

CR No.4711 of 2011 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CR No.4711 of 2011 (O&M)
Date of decision:10.02.2015**

Suresh Kumar and another

...Petitioners

Versus

Yogesh Kumar and others

...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Rajiv Atma Ram, Senior Advocate, with
Mr. Arjan Partap Atma Ram, Advocate, for the petitioners.

Mr. M.S.Sachdev, Advocate,
for respondent no.1.

Rakesh Kumar Jain, J.

The petitioners are aggrieved against the order dated 15.06.2011 by which an application filed by them under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (here-in-after referred to as the “CPC”) for rejection of the plaint on the ground of non-affixation of *ad valorem* court fee has been dismissed.

In brief, one Rajinder Kumar was allegedly the Karta of two HUFs, namely, Amin Chand Bhola Nath and Rajinder Kumar and Sons. He died in the year 1971 leaving behind his widow Parkash Wanti, three sons, namely, Suresh Kumar, Mukesh Kumar, Yogesh Kumar and one daughter

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Smt. Manju. Suresh Kumar is the eldest amongst his siblings who allegedly became Karta of the aforesaid two HUFs.

Shorn of unnecessary details, it is pertinent to mention that respondent no.1 Yogesh Kumar filed a suit for possession by way of partition of 5 properties including the Surya Hotel on 12.01.2011 claiming himself to be the joint owner in possession and, thereafter, filed a suit for declaration to challenge the sale deed dated 03.05.2011, bearing vasika No.1207, executed by Suresh Kumar, Mukesh Kumar, Smt. Parkash Wanti and his sister Manju in favour of defendant no.5 M/s P.V. Trade Link to the extent of 90 marlas in the Joint Hindu Family property known as Surya Palace/Hotel, situated at Green Park, Cool Road, Jalandhar and another sale deed of even date, bearing vasika no.1208, with regard to 40 marlas of land out of the same Surya Palace/Hotel to defendant no.5, without any legal necessity. The value of the suit for the purpose of court fee and jurisdiction for the relief of declaration was fixed at ₹500/- upon which a Court fee of ₹50/- was affixed on the plaint. Respondent no.1 Yogesh Kumar, besides seeking declaration also prayed for consequential relief of permanent injunction restraining the defendants from interfering in his possession of the said property before getting it partitioned in accordance with law and from raising any construction or demolishing any portion of the said property.

In the suit for declaration and permanent injunction filed by respondent no.1, defendant nos.1 to 5 filed the application under Order 7 Rule 11 of the CPC for rejection of the plaint on the ground that respondent

no.1 had not affixed *ad valorem* court fee though he had sought declaration in respect of the validity of the sale deeds.

The said application has been dismissed by the trial Court while relying upon a decision of the Supreme Court in the case of **Suhrid Singh @ Sardool Singh v. Randhir Singh and others**, 2010(2) Civil Court Cases 510 on the ground that if a non-executant want to seek cancellation or annulment of a deed much-less the sale deed without asking for the relief of possession, he is not required to pay *ad valorem* court fee and the suit can be filed by merely affixing a fixed court fee of ₹19.95/- under Article 17(iii) of Second Schedule of the Act.

Learned counsel for the petitioners has argued that respondent no.1 has cleverly filed the present suit in which he is not asking for possession though he is out of possession and a suit for declaration without asking for the relief of possession is not maintainable. In this regard, reliance has been placed upon a decision of the Supreme Court in the case of **Mehar Chand Das v. Lal Babu Siddique and others**, 2007(2) RCR (Civil) 628 and a judgment of this Court in the case of **Kartar Kaur and another v. Chhinder Singh and others**, 2004(2) PLR 630. It is further submitted that respondent no.1 has not come to the Court with clean hands as he did not deliberately ask for possession in the present suit for declaration and has filed a separate suit for possession by way of partition which cannot succeed until and unless the sale deeds in question are held to be invalid in the present suit for declaration.

On the other hand, counsel for respondent no.1 has argued that

in view of the judgment of the Supreme Court in **Suhrid Singh @ Sardool Singh's case (supra)**, respondent no.1, being non-executant of the sale deed and in possession of the suit property, is not required to affix the *ad valorem* court fee. He has also referred to a decision of the Supreme Court in the case of **Gajara Vishnu Gosavi v. Prakash Nanasaheb Kamble and others**, (2009) 10 Supreme Court Cases 654 in which it has been held that in the absence of partition of the property by metes and bounds either by decree of the Court in a partition suit or family settlement, the possession cannot be handed over to the vendee.

I have heard learned counsel for the parties and examined the available record with their able assistance.

It is now settled by the Supreme Court in **Suhrid Singh @ Sardool Singh's case (supra)** that if the plaintiff is the non-executant of the sale deed is also in possession and sues for declaration that the sale deed is null and void and does not bind him or his share, he is only liable to pay the fixed court fee of ₹19.95/- under Article 17(iii) of Second Schedule of the Act.

In the present case, it is an admitted fact that respondent no.1 is a member of the Hindu Undivided Family (HUF) and a co-sharer in the suit property. He filed the suit for separate possession of his share on the basis of partition by metes and bounds on 12.01.2011 and thereafter, when his share was also sold by the Karta of the family without legal necessity on 03.05.2011 to defendant no.5, the suit for declaration was filed to challenge the sale deeds being null and void with a consequential relief that neither

the possession be taken from him without partition nor any portion of the suit property be demolished and re-constructed at the instance of defendant no.5. There is no dispute that being a member of the HUF, respondent no.1 has a right to challenge the sale deeds executed at the instance of the Karta of the family of the HUF property, without legal necessity and since he was already in possession as the property in dispute has not been partitioned by metes and bounds, the vendee/defendant no.5 cannot take possession as no specific area can be sold to defendant no.5 without there being a partition of the joint property.

Thus, the decisions in **Mehar Chand Das's case (supra)** and in **Kartar Kaur and another's case (supra)**, relied upon by counsel for the petitioners, are not applicable to this case rather the decision in **Gajara Vishnu Gosavi's case (supra)**, relied upon by counsel for respondent no.1, is applicable to the facts and circumstances of the present case because as per decision of this Court in the case of **Bhartu v. Ram Sarup**, 1981 PLJ 204, every co-sharer is an owner of every inch of joint land which has further been approved by Five Judges Bench of this Court in the case of **Ram Chander v. Bhim Singh and others**, 2008(4) Civil Court Cases 002 (P&H) (FB). Thus, even if defendant no.5 had purchased the suit property, he would also have to file a suit for partition in order to take possession as in a joint property, specific portion cannot be sold to the detriment of the interest of the other co-sharers, therefore, respondent no.1 has rightly filed the suit for possession on the basis of partition by metes and bounds of the suit property for segregating his share and was not required to ask for

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possession in the later suit filed for declaration to challenge the sale deeds in which he was not associated.

Thus, there is no error in the impugned order passed by the Court below which requires any kind of interference by this Court.

Dismissed.

February 10, 2015
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(**Rakesh Kumar Jain**)
Judge