

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

**RSA No.1737 of 2014 (O&M)
Date of decision : July 16, 2015**

Sumer Singh and others

.....Appellants

Versus

Kuldeep and others

..... Respondents

CORAM : HON'BLE MR.JUSTICE GURMIT RAM

1. To be referred to the Reporters or not? No / Yes
2. Whether the judgment should be reported in the Digest? No / Yes

Present : Mr. Alok Jain, Advocate
for the appellants.

GURMIT RAM, J.

1. This Regular Second Appeal has been preferred by the appellants-herein (plaintiffs) against the judgment and decree dated 16.04.2013 passed by learned Additional Civil Judge (Senior Division) Pataudi, District Gurgaon, vide which the suit for partition filed by the appellants-herein (plaintiffs) was dismissed with costs, and the judgment & decree dated 23.10.2013 passed by learned Additional District Judge, Gurgaon vide which the appeal of appellants-herein (plaintiffs) preferred against the aforesaid judgment and decree of learned trial Court was also dismissed with costs.

2. The case of the appellants-herein (plaintiffs) before the learned trial Court in nut-shell was that the plaintiffs and defendants are joint

owners and in joint possession of plot measuring 3 kanals bearing *Khewat* No.180, *Khata* No.209, Rectangle No.2, *Killa* No.24/1 situated in village Khawaspur, Tehsil Farrukh Nagar, District Gurgaon marked by the letter ABEHGFC (hereinafter to be referred as property in dispute). The plaintiffs are owners to the extent of 2/3rd share in the property in dispute collectively, whereas the defendants are owners of its remaining 1/3rd share collectively. The property in dispute is stated to be still joint of parties and even this fact is also reflected in the revenue record. It was their further plea that for facility of enjoyment, plaintiffs No.1 and 3 have raised some constructions over some portion of the property in dispute marked by letters ABCD in site plan towards western side. Some of the defendants have also raised their constructions over some portion of the property in dispute towards the eastern side. Portion marked by letters EFGH in the site plan is lying vacant. Now there remains a dispute amongst parties to this suit relating to joint enjoyment of the property in dispute. It has become impossible to keep the suit property to be joint any longer, which resulted into filing the instant suit.

3. On notice, defendants No.1 to 3 and 5 (herein as respondents No.1 to 3 and 5) took preliminary objections in their written statement regarding the maintainability of the suit, concealment of material facts and that the plaintiffs have no locus standi as well as cause of action to file the instant suit. It is further plea of the answering defendants that both the parties to litigation had divided their shares in the property in dispute by way of an oral family settlement. Specific share with specific area was allotted to the co-sharers. The share of the plaintiffs is shown in yellow

colour, whereas share of defendants is shown in green colour, marked with the letters ABCD in the site plan (attached) which is part of *Khasra* No.24/1. Since the date of said partition, parties are the exclusive owners in possession of their respective shares and are no longer co-sharer qua the property in dispute. It was further their plea that plaintiffs had lost litigation in favour of Urmila daughter of Lal Singh in Suit No.295 of 1978/80. Even a *pucca* wall of about 8' in height is in existence separating the share of both the parties for the last so many years. Both the parties had raised the construction of their residential houses exclusively as per their share. The answering defendants had incurred huge expenses on this construction which was raised by them in the presence of the plaintiffs. The plaintiffs had no right, title or interest in the share of the answering defendants as they are exclusive owners in possession of their share. Remaining portion separated by red line CD and marked with letters CDEF is part of *Khasra* No.24/3, which is not the part of suit property, was purchased by the defendants separately. It is further their plea that at the time of alleged oral family settlement, another property of Lal Dora was also involved and that the defendants had relinquished their share in the said property in favour of other co-sharer Lal Singh etc. and in lieu of that, a portion was taken by them in the suit property. This settlement/partition could not be reflected in the revenue record since no revenue record of Lal Dora property is maintained. The sale deed dated 17th June, 1977 in favour of plaintiffs qua a portion of suit property was challenged by Urmila in pre-emption suit bearing No.295 of 1978/80, which was decreed in her favour on 28.08.1980 and as such, her share is also with the defendants' share. Rest of the

averments were also denied by the answering defendants.

4. Learned trial Court after hearing learned counsel for both the parties and going through the record as well dismissed the suit of the plaintiffs vide impugned judgment and decree dated 16.04.2013 and the appeal filed against this judgment and decree by the plaintiffs was also dismissed by the Court of learned Additional District Judge, Gurgaon vide impugned judgment and decree dated 23.10.2013.

5. The appellants-herein (plaintiffs) feeling aggrieved from the findings recorded by both the Courts below have approached this Court by way of instant Regular Second Appeal.

6. Learned counsel for the appellants was heard. Record as available on the file was also perused.

7. Learned counsel for the appellants has contended that both the Courts below have failed to appreciate the pleadings as well as the evidence led by both the parties. It is further his contention that it is admitted fact that total suit land is measuring 3 kanals, in which the appellants-herein (plaintiffs) are owners to the extent of 2/3rd share, whereas respondents are owners in this land to the extent of 1/3rd share. The dispute is only with regard to a portion of 24 square feet which is in exclusive possession of the respondents/defendants and the claim of the appellants-herein (plaintiffs) is only that they be given possession of 2/3rd share in the said property. Then it is also his contention that both the Courts below have also committed a grave error in not appreciating the alleged written statement Ex.P5 as a whole, which has caused a serious prejudice to the appellants-herein (plaintiffs). It is his contention that in para No.2 of the written statement

(Ex.P5) it was pleaded by the the answering defendants (now present appellants/plaintiffs) that they are in possession of land less than their share and this fact is also not appreciated by both the Courts below while passing the impugned judgments and decrees and as such, the same are liable to be set aside being not tenable either on facts or under the law.

8. As per the record, written statement (Ex.P5) is held to be a clincher to decide the matter in controversy between the parties. This written statement was filed by the present appellants (plaintiffs) along with others, who were defendants in an earlier suit bearing No.716 of 1981 instituted at the instance of Kumari Urmila (minor daughter of Lal Singh through her mother and natural guardian Smt. Krishna Devi wife of Lal Singh). Para No.5 of the written statement is held to be quite relevant for the purpose aforesaid which is as under:-

“....It is denied that the land is joint of the parties. That the ancestors of the parties had partitioned the land in suit for facility of exclusive use and had been in separate possession. It is denied that the defendants are in possession of property more than their share in it..... ”

9. So in this written statement the present appellants/plaintiffs (who were defendants Nos.1 to 3 in the said earlier suit along with others) had admitted the fact that the ancestors of the parties had partitioned the land in dispute for the facility of exclusive use and had been in separate possession. The factum of the suit property being joint was also denied by them therein. So in this situation they cannot be permitted to back-out from their admission which they had made earlier in their written statement Ex.P5

to say that the suit property is still joint of all the parties. Admission made by any party in any proceedings before Court of law is best piece of evidence and the parties making it cannot be allowed to deny the same unless it is proved on record that the said admission was the result of any fraud, misrepresentation, undue influence etc. etc. In the case in hand, nothing has come on the record to hold that the said admission made by the appellants/plaintiffs in their earlier written statement Ex.P5 was the result of any of the circumstances abovementioned. Section 17 of the Indian Evidence Act, 1872 defines the admission, which reads as under:-

“An admission is a statement, [oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned”.

Section 18 of the abovesaid Act defines the person who can make the admission which is as under:-

“Statement made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

Statements made by parties to suits, suing or sued in a representatives character, are not admissions, unless they were made while the party making them held that character.

*(1) **Statements made by** - persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding,*

and who make the statement in their character of persons so interested, or

*(2) **person from whom interest derived.**-persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements”.*

This Section lays down five classes of person who can make admission as defined below: -

- (i) Party to the proceeding;*
- (ii) Agent authorized by such party;*
- (iii) Party suing or sued in a representative character, making admissions while holding such character;*
- (iv) Person who has any proprietary or pecuniary interest in the subject-matter of the proceeding, during the continuance of such interest;*
- (v) Person from whom the parties to the suit have derived their interest in the subject-matter of the suit, during the continuance of such interest.*

10. In the case in hand as abovesaid, the present appellants/plaintiffs were impleaded as defendants in the earlier civil suit No.716 of 1981 and in the capacity of defendants, they had filed written statement in that suit, copy of which had also been brought on the record of case in hand as Ex.P5 by them themselves. So the admission made by them in Ex.P5 can be used against them without any ambiguity and condition. The oral partition as alleged if proved on the record is valid one and it does not matter if the same is not reduced in writing. So far as the plea of present appellants/plaintiffs in the written statement Ex.P5 filed by them in the

abovesaid earlier suit that they are in possession of less land than their share is concerned, the said matter was to be adjudicated upon in the said earlier suit itself. Then in the case in hand also, there is no specific plea taken on their part that they are in possession of less land than their share in land in dispute. So they cannot be permitted to take this plea in the instant suit for want of any pleading to that effect.

11. Then the record as available on file also shows that local commissioner was appointed in this case by the Court who had submitted her report alongwith rough site plan. Such like report is per se admissible. Her report and site plan as mentioned in the impugned Appellate Court judgment suggests 'that from the side of plaintiffs, Sumer and Jai Lal are having their houses in the width of 43 feet each in the northern side and they are having two separate houses and in the eastern side, an area shown to be in the measurement of 24 feet towards northern and southern side is reported to be in the shape of 3 rooms, verandha and room tin shed. There was a wall intervening both the portions and thereafter the houses of defendants Kuldeep etc. are in existence'. Then it has also come in the statement of PW-1 Chandu Lal that their agricultural land had already been partitioned during consolidation. The construction of disputed houses was raised over the property in dispute more than 20-25 years back. Then it was also case of the respondents/defendants that a pucca wall had already been constructed between the respective properties of both the parties to the litigation and now plaintiffs are residing towards the western side, whereas defendants are residing towards the eastern side of suit property after raising construction of their respective houses. This fact is also fully corroborated

by the report of local commissioner as above discussed.

12. Learned counsel for the appellants has failed to bring on record any worthwhile substantial question of law involved in the instant appeal for its survival. There is nothing on the record to hold that the concurrent findings recorded by both the Courts below are either perverse, illegal or the result of any misinterpretation of any documents, pleadings, evidence etc. of the parties. Consequently, the appeal stands dismissed and disposed of accordingly.

Both the impugned judgments and decrees as such are upheld.

Since the main appeal has been disposed of, the miscellaneous applications, if any, also stands disposed of automatically, having been rendered infructuous.

July 16, 2015
Gaurav Sorot

(GURMIT RAM)
JUDGE