REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 2571 OF 2008

Dharampal(Dead) Thr. LRs. ….Appellant(s)

VERSUS

Punjab Wakf Board & Ors. …Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1. This appeal is filed by defendant No.1 against the final judgment and order dated 17.09.2002 passed by the High Court of Punjab & Haryana at Chandigarh in RSA No. 4830 of 1999 whereby the High Court dismissed the appeal filed by the original appellant (defendant No.1) thereby upholding the judgment and order dated 28.10.1999 of the Additional District Judge-I, Faridabad in C.A. No.82 of 1998 which reversed the judgment/decree dated 12.08.1998 passed by the Civil Judge(Jr. Division), Faridabad in Case No. 419 of 1991 which had dismissed the plaintiff's suit and decreed the

counter-claim of defendant No.1 in relation to suit lands.

2. In order to appreciate the controversy raised in the appeal, it is necessary to state the relevant facts hereinbelow.

3. Dharampal-the original appellant herein (since dead and represented now by the present appellants as his legal representatives) was defendant No.1 whereas respondent No.1 herein is the plaintiff and respondent Nos.2 and 3 are defendant Nos. 2 and 3 in the suit out of which this appeal arises.

4. Respondent No.1 (plaintiff) is the Wakf Board registered under the Wakf Act, 1954 (hereinafter referred to as “the Act) having its office at Ambala Cantt. (Haryana) and a Branch at Faridabad. Respondent No.1 is the owner of huge parcel of land around total 14 fields measuring 54 Kanals 13 marlas situated in village Uncha Gaon, Tahsil Ballabgarh, District Faridabad (hereinafter referred to as "suit land"). The details of the suit land are set out hereinbelow:

> **“i) Comprising in Khewat No.713, Khatoni No.974, rect. No.38, Kila Nos.20(2-18), 21(7-9), 22/1(1-4), rect.No.47, Kila Nos.5 min (0-18), rect.39, Kila Nos.25(5-4), rect.No.48, Kila Nos.1 min(3-4), 2/1 min(1-2) and Khatoni No. 975, rect. No.48, Kila No.1 min(2-13), 2/1 min (4-5) fields 9, measuring 28 kanals 17 marlas, and**

ii) **Khewat No.713, Khatoni No.970, rect.No. 39, Kila No.16(5-10), rect. No.47, Kila No.5(6-5) fields 2, measuring 11 kanals 15 marlas, and**

iii) **Khewat No. 713, Khatoni No.971, rect.No.88 min(11-5) rect. No.89(2-15) and rect. No.133(0-1), fields 3, measuring 14 kanals 1 marla, and**

thus total fields 14 measuring 54 kanals 13 marlas situated within the revenue estate of village Uncha Gaon, Tehsil Ballabhgarh, District Faridabad. The copy of jamabandi for the year 1985-86 is attached herewith the plaint."

5. Long back, respondent No.1 had let out the land specified in clause (i) to respondent Nos.2 and 3 for one year. However, on the expiry of period of one year, the lease was not renewed. Respondent Nos.2 and 3, however, continued to remain in occupation of the suit land. In the meantime, one Ram Swarup, who was father of original defendant No.1 (appellant herein), occupied unauthorizedly some part of the suit land and later encroached the entire suit land. This he did somewhere in 1953 and onwards.

6. This gave rise to filing of a civil suit (74/1971) by respondent No.1 (Wakf Board) against Ram Swarup for recovery of possession of the suit land illegally occupied by him. This suit was filed in the year 1971. It was, however,

dismissed in default for 28.03.1972 by the Trial Court.

7. On 27.11.1991, respondent No.1 (Wakf Board) filed the present suit being suit No.419/1991 in the Court of Civil Judge (Junior Division), Faridabad against the original appellant (defendant No.1) - son of Ram Swarup and also against respondent Nos.2 and 3 (defendant Nos.2 and 3), out of which this appeal arises.

8. The suit was for possession and injunction restraining the defendants from changing the nature of the land and from making any construction over the suit land, which are open fields.

9. The suit was founded on the allegations *inter alia* that, respondent No.1 is the exclusive owner of the suit land, part of the suit land, as specified in the plaint (Para 3), had been given for a period of one year on rent to respondent Nos.2 and 3 (defendant Nos.2 and 3) but on the expiry of one year, this period was not extended and, therefore, respondent Nos.2 and 3 continued to remain in its un-authorized occupation on the expiry of one year, the original appellant (defendant No.1) has always remained in an un-authorized occupation of the suit

land and managed to get his name inserted in the revenue records behind the back of Wakf Board, showing him to be in occupation of the entire suit land without there being any right of any nature in his favour. It was, therefore, prayed that all the three defendants have rendered themselves liable to be evicted from the suit land as are un-authorized occupants.

10. Defendant No.1 (original appellant) filed his written statement whereas defendant Nos. 2 and 3 (Respondent Nos.2 and 3) filed their written statements. So far as defendant No.1 is concerned, his case was essentially based on the plea of "adverse possession" over the suit land. He alleged that his late father-Ram Swarup was all along in actual possession of the suit land since 1953 and onwards and on his death in 1987, he continued to remain in its possession and, therefore, due to his father's and then his own continuous possession over the suit land, he has acquired title over the suit land on the basis of "adverse possession" *qua* the plaintiff (Wakf Board). He also raised a plea that the present suit is barred for the reason that the plaintiff had earlier filed a civil suit (74/1971) in the year 1971 against his father (Ram Swarup) in

respect of the suit land claiming the same relief and the said suit was dismissed for default on 28.03.1972. It was, therefore, contended that since no application for restoration of the earlier suit was filed under Order 9 Rule 9 of the Code, the second suit, i.e., (present one) is barred under Order 9 Rule 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”).

11. Defendant No.1 also filed counter-claim and claimed therein the ownership over the suit land on the basis of perfecting his title by "adverse possession" against the plaintiff (Wakf Board).

12. So far as other defendants are concerned, they also raised the plea of non-maintainability of the suit. They, however, admitted that the land was let out by the plaintiff (respondent No.1) to them for one year. Their case was that they continued to pay the rent. They, however, blamed defendant No.1 to have entered into collusion with State Authorities to grab the entire suit land by one or other means.

13. By judgment/decree dated 12.08.1998, the Trial Court dismissed the plaintiff's suit but at the same time decreed the

counter-claim filed by defendant No.1. In other words, the Trial Court held that defendant No.1 has perfected his title over the suit land by virtue of his “adverse possession” as against the plaintiff (Wakf Board) and hence declaratory decree was passed in favour of defendant No.1 and against the plaintiff declaring defendant No.1 as owner of the suit land on the strength of his "adverse possession" over the suit land. As a consequence, the plaintiff suit was dismissed.

14. The plaintiff (Wakf Board), felt aggrieved, filed first appeal before the Additional District Judge. By judgment/decree dated 28.10.1999, the Appellate Court allowed the appeal and while reversing the judgment/decree of the Trial Court, dismissed the counter-claim of defendant No.1 and, in consequence, decreed the plaintiff's suit declaring Wakf Board to be the owner of the suit land and accordingly passed the decree for recovery of possession of the entire suit land against all the defendants.

15. Defendant No.1 alone felt aggrieved and filed second appeal before the High Court. By impugned judgment, the High Court dismissed the second appeal and affirmed the

judgment of the first Appellate Court giving rise to filing of this appeal by way of special leave before this Court by defendant No.1. In this way, the decree passed by the first Appellate Court against defendant Nos.2 and 3 had become final because they neither filed any second appeal in the High Court nor any special leave petition in this Court.

16. We are, therefore, only concerned with the appeal filed by defendant No.1 to find out as to whether the first Appellate Court and the High Court were justified in decreeing the plaintiff's suit *qua* defendant No.1 and were further justified in dismissing counter-claim of defendant No.1 (original appellant herein) in relation to the suit land.

17. Heard Mr. Mahabir Singh, learned senior counsel for the appellants and Dr. Salman Khurshid, learned senior counsel for respondent No.1.

18. Mr. Mahabir Singh, learned senior counsel appearing for the appellant (defendant No.1) while assailing the legality and correctness of the impugned order raised basically two points.

19. In the first place, learned counsel contended that the present suit is barred by virtue of bar contained in Order 9

Rule 9 of the Code. It was pointed out that the plaintiff had earlier filed one civil suit (74/71) for claiming a relief against defendant No.1, which is now again claimed in the present suit and since the earlier suit was dismissed for default on 28.03.1972, the present suit is barred by virtue of bar contained in Order 9 Rule 9 of the Code.

20. It was pointed out that since the plaintiff did not make any application seeking restoration of the earlier suit under Order 9 Rule 9 of the Code, they are now precluded from filing fresh suit to claim the same relief against defendant No.1 by virtue of bar created under Order 9 Rule 9 read with Section 9 of Code.

21. His second submission was on merits. According to learned counsel, the appellant (defendant No.1) was able to establish his "adverse possession" over the suit land since 1953 through his father and after his death in 1987 through defendant No.1, who continued to remain in possession of the suit land till the filing of present suit in 1991. It was urged that taking into consideration his long possession from 1953 to 1991, the Trial Court was right in decreeing his

counter-claim against the plaintiff by granting him a declaration of ownership on the strength of his "adverse possession" over the suit land.

22. Learned counsel lastly contended that the first and second Appellate Courts should have, therefore, confirmed the judgment/decree of the Trial Court which had dismissed the plaintiff's suit and rightly decreed the counter-claim of defendant No.1.

23. In reply, Dr. Salman Khurshid, learned senior counsel, supported the impugned judgment and contended that it does not call for any interference and deserves to be upheld by dismissing the appeal.

24. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeal.

25. Coming to the first submission, in our opinion, it has no merit for more than one reason. First, the appellant did not raise this plea in any of the Courts below and nor invited finding of any Court on this plea. In this view of the matter, we cannot now permit the appellant to raise this plea for the first

time in this Court.

26. Second, assuming for the sake of argument, we consider this plea on merits then also, in our opinion, it has no substance. It is not clear from the record and nor the learned counsel for the appellant was able to point out as to whether the dismissal of earlier suit (74/71) was under Rule 3 or Rule 8 of Order 9 of the Code.

27. In our opinion, in order to examine such plea, what is relevant at the first instance is to find out as to whether dismissal of the suit is under Rule 3 or Rule 8 of Order 9 of the Code.

28. If it is under Rule 3 then filing of fresh suit is permissible as provided under Rule 4 but if the dismissal is under Rule 8 then fresh suit may be barred as provided under Rule 9.

29. So far as the present case is concerned, we take the dismissal of earlier suit (74/71) to be under Rule 3 and, therefore, in our opinion, the present suit was not barred by virtue of Rule 4 and was, therefore, rightly entertained by the Courts below for being tried on merits.

30. Apart from what is held above, even otherwise, in our

opinion, the present suit could be filed notwithstanding dismissal of the earlier suit because the earlier suit was filed only against one defendant, i.e., father of defendant No.1 on a cause of action which accrued against one defendant at that time whereas the present suit was filed against three defendants out of which two defendants were not parties to the earlier suit. So the parties and even part of the cause of action *qua* defendants were different in both the suits. It is for all these reasons, so far as the first submission of learned counsel is concerned, it has no merit and hence rejected.

31. Now coming to the second submission, in our opinion, it has also no merit for more than one reason stated *infra*.

32. In the first place, we find that this Court in **Gurdwara Sahib** vs. **Gram Panchayat Village Sirthala & Anr.,** 2014 (1) SCC 669, has held in para 8 that a plea of adverse possession cannot be set up by the plaintiff to claim ownership over the suit property but such plea can be raised by the defendant by way of defence in his written statement in answer to the plaintiff's claim. We are bound by this view.

33. In the light of law laid down in the case of **Gurdwara**

Sahib (supra), in our view, the plea raised by the original appellant (defendant No.1) in his counter-claim filed against the plaintiff wherein he sought a declaration of his ownership over the suit land only on the plea of "adverse possession" was not permissible. It is for the reason that a counter-claim is treated as a plaint under Order 8 Rule 6A(4) of the Code. In other words, in counter-claim, the status of the defendant is that of the plaintiff because he seeks a relief for passing decree in his favour relating to the suit land and against the plaintiff, who is sued in counter-claim as the defendant as provided in Rule 6-A (4) of Order 8 of the Code.

34. That apart, even on merits, we find that the plea of adverse possession raised by defendant No.1 (original appellant) in his counter-claim was wholly misconceived and untenable both on facts and in law.

35. What is "adverse possession" and on whom the burden of proof lies and lastly, what should be the approach of the Courts while dealing with such plea have been the subject matter of large number of cases of this Court.

36. In **T. Anjanappa & Ors.** vs. **Somalingappa & Anr.,**

(2006) 7 SCC 570, this Court held that mere possession, howsoever long it may be, does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owners' title.

37. Relying upon the aforesaid decision, this Court again in **Chatti Konati Rao & Ors.** vs. **Palle Venkata Subba Rao**, (2010) 14 SCC 316 in Para 14 held as under:

> **"14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said is that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter".**

38. Applying the aforementioned principle of law to the facts of the case on hand, we find absolutely no merit in this plea of defendant No.1 for the following reasons:

39. First, defendant No.1 has only averred in his plaint (counter-claim) that he, through his father, was in possession of the suit land since 1953. Such averments, in our opinion, do not constitute the plea of "adverse possession" in the light of law laid down by this Court quoted *supra*. Second, it was not pleaded as to from which date, defendant No.1's possession became adverse to the plaintiff (Wakf Board). Third, it was also not pleaded that when his adverse possession was completed and ripened into the full ownership in his favour. Fourth, it could not be so for the simple reason that the plaintiff (Wakf Board) had filed a suit in the year 1971 against defendant No.1's father in relation to suit land. Therefore, till the year 1971, the question of defendant No.1 perfecting his title by "adverse possession" *qua* the plaintiff (Wakf Board) did not arise. The plaintiff then filed present suit in the year 1991 and, therefore, again the question of perfecting title upto 1991 *qua* the plaintiff did not arise.

40. The reason is that the plaintiff being a Wakf Board, the period of 30 years as prescribed under Section 66-G of the Wakf (Amendment) Act, 1984 is applicable to establish the

factum of "adverse possession" by any person against any Wakf property. In this case, defendant No.1 could not establish his 30 years' continuous possession *qua* the plaintiff because the continuity was broken twice by the positive act on the part of true owner-Wakf Board (plaintiff) first in 1971 and then in 1991 by asserting their ownership over the suit land against defendant No.1 in two suits.

41. In the light of these two admitted facts emerging from the record, we are of the view that the appellant (defendant No.1) failed to prove his case of "adverse possession" on facts and law.

42. Lastly, the learned counsel for the appellant argued that the suit was barred by virtue of bar created under Section 55-C of the Wakf Act, 1954, which was amended in the Wakf Act, 1954 by Act No. 69 of 1984. According to him, after the amendment made in Section 55 and further by adding Sections 55-A to 55-F by Act No. 69/1984, the jurisdiction of the civil court was barred (Section 55-C) to decide the suit of this nature and was transferred to the Wakf Tribunal under Section 55. It was urged that since the suit was filed in 1971,

it was, therefore, barred under Section 55-C of the amended Wakf Act.

43. In our view, this point was neither raised in the written statement nor any issue was framed and nor any finding was recorded by any of the Courts below. We cannot, therefore, permit the appellant(defendant No.1) to raise such plea for the first time before this Court. Yet on examining, we find no merit in it.

44. As rightly pointed out by Dr. Salman Khurshid, learned counsel for the respondent (plaintiff) that though the amendment in Section 55 was introduced in 1984 by Act No. 69 of 1984 in the Wakf Act, 1954 but the date of the amendment was never notified with the result, the amendment was never brought into force except two provisions with which we are not concerned here. In the meantime, the entire Wakf Act, 1954 and the Wakf (Amendment) Act, 1984 were repealed by the Waqf Act, 1995. (See-Introduction of The Waqf Act, 1995).

45. In other words, since the amendment made by Act No. 69 of 1984 in the Wakf Act, 1954 which governs the constitution

of Tribunal and creation of bar of filing suit in civil court was never notified and the main Act of 1954 including the amending Act, 1984 was, in the meantime, repealed by Act of 1995, the question of maintainability of the civil suit in the light of such provisions did not arise.

46. It is not in dispute that when the suit was filed in the year 1971 and later again in 1991, the Civil Court had the jurisdiction to try the suit by virtue of Section 6 of the Act of 1954.

47. In the light of this, the submission of learned counsel for the appellant though raised for the first time, cannot survive and has to be rejected. It is accordingly rejected.

48. In view of foregoing discussion, we find no merit in the appeal. It is accordingly dismissed.

.....J.
[R.K. AGRAWAL]

.....J.
[ABHAY MANOHAR SAPRE]

New Delhi;
September 13, 2017

ITEM NO.1501 COURT NO.3 SECTION IV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(S). 2571/2008

DHARAMPAL(DEAD) THROUGH LRS. & ORS. APPELLANT(S)

VERSUS

PUNJAB WAKF BOARD & ORS. RESPONDENT(S)

Date : 13-09-2017 This appeal was called on for pronouncement of judgment today.

For Appellant(s)
Mr. Ranbir Singh Yadav, AOR

For Respondent(s) **Mr. Imtiaz Ahmed, Adv.**
Mrs. Naghma Imtiaz, Adv.
Mr. Ahmed Zargham, Adv.
For M/s. Equity Lex Associates, AOR

Hon'ble Mr. Justice Abhay Manohar Sapre pronounced the judgment of the Bench comprising Hon'ble Mr. Justice R.K. Agrawal and His Lordship.

The appeal is dismissed in terms of the signed reportable judgment.

[VINOD LAKHINA] **[ASHA SONI]**
AR-cum-PS **BRANCH OFFICER**

[SIGNED REPORTABLE JUDGMENT IS PLACED ON THE FILE]