

Sr. No.101

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH****RSA-6523-2018 (O&M)****Date of decision: 18.04.2023**

Salimuddin

...Appellant

Vs.

Ram Kumar and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA**Present:** Mr. Ketan Antil, Advocate
for the appellant.

ARUN MONGA, J. (ORAL)**CM-18358-C-2018**

For the reasons stated in applications, same are allowed subject to all just exceptions.

Main case

For convenience, parties herein are addressed as per the recitals before learned trial Court.

2. Having suffered concurrent adverse findings by the two Courts below, defendant (appellant herein) is in second appeal before this Court assailing Ld. Trial Court judgment and decree dated 28.07.2015, as upheld by Ld. First Appellate Court vide its judgment and decree dated 27.09.2018, decreeing the suit for possession and mandatory injunction of land in dispute filed by respondent/ plaintiffs.

3. Briefly stated, facts as noticed by Ld. Courts below, are that plaintiff/ respondent No.1 herein filed a suit for possession and mandatory injunction being General Power of Attorney holder of plaintiffs/respondents No.2 to 6, *inter alia*, on the grounds that plaintiffs are owners and were in possession of the suit land as

described in para No.1 of the plaint, as per Jamabandi for the year 2006-2007. It was pleaded that defendant forcibly occupied the land measuring 240 sq. yards on road side out of the suit land about 2-3 year ago in the absence of plaintiffs and he had raised construction of some portion of his house illegally and forcibly, though he has no right, title or interest over suit property. Plaintiffs even got demarcated their land by way of appointment of Local Commissioner/Tehsildar, Sonapat, who visited the spot in the presence of defendant. Defendant is liable to handover the vacant possession of the suit land after removing *Malba* from the same at his own expenses and cost. Hence, the suit.

4. Upon notice, defendant appeared and filed written statement raising preliminary objections regarding maintainability of suit and non-joinder & mis-joinder of necessary parties.

4.1. On merits, the defense was that according to the alleged *jamabandi*, plaintiffs are only co-sharers and they are not the owners of the suit property. Further, no partition of the suit property has taken place between the alleged co-sharers. In fact, the suit property falls within Rectangle and Killa No.9/16 over which there was physical possession of one Dhani Ram since the year 1967 and Alimuddin is a brother of defendant, and he has been residing in the disputed portion along with Dhani Ram since 1967. It was further pleaded that possession of defendant is continuous, open and hostile for the past 15 years along with his brother Alimuddin since the year 1967. In this way, defendant and his brother Alimuddin have become owners in possession of the suit property by way of adverse possession since plaintiffs and their fore-fathers have knowledge regarding the forcible possession on the land taken by Dhani Ram and defendant's brother Alimuddin.

4.2. Further, it was pleaded in defense that in the year 1969, Gram Panchayat of Village Ahmadpur had filed the eviction proceedings against Dhani Ram from which it clearly proved that plaintiffs and their fore-fathers were not in physical possession of the suit property. It was further pleaded that defendant has constructed his residential house by spending more than Rs.3 lakh about 15 year ago and at that time, plaintiffs had not raised any objection *qua* the possession and construction of defendant.

5. Based on the rival pleadings, following issues were framed:

1. Whether the plaintiffs are entitled to relief of possession and mandatory injunction, as prayed for? OPP
2. Whether the suit of the plaintiffs is not maintainable in the present form? OPD
3. Whether the suit of the plaintiffs is bad for mis-joinder and non-joinder of necessary parties? OPD
4. Whether the plaintiffs are estopped to file the present suit by their own act and conduct? OPD
5. Whether the suit has not been properly valued for the purposes of Court fees and jurisdiction?
6. Relief.

6. The parties to the suit adduced their oral as well as documentary evidence in support of their pleadings and to discharge their respective onus as per the issues, *ibid*.

7. On appraisal of evidence vis-à-vis pleadings, all the issues were decided against defendant and consequently, the suit of plaintiff was decreed with costs vide impugned judgment and decree dated 28.07.2015.

8. Aggrieved, defendant-appellant preferred first appeal, which was dismissed by Ld. First Appellate Court vide impugned judgment and decree dated 27.09.2018, resulting in instant Regular Second Appeal before this Court.

9. In its judgment, learned First Appellate Court, *inter alia*, observed, as under:

“XXXX XXXX XXXX XXXX

12. I do not find any merit, in the contentions raised by learned counsel for the appellants that Dhani Ram was in possession of the suit land since 1967. Gram Panchayat village Kabipur had filed a petition under Section 7 of the Punjab Village Common Land Act, copy Ex.P-11, against Dhani Ram for ejectment from the land comprised in Khewat No.6 Khata No.130, Rect. And Killa No.9//6 (8-0) and 15 (8-0) and Khata No.144, Rect. And Killa No.9/5 (7-8) situated within the revenue estate of village Ahmadpur, Tehsil Sonipat and the said petition was allowed opining that said Dhani Ram was in unauthorized possession of the land measuring 374 square yards as per demarcation report Ex.AW2/A. From the evidence led on record, it is evident that said Dhani Ram had preferred an appeal against the order dated 26.04.1973 and the matter was remanded back vide order dated 18.09.1973 for reconsideration. Thus, from the demarcation report dated 27.09.1970, it is crystal clear that Dhani Ram was in unauthorized possession of Killano.9//15 to the extent of 14 Marla. Whereas the claim of the plaintiffs is that they are owners and were having possession of the land measuring 240 square yards comprised in Khewat No.16/18, Khata No.28, Rect. And Killa No.9//6 (8-0). Thus, it becomes clear that Dani Ram never remained in possession of the suit land, which is part of Rect. And Killa No.9//6.

13. Further, when the defendant himself is not having any knowledge about his unauthorized possession over the suit land, the question regarding knowledge of unauthorized possession of the defendant over the suit land, in the knowledge of the plaintiffs or the other peoples at large, does not arise at all. As discussed above, the defendant claimed that he has become owner by way of adverse possession. However, plea of adverse possession should satisfy the following requirements:-

- i). That the claimant must show that he has been in continuous possession over a particular property for more than 12 years without a break and without interruption.
- ii). His possession was to be exclusion of all other persons,
- iii). The possession was of such a nature that it involved the exercise of rights so irreconcilable with the true owner as to afford him an opportunity to dispute that possession over 12 years when he was in the process of perfecting his title.
- iv). Adverse possession must have commenced in wrong and maintained against the rights.
- v). It must be open and hostile to the true owner.
- vi). Possession must be adequate in continuity, publicity and extent. The plea of adverse possession is not always legal and is based upon facts which must be asserted and proved. A person who claims adverse possession must show on what day, he came into possession, what was the nature of the possession,

whether the factum of his possession was known to the legal claimants and his long is possession continued. He must also show whether his possession was open and undisturbed. It is an act of displacement of the owner by the adverse claimant and such ouster of the true owner is the foundation of the title by adverse possession. Before title of adverse possession is perfected, all presumptions are in favour of the real owner.

14. As discussed above, none of the conditions as required for adverse possession is established on record. The possession of the defendant over the suit land since 1967 is not established.

15. Further it has come in evidence led by the plaintiffs that Balwan Singh – plaintiff No.2 had moved an application Ex.P-11 for appointment of Local Commissioner and on the basis of which, PW -5 Ved Ram Saini, Halqa Kanoongo, was appointed as local commissioner for conducting demarcation and he accordingly, conducted the demarcation on 27.08.2009. The demarcation report Ex.P-11, shows that defendant Salimuddin was in unauthorized possession of the suit land measuring 240 square yards, i.e. 0 Kanal 8 Marla to the extent of 6 Karam on eastern side, 6 Karam on Western side, 11 Karam on southern side and 11 Karam on northern side on the land comprised in Rect. And Killa No.9//6 min south each. Further, to prove unauthorized possession of the defendant, plaintiffs have also examined PW-6 Madan Sangwan Architect, who had proved the site plan Ex.P-9, vide which it is evident that defendant was in unauthorized possession of the portion shown by letters ABCD.

16. Further, the learned counsel for the appellant submitted that the possession of the defendant over the suit land is more than 12 years, without any objection from the plaintiffs, despite the fact that the plaintiffs were well within the knowledge of the possession of the defendant over the suit land, and the same has ripened into ownership being adverse possession. However, this plea raised by learned counsel for the appellant has no force. Admittedly, the plaintiff got the suit land demarcated vide demarcation report dated 27.08.2009 Ex.P-16 and, thereafter, came to know about the unauthorized possession of the defendant over the suit land. Then, the plaintiffs requested the defendant to hand over the vacant possession of the suit land, but the defendant denied to accede to the request of the plaintiffs. Otherwise also, it is settled principle of law that mere long and continuous possession without interruption would not perfect the title of the defendant over the disputed portion on account of adverse possession. A person pleading adverse possession, has no equities in his favour because he is trying to defeat the rights of the true owner. Otherwise also, factum of unauthorized possession of the defendant over the suit land is not proved. Thus, no benefit can be given to the defendants from this contention as well.

17. Faced with this difficulty, the learned counsel for the appellant has submitted that the respondents-plaintiffs being co-sharers in the

suit land has no right to seek possession of the suit land and, thus, the suit is liable to be dismissed.

18. However, I do not find any force in the contentions raised by learned counsel for the appellant. It is settled that even a co-sharers can file a suit for possession even against a trespasser and a trespasser cannot take a plea that the co-sharers has no right to file the suit for possession on behalf of all the co-sharers.

19. As a sequel to my discussion above, it cannot be said that the impugned judgment and decree passed by the learned Additional Civil Judge (Senior Division), Sonipat suffers from any illegality or infirmity. Hence, findings of the learned lower Court on all the issues are affirmed. Accordingly, the appeal fails and the same is hereby dismissed with costs. Decree sheet be prepared accordingly. Lower court record alongwith a copy of this judgment be sent back. ”

10. The gravamen of the contentions of learned counsel for appellant is that the demarcation report relied upon by both Ld. Courts below is wrong as the same was made in the absence of defendant. He would further argue that both Ld. Courts below have failed to appreciate the evidence led by defendant regarding proof of possession of suit property since 1967. Learned Courts below further failed to appreciate that defendant and his brother Alimuddin are in possession of suit land for the past 15 years and their possession is continuous, hostile and therefore, defendant has become owner in possession of the suit land by way of adverse possession. According to learned counsel for appellant, no specific issue was framed by learned Trial Court with regard to plea of adverse possession raised by defendant/appellant herein, which was necessarily required to be framed.

10.1. Counsel for appellant further contends that learned Courts below wrongly ignored the overwhelming evidence adduced by defendant in the form of document pertaining to the year 1969-resolution Ex.D/1, order dated 26.04.1973 passed by Assistant Collector First Grade -Ex.D/2, copy of Aadhar Card -Ex.D/3, copy of ration card -Ex.D/4 and, copy of electricity bill -Ex.D/6 issued in the name of defendant's wife, which prove the possession of defendant over the suit

land to be continuous, open, uninterrupted, hostile and to the knowledge of plaintiffs.

11. Having perused the impugned judgments, my considered opinion is that the submissions made before learned Courts below were duly considered and repelled by recording sound and sufficient reasons consistent with record and the applicable law. There seems no substance in the submissions that the impugned judgments are based on conjectures and surmises.

12. There is nothing shown on record to show if at the time of framing of issues by the learned trial court, the defendant had sought the framing of an issue regarding his title by adverse possession or had requested for the same thereafter at any time during trial of the suit. Even otherwise, it is not shown that the non-framing of an issue regarding defendant's title by adverse possession has resulted in erroneous decision by the learned courts below or miscarriage of justice. In such situation, I am of the opinion that mere non-framing of such an issue is not fatal to the impugned judgments. The aforesaid remaining contentions raised in the instant appeal were also raised before and duly considered but rejected for the reasons recorded by the learned courts below. This is obvious from the discussion in the impugned judgment passed by the learned First Appellate Court more particularly the relevant part reproduced above.

13. Even otherwise, no fault can be found with the findings rendered by learned trial Court, as affirmed by learned First Appellate Court, since the same were based on cogent evidence adduced by plaintiff. I am thus inclined to agree with the view in this behalf taken by the learned Courts below.

14. No new arguments have been raised by learned counsel for appellant other than reiteration of the stand taken before learned Courts below.

15. In the premise, there seems to be no mis-appreciation of the evidence or perversity or illegality in the concurrent findings of facts returned by the Courts below. No interference is thus called for to disturb the said concurrent findings.

16. Furthermore, no question of law, much less substantial one, a *sine qua non* for entertaining regular second appeal, is involved herein, for exercise of appellate jurisdiction of this Court under Section 100 of Civil Procedure Code.

17. As an upshot of my preceding discussion, this appeal is dismissed, being bereft of any merit. Resultantly, both the impugned judgments and decrees passed by learned Courts below are upheld.

18. Pending application/s, if any, shall also stand disposed of.

19. No order as to costs.

(ARUN MONGA)
JUDGE

April 18, 2023
ashish

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No