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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH****RSA-5151-2003 (O&M)****Reserved on : 13.03.2023****Date of decision : 28.03.2023**

Gian Singh

....Appellant

Versus

Bachan Kaur and Ors.

....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Sushil Sharma, Advocate for the appellant.

Mr. Inderjit Sharma, Advocate for respondent No.1.

ALKA SARIN, J.

The appeal has been preferred by the defendant-appellant against the judgment and decree passed by the First Appellate Court dated 11.11.2002 whereby the suit of the plaintiff-respondents has been decreed.

The brief facts relevant to the present *lis* are that the plaintiff-respondents initially filed a suit for separate possession by way of partition of plot and house/haveli situated within the *abadi* of village Mustafabad Saidan, Tehsil and District Gurdaspur in an area measuring 10 marlas as described in the plaint. An objection was taken by the defendant-appellant in his written statement that the suit was bad for partial partition. Subsequently, an application for amendment of the plaint was filed which was allowed on 19.01.2001 and an amended plaint was filed on 22.01.2001 claiming

separate possession by way of partition of plot and house/haveli situated in an area measuring 32 marlas as described in the plaint. The said amendment was not challenged by the defendant-appellant at any point of time. The Trial Court vide judgment and decree dated 02.08.2001 dismissed the suit holding therein that the pleadings and the statements of the plaintiff-respondents were at variance. Aggrieved by the said judgment and decree, an appeal was preferred by the plaintiff-respondents which was allowed vide judgment and decree dated 11.11.2002 holding that there was no variance in the statements and the pleadings. The suit of the plaintiff-respondents was decreed. Hence, the present regular second appeal by the defendant-appellant.

Learned counsel for the defendant-appellant would contend that the suit is bad for partial partition and that the property already stood partitioned before the land was purchased by the defendant-appellant from Ajit Singh vide sale deed dated 05.06.1996. It is further submitted that while the amended plaint sought partition of plot and house/haveli situated in an area measuring 32 marlas, the deposition of the plaintiff-respondents was only for an area measuring 10 marlas and there being a mis-match the suit could not have been decreed.

Per contra, learned counsel for the plaintiff-respondent No.1 has contended that the suit was initially filed for partition of plot and house/haveli situated in an area measuring 10 marlas which was subsequently amended and the amended plaint was filed on 22.01.2001. The order dated 19.01.2001 allowing the amendment of the plaint was never challenged by the defendant-appellant at any stage and the amendment was sought only after an objection had been raised by the defendant-appellant.

According to counsel the parties have gone to trial and litigated regarding an area measuring 32 marlas. It is submitted that even the Trial Court accepted that the suit land was 32 marlas and that the plaintiff-respondents were not in possession of their 16 marlas but the Trial Court illegally non-suited the plaintiff-respondents.

Heard.

In the present case, the initial suit was for separate possession by way of partition of plot and house/haveli situated in an area measuring 10 marlas. The evidence of the plaintiff-respondents was closed on 06.09.1999. On 13.11.2000 the evidence of the defendant-appellant was closed. Vide order dated 19.01.2001 the Trial Court permitted amendment of the plaint so as to include a certain left out khasra number. Upon amendment of the plaint the suit became a suit for separate possession by way of partition of plot and house/haveli situated in an area measuring 32 marlas. The statement of the plaintiff-respondent was recorded prior to the amendment, wherein she had stated that the suit was qua 10 marlas. However, it has never been in dispute that the suit property was jointly owned by Dalip Singh (predecessor-in-interest of the plaintiff-respondents) and one Ajit Singh and that Ajit Singh had executed sale deed dated 05.06.1996 in favour of the defendant-appellant. Though the defendant-appellant took the plea that the suit land already stood partitioned between Dalip Singh (predecessor-in-interest of the plaintiff-respondents) and Ajit Singh, he could not prove the same. Rather, the Trial Court while deciding Issue No.1 held *“But I am of the considered view that even if the demarcation report is not taken into consideration, as per the site plan submitted by the defendants themselves. It is clear that the plaintiffs are not in possession of their total land measuring 16 Mls out of*

the suit land. As per the site plan submitted by the defendant Ex.D-2, the plaintiffs have constructed their house only in about 12 Mls of the suit land. Therefore, it is clear that the plaintiffs are entitled to possess the remaining land of about 4 Mls by way of partition by metes and bounds”. It was while deciding Issue No.3 that the Trial Court non-suited the plaintiff-respondents on account of the fact that their deposition was qua land measuring 10 marlas and not 32 marlas. There was clearly a dichotomy in the reasoning given by the Trial Court which warranted interference by the First Appellate Court.

The Trial Court also did not consider that it was on the objection taken by the defendant-appellant that the plaint was amended to claim partition of the joint property measuring 32 marlas. The only dispute which was to be adjudicated upon by the Courts was whether the suit land had already been partitioned between the parties. The onus to prove that the suit land had already been partitioned lay on the defendant-appellant. Though the defendant-appellant led evidence to try and prove that the suit land was jointly owned by Dalip Singh (predecessor-in-interest of the plaintiff-respondents) and his brother - Ghanaya Singh - and that partition took place between Dalip Singh and Ghanaya Singh and thereafter Ghanaya Singh sold his share to Ajit Singh who in turn sold it to the defendant-appellant, there are no pleadings to this effect in the written statement. Infact, Ghanaya Singh is not even named in the written statement. Further, no details about the alleged partition are available in the written statement nor any averment as to whether the same was incorporated in the revenue record. There is no concrete evidence whatsoever on the record to show that any partition had ever taken place.

In view of the above, I do not find any illegality and infirmity in the judgment and decree passed by the First Appellate Court. No question of law, much less substantial question of law, arises in the present case. The present regular second appeal, which is wholly devoid of any merit, is dismissed. Pending applications, if any, also stand disposed off.

Dismissed.

(ALKA SARIN)
JUDGE

28.03.2023
Yogesh Sharma

NOTE : Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO