

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

**ESA No.44 of 2014 (O&M)
Date of Decision:01.12.2015**

Pala

.....Appellant

Vs

Manga and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Rakesh Gupta, Advocate
for the appellant.

Mr. Sant Lal Barwala, Advocate
for respondents No.1 to 3.

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

RAJ MOHAN SINGH, J.

[1]. Appellant has filed this Execution Second Appeal against the judgment dated 05.08.2014 passed by Additional District Judge, Fatehabad vide which order dated 10.05.2012 passed by Additional Civil Judge (Senior Division), Tohana has been set aside and the objections filed by respondents No.1 to 3 in execution have been accepted.

[2]. Plaintiff-appellant filed a suit for possession by way of pre-emption of land measuring 20 kanals 3 marlas comprised in Khasra Nos.104//11(8-0), 12(8-0), 112//5/1 (4-3) situated in the

revenue estate of Samain, Tehsil Tohana, District Fatehabad. Suit was decreed by the trial Court vide judgment and decree dated 02.09.1993 and right of possession by way of pre-emption was given to the appellant. The operative part of the decree dated 02.09.1993 is reproduced as under:-

“It is ordered that the suit of the plaintiff is decreed. It is, therefore, directed that on plaintiff depositing the entire amount of the sale price together with the amount needed for stamp duty for execution of the conveyance and the amount of Rs.7500/- spent by defendants for improvement of the suit land within one month from today. The defendants 1 and 2 shall within 15 days of such deposit, execute a conveyance of land i.e. the share derived from his vendors, in favour of plaintiff and shall also deliver possession thereof now. If defendant 1 and 2 failed to do so, the court shall appoint a Commissioner, who shall execute conveyance on behalf of defendant 2 and 3 and the court shall put the plaintiff in possession of the suit land. However there will be no order as to costs. If the plaintiff fails to deposit the said amount his suit stand dismissed.”

[3]. The aforesaid judgment and decree passed by the trial Court was assailed by the judgment debtor in appeal. Appeal was dismissed on 07.04.2006. Operative part of the said

judgment is also reproduced here as under:-

“As such now the only question comes whether the respondent-plaintiff was not having any superior right to pre-empt the sale in question on the ground that the suit land was already partitioned and the same in question was the sale of specific khasra numbers. Accordingly after going through the evidence of both the parties, it comes out that there is no evidence on the file to prove that the suit land was already partitioned by metes and bounds either by mutual and private partition or by any competent court of jurisdiction and all the co-sharers were in possession of the specific khasra numbers. On the contrary entire revenue record shows that at the time of impugned sale the suit land was the part and parcel of unpartitioned land. Even if it is presumed that the sale in question was relating to some specific khasra numbers, it will not be treated as sale of specific khasra number because in case Bharatu Vs. Ram Sarup (Supra) Full Bench of Hon'ble High Court has held that the sale of a specific portion of land described by particular khasra numbers by co-owner out of the joint khewat would be a sale of share out of joint land and right of pre-emption cannot be defeated simply by describing the land purchased with some specific khasra numbers. Thus, there is

nothing on the file to say that the sale in question was after the partition of the joint land. On the contrary, it is proved that it was a sale of share of joint khewat and it is also proved that respondent-plaintiff Pala Ram was a co-sharer in the suit land at the time of this sale as well as at the time of decree of the suit by learned lower court.”

[4]. Still feeling aggrieved judgment debtors namely Dalbir Singh etc. filed RSA No.1545 of 2006 which was also dismissed by this Court on 18.05.2012. In the aforesaid litigation, factum of jointness of land was highlighted with reference to settled principle of law in terms of **Bhartu vs. Ram Sarup, 1981 PLJ 204 (Full Bench)**. Plaintiff/appellant was held to be a co-sharer in the joint land of which suit land is a part. Therefore, right of the plaintiff-appellant was acknowledged by the Court as superior right to pre-empt the impugned sale.

[5]. Thereafter, plaintiff-appellant filed execution petition on 09.02.2011 seeking possession of the land measuring 20 kanals 3 marlas comprised in khasra No.104//(8-0), 12(8-0), 112//5/1 (4-3) as mentioned in the sale deed dated 11.05.1989.

[6]. During pendency of the execution, respondents No.1 to 3/judgment debtors filed objections to the effect that by virtue of Civil Court decree passed in **Civil case No.401 of 22.07.2002** titled **Dalbir Singh vs. Mange Ram etc.** decided on

22.10.2005 by Civil Judge (Junior Division), Tohana, Dalbir Singh etc. i.e. present judgment debtors have been given land bearing Khasra No.103//15(4-0) and the defendants therein i.e. the present objectors have been given land in exchange bearing khasra No.112//5/1 (4-3). The objectors claimed their possession over the land so exchanged since then. Further it has been alleged that thereafter, partition has been effected between the parties and aforesaid Khasra No.112//5/1/2 has been given to the extent of 3 kanal 19 marlas to them.

[7]. Appellant/Plaintiff-decree holder filed reply to the aforesaid objections of respondents No.1 to 3 that the objectors have no subsisting right in the land in question. They can claim their rights qua judgment debtors and they have no right to obstruct the execution petition.

[8]. Additional Civil Judge (Sr. Division), Tohana dismissed the objection petition and ordered delivery of possession of the land in question to the decree holder-plaintiff/appellant vide order dated 10.05.2012. In pursuance to the said order the possession of the suit land was delivered to the decree holder-plaintiff/appellant.

[9]. The order dated 10.05.2012 passed by Additional Civil Judge (Sr. Division), Tohana was assailed by the objectors/respondents No.1 to 3 in appeal before Additional

District Judge, Fatehabad. Vide order dated 05.08.2014, appeal was accepted, thereby accepting the objections of respondents No.1 to 3.

[10]. When the order dated 10.05.2012 was passed, the Executing Court had already issued warrants of possession for execution, the objectors on the one hand filed appeal before the Additional District Judge against the impugned order dated 10.05.2012 and simultaneously filed CR No.3621 of 212 in the High Court by concealing the factum of filing appeal before the Additional District Judge, Fatehabad. This Court took very serious view in the revision petition and dismissed the same by order dated 03.08.2012 by imposing costs of Rs.50,000/-. Concealment was noted to be contemptuous in nature as well as of tarnishing behaviour. For ready reference the order dated 03.08.2012 passed by the this Court is reproduced here as under:-

“This petition assails the order dated 10.05.2012 passed by the Additional Civil Judge (Senior Division), Tohana, dismissing the objections filed by the objectors-petitioners (hereinafter referred as 'the petitioners').

It is startling that the petitioners being aggrieved by the order dated 10.05.2012, filed an appeal before the District Judge, Fatehabad. Copy of the order dated

25.05.2012 passed by the Additional District Judge, Fatehabad, indicates that the said appeal is pending for 08.08.2012. The petitioners while concealing the material facts have filed the present petition against the same order dated 10.05.2012. This is not only contemptuous, but it also tarnishes the image of the counsel and the petitioners. This concealment of fact is deprecated and the petition is bound to be dismissed with heavy costs.

I am also informed that the warrants of possession

had already been executed before filing the present petition, which is apparent from the order dated 31.05.2012 passed by the Executing Court. This fact has also been concealed by the petitioners before pressing for stay.

Dismissed with costs of Rs.50,000/-."

[11]. In execution of warrants of possession, land in question was delivered to the appellant-decree holder.

[12]. The fraud committed by the judgment debtors in creating alleged third party interest during the pendency of litigation by way of exchange of one khasra number with the objectors is writ large on the record. The alleged factum of partition by the objectors has not been given effect in the revenue record. An alleged affidavit has been pressed into

service on the factum of partition allegedly effected between the parties. The affidavit according to the appellant is a fabricated document and no reliance could have been placed by the Court on said affidavit. The affidavit cannot be appreciated in its lawful prospect inasmuch as that at the relevant time the appellant was neither owner, nor in possession of the suit land. Even in case of private partition, compliance of Section 123 of Punjab Land Revenue Act has to be done. Surprisingly, mutation No.4042 of partition has been allegedly sanctioned on the basis of aforesaid affidavit. Factum of oral partition has been entered on the basis of affidavit vide DDR No.99 dated 04.11.2008. The remarks in the aforesaid Mutation No.4042 allegedly sanctioned on 10.12.2008 has the following recital in column No.13:-

*“TAKSHIM KHANGI AMDA PRATHNA PATAR
WA DENE SHAPAT PATAR TASDIKSHUDA
TEHSILDAR TOHANA DINAK RAPAT ROJNAMCHA
VAKYTI NO.99 DATED 04.11.2008.”*

Apparently, mutation of partition has been sanctioned on the basis of oral partition based on undated affidavit, for which aforesaid entry was made in the revenue record.

[13]. The alleged affidavit even if read in its vernacular purports to provide information that at the time of obtaining affidavit of the land, the land was already mutually exchanged by objectors with

judgment debtors. Respondents No.4 and 5 in a collusive suit arising out of suit for permanent injunction, the matter was allegedly compromised before Lok Adalat, wherein judgment debtors respondents No.4 and 5 exchanged land in Khasra No.103//15 (4-3) by giving Khasra No.112//5/1 (4-3) to the objectors. Award was passed by the Lok Adalat on 22.10.2005 on the basis of collusion of objectors and judgment debtors. The aforesaid affidavit was forged and fabricated. A collusive Civil Suit No.401 dated 22.07.2002 was filed by judgment debtors Dalbir, Rajesh and Dhoop Singh against the objectors namely Manga and others. It was decided on the basis of compromise on 22.10.2005 .

[14]. First Appellate Executing Court accepted the objections of respondents No.1 to 3 on the premise that the decree holder is still a co-sharer with the judgment debtors and the decree holder can get the possession of the land measuring 20 kanals 3 marlas from the land taken by the Dalbir Singh etc or their vendees in parties who are still co-sharers in the land measuring 90 kanals 6 marlas after the partition. The First Appellate Executing Court gave right to the objectors to approach the Executing Court for restoration of possession under Section 144 CPC which has been taken in execution from them.

[15]. I have heard learned counsel for both the parties.

[16]. It is necessary to appreciate the recital of sale deed dated 11.05.1989 which has been placed on record by the appellant in CM No.11946-C of 2014. Ram Kumar vendor sold 20 kanals 3 marlas of land which he got by virtue of Civil Court decree on 02.05.1989. He sold this land to Dalbir Singh and Rajesh for a sale consideration of Rs.83738/-. The possession was allegedly given to the vendees.

[17]. Apparently, the judgment debtors have no community of interest in the land of the vendor Ram Kumar except the aforesaid three khasra numbers which were purchased by them vide sale deed dated 11.05.1989 which was successfully pre-empted by the plaintiff-appellant. So far as right of pre-emption is concerned that has been upheld in favour of plaintiff-appellant-decree holder upto High Court.

[18]. Learned First Appellant Executing Court accepted the objections of the objectors in appeal on the premise that the plaintiff can get possession of land measuring 20 kanals 3 marlas from Dalbir Singh etc in partition who were co-sharers in the land measuring 90 kanals 6 marlas. Question arises how the land purchased by Daljit Singh from Ram Kumar to the extent of 20 kanals 3 marlas would be subjected to hotch potch pull of Dalbir Singh etc and thereafter, can be treated to be joint land

with the plaintiff-decree holder who has pre-empted 20 kanals 3 marlas of land which was sold by Ram Kumar to Dalbir Singh etc. There is nothing on record which shows that Dalbir Singh etc were co-sharers with Ram Kumar and aforesaid land forms part of the joint land between Ram Kumar original vendor and Dalbir Singh etc/judgment debtors. The plaintiff-appellant-decree holder is not co-sharer with Dalbir Singh etc and has no community of interest in the alleged joint land of Dalbir Singh etc which has been observed to be 90 kanals 6 marlas by the First Appellate Executing Court.

[19]. The alleged partition between the plaintiff-decree holder, objectors and Dalbir Singh etc in the context of land measuring 20 kanals 3 marlas remains unexplained on record, particularly when the mutation of partition No.4042 has been sanctioned on the basis of affidavit only.

[20]. CM No.13424 of 2014 has been filed by the appellant to place on record Rapat Roznamcha at No.99 to show high handedness of the judgment debtors in collusion with the objectors. On the other hand, I have also considered the contention of the respondents in the context of alleged partition to which stand of the plaintiff is that he was never served or issued notice in any partition proceedings. Partition or Sanad Takshim were never acted upon and the land has not been

partitioned as alleged by the respondents.

[21]. Two things are apparent if there was a valid partition between the parties in which the land in question could have been subjected to the partition, then there was no reason to sanction Mutation No.4042 only on the basis of affidavit. Aforesaid mutation is the mutation of partition and was not based upon the order of partition, same was based on the affidavit allegedly given by the plaintiff-decree holder. Secondly, in the event of specific recital in the sale deed dated 11.05.1989, aforesaid three specific khasra numbers totaling 20 kanals 3 marlas came to vendor Ram Kumar through Civil Court decree passed in Civil Suit No.549 dated 02.05.1989. The aforesaid land was not part of any joint Khata of aforesaid Ram Kumar nor the same was emerged in the joint holding of Dalbir Singh etc vendees of the aforesaid land. Once the plaintiff-appellant pre-empted the aforesaid sale, he cannot be termed to be co-sharer with Dalbir Singh etc. as the land was never capable of merger as joint land in the holding of Dalbir Singh etc.

[22]. In view of aforesaid, observations of the First Appellate Executing Court seem to be beyond the scope of interpretation. However, at this stage, the controversy in the context of alleged partition and alleged interest vis-a-vis the land in question

between the parties cannot be appreciated over and above the scope of execution.

[23]. In view of aforesaid, the objections filed by the respondents No.1 to 3 are totally devoid of merits and cannot be appreciated in the light of facts as mentioned above. However, any right title or interest of any of the party to the lis including Inderjit, the objectors on account of alleged exchange and partition can be appropriately answered in some independent appropriate remedy but certainly such issues cannot be appreciated by the Executing Court over and above the decree for want of incriminating evidence on record.

[24]. In view of above-mentioned observations, this Execution Second Appeal is accepted. The objections filed by respondents No.1 to 3 are dismissed. Leaving the parties to bear their own costs.

December 01, 2015
prince

(RAJ MOHAN SINGH)
JUDGE