

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

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RSA No.304 of 1994 (O&M)

Date of Decision: 2.3.2023

Reserved on: 08.02.2023

Mohinder Kumar and another

... Appellants

Versus

Dharam Pal and others

... Respondents

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Argued by: Mr. Prateek Mahajan, Advocate,
Mr. Ashish Gupta, Advocate and
Ms. Perna Malhotra, Advocate,
for the appellants.

Ms. Neha Jain, Advocate,
for respondents No.1 to 3.

MANISHA BATRA, J.

1. The instant appeal has been filed by the appellants-defendants challenging concurrent findings of fact recorded by both the Courts below declaring the plaintiffs/respondents to be owners of the shops in dispute and further passing a decree for recovery of a sum of Rs.1100/- towards mesne profit against them.

2. For the sake of convenience, the parties shall hereinafter will initially be referred to as per the original nomenclature as given in the suit.

3. Brief matrix of the case is given as hereunder:-

Sh. Tara Chand who was father of the plaintiffs was owner of two shops shown with letters A B C D annexed with and fully detailed in the head note of the plaint (hereinafter to be mentioned as 'shops in

dispute'). After his death, the plaintiffs being his legal heirs, became co-owners of the shops in dispute. It was pleaded that Sh. Tara Chand had inducted the defendant No.1-Des Raj as a tenant over the shops in dispute on payment of monthly rent @Rs.100/-. It was an oral monthly tenancy. On 24.02.1987, the plaintiffs issued registered notice against the defendant No.1 calling upon him to pay the rent as due against him and also called upon him to hand over vacant possession of the shops in dispute by terminating his tenancy over the same with effect from March 1987. The defendant No.1 failed to pay either the arrears of the rent due against him for the period from 01.05.1986 to 31.03.1987 @Rs.100/- per month or to hand over the vacant possession of the shops in dispute. He sent reply to the notice on 01.04.1987 thereby denying the relationship of landlord and tenant between the parties. The defendants No.2 & 3 on the other hand asserted to be in possession of the shops in dispute through defendant No.1. The plaintiffs while making an alternative submission to the effect that the defendants had no right to retain possession of the shops in dispute even if the relationship of landlord and tenant between the parties had not been proved, prayed for grant of relief of possession and recovery of arrears of rent.

4. The defendant No.1 appeared in response to the notice and filed written statement. While denying the factum of relationship of landlord and tenant between Tara Chand and himself; it was asserted that the shops in dispute along with some other properties were joint between Tara Chand who was his real brother and himself and both of them had been jointly renting out the same to various tenants at different points of time till January 1959, when a settlement had been arrived at between themselves vide which

the shops in dispute and some other properties had fallen to his share whereas Tara Chand was given other properties situated at Village Hajipur and Village Jugial (wherein the shops in dispute are situated). The defendant No.1 had become exclusive owner of the shops in dispute and had been letting them out and had been exclusively enjoying the rents and profits derived therefrom. On 04.06.1976, a memorandum of settlement was reduced into writing between Sh. Tara Chand and himself in terms of settlement earlier arrived at in January 1959. It was submitted that the defendant No.2 was tenant in one of the shops in dispute under him whereas the defendant No.3 also was a tenant in the second disputed shop but he had vacated it and handed over the same to the defendant No.1 and as such defendant No.3 had no interest in the suit. An alternative plea that he had become owner of the shops in dispute by way of adverse possession had also been taken and dismissal of suit had been prayed for.

5. The defendant No.2 filed written statement submitting that he was inducted as a tenant over one of the shops in dispute by the defendant No.1 about two years back on payment of rent @Rs.200/- per month.

6. The plaintiffs filed replication to the written statement of defendant No.1 wherein the pleas taken in the written statement were controverted whereas those of the plaint were reiterated. On the pleadings of the parties, the following issues were settled by learned trial Court:-

1. Whether the plaintiffs are the owners/landlords of the property in suit? OPP.
2. Whether the shops in dispute are in possession of the defendants on payment of rent at the rate of Rs.100/- per month? OPP.

3. Whether the plaintiffs are entitled to possession of the disputed shop? OPP.

4. Whether the shops in dispute are the joint properties of the plaintiffs and defendant no.2? OPD.

5. Relief.

7. Both the parties produced oral as well as documentary evidence in support of their respective assertions. The plaintiffs examined five witnesses whereas the defendant No.1 examined seven witnesses. No rebuttal evidence had been produced. On appraising the evidence produced on record and considering the contentions raised by both the sides, the learned trial Court vide judgment and decree dated 14.02.1990, decreed the suit and a decree for possession of the shops in dispute and recovery of a sum of Rs.1100/- from defendant No.1 towards mesne profit for the period from 24.02.1987 to 24.01.1988 had been passed. The claim of plaintiffs that there was relationship of landlord and tenant between parties was, however, rejected. Feeling aggrieved, the defendant No.1 preferred Civil Appeal No.122 of 1990 which was dismissed vide judgment and decree dated 26.07.1993.

8. The instant appeal has been filed by the legal representatives of the deceased defendant No.1 for assailing the findings as given by the Courts below.

9. Learned counsel for the appellants vehemently argued that the impugned judgment and decrees passed by the Courts below were liable to be set aside as the findings given therein were wrong, illegal and perverse.

The learned Courts below did not apply their judicious mind. Non-speaking and cryptic orders were passed. The respondents-plaintiffs had miserably

failed to prove that they were either owners or were ever in possession of the shops in dispute. The father of the appellants was proved to be in possession of the shops in dispute since the very beginning and it was also well proved on record that he had been letting out the shops in dispute to several persons continuously ever since the year 1959 and no objection whatsoever had been raised by the father of the respondents or the respondents at any point of time and this fact itself was sufficient to prove that the shops in dispute had fallen to the share of father of the appellants in pursuance of family settlement that had taken place in the year 1959. The statements of witnesses examined by the appellants also proved the fact that writing dated 04.06.1976 (Mark F) had been executed between the father of the appellants as well as respondents. The learned trial Court committed a grave error by ignoring this document only on the ground that it was not a registered one. The learned trial Court had misread the contents of reply sent by father of the appellants in response to the notice issued by the respondents-plaintiffs. With these broad arguments, it was submitted that the impugned judgments were liable to be set aside, the suit filed by the respondents was liable to be dismissed and further that the instant appeal deserved to be allowed.

10. Per Contra, it was argued by learned counsel for the contesting respondents/plaintiffs that the findings as given by the learned Courts below were well reasoned and did not warrant any interference. Hence, it was argued that the appeal being devoid of any merit was liable to be dismissed.

11. Due deliberations have been given to the contentions as raised by learned counsel for both the parties and evidence available on record of

learned trial Court has been minutely scrutinized.

12. The case as set up by the respondents/plaintiffs was that their father Sh. Tara Chand was owner of the shops in dispute and he had let out the same to defendant No.1 Des Raj (now dead and represented by his LRs i.e the appellants). The respondents-plaintiffs while claiming that after the death of their father, they had become co-owners of the shops in dispute and further that they had terminated the tenancy of the father of the present appellants vide a notice, prayed for passing a decree for possession and recovery of arrears of rent w.e.f. 01.05.1986 till 31.03.1987.

13. On the other hand, the defendant No.1 Des Raj i.e. father of the present appellants had claimed that the shops in dispute had been purchased out of the joint funds of Sh. Tara Chand and himself and subsequently in a family settlement arrived at between them, the same had fallen to his exclusive share in the year 1959 and ever since then it was he who had been letting out these shops to different tenants. It was also claimed that the family settlement earlier arrived at, had been reduced into writing vide Mark F as on 04.06.1976. Both the parties were, however, not in dispute about the fact that the land over which the shops in dispute were constructed was purchased in the name of Sh. Tara Chand vide sale deed Ex.PW3/1. Ex.PW3/1 is in Punjabi language. Its English translation was got done by this Court and a perusal of contents of this sale deed reveals that land having length of 38 feet from North to South and width of 19 feet from East to West, mentioned as '*Taud Safed*' existing in Village Hajipur had been sold to three persons namely, Jaswant Rai son of Wadhawa Ram, Tara Chand son of Balli Ram and Tara Chand son of Sant Ram i.e. father of the present respondents/plaintiffs to the extent of equal shares as on 16.10.1946.

land had partitioned the same amongst themselves and the shops in dispute had been constructed on the land which had fallen to the share of Tara Chand.

14. The burden lied heavily on the appellants to prove that their father i.e. defendant No.1 had purchased this property along with Sh. Tara Chand with joint funds of both of them. The case of the appellants on this point rested upon the oral statements of four witnesses namely **DW-1 Mehar Singh**, mason who stated that he along with two labourers had raised construction of the shops in dispute on the asking of the Sh. Tara Chand and Sh. Des Raj in the year 1949; the construction material was arranged and supplied to him by Sh. Des Raj; the labour charges were also paid by him and further that these shops were constructed under the supervision of defendant No.1. However, during cross-examination, it was stated by this witness that he did not know as to who was owner of the shops in dispute. He had not seen the sale deed vide which the land of these shops was purchased. He could not tell about the exact length and width of the shops in dispute and admitted that no acknowledgement regarding receipt of construction charges had been received by him from Des Raj; **DW-2 Bihari Lal** resident of Village Jugial who deposed that the site underneath the shops was jointly purchased by Sh. Tara Chand and Sh. Des Raj but sale deed was executed in favour of Sh. Tara Chand; that the shops in dispute were constructed under supervision of Sh. Des Raj on the purchased land in the month of January/February 1949 and all expenses were incurred by him and Sh. Tara Chand. During cross-examination, this witness stated that he did not know as to who was the owner of the land underneath the shops. Admittedly, he too had not seen any sale deed

concerning the shops in dispute. He stated that Sh. Tara Chand had told him that the shops in dispute had been given to the defendant No.1 in a family settlement. He was, however, not aware that any settlement had taken place between Tara Chand and Des Raj in the year 1976; **DW-5 Mehar Chand** who stated that the land underneath the shops in dispute was jointly purchased by Sh. Tara Chand and Sh. Des Raj. This witness changed his version by admitting at the first instance that the land underneath the shops in dispute had been purchased by Sh. Tara Chand and then by saying that it was jointly purchased. Admittedly, he was not present at the time of execution of sale deed and stated that it was executed in the names of Sh. Des Raj and Sh. Tara Chand jointly; **DW-6 Ram Parkash** also stated that the shops in dispute were jointly constructed by Sh. Des Raj and Sh. Tara Chand but obviously, he too was not a witness to the execution of sale deed qua the purchase of land of these shops. On a collective perusal of statements of these witnesses, it is explicit that they were not personally aware about the fact that shops in dispute was infact purchased in the name of Sh. Tara Chand, father of the respondents-plaintiffs. None of them was either an attesting witness to the sale deed Ex.PW3/1 nor it was their claim that they were present at the time of execution of the same. Hence, the oral statements of these witnesses being hearsay in nature could certainly not be considered to be sufficient to prove that the land underneath the shops in dispute was purchased in the name of Sh. Tara Chand with the joint funds of Sh. Des Raj and the latter nor their statements can be relied upon to prove that the shops in dispute were also constructed over the said land with the joint funds of Sh. Des Raj and Sh. Tara Chand. Rather they clearly appeared to be that of tutored witnesses. Therefore, the observations made by the

Courts below that the shops in dispute were not proved to be constructed with the joint funds of fathers of the appellants and the respondents deserve to be upheld. Moreso, the plea/defence taken by the appellants that the shops in dispute was purchased with joint funds of father of the present appellants and Sh. Tara Chand, being a plea of benami transaction is barred by the provisions prescribed under Section 4(2) of the Prohibition of Benami Property Transactions Act, 1988 and could even otherwise not be taken by the appellants.

15. The learned trial Court while relying upon the contents of Ex.P4 reply to notice Ex.P3, had observed that the same amounted to admission on the part of Sh. Des Raj about ownership of Sh. Tara Chand and then the respondents qua the shops in dispute. Ex.P-3 is carbon copy of notice admittedly sent on behalf of the respondents-plaintiffs to defendant No.1 Des Raj calling upon him to terminate his tenancy and to pay arrears of land and to handover vacant possession of the shops in dispute. As per the contents of reply Ex.P-4 undisputedly sent by Sh. Des Raj, it was admitted by him that Sh. Tara Chand was owner of the shops in dispute. The plea further taken in this reply is that a written exchange deed had been executed between Sh. Tara Chand and Sh. Des Raj on 04.06.1976 which was scribed by Jaswant Rai resident of Village Jugial whereby the shops in dispute were given to Sh. Des Raj and ever since then he was in exclusive possession of the said shops. Learned counsel for the appellants vehemently argued that the admission as to the ownership of Sh. Tara Chand over the shops in dispute had been erroneously made in the reply Ex.P-4 and the said admission had been subsequently withdrawn by their father in the written statement which was filed in the suit and, therefore, he argued that the said

admission could not be considered. This argument cannot be stated to be tenable at all. No doubt in para No.7 of the written statement filed by Sh. Des Raj, it is pleaded that the admission as made in Ex.P-4 was withdrawn being incorrect, erroneous, vague, evasive, misconceived and was made only due to mistake of actual facts. However, the admission so made could not be considered to be withdrawn simply by pleading so and had become binding on the appellants.

16. It is also relevant to mention here that the father of the appellants i.e. defendant No.1 Des Raj is also shown to have taken other inconsistent pleas. As mentioned above, in the reply Ex.P-4, it was submitted by him that the shops in dispute had come to him on the basis of some exchange deed dated 04.06.1976 scribed by one Sh. Jaswant Rai. However, in the written statement as filed by him, a different plea had been taken that a family settlement had been arrived at between them in January 1959 and then a memorandum of settlement was reduced into writing on 04.06.1976. Photocopies of the alleged memorandum of settlement had been placed on record as Mark F (this document was in Urdu and its English translation was got done by this Court). As per this document, Sh. Tara Chand and Sh. Des Raj had exchanged their properties and Sh. Tara Chand had been given one haveli kanjhial wali and one shop in which one Chiranji Lal was inducted as a tenant whereas one big shop wherein Gurbachan Singh was inducted as a tenant and 1/4th share in residential house of Hajipur had been given to Sh. Tara Chand. The learned Courts below had not accepted the validity and admissibility of this document in evidence.

This Court is also not inclined to come to any other conclusion as agreement

Mark F as relied upon by appellants was only a photocopy. Neither the

original of the same had been produced nor any prayer had been made by the appellants to prove the authenticity of this document by producing any secondary evidence. The attesting witnesses to this document were also not tried to be summoned as witnesses. More so, as per this, document one kanjhial wali haveli was shown to have been given in exchange to Sh. Des Raj by virtue of this exchange deed but the contents of Ex.P-5 which is certified copy of judgment dated 17.10.1988 passed in Civil Appeal No.39 of 1986 and its decree sheet, Ex.P6, falsify the claim of the appellants on this point. As per this judgment, Sh. Des Raj along with some other persons had filed a suit for possession by way of partition against the father of the present respondents and some other persons and as per the decree sheet Ex.P6, the house which was having the same dimensions as of kanjhial wali haveli situated at Village Jugial was also claimed to be the subject matter of the said partition suit. The civil suit qua which this appeal had been filed, was instituted in the year 1983. Meaning thereby that till 1983, the kanjhial wali haveli was claimed to be jointly owned by Sh. Des Raj. The learned trial Court, therefore, had rightly concluded that if the defendant No.1 Des Raj had actually surrendered his rights in respect of this house as per Mark F exchange agreement, then there was no question of his claiming partition of the same by filing civil suit in the year 1983 and, therefore, due to this circumstance, in the considered opinion of this Court, the learned trial Court had rightly held that the execution of exchange agreement Mark F was doubtful and was not proved.

17. The learned trial Court had also observed that Mark F could not be considered for the purpose of determining the ownership of defendant

No.1 in the shops in dispute due to the fact that it had not been registered.

Obviously, by virtue of the alleged exchange deed Mark F, the defendant No.1 claimed right of ownership over immovable property. A document creating rights in immovable property having worth of more than Rs.100/- requires compulsory registration under Section 17 of the Indian Registration Act. As such, Mark F was required to be compulsorily registered if rights on the basis of the same were claimed and since it was an unregistered document, therefore, the learned trial Court had rightly held that the same could not be taken into consideration and the findings so given deserve to be upheld.

18. The appellants had also claimed that their father was in continuous possession of the shops in dispute since the year 1959 in his own right and after his death, they were in possession of the same and thereby their father and they themselves had become owners of the same by way of adverse possession as their possession was open, hostile, uninterrupted and to the knowledge of the respondents/plaintiffs as well as their father when he was alive. It may be mentioned here that by taking the plea that the defendant No.1 had become owner of the shops in dispute by way of adverse possession, the defendant No.1 and now the appellants were presumed to have admitted that they were not the original owners of the shops in dispute. So far as the claim of the appellants that it was their father Sh. Des Raj who had been letting out the shops in dispute to different tenants and had been receiving rents and had been issuing receipts concerned, to prove this, the appellants had examined DW-3 Surender Kumar who deposed that he as a tenant was in occupation of one of the shops in dispute since the year 1982 under Sh. Des Raj and had been paying rent to him. He produced on record Ex.DW3/A to Ex.DW3/C photocopies

of certain rent receipts. During cross-examination, it was admitted by him that no rent note was executed between them. DW-4 Surinder Singh deposed that he had remained tenant under the defendant No.1 Des Raj in one of the shops in dispute from 1987 till November 1988. He proved receipts Ex.D1 to D13. The statements of both these witnesses remained consistent and could not be shattered and thus could undoubtedly be considered to prove that Sh. Des Raj had been letting out the shops in dispute and had been receiving the rent thereof but the question is, was that is that sufficient to infer that he had become owner thereof by way of adverse possession? Let us discuss the position of law in this regard.

19. The well settled proposition of law is that a person who basis his title by adverse possession, must show by clear unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. Adverse possession means a hostile assertion i.e. possession which is expressly and impliedly in denial of title of the true owner. A party claiming adverse possession must prove that his possession is *nec vi, nec clam, nec precario* i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful dispossession of the original owner and be actual, physical, exclusive, hostile and continuous over a statutory period. In **Karnataka Board of Wakf v. Government of India**, 2004 (2) RCR (Civil) 702, the Hon'ble Supreme Court observed that a person who claims adverse possession should show:-

- a) Date on which he came into possession;
- b) What was the nature of his possession;

- c) Whether the factum of possession was known to the other party;
- d) How long his possession had continued;
- e) His possession was open and undisturbed;

It was also observed that the plea of adverse possession is not a pure question of law but a blended one by fact and law. The plea of adverse possession is not always a legal plea and an attribute of adverse possession is that it begins with disseisin or ouster of the owner. It is an act of displacement of the owner by adverse claimant. Ouster of the real owner is the foundation of title by adverse possession. Before title by adverse possession is perfected, all the presumptions and intents are in favour of the real owner. A person pleading adverse possession has no equities in his favour and possession howsoever long, cannot be treated as adverse and becomes so only when the intention of its being treated as adverse is made known to or at least manifested in the acts of the person who claims adverse possession. It is also equally settled that a person who traces his possession over the disputed property to a lawful title can never become an owner by adverse possession. Keeping in view the above-mentioned position of law as well as pleadings of the parties, it emerges that the burden lied heavily upon the appellants to prove the plea of ownership by way of adverse possession. The case of the respondents/plaintiffs was that their father had rented out the shops in dispute to the defendant No.1 Des Raj and latter had been letting out these shops to other persons but the rent of these shops was given to their father. PW-5 Om Kant one of the plaintiffs had also stated so in his sworn deposition and could not be controverted on the point. No doubt from the statements of DW-3 and DW-4 as well as the rent

receipts produced by them on record, it appears that these receipts had been issued in their favour by the defendant No.1 and it was he who had been letting out the shops in dispute to them, but it can also not be ignored that defendant No.1 was none other than the real brother of father of the present respondents/plaintiffs. It stands proved that he had been letting out the shops in dispute to others but he himself had been admitting the father of the respondents/plaintiffs as the owner of the shops in dispute till the date of filing reply to notice issued by the present respondents. Therefore, his possession over the shops in dispute either in his personal capacity or by way of letting out the shops in dispute to other persons could be considered to be a permissive possession only and no inference whatsoever could be drawn that any title by way of adverse possession had been created in his favour. Though the factum of physical possession of the father of the appellants over the shops in dispute through tenants is established but the animus i.e. intention to possess it adversely to the true owner i.e. respondents is proved to be lacking as no cogent and convincing evidence could be led by the appellants to affirmatively prove that their possession was hostile, notorious to the complete exclusion of the true owner and had ripened into full-fledged ownership. The learned Courts below had given concurrent findings of fact that the appellants/their father were not proved to have become owner of the shops in dispute by way of adverse possession as well as on other points. These findings are based on minute scrutiny of the evidence produced on record and are well reasoned. Therefore, in the considered opinion of this Court, these findings do not warrant any interference from this Court and deserve to be upheld. More so, no substantial question of law has arisen in this case which can be answered in

favour of the appellants. Accordingly, finding no merit in the appeal, the same is dismissed.

20. Miscellaneous application(s), if any, also stand disposed of.

2.3.2023
manju

(MANISHA BATRA)
JUDGE

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