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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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Date of decision: 04.04.2024

Lilla Singh & anr.

...Appellants

Versus

Harnam Singh (deceased) thorough LRs. & ors.

...Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present : Mr. Ashok Kumar Verma, Advocate,
for the appellants.

Mr. D.N. Ghaneriwala, Advocate,
for the respondents.

VINOD S. BHARDWAJ, J. (Oral)

1. Challenge in the present appeal is to the judgment and decree dated 03.05.1988 dismissing the Civil Suit No.544-C of 28.07.1984/29.09.1984 by the Court of Sub Judge, 1st Class, Sirsa as well as the subsequent dismissal of the appeal by the Additional District Judge, Sirsa, vide judgment dated 31.05.1989.

2. Briefly stated the facts of the present case are that the appellants/plaintiffs had instituted the suit for declaration to the effect that the judgment and decree dated 03.07.1971 passed by the then Sub Judge, IIIrd Class, Sirsa, in civil suit No.316 of 1971 titled as Harnam Singh (now deceased defendant No.1) Vs. Harnek Singh and others regarding the suit land was liable to be set aside. A further prayer for permanent injunction was sought to restrain respondent-defendant No.7 from giving any relief of repartition or of dispossession of the appellant/plaintiffs and other co-

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sharers of the patties Hosang and Godhu on the basis of impugned judgment and decree dated 03.07.1971.

3. It had been averred in the plaint that there were numerous co-sharers of land comprised in the patties Hosang and Godhu of Village Rori, Tehsil Sirsa, District Sirsa (formerly in District Hisar) as detailed in the head-note of the plaint and that the co-sharers continued to be fluctuating by reason of death, succession, transfers etc. The appellants/plaintiffs claimed to be owners in such pattis since 1971 and claimed that they had no adverse interest to the general body of the proprietors in the said two pattis. The suit was thus filed not only for themselves and also for the share-holders of the pattis under order 1 Rule 8 CPC in the representative capacity as proprietor of the said pattis. It was averred that respondent-defendant No.1-Harnam Singh instituted suit No.316 of 1971 against defendants No.2, 3, 5, 6 and Banta Singh (predecessor of defendant No.4-A to 4-E) to the effect that he was owner in possession of the land mentioned in the head note of the plaint by way of adverse possession. The said suit was filed against the said defendants (respondents herein) in their capacity as representatives of the proprietors of pattis Godhu and Hosang of Village Rori. It was averred that the said suit was filed in collusion with such defendants who were not interested in looking after the interest of the general proprietary body of those pattis and were interested in facilitating respondent-defendant No.1 Harnam Singh in getting his suit decreed. They thus practised a fraud on the Court by concealment of true facts and by conceding to the false suggestions.

4. It was also averred that the said judgment and decree was challenged by one Gurbachan Singh in suit No.275 of 1976 was dismissed

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on 21.09.1978 as the same was not filed in a representative capacity. The defendant Harnam Singh sought repartition of land on the basis of the said decree for which a notice under Section 80 CPC dated 17.07.1984 was served upon the Consolidation Officer, Consolidation Office, Bhiwani.

5. It was alleged that the respondent-defendant No.1 impleaded only his close relatives and associates as representatives of the proprietors of said pattis. Banta Singh (defendant No.3 in that case) since deceased, was son of defendant Harnam Singh (plaintiff therein). Defendant No.6 therein, was a fictitious person as no such person of the said name resided in village Rori and other defendants therein were also friends and near collaterals and cognates of the plaintiffs having an interest aligned with said plaintiffs. All the defendants were not served. Service of defendants No.6 to 8 in the said suit was dispensed with while service of defendants No.1 to 5 therein could not be effected by Munadi. Further, no permission was obtained under Order 1 Rule 8 CPC which was mandatory as per law for institution of such suit in a representative capacity and the suit, in the absence of such permission, could not be validly instituted in such capacity. Further, a declaratory suit as owner on the basis of an adverse possession was not maintainable (as per law then), as adverse possession was a plea of defence and not for ascertaining a substantive claim as an owner by way of institution of a suit.

6. Further, the fact of the plaintiffs(defendant-respondents herein) being co-sharer in the suit land was concealed during the said proceedings and that defendant No.1 was given share of his land held by these pattis as a co-sharer and the partition had been made on the basis of the plaintiff therein being a co-sharer, which was apparent from the Naksha Hakdar of

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Village Rori. It was also averred that in the said proceedings, the defendants therein, were ex parte. It is, thus, suggested that even they had not been served as a Manouvre by the plaintiff (defendant No.1 herein) and by divesting the other proprietors of their right in the property. It was, thus, known to Harnam Singh (defendant No.1) that if such suit was filed against other proprietors of these pattis, they would have contested the same and it would not be possible for defendant No.1(now deceased plaintiff in that case) to obtain a decree in the manner as secured by him. It was also averred that the scheme of repartition by consolidation authorities was challegned in various writ petitions in the Hon'ble Punjab and Haryana High Court and the said scheme was held to be valid and the challenge to the consolidation scheme was dismissed by this High Court. Various other issues were also raised highlighting the grounds on which the judgment and decree dated 03.07.1971 was liable to be set aside. It was also highlighted that there was no document to suggest any pleading that defendant No.1 herein (plaintiff in the said suit) was in open, exclusive and hostile possession of the suit land for a period of more than 12 years, to sustain a plea of adverse possession. So much so, the decree also did not see the light of the day and no mutation was got entered into the revenue record till 1984 i.e. for a period nearly 13 years. It was averred that defendant No.1 later sought re-partition of suit land of these pattis on the basis of the impugned judgment and decree. However, he is not entitled to the same as the balance of convenience lies in favour of the plaintiff/appellants. A notice was thereafter given by the consolidation officer, Bhiwani, to the plaintiffs to give possession of certain land allotted to defendant No.1 and it was on receipt of the notice on 23.07.1984 that the plaintiffs became aware of the

earlier judgment and decree. The suit was, thus, filed.

7. Only respondent-defendant No.1 Harnam Singh contested the suit. Defendants No.2, 3, 4-A to 4-E, 5, 6 & 7 were ordered to be proceeded against ex parte.

8. A reply was filed by respondent-defendant No.1 taking a preliminary objection that the suit was not maintainable and the plaintiffs have no locus standi to institute the same. Plea of estoppel and suit being barred by res judicata was also raised. An objection was also taken that the suit was not within limitation and was hence liable to be dismissed.

6. On merits, it was averred that defendant-respondent No.1 filed the said suit in his own capacity as well as the in the capacity under Order 1 Rule 8 of CPC and that other co-sharers in the pattis were served according to law. The factual aspects relating to allegation of collusion and fraud were denied. It was contended that proclamation was made in village Rori and all the land owners and co-sharers were in the knowledge of the institution of the suit. The possession of respondent-defendant No.1 was open, hostile, without payment of any rent or lagan and peaceful for more than 12 years and then he was declared to be owner of the suit land by way of an adverse possession. It was also submitted that one Gurbachan Singh co-owner of the Patti challenged the aforesaid impugned judgment and decree and that the suit was dismissed and the appeal filed was also dismissed. The appellants/plaintiffs are accordingly bound by the judgment and decree of suit No.316 of 1971 and as also suit No.275 of 1976 decided on 21.09.1978, The respondent-defendant No.1 has a legal right to seek partition of the said land. Certain additional objections as regards the special costs were also raised.

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9. Replication has been filed by the appellant/plaintiffs. On completion of pleadings following issues were framed:-

- “1. Whether the judgment and decree dated 03.07.1971 in civil suit No.316 of 1971 titled as Harnam Singh (now defendant No.1) vs. Harnek Singh is liable to be set aside on the grounds mentioned in the plaint? OPP
2. Whether the suit is not maintainable in the present form? OPD.
3. Whether the plaintiff has no locus-standi to file the present suit? OPD.
4. Whether the plaintiffs are estopped by their own act and conduct to file the present suit? OPD.
5. Whether the suit is barred by the principle of res judicata? OPD.
6. Whether the suit is not within limitation? OPD.
7. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPD.
8. Whether the plaintiffs have no cause of action to file the present suit? OPD.
9. Whether the defendants are entitled to special costs U/S 35-A C.P.C.? OPD.
10. Relief.”

10. Vide issue No.1 as to whether the judgment and decree dated 03.07.1971 was liable to be set aside on the ground as mentioned in the plaint, Sub-Judge, Ist Class, Sirsa, decided that even though the appellant/plaintiffs were not party in the impugned suit, they were in the

representative capacity and they were duly served under Order 1 Rule 8 CPC through munadi, thus, were served and duly represented in the said suit. These issues were accordingly decided in favour of the defendants. Issues No.2, 3 & 4 were regarding maintainability of the suit, whether the plaintiff has locus to file the same and also whether the plaintiffs are estopped by their act and conduct, these issues were also decided in favour of the respondent-defendants. Issue No.6 pertaining to the limitation was also decided against the appellant/plaintiffs and it was held that the suit was not within limitation, after considering that Gurbachan Singh had filed suit in the year 1976 and the same was dismissed on 21.09.1978 and the original decree was passed in the year 1971 and that shareholders of patts Hosang and Godhu knew about the impugned decree from 1972 and the suit in question was filed in the year 1984, which was beyond limitation prescribed.

11. Aggrieved against the said judgment, the appellant/plaintiffs preferred an appeal before the Additional District Judge, Sirsa. The said appeal bearing No.107-CA/27.05.1988 was also dismissed by the Additional District Judge, Sirsa vide judgment and decree dated 31.05.1989 by holding that in the earlier civil suit No.316 of 1971, both the patts were rightly represented and that the decision in the civil suit was binding on the rights of any and every patts. The appellants were thus deemed to have knowledge of the proceedings. It was further observed that the suit was not instituted within a period of limitation and was thus barred. Aggrieved thereof, the instant appeal has been filed.

12. Learned counsel appearing of behalf of the appellants contends that both the Courts committed an error in appreciating the crucial aspects

leading to miscarriage of justice, based on misappreciation of evidence and erroneous interpretation of the rights of the residents of the pattis. It is contended that respondent-defendant No.1 was a co-sharer of the said patti and he impleaded his four near relatives and one non-existing person as a party in the said civil suit 316 of 1971. The said suit was for declaration as an owner over an area measuring 34 bighas 18 biswas situated in village Rori on the basis of adverse possession for more than 12 years. The said suit was not contested by any person and hence, an ex parte decree was obtained by the respondent-defendant No.1. Even the said ex parte decree was not implemented and no mutation thereof was sought till the year 1984. Thus, there was no occasion for the appellant/plaintiffs to have any knowledge of passing of any such judgment and decree by Sub Judge, 3rd Class, Sirsa on 03.07.1971. It is argued that the Courts even though noticed that Bhagwan Singh mentioned as defendant in the said suit was not a co-sharer of the patti and remaining 4 defendants were near relatives of respondent-responder No.1-Harnam Singh (plaintiff in civil suit No.316 of 1971) yet the plea was dismissed notwithstanding that adverse possession was being claimed by a co-sharer without pleading adverse possession and establishing his open, hostile, exclusive and continuous possession for a period of 12 years preceding the date of institution of the suit.

13. He further contends that in the said civil suit, no revenue record was led in support of the contention raised and only four witnesses appeared. Thus, there was no documentary evidence to substantiate the testimony of all the witnesses in support of defendant-responder No.1-Harnam Singh to be continuous, open and hostile with regard to the occupation of the suit land for a period of 12 years preceding the date of

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institution of the civil suit. All the proprietors of the pattis were thus kept in dark. He further submits that Court failed to appreciate that plea of adverse possession is a plea of defence and could not lay basis for filing a suit for declaration as owner in possession. It is also argued that since respondent-defendant No.1-Harnam Singh was also a co-sharer in the Pattis, hence, the plea of adverse possession against the remaining co-shares could not have been raised. He further argues that in the suit instituted in 1971, no summons were issued to the defendants therein as per provision of Order 5 Rule 1 CPC and also no efforts were made for them to be served through post. There was no finding recorded that the defendants therein, were avoiding service. The substituted service by way of Munadi was not effected properly and said service cannot be deemed to be a valid service in the eyes of law. He makes a reference to the zimni orders passed in the said civil suit passed by the Sub Judge on 14.04.1971 and thereafter, which read thus:-

“Suit be registered. Defendants be served for 12.5.1971 vide P.F.”

On the application under Order 1 Rule 8 order was passed on 14.4.1971 was:

“Munadi U/O 1 Rule 8 CPC be issued for the date fixed.”

The English version of summon dated 17.4.71 reads:

“Summon BANAM MUNADI Order I Rule 8
Court of Shri A.S. Garg Sub-Judge Sirsa.
Harnam Singh S/o Such Singh r/o Rori.

Vs.

1. Harnek Singh adopted s/o Bachna.
2. Bhag Singh s/o Kishan Singh.
3. Bant Singh s/o Smt. Nand Kaur.
4. Jaggar s/o Dana.
5. Bhagwan Singh s/o Gajjan Singh.
6. Harpal Kaur. 7. Harchand Kaur. 8. Harkishan Kaur d/o Sucha Singh r/o Village Rori, Tehsil Sirsa.

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List of Owners of Patti Hosang Godhu is attached.

In the above said dispute (VAD), the aforesaid defendants are informed that they should be present in the Court at Sirsa on 12.05.1971.

Proclamation be made in Village Rori.

Proclamation No.
99
2/-

Sd/- Sub-Judge,
Sirsa.
17.4.71.

The English version of report of Process Server dated 23-4-71 reads:

“Shriman Ji:

Today on 23.4.71 reached village Rori and after pasting one copy of Summon munadi and one copy of list of owners of Patti Hosang & Godhu at commonly visible place and after getting the proclamation against defendants in Village Rori as per ZABTA an amount of Rupees Two by way of wages of Proclamation was handed over to the person making the Munadi and his thumb impression has been obtained. Report is submitted.

Dated: 23-4-71.

Sd/- Jagdish Chand Process Server
Sirsa.

Witness.

Sd/- in Urdu.

Witness

L.T.I.

Sd/- in Panjabi

Ram Singh

Affidavit of Jagdish Chand Process Server, Sirsa.

Stated that compliance of Munadi dated 23/4 is right and correct.

Sir,

Sd/ Jagdish Chand P.S. Sirsa.

After compliance report

is submitted. Sd/- Naib Nazar

Sirsa.

26.4.71.

Sd/- Sub-Judge, Sirsa.

Attested.

26.4.71.

On this ineffective Proclamation the Court on

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12.5.71 proceeded ex- parte.

The order of 12-5-71 reads:-

“Present Counsel for plaintiff.

All the defendants served personally, but none is present. Proforma defendants not served. Counsel for plaintiff want to make statement regarding Proforma defendant. Statement be recorded.

Statement of Sh. K.R. Jindal Counsel for plaintiff.

I give up Proforma defendants No.6 to 8. Their names be struck off.”

R.O. & A.C.

Sd/- S.J.I.C.

Defendants No.6 to 8 are hereby struck off from the plaint. Munadi U/O 1 Rule 8 CPC effected, but none is present out of representatives of Patti Hosang of Rori. To come up for ex-parte evidence on 22.5.71.

Sd/-

S.J.I.C. 12.5.71.”

14. Referring to the above, it is argued that there was no effective munadi or service on the co-sharers of patti of Hosang and Godhu in village Rori and that the ex parte judgment and decree dated 3.7.1971 in civil suit of 1971 were, thus, liable to be set aside being an act of collusion and fraud. He further submits that the Courts have non-suited the appellant-plaintiffs also on the ground of limitation notwithstanding that it was an ex parte decree and that the limitation had to commence from the date of knowledge and that such knowledge was derived by appellant/plaintiffs only after the notices were issued by the Consolidation Officer for repartition of the land on the basis of the decree dated 03.07.1971 and that the appellant/plaintiffs continued to be in the possession of their respective shares and the judgment and decree dated 03.07.1971 was never enforced. Hence, the period of limitation has to commence w.e.f the date when such judgment and decree is sought to be enforced against a person in possession as well as from the date when such knowledge is derived.

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15. Controverting the same, learned counsel for respondent No.1-defendant contends that both the Courts recorded concurrent findings against the appellant/plaintiffs and held that there was a proper proclamation and service, which was effected upon all co-sharers by beat of drum/munadi. Thereafter, Gurbachan Singh raised a challenge to the said judgment and the said suit was dismissed in the year 1978. It cannot thus be held that proprietors of patti Hosang and Godhu were not aware of the institution of the civil suit and passing of the judgment and decree dated 03.07.1971. Thus, considering the case from either of the perspective i.e. from the date of passing of the decree or also from the date of dismissal of the subsequent suit instituted by Gurbachan Singh in the year 1978, the limitation and order in favour of the proprietors to raise the challenge to the decree was 1981 and the instant suit was instituted in year 1984 and was thus barred by limitation and has been rightly dismissed by both the Courts.

16. I have heard learned counsel appearing for the respective parties and gone through the record as well. The judgment and decree dated 03.07.1971 which is subject matter of challenge in the present petition have also been perused.

17. Even though there is no necessity for framing substantial questions of law in view of Section 41 of the Punjab Courts Act, however, the following questions arise for determination:-

- i) Whether a co-sharer can claim adverse possession in a suit filed against defendants in a representative capacity, without proving the basic ingredients?
- ii) Whether the plaintiff is bound to still prove his own case even though all defendants are proceeded against ex-parte?

iii) Whether leave to sue/defend in a representative capacity is essential pre-requisite for suit to be proceeded without impleading all co-sharers?

(iv) Whether a decree surrounded by suspicious circumstances is fraudulent and liable to be set aside?

18. In order to comprehend the dispute, it would be necessary to go through the judgment and decree dated 03.07.1971 passed in case No.316 (Harnam Singh Vs. Harnek Singh & ors.), which reads thus:-

“Harnam Singh plaintiff has filed this suit against the defendants for declaration, to the effect that he is the owner in possession of the suit land.

2. The facts, as alleged by the plaintiff are that he is in possession of the suit land for the last about 20 years as owner. He has also stated that the suit land is in his possession and the possession is hostile, adverse to the owners and is also open and continuous. The suit land was previously cultivated by his father and after his death the suit land is under his possession. Now the defendants have denied the right of ownership of the plaintiff and hence this suit.

3. Defendants No.6 to 8 had been struck off the plaint vide order dated 12.5.71. Defendants No.1 to 5 did not associate with the proceedings and hence were proceeded against ex parte. The plaintiff was then called upon to lead his ex parte evidence, to substantiate his claim.

4. In support of the case, the plaintiff has produced three witnesses in addition to his himself coming to the witness box as PW4. PW1 Harnek Singh has stated that the land in dispute is being cultivated by the plaintiff for the last about 20 years. The land was previously in possession of his father and after his death the plaintiff is in possession of the suit land. He has also stated that

plaintiff occupied this land without any permission or sanction, nor pay any Batai or Lagan, to the owners of Shamilat Patti. His possession over suit land is adverse, hostile, open and he treats himself as owner of suit land. PW2 Harnek singh s/o Isher singh and PW3 Bhag singh, have corroborated the statement of PW1 in all material points. PW4 Harnan singh plaintiff has also stated to the same effect. In view of all this, the plaintiff has been able to prove that he is in possession over suit land for the last about 20 years. His possession is also proved to be adverse and hostiled to the owners and is not paying any Batai to anybody. He has thus become owner of the suit land, by adverse possession for more than 12 years.

5. In these circumstances, I pass a decree in favour of the plaintiff and against the defendants, for declaration to the effect that the plaintiff is owner of the land measuring 34 B 18 Biswas comprised in Khasra No 40/2/1 min(11-9)41 min(2-5),267(0-8) 268/1 (7-12)269/1(0-14),269/3(1-12),270/1/1(0-9), 271/1(0-4),512 min (1-2),260 min(8-16), 2476 min(0-3), situated at Rori Tehsil Sirsa.The suit of plaintiff is decreed ex parte with costs.

Announced,
3.7.71.

Sub Judge 3rd Class,
Sirsa”

19. As per the essential ingredients of establishing plea of adverse possession, a mixed question of law and fact needs to be determined. The Hon’ble Supreme Court held in the matter of **Konda Lakshmana Bapuji Vs. Government of AP, (2002) 3 SCC 258**, that existence of possession and animus possidendi are essential requirements. Period for reckoning adverse possession commences from the date when both these elements are fulfilled. It was also held in the above judgment that onus to prove is on the

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party claiming title by adverse possession.

20. Further, it was held by the Hon'ble Supreme Court, after examining the case law, in the matter of **Darshan Singh Vs. Gujjar Singh, (2002-2) PLR 233 (SC)**, that when property belongs to several co-sharers, possession by one co-sharer is deemed to be possession on behalf of all unless there has been a clear denial of title of all other co-sharers. Even a mere mutation in favour of a co-sharer does not make ouster till there is a clear declaration that title of other co-sharer is denied.

21. It was further held in the matter of **Daulat Singh Vs. Dilbagh Singh: (2004-1) PLR 871** that mere exclusive possession by one co-sharer, even though he enjoys all the profit moved not amount to an ouster of the other co-sharer not in possession, unless there is evidence to establish that the co-sharer in possession had asserted open, hostile and exclusive title and based his exclusive possession thereon. The above position in law was reflected also in the matter of **T. Ramalingeshwar Rao vs. N. Madhava, reported as (2019) 4 SCC 608.**

22. It is also a well settled position in law that a party has to prove its case even though defendants may be ex parte. A suit cannot be automatically decreed or be deemed to be admitted on a mere absence of the defendants. The plaintiff is still required to establish his pleaded case before a decree can be awarded.

23. The position in law is also well established that High Court can interfere with concurrent findings, while hearing a second appeal where the Courts have ignored material evidence or acted without it; where Courts have drawn wrong inferences by applying law erroneously to the proved facts; where the Courts wrongly cast the burden of proof or where the

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evidence, taken as a whole is not capable reasonably of supporting the finding, as per the judgment of **Boodireddy Chandraiah Vs. Arigela Laxmi: 2007(4) RCR (Civil) 354(SC)**.

24. The above position in law needs no further corroboration.

25. In the said background, when the judgment and decree dated 03.07.1971 is considered, it fails to refer to any evidence as regards the animus possidendi. There is no reference to any time or period or revenue record reflecting the time from when possession became hostile. A mere self serving statement and uncorroborated testimony is not sufficient to prove that burden to prove hostile and adverse possession is satisfactorily discharged by the propounder.

26. It is evident from perusal of the civil suit that defendants No.6 to 8 had been struck of the plaint by order dated 12.05.1971 and defendants No.1 to 5 therein did not associate with the proceedings and hence, were ordered to be proceeded against ex parte. An ex parte evidence in the form of testimony of four witnesses including the respondent-defendant Harnek Singh had been recorded. An ex parte decree was thereafter passed in favour of the defendant with effect that respondent-defendant is owner of the land measuring 34 bighas 18 biswas comprising khasra numbers detailed thereunder.

27. The civil suit had been filed for declaration as owner in adverse possession. It is well settled in case of **M. Siddiq (D) through LRs V. Mahant Suresh Das & ors., 2020 (1) SCC 1**, that the mandatory requirement for pleading and establishing ownership by way of adverse possession (notwithstanding that adverse possession is a plea of defence only) is that the person taking such a plea is required to establish an open,

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adverse, hostile, exclusive and continuous possession for a period of 12 years preceding the date of institution of the suit. Relevant portion is reproduced herein under:-

“xxx xxx xxx xxx xxx xxx xxx

1143.... A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous-possession which meets the requirement of being ‘nec vi nec claim and nec precario’. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence....”

28. In the instant case, apart from a claim that respondent-defendant was in open and hostile possession of the suit land for a period of 12 years prior to the institution of the appeal, there was no averment as to from what date the possession of the respondent-defendant became hostile, open and exclusive to the knowledge of the true owners. The period of hostile and adverse possession has to commence from the date when such possession is claimed to have become adverse and hostile to every true owner and it cannot be construed in the absence of any such pleading to the said effect.

29. Reliance may also be placed on case of **Karnataka Board of Wakf v. Govt. of India, (2004) 10 SCC 779**, wherein it was held as under:-

“xxx xxx xxx xxx xxx xxx xxx

11. It is a well settled principle that a party claiming adverse possession must prove that his possession “nec

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vi, nec clam, nec precario”, that is, 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 disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.....”

30. The Hon’ble Supreme Court in case of **Thakur Kishan Singh v. Arvind Kumar, (1994) 6 SCC 591**, has held that a person claiming adverse possession must show clear and cogent evidence to substantiate such claim. Relevant portion is reproduced herein under:-

“xxx xxx xxx xxx xxx xxx

5. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession.....”

31. Further, it is also established that there was no evidence adduced on record on the basis whereof the actual physical possession of the respondent-defendant No.1 was established before the Sub Judge, IIIrd Class, Sirsa in civil suit No.316 of 1971.

32. It is apparent from a perusal of the above that the basic ingredients of adverse possession were not established by defendant No.1 in the previous suit.

33. The said decree being under challenge, the Court was required to see whether the decree sought to be enforced satisfied the necessary ingredients. Specific allegation had been levelled by the appellant that the

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decree in question was collusive and as a result of fraud on Court. Certain additional facts also missed the attention of the Court which led to the passing of the instant decree. The same may be highlighted as under:-

- i) The status of appellant-plaintiff as co-sharer in the land is not disputed.
- ii) The specific pleading that defendants in civil suit No.316 of 1971 were related to respondent-defendant not been specifically denied in the written statement.
- iii) There is no order as per which permission under Order 1 Rule 8 had been granted to the defendant in Suit No.316 of 1971 and such a direction is needed to be issued. Notice can be issued to them in a representative capacity only thereafter. The pleading about absence of permission is not dispelled.
- iv) For a decree in representative capacity to operate as a res-judicata, it needs to be established that statutory provision and procedure is complied with.
- v) All the defendants in case No.316 of 1971 chose not to appear and were proceeded against ex parte in a case where adverse possession was being claimed. It would not be normal when all persons who are prejudiced choose not to defend their rights.
- vi) The Court failed to consider that the process service was not examined to prove the proclamation.
- vii) The Ahlmad appeared as PW-2 in the case and deposed that there was no order in Case No.316 of 1971 on the permission in application under Order 1 Rule 8 CPC.

viii) The PW's specifically stated that there was no resident by the name of Bhagwan Singh, S/o Jagar Singh and they denied adverse possession of Harnam Singh.

ix) Jagdish S/o Harnam Singh admitted in cross-examination and while appearing as DW-1 that Bant Singh (defendant No.3 in case No.316) was son of Bhua of Harnam Singh; Harnek Singh (defendant No.1 in case No.316) was brother of Harnam Singh (chacha of Jagdish above); Bhag Singh (defendant No.2 in case No.316) was grand father; Bhagwan Singh S/o Jagar Singh was admitted to be his chacha (brother of plaintiff Harnam Singh in Case No.316) while defendants No.6 to 8 were sisters of plaintiff Harnam Singh (Bhua of Jagdish). The close relationship of plaintiff Harnam Singh with defendants No.1 to 8 who chose not to appear, clearly shows that an act of fraud was committed by suing the representative interest of co-sharers through his family members. The defendants made party in the representative capacity had interest aligned to the plaintiff-Harnam Singh (defendant herein).

34. The fact that the close relationship of defendants No.1 to 4 with plaintiffs therein in suit No.316 of 1971 was not denied or disputed, the same was clearly a suspicious circumstance reflecting that the suit had not been filed with a proper intent and through proper parties.

35. Ordinarily, the service by way of a substituted service is to be resorted to after recording a satisfaction that service on the contesting respondent cannot take place in the normal manner prescribed as per law.

There was no such satisfaction recorded nor any compelling circumstances

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mentioned or noticed in the zimni orders passed by the Sub Judge, 3rd Class, Sirsa, that there was imminent need to effect service on the proprietors by means of a proclamation/ beat of drum. The absence of any person from the co-sharers in contesting the claim is another suspicious circumstance. Further, the respondent-defendant No.1 suppressed the abovesaid judgment and decree dated 03.07.1971 till the year 1984 is one corroborative piece of evidence which reflects at the dishonest intent and malice on the part of the respondent-defendant. There is no satisfactory explanation forthcoming as to why the respondent-defendant did not immediately implement the said judgment and decree which would be ordinarily and normally done if no co-sharer had any interest in it.

36. The position in law is thus well established that co-sharer has to establish his open and hostile possession to claim ownership by way of adverse possession. Even a mere revenue entry or exclusive benefit being drawn or not sufficient to infer adverse possession. The necessary ingredients were amiss when case No.316 of 1971 was decreed in favour of Harnam Singh (defendant herein) on 03.07.1971. He failed to prove his case as plaintiff therein. The witnesses also admitted that no permission was granted by the Court on the applications under Order 1 Rule 8 as well. The said aspect is significant taking into consideration the admitted relationship between Harnam Singh and defendants therein as well as his conduct in sitting over the ex-parte decree dated 03.07.1971. All the above circumstances cumulatively establish that the decree dated 03.07.1971 was obtained by way of an act of fraud and is not binding on the appellant herein. The questions thus are answered in favour of the appellants. The next issue is as regards the effect of judgment in the case of Gurbachan

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Singh bearing suit No.275 dated 24.03.1976 and it was held that Gurbachan Singh and others had not filed the suit as representative of the co-sharers of the pattis. Hence, the decree dismissing the suit of Gurbachan Singh dated 21.09.1978 can not be read as res-judicata against the appellant herein.

37. The finding about suit being barred by limitation is liable to be set aside in view of Section 17 of the Limitation Act, 1963. Limitation in case of fraud or mistake is to commence w.e.f. the date when fraud is detected and does not relate back to the date of suit/decreed.

38. Hence, the Courts failed to consider the legal principles as well as factual aspects of the case including the effect of the evidence adduced on record. Under such circumstances, even a concurrent judgment can be interfered with by the High Court.

39. Considering from any of the said perspective, I find that judgment and decree dated 03.05.1988 passed by the Court of Sub Judge, Ist Class, Sirsa, as affirmed by the Additional District Judge, Sirsa, vide order dated 31.5.1989, suffer from the vice of non-appreciation of law and misappreciation of evidence adduced on record.

40. The said judgments are hence liable to be set aside. The suit is, thus, decreed in favour of the appellant/plaintiffs and decree-sheet be drawn. The appeal is accordingly allowed.

41. All the miscellaneous applications also stand disposed of.

04.04.2024
monika

(VINOD S. BHARDWAJ)
JUDGE

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