

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.2071 of 2019

Date of Decision:15.10.2019

Sohan Lal (since deceased) and others

.....APPELLANTS

Vs.

Gian Singh

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE DR. RAVI RANJAN

Present: Dr.Naresh Kaushik, Advocate for the appellants.

DR. RAVI RANJAN, J.(Oral Judgment)

The Judgment and Decree dated 01.03.2019 passed by the Additional District Judge, Hosiarpur in Civil Appeal No.RBT No.155 is under challenge in the present Appeal by which the First Appellate Court has dismissed the appeal filed by the defendants-appellants preferred against the Judgment and Decree dated 15.01.2016 passed by the Civil Judge (Junior Division) Mukerian in Civil Suit No.694 of 2011, by which the suit filed the plaintiff-respondent was decreed and counter claim of the defendants-appellants was dismissed.

The dispute between the parties revolves around the agreement to sell executed between the parties regarding transfer of the suit property extended on 20.12.1991 for a sum of Rs.30,000/-. This is further admitted position that possession of the suit property was delivered by the plaintiff to the defendants-appellants in pursuance to the agreement to sell dated 20.12.1991. However, when the sale deed was not executed by the plaintiff-respondent, the defendants-appellants instituted a suit for specific performance of the said agreement to sell which was decreed by the Trial Court but the Judgment and

Decree of the Trial Court was set aside by the First Appellate Court vide Judgment and Decree dated 18.11.1997 and in place of a direction for execution and registration of the sale deed, alternative decree of recovery of money was granted with interest.

The said Judgment and Decree of the First Appellate Court was put to challenge by way of Regular Second Appeal preferred by the defendants-appellants before this Court but it was also dismissed in the year 2009 and even the Special Leave Petition (SLP) No.2501 of 2010 filed by Sohan Lal before the Hon'ble Supreme Court was also dismissed on 19.03.2010. At the same time, another suit was filed by the plaintiff-respondent being Civil Suit No.439 of 1992 for grant of permanent injunction restraining the defendants-appellants from interfering in legal and peaceful possession of the plaintiff being owner of the suit land, and in alternative, for recovery of possession of the suit land. That suit was also dismissed. The First Appeal No.1001 of 1995 preferred by the plaintiff-respondent was also dismissed on 18.11.1997. Then he preferred Regular Second Appeal No.130 of 1998 which was dismissed as withdrawn on 26.08.2009(Ex.D-2). In the meantime, it appears that the plaintiff-respondent filed Execution Petition at Dasuya before the Executing Court for grant of possession of the suit land on payment of Rs.40,800/- which was lying deposited in Court. The Executing Court, however, vide its order dated 28.05.2010 has held that since the amount payable to the defendants as per the decree dated 18.11.1997 was already deposited in the Court alongwith interest, the same should be remitted to the defendants and dismissed the Execution Petition as satisfied.

Obviously, the Executing Court did not pass any order regarding possession of the suit land in favour of the plaintiff-respondent. The plaintiff-

respondent moved before the Court by filing Revision Petition assailing the aforesaid order passed by the Executing Court but the High Court refused to interfere in the said order and did not pass any order for possession. The plaintiff-respondent, thereafter, filed a Special Leave Petition No.15877 of 2011 before the Hon'ble Apex Court which was dismissed on 07.07.2011 with liberty to the plaintiff-respondent to move before the appropriate Court if the same is permissible in law. Thereafter, the present suit was filed by the plaintiff-respondent for recovery of possession of the suit land in his favour. The defendants-appellants filed a written statement refuting the allegations made in the plaint chiefly on the ground that, since the earlier suit, i.e., Civil Suit No.439 of 1992 which was filed not only for a grant of decree of permanent injunction but also, in alternative, for grant of a decree of recovery of possession in favour of the plaintiff, having been dismissed, the subsequent suit for recovery of possession of the suit land in favour of the plaintiff would be barred by the principle of *res judicata* as cast under Section 11 of the Code of Civil Procedure (for brevity "the CPC"). The defendants-appellants, apart from countering allegation in the written statement, has filed a counter claim also to that extent, i.e., for declaration that the plaintiff's suit is barred by provisions of Section 11 of Order 2 Rule 2 of the CPC and also for declaration of their title with respect to the suit land on the ground that the defendants were in possession adverse and hostile to the plaintiff w.e.f. 18.11.1997 till 18.11.2009, i.e., more than continuous 12 years.

The Trial Court, on appreciation of rival pleadings, framed following issues:-

- “1. Whether the plaintiff is entitled to the relief of joint possession of suit land? OPP
2. Whether the plaintiff is entitled to recovery of Rs.25,000/- as share of Mesne Profits? OPP
3. Whether the suit of the plaintiff is within the limitation ? OPP
4. Whether the suit of the plaintiff is barred under Section 11 of Order 2 Rule 2 CPC? OPD
5. Whether the suit of the plaintiff is not valued properly for the purpose of Court fee and jurisdiction? OPD
6. Whether the plaintiff is estopped to file the present suit by his own acts, conducts? OPD
7. Whether the defendants are entitled to recover relief of declaration as prayed for? OPD
8. Whether the defendants have become owners on the basis of adverse possession? OPD
9. Whether the counter claim filed by the plaintiff is totally wrong, illegal, false and frivolous? OPP
10. Relief.”

From perusal of the issues, it appears that specific issue was framed as to whether the suit of the plaintiff is barred under Section 11 read with Order 2 Rule 2 of the CPC and issue No.8 as to whether the defendants have become owners on the basis of adverse possession.

After appreciation of the materials on record including the evidence led by the parties, the Trial Court returned the findings in favour of the plaintiff and dismissed the counter claim. So far the issue of suit being barred by principle of *res-judicata*, it recorded a finding that the cause of action being different entirely from the cause of action being there in Suit No.439 of 1992, it cannot be held that the matter and issue was decided conclusively between the parties in the previous suit.

So far the issue of adverse possession is concerned, the Trial Court has held that time spent in litigation cannot give the defendants any legal right

to claim adverse possession of ownership by efflux of time.

Having held so, the Trial Court has granted the relief by decreeing the suit and dismissing the counter claim.

The defendants-appellants preferred Civil Appeal assailing the aforesaid Judgment and Decree, however, the same was also dismissed and the findings of the Trial Court has been affirmed by the First Appellate Court. Hence, this Appeal has been preferred by the defendants-appellants.

In the aforesaid background of the factual matrix, I have heard learned counsel for the appellants at length and have perused the records of this case.

Learned counsel for the appellants assails the impugned Judgement and Decree on diverse grounds.

The first and foremost ground which has vehemently been argued before this Court is regarding suit being barred by principle of *res judicata*. It is contended that once the suit for possession filed by the plaintiff-respondent on earlier occasion was dismissed and the plaintiffs withdrew the Regular Second Appeal preferred against the Judgement and Decree of the First Appellate Court affirming the views of the Trial Court, the subsequent suit would be barred by Section 11 of CPC.

However, the question would be as to whether the cause of action of both the suits was also one and the same?

It is admitted that an agreement to sell was executed between the parties on 20.12.1991 and the consideration amount was fixed to be of Rs.30,000/- for transfer of the suit property in favour of the defendants-appellants by the owner, i.e., the plaintiff-respondent. In lieu of such agreement itself, it is further admitted position that the possession was delivered to the

defendants-appellants but after that delivery of possession, the defendants-appellants cannot be held to be in possession adverse and hostile to the plaintiff because the possession was given willingly in favour of the Sohan Lal and perhaps this is the reason that the appellants are not seeking declaration of possession adverse to the plaintiff from that date rather they are seeking declaration from the date on which the decree passed by the Trial court in the Suit filed by the defendants-appellants got reversed or modified by the First Appellate Court and the plaintiff was directed to return earnest money alongwith interest, i.e., since 18.11.1997. This is further admitted position that the defendants-appellants were not satisfied with the said decision of the First Appellate Court, therefore, they preferred Second Appeal before this Court but that was dismissed in the year 2009 and even the Special Leave Petition (SLP) filed before Hon'ble Supreme Court also stood dismissed. The plaintiff-respondent tendered the decreetal amount in the Court but it is contended that till date, the defendants-appellants have not made any effort for disbursement of that amount in their favour.

In the meantime, an execution case was filed by the plaintiff-respondent in which a prayer was made for restoration of possession in favour of the plaintiff as the plaintiff has already deposited the decreetal amount. However, the Executing Court only passed the order that since the decreetal amount has been deposited, decree stands satisfied and closed the proceeding. It did not pass any order regarding restoration of possession saying that the Appellate Court has not passed any order for restoration of possession in favour of the plaintiff. The plaintiff-respondent, even then, in place of filing a suit, filed a Civil Revision before this Court which was also dismissed and even the Special Leave to Appeal Petition filed by the plaintiff-respondent against that

order was also dismissed. However, liberty was granted to take resort to a legal remedy.

Now the situation is like this-admittedly earnest money was paid by the defendants in favour of the plaintiff at the time of execution of agreement to sell and the possession of the suit land was delivered by the plaintiff in favour of Sohan Lal at same time but the sale deed was never executed. Suit for specific performance of the agreement to sell was filed by the defendants-appellants which was decreed directing the plaintiff-respondent to execute sale deed in favour of the defendants but that decree was put to challenge in Civil Appeal before the First Appellate Court. The First Appellate Court modified the decree by reversing that part of the Judgment by which a direction was given to execute sale deed rather it directed the plaintiff-respondent to deposit the earnest money along with interest. Now even if such direction of restoration of possession was not given in the Judgment and Decree and the same was refused by the Executing Court because there is no such direction in Judgment and Decree and so have been done by this Court in Second Appeal and also by the Hon'b'le Apex Court but granting liberty as aforesaid, whether ordinarily, a person can be brought in a situation in which he or she does not have any remedy especially when, in the suit filed for specific performance, no direction was given for execution of the sale deed? Once it is not given that means that after payment of the earnest amount alongwith interest, the possession which was admittedly given by the plaintiff-respondent in favour of the defendants at the time of execution of agreement to sell on payment of earnest money for execution of the sale deed by which title was to be transferred in favour of the defendants but that having not been done and Court having directed the plaintiff-respondent only to return the earnest money alongwith interest, the plaintiff was not entitled

to retain possession even after such amount has been returned by him to the defendant? For such purpose, it would be immaterial as to whether, even after such amount has been deposited before the Executing Court, the same has been withdrawn by the defendants-appellants or not. This is the reason why the Hon'ble Apex Court had granted liberty to the plaintiff-respondent to take legal recourse because in a suit filed by the defendants-appellants for specific performance of contract, a direction to restore back the possession in favour of the plaintiff-respondent by the defendant in that suit, was not possible. Therefore, rightly such direction was not given by the Courts including the Executing Court. In such a situation, the plaintiff-respondent did not have any option than to file a fresh suit for recovery/restoration/restitution of possession in his favour. This cause of action was entirely different from the cause of action which was available to him in the earlier Civil Suit No.439 of 1992. In that case, the allegation was that possession was delivered in favour of the defendants-appellants but it was the defendants-appellants who did not appear for execution of sale deed by paying the sale consideration.

This Court would not form any opinion on whether the afoersaid allegation was right or wrong because that suit has already been dismissed. However, since agreement to sell was admitted and delivery of possession was also willingly given, therefore, the suit for permanent injunction was not available at that point of time especially in view of the fact that the Trial Court has taken notice of the fact that the defendants-appellants have already instituted a suit for specific performance of contract. Unless that suit was decided, there was no cause of action available to the plaintiff-respondent to recover the possession which was willingly given by him to the defendants-appellants in lieu of the earnest money received under the agreement to sell.

Having said so, I am of the firm opinion that in view of the changed circumstance, new cause of action as stated above coupled with the fact that Hon'ble Apex Court has also granted liberty to take a legal recourse, subsequent suit filed by the plaintiff-respondent would not be barred by the principle of *res judicata*.

This takes this Court to the next question raised by learned counsel for the appellants. It is contended that since November, 1997, when the First Appellate Court had modified the decree of the Trial Court in the suit for specific performance filed by the defendants-appellants, by directing the plaintiff-respondents to pay back the earnest money alongwith interest from that day, the defendants were in possession of the suit property hostile to the plaintiff and, therefore, since the suit was filed after 14 years and they are in continuous possession hostile to the plaintiff for more than 12 years, they have perfected their title on account of possession adverse to the plaintiff.

Prima facie, this limb of argument appears to be attractive but on deeper scrutiny of the matter, the same is noted only to be rejected for the following reasons:-

This point could have been raised by the defendants-appellants in case the plaintiff would have sat idle and had made no effort even after payment of the decretal amount for getting back the possession but the plaintiff filed an execution case and paid the decretal amount therein and also prayed for restoring back the possession after disbursement of that decretal amount in favour of the defendants but the Executing Court has taken a view that the same was not possible because there was no direction of the concerned Court. Then a Civil Revision was also filed which was dismissed and then SLP was also filed which was also dismissed by the Hon'ble Apex Court and during all the period,

some case was pending between the plaintiff and the defendants. It is not that the issue was not being raised. Therefore, merely, since the plaintiff chose a wrong forum or in view of the time taken in the litigation by different Courts, i.e., the systematic delay, it cannot be considered that the defendants in the meantime perfected title on account of adverse possession. Thus, in my considered view, both the Courts below have taken a correct decision by holding that the defendants cannot be held to have perfected the title by adverse possession when both the parties were still fighting the issue in between them and delay was a systematic delay.

Having held so, in my view, no cogent ground or substantial question of law could be raised by learned counsel for the appellants warranting any interference of this Court in the Judgment and Decree passed by both the Courts below.

In the result, this appeal, being devoid of any merit, is dismissed.

However, before parting with the matter I must indicate that no other ground has been raised on behalf of the appellants save and except same that have already been discussed as above.

(DR. RAVI RANJAN)
JUDGE

15.10.2019
Anjal

Whether speaking/reasoned?	Yes/No
Whether reportable?	Yes/No