

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

RSA-3476-2018 (O&M)

Date of decision: 27.02.2019

Harish Chand

...Appellant

Versus

Som Nath and others

...Respondents

CORAM: HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Mange Ram Sharma, Advocate,
for the appellant.

JAISHREE THAKUR, J.

1. The appellant is aggrieved against the judgment and decree dated 30.03.2015, by which the suit filed by plaintiff-respondent No.1 herein for a decree of possession of the suit property and mesne profits has been allowed by the Court of Addl. Civil Judge (Sr. Divn.), Kaithal and the appeal filed by appellant and defendants No.1 & 2 stands dismissed by the District Judge, Kaithal.

2. Brief facts as pleaded by respondent No.1 in the Civil Suit is that a residential house and open space shown in the site plan dated 27.08.2008 is situated within the abadi of village Siwan, District Kaithal and is bounded as detailed in para 1 of plaint (for short 'the suit property'). The plaintiff –respondent No. 1 (hereinafter called respondent No.1) and defendant No.1-appellant herein (hereinafter called 'appellant'), and defendants-respondents 2 & 4 (hereinafter called respondent No. 2 & 4) are real brothers. Vide judgment and decree in Civil Suit No. 23 dated 10.01.1990 passed by the then learned Sub Judge Ist Class, Kaithal, respondent No.1 had become the absolute owner of the suit property.

Earlier his father was the sole-owner in possession of the suit property, who vide decree dated 31.03.1990 had given the suit property to him. However, since March, 1990, the whereabouts of his father were not known and as he has not been heard of as alive by the relatives and the persons known to him, he is presumed to be dead. It was alleged that due to love and affection, he permitted appellant and respondent No. 2 & 4 to live in the suit property as licensee. Now, as per the site plan dated 27.08.2008, the red portion is in possession of the respondent No.1, appellant and respondent No. 2 & 4 are in illegal possession of green portion, blue portion and yellow portion respectively. Appellant has also transferred possession of South side of green portion to respondent No.3 vide alleged agreement to sell dated 29.07.1997, though being a licensee, he had no right to do so. On 01.08.2008, respondent No.1 has revoked the licence of the defendants verbally and requested them to vacate the possession of the suit property but they refused. Hence, the suit was filed.

3. On notice, appellant and respondent No.2 appeared and filed joint written statement taking preliminary objections regarding maintainability, cause of action, locus standi, court fee etc. On merits, it was stated that respondent No.1 has not given the correct description of the suit property in the site plan rather the same has been shown in site plan dated 26.03.2009 got prepared by the answering defendants. Also, in the previous Civil suit No. 333 of 2003 titled “***Som Nath vs. Sham Sunder and others***”, the correct description of the suit property was shown in site plan dated 25.08.1997, which was decided on 28.04.2004 and in that site plan, the property depicted as red, green and blue which was situated within the Abadi Deh of village Siwan and the property shown in pink colour measuring 6 marlas was comprised in Khewat No. 2845/3609, Khasra No. 1124 as per jamabandi for the year 1982-83. Thus, the decree in Civil Suit No. 23 of 1990 dated 31.03.1990 is null and void and had rightly been set aside by the trial Court

in Suit No. 333 of 2003, but the Appellate Court upheld the same vide judgment dated 22.01.2007 and Second Appeal dated 06.02.2007 is subjudice before the Hon'ble Punjab and Haryana High Court. It was further alleged that their father Dharam Chand was not competent to suffer any decree in favour of respondent No.1 as the said property was ancestral in the hands of Dharam Chand and all the brothers had a share in it. It was further alleged that if the decree in favour of respondent No.1 is not set aside, even then the answering defendants have become owners by adverse possession as they are in possession of the same without any interruption from anybody including the respondent No.1, who had never objected to the construction raised by them over the said property. It was also alleged that as per site plan dated 27.08.2008, respondent No.4 Khan Chand was never in possession of any portion rather said portion is a vacant plot owned and possessed by defendant No.2 Harish Chand after purchasing it from Bishamber Dass. Also, appellant had earlier legally transferred possession to respondent No.3 Parsanni which is now in possession of Sham Sunder. It was also alleged that they were not the licensee of respondent No.1, hence there was no question of its revocation. Rest of the averments of the plaint have been categorically denied and dismissal of the suit was prayed for.

4. No replication was filed. From the pleadings of the parties, following issues were framed by the trial Court :-

- “1. Whether the plaintiff is entitled for decree of possession and mesne profits? *OPP*
2. Whether the suit is not maintainable? *OPD*
3. Whether the suit is liable to be stayed under Section 10 CPC ? *OPD*
4. Whether the plaintiff has no locus standi to file the present suit? *OPD*
5. Whether the plaintiff has not affixed the ad-valorem Court fee on the plaint? *OPD*

6. *Whether the suit is bad under Order 2 Rule 2 CPC? OPD*

7. *Relief.”*

5. Respondent No.1 in order to prove his case himself stepped into the witness box as PW-1 and examined Suraj Bhan, Record Keeper as PW-2, Surinder Gupta, Record Keeper as PW-3, Suresh Chand Sharma, Draftsman as PW-4 & PW-6 and Ashok Kumar, Kanungo as PW-5. After tendering certain documents respondent No.1 closed his evidence. On the other hand, the defendants have examined Shyam Lal Gupta, Draftsman as DW-1, Harish Chand as DW-2 and Ramesh Chand, Registry Clerk as DW-3. After tendering certain documents, defendants closed their evidence. No rebuttal evidence was led.

6. The trial Court, on appreciation of the evidence, decreed the suit with costs and the appellant and respondent No. 2 & 4 were directed to hand over the vacant possession of the suit property to the respondent No.1 within two months of the passing of the judgment and decree failing which the respondent No.1 was held entitled to get the vacant possession of the suit property through the process of law. They were also directed to pay ₹ 500/- per month as mesne profits to the respondent No.1 from the date of institution of the suit till handing over of actual physical possession. The appeal preferred by the appellant and respondent No. 2 & 4 herein has been dismissed by the lower Appellate Court while upholding the judgment and decree passed by the trial Court. Aggrieved against the said orders, the instant second appeal has been filed.

7. Learned counsel appearing on behalf of the appellant (defendant No. 1 in the suit) herein, argues that the suit for possession and mesne profit is barred by Order 2 Rule 2 CPC. It is argued that previously respondent No.1 had filed a Civil Suit No. 333 of 2003 titled '**Somnath Versus Sham Sundar and Others**' for permanent injunction in respect of the same suit property which was dismissed on 28.07.2004 and Civil Appeal No. 93/2005 titled as '**Somnath Versus Sham**

Sundar and Others' was allowed on 22.01.2007 by the Additional District Judge Kaithal. It is contended that the execution application was dismissed in default on 06.05.1996 and, therefore, the present suit was filed which is barred by Order 2 Rule 2 CPC. It is contended that an application had been filed for amendment of the written statement before the First Appellate Court, which application was wrongly dismissed by an order dated 15.12.2017 by the District Judge, Kaithal . It is contended that in fact father of the appellant and the respondents had migrated from Pakistan and settled in village Siwan, Sub-tehsil Siwan in District Kaithal and he had never purchased any parcel of property in Siwan. Therefore, the land that had been allotted to him was ancestral in nature and, therefore, the consent decree arrived at was not sustainable. It is also argued that an application filed for rejection of the plaint under Order 7 Rule 11 CPC was also wrongly dismissed.

8. I have heard the counsel for the appellant and have also gone through the judgments of the court below.

9. Admittedly, respondent No.1 filed a Suit No 416 of 2008 for possession of the suit property on the basis that he is owner and that the defendants are licencees. His claim of being owner who was entitled to seek possession and menses profit, was based upon a decree dated 31.3.1990 passed in Civil Suit No 23 of 10.01.1990 declaring him to be an owner of the suit property. After that, respondent No.1 filed a Civil Suit No.333 of 2003 for permanent injunction in which the said decree dated 31.3.1990 was challenged by the appellant and respondents No. 2 & 4 herein by way of filing a counter claim. In the counter claim the appellant and respondents No. 2 & 4 had taken the plea that respondent No.1 is not the owner of the suit property as the same was not self acquired property in the hands of their father and was ancestral in nature, since it was allotted in lieu of lands left in Pakistan. The Civil Suit 333 of 2003 was initially dismissed, but in appeal the finding was reversed by the then Additional District

Judge Kaithal on 22.1.2007 and counter claim too was dismissed. These findings were subsequently challenged before the High Court in Regular Second Appeal No 1891 of 2009 titled *Sham Sunder and Another versus Somnath and another* dated 26.10.2009 and the judgment and decree of the Appellate Court were upheld. Therefore, there is a finding by the courts below, in previous litigation, that respondent No.1 is the owner, which finding has attained finality. In view of the said finding, there is little cause for this court to interfere in concurrent finding of fact that respondent No.1 is entitled to possession and mense profit for use and occupation.

10. The plea of the appellant that an application under Order 7 Rule 11 CPC asking for rejection of plaint as proper court fee was not affixed was wrongly rejected, cannot be agitated at this stage since the appellant had the remedy of filing a Civil Revision to challenge the said order, which remedy he did not avail of. The question that the suit is barred by Order 2 Rule 2 CPC was not argued or pressed.

11. An argument has been raised that the application seeking amendment of the written statement was wrongly dismissed by the Appellate Authority. It is contended that without taking into consideration the plea as sought to be introduced regarding a fraud having been played upon the Court, the amendment was disallowed. This argument too is not sustainable as a perusal of the record would show that the written statement was filed on 22.09.2009, which was sought to be amended before the Appellate Court by moving an application under Order 6 Rule 17 CPC. The District Judge, Kaithal took note of the fact that the appeal had been filed on 27.04.2015 and the application for amendment of the written statement was filed on 02.01.2016. The appellant herein by the amendment wanted to raise a plea of fraud. The District Judge, Kaithal rightly dismissed the application since the applicant-appellant was not able to show that in spite of due

diligence the said plea could not be taken in the written statement filed as far back as 2009. The law in this regard is well settled that in order to allow an amendment, the applicant has to show that despite due diligence a plea could not have been raised at the initial stage. The fact that Civil Suit No. 23 of 1990 dated 10.01.1990 was challenged by the appellant herein by filing a counter claim in the suit for permanent injunction, which counter claim stood dismissed cannot be ignored.

12. Learned counsel for the appellant has laid great stress that a fraud has been played upon the appellant and the other brothers by respondent No.1 and that fraud would vitiate the decree dated 31.03.1990. However this court does not find any merit in the argument as the decree was challenged by the appellant in the previous litigation and a finding has been returned against the appellant. All pleas taken seem to be a desperate attempt to retain the suit property.

13. Consequently, finding that no substantial question of law arises for adjudication, the regular second appeal against concurrent finding stands dismissed.

27.02.2019

Satyawan

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes.
No.