



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Civil Second Appeal No.170/1990

Shanti Lal Agarwal (since deceased) represented by his legal heirs:-

1. Vinod Kumar Agarwal S/o Late Shri Shanti Lal Agarwal, at present residing at House No.51/16, shipra Path, Opposite Technology Park, Mansarovar, Jaipur.

1/1. Ambika Rani Agarwal W/o Late Vinod Kumar Agarwal, aged 67 years.

1/2. Vijay Agarwal S/o Late Vinod Kumar Agarwal, aged 45 years.

1/3. Nirmala D/o Late Vinod Kumar Agarwal, aged 50 years.

1/4. Ajay Agarwal S/o Late Vinod Kumar Agarwal, aged 42 years.

1/5. Shelly Agarwal D/o Late Vinod Kumar Agarwal, aged 42 years.

All R/o House No.51/16, shipra Path, Opposite Technology Park, Mansarovar, Jaipur.

2. Ratan Devi W/o Late Shri Shanti Lal (deceased)

3. Pramod Kumar S/o Late Shri Shanti Lal,

4. Amod Kumar (deceased) represented by his legal heirs:-

4/1. Sushma Devi W/o Late Shri Amod Kumar

4/2. Ashish Kumar S/o Late Shri Amod Kumar

4/3. Anish Kumar S/o Late Shri Amod Kumar,

4/4. Anjum Kumari D/o Late Shri Amod Kumar,

All R/o Gali Bidhi chand, Purana Shahar, Dholpur.

5. Smt. Geeta Devi D/o Late Shri Shanti Lal, W/o Vishan Agarwal, R/o Mathur.

6. Smt. Laxmi Devi D/o Late Shri Shanti Lal W/o Dinesh Agarwal R/o Mathur.

7. Saraswati D/o Late Shri Shanti Lal , R/o Gali Bidhi Chand Purana Shahar, Dholpur (Raj.).

----Plaintiff/Appellants

Versus

1. Municipal Board, Bari through Executive Officer, M.B. Bari.

2. Shri Murari Lal, Secretary, M.B. Bari.

3. Ram Niwas, Oversear, M.B. Bari.

----Defendants/Respondents



For Appellant(s) : Mr. Bipin Gupta
Mr. Sidharth Bapna for Mr. Anil Mehta
For Respondent(s) : Mr. Rahul Sharma

HON'BLE MR. JUSTICE SUDESH BANSAL

Judgment

RTABLE:-

08/07/2022

1. This second appeal under Section 100 of Code of Civil Procedure (CPC) has been directed against the judgment and decree dated 01.08.1990 passed in Civil First Appeal No.03/1988 by the Court of Additional District and Sessions Judge, Dholpur affirming the judgment and decree dated 24.04.1986 passed in Civil Suit No.04/1980 by the Court of Munsif/Magistrate, Bari whereby and whereunder the civil suit for possession purportedly instituted invoking the provisions of Section 6 of the Specific Relief Act, 1963 by and on behalf of appellant-plaintiff (now deceased and represented through his legal representatives) was dismissed on merits.

2. On perusal of the previous order-sheets of the file, it reveals that the Co-ordinate Bench of this Court vide order dated 09.10.1991 admitted the appeal for hearing and framed following substantial question of law:-

“Whether in the facts and circumstances particularly when the municipality has not come with a case that it came into existence prior to the coming into force of the Act of 1959, the respondents can challenge the allotment made by



the Tehsil on 25.06.1968 and subsequent transfers effected under the said allotment?

3. Later on, another Co-ordinate Bench of this Court, vide order dated 02.09.1996 framed the following substantial question of law for consideration in the second appeal:-

- “1. आया विद्वान अपर जिला न्यायाधीश को यह फाइंडिंग कि विवादित जमीन नगरपालिका में निहित थी, बिना किसी साक्ष्य के आधारित है।
2. आया अधीनस्थ न्यायालयों ने प्रतिवादोगण के विरुद्ध विवादित भूमि के संबंध में दस्तावेज पेश नहीं करने के कारण प्रतिकूल अवधारणा बनाने में कानूनी भूल की हैं।
3. आया प्रतिवादोगण को यह अधिकार है कि वे बिना कानूनी प्रक्रिया अपनाये वादी को या उसके पूर्वज समदयाल को विवादित भूमि से बेदखल कर सकते हैं।”

4. It appears from the record that during the course of second appeal, appellant moved an application dated 06.04.1994 under Order VI Rule 17 CPC seeking amendment in the plaint, by adding prayer of restoration of possession of suit property.

5. Earlier the Co-ordinate Bench of this Court heard both parties on application for amendment in the plaint as well as appeal and finally decided this second appeal vide judgment dated 17.09.1996 whereby and whereunder the application under Order VI Rule 17 CPC was allowed and simultaneously, appeal was also allowed. The appellant-plaintiff was held owner of the plot in question and suit for possession was decreed, and both impugned judgments and decree were set aside.

6. Against the judgment dated 17.09.1996, respondent-Municipal Board preferred special leave petition before the Hon'ble Supreme Court being Civil Appeal No.6955/1997. The Hon'ble Supreme Court vide order dated 04.09.2003 set aside the



judgment and decree dated 17.09.1996 and remanded the matter back to this Court for fresh disposal in accordance with law after consideration whether the substantial question of law or questions of law arise for consideration and then dispose of the appeal on merits.

7. In order to deal with the substantial questions of law as framed by the Co-ordinate Benches of this Court, mentioned hereinabove for consideration in the present second appeal, it is necessary to look into the relevant facts of the present case.

8. As per the record of the present appeal, the necessary and relevant facts culled out from the material on record, may be recapitulated as under:-

8.1 The suit property is a plot measuring 1 biswa (about 88 square yards) situated in town Bari district, Dholpur and presently, 21 shops have been constructed thereupon by the Municipal Board, Bari.

8.2 Appellant-plaintiff-Shanti Lal Agarwal (now deceased and represented through legal representatives) instituted civil suit on 05.01.1980 alleging *inter alia* that a day before it means on 04.01.1980, the respondent-defendant-Municipal Board, Bari and its employees have removed his possession from the plot in question by taking the law in their own hands, hence the suit for possession was instituted invoking the provisions of Section 6 of the Specific Relief Act, 1963. It may be noted that though in the nomenclature of the plaint there is no mentioning of the provisions of Section 6 of Specific Relief Act, 1963 however, in Clause-4 of the plaint valuation of suit property has been made as per the provision of Section 6 of the Specific Relief Act and further the counsel for appellant did not dispute that the suit was initially led



within the scope and provisions of Section 6 of the Specific Relief Act but in the plaint, possession was claimed by plaintiff on the basis of previous possession as also on the basis of ownership and both the courts have also examined the ownership of plaintiff, hence present suit for possession is virtually a composite suit based on title and previous possession under Sections 5 and 6 of Specific Relief Act. It is also worthy to take note that although in the prayer clause of plaint there is no specific prayer for the restoration of possession however, pleadings of the plaint clearly reveals that the suit was filed for taking back the possession of the plot in question. Hence, virtually the present suit is suit for possession.

8.3 Plaintiff has claimed his ownership and possession over the plot in question on the basis of registered sale deed dated 13.12.1979 through which he purchased plot against sale consideration of Rs.2,000/- from one Shri Ram Dayal. In order to show his possession, the plaintiff has pleaded that plot was covered by means of stone pillars and putting a fencing of iron wires whereupon few stone slabs were laying.

8.4 The vendor of subject plot, namely Ram Dayal, was made a party as defendant No.4, though later on plaintiff prayed to struck out the name of vendor as party in the present suit and prayer was allowed vide order dated 30.01.1985, hence name of vendor was struck out from the array of title page.

8.5 Vendor-Ram Dayal submitted written statement, favouring the plaintiff's case and contended that the land of subject plot is government land (nazul land) of Khasra No.1191 which was allotted to him by the Tehsildar vide allotment dated 25.06.1968 and since then, the vendor-allottee is in continuous possession of



the plot in question. He contended that through registered sale deed dated 13.12.1979, the subject plot has been sold and possession has been transferred to the plaintiff.

8.6 Respondent-defendant-Municipal Board, Bari submitted written statement and categorically denied the possession of the plaintiff as also of vendor-Ram Dayal over the subject plot prior to filing of the suit. It has been contended that the land of subject plot has been vested in the Municipal Board, Bari, w.e.f. 13.02.1973 under the order of District Collector of Dholpur. Thereafter, Municipal Board, Bari published a communique for auction of their lands on 21.04.1973 and then again the auction notice was published on 16.11.1973. It was contended that against the auction notice dated 21.04.1973, Mr. Ram Dayal (defendant No.4-vendor of the subject plot) submitted objections before the District Collector under Section 285 of the Municipality Act which were dismissed vide order dated 22.10.1973. It was further contended that though the auction proceedings could not have finalized but the land of subject plot has been remained in actual and physical possession of the Municipal Board, Bari since 13.02.1973. The claim of plaintiff, to acquire ownership and possession of the subject plot on the basis of registered sale deed dated 13.12.1979 from Ram Dayal was categorically denied.

8.7 Learned trial court framed issues.

Issue No.1 was framed specifically to the effect that as to whether plaintiff purchased the land of subject plot from Ram Dayal through sale deed dated 13.12.1979 (registered on 19.12.1979) and whether Shri Ram Dayal was authorized to sale the disputed plot?



Issue No.2 as to whether the plaintiff got actual possession of the disputed plot on 13.12.1979?

Issue No.3 as to whether the cost of disputed plot is Rs.25,000/-, hence the court of Munsif has no jurisdiction to hear the present suit and insufficient court fee has been paid?

Issue No.4 as to whether the suit is beyond limitation?

Issue No.5 is as to whether the defendants entered into possession over the disputed plot on 04.01.1980 forcefully and unauthorizedly, as such plaintiff is entitled to remove their possession and for the means profits, if yes at which rate?

Issue No.6 is of relief?

8.8 Plaintiff has produced sale deed dated 13.12.1979 with appended map as Exhibit-1 and Exhibit-1/1 and has produced a certified copy of a ghatna bahi dated 12.07.1968 (Exhibit-2) to show that the possession of subject plot was given by the Tehsildar to Ram Dayal.

It is worthy to mention that for this document of possession Exhibit-2, the allottee and vendor-PW-2 admitted that the document was written by the then patwari, who is alive, however, plaintiff has not produced that patwari as his witness and both courts have drawn an adverse inference against the plaintiff for non-production of the material evidence.

In evidence, plaintiff has not produced the allotment letter dated 25.06.1968 through which the land of subject plot was said to be allotted to the vendor-Ram Dayal by the Tehsildar. Vendor-Ram Dayal appeared as plaintiff witness No.2 (PW-2) and states that the allotment letter was destroyed in burning at his house however, he stated that the land was allotted by the Tehsildar for agricultural purposes and whereupon he cultivated tobacco crop



for three years up to year 1971. It may be noticed that PW-2 admits that his allotment was challenged by one Shri Abdul Hamid by way of filing appeal however, he expressed his ignorance to the fate of appeal and on putting a suggestive question that the allotment had been cancelled in appeal, the vendor PW-2 has shown his ignorance.

8.9 The vendor-Ram Dayal has not produced any document either of revenue record or any license to show that the land allotted to him for agricultural purpose was entered into the revenue record and he cultivated tobacco crop on the subject land after obtaining licence from the government. In the sale deed executed by Ram Dayal (Exhibit-1) it is nowhere mentioned that the plot was allotted to him by the Tehsildar on 25.06.1968 and there is no details as to what nature of possession, vendor-Ram Dayal possess over the subject plot. Though in the sale deed, it is indicated that subject land was mutated in the name of Ram Dayal.

8.10 From the evidence of plaintiff, it appears that vendor-Ram Dayal has been said to be in possession of the subject land from the year 1968 to 1971 but thereafter there is no cogent evidence to show his possession over the subject plot at the time of execution of the sale deed dated 13.12.1979 in favour of the plaintiff. In the sale deed, it is mentioned that on the subject plot some stones and garbage, rubbish is lying. Plaintiff-Shanti Lal apart from his own evidence, produced PW-2 to PW-8 as his witnesses.

8.11 It is admitted position on record that the plaintiff is an advocate who had dealt with the legal cases of vendor-Ram Dayal in various matters.



8.12 Both the courts have recorded a fact finding while deciding issue Nos.1, 3 and 5 that there is no evidence of plaintiff to show the possession of vendor-Ram Dayal after the year 1971 and hence the factum of delivery of possession by the vendor-Ram Dayal to the purchaser plaintiff, at the time of sale deed dated 13.12.1979, has been disbelieved and it has been held that the plaintiff was not in established possession of the subject land even prior to filing of the present suit.

8.13 For the claim of ownership by the plaintiff on the strength of sale deed dated 13.12.1979, both the courts have recorded a fact finding that vendor-Ram Dayal could not show his title nor any allotment letter of the subject plot alleged to be made in his favour was produced, hence both courts below observed that it cannot be held that a lawful and valid title came to be acquired by the plaintiff under the sale deed dated 13.12.1979 made by Ram Dayal. Since Ram Dayal himself was not owner, he could not have transferred any better rights to plaintiff-purchaser. Trial Court observed that, it appears that plaintiff was advocate of vendor-Ram Dayal, in various cases, so plaintiff got executed sale deed in papers, from Ram Dayal, in his name to grab government land.

8.14 Respondent-defendant-Municipal Board, Bari has produced documents publishing the auction notices in the newspaper Exhibi-A1 and Exhibit-A3. Against the auction notices, an application raising objection was filed by Ram Dayal before District Collector, Dholpur which was dismissed on 22.10.1973 (Exhibit-A2).

Municipal Board has not produced any document/ notification/ order/ circular dated 13.02.1973 through which the land of subject plot came to be vested in Municipal Board, Bari



under the orders of the District Collector, Dholpur. It is relevant to mention here that though from the side of plaintiff an argument was raised that adverse inference should be drawn against the Municipal Board, Bari to the effect that since relevant documents/order of District Collector have not been produced, hence it may be inferred that the subject land never vested to Municipal Board, Bari. In order to deal with such an argument, the courts below have observed that the plaintiff has come out with a case claiming his ownership and previous possession over the subject plot on the basis of sale deed, hence plaintiff has to prove his case by his own evidence and cannot be allowed to take advantage of any lacunae of the evidence of defendants, if any moreso, when the defendant is a government body.

8.15 Issue No.3 which pertains to the valuation of the subject plot and jurisdiction of the Munsif court to entertain the civil suit. Initially, this issue was decided in favour of defendant vide judgment dated 24.04.1986 however, during the course of first appeal, the first appellate court remanded the issue No.3 to the trial court to decide afresh and after remand, this issue has been decided vide order dated 24.05.1989 holding that as per plaintiff, the subject plot was purchased by plaintiff against sale consideration of Rs.2,400/- through sale deed dated 13.12.1979, therefore the munsif court has pecuniary jurisdiction to entertain and decide the suit. The findings of this issue attained finality and have not been assailed further. Hence, it has been decided finally that the trial court had pecuniary jurisdiction to decide the present suit on merits.

8.16 Issue No.4 pertaining to limitation was decided in favour of plaintiff and the suit was treated within limitation.



8.17 Learned trial court vide judgment and decree dated 24.04.1986 dismissed the plaintiff's suit for possession with findings/observations that the plaintiff has miserably failed to prove his ownership over the subject plot on the basis of sale deed in question dated 13.12.1979 and further could not establish his actual and physical possession over the subject plot prior to filing of the suit. The trial court observed that plaintiff's suit for possession is qua the government body, Municipal Board, Bari. The plaintiff is deriving his title from one Ram Dayal who himself admits that the subject land is a government land, therefore, it is incumbent for the plaintiff to prove the chain of documents to show that he acquired a lawful and valid title of the subject land. Thus trial court observed that plaintiff neither could prove his previous possession, nor could show his lawful and valid title, hence, his suit for possession was dismissed.

8.18 Plaintiff preferred first appeal against the judgment and decree dated 24.04.1986. The first appellate court reconsidered the entire evidence and re-heard the matter as a whole. Vide detailed judgment dated 01.08.1990, the appellate court while concurring with the fact findings recorded in the judgment of trial court, dismissed the first appeal affirming the dismissal of plaintiff's suit vide judgment and decree dated 24.04.1986.

9. Against concurrent findings of fact on the issue of ownership and possession of subject plot, the instant second appeal has been filed.

10. During the course of this second appeal, the appellant moved an application dated 06.04.1994 under Order VI Rule 17 CPC for seeking amendment in the plaint. It has been mentioned in the application that the plaintiff was illegally dispossessed from the



subject plot by the defendants on 04.01.1980 and the suit was instituted under Sections 6 and 9 of the Specific Relief Act on the very next day of dispossession however, due to inadvertence, in the prayer clause, a specific prayer for restoration/delivery of possession could not be mentioned. Though, a prayer for removal of the possession of defendants have been made. However, since the respondent-defendants have raised an objection that no prayer for possession has been made in the suit, therefore, in order to meet out that technical objection, the instant application has been filed.

It has been prayed that in the prayer clause 1(a) of the plaint that "the possession of the disputed land may be restored to the plaintiff-appellant" be allowed to be added in the plaint. Learned counsel for appellant has contended that no evidence or any specific issue is required in support of the proposed amendment as the suit basically was instituted for possession and the amendment has been prayed for only to make the prayer of plaint clear and in specific terms asking for restoration of the possession.

11. The respondents-defendants have filed reply to the application and opposed the application. It has been contended that the amendment application has been filed after 14 years of the institution of the suit and the prayer for restoration of possession has become barred by limitation as such application cannot be granted at the stage of second appeal.

12. This Court finds that this second appeal was decided earlier vide order dated 17.09.1996, the Co-ordinate Bench of this Court considered the application under Order VI Rule 17 CPC and recording a finding that the addition of the prayer for restoration



of possession would not change the nature of suit and the same is in continuation to the cause of action disclosed in the plaint. Further the plaintiff does not want to lead any evidence hence the amendment was allowed and by the same order appeal was also allowed. Although, the order dated 17.09.1996 has been set aside by the Hon'ble Supreme Court and the matter has been remanded to decide the second appeal afresh in accordance with law to consider as to whether the substantial question of law or questions of law do arise for consideration and thus to dispose of the second appeal on merits. There is no findings in the order of Hon'ble Supreme Court, regarding the part of order dated 17.09.1996 allowing the application under Order VI Rule 17 CPC.

13. Nevertheless without entering into any technicalities on request of counsel for both parties, this Court has re-heard the parties on application under Order VI Rule 17 CPC. From the perusal of plaint itself, there is no room of doubt that the present suit has been filed for restoration of possession only. On perusal of the plaint as a whole, it stands clear that plaintiff has specifically pleaded in para No.2 of the plaint that the defendants entered into the possession and dispossess the plaintiff on 04.01.1980 and the suit has been instituted on 05.01.1980 seeking removal of possession of defendant.

14. The trial court decided the suit treating it as suit for possession. There is no objection from the side of respondent defendant before the trial court and during the course of trial that the suit may not be treated as for the possession, in absence of any specific prayer for restoration of possession. The objection raised at the appellate stage is of no importance however, in order to meet out the objection which is purely technical in nature, the



appellant-plaintiff has moved application seeking amendment in the prayer clause to add para 1(a) making a specific prayer for restoration of possession. The Hon'ble Supreme Court in case of

A.K. Gupta & Sons Ltd. vs. Damodar Valley Corporation

reported in [AIR 1967 SC 96] has held as under:-

"In the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred where however, the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts the amendment is to be allowed even after expiry of the statutory period of limitation."

The Hon'ble Supreme Court in case of **Santokh Singh & Anr. vs. Mahant Iqbal Singh reported in [AIR 2000 SC 3155]** has held that the defect regarding incorporating one prayer can be allowed to be cured at any stage of the proceedings. That was a case where the lease deed was challenged however, a prayer for declaration of lease deed was not made and the Supreme Court, observed that allowing to incorporate the formal prayer in the plaint asked for would not prejudice to the opposite party, hence the prayer was allowed to be amended.

In case of **Chakreshwari Constuction Private Limited vs. Manohar Lal reported in [(2017) 5 SCC 212]** the Hon'ble Supreme Court has observed as under:-

"16. It is true that there was some delay on the part of the appellant in filing the applications but, in our opinion, the appellant had explained the delay. One cannot dispute that in appropriate cases, the parties are permitted to amend their pleadings at any



stage not only during the pendency of the trial but also at the first and second appellate stage with the leave of the court provided the amendment proposed is bona fide, relevant and necessary for deciding the rights of the parties involved in the lis.”

15. Learned counsel for appellant has candidly submitted that no additional evidence is required to be adduced by the plaintiff, if the proposed amendment is allowed. Even any additional issue is not required to be framed as the issue to cover the relief of possession have already been framed.

16. As far as the objection of limitation raised by respondent is concerned, since the suit itself was filed for possession since inception, mere allowing to clarify the prayer of the suit in specific terms, would not create a new cause of action. It is not a case where the nature of suit is being converted as a suit for possession and no prejudice would be caused to the respondent-defendant by allowing the application for amendment.

17. In such backdrop of facts, and having considered the proposition of law, this Court deems it just and proper to allow the application for amendment. The prayer clause 1(a) as stated in the amendment application is treated to be part and parcel of the plaint.

18. In the aforesaid backdrop of the present case, now this Court is proceeding to deal with the substantial question of law as referred hereinabove.

At the outset, it may be noted that the plaintiff has set up his ownership and title over the subject plot in the plaint itself. The plaintiff has placed reliance on the sale deed dated 13.12.1979, registered on 19.12.1979 to contend that he purchased the subject plot from one Mr. Ram Dayal and on the strength of the



sale deed, plaintiff asserted his possession over the subject plot. On perusal of the pleadings of plaint, it can safely be inferred that the present suit for possession is based on title. It is altogether a different thing that for the purpose of payment of the court fee, plaintiff has taken resort to Section 6 of the Specific Relief Act and instead of making payment of court fee on the whole valuation of the subject plot that Rs.2000/-, he paid court fees only half of the value of the subject land i.e. Rs.1,000/-. This itself will not convert the nature of present suit and the suit cannot be treated within the scope and provision of Section 6 of Specific Relief Act only.

19. The trial court as well as the first appellate court, has considered the plaintiff's suit throughout a civil suit for possession based on title. Plaintiff-defendants were allowed to produce evidence, treating the present suit as a suit for possession based on title. Plaintiff, in his evidence has produced the sale deed and the ghatna bahi (Exhibit-1, 1/2 & 2) to prove his title and possession. The defendant in rebuttal has denied the title and possession of plaintiff and claimed that subject plot with other adjoining land has been vest in Municipal Board, Bari under the orders of the District Collector, Dholpur. Both the courts below have examined the plaintiff's case, treating the present suit as a suit for possession based on title and thereafter have observed that plaintiff had failed to prove his title as well as possession over the subject plot, hence his suit has been dismissed on merits. In such backdrop of facts, the scope of present suit led by the plaintiff cannot be confined within the scope of Section 6 of the Specific Relief Act but the suit is for possession based on title as well. In support, reliance can be placed on the judgment of



Hon'ble Supreme Court reported in case of **Nagar Palika, Jind vs. Jagat Singh, advocate reported in [(1995) 3 SCC 426]**.

20. Before proceeding to deal with the substantial question of law, this Court deems it just and proper that in the civil suit for recovery of possession on the strength of title, the burden is on the plaintiff to establish his title and any weakness of the defence or lacunae in his evidence would not enable the plaintiff to a decree for possession. In support of such principle of law, reliance can be placed on the judgment of **Pubjab Urban Planning & Development Authority vs. Shiv Saraswati Iron & Steel RE-rolling Mills reported in [(1998) 4 SCC 539]** wherein the Supreme Court has observed that "the plaintiff/appellant must succeed or fail on own case and cannot take advantage of weakness in the defendant/respondent's case to get decree."

In case of **Ramchandra Sakharam Mahajan vs. Damodar Trimbak Tanksale (dead) and Others reported in [(2007) 6 SCC 737]** the Supreme Court held in para No.13 as under:-

"13. The suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions."

In case of **P.H. Dayanand vs. S. Venugopal Naidu and Others reported in [(2009) 2 SCC 323]** the aforesaid principle has been reiterated.



In the present case, both courts below have dismissed the appellant-plaintiff's suit on account of failure of prove the ownership/title by the plaintiff as well as his previous possession over the subject plot.

21. It appears that at the stage of second appeal, the appellant-plaintiff has tried to make an endeavor that an adverse inference be drawn against the respondent-defendant-Municipal Board, Bari for non-production of the documents to show that the subject land has vested in it and further a presumption be drawn in favour of plaintiff and against the Municipal Board, Bari that the defendants dispossess the plaintiff from the subject plot without adopting the process of law. Whereas, this Court is of considered opinion that in the present nature of civil suit instituted by the plaintiff, it is incumbent and necessary for plaintiff to prove his ownership/title and possession over the subject plot by his own evidence. If plaintiff miserably failed to produce evidence, his suit for possession must be failed and plaintiff cannot claim a decree for possession in his favour, by drawing an adverse inference against the defendant-Municipal Board, Bari for non-production of evidence by it.

22. Now, the substantial question of law already framed in this appeal may be considered:-

“Whether in the facts and circumstances particularly when the municipality has not come with a case that it came into existence prior to the coming into force of the Act of 1959, the respondents can challenge the allotment made by the Tehsil on 25.06.1968 and subsequent transfers effected under the said allotment?”



In the present case, the appellant-plaintiff has claimed his ownership and possession on the basis of registered sale deed dated 13.12.1979 (Exhibit-1). In rebuttal, the respondent-defendant- Municipal Board, Bari is claiming that the subject plot came to be vested in it w.e.f. 13.02.1973. In such factual matrix, this Court finds that the question of law does not arise at all in the present appeal. Learned counsel for appellant, during the course of argument has also not disputed this fact and does not press such question of law and admit that no such substantial question of law arises for consideration in the present case. Hence, the substantial question of law is answered in negative in the aforesaid manner.

23. “1. आया विद्वान अपर जिला न्यायाधीश को यह फाइंडिंग कि विवादित जमीन नगरपालिका में निहित थी, बिना किसी साक्ष्य के आधारित है।”

In the present case, plaintiff has instituted a suit for possession asserting his ownership and previous possession over the subject plot on the strength of registered sale deed dated 13.12.1979 (Exhibit-1). Firstly, it is a cardinal principle of law that plaintiff has to prove his own case in order to secure the decree for possession and may not be placed reliance on any lacunae/weakness of the evidence of the respondent-defendants, if any. In evidence, the plaintiff has miserably failed to show the ownership rights of the vendor-Ram Dayal, from whom plaintiff alleged to purchase the subject land. Though, it has come on record that at one point of time Ram Dayal was found in possession of the land in question and cultivated the crop of tobacco from 1968 to 1971 but neither any document of the allotment of the subject land in favour of the Ram Dayal has been produced nor any other documents/evidence have been produced



to show the possession of Ram Dayal over the subject plot after 1971. It has been observed by the trial court as well as appellate court that there is no evidence on record that at the time of execution of the sale deed dated 13.12.1979 by the Ram Dayal, he was having actual possession over the subject plot hence the factum of delivery of possession of the subject plot by the Ram Dayal to plaintiff has been disbelieved. Otherwise also, as per the plaint, plaintiff asserts that his stone slabs, garbage and rubbish was laying on the plot and the same was covered with the stone pillars and iron fencing. No substantive evidence to prove such possession have been adduced, nor any ownership has been established by the plaintiff.

In the judgment dated 09.09.1980 passed by Co-ordinate Bench of this Court in **Prem Raj vs. Jeth Mal & Ors. [S.B. Civil Second Appeal No.169/1970]** has categorically held that the possession over the open piece of land follows title and the nature of possession in the form of tethering some cattle putting the garbage may not be treated as possession over the open piece of land.

In *Prem Raj* (supra) the Co-ordinate Bench of this Court has observed as under:-

“The statement of D W 1 Premraj, D W. 2 Hastimal, D W 3 Mishrimal D W. 4 Jainarayan and DW, 5 Shankar Lal were also a(sic)ticed by the learned Civil Judge Having referred to the fact that it was an open land, the learned Civil Judge as of the opinion that mere tethering of some animals or using the land for the purpose of s(sic)oring fuel would not tantamount to possession of defendant No. 1 That view that such acts would not amount to the possession stands supported by *Wazirimal v. Ganga Ram AIR 1926 Lah*



370 Rulia v. Noor Mohamhned AIR 1926 Lah 615 and Asaram v. Ramchandra AIR 1939 All 161 The learned civi Judge, in my opinion was right”

The aforesaid judgment was followed by Punjab and Haryana High Court in case of **Desha vs. Man Singh & Ors. reported in [2010(5) RCR (Civil) 481].**

In the present case, plaintiff has miserably failed to prove his ownership. The execution of sale deed (Exhibit-1) made by Ram Dayal in favour of plaintiff is without any valid document of title in his favour. Hence, Ram Dayal had no authority to pass on title of this plot to plaintiff. Vendor-Ram Dayal himself failed to prove his title. Any allotment, if made in favour of Ram Dayal has not been produced on record. Thus, the plaintiff could not prove acquiring of ownership and possession over the plot in question, his case set out in the plaint that he was dispossessed a day before institution of the suit and restoration of possession deserves to be failed in absence of his evidence.

The question of law has been framed in the manner as if it is burden of respondent-defendant Municipal Board, to prove title and the fact that the subject land came to be vested in it. No such issue was raised by and on behalf of the plaintiff during the course of trial. It is not clear on record that if the land was allotted by the Tehsildar to Ram Dayal for cultivation whether allotment was for perpetual or for temporary? How the nature of land converted into abadi? PW-2-Ram Dayal admits the subject land to be a government land and there is no document either to show the allotment of subject land; entry of the name of Ram Dayal as allottee in the revenue record or having cultivation of the tobacco crop. It is undisputed fact and clear position on record that the



subject land was a government land (nazul land) and the vendor-Ram Dayal claimed its allotment from the Tehsildar. In turn, the Municipal Board, Bari claims to get the area including subject land from government and published auction notice to auction the subject land alleging that the land of subject land with adjoining land have been vested in it by the order of District Collector dated 13.02.1973. Though such order has not been produced on record but non-production of order of the Collector does not improve the plaintiff's case nor leads to any adverse inference in favour of plaintiff or against defendant treating the plaintiff as owner of subject land. Thus, this Court is of considered opinion that the question of law referred hereinabove does not arise at all in the present case. The plaintiff's suit for possession has been dismissed on account of lack of plaintiff's evidence to show his ownership and previous possession over the subject plot. Therefore, substantial question of law deserves to be held in negative against the appellant and accordingly answered.

24. "2. आया अधीनस्थ न्यायालयों ने प्रतिवादोगण के विरुद्ध विवादित भूमि के संबंध में दस्तावेज पेश नहीं करने के कारण प्रतिकूल अवधारणा बनाने में कानूनी भूल की हैं।"

On perusal of the substantial question of law itself shows that the same is in complete. It appears that the question of law was framed in the tune that an adverse inference should be drawn against respondent-defendant due to non-production of the title documents by the Municipal Board, Bari.

Be that as it may, as has already been discussed by this Court while considering the substantial question of law No.1 hereinabove, this is not the case where on the basis of drawing an adverse inference the plaintiff is entitled for the decree for possession.



In the facts and circumstances of the present case, it is for the plaintiff to prove his previous established possession, in order to succeed within the scope of Section 6 of the Specific Relief Act for restoration of possession. That apart, plaintiff has also claimed his ownership on the basis of sale deed, hence it is incumbent and necessary for the plaintiff to prove his ownership and title on the subject land and in which he miserably failed to prove. Hence, the question of drawing any adverse inference against the respondent-defendant neither arise nor extends any help to the appellant-plaintiff. Accordingly, this substantial question of law is answered negative against the appellant.

25. "3. आया प्रतिवादोगण को यह आधकार है कि वे बिना क़ानूनी प्रक्रिया अपनाये वादी को या उसके पूर्वज रामदयाल को विवादित भूमि से बेदखल कर सकते हैं।"

As far as this substantial question of law is concerned, the same is essentially a question of fact and may not be treated as a question of law what to say as a substantial question of law.

That apart, in the present case when the appellant-plaintiff could not prove his actual and physical possession over the plot in question, before filing of the present suit for possession, it is not the issue at all that the plaintiff has been dispossessed without following the due course of law.

26. According to the pleadings and evidence of the present case, as referred hereinabove, both the courts have recorded a fact finding that the vendor-Ram Dayal was not in actual and physical possession over the said plot after year 1971, therefore, the delivery/transfer of possession by Ram Dayal to the appellant-plaintiff through the sale deed dated 13.12.1979 has not been believed. Thus, the case of plaintiff to acquire the possession of



the subject plot through the sale deed dated 13.12.1979 does not find corroboration.

27. As far as document (Exhibit-2) ghatna bahi is concerned, it has been observed by both courts that the person (patwari) who prepared this document was alive as admitted by PW-2 but the concerned patwari was not produced by the plaintiff in his evidence to prove the document Exhibit-2. Moreover, the Exhibit-2 is a document, to support and corroborate the original allotment. Once the allotment letter itself has not been produced merely on the basis of document (Exhibit-2), the delivery of possession cannot be held as absolute.

28. It may be noticed here that both courts have recorded a fact finding that even if, it is assumed that the subject land was allotted to vendor-Ram Dayal in the year 1968 for the purpose of cultivation and the vendor-Ram Dayal cultivated the crop from the year 1968 to 1971 but thereafter there is no substantive evidence to show the continuity of the possession of Ram Dayal over the subject plot after 1971. Thus, the claim of plaintiff to get the possession of subject plot from Ram Dayal on 13.12.1979 and he was in possession of the plot prior to the institution of the present suit on 05.01.1980 is not believable and both courts have already examined the evidence on record, while recording the fact finding in this regard against the appellant-plaintiff. At the stage of second appeal, the fact findings unless and until are not found to be perverse or suffer from misreading/non-reading of evidence cannot be disturbed. Therefore, this question of law is of no importance in the present appeal and does not arise at all hence answered accordingly.



29. Hon'ble Supreme Court in case of **Umerkhan Vs. Bismillabi [(2011)9 SCC 684]** has propounded that if a second appeal is admitted on substantial questions of law, while hearing second appeal finally, can re-frame substantial question of law or can frame substantial question of law afresh or even can hold that no substantial question of law involved, but the High Court cannot exercise its jurisdiction of Section 100 CPC without formulating substantial question of law.

30. Since the substantial questions of law framed by appellant-plaintiff have already been answered in negative and no other substantial question of law have been suggested and proposed nor are involved.

Learned counsel for plaintiff has not been able to prove his case or to point out any perversity or make out any substantial question of law in respect of the judgment and decree passed by courts below. There are concurrent findings. The conclusion of the courts below are based on findings of fact. The Hon'ble Supreme Court in the case of **Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar [(1999)3 SCC 722]** and catena of other judgments passed in case of **Pakeerappa Rai Vs. Seethamma Hengsu & Ors., [(2001)9 SCC 521]**, **Thulasidhara & Anr. Vs. Narayanappa & Ors., [(2019) 6 SCC 409]**, **Bholaram Vs. Ameerchand, [(1981)2 SCC 414]**, **Ishwar Das Jain Vs. Sohan Lal, [(2000)1 SCC 434]** and **State of Madhya Pradesh Vs. Sabal Singh & Ors., [(2019)10 SCC 595]**, **C. Doddanrayana Reddy and Ors. Vs. C. Jayarama Reddy and ors. [(2020)4 SCC 659]** has held that the concurrent findings of facts even if erroneous cannot be disturbed by the High Court in exercise of the powers under Section 100 CPC unless not found to



be perverse or suffer from misreading/non-reading of evidence or based on inadmissible peace of evidence or lead to miscarriage of justice being wholly violative to settled proposition of law. This proposition is well established. Findings of fact based on appreciation of evidence are the province of the trial court and the first appellate court. Hence the second appeal is not liable to succeed and accordingly the same is hereby dismissed. No order as to costs.

31. Record of both courts below be sent back

32. All pending application(s), if any, stand(s) disposed of.

(SUDESH BANSAL),J

SAURABH/89

