

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

**RSA No.4939 of 2011 (O&M)
Date of Decision: 20.05.2015**

Smt. Premo & ors.

... Appellants

Versus

Smt. Rajwanti & ors.

... Respondents

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

Present: Mr. Rajbir Sehrawat, Advocate,
for the appellants.

Mr. Dinesh Arora, Advocate,
for respondents No.1 to 3, 8, 10 & 11.

Mr. Kulvir Narwal, Advocate,
for respondents No.12 to 14.

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

RAJIV NARAIN RAINA, J.

The plaintiffs are in second appeal against the judgment and decree of the Court of first appeal dated 10th September, 2011 affirming the findings recorded in the judgment and decree of the learned trial Court dated 24th April, 2010.

A set of plaintiffs are in litigation as against a set of defendants who have locked horns in a suit for division of property measuring 3 kanals 4 marals falling in Khasra No.375 which has by passage of time come within the abadi deh of Rohtak City and now falls in urban area. The property is admittedly ancestral in nature and the parties to the suit are members of the family torn by finding the positions of their feet on one or other of the joint property as happens when families grow in numbers and protect their respective possession.

Briefly put, the plaintiffs filed a suit for partition and separate possession of the land lying close to the vicinity of the Jat College, Rohtak. There has been no division of shares for the last 50 years of the property inherited by them through the progenitor. The plaintiffs claim that the property was never partitioned during the life time of the father of the defendants and each came to take separate possession share-wise, where parties have raised construction of residential houses for the last 40 years and reside in them since. One of the defendants, namely, Dharam Pal D-8(b), in addition to the ancestral property had purchased an independently from his own resources a plot measuring 188 square yards from the Municipal Committee, Rohtak, along side the ancestral property on which land their house has been built. This plot is private property of Dharam Pal and is not to be put in the pool of division of ancestral property. If this plot is put into the pool, it will upset the share ratio but that does not mean Dharam Pal has given up his rights to ancestral property and is entitled to a share, in which plaintiffs assert that they are joint owners and being co-sharers have rights of each inch of the land. To the contrary, the defendants plead that the property is no longer joint as it once was, since during the life time of their father, the property was divided and each of them came to be settled on the property in the respective shares and have built houses thereon. The joint family is split into nuclear families in its branches.

The rule of inheritance runs thus:- Deshu was grandfather of the defendants. He had four sons namely Suraj Mal, Dhup Ram, Chattar Singh and Balbir Singh. Neither of the parties dispute that Dhup Ram became a Sadhu and renounced the world. Before parting, he had given his share to his brothers in equal shares i.e. $1/3^{\text{rd}}$ share each. That is how three

brothers in the life time of their father partitioned the suit land by an oral partition. They constructed their respective houses and have been residing therein with their respective separate families long ago. The defendants allege that their mother and sisters have also transferred their shares in their favour. Since the property has ceased to be joint, the question of partition does not arise. Defendants prayed that the suit be dismissed.

The plaintiffs filed a replication reiterating the averments made in the plaint and denied those of the written statement. The parties went to trial on 7 issues. The principal one of which was the question whether the property mentioned in para. 1 of the plaint is joint between the plaintiffs and defendants up to the share i.e. one half each. If property is joint, then whether the plaintiffs are entitled to a preliminary decree of partition. The remaining issues were, that is, locus standi, limitation, estoppel and misjoinder and non-joinder of necessary parties with the last issue of relief to be granted.

Parties led their respective evidence both oral and documentary and closed it by order. The suit was filed on 20th January, 1998. The cause of friction between the parties is that the plaintiffs think that the defendants assert their rights on the suit property more than their share. All the four brothers had expired before the suit was filed and it is their children, who are the disputing parties. The plaintiffs are the legal heirs and representative of Surajmal. The defendants are legal heirs of Balbir Singh and Chattar Singh. Dhup Ram became a Sadhu and has executed a will in favour of Surajmal, according to which the share of Dhup Ram was also inherited by Surajmal, whose share in the ancestral property

consequently increased to half share.

In the defendants' evidence, five witnesses were produced, being they Upper Division Clerk, UHBVN, Rohtak to prove electricity bills issued in the name of Chattar Singh, which were marked as Ex. D1 to Ex.D4 since the official record was lost; DW-2 was a Building Inspector of Municipal Corporation, Rohtak who produced a copy of the site plan submitted by Dharambir and Mahabir sons of Chattar Singh, which was duly signed by the department. DW-3 Karan Singh was the record keeper of the Deputy Commissioner's office, Rohtak, who produced the certified copy of the sale deed No.2665 dated 1st August, 1985, executed by Balbir Singh, deceased defendant 8 in favour of his son Dharmpal regarding sale of a house (Ex. D-7) standing in the suit property. Defendants' witnesses deposed that their share had come into 1/3rd share with the exit of Dhup Ram leaving behind no legal heirs. Dharampal son of Balbir Singh appearing as DW-5 deposed that suit property had been verbally partitioned 50 years ago. He deposed that plot measuring 188 square yards was his self-acquired property from Municipal Committee Rohtak, on which he has built a house to reside with his family. Dharampal has an electricity meter connection. He deposed that the plaintiffs were the LRs of Surajmal, who have constructed their respective houses on the suit property and that the property has been mutually partitioned and they are in long settled possession.

While the plaintiffs asserted rights suit property was joint, but PW-1 Rajender Singh in his cross-examination admitted that Mahabir and Dharambir, sons of Chattar Singh, opposite party were residing separately in their separate houses on the suit property. He also admitted that both of

them have constructed their separate showrooms in the suit property and they reside with their families on the first floor above the showrooms. He admitted that he had no concern with the houses of the sons of Balbir Singh and Chhattar Singh. He also admitted that his father had constructed the house prior to his birth i.e. about 49 years ago and that Balbir Singh and Chhattar Singh were his uncles, who have also constructed their houses prior to their birth. Besides, Dharampal and Krishan have also constructed their houses in the plot in dispute.

PW-2 admitted that upon death of Chhattar Singh, his sons Mahabir and Dharambir constructed their double storied houses. Two shops were constructed by Balbir Singh and three shops by Surajmal and Dharampal. These witnesses admitted that all the parties have constructed their houses separately.

On calling upon the parties to produce photographs and a Google Earth download to view the aerial view of the property in dispute, the same has been produced and shaded in colour to identify the separate portions parties are in occupation, a copy of which is taken on record as mark 'A'. The red portion is shown in the share of respondents 12 to 14 (LRs of Balbir Singh). The area with crosses is shown as share of respondents 1 to 8 (LRs of Chhattar Singh). The portion shaded with lead pencil is stated to be in the possession of Surajmal/Dhup Ram. In this factual situation existing over 50 years, where the shareholders have come into settled possession and constructed independent properties and are residing there, the trial Court balanced the preponderance of probabilities in favour of a verbal or mutual partition having taken place between the parties. The version of the defendants was believed and not within reason.

The trial Court further noticed from two sale deeds dated 28th June, 2006 and 19th September, 2006, by which some portion of the suit land was sold to third party vendors, through which sale deeds the vendors have delivered possession of a specific portion comprising 7 marlas of land from the suit property. This was the land owned by the share holder vendors including the plaintiffs and the defendants. Since the sale is from the suit property, thus, the learned trial Court thought made the story of the plaintiffs improbable that the holding was still joint in possession. The suit was dismissed.

Having failed in the trial Court, the plaintiffs carried an appeal under Section 96 of the CPC to the Court of learned Additional District Judge, Rohtak, which agreed with findings recorded by the trial Court on all its issues. The learned Court of first appeal noticed precedents of this Court on various issues arising in the case to resolve the lis. The citations are as follows:- **Nathu Ram v. Akhara Panchayat**, 2010(1) LJR 220, **Satish Chander & ors. v. Rattan Chand and ors.**, 2009(3) LJR 373, **Rohtash Singh & anr. v. Ram Niwas and ors.**, 2008(3) LJR 664, **Gulwant Singh (died) through LRs. v. Ailt Sinah(died) through Lrs.**, 2004(4) RCR (Civil) 389, **Giani Ram & ors. v. Ompatl & ors.**, 2008(1)LJR 434, **M. Venkataramana Hebbar (D) by LRs. v. M. Rajagopal Hebbar & ors.**, 2007(2) LJR 44, and **Suman Balkrishna Zodge v. Alaka Suresh Zodge & ors.**, 2009(1) LJR 710.

There is a rule in favour of settled possession among family members where each have established the positions on their respective portions and have respected each others' spaces for sufficiently long time for it not to be disturbed by a decree of partition. The law does not abhor oral or mutual partitions, if they are effected to maintain peace and harmony within

the family members who by passage of time have separated in hearth and home and have continued to enjoy the beneficial use of the common property respecting each others' territories. Here, the technical rules of the law and its procedure ought not to be used to inflict what may appear to disturb the equilibrium maintained for 50 years. The plaintiffs' witnesses supported the existence of separate residences rather frankly and truthfully conceding that Balbir Singh and Chattar Singh had also constructed houses over the land. Verbal partition going back to 50 years was supported by Rajender Singh when he appeared in Court for the plaintiffs and his cross-examination supported the case of defendants. The first appeal Court noticed that when the suit was filed, the house of Surajmal, from where the plaintiffs claimed rights, was already in existence over a portion of the total land comprising 3 kanals 4 marlas. But this fact was not disclosed in the plaint at the time of filing of the suit. This was viewed as a concealment of material fact by the court below.

However, the contentious issue raised by Mr. Sherawat appearing for the appellants is that the learned trial Court in the suit for partition and separate possession did not determine the shares of the plaintiffs which flawed the decree. When shares are not determined and declared, the entire suit stands frustrated and the effort wholly wasted. It is only where parties admit each others claim as co-owners in possession of separate holdings in joint property that shares stand determined by consent, but there is no consent of the plaintiffs. To determine separate shares by partition even than a preliminary decree has to be drawn in a partition suit and in absence of which determination it will by itself give rise to a substantial question of law. There is no doubt that the trial Court did not

determine shares of the respective parties. However, the learned Additional District Judge, Rohtak took cognizance of this position in the trial Court decree but did not attach weight to the omission. I would tend to accept the opinion of the learned Additional District Judge, Rohtak, that when property was not conclusively joint then determination of shares had receded in the background and in the remote past and therefore, in a way, the reasoning of the learned Additional District Judge, Rohtak is not incorrect that the plaintiffs would not be entitled to a decree for partition, having failed to prove of their entitlement. Moreover, the plaintiffs did not disclose in the plaint that they had already made construction in the plot in question for their own use where they resided. It is this fact that predominantly makes the material difference, which keeps me back from interference in the just and fair end of the disputes amongst the grid of constructions in the suit property by overt acts of each of the parties on both the sides in defining their shares which lends credence to a family settlement having taken place during the lifetime of the ancestor. The some amount of flexibility, free play in the joints and a spirit of give and take is not out of order.

It would be only fair for me to record the sentiment of Mr. Sehrawat that his party has been wronged and unlawfully dealt with since the other side has gained over time a 100 ft. frontage which abuts on a city road, with commercial shops and residences already existing over there while the plaintiffs have got much less frontage and this is inequitable. He has shown to the Court photographs of the site, which are taken on record as mark 'A'. Though the argument is attractive but I find this to be not the pleaded case and consequently, it has not been examined by the Courts below from this angle and is impermissible in second appeal. As a result, I

find no ground to interfere on the second appeal side of this Court and would, thus, disallow the appeal, there being no substantial question of law involved.

Appeal dismissed.

20.05.2015
monika

(RAJIV NARAIN RAINA)
JUDGE