IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No.617 of 1986.
Decided on:-March 23, 2015.

Hari Singh. .....Appellant.

Versus

Mukhtiar Singh and another .....Respondents.

CORAM: HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON.

*****

Argued by:- Mr. Harparteek Singh Sandhu, Advocate for
Mr. Akshya Bhan, Senior Advocate
for the appellant.

Mr. Anshuman Chopra, Advocate
for respondent No.1.

Dr. Bharat Bhushan Parsoon, J.

This regular second appeal is directed against judgment and decree dated 22.1.1986 of the appellant court below whereby judgment and decree dated 1.8.1983 vide which suit of plaintiff Mukhtiar Singh, respondent herein, for declaration that he is owner in possession of the suit land measuring 44 Bighas 18 Biswas situated in village Fatehgarh Panjghariyan detailed and described in the plaint and of permanent injunction restraining the defendants from taking forcible possession thereof as also against alienation of any portion of the suit land, had been dismissed.

2. The defendants including appellant Hari Singh alongwith one

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Chanan Singh who was brother of appellant Hari Singh uncle of Gurdial Singh, defendant No.1 and respondent No.2 herein were in possession of the suit land. Chanan Singh sold the suit land to the plaintiff for consideration and executed a sale deed in his favour. The vendor, Chanan Singh had claimed the suit land to be of his share devolved on him through a family settlement. The plaintiff was put in possession of the suit land by vendor Chanan Singh on the basis of sale deed dated 24.5.1978 of sum of Rs.49,000/-. When later on, it was discovered that in sale deed, Khasra No.859 had wrongly been mentioned instread of Khasra No.851, correction was made through registered document executed by Chanan Singh in favour of the plaintiff on 6.11.1978. On the basis of sale deed, mutation was sanctioned in his favour.

3. It was further the case of the plaintiff that in the revenue record, the defendants were wrongly mentioned as owners in possession of 2/3rd share therein, whereas the plaintiff had claimed to be sole owner of the land which was subject matter of the sale deed.

4. Defendants had contested the suit disputing execution of the sale deed in favour of the plaintiff as also delivery of possession of the land to him. Asserting validity and legality of the revenue record, it was claimed that the plaintiff was owner only of 1/3rd share in joint land.

5. For adjudication of rival claims of the parties, following issues were framed by the lower court:

1. Whether the plaintiff is owner and in possession of the land in dispute? OPP
2. Whether the plaintiff is entitled to the injunction as prayed for? OPP
3. Relief.

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6. After receiving oral as well as documentary evidence from the parties and providing a hearing to their respective counsel, deciding all the issues in favour of the defendants, suit of the plaintiff was dismissed by the lower court on 1.8.1983.

7. In the first appeal preferred by the plaintiff before the first appellate court assailing the impugned judgment and decree, it was claimed that neither the oral nor the documentary evidence had properly been appreciated by the lower court resulting in miscarriage of justice. It was explained that Chanan Singh had become exclusive owner of the land on the basis of partition among the co-sharers and thus, could transfer his exclusive share which he did vide sale deed dated 24.5.1978. Agreeing with the plea of the appellant-plaintiff, reversing findings of the lower court on all the issues, accepting the appeal, reversing the impugned judgment and decree, suit of the plaintiff was decreed. Judgment and decree of the first appellate court is of 22.1.1986.

8. Defendant Hari Singh challenging the said judgment and decree of the first appellate court has preferred the present regular second appeal. It is claimed that well founded findings of the lower court were overturned on all the issues by the appellate court below without any basis and particularly when there was no acceptable evidence to prove family partition of the land among the co-sharers resulting in exclusive ownership of vendor Chanan Singh. Report No.431 dated 22.5.1978 (Ex.P3) is assailed to be a fake document. Sale deed of 24.5.1978 as also the subsequent document making correction therein of 6.11.1978 are claimed to be sham transactions having been held without any consideration and claiming that vendor Chanan Singh was not even competent to alienate the whole land. Reversal of the impugned judgment and decree is sought.

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9. In terms of provisions of Section 100 CPC, following substantial questions need determination by this Court:

1. Whether in the fact and circumstances of the case, the alleged Roznamcha entry dated 22.5.1978 (Ex.P3) can be held to be valid when none of its executants and marginal witnesses have deposed to the genuineness of the same?
2. Whether in fact and circumstances of the case, the alleged Roznamcha entry dated 22.5.1978, be held legal and valid document as it itself divides the property and is not memorandum of a fact already accomplished?
3. Whether findings returned by lower appellant court are sustainable as ownership of respondent/plaintiff has been held to the proved merely on the basis of unregistered document of partition which is inadmissible in evidence?
4. Whether findings of lower appellate court based upon non-appreciation and misappreciation of evidence are legally sustainable?

10. Contention of learned counsel for the appellant is that when neither vendor Chanan Singh was absolute owner of the land in suit nor was in possession thereof, he could not have sold the entire land vide sale deed dated 24.5.1978 and subsequent document of correction therein of 6.11.1978. It is urged that the appellate court below wrongly overturned the findings of the court of first instance.

11. Counsel for the respondent, repelling pleas of the counsel for the appellant, claims that vendor Chanan Singh had become absolute owner consequent upon a family settlement arrived at among the co-sharers and sequelly, had right to transfer his exclusive ownership vide impugned sale deed dated 24.5.1978 and subsequent correction deed dated 6.11.1978.

12. Concededly, Chanan Singh, Hari Singh and Gurdial Singh are real brothers. They owned joint land. Clear case of respondent-plaintiff Mukhtiar Singh son of Chanan Singh is that the land was partitioned among

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the co-sharers and the land in suit had come to the exclusive share of his father Chanan Singh who sold the same to him for a consideration of Rs.49,000/- vide registered sale deed dated 24.5.1978 and registered correction deed dated 6.11.1978. **Title of his vendor who is his father is in question**.

13. Though the lower court having not been impressed by the stand taken by the plaintiff, respondent herein, and having found factual and legal embellishments in his case had dismissed his suit, the appellate court below finding chinks in appraisal of evidence by the lower court had accepted the appeal and reversed the judgment and decree of the lower court.

14. Originally in total land jointly owned by three brothers everyone had 1/3rd share therein. Consistent stand of the defendants including defendant Hari Singh, appellant herein, is that no partition had ever taken place among them and the land continues to be joint as yet. It was conceded by the respondent-plaintiff that proceedings for partition of the joint land were even pending.

15. Despite tough resistance having been offered by both defendants Hari Singh and Gurdial Singh, the plaintiff had not come with any clear and transparent claim regarding partition of the joint land. Neither date nor month nor year of such partition has been mentioned in the plaint nor the circumstances and the details of such family partition have been elaborated. In fact, if the plaint is taken to be an index, no clue is found with regard to details of mutual partition between the brothers who were co-sharers of the joint land.

16. In absence of details of family arrangement in the plaint, the plaintiff, respondent herein, during his evidence had produced report (Ex.P3) recorded by Patwari Ramji Lal PW7 in his Roznamcha of 22.5.1978 for

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which no foundation has been laid by the plaintiff in his pleadings. Notwithstanding the plea of family arrangement and the land in suit having been settled in favour of Chanan Singh vendor of respondent-plaintiff having been strongly refuted by both the defendants in their separate written statements preferred in the lower court, the plaintiff did not come forward with details and clarification with regard to the alleged family arrangement. Rather, stand taken by the defendants in their pleadings denying the alleged family partition remained uncountered by the plaintiff as no replication was filed by him. Going by strict rules of pleadings and evidence to be brought by the parties in support of their rival claims set up in such pleadings, no evidence beyond the domain and sweep of the pleadings can be received by the court. When there is absolutely no basis laid in the plaint for it, consideration of Roznamcha entry (Ex.P3) is beyond pleadings and thus, could not have been accepted in evidence.

17. Had it been a genuine document existing at that time in the revenue record, there was no reason for its foundation having been laid in his pleadings by the plaintiff.

18. Plea of family partition set up by the respondent-plaintiff is not acceptable for the following reasons:

(i) Neither particulars of the family partition such as date, month and year nor even the circumstances in which it had taken place, form part of the pleadings of the respondent-plaintiff;

(ii) What were terms and conditions of the family arrangement are also missing from the pleadings of the respondent-plaintiff. Out of joint land, what land had come to the exclusive share of each of them finds complete omission in the pleadings of the respondent-plaintiff;

(iii) If we leave the pleadings and go by document Ex.P3

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which to suffer repetition, is inadmissible in evidence being beyond pleadings, the partition took place there and then on 22.5.1978 and was effected by Halqa Patwari Ramji Lal PW7 who appeared in the witness box as PW7. There is a procedure laid down in the Punjab Land Revenue Act, 1887 for partition of joint agricultural land. Clearly enough such procedure was followed more in breach;

(iv) In the scheme of things, Patwari is not competent to effect partition of joint land. In his pointed cross-examination, Patwari Ramji Lal PW7 concedes that during his entire service, report of the kind as is Ex.P3 is the only one which had ever been recorded by him in his Roznamcha;

(v) Report (Ex.P3) is neither authenticated nor approved nor was rather even shown by Patwari Ramji Lal PW7 to any of his senior officers;

(vi) From where Patwari Ramji Lal PW7 had got details of the land has not been disclosed by him. He, rather, states that the parties to the partition were dictating the text of report Ex.P3 and he was recording the same at their instance. When Patwari Ramji Lal PW7 concedes that he was neither shown any document of partition nor was given details thereof and the parties had approached him to record partition, it is highly unbelievable story put forward by the Patwari appearing as PW7.

(vii) Had actual partition been effected mutually among the parties, mutation thereof was immediately to follow and separate possession of each of the co-shares was to be depicted in the revenue record. Nothing such was done. Patwari Ramji Lal PW7 concedes that no mutation to this effect had then been recorded;

(viii) Revenue record rather shows that land continues to be joint of the parties wherein Chanan Singh vendor of the respondent-plaintiff is shown to be owner of 1/3rd share and other two defendants viz. Hari Singh and Gurdial Singh are shown to be owner in possession of 2/3rd share;

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(ix) Partition is never partial. Had partition been effected, share of each co-sharer was to be separated by metes and bounds and separate possession with ownership was to be indicated for each of them in the revenue record;

(x) Hurry shown by vendor Chanan Singh in transferring the land to the respondent-plaintiff, who is none else but his son is worth notice. Entry in Roznamcha is of 22.5.1978 whereas transfer vide sale deed is just two days later i.e. of 24.5.1978;

(xi) If document Ex.P3 is considered on its own worth forgetting the status of its scribe Ramji Lal (PW7) as Patwari and he is taken only as scribe, recitals thereof reveal that the partition was allegedly effected there and then. In short, Ex.P3 is not a memorandum of partition which allegedly was effected in the past. Rather, document Ex.P7 is current and depicts the chain of events in presenti. To carry effect as a document of title, when value of property concededly was more than Rs.100/-, it required compulsory registration in terms of Section 17(2) of the Registration Act, 1908. Without such registration, it is inadmissible in evidence and does not create any right in law in favour of any of the parties. Reference may be made to ***Bhoop Singh v. Ram Singh Major and others AIR 1996 Supreme Court 196*** and ***Hans Raj and others Versus Mukhtiar Singh 1996(3) RCR (Civil) 740***;

(xii) It is a conceded fact that the land in suit claimed by the appellant deriving his title from his father Chanan Singh, his vendor, is prime land whereas the remaining land is not strategically located as is the suit land. Claim of the appellant-defendant is that to deprive him and his other brother, vendor Chanan Singh had falsely set up a case of family partition to provide undue gain to the respondent-plaintiff whereas causing undue and wrongful loss to the appellant-defendant and his other brothers; and,

(xiii) Chanan Singh was the most important witness for the respondent-plaintiff but was not brought in the witness

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> box for the reasons best known to him. It is also a circumstance to raise adverse inference against the respondent-plaintiff qua genuineness of the alleged family partition.

19. Counsel for the respondent-plaintiff has urged that when respondent-defendant Gurdial Singh himself is a witness of sale deed Ex.P1, entire discussion on validity and legality of family partition raised by said Gurdial Singh respondent-defendant and appellant-defendant Hari Singh, is meaningless. But this argument has no merit. Merely because Gurdial Singh respondent-defendant who entered the witness box as DW3 is an attesting witness of sale deed Ex.P1 does not raise any presumption that he had approved the family partition and had accepted his brother Chanan Singh father of respondent-plaintiff to be absolute owner of the land in dispute. Attesting witness ipso facto is not taken to be in the know of contents of the document. Reference may be made to ***Narendra Jayantilal Modi Versus Vadilal Bapalal Modi and others (1989) 2 Supreme Court Cases 630***. It was held in this authority that attesting witness of a document is not presumed to be aware of the contents of the document. Relevant observations of the Hon'ble Apex Court in Para No.15 of the judgment are reproduced as below:

> "*So far the agreement Ex. 167 is concerned, it has not been stated by anybody that Bapalal went through its contents or that somebody read the same to him before he attested it. There is no presumption that an attesting witness of a document must be assumed to be aware of its contents.*"

Similar view has also been taken in ***Haji Shaukat Ali Versus State of Rajasthan and another 2004(4) RCR(Criminal) 283 (Rajasthan)***.

20. By no means, knowledge can be attributed to the attesting witness defendant Gurdial Singh, respondent herein, that vendor Chanan Singh was selling part of joint land as an exclusive owner and not as a co-

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sharer. Contention of the respondent-plaintiff on this count being devoid of any merit is not acceptable.

21. Keeping in view the totality of facts and circumstances detailed above, the plea of family partition set up by respondent-plaintiff Mukhtiar Singh in favour of his father Chanan Singh being devoid of any merit is rejected.

22. Sequelly, registered sale deed of 24.5.1978 (Ex.P1) and registered deed of correction therein of 6.11.1978 (Ex.P2) operate only with respect to 1/3rd undivided share of vendor Chanan Singh.

23. Though validity and legality of these two deeds i.e. the sale deed has also been questioned by the respondents but since the same has been held to be valid only to the extent of 1/3rd share of the vendor in the joint holding, the question of validity and legality is no more open for attack from appellant-defendant Hari Singh and respondent-defendant Gurdial Singh.

24. Sequelly, all the substantial questions of law are decided against the respondent-plaintiff and in favour of the appellant-defendant and proforma respondent-defendant.

25. As such, it is found that the lower court was also wrong in dismissing suit of the plaintiff in toto. Sale deed Ex.P1 corrected vide document Ex.P2 would operate with respect to 1/3rd share of Chanan Singh and sequelly, suit of the plaintiff is decreed to the extent that he is co-owner in joint possession of 1/3rd share of joint land.

26. However, decree of permanent injunction cannot be passed against the defendants including the appellant-defendant as injunction cannot be issued against co-sharers particularly when the respondent-

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plaintiff has not been proved to be in exclusive possession of any particular portion of the joint land.

27. Consequently, the appeal is partly allowed in the above terms. Decree sheet be drawn accordingly.

(Dr. Bharat Bhushan Parsoon)
Judge

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1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. Whether to be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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