

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3360 of 2011 (O&M)
Date of Decision: 23.04.2015

Jagta and another

..... Appellants

Versus

Bhagta @ Bhagat Ram and others

..... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Manpreet Singh, Advocate,
for Mr. P.S. Khurana, Advocate,
for the appellants.

Ms. Jasleen Kaur, Advocate,
for Respondent No 1.

1. To be referred to the Reporters or not? Yes.
2. Whether the judgment should be reported in the Digest? Yes.

RAJIV NARAIN RAINA, J.

Plaintiff Bhagta @ Bhagat Ram instituted a suit for separate possession by way of partition by metes and bounds of the property described in the site plan annexed to the plaint which was two houses built in land comprising 12 Marlas and 9 Marlas respectively within the Lal Lakir of Village Jagpalpur, Tehsil Phagwara, District Kapurthala as bounded by properties described. A restraint order was sought against the defendants and their attorney from raising any sort of construction over the disputed properties or to change the nature of the suit corpus. Admittedly, the

plaintiff and the defendants are joint owners of the said properties and have an equal share therein. Though defendant No.5 had no concern with the property in dispute but he was named as a co-sharer in the land comprised in Khasra No.16 (1-0), and as such, was impleaded as party to the suit.

Indisputably, no partition has taken place between the parties with respect to the properties in dispute by metes and bounds. Thus, the plaintiff is entitled to separate possession as was asserted in the suit. Therefore, it was pleaded that the defendants have no right to raise construction over properties without partition. Since plaintiffs claimed they were under threat of neighbour to raise construction to injure the plaintiff, the suit was brought for permanent injunction for restraints orders.

Defendant Nos.1 and 3 contested the claim of the plaintiff while defendant Nos.2 and 4 were proceeded ex parte on August 01, 2005 vide order passed by the Civil Judge (Junior Division), Phagwara. The defendants pleaded that the properties had been mutually partitioned. The suit was bad for partial partition. Since the parties owned two other houses, the total joint land holding comprising four houses and the defendants are in possession of their respective houses. The defendants pleaded that the house mentioned in para.1 of the plaint is exclusively owned and possessed by Jagta, defendant No.1, who constructed his house about 35 years ago, which is a double storied house. The plaintiff has no right in it. The land on which the house is constructed was purchased by the parties to the suit by sale deed dated January 07, 1962 with half share belonging to Jagta and the other half belonging to Bhagta, Lakha and Jagiri in equal shares i.e. Jagta purchased 6 marlas while the other purchased 2 marlas each. A

memorandum of partition was written on June 06, 1970. It was pleaded that the property mentioned in Khasra No.16 (1-0) is a house owned and possessed by Jagiri and Lakha to the extent of 6 marlas and 3 marlas respectively which is constructed over 30 years ago and by private partition on June 06, 1970, this property fell to the share of Bhagta, Lakha and Jagiri in equal shares. There was a second private partition between two of the brothers, that is, Jagiri and Bhagta whereby the plot fell to the share of Jagiri and Bhagta but Bhagta relinquished his share in favour of Jagiri while Jagiri relinquished his share in the house in favour of Bhagta, plaintiff. The parties are in possession of their respective houses and after partition, had no connection with each other whatsoever. The plaintiff has no share in the suit property after partition was effected mutually.

A replication was filed assailing that the property was joint between the parties and the suit as framed is not bad for partial partition. The other properties are ancestral in nature and rights are joint therein. Six issues were framed by the trial Court, the main of which was whether the plaintiff is entitled for separate possession by way of partition and whether the plaintiff is entitled to permanent injunction as prayed for etc. The parties went to trial and adduced their respective oral and documentary evidences. Issues 1 to 4 were decided jointly by the trial Judge. The trial Judge appreciated the evidence on record and took the view that the plaintiff is entitled to seek separate possession by way of partition and has, therefore, right to seek injunction as prayed for. The suit was held not bad for partial partition. The documents produced on record were vague and did not convey as to which property was partitioned and to whom the share was

given. The suit was decreed on January 16, 2009.

Aggrieved by the decree, Jagta and Jagiri filed Civil Appeal No.14 of 03.03.2009. The question which fell for consideration in appeal was whether a private partition took place on June 06, 1970 according to which the suit property had fallen to the share of Bhagta, Lakha and Jagiri in equal shares and while second partition between two brothers Jagiri and Bhagta with respect the plot mentioned in para.2 of the plaint had fallen to the shae of Jagiri and plaintiff Bhagta had relinquished his share in favour of Jagiri.

The other question which fell for consideration was whether the suit was maintainable on account of partial partition since there were other properties which were not put to partition proceedings which were ancestral in nature. The appellants contended that private partition was reduced in writing by drawing a memorandum of agreement executed and duly signed by the parties, i.e., all the four brothers on June 06, 1970 by which the suit property fell to the share of Jagta. While Bhagta and his brother Jagiri had relinquished their rights in property mentioned in para.1 while property mentioned in para.2 of the head note of the plaint was given to Jagiri. Thus all the four brothers were in possession of their respective houses while the house in possession of respondent No.1 Bhagta was ancestral property that is also the subject matter of present partition but Bhagta has not intentionally included the property in his possession in the present suit.

It was urged that the trial Court fell in error in ignoring the memorandum of partition dated June 06, 1970 and consequently erroneously decreed the suit. The private partition reduced in writing dated

June 06, 1970 has been proved as Exb..D4 which has been ignored by the Lower Courts. The second writing has been proved as Exb..D5 according to which the other house was given to Jagiri. The plaintiff argued that the writing dated June 06, 1970 is neither a memorandum agreed by the parties nor can it be read as a partition deed and it is merely an exchange of properties. It was further argued that new rights were created in Jagta and hence the documents were necessarily registerable but were not. Therefore, it cannot be read as a valid partition.

The Lower Appellate Court examined Exb.D4 and Exb.D5 and found that the suit properties are owned by four brothers only who are parties to the suit. There was failure of the appellant-defendants to produce any document depicting and proving nature of the disputed house as ancestral. The assertion that the property in possession of Bhakta was ancestral in character has not been proved by way of evidence. Before it can be held that the suit is bad for partial partition the other properties alleged to be not subject matter of the present suit was in joint onwership of all the brothers but this has not been proved. The Lower Appellate Court formed an opinion that the suit property belongs to the four brothers and was not inherited from their father Dhanna and, therefore, non-inclusion of the mother or sister of the appellants has party is not vital to the action.

The first appeal court endorsed the view of the trial Judge that writings Exbs.D4 and D5 cannot be read as partition deeds because both these deeds pertain to two houses and on a reading of the recitals and the wording of the documents it is nothing but an exchange deed. Moreover, writing Exb.D5 has not been executed among four brothers and, therefore, it

cannot be read as a partition deed. To make matters worse, both the alleged partition efforts did not depict a clear picture regarding properties owned by the parties and are bad for vagueness. If Exbs.D4 and D5 are partition deeds then the other properties alleged to be ancestral by the appellants should have been included in the partition deeds/memorandum of settlement. Consequently, if the said deed qualifies as partition then it should have been registered, therefore, no reliance can be placed on these documents for being vague. By this reasoning, the opinion of the trial Judge has been affirmed and the appeal has been dismissed by the learned Additional District Judge, Kapurthala on July 28, 2010 against which the present appeal has been preferred.

I have heard the learned counsel for the parties at length and have perused the record do not find any merit in the appeal as the view taken by both the Courts below weighs correctly the probabilities of the case tilting in favour of the plaintiff and of his right to separate possession of the suit property described in para.1 and para.2 of the plaint being thrown in a mixed bag or a hotchpotch. In my view, no interference is called for in the concurrent findings of fact recorded by both the Courts below which do not give rise to a question of law, much less substantial one, warranting interference or any further consideration by this Court in second appeal jurisdiction provided under Section 100 of the Code of Civil Procedure, 1908 which ties the hands of this Court considerably as are in straitjacket as not in first appeal to examine and reappreciate in on facts and law and to traverse the findings recorded afresh.

For the reasons mentioned by both the Courts below, the suit must

succeed and the appeal dismissed. It is ordered accordingly.

(RAJIV NARAIN RAINA)
JUDGE

23.04.2015
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