

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH

RSA No.3809 of 2013 (O&M)

Date of Decision: 28.03.2019

Satnam Singh

...Appellant

versus

Jit Ram

...Respondent

**CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH**

Present:- Mr. Sarju Puri, Advocate  
for the appellant.

Mr. Deepak Verma, Advocate,  
for the respondent.

**Amol Rattan Singh, J.**

This regular second appeal has been filed by the defendant in a suit instituted by the respondent herein (now represented by his LRs), by which he sought possession of a house marked as ABCD, shown in red in the site plan annexed with the plaint.

The suit was dismissed by the learned trial court (Additional Civil Judge (Senior Division), Garhshankar), with that judgment and decree however reversed by the learned 1<sup>st</sup> appellate court, thereby decreeing the suit in favour of the respondent-plaintiff, leading to the filing of this appeal by the defendant.

2. As per the case of the respondent herein (plaintiff), he and his father Banta constituted a Joint Hindu Family, with the suit property being owned and jointly possessed by hem 'as co-parceners'.

Banta died on 02.07.1992 leaving behind the plaintiff as his sole legal heir and as such the plaintiff claimed that he had become the owner of

the suit property.

He also stated in the plaint that his sister, Sibbo, was abandoned by her husband after marriage and therefore she was residing in the suit property with their father, i.e. Banta, with the defendant (present appellant) being the son of another sister of the plaintiff (not the son of Sibbo).

3. The plaintiffs' claim was that a mutation of inheritance having been sanctioned qua the estate of his father in his (plaintiffs') favour, his sister, Sibbo, instituted Civil Suit no.143 of 1993 against him and others, qua the estate of Banta, with that suit having been dismissed on 28.04.1998.

Sibbo is stated to have died during the pendency of that suit, with the appellant herein having thereafter contested it as her legal representative. The appeal filed by him before the Additional District Judge in that suit was also however dismissed on 14.01.2003, with that judgment and decree having become final.

Hence, the plaintiff (respondent herein) claimed in the current *lis* that he was rightly recorded as the sole owner of the entire estate of his father, Banta, including the suit property.

4. The next contention of the plaintiff was that the appellant herein belongs to village Ispur, Tehsil Garshankar but had started residing with Sibbo, which however did not vest him with any right, title or interest in the house in dispute, over which his possession was illegal and that of a trespasser.

Consequently, on the aforesaid contentions, the plaintiff, claiming to be the sole owner of the suit property, sought its possession vide the suit instituted in the present *lis*.

5. Upon notice issued to him, the appellant-defendant appeared and filed a written statement before the trial court, taking an objection that the

plaintiff has no *locus standi* or cause of action, with the suit also not being maintainable, it also being barred by limitation.

He also claimed that it was not valued properly for the purpose of court fee and further, that the suit property did not bear *Khasra* no.580/321, 578/321 and 576/321, as was contended in the suit.

On the merits of the plaint, the appellant denied that the plaintiff was the owner of the suit property marked as ABCD.

He further stated that he was residing with his maternal grandfather, i.e. the father of the plaintiff, as also with his maternal aunt, Sibbo, from the date of his birth and further, that the site beneath the house was a low lying vacant land (*Taur*) that was in the ownership of Banta.

In April 1989 he (the present appellant-defendant) had requested Banta to give the site or any other site to him to construct his house because his family had increased due to the birth of his children, to which Banta did not agree.

6. The appellant further claimed that therefore on 15.04.1989 he forcibly entered into possession of the site in dispute against the wishes of Banta, filled up the site with earth by spending Rs.10,000/- from his own pocket, after which he raised construction on it in the shape of two rooms, a kitchen, a boundary wall, as were shown in the site plan annexed by the plaintiff himself, and that he started residing in the premises treating and claiming it to be his own, alongwith the plot beneath it, for which he had also obtained an electric connection from the Electricity Department a few months after the construction.

7. Thus, the appellant claimed that he had perfected his title over the suit property by way of adverse possession on 15.04.2001, which

possession was 'open, visible, notorious, under the colour of ownership, continuous and uninterrupted', to the previous knowledge of Banta and after his death to the knowledge of his legal heirs.

Hence, the appellants' first contention in his written statement was that the plaintiff had no right, title or interest left in the suit land any longer.

8. Next, the appellant claimed in his written statement that the judgment in favour of the plaintiff, in the previous civil suit (no.143 of 1993), instituted by Smt. Sibbo against the plaintiff, had no effect on the suit property because during his life time, Banta had executed a sale deed dated 15.05.1992 qua the suit property in favour of Sibbo, after the execution of which Banta was in any case left with no interest in the site beneath the house in dispute, as was marked in the site plan.

The appellant further contended that he had served Smt. Sibbo after the death of her father, Banta, and she, pleased with his services, had executed a registered will dated 24.11.1997 in his favour, and consequently he had become owner of the suit site also through the will of Sibbo.

9. He further reiterated that the suit site was not contained in *Khasra* nos.576/321, 578/32 and 580321, and therefore the judgment in the previous civil suit, and the mutation in favour of the plaintiff qua the estate of Banta, in any case did not make the plaintiff the owner of the suit property.

Alternatively, the appellant contended in his written statement that if the suit site was found to be comprised in the aforesaid *khasra* numbers, then in any case, with Banta having executed the sale deed on 15.05.1992 in favour of his daughter Sibbo, she had become the owner thereof, with the plaintiff never having been its owner despite the mutation entries

reflecting in his favour.

On the aforesaid contentions, the appellant sought dismissal of the suit.

10. In the replication filed by the respondent-plaintiff, other than reiterating the contents of the plaint, he stated that earlier a *kacha* house existed on the suit site, which was demolished about 20 years earlier by the plaintiff and his father, after which they had raised *pakka* construction as shown in the site plan.

The plaintiff then denied that the appellant-defendant was residing with Banta at village Sadhowal from the date of his birth (that village being the place where the suit property is situate).

11. On the aforesaid pleadings, the following issues were framed:-

- “1. Whether plaintiff is entitled to possession of the suit property? OPP
2. Whether plaintiff has no locus standi to file the present suit? OPD
3. Whether suit is not maintainable in its present form? OPD
4. Whether plaintiff is estopped from filing the present suit? OPD
5. Whether plaintiff has no cause of action to file the present suit? OPD
6. Whether suit is barred by limitation? OPD
7. Whether suit is not properly valued for the purpose of court fee and jurisdiction? OPD
8. Whether house in dispute does not bear *khasra* no.580/321, 578/321 and 576/321? OPD
9. Whether defendants have become owner of the suit property by way of adverse possession? OPD
10. Relief.”

12. As per the judgment of the trial court, the plaintiff himself

testified as PW1 and closed his evidence after tendering some documents, whereas the appellant first examined himself as DW1 and thereafter Jaspal Singh (Mason) as DW2, one Inderjit Singh, resident of village Sadhowal (the witness to the sale deed dated 15.05.1992), as DW3 and Mohan Lal, a lower division clerk in the electricity office at Garhshankar, as DW4.

Thereafter, he closed his evidence after tendering documents.

13. Upon appraising the aforesaid evidence and the arguments raised before it, that court first recorded a finding that as regards DW2, he was the appellant-defendants' brother, who claimed that he worked as a mason and had raised construction of the house in dispute about 20 years earlier, thereby supporting the version of the appellant.

The clerk from the office of the electricity department proved that an electricity connection in the name of the appellant herein (defendant) had been running in the suit property for about ten years, but as regards the period prior thereto, he testified that the record was not traceable.

14. The trial court thereafter recorded a finding that the plaintiff having failed to show that the electricity connection was not installed in the name of the defendant at the suit site, or that it was actually installed elsewhere, it was therefore evident that the defendant (present appellant) was in possession of the construction existing on the suit site, which he himself claimed to have raised.

As regards the plaintiffs' contention that he and his father Banta had raised the construction, that court further recorded a finding that the plaintiff in fact did not even know in whose name the electricity connection was and as to when it was installed.

Thereafter, he also admitted that the masonry work of the house

was done by his nephew Jaspal Singh, i.e. the appellants' brother and the person who testified as DW2.

The plaintiff also did not remember how much time it had taken to construct the house or the 'number of bricks' that were used therein, or even as to how much money was spent on the construction.

Thus, on the basis of the aforesaid evidence, the trial court came to a conclusion that the plaintiff had not raised the construction on the suit site and had even failed to examine any witness in support of the claim that his father had raised such construction, and consequently, it was very obvious that it was the defendant, i.e. the present appellant, who had raised the construction.

15. As regards the appellants' contention that he had taken forcible possession of the suit site and had raised construction during the life time of Banta, and that his possession was open, visible, “notorious” and under the colour of ownership, as also continuous and uninterrupted to the knowledge of Banta and after his death to the knowledge of his legal heirs, and therefore he had become owner of the suit land by way of adverse possession, that court recorded a finding that it was not even the case of the plaintiff that the possession of the defendant over the property was permissive or that he had raised the construction with the permission of either Banta or himself.

Hence, that court held that since the title of Banta over the suit property was admitted at the time when the present appellant raised the construction, it was therefore clear that he had taken forcible possession of the suit site as he claimed, and consequently, his possession was adverse to the true owners, which had perfected into a title of ownership.

16. The trial court next recorded that the appellant herein had also

proved on record the sale deed dated 15.05.1992, by which he claimed that his maternal grand-father (Banta) had sold the site to Sibbo daughter of Banta, with Inderjit Singh, i.e. the witness to the sale deed, also having testified to that effect. (The said sale deed was exhibited as Ex.D1).

It also having been contended that the sale deed was executed for an amount of Rs.98/- and therefore was not required to be registered, it otherwise having been executed in this witness' presence by Banta in favour of his daughter Sibbo.

The court then observed that the sale deed had never been challenged in Bantas' life time and as regards the value of sale consideration being less, the plaintiff had not objected to the sale deed on that ground.

17. Coming to the will propounded by the appellant defendant, the trial court held that the said will, dated 24.11.1997, was executed by Sibbo in favour of the appellant, Ex.D2, with the same witness, Inderjit Singh, testifying as the attesting witness thereof, and that in any case the inheritance of Sibbo was not in question in the present case.

Thereafter, after recording a finding that the same will had been admittedly contested in the previous civil suit, the trial court next recorded that the sale deed Ex.D1 had been proved, and with the will Ex.D2 also having been relied upon, it was clear that the defendant also claimed title through his aunt Sibbo, who had purchased the suit site from her father, and therefore the appellant herein had become its owner.

18. An argument having been raised for the plaintiff that the plea of ownership and the plea of adverse possession are mutually destructive pleas that could not be taken in the suit, that argument was negated by citing a judgment of the Supreme Court in L.N.Aswathama & Anr. v. P.Parkash

2011 (1) CCC 26 (SC), holding that “when a person in possession asserts to be true owner then even if he fails to establish his title his possession would be adverse to the true owner”. (The quote taken from paragraph 16 of the trial courts' judgment).

After stating as above, the trial court further went on to hold that the Supreme Court had clearly held in paragraph 18 of the said judgment that when a person in possession claims to be the owner and in the alternative claims adverse possession, then the two pleas can be put forward and are not inconsistent pleas but alternative pleas on the same facts.

20. Observing so, it was held that the appellant having become owner of the suit property even by way of the sale deed executed in favour of Sibbo and the will executed by her in his favour, the plaintiff had no *locus standi* or cause of action to file the present suit.

[However, the lines immediately following thereafter, i.e. the last lines of paragraph 16 of the trial courts' judgment, read as follows:-

“Therefore, issue no.1 is decided against the plaintiff and in favour of the plaintiff, while the issues no.2 and 5 are decided in favour of the defendant and against the plaintiff.”

Obviously it is a typographical error as regards issue no.1, which was decided in favour of the appellant-defendant].

21. Issue no.8 was decided holding that in view of the findings recorded on issues no.1, 2 and 5, it was clear that the suit property was comprised in *khasra* nos.576/321 (0-2), 578/321 (0-1), 580/321 (0-3). (The implication being that the issue was decided in favour of the plaintiff and against the defendant because it was the appellant-defendant who had denied that the suit land was comprised in aforesaid *khasra* numbers).

As regards issue no.9, on whether the appellant herein, i.e. the defendant, had become owner of the suit property by way of adverse possession, that already having been actually adjudicated in the earlier part of the trial courts' judgment, (as already seen), the issue was formally held to be decided in favour of the present appellant and against the plaintiff.

22. Having held as above, on issue no.3, i.e. as to whether the suit was maintainable in its present form or not, the trial court held that the plaintiff had claimed possession of the suit land on the basis of his title, arising out of a judgment and decree in the previous *lis* (between himself and his sister Sibbo), i.e. Exs.P3 and P4, as also on the basis of the entry in the *jamabandi* (record of rights), Ex.P5. On the aforesaid basis, it was held that the suit was maintainable.

23. On issue no.4, i.e. as to whether the plaintiff was estopped from filing the suit, the trial court held that the plaintiff having accepted the open, visible, notorious (hostile), possession over the suit property of the defendant till the decision of the previous civil suit (no.143 of 1993), and thereafter he having instituted the suit in the present *lis* seeking the relief of possession, his past conduct estopped him from instituting the suit.

Consequently, that issue was also decided in favour of the present appellant and against the respondent-plaintiff.

24. On the issue of limitation, i.e. issue no.6, it was held that in view of the findings on the main issues, with the appellant having been held to have become the owner of the suit property through the will Ex.D2, as also by way of adverse possession, 'for a period of 12 years from the date of first possession' the suit instituted on 13.10.2003 was barred by limitation.

Thus, that issue was also decided against the respondent-plaintiff.

25. The last issue, on adequate/inadequate court fee, was however decided in favour of the plaintiff, holding that he had valued the suit for a sum of Rs.15,000/- with a court fee of Rs.1500/- having been affixed, with it not shown by the appellant (defendant) as to how the said fee was inadequate.

26. On the aforesaid findings, the suit of the respondent-plaintiff was dismissed by the trial court.

27. Upon the respondent herein having filed an appeal before the learned District Judge, that court, after noticing the pleadings and the issues framed, and the arguments addressed before it, observed that as regards the findings of the trial court on issues no.1, 2, 5, 8 and 9, the previous ownership of Banta, father of the plaintiff and maternal grand-father of the defendant, was not denied by either party, with it also admitted that the sister of the plaintiff, Sibbo, used to reside with Banta over the suit property and that Banta died on 02.07.1992.

28. It was next observed that again admittedly, Sibbo had filed a civil suit against the plaintiff in the present *lis* and others (Jeet Ram and others), which was dismissed, and the unregistered wills relied upon by Sibbo in that case “were set aside” (in that *lis*).

Having observed as above, the first appellate court next observed that, in that *lis*, the learned trial court had made it clear that it is a general tendency amongst agriculturists that land should remain in their family and consequently, there was no ground for Banta to deprive Jeet Ram of his property, due to which the suit filed by Smt. Sibbo had been dismissed, with the appeal filed by Sibbo also having been dismissed, with no further appeal or revision thereafter having been filed.

Thus, the lower appellate court held that the previous litigation

had been completely ignored by the trial court in the present *lis* while giving its findings in favour of the defendant, and once Sibbo had lost the previous litigation, then she could not confer a better title through her will upon the defendant, she not being the owner of the suit property and consequently, the will set up by the defendant, Ex.D2, in his favour, was of no consequence.

29. As regards the sale deed exhibited as Ex.D1 by the present appellant (defendant), the lower appellate court noticed that even Sibbo had not “put forward” any such sale deed in the previous litigation and therefore the defendant could not take any benefit of the same in the present *lis*.

30. Next, it was recorded that the plaintiffs' suit was one seeking possession, with him relying upon a *jamabandi* (record of rights) for the year 2000-01 (Ex.P5), in which he was recorded as the owner of the suit property and upon a local commissioner having been appointed, he had submitted a report that the suit property was a part of  *khasra*  nos.576/321, 578/321, 580/321. Consequently, with the plaintiff being the recorded owner thereof, it was held that a presumption of truth was attached to the revenue record, with nothing shown to dislodge that presumption, the defendant also having failed to prove that the suit property was not contained in the aforesaid  *khasra*  numbers.

31. On the plea of the present appellant-defendant that he had taken forcible possession of the suit property from Banta on 15.04.1989 and therefore had become owner of the suit property by way of adverse possession, that plea was also rejected by the first appellate court, by referring to a judgment of this court in **Murti Shri Durga Bhawani (Hetuwali) Trust v. Harbhajan Singh and another** 1987 PLJ 555. It was thereafter held by the learned Additional District Judge, that “In view of previous litigation, revenue

record placed on the file and by taking plea of adverse possession, it is clear that plaintiff is owner of suit property”.

32. Further elaborating on the issue of adverse possession, the lower appellate court observed that adverse possession contemplates hostile possession, which expressly or impliedly denies the title of the true owner and that for possession to be adverse, it must be of a person who does not acknowledge the others' right and denies it.

It was further observed that a person who bases his claim on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner, and that it amounted to denial of his title to the suit property.

Next, citing a judgment of the Supreme Court in **Saroop Singh v. Banto and others** 2006 (1) CCC 198, and two judgments of this court, the lower appellate court held that admittedly the defendant had started residing, alongwith Sibbo, i.e. his maternal aunt, in the house of his maternal grandfather since he was an infant. Hence, it was obvious that he was residing in the property with the permission of his maternal grandfather.

Consequently, it was held to be “not proved on file” as to how permissive possession turned hostile to the knowledge of the true owner and therefore, by misusing permissive possession after the death of his grandfather, the defendant started claiming ownership of the suit property, due to which he also contested the previous suit between the plaintiff in the present *lis*, i.e. Jit Ram (respondent in this second appeal), and his aunt Sibbo, “on the side of Sibbo”.

He however having lost that case, instead of vacating the suit property, he took the plea that he had become its owner by way of adverse

possession, though in the revenue record there was no entry of him being in such possession either *Zabran* or *Mukhalfan*.

Hence, it was held that the appellant herein had failed to prove his adverse possession over the suit property for a period of more than 12 years, whereas actually such possession was permissive, and therefore he could not be declared to be its owner (by way of adverse possession), even though the electricity connection was in his name and even if he had raised construction over the property.

33. Therefore, on the aforesaid grounds (with repetition made by the lower appellate court on the same issue in the subsequent part of its judgment also), the appellant defendants' case was rejected, both, on account of not having perfected his title by way of adverse possession, nor on the basis of any sale deed executed in favour of Sibbo by her father, nor the will thereafter executed by her in favour of the present appellant.

34. On the issue of limitation, the first appellate court held that the plaintiff having filed the suit for possession on the basis of his ownership of the suit property and the defendant having failed to show that he had perfected his title by way of adverse possession, the suit could not be held to be time barred.

35. On the aforesaid findings, the judgment of the learned trial court was set aside by the first appellate court and the suit of the plaintiff decreed in his favour, holding him entitled to take possession thereof.

36. At the time when notice of motion had been issued in this second appeal (by this court), the following order had been recorded by a co-ordinate Bench on 23.05.2014:-

“The defendant is claiming the property in dispute on the basis of

a registered Will dated 24.11.1997 (Ex.D2) purported to have been executed in his favour by his aunt (mausi) Smt.Sibo. On the other hand, the defendant is claiming the property in dispute on the basis of an order passed in the earlier litigation titled as Smt. Sibbo Vs. Jit Singh in which she had sought declaration that she is the owner of the entire property on the basis of a Will and in that case, the plaintiff had also set up a Will dated 07.4.1992. However, the suit was dismissed by the trial Court on 07.4.1996 and both the Wills set up by her and the plaintiff were disbelieved. It is submitted that in the present case, the Courts below have held that since Sibbo was not held to be owner by virtue of Will dated 24.11.1997, therefore, the defendant cannot claim the property. It is submitted that if Smt. Sibbo could not claim the entire property on the basis of the Will, she was otherwise owner of ½ share of the property on the basis of natural succession which would go to the defendant and the plaintiff cannot claim the entire property.

Notice of motion for 08.8.2014.

In the meantime, execution of judgment and decree of the Appellate Court shall remain stayed.”

(Obviously the word defendant used in the 4<sup>th</sup> line of the aforesaid order is actually an error because it was the respondent-plaintiff who was claiming the property (also) on the basis of the judgment in the earlier litigation, and not the appellant-defendant).

41. in the context of the above argument raised by him, Mr. Sarju Puri, learned counsel appearing for the appellant-defendant, upon query by this court, first could not refute that as regards the plea of the appellant having inherited the property on the basis of the will relied upon by him executed by his aunt (*Mausi*), Sibbo (sister of the respondent-plaintiff), that plea would not be available in view of the fact that the will set up by the aunt (Sibbo) had been rejected to be a valid will in the suit instituted by Sibbo against the respondent

herein, with that judgment having become final.

Next, as regards the specific plea raised by learned counsel when notice of motion was issued, that Sibbo had, even *de hors* the will, become owner of at least half the property by way of natural devolution of the property after the death of her father, as a matter of fact though that plea may have had merit otherwise as regards devolution of the suit property on all children of the late Banta, however that too, in my opinion, is no longer a plea available to the appellant, because the respondent herein in his capacity as a defendant in the suit filed by his sister (Ex.P3 in the present *lis*), had taken a plea that the suit property was Joint Hindu Family property, such Hindu family consisting of him and his father, and that it was also ancestral coparcenary property. Though the second plea, of it being ancestral and coparcenary property, had been rejected by the trial court in that *lis*, in its decision on issue no.9 framed therein, however as regards the respondent herein and his father constituting a Joint Hindu Family, that was issue no.8 in that *lis*, which was decided in favour of the respondent herein and against Sibbo, i.e. the plaintiff in that *lis*.

Again, that judgment having become final after the first appeal filed against it was dismissed (as is not fairly denied by Mr. Puri), naturally Sibbo cannot be held to have inherited any part of the Joint Hindu Family property of which the only members were obviously held to be the respondent-plaintiff and his father Banta. Otherwise of course, had that finding not being there, this court would be inclined to hold that Sibbo had become owner to the extent of an equal share of her fathers' property, as would devolve upon her and her other siblings.

That plea is, as said, however no longer available in the present

*lis* to the appellant, because once Sibos' claim to the title of the suit property was ousted, both on the basis of the will and on her not having succeeded to the property even by natural succession (on the ground that it was Joint Hindu Family property of Banta and the respondent-plaintiff herein), naturally the appellant cannot claim any title to it on any devolution of that property upon him from Sibo.

42. Though in the present *lis* the appellant also set up a plea that Sibo had also become owner of the property by virtue of a sale deed dated 15.05.1992 executed by her father in her favour (exhibited as Ex.D1), again, that unregistered sale deed never having been propounded even by Sibo in the suit instituted by her against the respondent herein, in my opinion, the learned lower appellate court did not err in holding that it was not a plea or a ground available to the appellant-defendant in the present *lis*, (that Sibo had become owner of the suit property by virtue of that sale deed and that the sale value of the suit property having been shown to be Rs.98/- only therein, it was not required to be registered even in terms of Section 17 of the Registration Act and was consequently admissible in evidence).

Had Sibo relied upon that unregistered sale in the previous *lis* to her benefit, and had been able to prove that it had actually been executed and that it was not required to be registered it being of a value less than Rs.100/-, the appellant may have had an almost foolproof case in his favour on that ground, if he could thereafter also prove Sibos' will. However, for him to take a plea of ownership of the suit property on the basis of that unregistered sale deed shown to be executed in favour of Sibo, when Sibo herself in her suit had not done so (with the appellant being her LR in that suit itself), the production of that allegedly executed sale deed, in the subsequent

*lis*, would be barred even in terms of Order 2 Rule 2 of the Code of Civil Procedure.

43. Hence, as regards devolution of the suit property upon the appellant through his aunt Sibbo (sister of the respondent-plaintiff), in any manner, has to be rejected as has been correctly done by the learned 1<sup>st</sup> appellate court thereby reversing the findings on that issue by the trial court; and consequently that part of the judgment of the lower appellate court does not call for any interference with, in my opinion.

44. Coming then to whether the appellant can be held to have perfected his title to the suit property by way of adverse possession thereof.

In that context, first the judgment of the Supreme Court relied upon by the trial court, as also by Mr. Puri before this court, in **L.N.Aswathama and another v. P. Parkash** (2009) 13 SCC 229, needs to be looked at, in the context of a plea of adverse possession being available as an alternative plea in the same *lis*, to a person who otherwise seeks to defend his title to the suit property on the basis of testamentary succession as also a sale deed in favour of his predecessor-in-interest.

45. In *Aswathamas'* case (*supra*), the defendant had resisted the suit for title on the ground that, firstly, it had been sold to him by the previous owner vide a registered sale deed, and further, that he was also in continuous undisturbed possession of the suit property for more than 30 years and had therefore perfected his title by way of adverse possession. Their Lordships after considering the issue, held as follows in the said judgment:-

“He alternatively contended that if Gowramma did not have title and consequently his claim based on title was rejected, then having regard to the fact that he had been in possession by setting up title in Gowramma and later in himself, his possession was

hostile to the true owner; and if he was able to make out such hostile possession continued for more than 12 years, he could claim to have perfected his title by adverse possession. There is considerable force in the contention of defendant provided he is able to establish adverse possession for more than 12 years. When a person is in possession asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. Therefore, the two pleas put forth by the defendant in this case are not inconsistent pleas but alternative pleas available on the same facts. Therefore, the contention of the plaintiffs that the plea of adverse possession is not available to defendant is rejected.”

46. That being so, in the present case, the contention of Mr. Deepak Verma, learned counsel appearing for the respondent-plaintiff, to the effect that the plea on the basis of documentary title to the suit property and that of adverse possession are not sustainable at the hands of a defendant qua the same property, is an argument that is to be rejected, no other judgment to the contrary having been shown to this court, and in any case the reasoning given in *Aswathamas'* case being that if a person has remained in possession for a long time, claiming documentary title to a property but eventually is unable to prove that title, he can also take an alternative plea of having been in adverse possession thereof, open and hostile to the true owner, by which he has perfected his title to the property in any case.

47. That being so, what has to be now seen is as to whether the conditions necessary to claim a property on that basis were shown by the appellant, with this court having already rejected, earlier in this judgment, the contention that the appellant-defendant became owner of the suit property on the basis of a will executed in his favour by Sibbo, as she in any case had not been above to prove her title on the property in the previous *lis*. Thus, what is

to be seen now is as to whether the necessary conditions to prove perfection of the appellants' title by way of adverse possession are met with or not.

48. The contention of the appellant in his defence also was that he had lived with Sibbo ever since his birth, and had entered possession forcibly in the suit property in April 1989 after having been refused title to it by Banta, and that he had construction erected over it. His brother (DW2 Jaspal Singh), also testified to the effect that he, being a mason, had constructed over it.

Whereas with DW2 being the brother of the appellant, the said testimony could be also interpreted to be a wholly self-serving one, however, it has also been recorded by the learned trial court, not shown to be perverse in any manner by learned counsel for the respondent, that even the respondent had admitted in cross-examination that the masonry work of the house in question was done by his nephew, Jaspal Singh, i.e. the present appellants' brother.

49. The next question then is as to whether such construction by itself would prove that it was made for the benefit of the appellant, or it was actually done for Banta, (grand-father of the appellant and his brother, and father of the respondent-plaintiff).

In that context, it also has to be noticed by this court that the trial court recorded a positive finding, not factually disturbed by the appellate court, to the effect that even the electricity connection in the property was in the name of the appellant, with the respondent-plaintiff not having been able to show in any manner that the said electricity connection was actually running at a different place and was therefore wrongly being relied upon, with him also admittedly not having known as to in whose name the electricity connection in the suit premises was running.

Further, the respondent-plaintiff also did not know as to how much time the construction of the house had taken, or the details thereof.

Therefore, it would seem obvious to this court that the construction on the site was very obviously got done by the appellant through his brother, never resisted by Banta, he being his grandfather. Very possibly, he had intended the house to be constructed on the suit land for the benefit for his daughter Sibbo and his grand-son, i.e. the appellant, though he did not formally transfer the same in their favour. In any case, he never resisted the construction taking place.

50. In this context, it needs to be noticed that the will relied upon by Sibbo (to have been executed by her father in favour of both, her and the respondent, qua shares in his property, was disbelieved by the trial court in the previous *lis* (between Sibbo and the present respondent-plaintiff), on the ground that she had also admitted to having in her possession three other wills executed by Banta, which she had not been able to explain, thereby leading that court to come to a conclusion that the authenticity of the unregistered will dated 26.06.1992 would also be very doubtful and suspicious.

Even so, as has already been held, the judgment in that *lis* having become final against Sibbo and her LR (present appellant), whatever the intention of Banta may have been qua the suit property even in favour of his daughter and the present appellant (grand-son from another daughter), documentary evidence definitely is not in favour of the appellant to establish his title.

51. However, with it having already seen by this court that the construction of the house on the suit land was got done by the appellant through his brother, DW2 Jaspal Singh, as was not refuted even by the

respondent-plaintiff in his testimony, and the electricity connection running on that property admittedly being in the name of the appellant, with the respondent-plaintiff not even knowing the details of the manner of construction, or in whose name the electricity connection was, I would hold that at least as regards the respondent-plaintiff, the appellant remained in open and hostile possession of the suit property for more than 12 years since 1989 because as per the testimony of DW2 Jaspal Singh also, construction commenced sometime after April 1989 when the foundation was laid, with Rs.40,000/- to Rs.50,000/- having been spent on the construction of the house (as pointed out by learned counsel for the appellant), with the respondent plaintiff on the other hand never having established in any manner that he had been in possession of the property.

It was also pointed out that DW4, Mohan Lal, a lower division clerk from the electricity department, had also testified that the connection was in existence for more than 10 years as per record, though the exact date when it was issued was not available.

52. Though learned counsel for the respondent has also specifically pointed to that part of the testimony, to submit that since the original record was not available to show that the electricity connection had been issued at least 12 years prior to the date of institution of the suit (13.10.2003), the issue obviously is not when the electricity connection was issued, but as to when the appellant came into open possession of the suit property, which would be accepted to be April 1989 by this court, with the testimony of DW2 not discredited by the respondent.

53. It is necessary to notice here that Banta is stated to have died on 02.07.1992, which is 11 years, 3 months and 11 days prior to the institution of

the suit. Yet, as already noticed hereinabove, the possession of the appellant over the suit property, is not stated to be adverse to just Banta, who seemingly at least had allowed his daughter and grand-son to construct thereupon and to live in the property, but essentially qua the respondent-plaintiff who, being the uncle of the appellant-defendant, is not shown to be younger than him, and therefore was definitely not shown to be a minor at the time when either his father died or even prior to that in 1989 when the construction is stated to have taken place. Hence, if he had any grievance with regard to his father handing over the suit property to his aunt and his grand-son who were living together, or allowing the appellant to construct upon it, in my opinion, he could have very easily challenged that action by Banta at that time itself, instead of letting more than 11 years go by after Banta died to institute the suit, just short of 12 years elapsing and then claiming that 12 years had not gone by since he had become the owner of the suit property. Therefore, with nothing having been pointed out even from the plaintiffs' own evidence that the construction did not take place in 1989, then naturally, if he was in any manner aggrieved of the occupation of his fathers' suit property by his sister and his nephew, he should have challenged the same by 2001 positively, i.e. within 12 years of such occupation and not two years thereafter.

Correctly, actually he should have challenged it during his fathers' life time, by impleading his father as a defendant to protest against his father giving away any property to Sibbo, i.e. his fathers' daughter and appellant-plaintiff, (or in not resisting the construction being raised by them). However, he never did that when Banta was alive.

54. It is also to be noticed that the learned 1<sup>st</sup> appellate court has also relied upon the record of rights (*jamabandi*) Ex.P5, for the year 2000-01,

showing the respondent to be the owner of the suit property, with the column of cultivation showing him also in possession thereof. However, in my opinion, that court erred in holding that there was a presumption of truth as regards the record of rights which was not rebutted successfully, because though no doubt there is such a presumption to be attached to the revenue record, however, as regards the plea of adverse possession, the ownership and title to the suit property is in any case not in doubt; it is only the occupation thereof for a sufficiently long period of time that has to be proved by a defendant who claims to have perfected his title thereto by way of adverse possession.

Again very obviously, the column of cultivation (occupation) in the said *jamabandi* states that it was occupied by “*makhbhuza malkan*”. However, in my opinion the first appellate court erred in holding that to be an unrebutted presumption (as would seem to have been inferred by that court), because it is not even the respondent-plaintiffs' case that he lived in the suit property, he having specifically stated that he was residing in a separate house which was inherited from his father.

55. Consequently, in my opinion, the appellant-plaintiff having proved himself to be in possession of the suit property alongwith his aunt Sibo, (till her death and after that on his own), right since 1989, such possession obviously was open and hostile to the knowledge of the respondent-plaintiff, who did not dare to challenge his fathers' action in not resisting the construction made by the appellant for himself and Sibo; but chose to start claiming the property more than 11 years after his fathers' death and 14 years after the appellant-plaintiff came to be in possession thereof.

His father in any case did not oppose the construction, or challenge it in a

court of law.

56. Therefore, in view of what has been discussed hereinabove, the findings of the lower appellate court as regards the appellant not having succeeded to the suit property on the basis of any will or sale deed executed by his aunt, Sibbo, are upheld, in view of the finding in the previous litigation between Sibbo and the respondent-plaintiff; however, the findings on the appellant not having become owner of the suit property by way of adverse possession are reversed, with the finding of the trial court on that issue reinstated, it having been found by this court that at least as regards the respondent-plaintiff, the appellant remained in open and hostile possession of the suit property which he got constructed from his brother in the year 1989, with the previous owner, i.e. his grand-father Banta, also not resisting the construction made for his daughter and grand-son.

The appeal is consequently allowed in the above terms, with the suit of the respondent-plaintiff therefore dismissed.

The parties are however left to bear their own respective costs.

A decree-sheet be prepared accordingly.

**March 28, 2019**

dinesh

**(AMOL RATTAN SINGH)**

**JUDGE**

1. Whether speaking/reasoned?

Yes

2. Whether reportable?

Yes