Before Amol Rattan Singh, J.

MEGH RAJ—*Appellant*

versus

LUXMI DUTT AND OTHERS—*Respondents*

RSA No.3990 of 2016

September 04, 2018

(A) ***Code of Civil Procedure, 1908—S.100—Claim for possession—Onus to prove in suit for prohibitory injunction upon plaintiffs.***

Held, that therefore, if the respondents herein were claiming possession of the property that they owned (on the basis of the allotment letters Exs. P-7 to P-11), the onus to prove such possession, in a suit for prohibitory injunction, was upon them.

(Para 26)

(B) ***Code of Civil Procedure, 1908—S.100—Onus to prove dispossession lies on plaintiff and not defendant.***

Held, that however, to repeat, where the suit filed by the plaintiff is only one seeking prohibitory/permanent injunction against the defendant from interference in the plaintiffs' possession of the suit property (as claimed by the plaintiff), then the onus to prove that he was dispossessed by the defendant during the pendency of the suit, would lie upon the plaintiff and not the defendant.

(Para 27)

(C) ***Code of Civil Procedure, 1908—S.100—Adverse possession—Upon defendant to prove possession of suit property for more than 12 years.***

Held, that the situation would again be different in a case where the plaintiff-landowner seeks a declaration of title and his possession of the suit property, claiming to have been originally in possession of the suit property at the time of institution of the suit, but claims to have been dispossessed by the defendant during the pendency of proceedings. In such a situation, though the onus of proving that he/she has been in continuous possession of a suit property owned by the plaintiff, for more than 12 years, would lie upon the defendant, however, the onus to prove that the plaintiff was dispossessed thereof during the pendency of the suit would essentially lie upon the plaintiff, though of course if the defendant is unable to prove his possession for 12 years and during the course of leading such evidence, he can prove his possession only from a date after the suit was instituted, naturally the burden upon the plaintiff would, by that fact itself, stand discharged in the given circumstances of any case. (That in any case not being the fact situation at all in the present case as it not one seeking a declaration).

(Para 27)

(D) ***Code of Civil Procedure, 1908—O.39, Rls. 1 and 2—Suit for Injunction restraining defendants from interfering in possession of suit land—Original plaint have no reference of construction on suit property—In replication admitted two rooms stood constructed on suit land—Amended plaint—Plaintiffs took stand that defendant forcibly entered suit land and made construction on property during pendency of suit—Entirely new story made out—Had suit been seeking possession of suit property on basis the of title, findings on rights of plaintiff would be completely different—Suit being for permanent injunction and thereafter seeking mandatory and consequent permanent injunction in its amended form, possession by plaintiff on date of institution of suit had to be proved which they actually disproved by their own pleadings—Appeal partly allowed Suit of plaintiff qua constructed rooms dismissed.***

Held, that of course, had the suit been one filed by the plaintiffs seeking possession of the suit property on the basis of their title to it, the findings on their rights to do so may have been completely different; but the suit being only one seeking permanent injunction (in its original form), and thereafter seeking mandatory and consequent permanent injunction in its amended form, possession by them on the date of the institution of the suit had to be proved by the plaintiffs, which in my opinion they actually disproved by their own pleadings.

(Para 34)

Further held, that having held as aforesaid, it needs to be said, however, that as regards the finding of the learned trial Court that with only one plaintiff having stepped into the witness box and not the others, with the said plaintiff not being a joint owner of the entire suit property and therefore his testimony not being acceptable with regard to possession of the other plots as were not in his ownership (*'Khasra'* nos. 40 and 42), that finding in my opinion is erroneous, as correctly held by the learned lower appellate Court, because once it was admitted that the plaintiffs were immediate family to each other, i.e. father, sons and grand-son, with the plots all being contiguous to each other, even plaintiff no. 2, appearing as a witness for all the plaintiffs, would be deemed to be testifying in terms of his knowledge of the case, though that testimony may otherwise be rejected for the reason given hereinafore, i.e. possession of the plaintiffs over the suit property actually stood disproved by the contradictory stands they took in their pleadings at different times, with the evidence of the defendant on his possession of the suit property therefore becoming wholly believable.

Gopal Sharma, Advocate,*for the appellant.*

Yash Pal Malik, Advocate,for the respondents.

AMOL RATTAN SINGH, J. (Oral)

CM No. 10314-C-2016

(1) Before going on to addressing the issues raised in this appeal, it needs to be noticed here that there is a delay of 85 days in filing it andthough no notice was issued in the application seeking condonation of that delay, with notice having been issued in the main appeal itself, learned counsel for the respondents has also not raised any serious objection to the delay being condoned and consequently, the application is allowed and the delay of 85 days in filing the appeal is condoned, in view of the reasons given in the application, to the effect that the applicant is a poor person, residing in a village who was (as stated) assured by respectable persons of the village that the matter would be resolved amicably. Instead, however, the respondents in fact instituted proceedings for execution of the decree, upon which this appeal was filed.

This Regular Second Appeal has been filed by the defendant after the suit filed by the respondents herein (plaintiffs) was initially dismissed by the trial Court [Additional Civil Judge (Senior Division), Kaithal], on 31.10.2013, but with the appeal filed by the plaintiffs having been allowed by the first appellate Court, i.e. the Additional District Judge, Kaithal, vide the impugned judgment and decree dated 15.02.2016.

(2) Vide the suit filed by the respondent-plaintiffs (hereinafter referred to as the plaintiffs), they initially sought that a decree of permanent injunction be issued against the appellant herein, restraining him from interfering in their peaceful possession over the suit land, (the full details of which have not been given in the judgments of the learned courts below but from the records it is seen to be non-agricultural land fully described in four parts, in paragraph 1 (A) to (D) of the plaint).

Upon notice having been issued in the suit, the appellant-defendant appeared and filed a written statement raising the usual preliminary objections on *locus standi*, concealment of facts etc. and on merits stating that he is the owner in possession of the land, with the Public Health Department having constructed a boundary wall over a part of thesuit property and a tender also 'released' for the construction of a water tank within the said boundary wall.

Some part of the suit property was stated by the appellant to be vacant, whereas on the other part of it he had constructed his residential house consisting of two rooms, where he is stated to be residing with

his family.

In the replication filed by the plaintiffs, they refuted that the two rooms constructed were so constructed by the defendant, contending on the other hand that they had been constructed by them (plaintiffs- respondents).

(3) Upon the aforesaid pleadings, the following issues were framed by the learned trial Court:-

> "1.Whether the plaintiffs are entitled to a decree for permanent injunction as prayed for? OPP.
>
> 2. Whether the suit of the plaintiffs is notmaintainable in the present form? OPD
>
> 3. Whether the plaintiffs have no locus standi to file the present suit? OPD
>
> 4. Whether the plaintiffs are estopped to filethe present suit by their own act and conduct? OPD
>
> 5. Whether suit is bad for non-joinder ofnecessary party? OPD
>
> 6. Whether civil Court has no jurisdiction toentertain and try the present suit? OPD
>
> 7. Whether suit is bad for misfeasance? OPD
>
> 8. Whether plaintiffs have concealed true andmaterial facts from the court? OPD
>
> 9. Relief."

(4) Subsequently, at the stage of the trial itself, the plaintiffs filedan application for amendment of the plaint, contending therein that on 07.07.2012, when they were out of station, the appellant-defendant had trespassed into the suit property and had taken possession thereof illegally and had raised construction thereon without their consent. The application was allowed, with the amended plaint therefore taken on record, by which a decree of mandatory injunction was then sought by the plaintiffs, directing the appellant to hand over vacant possession of the property, with him further to be restrained from interfering in their peaceful possession over it thereafter.

A written statement to the amended plaint was thereafter filed by the appellant, contending therein that the plaintiffs had actually left

the village for the past 40 years, with him having constructed his house containing two rooms over the suit property and that no construction was raised by him on 07.07.2012.

On the amended pleadings having been filed, the following additional issues were framed by the learned trial Court:-

> "2-A)Whether during the pendency of the suit defendant had taken possession of the suit property illegally and unauthorizedly? OPP
>
> 2-B) Whether the plaintiff is entitled for decree for mandatory injunction as prayed for? OPP
>
> 3. Relief."

(5) The plaintiffs examined two witnesses, including plaintiff no. 4 Jai Dev @ Dev and one Sadhu Ram, whereas the appellant-defendant examined himself, one Ram Kumar and another, Raj Kumar, as DWs 1, 2and 3 respectively.

Both the sides also tendered documentary evidence.

(6) Issues nos. 1, 2, 2A and 2B were taken up together by the learned trial Court, which first recorded a finding that the dispute was actually not qua all the four '*Khasra'* numbers depicted in the first paragraph of the plaint but only with regard to that part of the suit land over which a house consisting of two rooms was constructed, which each party claimed to have constructed, though with the appellant herein stating that the construction was not made on 07.07.2012 but much prior thereto.

(7) Having recorded that finding, the learned trial Court went on to hold that in the plaint that was initially filed, the plaintiffs had not mentioned anywhere that they had constructed two rooms on the suit land and it was only when the appellant had submitted his written statement, stating therein that he had constructed his house consisting of two rooms, that in their replication the plaintiffs alleged that the rooms had been constructed by them; however, without mentioning even therein as to on which '*Khasra'* number, out of the '*Khasra'* numbers depicted by them, the construction had been made.

(8) Events stated to have taken place during the pendency of the suit have also been noticed by the learned Additional Civil Judge in his judgment, to the effect that upon the application filed by the plaintiffs, under Order XXXIX Rules 1 and 2 CPC, having been

allowed by that Court on 08.09.2009 (the suit having been instituted on 25.04.2009), thereafter on 29.07.2010 the plaintiffs moved an application seeking police help for implementation of the aforesaid order, alleging that even after it was passed, the defendant was threatening to dispossess them from the suit property and consequently, vide an order dated 31.03.2011, the SHO Police Station Kalayat had been directed to provide adequate help to the plaintiffs to implement the said order (dated 08.09.2009).

Thereafter again on 02.09.2011, the plaintiffs moved another application under Section 151 of the CPC, again seeking police help, with the allegation that the appellant-defendant was violating the aforesaid order. That application was also allowed, with the SHO again directed to provide police help if required by the plaintiffs, to protect their possession.

(9) On 02.09.2011, the SHO was directed to register a case against any person trespassing "the possession of the plaintiffs".

Against that order, the appellant herein filed Civil Revision No. 6348 of 2011 before this Court, which was disposed of on 10.07.2012, observing in the order that the plaintiffs had claimed the suit land to be vacant, with an injunction granted in their favour on 08.09.2009, and therefore that injunction would be treated to be one only in respect of the vacant land described in paragraph no. 1 [sub paragraphs (A) to (D) of the plaint].

The learned trial Court further went on to observe that a perusal of the said order of this Court showed that it had been 'argued' by learned counsel for the plaintiffs that the property be got measured and identified by appointment of a Local Commissioner, which prayer was declined but liberty granted to the plaintiffs to move such an application if they wishedto, before the trial Court.

(10) It is further observed by the trial Court in its judgment that instead of moving such an application for appointment of a Local Commissioner, the plaintiffs moved an application on 02.11.2012 for amendment of the plaint, alleging therein that on 07.07.2012 the defendant had trespassed into the suit property, taken illegal possession and had raised construction. That court noticed that this stand was taken by them even though nothing was shown from Civil Revision No. 6348 of 2011 that it had been argued before this Court that the defendant had already taken possession of the house during the pendency of the suit.

(11) Hence, the trial Court came to a conclusion that the

plaintiffshad deliberately not moved an application for appointment of a Local Commissioner to demarcate the suit land as regards the exact location of the house, contended by the defendant (present appellant) to have been constructed by him, and consequently, it appeared that the plaintiffs knew that the house had already been constructed by the defendant over a part of the suit land which the plaintiffs wished to take possession of, "under the garb of alleged dispossession", which, as per that Court, was also evident from the oral evidence led by the plaintiffs.

It was noticed that although PW-1 Jai Dev (plaintiff no. 4 and respondent no. 3 herein) had stated in his cross-examination that his Voter Card and Ration Card were issued at Samalkha, however, PW-2 Sadhu Ram had stated that the Voter Cards and Ration Cards of the plaintiffs were issued at Village Matore, i.e. where the suit land is situate. PW-2 was also seen to have testified that the plaintiffs had cast their votes for the Panchayat, parliamentary and state legislature directions.

It was also found by the trial Court that PW-2 had stated in his cross-examination that plaintiff no. 1 Laxmi Dutt had constructed his house consisting of two rooms on the suit land, which the defendant took forcible possession of, whereas PW-1 Jai Dev, in his cross-examination, stated that in the first week of July 2012, the appellant-defendant, after demolishing a *'Kotha'* constructed by the plaintiffs, took illegal possession of two plots bearing *'Khasra'* nos. 40 and 41.

Opposed to the aforesaid oral evidence, in the pleadings the plaintiffs were found to have alleged that the defendant had raised the construction on 07.07.2012, with no mention that he had first demolished the rooms already constructed by the plaintiffs. PW-2 was also found to havestated in his testimony that the house in dispute was constructed in the 2nd month of 2012.

(12) The aforesaid contradictions were held to be wholly inconsistent and consequently, it was held that the evidence led by the plaintiffs was not sufficient to prove that the house in dispute was constructed by them.

Referring to a 'file writing' (Ex. P-13), by which the plaintiffs wished to prove that the construction had been raised by them, the trial Court held that the said document was admitted by the defendant to have been signed by him but that it pertained to a dispute between plaintiff no. 1 Laxmi Dutt and one Suresh, on payment for bricks, with that matter compromised. However, it was also found by that Court

that no date hadbeen mentioned on the document and that it also could not be presumed that the dispute on the bricks was pertaining to the dispute of the house (two rooms) constructed on the suit land.

(13) The learned trial Court went on to record another finding to the effect that though the plaintiffs were all members of one family (plaintiff no. 1 being the father of plaintiff nos. 2 and 4 and grand-father of plaintiffno. 3), however, all four '*Khasra'* numbers that comprised the suit land were allotted individually to each of the plaintiffs and therefore, they were absolute owners in possession of one '*Khasra'* number each as was allotted to them and were not co-sharers in joint possession of the entire suit land described in sub-paragraphs (a) to (d) of paragraph 1 of the plaint.

(14) The (late) father of plaintiff no. 3 was found to have been allotted '*Khasra'* no. 40, plaintiff no. 2 khasra no. 41, plaintiff no. 4 '*Khasra'* no. 42 and plaintiff no. 1 '*Khasra'* no. 43. However, with only plaintiff no. 4 Jai Dev having testified as PW-1 and having stated in his cross-examination that the defendant had encroached upon '*Khasra'* nos. 40 and 41, it was inferred by the trial Court that the onus, as regards the the said two '*Khasra'* numbers, was on plaintiffs no. 3 and 2 respectively, who not having testified with regard to any encroachment thereupon, the testimony of plaintiff no. 4 on that aspect could not be accepted.

(15) On the basis of all the aforesaid observations and findings, itwas held by the learned Additional Civil Judge that the two rooms constructed on a part of the suit land were not constructed by the plaintiffs and therefore a reasonable inference could be drawn that they were constructed by the appellant herein (defendant), before the institution of the suit. This was further held to be fortified by the testimony of the appellant- defendant as DW-1, who, other than reiterating the averments of the written statement in his affidavit, Ex. DW1/A, also examined two other witnesses who testified that the house had been constructed by him about 40 years ago, with nothing found in their cross-examination by that Court as would create any doubt on the truthfulness of the testimony.

(16) Thus, the main issues were decided in favour of the appellant- defendant and against the respondents-plaintiffs, with the other issues described as not pressed or argued, resulting in dismissal of the suit.

(17) In the appeal filed by the respondent-plaintiffs, the learned

Additional District Judge, Kaithal, after noticing the facts, as also the evidence led, recorded a finding that the documents produced on record as Exs. P7 to P-11, showed that the plaintiffs were residing in Village Matore in the year 1976 and that the plots described in the first paragraph of the plaint, measuring 03 marlas each, had been allotted to them for the purpose of constructing houses, the allotment having been made on 06.08.1976.

The revenue record in the form of a '*Jamabandi'* (record of rights) for the year 2004-05, exhibited as Exs. P-1 to P-4, also reflected them to be owners in possession of the said *'Khasra'* numbers, with the *'Aks Shajra'* (site plan with field numbers) also showing the location of the *'Khasra'* numbers.

(18) Having recorded the aforesaid finding, it was held that the allotment as also the revenue record showing the plots to be owned and possessed by the plaintiffs, the presumption of truth attached to the record of rights could only be rebutted by evidence of equal value and therefore, the onus to show how the appellant herein (defendant) came into possession of the suit property, shifted on to him, for which he had relied upon a document placed on the record before that Court only as Mark DA, which however was not proved by him. The said document simply stated that plots which were allotted to other persons were allowed by the Gram Panchayat to be constructed upon by the defendant, also stating therein that the plaintiffs were not residing in the village for a long time.

However, the learned first appellate Court also found that the said document (Mark DA) did not depict any *'Khasra'* or *'Kila'* numbers in respect of which such permission was given. Therefore, it was held that it could not be said that the plots as were subject matter of the suit, were the same as were allotted to the defendant (appellant herein) by the Gram Panchayat.

(19) Another document produced by the appellant-defendant herein was seen to be Mark DB by the first appellate Court, (though eventually that was proved by him in the form of Ex. D-4). However, that document was found to be dated 20.04.2009 and for that reason (the inference taken as regards the date not given in the impugned judgment), it was held that the appellant had no right to the suit property.

Even while holding so, that Court did notice that the plaintiffs had admitted in their cross-examination that they were not residing in

Village Matore, however, it was found from the testimony of their witnesses that "their father" was still residing there and that plaintiff no. 1, Luxmi Dutt, (actually the father of two of the plaintiffs), used to come to the village after every few days. Hence, it was held that it could not be said that Luxmi Dutt was not residing in the village and even if his sons were working at some other place, that did not mean that they had lost the right to the property allotted to them in the year 1976, especially as no counter-claim had been filed by the defendant; with the gift deeds, Exs. P-7 to P-10, in favour of the plaintiffs also never challenged either by him or the Gram Panchayat. Even the '*Jamabandi' (*exhibited as Exs. P-1 to P-4) was found to have never been challenged and consequently, that Court held that even if it were to be presumed that the appellant-defendant had been residing on the land in dispute for 40 years, he never having challenged the gift deed or the '*Jamabandi'*, despite them being very much in his knowledge, including the fact that the lands were allotted in favour of the plaintiffs, that could not dis-entitle the plaintiffs to the decree that they sought.

It was then held that simply the admission of one of the plaintiffs that the defendant had encroached upon the land and constructed his house, was not enough to prove his long possession thereupon.

(20) It was further held that the plaint having been allowed to be amended, with the contention being that the defendant had encroached upon the suit land during the pendency of the suit, the onus was upon him (defendant) to prove as to when he came into possession thereof; but other than stating that he had been residing upon it for long, he had not specifically mentioned since which date, month and year he was residing there.

Thereafter, again referring to the document, Mark DA, by which the defendant had been permitted to construct the house on 04.03.2009, the Court went on to read that document with Ex. P-13, which was admitted to be correct by the appellant-defendant, to the effect that bricks and soil were supplied by one Suresh on the land in dispute and that it was therefore decided that plaintiff no. 1 Laxmi Dutt would pay Rs.5,000/-to Suresh in lieu of the bricks. Consequently, it was inferred by the Ist appellate Court that Laxmi Dutt had purchased the material to construct the house. Therefore, all circumstances put together, including the presumption of truth attached to the '*Jamabandi'*, with the allotment of the plots in question being in the name of the plaintiffs, that Court went on to hold that the suit of the plaintiffs deserved to be decreed.

On the aforesaid findings, the appeal filed by the plaintiffs was allowed and the suit decreed in their favour by that Court.

(21) Before this Court, in this 2nd appeal, Mr. Gopal Sharma, learned counsel for the appellant-defendant, submitted (in fact reiterated what was observed by the trial Court), that with only plaintiff no. 4 Jai Dev (respondent no. 3 herein), having stepped into the witness box to testify with regard to the possession of the suit property having been forcibly taken by the defendant, and his testimony only being in the context of plots no. 40 and 41, which did not belong to him but to plaintiffs no. 2 and 3, hence, the said testimony could not have been accepted, (by the appellate Court), as was rightly held by the trial Court, with plaintiffs no. 2 and 3 not having stepped into the witness box. As per learned counsel, this would be in violation of Rule 31 of Order XLI of the Code of Civil Procedure, which reads as follows:-

> "**Contents, date and signature of judgment.**---The judgment of the Appellate Court shall be in writing and shall state---
>
> (a) the points of determination;
>
> (b) the decision thereon;
>
> (c) the reasons for the decision; and
>
> (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

Thus, the contention is that as the impugned judgment does not give any reasons as to how the testimony of plaintiff no. 4 Jai Dev, as PW-1, can be accepted in the context of plots which do not belong to him, with plaintiffs no. 2 and 3 (Devi Dutt @ Dev and Mahi Pal), to whom the said plots belong, not having stepped into the witness box, the testimony should have been discarded.

He relied upon the following two judgments of the Supreme Court in that context:-

H.Siddiqui (D) By LRs *versus* **A. Ramalingam**[1] and **Rajeshwari** *versus* **Puran Indoria**[2].

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[1] 2011 (4) SC 240
[2] 2005 (4) RCR (Civil) 36

(22) Learned counsel next submitted that the appellate Court erroneously shifted the onus on to the appellant-defendant to prove that possession was not subsequently taken by him, whereas the onus to provethat would remain upon the plaintiffs, who had in fact amended their plaint only when they found that they could not prove their possession of the suit property.

(23) Per contra, Mr. Yashpal Malik, learned counsel for the respondent-plaintiffs, submitted that the inference taken by the learned Civil Judge in favour of possession of the defendant over the suit property, was rightly overruled by the first appellate Court, for the reason that a presumption of truth is attached to a record of rights ('Jamabandi' Exs. P-1 to P-4) and hence, the onus to show that the defendant was in possession of the suit property even prior to filing of the suit, was actually upon him, i.e. the appellant-defendant.

As regards only one of the plaintiffs stepping into the witness box, Mr. Malik submitted that no adverse inference could be drawn against the other plaintiffs on behalf of whom one plaintiff had stepped into the witness box, and testified in terms of the plaint filed by all the plaintiffs.

(24) He next referred to the testimony of the appellant-defendant Megh Raj (as DW-1), from the record, to submit that once the ownership of the property was not disputed even by him, with the plots having been allotted by the Gram Panchayat, duly reflected in the '*Jamabandies'*, the presumption in favour of such record was correctly taken in favour of the plaintiffs by the appellate Court.

Consequently, learned counsel for the respondents prayed for dismissal of the appeal.

(25) Having considered the judgments of both the courts below as also the arguments made before this Court, it is necessary to notice that inthe grounds of appeal, the following questions of law have been framed by learned counsel for the appellant:-

> i) Whether the findings of the learned courts below is misreading of Exs. P-7 to P-10 (allotment/gift deed)?
>
> ii) Whether the suit for injunction filed by the plaintiffs is maintainable against the defendant?
>
> (iii) Whether the findings of the learned lower appellate Court is based on misreading of evidence and isperverse?

(iv) Whether the impugned judgment and decree has caused great prejudice to the appellant-defendant?

(v) Whether the impugned judgment has been passed without the compliance of provisions of Rule 31 of Order XLI of the CPC?

Of the aforesaid question, question (ii) actually should, in the opinion of this Court, read to be "*as to whether the plaintiffs should have been granted the injunction prayed for in the circumstances of the case*" and is accordingly reframed.

Another question of law that is required to be framed is "*as to whether the onus to prove possession over the suit property, in a suit filed seeking permanent injunction against the defendant from interference in the property, would lie upon the plaintiffs or the defendant and secondly, whether the onus to prove that possession had been taken by the defendant from the plaintiffs during the pendency of the suit, was upon the plaintiffs or the defendant*". Accordingly, that is the last question of law (Question no.vi) to be gone into in this 2nd appeal and is accordingly framed.

In fact, Question no. (i) hereinabove is actually not a question of law and is wholly a question of fact; even so, learned counsel for the appellant could not point out from the record of the trial Court as to how the gift/allotment letters, Annexures P-7 to P-10 in favour of respondents no. 1 to 4 herein are in any way not readable as such allotment letters shown to be issued by the '*Sarpanch*' of the Gram Panchayat of Village Matore, the purpose of such allotment of three marla plots being to enable the allottee to construct a house thereupon.

Learned counsel has not addressed any arguments as to why the said allotments are illegal or invalid, either on account of any statutory orprocedural estoppel, or on account of the stamp value of the papers (onwhich the allotment is prescribed), being contrary to any statutory provision.

In fact, no such issue was even shown to be actually argued before the learned courts below.

Consequently, I see no reason to hold that the learned first appellate Court has misread those documents.

(26) Taking up the last question framed hereinabove first (Question no. vi), first, and to on whom the onus lies to prove possession, firstly at the stage when the original suit seeking

prohibitory injunction was filed by the respondents-plaintiffs and secondly, on whom the onus lies to prove that any such possession by the plaintiffs was disturbed by the defendant during the pendency of the suit.

On the first part thereof, a judgment of the Supreme Court, in ***Anathula Sudhakar*** *versus* ***P. Buchi Reddy (Dead) by LRs and others***[3], can be referred to, in which it was held as follows:-

> "**1**. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to thembriefly.
>
> **1** .1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.
>
> **1** .2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.
>
> **1** .3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession,necessarily the plaintiff will have to file a suit for declaration,possession and injunction."
>
> (Emphasis applied by this Court only)

A perusal of the above principles reveals that, no doubt, in

[3] 2008 (2) RCR (Civil) 879

paragraph 11.1 of the judgment it is stated that a person in wrongful possession is not entitled to an injunction against the rightful owner, but that is however qualified by what is stated in paragraph 11.2, to the effect that where the plaintiffs' title is not disputed but he is not in possession, his remedy is to file a suit for such possession and in addition seeking an injunction; and that a person out of possession cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

Therefore, if the respondents herein were claiming possession of the property that they owned (on the basis of the allotment letters Exs. P-7 to P-11), the onus to prove such possession, in a suit for prohibitory injunction, was upon them.

Whether or not they sufficiently proved or did not prove it, would be seen further ahead; but as regards the question of proving possession over property in respect of which the defendant is sought to be injuncted from interfering and entering into, that question of law is answeredto the effect that, to prove possession over the suit property at the time of filing of the suit, the onus lies upon the plaintiff, in a suit seeking permanent/prohibitory injunction against the defendant.

(27) Coming to the second part of that question of law, i.e. as to whether the onus of proving that possession of the suit property was takenby the defendant during the pendency of the suit, that too, even on first principles alone, has to lie upon the person who claims such dispossession by the opposite party, especially in a suit by which mandatory injunction is subsequently sought by amendment of the suit, claiming therein that such possession has been taken by the other party after the suit was filed.

Undoubtedly, this would be so only in a suit seeking injunction simplicitor and not when the suit itself is filed seeking declaration and possession of title, because in that situation, if the defendant is taking a plea of having perfected his title by way of adverse possession, then it is upon him (the defendant) to prove that he was in possession of the suit property for a period of 12 years or more, with such possession being open and hostile to the knowledge of the plaintiff-land owner.

The situation would again be different in a case where the plaintiff-landowner seeks a declaration of title and his possession of the suit property, claiming to have been originally in possession of the suit property at the time of institution of the suit, but claims to have

been dispossessed by the defendant during the pendency of proceedings. In such a situation, though the onus of proving that he/she has been in continuous possession of a suit property owned by the plaintiff, for more than 12 years, would lie upon the defendant, however, the onus to prove that the plaintiff was dispossessed thereof during the pendency of the suit would essentially lie upon the plaintiff, though of course if the defendant is unable to prove his possession for 12 years and during the course of leading such evidence, he can prove his possession only from a date after the suit was instituted, naturally the burden upon the plaintiff would, by that fact itself, stand discharged in the given circumstances of any case. (That in any case not being the fact situation at all in the present case as it not one seeking a declaration).

However, to repeat, where the suit filed by the plaintiff is only one seeking prohibitory/permanent injunction against the defendant from interference in the plaintiffs' possession of the suit property (as claimed by the plaintiff), then the onus to prove that he was dispossessed by the defendant during the pendency of the suit, would lie upon the plaintiff andnot the defendant.

Thus, in that situation, again the burden of proving such dispossession lies upon the person claiming such dispossession at the hands of the other party.

Hence, question no. (vi) is answered to the aforesaid effect.

(28) Having held as above, coming to the main question (question no. ii), of whether the injunction granted in the impugned decree, was correctly granted by the lower appellate Court, reversing the decision of the trial Court, obviously, the essential ingredient to be proved in any suit of prohibitory injunction qua possession of the plaintiffs, is proving such possession by them.

(29) On that aspect also, I agree with the eventual finding of the trial Court, as regards the claim for injunction not being sustainable by the plaintiffs, at least qua the constructed part of the suit property.

(30) It was found by the trial Court that, firstly, after an interim order had been passed on an application moved under Order XXXIX Rules 1 and 2 of the CPC, in favour of the plaintiffs, about 10 to 11 months thereafter they filed an application seeking police help for implementation of that order, alleging that the defendant was still trying to dispossess them from the suit property. An order in their favour having been passed about 08 months thereafter on 31.03.2011, a

similar application was filed by them about 06 months later on 02.09.2011, with that application also allowed and the SHO of the Police Station directed to register a case of trespass if anyone tried to interfere with the possession of the plaintiffs.

That order having been challenged by the present appellant-defendant by way of CR No. 6348 of 2011, this Court directed that since the plaintiffs in their plaint claimed the suit land to be vacant, (in the unamended plaint), the interim injunction in their favour would only be treated to be one in respect of such vacant land as described in the first paragraph of the plaint. This Court having also granted liberty to the present appellant at that stage to file an appropriate application before the trial Court for appointment of a Local Commissioner to demarcate the suit property and to "locate the house", no such application was filed by the plaintiffs, with instead them having filed an application on 02.11.2012 (about four months after the order was passed by this Court in the civil revision), seeking to amend the plaint, alleging that on 07.07.2012 (03 days prior to the order passed by this Court on 10.07.2012), the present appellant-defendant had trespassed into the suit property and had raised construction thereupon and consequently, a decree of mandatory injunction be issued directing him to restore/hand-over the peaceful vacant possession of the property to the plaintiffs, and to also permanently injunct him from interfering in the peaceful possession of the plaintiffs.

(31) What is to be noticed here is that (as already noticed by a co-ordinate Bench in Civil Revision No. 1503 of 2010), that the original plaint never contained any reference to any construction on the suit property (with the construction admitted only in replication by the respondents-plaintiffs). In fact at that stage, the plaintiffs' contention was that the appellant (defendant) wished to enter upon the suit land and to raise construction thereupon.

However, thereafter, in the replication dated 17.07.2009, they admitted that the two rooms referred to in the written statement of the present appellant, stood constructed on the property, but that they (plaintiffs) had constructed them when they visited village Matore occasionally.

Thereafter, in the application seeking amendment of the plaint, the plaintiffs stated in paragraph 7 thereof that the appellant herein entered the suit property on 07.07.2012, when the plaintiffs were out of station, and had unlawfully raised construction thereon without the consent of the plaintiffs. It is to be noticed that nothing has been

pointed out from the plaint by counsel for the respondents-plaintiffs that even in the amended plaint it was stated anywhere that the plaintiffs had raised the construction earlier, though that had been the stand taken by them in the replication filed to the written statement filed in response to the original plaint.

(32) That being so, it having already held hereinabove that the onus to prove that possession was taken over by the defendant during the pendency of the suit, was actually upon the plaintiffs and not on the defendant, with even the onus to prove their possession at the time of filing of the suit being naturally upon them (plaintiffs), that onus was never fully discharged by them, other than by relying upon entries in the revenue record as regards their possession in the year 2001-05.

Undoubtedly, nothing has been pointed out to this Court by learned counsel for the appellant, that the finding of the learned lower appellate Court to the effect that the '*Jamabandies'* Exs. P-1 to P-4 showed the plaintiffs to be owners in possession of the suit property in the year 2004-05 (the '*Jamabandi'* of that date), is a perverse finding; however, in fact, as regards ownership, even the appellant-defendant did not deny that the suit property had been allotted to the plaintiffs vide the documents(allotment letters) Exs. P-7 to P-10, his stand being that they had actually abandoned the suit land and had left the village and that he had constructed the two rooms upon a part of the suit land, with the allotment actually deemed to have been cancelled as the plaintiffs had not constructed their houses thereupon within the stipulated period of 12 months of the allotment. It is to be noticed at this stage that as regards the deemed cancellation, even the trial Court had not held in favour of the appellant- defendant, on the ground that nothing had been shown that the allotment stood cancelled or that the Gram Panchayat had resumed possession of the plots.

The discussion of the learned first appellate Court, on a letter, Mark DA, by which the appellant-defendant had contended that the Panchayat had allowed him to construct his house on the plots, was rightly held by that Court to be not admissible in evidence, the document never having been exhibited as such, and in any case, even before this Court, it has not been pointed out by learned counsel for the appellant that any member of the Panchayat had stood to testify in favour of that letter.

Even so, that letter apart, the question in this *lis* is not with regard to the ownership of the suit property, which in any case on the basis

of the allotment is not disputed even by the appellant (as regards the allotment originally made), the question therefore is only with regard to whether, firstly, the respondents-plaintiffs were actually in possession thereof at the time when the suit was filed and if so, whether the appellant- defendant took forcible possession thereof during the pendency of the suit.

(33) Though, again undoubtedly, a 'statutory presumption' under Section 44 of the Punjab Land Revenue Act, 1887, is raised in favour of the entries in the revenue record and therefore, the '*Jamabandi*es' for the year 2004-05 would carry weight, wherein the respondents-plaintiffs are shownto be owners in possession of the property, yet, in the opinion of this Court, the presumption stood successfully rebutted even by the pleadings of the plaintiffs themselves, when they did not mention any construction on the suit property in the original plaint and only took a stand in the replicationthat the construction contended to have been made by the appellant- defendant as described by him in his written statement, was actually madeby them, i.e. plaintiffs.

However, taking a complete *volte face*, in the amended plaint they took a stand that the appellant-defendant forcibly entered into the suit property during the pendency of the suit on 07.07.2012 and then made the construction on the property.

As already noticed earlier, the suit was instituted on 25.04.2009, i.e. about 04 years after the period 2004-05, which is the period depicted in the '*Jamabandies*' Exs. P-1 to P-4.

Though, with no subsequent mutation entered in favour of the defendant as regards possession of the suit property, the revenue record would be presumed to be continuing to show such possession in favour of the plaintiffs; however, in view of what has been noticed twice hereinabove by this Court, as also dealt with in detail by the trial Court, to the effect that construction of the two rooms was never ever referred to in the original plaint, with the replication stating that the plaintiffs had made the construction referred to in the written statement (and not the defendant), but with that stand also abandoned in the amended plaint and a wholly new story made out, that possession had been entered into by the defendant on 07.07.2012 and the construction raised by him thereafter, the presumption in favour of the entries in the revenue record would stand rebutted; further seen with the oral evidence led by the appellant-defendant, in the form of three witnesses (including himself), to the effect that he had constructed the roomson it and was living in them since long.

(34) Whether the period of 40 years of such residence claimed by theappellant is accurate or not is not being commented upon by this Court, because what was to be proved was not the period of possession on the date of filing of the suit, but the actual possession of either party on that date.

Of course, had the suit been one filed by the plaintiffs seeking possession of the suit property on the basis of their title to it, the findings on their rights to do so may have been completely different; but the suit being only one seeking permanent injunction (in its original form), and thereafter seeking mandatory and consequent permanent injunction in its amended form, possession by them on the date of the institution of the suit had to be proved by the plaintiffs, which in my opinion they actually disproved by their own pleadings.

Actually, instead of trying to prove possession which the plaintiffs actually disproved by their own pleadings, the right remedy for them would have been to seek a suit for possession and subsequent permanent injunction.

(Possibly they did not do so fearing a plea of adverse possession being taken by the defendant; but be that as it may, without commenting on any such possibility (or any merits of any such plea), what cannot be ignored is that the plaintiffs have, other than referring to revenue record, failed to prove their possession, (in fact disproved such possession) of the suit property, by taking contradictory stands in their pleadings, with the appellant defendant having proved his possession over it at the time of filing of the suit).

(35) Having held as aforesaid, it needs to be said, however, that as regards the finding of the learned trial Court that with only one plaintiff having stepped into the witness box and not the others, with the said plaintiff not being a joint owner of the entire suit property and therefore his testimony not being acceptable with regard to possession of the other plots as were not in his ownership (*'Khasra'* nos. 40 and 42), that finding in my opinion is erroneous, as correctly held by the learned lower appellate Court, because once it was admitted that the plaintiffs were immediate family to each other, i.e. father, sons and grand-son, with the plots all being contiguous to each other, even plaintiff no. 2, appearing as a witness for all the plaintiffs, would be deemed to be testifying in terms of his knowledge of the case, though that testimony may otherwise be rejected for the reason given hereinafore, i.e. possession of the plaintiffs over the suit property actually stood disproved by the contradictory stands they took in their

pleadings at different times, with the evidence of the defendant on his possession of the suit property therefore becoming wholly believable.

(36) Coming then to the question of whether on the basis of the document, Ex. P-13, showing that bricks and soil were delivered by one Suresh, with respondent-plaintiff no.1 (Laxmi Dutt), having paid Rs.5,000/- to Suresh for delivery thereof, thereby it being proved that the construction was made by Laxmi Dutt and not by the appellant, I again agreewith the findings of the learned trial Court and not the first appellate Court, inasmuch as it is nowhere shown to be proved as to the date on which thesaid document was executed (it being undated), nor in respect of which land any such material for construction was delivered.

Even presuming for a minute that payment for construction material delivered upon the suit land itself was made by respondent-plaintiff no. 1, that still does not prove that the construction itself was eventually raised by him and that it was he and not the appellant who occupied it at the time when the suit was filed.

Even though the following observation would be delving into the realm of conjecture, it would seem to be the case that the construction may have been raised at the instance of respondent no. 1 but with the appellant (seemingly) having raised it and thereafter it having been occupied by him.

However, naturally without relying on that conjecture, as already seen, the plaintiffs having themselves disproved their actual possession over the constructed portion of the suit property at the time of filing of the suit, the question of the subsequent entry upon it of the appellant would not arise, which in any case was not proved by the respondents-plaintiffs as they were bound to do.

(37) In view of the above, the main question of law that arises in this second appeal, i.e. as to whether the decree of mandatory and consequent prohibitory injunction passed by the learned first appellate Court, should have been so issued, that is answered to the effect that such decree could not have been issued, the respondents-plaintiffs having actually disproved their possession over at least the constructed part of the suit property, on the date when the suit was filed and consequently, obviously their contention that possession was taken over by the appellant-defendant during the pendencyof the suit, also "falls flat" and is not found to be proved. Thus the finding of the trial Court to that effect is upheld.

(38) The 3rd question of law framed by learned counsel for the appellant is also consequently answered to the effect that the first appellate Court wholly misread the evidence, which was correctly construed by thetrial Court.

Question no. (iv) is actually not a question of law but is still answered to the effect that in the light of what has been held by this Court, the appellant has been prejudiced by the findings of the first appellate Court.

(39) As regards question no. (v), on whether the impugned judgment of the learned first appellate Court has been passed "without compliance of the provision of the Order XLI Rule 31 CPC", that question is answered to the effect that the said rule lays down that the appellate Court shall state the points for determination, its decision thereon and the reasons for such decision, as also the relief that the appellant is entitled to, with the judgment to be pronounced, signed and dated by the Judge/Judges passing the judgment. The lower appellate Court has given due reasoning for its decision, though that reasoning has been found to be wholly erroneous by this Court and has been reversed; however, the provisions of the aforesaid Rule are found to be duly complied with.

(40) Having held as above, it is however to be specifically noticed that the learned trial Court even while having found that the dispute actually was not qua the entire land referred to in sub-paragraphs (A) to (D) of paragraph no.1 of the plaint, but only with regard to the constructed portion thereupon (reference paragraph 17 of that Courts' judgment); however that Court erred in eventually dismissing the suit of the plaintiffs in its entirety, qua the entire suit land, whereas nothing has been pointed out to this Court in this 2nd appeal with regard to evidence led on possession of the appellant-defendant over the remaining part of the suit land, or that the plaintiffs were not able to prove their possession over the vacant part of the suit land, the entire evidence very obviously having been concentrated and led only qua who was in possession of the constructed portion.

That being so, the suit should have been only partly allowed by issuing a decree to the effect that the appellant be restrained from interfering in the vacant part of the suit land, with the suit dismissed qua the constructed portion found to be actually in possession of the appellant-defendant. Accordingly, a decree to that effect should also have been issued.

The first appellate Court, of course, having allowed the suit of the plaintiffs in toto, which has been found to be wholly erroneous by this Court, that decree is to be set aside; but with the decree of the trial Court restored only partly, i.e. in respect of the constructed portion on the suitland, which as per the trial Court was found to be on *khasra* nos.40 and 41, even as per the evidence of the plaintiffs themselves (plaintiff no. 4 Jai Dev- PW1).

(41) In the light of the aforesaid discussion, this appeal is partly allowed, with the judgment and decree of the learned lower appellate Court partly set aside and that of the Additional Civil Judge (Senior Division), Kaithal, dated 31.10.2013, partly restored. The suit of the plaintiffs qua *khasra* nos.40 and 41, upon which the construction of two rooms was found to be existing, is dismissed; but decreed to the extent that the appellant- defendant is restrained from interfering in their possession over *khasra* nos.42 and 43. The judgment of the first appellate Court is also modified to the aforesaid effect.

In the circumstances of the case, the parties are left to bear their own costs through out.

A decree-sheet be issued accordingly.

Dr. Payel Mehta