

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

1. **RSA No. 3387 of 2005 (O&M)**
Date of Decision : 09.12.2015

Mohan LalAppellant

Versus

Sandeep KumarRespondent

2. **CR No. 2125 of 2010 (O&M)**

Sandeep KumarPetitioner

Versus

Mohan LalRespondent

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. V.K. Jain, Sr. Advocate with
Mr. J.L. Malhotra, Advocate,
Mr. Ravi Kadian, Advocate and
Mr. C.B. Goel, Advocate
for the appellant (in RSA No. 3387 of 2005).

Mr. Sumeet Mahajan, Sr. Advocate with
Mr. Amit Kohar, Advocate
for the petitioner (in CR No. 2125 of 2010).

Mr. M.L. Sarin, Senior Advocate with
Mr. Sahil Sharma, Advocate
for the respondent (in RSA No. 3387 of 2005).

SURINDER GUPTA, J.

By this common order, the above captioned Regular
Second Appeal and Civil Revision are being disposed of.

RSA No. 3387 of 2005 (O&M)

2. This is Regular Second Appeal against judgment and
decree passed by the Additional Civil Judge (Senior Division),
Samrala whereby suit of the plaintiff-Sandeep Kumar seeking
partition of property bearing Nos. B.XII-3346, B.XII-3347, B.XII-
3348 and B.XII-3348-A was decreed and a preliminary decree was

passed for partition of the aforesaid property and delivery of ½ share therein to the plaintiff.

3. Case of the plaintiff-Sandeep Kumar, in brief, is that the land bearing *khewat* No. 679, *khatoni* no. 833, Rect. no. 105, *kill*a no. 11/1/2 situated in the revenue estate of village Machhiwara, *Tehsil* Samrala, District Ludhiana as per *jamabandi* for the year 1991-92 was owned by Mohan Lal (appellant) and his brother Ram Murti in equal shares. This plot is situated on *Gurudwara Charan Kanwal* Road within the revenue limits of *Nagar Panchayat* of village Machhiwara, *Tehsil* Samrala, District Ludhiana. In the year 1995 under an oral family settlement between Mohan Lal and Ram Murti, suit land was partitioned and Mohan Lal got portion of the plot on eastern side measuring 42' x 88' and Ram Murti got the plot on western side measuring 45.5' x 88'. Both also raised construction over the plots which came to their shares.

4. Plaintiff purchased share of Ram Murti vide sale deed dated 05.08.1997. As there was no entry in the revenue record regarding family settlement, the plot purchased was mentioned as share of Ram Murti and possession of the portion of Ram Murti alongwith structure was delivered to plaintiff. In October, 1997, defendant-Mohan Lal with evil intention wanted to disturb the possession of plaintiff leading to filing of a suit for injunction by plaintiff. In the written statement, Mohan Lal *inter alia* admitted that property stood in the joint name of Ram Murti and Mohan Lal and claimed that share of Ram Murti has fallen to his share. In that case temporary injunction was allowed but in appeal it was held that both the parties are co-sharer, as such, injunction cannot be

allowed and the parties may seek partition. Due to his connection with local police and his aggressive nature, Mohan Lal taking advantage of absence of plaintiff broke open the central wall towards the plot in possession of plaintiff and occupied the room situated on the northern-western side of the plot and also opened a *chimney* outlet for throwing rice husk of his mini rice sheller on that side. This led to filing of the suit by plaintiff seeking partition of his $\frac{1}{2}$ share in the suit property.

5. The defendant contested the claim of plaintiff *inter alia* pleading that the civil court has no jurisdiction to partition the suit property and the suit was barred under Order II Rule 2 of the Code of Civil Procedure (CPC). It was also alleged that suit was not correctly valued for the purpose of court fee and jurisdiction. The defendant is in exclusive possession as owner of the property and has constructed a huge building, house and has also installed a *Atta Chakki, Kohlu* and Saw Mill etc. by spending huge amount and as such plaintiff is estopped by his act and conduct from filing this suit. It was also alleged that Ram Murti was owner of the suit land and entries to this effect in the revenue record were dubbed as wrong and illegal. The plea of plaintiff that there was family partition between Mohan Lal and Ram Murti was also declined and the sale deed in favour of plaintiff was termed as false and forged document. All the other averments in plaint were also contested, controverted and denied.

6. Plaintiff reasserted his case in the replication and pleadings of the parties led to framing of the issues as follows:-

- (i) Whether the plaintiff is entitled for partition of the suit property as prayed for? OPP

- (ii) Whether this Court has no jurisdiction to try and decide this case? OPD
- (iii) Whether the suit of the plaintiff is barred under Order II Rule 2 of CPC? OPD
- (iv) Whether the site plan filed by the plaintiff is not correct? OPD
- (v) Whether the suit of the plaintiff has filed the proper court fee? OPP
- (vi) Whether the property in dispute was partitioned by Mohan Lal and Ram Murti in the year 1985 and Ram Murti got the portion on the northern side measuring 45'-6" on the North and South and 88' on the East and West in the family partition/arrangement? OPP
- (vii) Whether the suit is not maintainable in the present form? OPD
- (viii) Relief.

7. Learned Additional Civil Judge (Senior Division) discarded the plea of plaintiff that suit property was partitioned between Mohan Lal and Ram Murti by way of family settlement and held both as joint owner of the suit land in equal shares. As plaintiff had purchased share of Ram Murti, he was found entitled to claim partition of his $\frac{1}{2}$ share.

8. Learned counsel for the defendant conceded before the learned trial Court that the civil court has jurisdiction in the subject matter of this case as construction has been raised over the suit property.

9. Not satisfied the defendant filed appeal which was dismissed by learned District Judge, Ludhiana.

10. I have heard learned counsel for the parties and perused the lower Court record with their assistance.

11. Learned counsel for the appellant has argued that this fact is not disputed that plaintiff-respondent had earlier filed a suit seeking relief of permanent injunction but had omitted to claim relief of partition of suit property, as such, this suit is barred under Order II Rule 2 CPC. Both the Courts have not taken into account this aspect. It is also admitted fact that the respondent is not in possession of the suit property. To seek the relief of partition and possession he is required to pay *ad valorem* court fee on the value of suit property. Learned trial Court has erroneously decided that being co-sharer the plaintiff is to be considered in possession of the suit property, as such, not required to pay *ad valorem* court fee. The plaintiff-respondent has alleged partition of the suit property between the appellant and his brother Ram Murti and in such eventuality he could not file another suit for partition. At the most he could file suit for possession by paying *ad valorem* court fee. The observations made by the Court while deciding application under Order XXXIX Rules 1 and 2 CPC could not be treated as decision of the case on merits or operate as *res judicata*. That suit was ultimately dismissed. The Courts below have heavily relied upon the entries in *jamabandi* while observing that plaintiff and defendants have equal shares in suit property. Admittedly, the suit property falls within the municipal limits, as such, the entries in *jamabandi* have no relevance. The Courts below, as such, have committed grave error of law and fact while allowing the partition of suit property with the observation that the plaintiff-respondent is having half share in the same.

12. Learned counsel for the plaintiff-respondent has argued

that the plaintiff claimed his half share in the suit property by way of partition. His title over the half share in the suit property is not disputed. The appellant has nowhere come up with the plea that he is owner of the entire suit property. In earlier suit for injunction, the appellant had admitted that title of suit property stands in the name of Ram Murti and appellant, and raised a plea that the same had fallen to his share. No evidence has been produced as to when, how and in what manner the plaintiff became owner of the suit land. In the absence of any evidence to prove his title, the Courts below have rightly relied upon entry in the revenue record and admission of appellant that suit property is jointly owned by plaintiff and defendant. The suit was properly valued for the purpose of court fee and jurisdiction as plaintiff-Sandeep Kumar is still in possession of part of the suit property i.e. a shop which is under the tenancy of Harbans Singh, who while appearing as PW-9, has categorically stated that he was earlier tenant under Ram Murti and now under Sandeep Kumar-plaintiff and paying rent to him. There is no rebuttal to this evidence. The appellant had resisted the plea of plaintiff-respondent in earlier suit about partition of suit land by mutual settlement which compelled the plaintiff to file the instant suit.

13. The plea raised by learned counsel for the appellant while assailing findings of the Courts below can be summarized as follows:-

- (i) that the suit was barred under Order II Rule 2 CPC;
- (ii) that the suit was not properly valued for the purpose of payment of court fee; and
- (iii) that the appellant had become owner of suit

property and the suit seeking partition was not maintainable.

1st PLEA - SUIT WAS BARRED UNDER ORDER II RULE 2 CPC

14. This plea of learned counsel for the appellant that suit is barred under Order II Rule 2 CPC has no basis as earlier suit was filed by the plaintiff seeking relief of permanent injunction to restrain the defendant from interfering in his possession. In that suit plaintiff had taken the plea that suit land was jointly owned by Ram Murti and defendant-appellant and was partitioned. However, the defendant denied the factum of partition and possession of plaintiff over his portion in the suit land. The subject matter in that suit was relief of injunction claimed by the plaintiff. While deciding injunction application a finding was recorded against him by Ist Appellate Court and in revision (CR No. 4150 of 1999) by this Court that the property is still joint and the plea of partition raised by Sandeep Kumar-plaintiff in that suit was not *prima facie* proved. Ist Appellate Court while deciding appeal of appellant-Mohan Lal has observed that a co-owner has right to use the joint property in a husband-wife manner not inconsistent with the similar right of other co-owner. This led plaintiff to file separate suit claiming relief of partition of the suit property and abandoning the earlier suit. While discarding the plea of plaintiff that this suit is hit by provisions of Order II Rule 2 CPC, learned Additional Civil Judge (Senior Division) observed in para 13 of the judgment as follows:-

“13. Admittedly, the civil suit no. 283 of 9.11.97 was a suit for permanent injunction to restrain the defendant from interfering or causing to interfere in the possession of the plaintiff. The present suit is a

suit for partition. The relief which has been claimed in the present suit i.e. the relief for partition has not arisen out of the same cause of action on which the previous suit was instituted. At the time when the plaintiff filed the civil suit no. 283 of 9.11.97, he was legally (sic not) bound to claim partition on the cause of action which lead to the filing of the civil suit no. 283. Resultantly, I am of the view that the provisions of Order II Rule 2 CPC are not applicable to the instant suit as the previous suit No. 283 and the present suit are based on different cause of action. As a result, this issue is decided against the defendant and in favour of the plaintiff.”

15. The above findings of learned trial Court were rightly affirmed by Ist Appellate Court with the observation that suit No. 283 dated 09.11.1997 was filed by plaintiff only to protect his possession, as such, the suit is not hit by provisions of Order II Rule 2 CPC. Above findings of Courts below are based on proper appreciation of facts and evidence on record calling for no interference.

2nd PLEA – VALUATION OF SUIT FOR THE PURPOSE OF COURT FEE AND JURISDICTION:

16. The second plea raised by learned counsel for the appellant that suit is not properly valued for the purpose of court fee and jurisdiction is also without merit. Harbans Singh tenant in a shop over the suit property has appeared as PW-9 and categorically stated that he is tenant under plaintiff-Sandeep Kumar. His statement is un-rebutted and shows that plaintiff is in possession of part of the suit property and as such was not required to pay *ad valorem* court fee for seeking relief of injunction.

17. Learned counsel for the appellant has made reference to

observation in case of **Asa Ram and others vs. Jagan Nath and others, AIR 1955 Lahore 563** wherein it was observed that where plaintiff, seeking relief of partition, is out of possession he must pay *ad valorem* court fee on value of his share in the property. As discussed above, plaintiff is in possession of the part of suit property, as such, is not liable to pay the court fee. In case of **M/s Ram Gopal Dula Singh vs. Sardar Gurbax Singh Jiwan Singh and others, AIR 1955 Punjab 215**, it was observed that where in a suit for partition plaintiff has alleged that he is in joint possession and his plea is found to be false, ordinarily, the suit should be dismissed.

18. The above arguments of learned counsel for the appellant have no merits in view of the fact that plaintiff-respondent is in possession of suit property and where he is found in possession of some portion of suit property he is required to pay a fixed court fee. Reference in this regard can be made to judgment of a coordinate Bench of this Court in **Surjit Kaur and others vs. Smt. Lila Wati and others, 2015 (1) PLR 523** and a judgment of Delhi High Court in case **Rani Devi vs. Ashok Kumar Nagi, 1999 (1) RCR (Civil) 22**. In view of above facts, observations of Courts below on this point are affirmed.

3rd PLEA – TITLE OF SUIT PROPERTY

19. So far as the question of title over the suit property is concerned, the appellant had himself pleaded in the written statement filed in the injunction suit that the property stand in the joint name of appellant and Ram Murti. He has, however, alleged that it has fallen to the share of appellant but failed to produce any

evidence to prove any family settlement or partition vide which he became exclusive owner of suit property. In view of admission of appellant, the entry in *jamabandi* and the assessment registers of Municipal Council get corroboration and have rightly led the Courts below to reach the conclusion that plaintiff and defendant are joint owner of the suit land in equal share.

20. In view of my discussion above, I find no legal or factual infirmity in the judgments of Courts below calling for any interference therein.

21. This appeal has no merits and the same is dismissed.

CR No. 2125 of 2010 (O&M)

22. This is revision petition against order dated 15.01.2010 passed by Additional Civil Judge (Senior Division), Samrala whereby proceedings on the application for passing of final decree as per preliminary decree passed in favour of revision-petitioner in Civil Suit No. 2 dated 07.01.2000, vide judgment dated 26.10.2004, affirmed by Ist Appellate Court were adjourned *sine die* till disposal of RSA No. 3387 of 2005. As the above regular second appeal has been finally decided vide judgment above, this revision petition is accepted. The Executing Court is directed to proceed with the application for passing of final decree. As the case has been considerably delayed, it is directed that application be decided within a period of six months of receipt of copy of this order.

December 09, 2015
jkk

(SURINDER GUPTA)
JUDGE

Whether to be referred to the Reporters? Yes/No