

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

136

**RSA-1202-2024 (O&M)
Date of decision : 24.03.2026**

Chander Bhan (since deceased) thr. his LRs & ors. Appellants

versus

Biswedaran Shamlat Patti Tek Chand & ors. Respondents

CORAM : HON'BLE MR.JUSTICE PANKAJ JAIN

Present :- Mr. Ashish Aggarwal, Sr. Advocate with
Mr. Vishal Pundir, Advocate
Mr. Anmol Rattan S.Dhillon, Advocate
and Mr. Saket Bhandari, Advocate
for the appellants.

PANKAJ JAIN, J. (Oral)

CM-4697-C-2024

This is an application for bringing on record the LRs of appellant no.1 (iv), appellant No.2(i) and appellant No.3 who are stated to have unfortunately expired.

For the reasons recorded, the application is allowed subject to all just exceptions. Amended memo of parties is taken on record.

Registry is directed to make necessary correction in the memo of parties.

Main case

1. Plaintiffs are in second appeal aggrieved of judgment and decree passed by the Lower Appellate Court whereby, suit filed at their behest stands dismissed reversing the judgment of decree passed by the Trial Court.



2. Plaintiffs filed suit seeking decree of declaration with the consequential relief of permanent injunction against Biswedaran Shamlat Patti Tek Chand and others in representative capacity under Order I Rule 8 CPC.

3. As per plaintiffs, their predecessors-in-interest and those of defendant No.7 were owner in possession of the suit property total admeasuring 18 Bighas, 16 Biswas. For last more than 50 years, the plaintiffs are continuing to be owner in possession of the suit property and have raised huge construction over the suit land. Though, defendants are recorded as co-sharers in the revenue record, but never remained in possession over the suit property. Plaintiffs have thus become owners of the same by way of adverse possession. Bhoru predecessor-in-interest of defendant No.6 mortgaged his 1/2 share in favour of Jai Chand etc. who sold the mortgagee rights to Ghisa the predecessor-in-interest of the plaintiffs on 29.01.1950. The period of redemption having expired, the plaintiffs became successors in interest of Ghisa have become owners by efflux of time. Ram Mehar defendant No.5 left the village 20 years ago, admitting Ghisa the predecessor-in-interest of plaintiffs to be owner in possession of the entire suit property. The possession of the plaintiffs or their predecessors-in-interest were never objected by the defendants.

4. Defendant No.1 Shamlat Patti filed suit for joint possession which was decided vide judgment and decree dated 27.02.1978 by Appellate Court. Execution was dismissed. Thereafter, Shamlat Patti filed suit for injunction which was dismissed by the Trial Court vide judgment and decree dated 28.11.1990. The findings recorded therein



operates as *res judicata*. Plaintiffs claimed that there are more than 250 proprietors in Shamlat Patti. It is not possible to join them as defendants. Plaintiffs accordingly moved an application under Order I Rule 8 CPC to sue defendants in representative capacity. Plaintiffs accordingly, sought decree of declaration to the effect that the entries in the revenue record in favour of the defendants are not binding on the right, title and interest of the plaintiff, who is owner in possession of the suit property and sought decree of permanent injunction against the defendants.

5. Suit was contested by the defendants. Defendant No.1 in the written statement filed through Ram Kishan claimed that the provisions of order I Rule 8 CPC have not been complied with. No list of proprietors of Shamlat Patti Tek Chand has been placed on record and thus, the suit is not maintainable. Earlier also, predecessors-in-interest of plaintiffs made an attempt seeking declaration as occupancy tenant. The same was rejected vide judgment and decree dated 03.12.1974. The appeal preferred by Ghisa predecessor-in-interest of the plaintiffs was dismissed on 27.02.1978. Once a mortgagee always a mortgagee is a settled law, plaintiffs thus cannot claim to have become owners by efflux of time having purchased mortgagee rights on 29.01.1950.

6. Defendants No.5 and 6 also appeared and filed their joint written statement. It was denied that defendant No.5 ever abandoned his rights in favour of plaintiffs. As per defendants No.5 and 6, plaintiffs have no cause of action to file the present suit. In the judgment and decree dated 09.05.1994 relied upon by the plaintiffs, defendants were never served. They never signed any power of attorney in favour of K.L.



Dang, Advocate. The decree was obtained by impersonation. The same was set aside by High Court vide order dated 31.08.2013 passed in Civil Revision No.4326 of 2006. Civil Suit No.247 instituted on 17.07.2006 titled as “*Ram Mehar vs. Makhan*” by defendant No.5 was lying adjourned *sine die*. Defendants No.5 and 6 accordingly prayed that the suit filed by the plaintiffs be ordered to be dismissed.

7. Suit filed by the plaintiffs was put to trial by the Court of First Instance on the following issues:-

- “1. Whether the plaintiffs are exclusive owners in possession of property measuring 18 bigha, 16 biswas detailed in the plaint? OPP.
2. Whether the entries showing the defendants to be co-sharers are liable to be declared illegal, null and void? OPP.
3. If issues No.1 and 2 are decided in favour of plaintiffs, whether they are entitled for the relief of permanent injunction as prayed for? OPP.
4. Whether the suit is not maintainable in the present form? OPD.
5. Whether the plaintiffs have no locus-standi and cause of action to file the present suit? OPD.”

8. While deciding issue No.1 and 2, the Court found that the plaintiffs successfully proved their continuous possession over the suit land for last 70 years. Onus shifted upon the defendants to prove that the revenue entries are as per the situation on the spot and that the land belongs to Shamlat Patti Tek Chand. Judgment and decree dated 03.12.1974 was never acted upon by the parties. The properties of Shamlat Patti Tek Chand never sought possession of the suit land. No possession was sought in the earlier suit and thus in terms of Order II



Rule 2, defendants cannot claim possession over the suit land. The Court of First Instance held that even though plea of adverse possession and foreclosure is not available to the plaintiff, but defendants are estopped from questioning their title and possession over the suit property by way of their own act, conduct and acquiescence. The Court of First Instance accordingly decreed the suit filed by the plaintiffs.

9. The findings recorded by the Court of First Instance have been reversed by the Lower Appellate Court relying upon the earlier litigation, wherein proprietors of Shamlat Patti Tek Chand were held to be co-owners to be extent of 18 shares alongwith predecessors of the plaintiffs Ghisa, Budha and Bhoru, who were held to be co-owners to the extent of 02 shares in the suit property. The Court of First Instance accordingly held that the revenue entries having been rectified on the basis of decree dated 03.12.1994, the plaintiffs are not entitled for decree of declaration.

10. Learned senior counsel appearing for the appellants has assailed the findings recorded by the Courts below. It has been contended that a well reasoned judgment and decree passed by the Court of First Instance have been reversed by the Lower Appellate Court. It has been further contended that the Lower Appellate Court wrongly relied upon the judgment and decree dated 03.12.1974 which was never executed and despite the execution petition filed by the defendants having been dismissed.

11. I have heard senior counsel for the appellants and have carefully gone through the records of the case.



12. Parties are fighting for the suit land for last more than 50 years. Predecessor-in-interest of the plaintiffs instituted Civil Suit No.209 of 05.05.1972 seeking decree of declaration to the effect that they are exclusive and sole owners of the suit property ad measuring 18 Bighas 13 Biswas and that the entries in revenue record in favour of Shamlat Patti Tek Chand hasab hissa malkiat andrun patti deserves to be deleted from the column of ownership in jamabandi for the year 1969-70. The plaintiffs pleaded their right as occupancy tenants in the said suit. Plaint is on record as Ex.D3. Vide judgment and decree dated 27.06.1972 Ex.D4, the suit filed by the plaintiffs was decreed by the Court of Sub-Judge III.C, Gurgaon.

13. Defendants, i.e. properties of Shamlat Patti Tek Chand filed suit seeking decree of joint possession of permanent injunction qua the same suit land pleading that plaintiffs wrongly obtained decree impleading defendant No.5 and defendants No.6 in the earlier suit in representative capacity. Defendants No.5 and 6 colluded with defendants No.1 to 4 and did not lead any evidence.

14. Plaintiffs in their written statement Ex.D-7 specifically raised a preliminary objection that without getting decree dated 27.06.1972 set aside, the proprietors of Shamlat Patti Tek Chand are not entitled to the relief claimed in the suit. Issue No.2 was framed which reads as under:-

“Whether the decree obtained by defendants No.1 to 4 against defendant No.6 is null and void and5 inoperative against the rights of the plaintiff as alleged in para No.4 of the plaint? OPP”



15. Specific finding was returned which reads as under:-

“Plaintiffs have taken a plea that decree dated 27.6.72 obtained by defendants No.1 to 4 is null and void and inoperative against the rights of the plaintiffs since the defendants No.1 to 4 had committed fraud by representing that they were occupancy tenants of the entire land and provisions of order I rule 8 CPC were not complied with and moreover defendants No.5&6 could not and did not represent the plaintiffs. The discussion on issue No.1 shows that defendants No.1 to 4 were not occupancy tenants of the entire land of Shamlat Patti Tek Chand and they were occupancy tenants of only two shares out of 20 shares and the remaining shares were owned by Shamlat Patti Tet Chand. Plaintiffs tendered in evidence certified copy Ex.P6 of the decree sheet, certified copy Ex.PW6/B of the application made under order I rules 8 CPC, and certified copy Ex.PW3/1 of the order passed on the application under order I Rule 8, CPC and certified copy Ex.P6/A of the plaint filed in earlier suit No.209 of 1972 instituted on 5.5.72 and decided on 27.6.72. The perusal of these documents show that the earlier suit was filed by present defendants Nos.5&6 and defendants No.5&6 were impleaded as defendants both in their personal capacity and also as representative of other proprietors of Patti Tek Chand. Plaintiffs examined Shri Mahipal Singh Ahalmel of the court then presided over by Shri Sarvdaman Anand who deposed from the official file of the said earlier suit that there is no order on the file of civil suit No.209/1972 for issue of proclamation by beat of drum and no report about proclamation by beat of drum is placed on the said file. Plaintiffs have also drawn my attention to the fact that in the application under order I Rule 8 CPC in civil suit No.209/1972, the plaintiffs had prayed that Manohar Singh and Ram Kishan be allowed to represent the proprietary body of Shamlat Patti Tek Chand and the court had granted permission certified copy of which is



Ex.PW3/1. The court had granted permission to Manohar Singh and Ram Kishan while Ram Kishan was not a party to the suit at all. Plaintiffs have also contended that Manohar Singh to whom permission was granted was not a proprietor and was not competent to represent other proprietors of Patti Tek Chand and moreover the permission obtained was collusive. A perusal of the list Ex.P1 shows that Manohar Lal and Ram Kishan to whom permission to represent under order I Rule 8 CPC was granted in Civil suit No. 209/1972 are not mentioned as proprietors in the said list.

Learned counsel for the plaintiffs has referred me to 1933 Privy Council page 183 (Kamaravelu Chetti and others v. T.P. Ramaswami Ayyar and others) wherein it was confirmed that if a suit is to have benefit of explanation 6 of section 11 CPC, conditions of order 1 rule 8 CPC must be complied with fully. He has also referred me to 1960 Punjab page 26 (Bishan Singh and others vs. Mastan Singh and others), wherein it was held that if proper notice is not issued under Order I Rule 8 CPC, the irregularity in not serving proper notice vitiates the trial. He has also referred me to AIR 1973 page 281 (Smt. Munni Devi and others vs. Satgur Dayal Tondon and others) wherein it was held that omission to comply with the provisions of Order I Rule 8 CPC is not a mere irregularity but goes to the route of the matter and if compliance of these provisions have not been made the decree would not be deemed to have been passed in a representative capacity.

Learned counsel for the defendants on the other hand has referred me to 1971 PLR 126 (Padam Kishan vs. Malerkotla Club Malerkotla and another) wherein it was held that if the court has been negligent in not issuing a notice in a representative suit to all the persons interested in the subject matter, then the plaintiff is not to suffer on that account. In the present case the permission was only applied for Manohar Singh and Ram Kishan.



Ram Kishan was not impleaded as a party to the suit and both Ram Kishan and Manohar Singh are not proprietors in the Shamilat Patti Tek chand. Manohar Singh and Ram Kishan cannot be said to have same shown in red by letters XAYZ in shijra Aks Ex.P2. It is admitted case that there is no passage indicated in shijra. Ex.P2 from X to Z and the marking of this passage by way of red pencil has been done by the plaintiff himself. Plaintiffs had examined Shri Kishan Chand Patwari Halqa who deposed that there is no passage on the spot as indicated by red pencil XAYZ by the plaintiff to Aks shijra Ex.P1 issued by him. He has contradicted the plaintiffs claim about the existence of the alleged passage. Plaintiffs also examined Jot Ram Peshi Kanungo Consolidation Department Gurgaon who produced the consolidation field book and tendered copy of Ex.PW5/1 of the field book for the year 1939-40. He has deposed if village path is less than one GHATHAS (8feet 3”) then such path is not shown in the Shijra Aks but is only mentioned in Khana Khafiat. Case of the plaintiff is that the path in dispute goes to the north of Khasra Nos. 919,880 and 981. The perusal of the copy of Tamahandi Ex.P8 for the year 1955-56 & Ex.D4 for the year 1953-54 show that during consolidation Khasra No. 921 was carved out of previous Khasra Nos. 1145 1146 and 1147. Relying on the said entries plaintiffs try to take advantage of the entry in the field book copy of which is Ex.PW5/1. The perusal of extract of the field book entry Ex.PW5/1 shows that in the KHANA KAFIAT of the field book for the year 1939-40 against field No.1145 there was an entry of GHAIK MUMKIN RASTA and the writing Ghair Mumkin Rasta was scored out. Thus the entries in the suit as proprietors of Patti Tek chand and so the permission granted was, therefore, defective and hence they were not representative of the shamilat patti Tek Chand, the proprietors of Shamilat Patti Tek Chand were not bound by the acts of omission and commission of



Manohar Singh and Ram Kishan aforesaid. Moreover, no notice was issued to the proprietors either personally or through any proclamation by way of advertisement. At any date, file of civil suit No.209/72 is before me and I find that the court had never ordered notice of the institution of the suit to all the proprietors of Patti Tek Chand after granting permission in favour of Manohar Singh and Ram Kishan. Permission in this case was granted to persons who were not proprietors in Shamlat Patti Tek Chand and no notice was ordered by the court to be issued to the proprietors of Patti Tek Chand. Since no notice was given as required under Order I Rule 8 CPC and defendants in suit No.209 of 1972 had not represented the proprietary body of Shamlat Patti Tek Chand, the decree in that suit is only operative against the parties actually on record and not against others. Thus the decree dated 27.6.72 is in operative against the rights on the present plaintiffs. This issue is, therefore, decided accordingly in favour of the plaintiffs and against the defendants.”

16. The suit filed by the proprietors of Shamlat Patti Tek Chand was accordingly decreed holding them to be co-owners of 18 share out of 20 shares in the suit land measuring 18 Bighas 13 Biswas and they were held to be entitled for joint possession of the same. The decree of joint possession qua the suit land was accordingly passed. Judgment dated 03.12.1974 is on record as Ex.D-9. Decree passed thereupon dated 03.12.1974 is on record as Ex.D-10. Admittedly, the said decree was never challenged. Plaintiffs thereafter filed suit seeking decree of declaration along with consequential relief of permanent injunction. Present defendants were proceeded against ex-parte. The Trial Court vide judgment and decree dated 09.05.1994 decreed the suit observing as under:-



“XX XX XX

13. Keeping in view that DW5 & DW6 who are contesting the defendants in this case was proceeded against ex parte and they appear to rebut the evidence led by the plaintiffs. Plaintiffs with the help of documentary as well as oral evidence of PW1 and PW2 succeeded in proving that they are owner in possession of suit land. Hence, case of the plaintiff is decreed ex parte, no order as to costs. Decree sheet be prepared. File be consigned to record room.”

17. The defendants filed application under Order IX Rule 13 CPC seeking setting aside of ex-parte decree. The same was dismissed vide order dated 01.03.2002. The defendants further preferred appeal. The same was dismissed vide order dated 06.03.2006 Ex.P-1.

18. Plaintiffs in the present suit want to rely upon ex-parte judgment and decree Ex.P-6 dated 09.05.1994 to claim *res judicata*.

19. Learned senior counsel submits that since execution qua judgment and decree dated 03.12.1974 Ex.D-9 and D-10 was dismissed, the same should be treated as judgment and decree in nullity.

20. The plea raised by the plaintiffs qua adverse possession and having become owners being mortgagees in possession by efflux of time were discarded and rejected by the Court of First Instance. Plaintiffs did not file cross objections against the same. Thus, the same have attained finality.

21. The Court of First Instance held that the defendants are precluded from denying the title of the plaintiffs on the basis of acquiescence. Once the Trial Court rejected the claim of the plaintiffs of having become owners by way of adverse possession, this Court fails to understand how acquiescence of defendants can aid the rights of



plaintiffs. The plaintiffs claimed that the findings recorded in Civil Suit No.170 of 1991 should operate as *res judicata*. If so is the case, the present suit has to be held to be barred and deserves to be dismissed.

22. From the afore stated facts, it is evident that repeated attempts are being made by the plaintiffs to claim ownership over the suit property. They initially filed suit claiming his rights as occupancy tenant. Plaint filed in Civil Suit No.209 dated 05.05.1972 is on record as Ex.D-3. The suit was decreed vide judgment and decree dated 27.06.1972 Ex.D-4. Defendants resisted the claim of the plaintiffs by filing separate suit Ex.D-6. Plaintiffs sought refuge under judgement passed in his favour Ex.D-4. The suit was decreed and the objection raised by the present plaintiffs seeking protection under Ex.D-4 was rejected. Judgment and decree are on record as Ex.D-9 and D-10. The proprietors of Shamlat Patti were held to be co-owners to the extent of 18 shares out of 20 shares. Still plaintiffs filed Civil Suit No.170 of 1991. The same was decreed vide judgment and decree dated 09.05.1994. It was decreed merely for the reason that defendants No.5 and 6 have been proceeded ex-parte. No evidence was analysed. No finding was recorded by the Trial Court.

23. Learned senior counsel wants to wriggle out of Ex.D-9 and D-10 pleading that the execution filed on the basis thereof was dismissed. Bare perusal of the decree Ex.D-9 would reveal that the same is the decree for joint possession. Decree holders were already recorded as join owners in the revenue record. Decree for joint possession of immovable property is executed in terms of Order XXI Rule 35(2) CPC.

Thus, the plea raised by senior counsel claiming that the defendants did



not obtain possession under decree Ex.D-10 sans merit and cannot be accepted. Decree was for joint possession of immovable property. Decree holders were already recorded as co-owners in the suit property. Thus, merely for the reason that the decree could not be executed, the factum of defendants having been declared as co-owners cannot be washed away.

24. The decree Ex.D-10 even if not executed, is a cogent and relevant piece of evidence to evince that the defendants are co-owners in the suit property. Having held so, this Court finds that the rights of co-owners have been elaborately explained by Division Bench of this Court in *Sant Ram Nagina Ram vs. Daya Ram Nagina Ram* reported as *AIR 1961 Pb. 528*. The same was reiterated by Full Bench of this Court in '*Bhartu vs. Ram Swarup*, reported as *1981 PLJ 204*', with approval observing as under:-

- “(1) A co-owner has an interest in the whole property and also in every parcel of it.
- (2) Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
- (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
- (4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession, of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other.
- (5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.
- (6) Every co-owner has a right to use the joint property in



a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.”

25. The fact of plaintiffs having raised construction over the suit property in their capacity as co-owners, cannot clothe them to claim exclusive ownership. By raising construction, they cannot claim exclusion of other co-sharers. Reference can be made to Division Bench judgment of this Court in ***Bachan Singh versus Swaran Singh***, **2000(2) PLJ 143**, wherein this Court observed as under :-

“15. On a consideration of the judicial pronouncements on the subject, we are of the opinion that :

(i) a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession.

ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

In all other cases, the remedy of the co-owner out of possession of the property is to seek partition, but not an injunction restraining the co-owner in possession from doing any act in exercise of his right to every inch of it which he is doing as a co-owner.

16. In this view of the matter, we are unable to agree to the propositions laid down by the learned single Judge of this



Court in Nazar Mohd. Khan v. Arshad Ali Khan and others (supra) wherein his Lordship broadly stated that there is no denying the fact that a co-sharer has no right to raise construction until the land is partitioned by metes and bounds and so even when one of the co-sharers is in exclusive possession of a particular piece of land any other person can seek injunction restraining the other co-owner from raising construction. We accordingly overrule the said decision of the learned single Judge of this Court and also the decisions in Mst. Parsini alias Mano v. Mahan Singh, 1982 P.L.J. 280, Om Parkash and others v. Chhaju Ram, 1992 P.L.J. 546 and Daulat Ram v. Dalip Singh, 1989 R.L.R. 523.”

26. In view of above, this Court finds no merit in the present appeal. The Lower Appellate Court rightly dismissed the suit filed by the plaintiffs.
27. Finding no merits in the present regular second appeal, the same is ordered to be dismissed.
28. Since the main case has been decided, pending miscellaneous application, if any, shall also stands disposed off.

(PANKAJ JAIN)
JUDGE

24.03.2026
Dinesh

Whether speaking/reasoned :	Yes
Whether Reportable :	No