

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

Regular Second Appeal No. 5083 of 2014 (O&M)
Date of Decision: September 23, 2015

JAI GOPAL

..... APPELLANT

VERSUS

GHANSHAM DASS AND OTHERS

..... RESPONDENT

CORAM HON'BLE MR. JUSTICE JASPAL SINGH

PRESENT: Mr. Sanjiv Gupta, Advocate for the appellant.

None for the respondents.

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1. Whether Reports 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?

JASPAL SINGH, J

1. This appeal has been preferred by defendant-Jai Gopal against judgment and decree dated 11.08.2014 passed by lower appellate court whereby judgment and decree dated 4.1.2012 rendered by the trial court has been affirmed and appeal filed by him dismissed.

2. Brief facts of the case are that plaintiffs-Ghansham Dass & others filed the suit for separate possession out of *gair mumkin* plot measuring 1 kanal comprised khasra No. 581, *gair mumkin* manure pit measuring 2 marlas comprised in khasra No. 950 situated in village Bhodia Khera, Tehsil and District Fatehabad and residential house No. 35

situated within the lal lakeer of the village Bhodia Khera by way of partition by metes and bounds and also for permanent injunction restraining the defendants from raising further construction over the property or to cut and take away the trees of kikar and jamun grown thereon.

3. Defendants resisted the suit filed by the plaintiffs-respondents. Defendant No. 1-appellant filed written statement taking preliminary objections regarding maintainability of suit, cause of action, locus standi, estoppel and concealment of true and material facts from the court. On merits all averments have been denied. Defendant No. 2-Hans Raj filed written statement admitting the claim of the plaintiffs but controverting and denying the contents of written statement filed by defendant No. 1. Replication controverting the contents of the written statement of defendant No. 1 and reiterating the stand taken in the plaint was filed by the plaintiffs.

4. From the pleading of the parties, the learned civil court framed the following issues on 15.10.2009:

1. Whether the suit property is still joint between the parties to the suit and has not yet been partitioned by metes and bounds? OPP
2. If issue no. 1 is decided in favour of the plaintiffs, then what are the sharers of the parties? OPP
3. Whether the suit of the plaintiffs is not maintainable in the present form? OPD
4. Whether the plaintiffs have no cause of action as well as locus standi to file the present suit? OPD
5. Whether the plaintiffs has concealed true and material facts from the court? OPD
6. Relief.

5. Both the parties led their oral as well as documentary evidence. After appreciating the evidence led by the parties and hearing

learned counsel, the suit preferred by the plaintiffs was decreed in their favour vide judgment and decree dated 4.1.2012 by the trial court. Aggrieved by the aforesaid judgment and decree defendant No. 1-Jai Gopal Approached lower appellate court by filing Civil Appeal No. 86 of 2012/2014 which has also been dismissed vide judgment and decree dated 11.8.2014.

6. While assailing the impugned judgments and decree as well as findings recorded by both the courts below, it has been ebulliently argued by learned counsel for the appellant-defendant No.1 that misappreciation of evidence brought on record by the appellant-defendant No.1 has resulted into miscarriage of justice. In fact, there is an ample evidence available on record to establish that suit land has already been partitioned amongst the co-sharers about more than 20 years ago and they are in possession of their respective shares. This fact has been ignored/disbelieved by both the courts below. It is an undisputed fact that predecessor-in-interest of the parties were owner in possession of the property in suit alongwith some other property and as per mutual settlement-cum-partition, plots comprised in killa No. 581 situated in village Bhodia Khera fell in his share whereas house No. 35 as well as another house situated within the red line of the village Bhodia Khera fell in the share of Ghanshyam-plaintiff and Hans Raj-defendant. Since, the entire joint property has been partitioned amongst the three brothers, so the suit for partition is not maintainable.

7. It has been next argued by learned counsel for the appellant that lower Court has also failed to cull out the specific issue in respect of

pleadings that the partition amongst the co-sharers has already taken place or not. So, in the absence of a specific issue, appellant could not adduce the evidence in this regard. Rather, he stands condemned unheard. Not only this, even an application for withdrawal of the suit was filed by plaintiff No.3, which has not been dealt with and finally disposed of by both the courts below. Thus the impugned judgments and decrees are not sustainable in the eyes of law and are liable to be set aside by way of acceptance of instant appeal.

8. This Court has given an anxious thought to the submissions made by learned counsel for the appellant but find the same to be devoid of merit, in view of oral and documentary evidence available on file as well legal proposition applicable to the facts and circumstances of the case in hand.

9. By now , it is pretty settled that party who asserts any claim is obliged to prove the same by leading cogent and convincing evidence, as has also been observed by this Court while delivering judgment in the case of **Raja Ram vs. Krishan Lal; 2009 (1) CCC 90.** In the light of afore-said settled proposition, it is to be seen whether appellant-defendant No.1 who has a categoric plea that suit property alongwith some other property stood already partitioned about 20 years ago is establish on record or not and the answer to this question is in negative. There is no document brought on record by appellant-defendant No.1 to prove any some mutual private partition, as has been alleged by him. In the absence of any such document, plea of private partition is otherwise not sustainable. To buttress this observation, we can have the reference of

pronouncements of this Court rendered in the cases of **Ram Rakh v. Kalu Ram; 2010 (CCC) 73 and Gurdev Singh v. Nachhtar Singh; 2002 (2) Civil and Rent Judicial Reports (PHHC) 252.** Except the bald assertion of defendant No.1/appellant with regard to the mutual settlement-cum-partition there is no evidence.

10. Moreover, the factum of alleged private partition was also not got incorporated in the revenue record. The revenue record brought on record by the plaintiff-respondents clearly depicts that khasra No. 581 (1-0), Gair mumkin manure pit comprised in khasra No. 950 (0-2) and gair mumkin house No. 35 situated within the red line of Village Bhodia Khera had been owned and possessed by Kora Ram son of Diwan Chand, predecessor-in-interest of the parties to the instant *lis*. So, it can be said that there is cogent and convincing evidence available on file to establish that the property in suit has been still independent and has not been partitioned so far, amongst the co-sharers.

11. Now coming to the next contention that specific issue has not been framed with regard to the private partition-cum-settlement amongst the co-sharers, the contention in this regard also does not carry any legal weight. Accordingly, non-framing of a particular issue could not be fatal. Moreover the issue whether family partition-cum-settlement was arrived at amongst co-sharers stands fully covered under issue No.1. Even otherwise, it is well settled if the parties are aware that what they have to face in the trial. Accordingly, mere non framing of a particular issue could not be fatal. In this regard we can have the reference of

Madhya Pradesh High Court judgment rendered in the case of **Durg Singh vs Mahesh Singh And Ors.; AIR 2004 MP 146.**

12. As far as the contention of learned counsel for the appellant with regard to non disposal of application for withdrawal of the suit property by plaintiff No.3 is concerned, the same is not fatal to the case of the plaintiff-respondent, it would be appropriate to mention here that prior to the filing of an application for withdrawal of the suit by plaintiff No.3, she had already appeared and made deposition in the Court, that too in favour of her co-plaintiffs. So, if in such situation an application has not been dealt with and disposed of by lower Court it otherwise deems to have been dismissed. As such, taking the case of the appellant from any of the angles, this Court does not find any merit therein. Rather, this Court is of the considered view that there is no infirmity or illegality either in the findings recorded by trial Court on all the issues and upheld by lower Appellate Court. Thus, findings on all the issues are affirmed.

13. In the light of what has been discussed above, this Court does not find any merit in the instant appeal. As such, the same is dismissed with no order as to costs.

**(JASPAL SINGH)
JUDGE**

**September 23, 2015
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