



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CMPMO No. 387 of 2020

Date of Decision: December 19, 2023

Sudhakar Sharma & others

... Petitioners.

Versus

Nandini Mishra & others

.. Respondents.

Coram:

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting?¹ Yes

For the petitioners: Mr.Sameer Jain, Mr Himesh Thakur,
Mr.Anubhav Chopra, Advocates.

For the Respondents: Mr.Sudhir Thakur, Senior Advocate,
alongwith Mr.Karun Negi, Advocate, for
respondents No.1 to 3.

Service of respondents No.4 to 8
dispensed with on request of learned
counsel for the petitioner, vide order dated
17.12.2021.

Respondents No.9 to 11 are ex parte vide
order dated 28.10.2021.

Vivek Singh Thakur, J.

Instant petition has been preferred, invoking provisions of Article 227 of Constitution of India, for setting aside order dated 11.11.2019, passed by Additional District Judge, Solan, whereby application filed by the petitioners-defendants under Order 7 Rule 11 (d) of Code of Civil Procedure (in short 'CPC') has been rejected.

2. Main ground to make prayer for rejecting the plaint is that respondents-plaintiffs have never had possession of the suit

¹ Whether reporters of the local papers may be allowed to see the judgment?

property and, therefore, prayer to declare them owner in possession is devoid of merit and petitioners-defendants have preferred a suit for declaration only but without consequential relief seeking possession of the suit property and, therefore, suit is barred by provisions of Section 34 of the Specific Relief Act, 1963 (hereinafter referred to as the 'Act') and thus the plaint is liable to be rejected under Order 7 Rule 11 (d) CPC.

3. Plea of respondents-plaintiffs is that averments made in the application, filed for rejecting the plaint, are to be adjudicated and decided on merit in main suit and, thus, application is not maintainable at this stage. It has been claimed that respondents-plaintiffs have been visiting their grandfather's property during life time of their grandfather as well as thereafter and, therefore, it is never admitted by the respondents-plaintiffs that they were or are not in possession of the property, rather they have claimed their possession and, thus have prayed for declaration of ownership in possession.

4. Learned counsel for the petitioners-defendants to substantiate his plea for rejecting plaint has placed reliance upon *Deo Kuer and another vs. Sheo Prasad Singh and others, AIR 1966 SC 359; Ram Saran and another vs. Smt. Ganga Dvi, (1973) 2 SCC 60; Vinay Krishna vs. Keshav Chandra and another, 1993 Supp (3) SCC 129; Sadasivam vs. K. Doraisamy, (1996) 8 SCC 624; Gain Kaur vs. Raghubir Singh, (2011) 4 SCC 567; and Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148.*

5. Learned counsel for the respondents-plaintiffs has placed reliance upon judgments of the Supreme Court in *Deo Kuer's* and *Sadasivam's cases* as well as this High Court in *Gian Chand vs. Om Prakash, 2016 SCC Online HP 364 (RSA No.29 of 2005)* and judgment of Madhya Pradesh High Court in *Mukund vs. Smt. Sulekshna*, in *F.A. No. 678 of 2000, decided on 05.11.2015*.

6. I have heard learned counsel for the parties and have gone through the record as well as case law referred by the parties.

7. Section 34 of the Act reads as under:-

"34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

8. Prayer made in Civil Suit is as under:-

"Prayer clause:

It is, therefore, respectfully prayed that a decree of declaration may kindly be passed in favour of the plaintiffs and against the defendants declaring that

a) Will dated 1-07-1994 is legal and valid document and is binding on party to suit.

b) declaring that plaintiffs are owner in possession of Khasra number 284 & 283 measuring

476 sq. meters in mauza Ser Solan, Tehsil and District Solan.

c) declaring the deed of rust dated 2-07-1994 registered with Sub Registrar Solan vide document no. 137 is wrong, illegal, null and void and is not binding upon the right, title and interest of the plaintiffs.

d) declaring that mutation no. 1198 and 17-11-1994 sanctioned in favour of defendant no.2 is wrong, illegal, null and void and is not binding upon the right title or interest of the plaintiffs and the revenue entries carry forward thereafter in the revenue records is wrong and illegal and is not binding upon the right, title and interest of the plaintiffs.

e) declaring that General Power of Attorney dated 15-12-1989 attested on 16-12-1989 stand revoked by execution of deed of revocation/cancellation of General Power of Attorney dated 15-06-1990 registered with Sub Registrar Solan vide document no. 147 on dated 19-06-1990.

A decree of permanent prohibitory injunction restraining defendants no.1 to 3, from interfering in Khasra number 284 & 283 measuring 476 sq. meters in mauza Ser Solan, Tehsil and District Solan and further claiming any right in the aforesaid number, further transferring Khasra number 284 & 283 and further creating any charge or encumbrance, damaging, changing the nature of suit land, either by themselves or through their agents, servants, family members, whosoever in any manner whatsoever, may be passed in favour of the plaintiffs and against the defendants alongwith cost of the suit, in the interest of justice.

A decree of recovery of damages to the tune of Rs. 24,00,000/- alongwith future interest @ 12%

per annum from the date of filing suit is to be passed in favour of the plaintiffs and against defendants no.1 and 2.

Any other relief which this Hon'ble Court deems fit and proper may also be passed in favour of the plaintiffs and against the defendants, in the interest of justice."

9. In present case, respondents-plaintiffs are claiming them owners in possession of the suit property. Whereas, it has been contended on behalf of the petitioners-defendants that they are married at different places and residing with their respective families-in-laws and, therefore, their claim of possession is false, and as they have failed to seek relief for possession, their suit for mere declaration is not maintainable, because for omission to seek such further relief, they are falling within the scope of proviso of Section 34 of the Act.

10. Plea with respect to possession as made, is not sufficient to hold that respondents-plaintiffs are not in possession of the property in reference. If such plea is accepted, then every person having ancestral property in their native Villages or any other place but working/residing in Cities or another place(s) would be deprived of his possessory right in the property in their native Villages/respective place(s). For possession of property, a person is not required to stay in such property for 24x7. A person residing at one place, but having right to own and possess the property at another place, is not only in deemed or constructive possession but in actual possession of such property and is entitled to visit his property to look after the same or to

stay for some time or not as per his convenience as and when he finds suitable time to manage the same. For absence of a person for a long time, he cannot be deprived from his property by treating him to be dispossessed from his property owned and possessed by him.

11. Whether a person is in possession or not, actual, deemed or constructive, is a fact to be established or dismantled by the parties by leading evidence to be appreciated by the Trial Court on conclusion of trial. It is not a fact which can be elucidated or extracted from the averments of the plaint and documents filed therewith. Rather contents of the plaint in present case read with prayer clause seeking declaration of ownership in possession of the property indicates that respondents-plaintiffs are claiming their ownership in the property alongwith possession. It is not case of the respondents-plaintiffs that they are not in possession and, therefore, there is no occasion for the respondents-plaintiffs to seek further relief of possession, and it is more clear from other prayer of consequential relief made in the plaint seeking permanent prohibitory injunction against the petitioners-defendants with respect to the suit property.

12. It is also apt to notice that suit filed by the respondents-plaintiffs is not a suit merely for declaration, but consequential relief, as considered necessary and fit, including suit for permanent prohibitory injunction and damages, has also been sought. Therefore, it is wrong to allege that it is a suit for

mere declaration without consequential relief therewith which ought to have been sought by the respondents-plaintiffs alongwith suit for declaration.

13. Section 34 of the Act does not mandate that declaratory suit without consequential relief which respondents-plaintiffs being able to seek have omitted to do so, is not maintainable at all. Rather it provides that no such declaration shall be made by the Court for omission on the part of the respondents-plaintiffs to seek further relief other than mere declaration of title which could have sought by the respondents-plaintiffs. It is an issue to be decided after adjudication of the suit as to whether some further relief other than the relief sought in the plaint was available to the respondents-plaintiffs and respondents-plaintiffs were able to seek same, but have omitted to do so. Such issue is to be decided at the time of conclusion of trial.

14. Ratio of law laid down in the judgment cited by both sides is not in dispute, but the same has to be applied in the given facts and circumstances, and provisions of proviso to Section 34 of the Act are not attracted in present case and, therefore, plaint is not liable to be rejected under Order 7 Rule 11 (d) CPC.

15. Keeping in view nature of suit and relief sought therein, I do not find any illegality, irregularity, judicial impropriety or perversity in the impugned order and, therefore, no interference by exercising powers under Article 227 of the

Constitution of India, is warranted. Accordingly, impugned order rejecting application under Order 7 Rule 11 (d) CPC is upheld and affirmed.

16. Petition is dismissed with no order as to costs. Pending application(s), if any, also stand disposed of.

(Vivek Singh Thakur),
Judge.

December 19, 2023
(Purohit)

High Court of Punjab