into possessory title until possessor holds property adverse to title of true owner and the onus is on the claimant to establish (i) when and how he came into possession; (ii) nature of his possession; (iii) factum of possession known and hostile to other parties; and (iv) continuous possession over 12 years which was open and undisturbed.

Learned counsel has further referred to judgment **Tribhuvanshankar Versus Amrutlal, 2014(1) Civ.CC 360** by the Apex Court wherein it was observed that once a suit for recovery of possession against the person who is in adverse possession is filed, the period of limitation for perfecting title by adverse possession comes to a grinding halt and such adverse possession does not continue to run after filing of the suit irrespective of time spent in the suit.

Learned counsel for the appellant has also pressed into service **State of Haryana Versus Mukesh Kumar and others, 2011(10) SCC 404** by the Apex Court and **Dagadabai (Dead) by LRs Versus Abbas @ Gulab Rustum Pinjari, 2017(3) CivCC 311** in

support of his contentions that defendants have been unable to establish that they have become owners of the suit property belonging to the plaintiff by way of adverse possession.

Resultantly the judgment and decree passed by Additional District Judge, Gurdaspur are set aside and the judgment and decree passed by the trial Court decreeing the suit of plaintiff are restored.

The appeal stands allowed accordingly with costs.

11.12.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No