

In the High Court of Punjab and Haryana at Chandigarh

R.S.A.No. 2137 of 1992
Date of decision: 11.3.2015

Lekh Ram and others

.....Appellants

Versus

Prabhu Dayal and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Sanjay Mittal, Advocate,
for the appellants.

Mr.Ajay Jain, Advocate
for the respondents.

Raj Mohan Singh, J.

1. Defendants No. 6 to 8 are in appeal against the judgment and decree dated 5.8.1992 passed by Additional District Judge, Narnaul, whereby, judgement and decree dated 4.3.1991 passed by Sub Judge, Ist Class, Narnaul was set aside.

2. Plaintiff Prabhu Dayal and others filed suit for partition in respect of land situated within abadi shown in red colour in the site plan attached with the plaint. Plaintiffs alleged that the property was joint property of the parties and earlier it was owned and possessed by Ram Sukhi, widow of Nar Singh and was comprised in *ahatas and ghar* according to *bandobast* of 1947 B.A. of village Begpur. The suit

land was inherited by the parties, being collaterals of Nar Singh, husband of Ram Sukhi. Ram Sukhi expired in the year 1975 BK and, thereafter, the property was inherited by the plaintiffs to the extent of 1/4th and defendants to the extent of 3/4th share. Since the joint property was not partitioned till date, the plaintiffs ventured to file the suit for partition after having failed to persuade the parties to separate their shares.

3. The suit was contested by defendants No.6 and 7 by way of denying the averments of the plaintiffs. Case of the plaintiffs was denied on all material particulars and it was claimed that the plaintiffs had no concern with the suit land, rather defendants alleged that they were owner in possession of the land in question since the times of their fore-fathers.

4. Trial Court framed the following issues and parties were put to trial:-

“1. Whether the suit property is joint of the parties, so how much share the plaintiffs have there in ? OPP

2. Whether the plaintiffs are stopped from bringing the present suit by their act and conduct ? OPD

3. Whether the suit is bad on account of partial partition ?
OPD

4. Relief.”

5. The following additional issues were framed by the trial Court vide order dated 9.6.1989:-

“3-A: Whether the suit is not maintainable in the present form ? OPD

3-B: Whether the suit is not properly valued for the purposes of court fee and jurisdiction ? OPD”

6. Though in the written statement, defendants denied the total claim of the plaintiffs but ultimately, they had to bow down. The Court under issue No.1 held that the plaintiffs were joint owners to the extent of 1/4th and defendants were joint owners to the extent of 3/4th share and, therefore, issues No.2 and 3 were redundant. Under issue No.3-A, trial Court decided that the plaintiffs could not prove that they are in possession of the suit property and they have not prayed for decree for possession of the suit property, therefore, the suit was not maintainable. The entire possession was held to be in favour of the defendants and suit for possession should have been filed. Issue No.3-B was not pressed and, therefore, the suit was dismissed by the trial Court vide its judgment and decree dated 4.3.1991.

7. Lower Appellate Court allowed the appeal on the basis of concept of co-sharership. Lower Appellate Court discussed the evidence and on the basis of precedent highlighting concept of co-sharership, accepted the appeal.

8. The present regular second appeal was filed under Section 41 of the Punjab Courts Act. Framing of question of law was not necessary in the light of decision rendered by Full Bench of this Court in '**Ganpat versus Smt. Ram Devi and Ors. 1977 PLR Page-1**', wherein it was held that the provisions of Section 41 of the Punjab Courts Act, are in no way effected and curtailed by the amendment made in Section 100 of CPC. Now, since the regular second appeal

is maintainable only with the aid of section 100 CPC, therefore, substantial questions of law is *sine qua non* for maintaining the appeal.

9. Prior to amendment of Section 100 CPC, a second appeal could have been filed before this Court on the grounds set out in clauses (a) to (c) of Section 100 (1) CPC i.e. (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law and (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

10. Now the interference in the second appeal could only be made if substantial question of law arises in the case. Therefore, the interference cannot be only because the order is contrary to law, but when the disputed issues raised a substantial question of law. Limiting such a power in the Appellate Authority is based on public policy having roots in the maxim '*interest reipublicae ut sit finis litium*'. The underlined purpose was to bring finality to the issues/litigation at some point of time.

11. In the present appeal, the substantial question of law has not been framed. This Court formulates the following questions of law in order to test the claim of the appellant:-

“1. Whether a co-sharer not in possession of his share of land would be deemed to be in possession of every inch of land till the land is partitioned by metes and

bounds ?

2. Whether a co-sharer not in possession of his share out of joint property is entitled to file the suit for partition?”

12. This Court has considered the controversy on the basis of evidence on record. Even if the application for amendment of the plaint seeking claim of possession over the suit land was dismissed by the lower Appellate Court, still the controversy can be effectively decided by the Courts on the basis of pleadings and evidence on record. Rather there was no such necessity for claiming amendment of plaint by inserting claim of possession over the suit property. Once the nature of suit was itself a suit for partition that itself has the mechanism of possession inbuilt therein. In **Sant Ram Nagina Ram vs. Daya Ram Nagina Ram AIR 1961 Punjab 528**, the concept of co-sharership, their rights and liabilities were considered and were highlighted. With regard to rights and liabilities of co-sharers in all, nine propositions were formulated, which are highlighted as under:-

“(1) A co-Owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession, of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition Or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9) Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent

user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.”

13. From the aforesaid it is deducible that possession of one of the co-sharers would be deemed to be possession on behalf of all even if all but one were actually out of possession. A mere occupation over larger portion of joint land does not necessarily amount to ouster of that co-sharer who is not in possession of the land. The exception to the above rule is when ouster is claimed by the co-owner in possession and that is always on the basis of such possession being exclusive but hostile to the knowledge of other co-sharers and the co-sharer in possession openly asserts his own title and denies the title of another co-sharer. The remedy to co-sharer not in possession of his share in the joint property is always by way of filing suit for partition or for actual joint possession but not for ejectment in any eventuality.

14. The aforesaid Division Bench judgement in **Sant Ram Nagina Ram’s case (supra)** was further approved by the Full Bench of this Court in **Bhartu vs. Ram Sarup 1981 PLJ 204**. A co-sharer in possession exclusively on some portions of joint land not more than his share is entitled to continue in possession till the joint land is partitioned and can transfer that portion subject to adjustment at the time of partition. The Full Bench also admitted the same rights and liabilities of co-sharers as propounded in the judgment in **Sant Ram**

Nagina Ram's case (supra).

15. In **Kala and others vs. Suraj Bhan and others 1985 (1)**

PLR 219, a Division Bench of this Court highlighted that for a co-sharer, who is not in possession of his share in joint property, remedy is to file suit for partition or for actual joint possession and not a suit for ejectment. The aforesaid propositions of law is squarely based on the nine propositions with regard to rights and liabilities of co-sharers as given in **Sant Ram Nagina Ram's case (supra)**. In view of crystalised legal position on the subject in issue, there is no escape but to hold that a co-sharer not in possession of his share in joint holding is entitled to seek his share by way of suit for partition.

16. Question No.1 in the light of aforesaid legal position is answered in affirmative and it is held that a co-sharer who is not in possession of his share would be deemed to be in possession over every inch of land and this deemed status would be subject to final outcome of the partition. Mere occupation of another co-sharer on larger portion of the land does not necessarily amount to ouster of co-sharer not in possession of the land. No exception is involved in the present case because there is no assertion of hostility by the defendants or ouster of the plaintiffs or denial of title of the plaintiffs based on such hostility claimed by the defendants. The second question is also answered in favour of the plaintiffs. A co-sharer not in possession is entitled to seek his possession by way of filing suit for partition. Suit for partition by its nature has the mechanism of possession. No independent suit for possession is required to be filed because after a decree of partition, the possession is legally

required to be given as per the entitlement of the parties. Therefore, the suit itself is maintainable and this question is also decided in favour of the plaintiffs. The position of law has been settled by series of judgments on this issue as detailed in preceding paras. Therefore, the issue is not res integra any more.

17. In view of this settled position of law, it is found that the lower Appellate Court has based its conclusion on sound principle of interpretation of law and, thus, has not committed any error of law and jurisdiction. Therefore, no interference is called for in the judgment and decree passed by the lower Appellate Court. Hence, the appeal is dismissed.

(RAJ MOHAN SINGH)
JUDGE

March 11, 2015
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