

In the High Court of Punjab and Haryana at Chandigarh

R.S.A.No.3369 of 2013 (O&M)
Date of decision: 14.10.2015

Om Parkash

.....Appellant

Versus

Devender and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Shamsher Singh, Advocate for
Mr.Harkesh Manuja, Advocate,
for the appellant.

Mr.Roopak Bansal, Advocate
for the respondents.

- 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. Plaintiff is in second appeal against the concurrent findings of the Courts below.

2. Plaintiff filed a suit for partition by metes and bounds with consequential relief of permanent injunction. Plaintiff claimed that he is owner in possession of a plot *gair mumkin* to the extent of ½ share in khewat No.74 min/ 65, Khatoni No.102 min, measuring 0K-7M, vide plot No.56 situated within the revenue estate of village Safiabab Pana Paposia, Tehsil and

District Sonapat. Plaintiff had purchased $\frac{1}{2}$ share of the plot measuring 0K-7M i.e. 3.5 marlas, measuring about 105 sq. yards vide plot No.56 from one Prem Singh, resident of village Safiabad, Tehsil and District Sonapat through a registered sale deed dated 27.4.2004. Plaintiff claimed that he is in possession of the plot measuring 105 sq.yards marked by letters 'ABCDEF' bounded as East- House of Jaswant, West- Gali Share-aam, North- House of Jaswant and South- Houses of Bani Singh etc. He alleged that defendants, who are strong headed persons, are owners in possession to the extent of remaining $\frac{1}{2}$ share of plot measuring 105 sq. yards. The plot is *gair mumkin* plot situated within the abadi-deh of village Safiabad and there was always a dispute in respect of enjoyment of the property between the plaintiff and the defendants. With this background, suit came to be filed.

3. Defendants contested the suit, denying the ownership of the plaintiff to the extent of $\frac{1}{2}$ share . It was also denied that the plaintiff ever purchased the plot in question from Prem Singh as per sale deed dated 27.4.2004. Sale deed was claimed to be illegal, void *ab initio* and was without consideration. Defendants alleged that Dharam Singh was the common ancestor of Prem Singh from whom plaintiff claimed to have purchased the property. Dharam Singh was owner of the property situated within the *lal dora* of village Safiabad. This

property was partly under residential house and partly it was lying vacant. Consolidation took place in the village in the year 1957-58. During consolidation proceedings, the plot bearing No.56 was allotted to Dharam Singh by the consolidation authorities and this plot was situated in the extension of *abadi deh* adjoining the property owned by him. Dharam Singh immediately after the consolidation proceedings, orally partitioned the house situated in *lal dora* by way of family settlement and the plot bearing No.56 allotted during consolidation which was adjoining the house by metes and bounds. For clarification, site plan of both the properties was got prepared by the authorities. *Lal dora* line was marked by letters 'KLM' and was shown in dotted line and blue colour. On the eastern side the house was situated, which was held by Dharam Singh and was marked by letters 'ABGHMPLK'. Plot No.56 was marked by letters ' KLMJCDEF' in the site plan. Both these properties were treated as one unit by Dharam Singh at the time of effecting oral partition and he distributed these properties to his sons, namely, Behari, Charan Singh and Harphool. The portion marked by letters 'BGHJ' and shown in yellow colour in the site plan came to the share of Harphool. Harphool died issueless and his wife also died after some time. On the death of Harphool in the year 1968, his property was succeeded by Behari and Charan Singh. Property marked by letters 'HICJ' and

shown in red colour in the site plan came to the share of Behari and the portion marked by letters ABCDEF and shown in orange colour came to the share of Charan Singh. All the three sons came into possession of their respective shares in pursuance of oral settlement done by Dharam Singh and immovable properties situated in *lal dora* as well as in the extension of abadi were divided and partitioned by metes and bounds in the manner as shown above.

4. After the death of Behari, he was succeeded by his son Prem Singh and his widow Lachhmi. The portion of the two properties, which fell to the share of Behari came in their possession. The portion marked by letters 'HICJ' shown in red colour was sold to Kalawati, widow of Rattan Singh for a sale consideration of ₹ 3,800/- as per sale deed dated 15.11.1973. The property covered by the aforesaid sale deed is partly from the area of house falling within *lal dora* and from plot No.56. Therefore, persons, namely, Prem Singh and Lachhmi were left with no title or interest in any manner in any portion of the two properties left by Dharam Singh and were given to Behari in oral partition. In this manner, sale of ½ share of plot No.56 by said Prem Singh in favour of the plaintiff is illegal and void *ab initio* and Prem Singh had no right, title or interest in the property i.e. plot No.56 because the area out of this plot was allotted to Behari, predecessor-in-interest of Prem Singh and Lachhmi,

which they had already sold as per above sale deed and presently Kalawati, widow of Rattan Singh and her grand son Narender Singh, son of Baljit are in possession of the property of his part. According to sale deed dated 20.12.1978, share of Harphool, which came to him in oral partition done by Dharam Singh, was sold by Prem and Charan Singh in favour of Suraj Bhan- $\frac{1}{2}$ share and Jai Kishan- $\frac{1}{2}$ share, sons of Jage Ram. The property sold by them was inherited by them from Harphool and the said property is marked by letters 'BGHI' shown in yellow colour in the site plan. Suraj Bhan was in possession of the same being vendee. As per sale deed dated 26.4.2004, $\frac{1}{2}$ share of plot No.56 had been purchased by Pawan and Devender sons of Jaswant, defendants No.1 and 2 for a sale consideration of ₹ 94,500/- from Ram Dei widow of Pritam, Krishna wife of Dalel, Sanjay son of Pritam, resident of village Safiabab. On the same date, Ram Dei, Krishna and Sanjay sold their house property adjoining to the portion of plot No.56 in its western side for a sale consideration of ₹ 34,000/- to Jaswant Singh, father of defendants No.1 and 2. The area covered by these two sale deeds i.e. one in favour of Pawan and Devender, answering defendants and the other in favour of Jaswant Singh, father of defendnants No.1 and 2 is one unit and this property was allotted by Dharam Singh to his son Charan Singh in the manner as aforesaid. In this way, defendants had alleged that

the two properties, which were originally held by Dharam Singh and partitioned amongst his sons are under house properties on the spot. Ram Dei, Krishna and Sanjay are not in possession of any property. The property comprised in plot No.56 and house property are situated in the *lal dora*. Prem Singh son of Behari was left with no right in any portion of the plot No.56. Whatever share he got in plot No.56 as successor of his father Behari was sold by him along with his mother in the manner as stated in preceding para. Defendants alleged that Civil Court has got no jurisdiction to partition the property, which is outside the abadi of the village i.e. *Lal dora*.

5. Plaintiff filed replication and the trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled for permanent injunction, as prayed for ? OPP
2. Whether the plaintiff and defendant are joint owners in possession of the suit land as mentioned in para Nos. 1 and 2 of the plaint ? OPP
3. Whether the suit of the plaintiff is not maintainable in the present form ? OPD
4. Whether the plaintiff has no cause of action to file the present suit ? OPD
5. Whether the plaintiff has no jurisdiction to try and entertain the present suit ? OPD

6. Whether the plaint is not properly valued for the purposes of court fee and jurisdiction ? OPD

7. Relief.”

6. Parties led their respective evidence in support of their case on the aforesaid issues.

7. Trial Court took issues No.1 and 2 jointly and held that the plaintiff was not entitled to relief of possession by way of partition as he was left with no share in the property in plot No.56, therefore, issues No.1 and 2 were decided against the plaintiff. Issues No.3 to 6 were not pressed by the defendants and accordingly, these issues were decided against them. On the basis of findings recorded under issues No.1 and 2, the suit of the plaintiff was dismissed by the trial Court vide judgment and decree dated 27.2.2012.

8. Feeling aggrieved against the aforesaid judgment and decree, plaintiff went in appeal, which was also dismissed by the lower Appellate Court vide judgment and decree dated 7.5.2013. Hence, the present appeal by the plaintiff-appellant.

9. 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.

10. 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.

11. 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.

12. In Regular Second Appeal, learned counsel for the appellant formulated the following substantial questions of law:-

“1. Whether the sale deed dated 15.11.1973 could have been relied upon without the same being proved in accordance with the law of evidence ?

2. Whether the courts below have totally ignored the documentary evidence produced by the appellant in the shape of jamabandis ?

3. Whether the alleged oral partition, unless recorded in the revenue record, could have been relied upon by the courts below ?”

13. I have considered the arguments of both the sides and have also perused the record.

14. The evidence on record shows that the suit land was orally partitioned by common ancestors of the parties, namely, Dharam Singh. After the death of Behari, his son Prem Singh and widow Lachhmi came in possession of the property to the extent of their share and they sold away their share in favour of Kalawati for a sale consideration of 3,800/- as per sale deed dated 15.11.1973. Factum of oral partition of the suit land and site plan filed by the defendants in the present suit is admitted by the plaintiff in his deposition in civil suit titled Om Parkash vs. Ram Dei. Therefore, plaintiff is left with no share in plot No.56. The plaintiff has based his claim on the ground that he had purchased the plot from Prem Singh, which has been proved on record as Ex.PW-3/B and Ex.P-1 to the extent of ½ share i.e.

105 sq.yards and remaining ½ share is owned and possessed by the defendants. The mutation was sanctioned as Ex.P-2. Prem Singh was the owner of the plot to the extent of ½ share since the year 1980 onwards. Plaintiff-appellant claimed that the Courts below have not appreciated the facts of the case in correct manner. In the sale deed dated 15.11.1973, there is no background of any partition in respect of property covered under the house, which is situated in *lal dora*. Plot No.56 is still lying vacant and appellant claimed to be in possession of the same.

15. The appellant, while appearing as PW-1, has expressed ignorance about the site plan Ex. PW-1/ B prepared by whom. He further admitted that the portion shown in red colour in the site plan is in his possession and the same is lying vacant and no construction has been raised thereon. He further admitted that he had earlier filed suit titled Om Parkash. vs. Ram Dei and in his cross-examination he admitted the fact that the site plan filed by the defendants in that civil suit and the present suit are similar in terms of dimensions and boundaries. While appearing as PW-1, during proceedings of that suit, vide his statement as Ex.DW-2, appellant expressed his ignorance as to who was the owner of the plot, which was purchased by him from Prem Singh. He admitted to have not prepared the site plan of the plot. He also admitted that Jaswant Singh and his sons have purchased the land from defendants No.1 to 3 to the

extent of $\frac{1}{2}$ share but denied that after the purchase they had constructed their respective houses. The appellant has admitted the possession of the defendants over the plot in dispute and covered by the house and also admitted that portion of the properties which fell to the share of Behari came in their possession and the portion marked by letters 'HICJ' in the site plan shown in red colour was sold to Kalawati for a sale consideration of ₹ 3,800/- vide sale deed dated 15.11.1973. A perusal of the sale deed shows that Prem Singh and Lachhmi had already sold their shares and sale deed was never assailed by the plaintiff. Since, the appellant had already admitted the possession of the defendants over the suit property, therefore, it can be said that Prem Singh had no share in plot in dispute after execution of sale deed dated 15.11.1973.

16. Question No.1 as formulated has its answer in the aforesaid factual details. Question No.2 does not arise as the findings are based on proper reading and appreciation of evidence. Question No.3 is also answered in negative on the basis of evidence of oral partition effected by Dharam Singh and therefore, the factum of sale deed dated 15.11.1973 executed by Prem Singh and Lachhmi rendered them without any interest in the property, which is being claimed by the plaintiff in the present suit.

17. Section 31 of the Evidence Act estopes the plaintiff to say

that there was no partition. The entries in the mutation are not the documents of title, rather these are the entries capable of being changed with the title of the property in favour of either of the parties. Nothing could be pointed out as to how judgments and decrees passed by the Courts below are the result of misreading of evidence or suffered with patent perversity on record. Consequently, finding no merit in this appeal, the same is dismissed.

(RAJ MOHAN SINGH)
JUDGE

October 14, 2015
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