

11.10.2013 vide which appeal of the plaintiffs was accepted and case was remanded back to the trial Court for passing preliminary decree first and then to proceed in accordance with law.

[3]. The second case i.e. RSA No. 4504 of 2014 has been filed against the judgment and decree dated 14.05.2014 passed by Additional District Judge, Fazilka vide which judgment and decree dated 22.10.2013 passed by Civil Judge (Jr. Divn.) Abohar has been upheld.

[4]. Plaintiffs namely Krishan Kumar and Jatinder Kumar filed suit for separate possession and permanent injunction to the effect that plaintiffs and defendant No.1 Mohinder Kumar (deceased husband of appellant No.1. Savitri Devi and father of appellants No.2 to 4) are co-owners in possession of house measuring 128-3 square yards i.e. 1155 square feet (21' x 55') comprised in *Rect.* No.261, *Khewat* No.1261, *Khatauni* No.1921 bearing MC No.1087 situated in street No.3 Mandi Abohar according to *jamabandi* for the year 1997-98.

[5]. It has been further pleaded that the plaintiffs and defendants are co-owners in possession of house measuring 366-6 square yard i.e. 3300 square feet comprised in *Rect.* No.260, *Khewat* No.1086, *Khatauni* No.1648 bearing MC No.1084 to 1086 according to *jamabandi* for the year 1997-98 situated in Street No.3, Mandi Abohar.

[6]. Pleaded case of the plaintiffs is that the plaintiffs and defendant No.1 are co-owners to the extent of 1/3rd share each in

MC No.1087 and they are joint owner in possession of 1/3rd share and defendants No.6 to 9 are also joint owners in possession of 1/3rd share in M.C. No.1084 to 1086.

[7]. Plaintiffs have claimed that the defendant No.1 threatened to close the passage marked AB as shown in the site plan in order to deny the use of the passage by the plaintiffs and to raise illegal construction and to demolish a part of the suit property which is in joint possession of the plaintiffs with defendant No.1, illegally and forcibly without getting the same partitioned. The alleged attempt by defendant No.1, prompted the plaintiffs to file the suit in question.

[8]. On notice defendants appeared and contested the case. Legal representatives of defendant No.1 i.e. the appellants contested the suit on the ground that the suit is *mala fide* and has been filed maliciously to create defence in a criminal case arising out of FIR No.17 dated 22.01.2004 registered under Sections 452, 323, 325 IPC at Police Station Abohar pending against the plaintiffs. According to legal representatives of defendant No.1, suit property was partitioned in a family settlement dated 05.04.1998 entered between Krishan Kumar and Mohinder Kumar (predecessor in interest of defendants). In the said partition H.No.1086 had fallen to the share of deceased Mohinder Kumar and House No.1087 had fallen to the share of plaintiff Krishan Kumar and since then plaintiff and deceased Mohinder Kumar continue to possess the properties exclusively as exclusive owners. Both the houses are not the joint properties between the parties and, therefore, suit was pleaded to be

not maintainable by the defendants.

[9]. It has been pleaded by the LR's of defendant No.1 that the plaintiffs are not entitled to permanent injunction in view of earlier suit RBT No.658-1 dated 30.11.2004 which was dismissed on 28.01.2008. Partition was duly effected on 05.04.1998 and property bearing MC No.1087 had fallen to the share of plaintiff Krishan Kumar who is in exclusive possession of the same as owner thereof and property bearing MC No.1086 had fallen to the share of deceased Mohinder Kumar. The settlement was reduced into writing and was signed by all the concerned parties.

[10]. On completion of pleadings, following issues were framed by the trial Court:-

- “1. Whether plaintiffs are entitled for separate possession as prayed for ? OPP
2. Whether plaintiffs are entitled for injunction as prayed for? OPP
3. Whether plaintiffs have no cause of action or locus standi to file the suit? OPD
4. Whether plaintiffs have concealed any material facts? OPD
5. Relief.”

[11]. Both the parties led their respective evidence on the aforesaid issues to prove their case.

[12]. Trial Court took up issues No.1 and 2 jointly and after discussing the evidence held that plaintiffs are not entitled to partition of the properties and they are also not entitled to injunction. Since

issues No.3 and 4 were not pressed at the time of arguments, therefore, both the issues were decided against the defendants. Ultimately suit of the plaintiffs was dismissed with costs vide judgment and decree dated 20.09.2011 passed by Civil Judge (Jr. Divn.) Abohar.

[13]. Against the aforesaid judgment and decree plaintiffs filed appeal before Additional District Judge, Fazilka who accepted the same and remanded the case back to the trial Court to pass preliminary decree first and then to proceed with the suit in accordance with law vide judgment dated 11.10.2013. That is how the aforesaid SAO No.5 of 2014 came to be filed against the said judgment of remand passed by the lower Appellate Court.

[14]. The aforesaid case has some overlapping peculiar facts and circumstances. The aforesaid appeal came to be filed on 13.01.2014. In the remand order Additional District Judge, Fazilka directed the parties to appear before the trial Court on 22.10.2013. Trial Court on appearance of the parties on 22.10.2013 decided the suit itself.

[15]. According to the appellants certified copy of the judgment dated 11.10.2013 was applied on 15.10.2013 which was prepared on 19.10.2013 and appellants appeared before the trial Court on 22.10.2013 and requested for time as they were contemplating to file appeal against judgment dated 11.10.2013 before this Court within limitation. The request for adjournment was rejected by the trial Court and preliminary decree was passed on 22.10.2013 itself

without affording any opportunity to the appellants to file present Second Appeal against Order against the judgment dated 11.10.2013 passed by the Additional District Judge, Fazilka. Against the preliminary decree passed by the trial Court, appellants had to file appeal before the District Judge, Fazilka and the present appeal was filed against the remand order in order to avoid any legal consequences at a subsequent stage.

[16]. The lower Appellate Court in an appeal against preliminary decree dated 22.10.2013 dismissed the appeal vide judgment and decree dated 14.05.2014 thereby maintaining the judgment and decree dated 22.10.2013 passed by Civil Judge (Jr. Divn.) Abohar. That is how second appeal i.e. RSA No.4504 of 2014 tilted as Savitri Devi and others vs. Krishan Kumar and others came to be filed in this Court on 19.08.2014.

[17]. In the first case i.e. SAO No.5 of 2014, learned counsel for the appellants has submitted that the learned Additional District Judge, Fazilka while remanding the case has observed that before proceeding with the partition, it was incumbent upon the trial Court to pass preliminary decree and shares were to be determined and then the trial Court should have proceeded further. Since preliminary decree was not passed by the trial Court, therefore, judgment and decree of the trial Court was set aside and case was remanded back to the trial Court for passing preliminary decree first and then to proceed with the suit in accordance with law.

[18]. Learned counsel has submitted that passing of preliminary

decree and separation of shares are necessary only if the suit is to be decreed. If the Court is to dismiss the suit, there is no necessity to draw preliminary decree. He has further submitted that such a remand is not contemplated under Order 41 Rules 23, 23-A and 25 CPC.

[19]. Remand of case by Appellate Court under Order 41 Rule 23 CPC deals with a situation where the Court from whose decree an appeal is preferred, has disposed of the suit upon a preliminary point and the decree is reversed in appeal by the Appellate Court. The Appellate Court, if thinks fit by order of remand may further direct the trial Court to try the issue/issues and remand the case to the Court from whose decree the appeal is preferred with directions to re-admit the suit at its original number and proceed to determine the suit on the basis of material.

[20]. Order 41 Rule 23-A CPC deals with remand in other cases where the Court from whose decree, an appeal is preferred has decided the case otherwise than on a preliminary point and the decree is reversed in appeal and retrial is considered necessary. The Appellate Court has the same powers as under Order 41 Rule 23 CPC.

[21]. Order 41 Rule 25 CPC deals with the situation where Appellate Court frames issues and refer them to the trial Court whose decree is appealed from and in such case Appellate Court may direct the trial Court to take additional evidence and return the evidence to the Appellate Court together with findings thereon within

such time as may be prescribed by the Appellate Court.

[22]. Learned Counsel for the appellants has contended that the remand can only be made on aforesaid premises. The impugned order of remand neither covered under Order 41 Rule 23 CPC, nor in Rules 23-A and 25 CPC. According to learned counsel the trial Court had rightly decided on the basis of admission of plaintiff No.1 that houses No.1084 and 1085 are in exclusive ownership of defendants No.5 and 8 and they have no right to claim any partition. Compromise dated 05.04.1998 (Ex.D1) is an admitted fact. In the said compromise House No.1086 had fallen to the share of Mohinder Kumar and House No.1087 had fallen to the share of Krishan Kumar. House in village Kera Khera had fallen to the share of Jatinder Kumar. The settlement (Ex.D1) was never cancelled.

[23]. Learned counsel further submitted that so far as the house Nos.1084 and 1085 are concerned, plaintiff No.1 has categorically admitted that Raj Kumar defendant No.5 and Om Parkash defendant No.8 are exclusive owners of said properties and are not entitled to claim partition. These findings have not been reversed by the lower Appellate Court and, therefore, these findings have attained finality. Now question remains to be decided in respect of House No.1086 and 1087 between the plaintiffs and legal representatives of defendant No.1 Mohinder Kumar. Other defendants have no subsisting claim in respect of these houses.

[24]. Lower Appellate Court has wrongly concluded that compromise Ex.D1 is not specific with regard to houses to be

partitioned. Lower Appellate Court while returning the findings under para No.13 of the judgment has observed that properties No.1084 and 1085 are not in possession of the plaintiffs and defendant No.1, rather these properties are in possession of Raj Kumar and Om Parkash and defendants No.1 to 4 are not the parties to the compromise, nor these properties are in possession of plaintiffs and defendants No.1, therefore, according to compromise only three properties are the subject matter of consideration between the plaintiffs and deceased defendant No.1 i.e. property No.1086, 1087 and house situated in village Kera Khera. The partition Ex.D1 correctly reflects that H.No.1086 had fallen to the share of Mohinder Kumar, H.No.1087 had fallen to the share of Krishan Kumar and house situated in village Kera Khera had fallen to the share of Jatinder Kumar. Other house Nos.1084 and 1085 were not subject matter of compromise, nor are relevant to be considered in the present context.

[25]. Learned counsel relied upon the statement of Krishan Kumar as PW-1, who in his cross-examination stated in the following manner:-

“It is correct that in Rect No: 260 Khewat No:1060 Khatoni No:1648 there are three houses separately bearing municipal No:1084, 1085, 1086. On house bearing municipal No:1084 one Raj Kumar son of Lachi Ram is in possession, who is the exclusive owner of this house. On house bearing municipal No:1085 one Om Parkash son of Megh Raj is in possession who is also owner of this house. On house bearing municipal No:1086 Krishan Kumar

himself, Jatinder Kumar and Mohinder Kumar now his LRs are in possession over this house. All the three brothers are residing in this house with their family members. It is correct that all the said houses are within the municipal limits of Abohar. All the three brothers and their families are having their votes, ration cards and gas connection at the address of this house bearing municipal N:1086. House tax have been exempted by the MC on the residential houses in the Abohar from about 20/25 years back. It is correct that the survey of buildings residential and commercial are situated with the MC limits of Abohar are conducted by the MC authorities and a register occupiers and owners of house No: 1086 in MC record. In house bearing MC No:1087 which is comprised Rect No:261 Khewat No;1261 Khatoni No:1921 we all three brothers with out families are residing in the house No:1087. We all three brothers are having one house in village Kera Khera as our joint ownership. Volunteered that house are not belong to myself and my brother whether the same belong to Smt. Gogi Devi paternal aunti. Signature on compromise effected between the brothers is Ex.D-1 bears his signatures. This Ex.D1 also bears signatures of his brother the brothers Mohinder Kumar and Jatinder, which he identify as these were signed in his presence at the same time alongwith him. It is correct that in our family partition Ex.D1 compromise house situated in vilalge Kera Khera was included and that house was given to Jatinder Kumar in the family partition. Volunteered that compromise was lateron not accepted by the parties and was canceled. Volunteered that Mohinder Kumar my brother himself back out from the compromise. It is correct that Ex.D-1 house No:1086 had fallen to the share of Mohinder Kumar and House No;1087 had fallen to the share of myself and the house situated in village Kera

Khera was given to my brother Jatinder Kumar. It is wrong that from dt.5.4.98 the day of family partition which is Ex.D-1. The record of MC Abohar is recorded according to the partition separately in name of individual brothers. It is wrong to suggest that I had been paying house tax and water tax of House No;1087 and I have been recorded as owner and occupier of this house in the MC regularly.”

[26]. Learned counsel for the respondents supplemented his arguments by saying that the plaintiffs themselves admitted the correctness of the documents, thereafter nothing remain to the decided between the parties and the lower Appellate Court omitted to consider the cross-examination of Krishan Kumar as PW-1.

[27]. The findings of the lower Appellate Court that settlement Ex.D1 do not bind defendants No.2 to 9 as they were not parties to the same are equally erroneous because defendants No.2 to 9 have no right in the house Nos.1086 and 1087 and house situated in the village Kera Khera. This fact is apparent from the cross-examination of Krishan Kumar. There was no occasion for the parties to join as defendants No.2 to 9 at the time of compromise as they were in exclusive possession of different properties as owners. Therefore, defendants No.2 to 9 have been wrongly impleaded in the present suit and house Nos.1084 and 1085 have been wrongly included in the suit.

[28]. Mere fact that the compromise has not been given effect in the revenue record is wholly inconsequential as the plaintiffs themselves have admitted the partition by giving details of the properties which had fallen to their shares and to the share of

deceased defendant No.1.

[29]. The precedents cited in the judgment rendered by Additional District Judge, Fazilka are not attracted to the facts of the present case. In the cited judgment factum of partition was not admitted between the parties, therefore, factum of not giving effect in revenue record became relevant consideration to rule out the partition. Since factum of partition has been admitted in the present case and respective properties falling to the shares of parties has also been an admitted fact, therefore, factum of partition is *writ large* on the record in view of admission by the plaintiffs which is best piece of evidence and is not required to be proved any more.

[30]. Defendants No.2 to 9 being not co-sharers in the house Nos.1086 and 1087 and the house situated in village Kera Khera is also an admitted fact in view of admission of the plaintiffs. Non-joining of defendants No.2 to 9 in the compromise is wholly inconsequential in view of aforesaid admitted position, therefore, on that premise observation of the lower Appellate Court are claimed to be wrong.

[31]. Learned counsel for the appellants has vehemently argued that the lower Appellate Court has placed wrong reliance on the precedents which are not even related to the nature of the properties in question. If the partition is not reflected in the revenue record in respect of agricultural land, the same cannot be relied upon. In the present case, the issue is of partition of residential properties. Factum of separate residence is an admitted fact. This fact has been

illegally ignored by the lower Appellate Court.

[32]. Suit is in respect of partition of urban residential properties in which long separate possession over residences by the parties is a relevant fact to be considered. Material on record i.e. receipt of Municipal Council, Abohar in respect of payment of house tax assessment Exs.D5 to D8, telephone bills on the address of separate premises i.e. Exs.D-9 to D-10 are the instances of exclusive possession of Mohinder Kumar defendant No.1 over house No.1086 and this fact could not have been ignored by the lower Appellate Court. Even the voter list Ex.D-11 shows the plaintiffs and legal representatives of defendant No.1 to be residents of separate houses.

[33]. Factum of private partition has been specifically pleaded in the written statement. Document of partition Ex.D1 has been duly exhibited on record, property being urban residential property not required to be given effect in revenue record which is otherwise proved to be in exclusive separate possession of the parties.

[34]. Learned counsel further submitted that lower Appellate Court has not assigned any reason as to how the findings of trial Court on issues No.1 and 2 are wrong. The remand could have been made only after setting aside the findings of the trial Court on all issues. Cancellation of compromise has not been proved on record. Once the plea of cancellation has been taken in the replication filed by the plaintiffs and changing the stand then factum of existence of compromise at one point of time stands proved. Cancellation has to

be proved thereafter.

[35]. No evidence has been brought on record to prove cancellation of compromise effected between the parties. The execution of compromise is an admitted fact. No document has been brought on record showing cancellation of written compromise which duly satisfies the ingredients of Sections 90 and 91 of the Evidence Act. The cancellation or variation of terms and conditions of written document can only be varied by another written document and, therefore, lower Appellate Court was not justified in remanding the case to the trial Court which otherwise is not in consonance with the Order 41 Rules 23, 23-A and 25 CPC. No issue of private partition was framed. Parties knew about the case and plaintiffs themselves admitted the factum of compromise, therefore, lower Appellate Court was not justified in remanding the case.

[36]. On the issue of appearance before the trial Court on 22.10.2013, learned counsel for the appellants states that the trial Court was legally under obligation to provide reasonable opportunity to the appellants to prove their case. Framing of preliminary decree on 22.10.2013 itself shows that the trial Court acted in haste. The observation of the lower Appellate Court directing the trial Court to pass preliminary decree first and then to proceed with the suit in accordance with law was impleaded by the trial Court on that very day of appearance of the parties before the Court and preliminary decree was drawn.

[37]. According to learned counsel, preliminary decree is not

required to be drawn in each and every case. It is be drawn only when the suit is to be decreed. Since the trial Court had already dismissed the suit vide judgment and decree dated 20.09.2011, the trial Court was under obligation after remand of the case to decide the controversy on merits and thereafter trial Court was obliged to draw the decree. It seem that direction of the lower Appellate Court was implemented on 22.10.2013 itself i.e. on the day of appearance of the parties before the trial Court as, if, the lower Appellate court has directed to frame the preliminary decree by ignoring the fact that after the remand the issue was to be debated on merits before the trial Court and for that reasonable opportunity was required to be given to the defendants in the suit.

[38]. It is settled principle that the Courts are not only meant to advance the cause of justice between the parties, but justice should appear to have been done in the eyes of law. After the remand by the lower Appellate Court, the trial Court should have decided the suit on merits either way. But framing preliminary decree without giving an opportunity to the defendants/appellants is an issue which apparently shows that the trial Court has accepted the mandate of remand order to the effect that trial Court should pass preliminary decree and determine the shares first before proceeding further in the suit. The aforesaid observation of the lower Appellate Court has to be tested in the light of judgment and decree dated 20.09.2011 passed by the trial Court vide which suit itself was dismissed on the basis of findings recorded under issues No.1 and 2. The context in

which findings of issues No.1 and 2 have been discussed and remand has been made does not show that the trial Court was only to draw a decree because the observation of the lower Appellate Court was that before proceeding with the partition of the suit property, it was incumbent upon the trial Court to pass preliminary decree and issues of shares were to be determined and then trial Court was required to proceed further. If trial Court is to dismiss the suit, there is no requirement of drawing preliminary decree, it is only when suit is to be decreed requirement of drawing preliminary decree becomes necessary.

[39]. Learned counsel for the respondents has further submitted that after the remand, the trial Court took cognizance and after framing of preliminary decree the appellants remained unsuccessful in first appeal as well, therefore, the remand order has already been implemented and this Second Appeal against Order has become infructuous. Further, learned counsel has submitted that the statements of plaintiffs in the context of joining all the three properties between plaintiffs and defendant No.1 is also an admitted fact and the compromise has not been given effect in the revenue record and, therefore, the same has no evidentiary value in the eyes of law. According to learned counsel decision rendered by trial Court on remand vide judgment and decree dated 22.10.2013 and decision rendered by the lower Appellate Court vide judgment and decree dated 14.05.2014 virtually taken away the scope of interference.

[40]. In first case i.e. SAO No.5 of 2014, notice of motion was

issued on 11.04.2014 and further proceedings were ordered to be stayed. Since the trial Court decided the suit thereby framing preliminary decree on 22.10.2013 itself, therefore, stay of further proceedings was issued to the proceedings before first Appellate Court. Lower Appellate Court has dismissed the appeal only on 14.05.2014 i.e. during the stay order passed by this Court on 11.04.2014. The fate of second case i.e. RSA No.4504 of 2014 is totally dependent upon the decision of SAO No.5 of 2014. In view of facts on record, an anomalous situation has arisen. On the one hand present SAO is pending with an interim order of stay on further proceedings before the Courts below. On the other hand lower Appellate Court decided the appeal on 14.05.2014 i.e. after the grant of stay of further proceedings by this Court on 11.04.2014.

[41]. The aforesaid facts, if read in the context of spirit attached to the order of remand would make the things more complicated. Admittedly first decree of the trial Court i.e. 20.09.2011 is of dismissal of the suit for partition. The order of remand by the Additional District Judge, Fazilka mandated the trial Court to draw preliminary decree before partition of the suit property and to determine the shares and then to proceed with the suit. Apparently, the ground on which the remand was made by the Additional District Judge, Fazilka is debatable connotation in view of Order 41 Rules 23, 23-A and 25 CPC. The remand has been further aggravated by the trial Court when it proceeded to draw preliminary decree on the day of appearance of the parties before it without giving any

opportunity to the defendants to argue the case on merits and to file appeal against the remand order.

[42]. If the Court is to proceed from the stage of drawing preliminary decree by the trial Court in a hastily manner, then the legality and propriety of the judgment under challenge in SAO No.5 of 2014 has to be ignored. At the same time if remand order is tested on the settled principles of law, then the judgment and decree passed by the trial Court on 22.10.2013 and the judgment of the lower Appellate Court on 14.05.2014 are to be ignored.

[43]. Taking into considerations all the facts and circumstances appearing on the record, this Court deems it appropriate to observe that the proceedings of RSA No.4504 of 2014 are wholly inconsequential in the light of pendency of SAO No.5 of 2014 in which stay of further proceedings was granted on 11.04.2014 and factum of filing of appeal before the lower Appellate Court against judgment and decree of the trial Court dated 12.10.2013 was duly mentioned in para No.26 of the the grounds of appeal of SAO No.5 of 2014.

[44]. In view of aforesaid order of stay of further proceedings dated 11.04.2014 passed by this Court was relatable to the proceedings of lower Appellate Court, therefore, this Court deems it appropriate not to decide RSA No.4504 of 2014 on merits, rather the decision thereof would tantamount to not giving any reasonable opportunity to the appellants in availing legal remedies available to them.

[45]. Accordingly, it would be appropriate to set aside the order dated 11.10.2013 passed by the Additional District Judge, Fazilka and remand the case to the Additional District Judge, Fazilka to decide the appeal afresh after giving reasonable opportunities to both the sides, particularly in view of the fact whether drawing of preliminary decree is inevitable/necessary in all the suits for partition, even if trial Court is to dismiss the suit. Parties are directed to appear before the Additional District Judge, Fazilka on 21.12.2015.

[46]. Since order of remand dated 11.10.2013 passed by the Additional District Judge, Fazilka has been set aside, therefore RSA No.4504 of 2014 stands dismissed as having become infructuous.

[47]. Additional District Judge, Fazilka would be obligated to decide the appeal as expeditiously as possible preferably within a period of six months from the date of appearance of the parties before it.

October 12, 2015

Atik

(RAJ MOHAN SINGH)
JUDGE