2023:PHHC:086353

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 5441 of 2016(O&M)

Reserved On: 04.07.2023
Pronounced On: 11.07.2023

Yadwinder Singh and Others

... Appellant(s)

Versus

Gurmukh Singh and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Pawan Kumar, Senior Advocate
with Mr. Ashok Bhardwaj, Ms. Vidushi Kumar and
Mr. Ravinder Chaudhary, Advocates
for the appellant(s).

Mr. Vishal Satija, Advocate
for the respondents.

Anil Kshetarpal, J.

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC"), as held by a five Judge Bench of the Supreme Court in ***Pankajakshi (Dead) through LRs v. Chandrika and Others (2016) 6 SCC 157***.

2. This regular second appeal has been filed by the defendants against the concurrent findings of facts arrived at by both the Courts below while decreeing the plaintiffs' suit for grant of decree for possession and mandatory injunction. Though, the detailed facts have already been noticed by both the Courts below, however, the relevant facts, in brief, are required

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

to be noticed.

3. On 05.08.1999, Civil Suit No. 271 was filed by Rajinder Singh and Others wherein the appellants herein were the proforma defendants. While claiming a decree of declaration with respect to the land measuring 93 kanals and 2 marlas, the plaintiffs, namely Rajinder Singh etc. stated that the predecessor-in-interest of Joginder Singh etc. had mortgaged the property in favour of the predecessor-in-interest of the plaintiffs as well as the defendants No. 6 to 15 (the appellants herein). The aforesaid mortgage has not been redeemed even after the passage of 30 years, therefore, they have become the owners by way of prescription of time. Joginder Singh etc. while contesting the suit claimed that the land was never mortgaged in favour of the predecessor-in-interest of the plaintiffs or the proforma defendants (the appellants herein) and the plaintiffs were never in possession of the property in dispute. In the aforesaid suit, it was found that the land which was mortgaged was separate and distinct from the suit land, resulting in its dismissal vide a detailed judgment passed on 16.03.2006. It was further held that the aforesaid mortgage stood redeemed. The trial Court also held that Rajender Singh etc. (the plaintiffs in the previous suit) and Yadwinder Singh etc. (the appellants herein and the proforma defendants in the previous suit) are not proved to be in possession of the property as mortgagees. The judgment and decree passed by the trial Court was affirmed by the First Appellate Court in the first appeal. Thereafter, Joginder Singh etc. (the defendants in the previous suit) filed the present suit for decree of possession and mandatory injunction. It was claimed that the respondents, by taking advantage of the entries in the revenue record, have

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

forcibly entered into the possession. The suit was contested by the plaintiffs while taking the following four alternative stands:-

i) Their possession over the suit land is as mortgagees;

ii) They have become owners by way of adverse possession;

iii) The plaintiffs are not the owners of the suit property;

iv) The land was allotted to the predecessor-in-interest of the defendants in lieu of their land situated in Pakistan.

4. The trial Court, in order to cull out the points which require adjudication, framed the following issues:-

"1. Whether the plaintiffs are entitled to the possession of the suit property? OPP

2. If issue no. 1 is proved, whether the plaintiffs are entitled to the mandatory injunction as prayed for? OPP

3. Whether the plaintiffs have no locus standi and cause of action to file the present suit? OPD

4. Whether the suit is not maintainable in the present form? OPD

5. Whether the plaintiffs are estopped by their act and conduct from filing the present suit? OPD

6. Whether the suit is bad for non joinder and mis joinder of necessary parties? OPD

7. Whether proper court has not been affixed on the plaint? OPD

8. Whether this court has no jurisdiction to try and decide the present suit? OPD

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

9. Whether the suit is not within limitation? OPD

10. Whether plaintiffs have not come to the court with clean hands and have concealed the material facts from the court. If so, its effects? OPD

11. Relief."

5. On appreciation of the evidence, the trial Court dismissed the suit, which as already noticed has been affirmed in the appeal.,

6. Heard the learned counsel representing the parties at length and with their able assistance, perused the paper-book.

7. It would be noted here that on 04.07.2023, besides hearing the oral arguments, liberty was granted to the learned counsel representing the parties to file a written note of their submissions. The learned counsel representing the appellant has filed a written note with the following submissions, which reads as under:-

"i) That the learned courts below over looked/ignored the very fact that appellants have been in possession of the suit land since 1947. This possession of the appellants on the suit land has been in the capacity of Mortgagees as is evident from the revenue record since 1947.

ii) That even if the courts below reached to the conclusion of mortgage not been proved, then the appellants would have been given the benefit of adverse possession as they have been in continuous possession of the suit land since 1947.

iii) That the courts below erred on legal aspect that the

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

revenue record of 1947 in respect of suit land records the appellant as Mortgagees and the same being more than 30 years old document is covered under the provisions of Section 90 of the Indian Evidence Act, 1872 and was not required to be proved through some deed of mortgage.

iv) *That the learned court below ignored the very fact that the allotment of the suit land to the predecessors of the parties in India was done on the line of Mortgagor-mortgagee status of the predecessors of the parties as they were having in Pakistan and the predecessors of the parties must have agreed for their similar status in India at the time of allotment of suit land. This aspect further gets fortified from the fact that the predecessors of the parties never challenged their status of Mortgagor-mortgagee in their life time.*

v) *That the courts below have erred in placing reliance on the Judgment and Decree dated 16.03.2006 passed in the suit filed by the appellants dismissing the claim of the appellants for decree of adverse possession of the suit land. It is settled law that plaintiff has to stand on its own leg and the respondent/plaintiffs should have led their evidence to prove their case.*

vi) *That admittedly the appellants are in possession of the suit property from 1947, which is evident from the copies of jamabandies for the year 1959-60 (Ex. AP-1) to 2012-*

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

2013 (Ex. AP-11) and also khasra girdawaries for the crops of 2008-2013 as Ex. AP-12 and 2013-15 as Ex. AP-13. Since from the revenue record possession of the appellants is established and the present suit has been filed on 18.07.2013, therefore, the same was barred by limitation. Unfortunately this issue has not been considered judiciously by the Ld. Courts below. The Ld. Courts below has even ignored the fact that the plaintiffs themselves placed on record copy of the jamabandy for the year 2007-08 of the suit land as Ex. P-1, in which possession of the appellants has been shown. Further the plaintiff themselves have also placed on record the khasra girdawarai from the year 2007- 08 as Ex. P-4, showing the possession of the appellants. Even otherwise, the present suit was deserves to be dismissed on the grounds of delay and latches.

vii) *That the plaintiffs-respondents also placed on record copy of order dated 24.08.2012 passed by Ld. Collector (SDM), Lehra as Ex. P-3, vide which the collector has held that the nature of land as mortgaged land and the entries in the revenue record were of quite considerable time and liberty was granted to the plaintiffs for getting the land redeemed. The order passed by the Ld. Collector (SDM), Lehra, is an appealable order and no appeal has preferred the said order. Further it is respectfully*

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

submitted here that Gurmukh Singh - plaintiff appeared as PW-1 and in his cross examination has admitted that the plaintiffs filed an application before the SDM for redeeming the land. These facts clearly show that the land was mortgaged with the appellants. Unfortunately these facts have not been considered by the Ld. Courts below. Therefore the impugned judgments suffer from perversity.

viii) *That once the, Ld. Courts below have held that there was no relationship of mortgagors and mortgagees between the parties, then the plea of adverse possession was liable to be accepted, since, possession of the appellants/defendants has been proved since 1947.*

ix) *That the findings returned by the Ld. Courts below are perverse. The Ld. Courts below have failed to consider that the plaintiffs have not led any evidence regarding taking of possession by the appellants from them on 27.08.2012.*

x) *That the appellant even moved an application for framing of additional issue of adverse possession, but the same has not been considered by the Ld. Court below.*

xi) *That the plaintiffs - respondents has sought possession of the suit land and have affixed court fee of Rs. 100/- only. In this way the suit has been entertained without proper court fee. The issue no. 7 was framed regarding the*

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

aspects but has not been considered by the Ld. Courts below.

xii) The present suit is also not maintainable being hit by the principles of res judicata. The plaintiffs/respondents were parties in the previous suit and the relief claimed in the present suit was very much available to the plaintiffs/respondents, which they failed to exercise. Explanation IV of section11 CPC, provides that any matter which might and ought to have been made ground of defence or attack in such form of suit, shall be deemed to have been a matter directly and substantially in issue in such suit."

8. This Court has considered the submissions and analysed the arguments while perusing the judgments passed by both the Courts below along with the requisitioned record of the trial Court.

9. As regards the first argument, it would be noted that in the previous suit filed by Rajender Singh etc. wherein the appellants herein were also the proforma defendants. The appellants have failed to prove their possession. Though, they claimed to be in possession as mortgagees, however, both the Courts below held that the appellants failed to prove that the predecessor-in-interest of the plaintiffs in the suit had mortgaged the property in their favour. In that case, a specific stand was taken by the plaintiffs therein that the appellants herein, namely Yadwinder Singh etc. are not in possession. Now, now once again, the appellants claim that they are mortgagees which is not permissible because of the principles of *res*

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

judicata as provided under Section 11 of the CPC.

10. The next argument of the learned counsel is with respect to the alternative prayer for grant of decree on the basis of prescription of time i.e. adverse possession. It is well settled that the person claiming adverse possession is required to prove the following five facts:-

I) On what date, he came into possession;

II) What was the nature of his possession;

III) Whether the factum of possession was known to the other party;

IV) How long his possession continued; and

V) His possession was open, hostile and undisturbed.

Reference in this regard can be made to the judgment of the Supreme Court in ***Saroop Singh v. Banto and Others AIR 2005 SC 4407***. Moreover, the adverse possession implies that if commenced wrong and is maintained against the right. When the commencement and continuation of possession is legal and proper, there cannot be any adverse possession. In the present case, if we test the case of the appellants, they failed in each of the test. They have failed to prove as to on what date they came into possession and what was the nature of their possession. Moreover, they have failed to prove their possession in the previous round of litigation. In such circumstances, the appellants entered into possession after having lost in the previous round. Hence, they cannot get a declaration of title on the basis of the adverse possession.

11. As regards the argument No.(iii), it would be noticed that Section 90 of the Indian Evidence Act, 1872 (hereinafter referred to as "the 1872 Act") dispenses with the requirement of evidence if the document is

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

more than 30 years. In the present case, the revenue record relied upon by the appellants has already been held to be wrong in a judgment which was delivered inter parties. Hence, reliance on Section 90 of the 1872 Act is misplaced.

12. As regards the argument No. (iv), the previous judgment passed in the previous judgment passed between the same parties on 16.03.2006 is binding on the appellants. Hence, this arguments has no substance.

13. As regards the argument No. (v), it would be noted that the plaintiffs have come to the Court on the basis of title. As per the revenue record, which carried presumption of correctness, they are the owners of the property. Hence, they have proved their case on the basis of the evidence led.,

14. The sixth argument of the learned counsel is with regard to the fact that the suit filed by the plaintiffs (respondents herein) was barred by limitation. It would be noted here that the present suit is governed by Article 65 of the Schedule attached to the Limitation Act, 1963 which provides that the time from which the period of 12 years will begin to run would be when the possession of the defendants become adverse. The appellants, in the previous suit, have failed to prove their possession. Hence, they entered into possession only after they lost in the previous round i.e. after 2009. Hence, the suit which was filed in the year 2013 is not barred by limitation. Even there is no substance in the plea of delay and laches because the respondents did contest the previous suit and thereafter, filed the present suit.

15. As regards the argument No. (vii), it would be noted that the order passed by the Collector is not relevant particularly in view of the

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

judgment passed by the competent Court i.e. Civil Court. Hence, the observation made by the Collector that the land is required to be redeemed has no substance.

16. The argument No.(viii) is repetition of the argument No. (ii) correctness whereof has already been analyzed. Hence, it does not require further deliberation.

17. As regards the argument No.(ix), it would be noted that the learned counsel representing the appellant has failed to prove that the findings arrived at by both the Courts below suffer from perversity.

18. As regards the argument No.(x), the same has no substance because the question of adverse possession has already been examined.

18. As regards the argument No.(xi), it would be noted that the appellants, while contesting the suit, objected to the maintainability on account of non-payment of proper court fee. The trial Court, after examining the facts of the case, has found that proper court fee has been paid while deciding the issue No. 7. Before the First Appellate Court, this issue was never pressed. Moreover, the appellants have failed to prove that proper court fee has not been paid because as per the local amendment in the Court Fees Act, 1870, the decree for possession of agricultural land, the court fee on the market value of the land is not payable.

19. The last argument of the learned counsel is based on the Explanation-IV of Section 11 of the CPC. Explanation IV is in the context of any matter which might and ought to have been made ground of defence or attack in the former suit. It would be noted here that the respondents herein were the defendants in the previous suit. They contested the suit by

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document

claiming that the appellants herein are neither the mortgagees nor in possession. Hence, the respondents have successfully defended the previous suit.

21. Keeping in view the aforesaid facts and discussion, finding no merit, the present appeal is dismissed.

22. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

July 11, 2023
"DK"

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

DEEPAK KUMAR BHARDWAJ
2023.07.12 10:29
I attest to the accuracy and
integrity of this document