

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No. 1747 of 2018 (O&M)
Date of decision:07.01.2020

Mam Chand (deceased) through LRs
Ram Gopal and another

...Appellants

V/s.

Fakir Chand and others

...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI.

Present: Mr. Rakesh Kumar Sharma, Advocate
for the appellants.

RITU BAHRI, J. (Oral).

CM-4726-C-2018

For the reasons mentioned in the application, the same is allowed and the delay of 65 days in re-filing the appeal is condoned.

RSA-1747-2018 (O&M)

The appellant/plaintiffs have come up in appeal against the judgment of lower appellate Court dated 08.12.2016 whereby suit of the plaintiffs has been dismissed.

The brief facts of the case are that the plaintiffs filed a suit that they and proforma defendant were joint owners of the residential house marked with letters L K N O situated in khasra No. 39 measuring 51'X33' in site plan Ex.PW2/1. It has been mentioned that Shri Devi Sahai, father of plaintiffs No. 1 and 2, and grand father of plaintiff No. 4 as well as Sh. Hariya, father of defendants No. 1 to 3 were real brothers and on 03.06.1960 they made an oral exchange regarding khasra No. 73/4(0-4) to the extent of

half share which comes to 4 marlas bearing khewat/khatoni No. 274/288. However the disputed property is 51'X33' which is part of khasra No. 39 and it was exchanged mutually and orally. The bahi entries were made in bahi of Devi Sahai on 03.06.1960. The writer/witness of Bahi dated 03.06.1960 had died and oral exchange was made before the brotherly panchayat of village Kushlipur. After the death of Hariya and Devi Sahai, the disputed property was inherited by the plaintiffs and proforma defendant as Hariya was given the disputed property marked with letters L K N O in oral exchange but the defendants resiled from oral exchange and refused to accept before the court of Addl. Civil Judge (Sr. Divn.) Palwal as well as in the village. The civil suit for partition bearing case No. 682/2004 titled Fakir Chand Versus Mam Chand was decreed declaring the plaintiffs and contesting defendants as joint owners in the joint possession of the property khasra No.73/4(0-8) to the extent of half share. On 01.02.2010 defendants illegally and focibly took possession of the disputed property without having any right, title or interest in it and in this backdrop, the suit was filed.

After notice of the suit, defendants appeared and filed joint written statement denying the plaintiffs to be owner in possession of the suit land and the suit was filed as a counter blast to the earlier suit filed by Fakir Chand bearing case No.682/04 which had already been decreed in favour of the contesting defendants vide judgment and decree dated 20.01.2010 by the Court of Smt. Ashu Sanjeev Tinjan, ACJ (SD), Palwal.

From the pleading of the parties, following issues were framed by the trial Court:-

1. "Whether the plaintiffs and proforma defendant are in joint owner of the residential house? OPP

2. Whether the plaintiff is entitled to injunction as prayed for?
OPP
3. Whether the suit of the plaintiff is not maintainable in the present form?
4. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD
5. Whether the plaintiff has concealed the true and material facts from this court?
6. Relief.”

The trial Court decided issue Nos. 1 and 2 in favour of the plaintiffs and against the defendants and issue Nos. 3 to 5 were decided against the defendants and the suit was decreed in favour of the plaintiffs and proforma defendant.

The plaintiffs claimed that they were joint owners of the residential house marked with letters L K N O situated in khasra No. 39 measuring 51'X33' as per jamabandi for the year 1981-82, 1991-92, 2006-07 the total land of khasra No. 39 measuring 47 K 19 M is shown to have been owned by abadi deh of the village. The plaintiffs placed reliance upon site plan Ex.PW2/A and examined Megh Shyam Drafts Man as PW3 who claimed that he visited the spot and prepared the site plan and the site plan Ex.PW2/A was not disputed by the defendants. Defendant Fakir Chand appeared as DW1 and admitted in his affidavit Ex.DW1/A that the grand father of DW1 Bhule was the owner of the disputed property in khasra No. 39 and after the death of his grand father, his father Hariya and his uncle Devi Sahai became owners of the disputed property. The plaintiffs are the heirs of Devi Sahai and defendants No. 1 to 7 are the heirs of Hariya and both the parties are owners in possession of the share left by their father.

He further admitted that defendants No. 1 to 7 are owners to the extent of half share and plaintiffs are owners to the extent of half share in the

disputed property. In his cross-examination, he admitted that disputed property is in khasra No. 39 and Mam Chand is owner in possession of 80X50 foot land in khasra No. 39. He admitted the boundaries of the house as given in the plaint and further admitted that the plaintiffs are owners in possession of the disputed land. He also admitted the correctness of the map filed by the present plaintiffs in the earlier suit filed by him. He specifically admitted that all are owners in possession of the disputed property and further admitted the joint ownership of the plaintiffs and defendants. DW2 Roop Chand also admitted that in disputed land two rooms and a baithak of the plaintiffs has been constructed. The plaintiffs also placed on record copy of the judgment dated 05.12.1985 (Ex.P3) which relates to the khasra No. 39 in a suit filed by Munshi Ram against Mangli wherein the plaintiff Munshi Ram has been declared owner in possession of the suit land. In judgment dated 20.01.2010 passed by Ms. Ashu Sanjeev Tinjan ACJ (SD), Palwal in civil suit No. RBT 682 of 2004 (Ex.P1) filed by the present defendants for partition and permanent injunction, it has been observed that the alleged family settlement dated 03.06.1960 was never acted upon by the parties and this judgment (Ex.P1) relates to khasra No. 73/4(0-8) and no observation was given by the Court regarding the disputed land situated in khasra No. 39 of the present suit. The land of khasra No. 39 is abadi deh land and the constructive possession of the plaintiffs have been admitted by the defendants. The plaintiffs have proved that they and proforma defendants are the joint owners in possession of the disputed land and they were entitled to a decree for permanent injunction restraining defendants from interfering into peaceful possession of the suit property.

In view of the above, the suit of the plaintiff was decreed by the trial Court.

On appeal filed by the defendants, the lower appellate Court reversed the finding and dismissed the suit of the plaintiffs. The lower appellate Court proceeded to examine Bahi writing dated 03.06.1960 (Mark A) with Hindi translation. As per this document possession of 5.1X53 sq. feet land forming part of khasra No. 39 was handed over to Hariya and this document further mentions that possession was given as the document was scribed. There was condition imposed on Hariya that in case Hariya does not get his share of land in khasra No. 73/4 transferred in the revenue record in favour of Devi Sahai, he will be under obligation to return the constructed house etc. which he has received by virtue of this exchange. The plaintiffs are still persisting with the exchange and document dated 03.06.1960 they cannot say that defendant or their predecessor were not in possession of the present suit property marked with letter KLON in site plan Ex.PW2/A when previous suit was filed where also this exchange was set up.

The plaintiffs filed a suit taking a plea that on 01.02.2010 defendants illegally and forcibly took possession of the disputed property without having any right, title or interest in it. In this backdrop, the lower appellate Court has further observed that Fakir Chand while appearing as DW1 admits ownership of plaintiffs but also put forward his claim as co-owner. He clarifies that disputed land is measuring 35X80 and 19 is in possession of plaintiff Karan, 40 ft. in possession of deceased defendant Mam Chand, 26 ft. in possession of deceased plaintiff Munshi and 35X50 ft. land in his possession. Since possession of the plaintiffs and defendants

was explained by Fakir Chand, the settlement document Mark A became relevant again wherein Devi Sahai elder son of Bhule and Hariya younger son of Bhuley seem to be first co-sharer and second co-sharer. Hence in khasra No. 39 as per mark A, possession of plaintiffs and defendants is merely co-sharers. It seems improbable that all the persons would simultaneously enter into forcible possession of such a small part of property. On 01.02.2010, after losing their claim in the earlier suit, the plaintiffs took a plea of forcible possession by the defendants. Even the site plan proved by the draftsman PW2, was not prepared after 01.02.2010 but the site plan tendered in evidence Ex.PW2/A is the one which was tendered as Ex.D1 in the previous suit. Hence, the possession of the defendants was not held to be illegal and forcible as on 01.02.2010. Hence, the suit of the plaintiffs for permanent injunction restraining the defendants from interfering into peaceful possession was dismissed and appeal was allowed.

After hearing learned counsel for the appellants at length, at the outset learned counsel for the appellants has not been able to show that site plan Ex.PW2/A was made after 01.02.2010 and hence the finding given by the lower appellate Court that the site plan Ex.PW2/A was the same site plan which was tendered in the previous suit filed by the plaintiffs. Since the site plan can be made basis for examining the lower appellate Court judgment that the defendants were in possession of the suit property before 01.02.2010 as per site plan Ex.PW2/A. They were in possession of the suit property as per family settlement dated 03.06.1960 Mark A. Possession of the plaintiffs and defendants being legal heirs of Devi Sahai and Hariya has been clarified by Fakir Chand while appearing as DW1 in para No. 13 of the lower appellate Court judgment. Even Ram Gopal son of Mam Chand

denied that the property is not ancestral and Devi Sahai had acquired himself, but was unable to explain if it was purchased by Devi Sahai or was allotted to him. In this situation, settlement document Mark A is relevant. Bhuley was the common ancestor of the parties and Devi Sahai is elder son of Bhuley and Hariya is younger son of Bhuley and are first co-sharer and second co-sharer. One of the conditions imposed in settlement document Mark A was that in case Hariya does not get his share of land in khasra No. 73/4 transferred in the revenue record in favour of Devi Sahai, he will be under obligation to return the property of khasra No. 39 which he has received by virtue of this exchange. Since possession of the defendants was before 01.02.2010 as per site plan Ex.D1 in the previous suit, the suit of the plaintiffs for permanent injunction has been rightly dismissed.

No substantial question of law arises for consideration in the present appeal.

Dismissed.

Pending applications also stand dismissed.

(RITU BAHRI)
JUDGE

07.01.2020
Divyanshi

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No