

RSA No.830 of 1993 (O&M)

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IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.830 of 1993 (O&M)

Date of decision:21.01.2019

Baldev Singh and another ... Appellants

Vs.

Dhanvir Singh and others ... Respondents

RSA No.1159 of 1993 (O&M)

Maninder Singh and others ... Appellants

Vs.

Dhanvir Singh and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ashok Singla, Advocate
Mr. Aakash Singla, Advocate and
Mr. Ravish Bansal, Advocate
for the appellants (in RSA No.830 of 1993).

Mr. Som Nath Saini, Advocate
for the appellants (in RSA No.1159 of 1993).

Mr. Rajiv Joshi, Advocate
for the respondents (in both cases).

AMIT RAWAL J.

This order of mine shall dispose of two Regular Second Appeals bearing Nos.830 and 1159 of 1993 at the instance of defendants arising out of decision of common civil suit bearing No.1034-T-1984 dated 21.12.1982.

The facts which emanate from the pleadings of the parties are that plaintiff sought the declaration that shamlat land measuring 397 bighas

10 biswas being '*hasab rasad*' as described in the head note of the plaint situated in village Gazipur, Tehsil Rajpura, was in joint of khewatdars/proprietors and thus, partible according to the extent of khewat held by each khewatdar and for separate possession being not assessed to land revenue.

Mehma Singh, grandfather of the plaintiff and defendant no.60 was stated to be the original settler and biggest khewatdar of aforementioned village. On his demise, the entire estate of the village was mutated in equal shares in favour of his five sons namely, (i) Dr. Arjan Singh, (ii) Surjan Singh (iii) Gurcharan Singh, (iv) Harcharan Singh and (v) Dr. Hazara Singh. The plaintiff being son of Dr. Arjan Singh alongwith defendant no.60 claimed to have inherited the entire estate of his father after his death on 14.03.1978 by virtue of registered Will dated 14.05.1971. The mutation no.263, as per the terms of the Will with regard to inheritance was stated to be sanctioned on 19.10.1979. It was averred that entire shamlat land did not vest with the Gram Panchayat being '*hasab hissa rasad khewat*', therefore, all the khewatdar of the village were co-owners to the extent of khewat held individually by them and plaintiff was also joint owner in possession of the suit land being khewatdar.

The civil suit at the instance of Surjan Singh and late Dr. Arjan Singh for permanent injunction was filed against defendants no.1 to 6 in respect of suit land alleging to be vesting in the khewatdars seeking restraint against the defendants not to alienate the land being beyond their share as the share of shamlat land was 4 biswas 7 ½ biswanies per bigha of the

proprietorship land of the khewatdar. The suit was decreed, vide judgment and decree dated 29.01.1979, Ex.P3. The appeal preferred against the same by the defendants was dismissed on 04.02.1980, Ex.P4. The matter attained finality upto the Hon'ble Supreme Court.

The plaintiff alongwith Kirandev and Surjan Singh, filed a partition application before the revenue Court for partition of the entire suit land as per '*hasab rasad khewat*' but the said application was allegedly declined by the revenue authorities on the ground that land was not partible being not assessed to the land revenue. Defendants No.1 to 6 and their ancestors gifted the land out of the suit land more than their share which was said to be illegal, void and sought the relief as aforementioned.

Defendants no.1 to 4, 35, 51, 52, 53, 57, 58, 59, 60 and 61, filed the written statement and stated that suit land was *shamlat deh* and had been in their possession before 26.01.1950 and at that relevant point of time, it was banjar kadim and with the dint of hard work, was made cultivable. The plaintiff had not been in possession nor cultivated the land and vested in the Gram Panchayat. In such circumstances, the proprietors were deprived of their right from the shamlat deh. The possession was stated to be separate and jurisdiction of the Civil Court was objected to. A plea of adverse possession was taken on the ground of hostile, notorious and knowledge of the everybody. Death of Mehma Singh and mutation in equal share in favour of his five sons was not denied. Dr. Arjan Singh, father of the plaintiff never remained in possession of suit land as he was employed as doctor in Uttar Pradesh and prayed for dismissal of the suit.

Defendants No.5, 6, 24 and 25 filed a joint written statement and denied the execution of the Will by Dr. Arjan Singh and mutation on the basis of the Will, for, mutation did not confer title. It was explained that land measuring 998 bighas was earlier mutated in the name of Gram Panchayat and the suit land measuring 397 bighas 10 biswas did not fall within the definition of shamlat deh, was excluded as per the statutory provisions of Punjab Village Common Land (Regulation) Act, 1961 (hereinafter referred to as "1961 Act") as applicable to Punjab. In such circumstances, all biswedars did not become the owners of suit land as possession vested only in those persons who were in respective separate possession on or before 26.01.1950. The suit was stated to be bad for non-joinder of necessary parties and jurisdiction of the Civil Court was allegedly to be ousted as per the provisions of Section 13 of 1961 Act. They alleged to have become owners of 47 bighas 3 biswas of land on the basis of registered gift deed dated 18.9.1968 executed by Harcharan Singh and have been in possession of suit land. They also alleged to have become the owners by way of adverse possession.

Defendants no.14, 15, 16 and 46 to 50 have also filed their separate written statement.

Since the parties were at variance, the trial Court framed the following issues including issue 12-A:-

"1. Whether the suit land is 'hasab rasad khewat and is jointly owned by the khewatdars of the village?OPP

2. *Whether the suit land is partible as alleged? If so what is the share of the plaintiff and defendant no.60?OPP*
3. *Whether the plaintiff is entitled for separate possession by way of partition of his share in the suit land?OPP*
4. *Whether the suit is not within time?OPD*
5. *Whether the suit is bad for non-joinder of necessary parties?OPD*
6. *Whether the Civil Court has no jurisdiction to decide this case?OPD*
7. *Whether the suit in the present form is not maintainable?OPD*
8. *Whether defendants no.24 and 25 have become owners of the land in their possession by way of adverse possession?OPD*
9. *Whether the suit has not been properly valued for the purposes of court fee and jurisdiction?OPD*
10. *Whether the plaintiff has no locus standi to file the suit in respect of the land gifted by Harcharan Singh defendant?OPD*
11. *Whether the plaintiff has no right to claim partition in respect of the land in possession of the defendants no.24 and 25?OPD*
12. *Whether the defendants no.1 to 4, 51 to 53 and 35 have become the owners of the land in their possession by way of*

adverse possession?

12-A Whether Dr. Arjan Singh son of Mehma Singh executed a valid last Will dated 14.5.1971 in favour of plaintiff and proforma defendant no.60 with regard to his estate?OPP

13. Relief.”

The plaintiff examined himself as PW1, Ram Kishan Dass, deed writer as PW2 and Roshan Lal Sharma, Advocate as PW3 and brought on record the following documents:-

- i) Ex.P1 copy of mutation dated 11.8.1964
- ii) Ex.P2 copy of jamabandi for the year 1977-78
- iii) Ex.P3 copy of judgment dated 29.1.1979
- iv) Ex.P4 copy of judgment dated 4.2.1980
- v) Ex.P5 copy of decree sheet
- vi) Ex.P6 copy of jamabandi for the year 1962-63
- vii) Ex.P7 copy of order of A.C.Ist Grade
- viii) Ex.P8 copy of order of Collector
- ix) Ex.PW1 cop of order
- x) Ex.PW1/C copy of jamabandi for the year 1981-82
- xi) Ex.PW2/A Will dated 14.5.19871 of Arjan Singh

On the other hand, defendants examined Kishori Lal Patwari as DW1, Sant Ram Clerk as DW2, Bachan Singh as DW3, Gurdev Singh as DW4 and Assistant Office Kanungo Sh. Ram Chand as DW5 and brought on record the various documents i.e., copies of mutation Ex.D/A to Ex.D/D, copies of jamabandi for the year 1967-68, 1972-73, 1977-78, 1981-82,

Ex.D/E copy of mutation Ex.D/F to Ex.D/I, khasra girdawaris from 1973 onwards. Ex.D/J to Ex.D/FR, copies of mutation, Ex.D/Q1 copy of order of collector dated 13.01.1981, Ex.DQ2 copy of application.

On the basis of evidence, the trial Court on issue no.12-A returned the findings in favour of plaintiff and by clubbing issues no.2, 3 and 11 held that suit to be not maintainable, whereas, issues no.1, 8 and 12 were decided in favour of defendants. Issues No.6, 9 and 10 were decided against the defendants as no arguments were advanced on those issues.

One Civil Appeal No.342-T of 3.9.1986/91 was filed by the plaintiff which has been allowed and suit has been decreed. Two appeals have been filed before this Court. Vide order dated 12.11.1993, operation of the impugned judgment and decree of the Lower Appellate Court was stayed.

Mr. Ashok Singla and Mr. Som Nath Saini, learned counsels appearing on behalf of appellants (in both cases) in support of the memorandum of appeals raised the following submissions:-

a. The suit was not maintainable, for, was hit by provisions of Order 2 Rule 2 CPC as such relief could have been taken at the time when the suit for injunction resulting into judgment and decree dated 29.01.1979, Ex.P3 and Ex.P4 was filed, whereas, present suit claiming the relief as noticed above, was filed on 21.12.1982.

b. section 2(g) of 1961 Act, defines the inclusion of particulars of land as shamlat deh but as per (viii) does not include the land which was in possession of co-sharers not in excess of their respective

shares in such shamlat deh on or before 26.01.1950. For the sake of brevity, provisions of 2(g) read thus:-

2(g) : shamlat deh includes

(1) to (5)

but does not include

(i) to (vii)

(viii) was shamlat deh was assessed to land revenue and has been in the individual cultivating possession of co-sharers not in excess of their respective shares in such shamlat deh on or before 26th January, 1950 or”

c. In such circumstances, the suit land was required to be retained by those proprietors who were in individual cultivating possession irrespective of the status whether he was a co-sharer or sole owner in individual capacity.

d. During consolidation, a committee was formed out of khewatdars of the village and the land known as *shamlat deh* was kept intact being un-partitionable.

e. Ex.D3 clearly showed that some khewatdars were in possession of some area as previous co-sharers in khewat and remaining area of shamlat deh was to be under the control and management of the Gram Panchayat.

f. Once the land in dispute was excluded from the definition of *shamlat deh*, name of Gurcharan Singh, Harcharan Singh sons of Mehma Singh figured as persons in individual cultivating possession of

specific khasra numbers but not as co-sharers.

g. In the absence of status of co-sharers, the suit land could not have been partitioned or confer separate possession, for, application for partition was already dismissed on 02.04.1971 and appeal was dismissed on 06.02.1975.

h. The finding of Court in a suit for injunction relating determination of share of a person not in individual cultivating possession, was not binding in the present suit as except defendants no.1 to 16, no other defendants were party. The transferees through transfer before institution of that suit cannot be bound by these findings. The suit was not maintainable as the remedy at that relevant point of time was to seek possession, much less joint possession.

j. The partition could not have been effected amongst the persons who were in individual in cultivating possession and not amongst the co-sharers.

k. Concededly, as per the admission of the plaintiff, neither he nor his father Dr. Arjan Singh were ever in possession of the suit land.

l. The suit was clearly barred in view of the fact that application for partition was dismissed in 1971 and appeal in 1975 and the order became final.

m. The second application for partition was also dismissed on 13.01.1981 and appeal on 16.11.1981.

n. The Civil Court could not grant the declaration to the effect that land was partitionable and decree of declaration for separate

possession owing to lack of jurisdiction to entertain and try the matter regarding partition and separate possession of suit land.

o. The finding of the trial Court qua possession and alienation were justified, for, it has been proved on record that predecessors-in-interest of the appellants were in possession of the suit land prior to the gift deed which was made on 18.09.1968 and the possession was delivered. Jamabandi for the year 1967-68, Ex.D2 in the remarks column showed separate possession of the defendants and similarly, jamabandi for the year 1977-78, Ex.D30. Gram Panchayat was a necessary party but had not been impleaded. Remedy for the plaintiff was under Section 11 of 1961 Act. The share was not to be calculated out of land measuring 397 bighas 10 biswas but from the total i.e. 998 bighas, total shamlat area.

p. Provisions of Section 11 CPC were applicable as suit was hit by *doctrine akin to res judicata*.

q. Harcharan Singh gifted 36 bighas in favour his wife Gurdev Kaur vide Ex.DE. Ex.D3 was not dealt with in correct perspective.

r. Ex.D6/B, jamabandi for the year 1946-47 showed the possession of Gurcharan Singh and Harcharan Singh. Similarly, jamabandi for the year 1962-63, Ex.P6 and after the gift deed, Ex.D13, reflected the name of donees.

s. The question of title was not involved in the injunction suit, nor there was any issue of vesting. The calculation of the share in the suit for injunction was apparently wrong. As per the provisions of Article 100 of the Limitation Act, 1963 (hereinafter referred to as "1963 Act"), the

suit was barred by law of limitation as the order of the Govt. servant was liable to be challenged within one year, whereas, present suit was filed after a period of 7 years.

t. The appellants were entitled to protection under Section 41 of the Transfer of Property Act being bonafide owners by virtue of gift deed, *ibid*. All the biswedars did not become the owners of such land only those who had been in separate possession before 26.01.1950.

In support of the aforementioned contention relied upon the following case laws:-

i) **Canara Bank vs. N.G. Subbaraya Setty and another 2018(2) RCR (Civil) 962**, regarding applicability of provisions of Section 11 CPC to submit that well known exception is that doctrine cannot impart finality to erroneous decision on point of jurisdiction and judgment on question of law. Decision in the earlier suit declared valid transaction is affirmed to be erroneous and will not operate as *res judicata*.

ii) **Ramti Devi Vs. Union of India 1995 (2) RRR 108** to contend that suit has to be filed within three years from accrual of cause of action.

iii) Relied upon para 14 of **Khatri Hotels Private Limited and another vs. Union of India and another 2011(9) SCC 126** to submit that if the suit is based upon multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. Successive violation of the right will not give rise to fresh cause of action.

iv) With regard to applicability of Order 2 Rule 2 CPC,

relied upon the judgment rendered by the Hon'ble Supreme Court in **M/s Virgo Industries (Eng.) P. Ltd. Vs. M/s Venturetech Solution P.Ltd. 2012(4) RCR (Civil) 372.**

v) On jurisdiction of the Civil Court relied upon **Gian Dass Vs. The Gram Panchayat, village Sunner Kalan and others 2006(3) RCR (Civil) 748** and **Des Raj and others Vs. Bhagat Ram (dead) by LRs and others 2007(2) RCR (Civil) 581** to contend that where co-owner of the property failed to take action within a period of 12 years. The party establishing adverse possession became owner as per the provisions of Article 65 of 1963 Act.

Per contra, Mr. Rajiv Joshi, learned counsel appearing on behalf of the respondent-plaintiff(s) supported the judgment and decree of the Lower Appellate Court and drew the attention of this Court to the various documents i.e. Ex.P3 and Ex.P4, relevant findings of the judgments, cross-examination of DW4 and DW5. It was objected that in the absence of any objection in the written statement or issue, Order 2 Rule 2 CPC at the instance of defendants, was not maintainable. All the jamabandies, Ex.PW1/C reflected the status of the plaintiff as co-sharer by referring to *bahisa brabar*. There was no document of ouster. Will of Arjan Singh has already attained the finality as no appeal was filed against the aforementioned finding on issue no.12-A. The suit was maintainable as per the provisions of Section 4 of 1961 Act as the present land has come within the limits of Municipal Committee. An application has been filed for impleadment. He has also drawn the attention of this Court to the

miscellaneous application bearing No.5550-C of 2018 under Order 41 Rule 27 CPC for placing on record notification dated 13/14.12.2005, Annexure A-1 to establish that after passing of the judgment and decree by the First Appellate Court, Patiala, the land in question falling within Hadbast No.50 of village Gazipur had fallen within the municipal limits. The aforementioned evidence would help the Court in rendering the adjudication of the lis qua jurisdiction of the civil court. The judgment and decree, Ex.P3 and Ex.P4 had already attained the finality. The appellant-defendants cannot be permitted to take objection qua its binding effect. There is no limitation where suit for separate possession on the basis of inheritance is filed.

In support of the aforementioned submissions, relied upon Division Bench judgment of this Court in **Mohinder Singh (dead) by LRs vs. Kashmira Singh 1985 PLJ 82**. In order to buttress the arguments, submitted that once the appellant-defendants have taken the plea of adverse possession, it tantamounts to admitting the title/share holding of the plaintiff as defendants failed to prove on record any document with regard to ouster. The certain issues were not pressed before the trial Court and therefore, could not be pressed before this Court as it would be without jurisdiction.

Reliance was laid to the judgment rendered by the Hon'ble Supreme Court in **Babu Ram @ Durga Parsad Vs. Indra Pal Singh (dead) by LRs 1998(4) RCR (Civil) 1** and **Roop Singh vs. Ram Singh 2000(2) RCR (Civil) 592** to contend that adverse possession of a tenant or lessee by operation of Section 53-A of the Transfer of Property Act are in

consistent with the provisions of Section 27 of 1963 Act.

The High Court has very limited jurisdiction and power qua interference in second appeal against the findings of fact based upon the appreciation of oral and documentary evidence. In this regard, laid reliance upon larger Bench judgment of the Hon'ble Supreme Court in **Sri Sinha Ramanuja Jeer alias Sri Vanamamalai Ramanuja Jeer Swamigal Vs. Sri Ranga Ramanuja Jeer alias Emberumanar Jeer and others AIR 1961 SC 1720.**

Lastly, he submitted that no substantial question of law arises for determination of the present appeals.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of both the Courts below and judgments cited at bar and of the view that there is no force and merit in the submissions of Mr. Singla. The reason is not one but many:-

It would be apt to reproduce memo of parties of the civil suit bearing No.571 of 1976, issues and relevant findings on issue nos.1 and 7:-

Memo of Parties

“1. Surjan Singh son of Mehma Singh resident of village Ghazi Pur Tehsil Rajpura.

2. Arjan Singh son of Mehma Singh (now deceased) represented by his LRs namely:

Dhanbbir Singh son of Arjan Singh

Karan Dev son of Gurdev Singh residents of Gazipur Tehsil Rajpura.

....Plaintiffs

Vs.

1. *Maninder Singh*
2. *Jasvinder Singh*
3. *Balvinder Singh sons of Gurcharan Singh son of Mehma Singh.*
4. *Jaswant Kaur wd/o Gurcharan Singh.*
5. *Harcharan Singh son of Mehma Singh.*
6. *Smt. Gurdev Kaur w/o Harcharan Singh*

all residents of V. Ghazipur Tehsil Rajpura, Distt. Patiala.

....Defendants”

Issues

1. *Whether Gurcharan Singh and Harcharan Singh defendant no.5 have sold land in shamlat deh in excess of their share, if so its effect?OPP*
2. *Whether the defendants are in exclusive possession of any specific khasra number and whether they are entitled to alienate them?OPP*
3. *Whether the suit is properly valued for purposes of Court fee and jurisdiction?OPP*
4. *Whether the plaintiffs are entitled to the injunction prayed for?OPP*
5. *Whether the plaint does not disclose any cause of action if so its effect?OPD*

6. *Whether the suit is bad for non-joinder of necessary parties if so its effect?OPD*

7. *Whether the suit is maintainable in the present form?OPP.*

8. *Relief.”*

Issue no.1

5. *Sh. Gurbachan Singh PW1 is the village Patwari. With reference to his official record, he has deposed that the total land included in the revenue estate of village Gazipur is 3159 bighas 11 biswas and the proprietorship holding of the two plaintiffs and their three brothers Gurcharan Singh (now deceased) Harcharan Singh defendant no.5 and Hazura Singh is 769 bighas 5 biswas. But the evidence of Sh. Ram Chand Assistant Office Kanungo is more elaborate. On the application Ex.P2 of the plaintiff, he prepared the Goshwara Ex.P1 with reference to his official record on which the*

*Gurbachan Singh (**missing**) deposed that the total shamilat land which does not vest in the Gram Panchayat is 397 bighas 10 biswas. The total land in the village is 3159 bighas 11 biswas. Out of this, the lands which are abadi deh, are owned by the State and Vest in the Gram Panchayat, must be excluded, because these lands do not carry per capita shares in the shamilat land. After excluding lands of these categories, we are left with 17th bighas of land. The shamilat land*

measuring 397 bighas 10 biswas is to be divided Hasab Rasad Khewat among the proprietors of the village owing 1817 bighas 14 biswas of land indicated above. Thus the share of shamilat land is four biswas $\frac{7}{3}$ biswanies per bigha of the proprietorship land. As noted plaintiffs and their three co-sharers own 759 bighas 4 biswas of land. Therefore the share of each plaintiffs and their each co-sharer per line comes to 38 bighas 18 biswas.

6. *On the other hand the defendants have examined Avtar Singh Patwari DW1. He has prepared a similar Goshwara, Ex.D1. According to the evidence of this DW, the total proprietorship land after excluding the Abadi, Government land and Gram Panchayat land is 1913 bighas 17 biswas. But the corresponding figure of 1817 bighas 14 biswas given by Sh. Ram Chand Assistant Office Kanungo PW2 appears to be more correct because he has excluded all lands which do not carry share in shamlat land. Sh. Avtar Singh DW1 has further stated that the total shamilat land in the village is 998 bighas 18 biswas. This figure is fallacious because this DW appears to have included in his reckoning such lands as are already vested in the Gram Panchayat. As stated by Ram Chand PW2 the total shamilat land which has not vested in the Gram Panchayat is 397 bighas 10 biswas. It is this land and not 995 bighas 18 biswas of land, which is to be divided among the*

proprietors Hasab Rasad Khewat to arrive at the correct figure of the share of each co-sharer in the shamilat land. For this reason, the calculation of Avtar Singh DW1 that 10 bighas of shamilat land come as share to each of the co-sharers owing the bigha of proprietorship land is erroneous and hence the evidence of Sh. Ram Chand PW2 must be accepted in preference to the evidence of Avtar Singh Patwari DW1. Thus it is held as proved that Harcharan Singh defendant no.1 and the Branch of Gurcharan Singh deceased each own a share measuring 38 bighas 18 biswas in the suit land.

7. Now Maninder Singh DW2 has admitted that the defendants no.1 to 4 have already sold 40 bighas out of the shamilat land. This means that they have already sold more than their share in the shamilat land. Copies of jamabandis Ex.P3 to Ex.P6 show that Harcharan Singh defendant had already gifted 47 bighas 3 biswas of shamilat land from khatoni no.77. This document also shows that Gurcharan Singh aforesaid has already sold 43 bighas 10 biswas out of shamilat land per khatoni no.76. It is further shown that per khatoni no.75, Harcharan Singh has already gifted 36 bighas of land out of the shamilat land. Thus it is proved that the defendants have already alienated more than their share in the shamilat land. This issue is decided for the plaintiffs.

Issue no.7

12. *Of course, the defendants are in possession of the suit property, but the plaintiffs do not crave a permanent injunction restraining them from dispossessing them (the plaintiffs). The plaintiffs crave a decree for permanent injunction restraining the defendants from alienating more than their share in the shamilat land. The plaintiffs being co-sharers in the suit land are in constructive possession thereof. Therefore, in my opinion, this suit is maintainable in the present form. This issue is decided for them.”*

On plain and simple reading of aforementioned findings, it has categorically been held that both the Courts below by noticing the objections of the appellants with regard to continuous possession prior to 26.01.1950 as per the provisions of sub-clause 5(viii) of Section 2(g) of 1961 Act and the revenue record held the plaintiffs to be in constructive possession. The defendants had already sold 40 bighas of land out of shamlat land as per the jamabandi, Ex.P6, Gurcharan Singh had sold 43 bighas, 10 biswas and Gurcharan Singh gifted 47 bighas 3 biswas beyond their share. The aforementioned finding arrived at by noticing the statement of DW5-Ram Chand, Assistant Office Kanungo, wherein he stated that share of each of them was only 38 bighas 18 biswas so alienation was found to be more than his share.

The defendants had also taken an alternative plea of adverse possession in view of finding of fact and law against them. It is settled law that As and when the plea of adverse possession is taken, title of opposite

party is admitted. The law with regard to adverse possession is no longer res integra. The ouster amongst the co-sharers though is permissible but has to be pleaded or proved from the date, year and knowledge to the entire world. The aforementioned view of mine is derived from the ratio decidendi culled out by the Hon'ble Supreme Court in **Ram Nagina Rai and another vs. Deo Kumar Rai (deceased) by LRs and another 2018 (5) RCR (Civil) 398**. For the sake of brevity, paragraphs 11 to 13 read as under:-

“11. Thus, it is important to assess whether such intention to dispossess is apparent to the actual owner or not. The intention of the adverse user must be communicated atleast impliedly to the actual owner of the property. His hostile attitude should be open to the knowledge of the real owner. It follows that the intention and possession of the adverse possessor must be hostile enough to give rise to a reasonable notice to the actual owner.

12. Applying the test of nec vi, nec clam, nec precario i.e., 'without force, without secrecy, without permission' as an established test for finding adverse possession, we find that the defendants have not proved their possession to be adverse to that of the real owner inasmuch as they entered into possession as licensees to begin with and there is nothing on record to show as to when the permissive possession became adverse to the interest of the real owner. 'Animus possidendi' is one of the

ingredients of adverse possession, and unless the person possessing the property has the requisite hostile animus, the period of prescription does not commence. Virtually, the defendants are required to prove the possession to be adequate in continuity, adequate in publicity and to adequately show that their possession is adverse to that of the true owner. It must start with wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

The physical fact of exclusion, possession and animus possidendi to hold as owner, in exclusion to the actual owner, are the most important factors to prove adverse possession.

A person pleading adverse possession has no equities in his favour. Since he is trying to take away the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession.

13. It is an established position of law that insofar as Articles 64 and 65 of the [Limitation Act](#) are concerned, once a party proves its title, the onus of proof would be on the other party to prove the claim of title by adverse possession. In this case, it is an admitted fact that the ownership of the said suit property rests with the plaintiffs. In this given scenario, it is our

considered view that the defendants have not proved the onus of adverse possession against the plaintiffs.”

As and when separate possession on the basis of inheritance is claimed, provisions of Article 100 of 1963 Act or 58 would not apply as urged by Mr. Singla by relying upon the various judgments cited (supra), for, para 14 of the judgment rendered by the Hon'ble Supreme Court rendered in Khatri Hotels Pvt. Ltd.'s case (supra) reads as under:-

“14. In the written statement filed on behalf of the DDA, several objections were taken to the maintainability of the suit including the following:

(i) The plaintiffs have not challenged notification dated 20.8.1974 vide which the Central Government transferred the suit land to the DDA.

(ii) The suit was barred by limitation because the same has been filed after 16 years of the accrual of cause of action.

(iii) The suit is barred by the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908.

(iv) The plaintiffs not only made encroachment on the suit land, but also abused the process of Court by filing different suits.

On merits, it was pleaded that the suit land belonged to Gaon Sabha and with the urbanization of village Kishangarh, the same automatically vested in the Central Government. It was further pleaded that the appellants do not have any right, title or interest in the suit land and they do not have the locus to

question the revenue entries. Another plea raised on behalf of the DDA was that the suit was barred by limitation.”

Thus, argument of Singla is hereby repelled.

It is also matter of record that judgment and decree, Ex.P3 and Ex.P4 though had attained finality upto the Highest Court. Once the share of the respondent-plaintiff had already been determined and defendants had already sold the excess share, the status of subsequent person would be of co-sharer and therefore, they cannot be permitted to claim the plea of bonafide purchaser as they had obtained an excess share out of joint share. Non-impleadment of Gram Panchayat was, thus, meaningless.

It is also settled law that gift of share beyond the entitlement would be void act, transaction. The many jamabandies as noticed above, reflected the status of parties as co-sharers, 'bahisa brabar'. Under the garb of some technical objection, the appellant-defendants cannot be permitted to reserve the excess share of the plaintiff in the manner and mode as indicated above and already noticed in Ex.P3 and Ex.P4.

The objection qua Order 2 Rule 2 CPC, cannot be permitted to be agitated in the absence of any objection in the pleadings or issues, thus, same is hereby rejected. One line here and there in cross-examination would not belie the documentary evidence. The jurisdiction of the Civil Court cannot also be ousted in view of the notification as the land in dispute has fallen within the municipal limits.

The objection of *res judicata* would also not be maintainable as it is settled law that pleadings of the previous suit like plaint and written

statement are required to be placed on record. The Will of Arjan Singh in favour of the plaintiff and defendant no.60 had also not been assailed as issue no.12-A was returned in favour of the plaintiff in the absence of any appeal by the defendants. Once the title was not in dispute, the objection qua non challenge of the gift deed was meaningless.

Any void document has not any applicability and can be assailed at any point of time. Much focus had been laid in determination of the share which had already been arrived at in view of the finding extracted above (Ex.P3 and Ex.P4). In view of observations above, the judgments cited at by on behalf of Mr. Singla are not applicable in the present case.

Thus, arguments of Mr. Singla, thus, do not enable this Court to form a different opinion than the one arrived at by the Lower Appellate Court. No ground for interference is made out or finding of fact and law of Lower Appellate Court do not fall within the realm of perversity.

Resultantly, the appeals are dismissed.

सत्यमेव जयते

	(AMIT RAWAL) JUDGE
January 21, 2019 savita	
Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No