

201

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

**RSA-3593-2008 (O&M)
Date of decision : 26.05.2016**

Bhagwant Singh and others

... Appellants

Versus

Charan Singh (deceased through LRs) and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Gaurav Chopra, Advocate
for the appellants.

Mr. K. S. Rekhi, Advocate
for respondents No.11 to 20.

Ms.. R.K. Thind, Advocate
for respondents No.30 to 32.

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?

AMIT RAWAL, J. (ORAL)

The appellant(s)-plaintiff(s) are aggrieved of the judgment and decree rendered by both the Courts below, whereby despite having rendered findings on issue Nos.1, 2 in favour of plaintiffs, issue Nos.4 and 5 have been rendered against them for want of the compliance of the provisions of Order 9 Rule 2 of the Code of Civil Procedure (hereinafter called 'CPC') and finding on issue No.3 qua the possession has also been declined.

Mr. Gaurav Chopra, learned counsel appearing on behalf of the

appellants-plaintiffs submits that in respect of entire land measuring 98 kanals 5 marlas, there were three co-sharers, i.e. the plaintiff, defendant Nos.1 and 2, having 1/3rd share each, In the year 1963, defendant Nos.4 and plaintiff sold the land measuring 20 kanals 17 marlas qua half share and therefore, the sale deed was for the land measuring 10 kanals 8 marlas. The partition proceedings were initiated at the behest of the co-sharers, which ultimately was rendered against the plaintiff(s) by deducting the land measuring 20 kanals 17 marals instead of 10 kanals 8 marals and it is, in this regard, the appellant(s)-plaintiff(s) instituted a suit and the suit was decreed vide judgment and decree dated 27.03.1981 (Ex.PW-3/1). The things did not rest here, the respondent(s)-defendant(s) again knocked the door of the Revenue Court by filing another partition proceedings on 16.07.1981 and the Assistant Collector First Grade erroneously passed the partition order on 07.05.1986 totally opposite to the judgment and decree *ibid*. The aforementioned order was assailed by filing the appeal before the Collector and the Collector vide order dated 25.05.1987 remanded back the matter. The aforementioned order was assailed by the respondent(s)-defendant(s) before the Commissioner and the Commissioner, vide order dated 25.03.1991, upheld the order of the Assistant Collector First Grade by holding that during the interregnum, certain persons have stepped into the shoes of the co-owners by virtue of the sale deeds, being mortgagee at one point of time and had also taken the possession. He further submits that in the absence of the partition proceedings and particularly in view of the judgment and decree, the sale deed of his specific share was not valid in law and accordingly, prayer for possession of 5 kanals 10 marlas of land giving

the specific khasra number was sought, but the same has been declined. The trial Court rendered the finding on issue No.1 and 2 in favour of the appellant(s)-plaintiff(s) holding that the institution of the second partition proceedings was complete abuse and set aside the orders, but dismissed the suit for want of compliance of Order 9 Rule 2 CPC. He submits that the trial Court ought not to have dismissed the suit after the trial as the said provisions could have been invoked at initial stage and in support of his contentions, he relies upon the provisions of Order 9 Rule 4 CPC, to contend that the appellant(s)-plaintiff(s) can always move an application for recalling of the order. The aforementioned judgment and decree was assailed by filing the appeal, taking all the grounds available, much less, the order passed under the provisions of Order 9 Rule 2 by taking the aid of provisions of Order 43 Rule 1-A CPC, but the lower Appellate Court has also upheld the findings rendered by the trial Court. He further submits that the defendant(s) herein the alleged purchasers of his specific sharers cannot assail the finding rendered on issue Nos.1 and 2 and they had an opportunity in law to challenge the said findings, dehors of fact that the judgment and decree had not been passed against them. All these aspects have not been examined by the trial Court, much less, the lower Appellate Court being the last Court of fact and urges this Court for at least, remand of the matter for appreciation of all the aforementioned facts and law and submits that the following substantial questions of law would arise for determination:-

1. Whether the judgment and decree rendered by the lower Appellate, much less, of the trial Court on issue No.4 and 5 is sustainable or not?
2. Whether the respondent(s)-defendant(s) could assail the

finding on issue Nos.1 and 2 despite the suit having been dismissed?

3. Whether the lower Appellate Court has committed illegality and perversity in not appreciating the fact that the order dismissing the suit by invoking the provisions of Order 9 Rule 2 CPC was assailed by taking the aid of provisions of Order 43 Rule 1-A CPC.

Mr. K.S. Rekhi and Ms. R.K. Thind, learned counsel appearing on behalf of the respondent Nos.11 to 20 and 30 to 32, respectively, submits, that the appellant(s)-plaintiff(s) could not have sought the possession of his specific area by mentioning the khasra number as they had not specified the shares. The respondent(s)-defendant(s) have purchased the land from the other co-sharer way back in the year 1971 and even the partition proceeding had not been initiated. This Court can always examine the finding rendered on issue Nos.1 and 2 by invoking the provisions of Order 41 Rule 33 CPC, even if, the provisions of Section 96 of the Code of Civil Procedure have not been availed of, thus, urges this Court for affirming the findings rendered by both the Courts below as no substantial question of law arises for determination.

I have heard the learned counsel for the parties and appraised the paper book and of the view that the trial Court, in my view, has abdicated in not examining the facts noticed above, particularly the provisions of Order 9 Rule 4 CPC, particularly when the finding on Issue Nos.1 and 2 had already been rendered in favour of the appellant(s)-plaintiff(s). It is a settled proposition of law that in the absence of the partition proceedings, one of the co-owners cannot sell the specific area and

hand over the possession of the same except their share. Already the appellant(s)-plaintiff(s) had decree Ex.PW-3/1 in their favour, yet the defendant(s) attempted to reopen the partition proceedings in the year 1981. The Commissioner in a most fallacious and erroneous manner dismissed the appeal upholding the order dated 07.05.1986 passed by the Assistant Collector First Grade. The pleadings claiming possession are sketchy, but the Court cannot remain mute spectator, where a co-owner seeks the possession of his specific area, in the absence of the determination of his share. There is no legal bar for the respondent(s)-defendant(s) to challenge the finding on issue Nos.1 and 2 de hors of fact that the judgment and decree has been rendered in their favour. Be that as it may, I am of the view that both the parties should be given a chance to redress the issues already raised before the lower Appellate Court.

In view of the reasons assigned hereinabove, the judgment and decree of the lower Appellate Court is hereby set aside and the matter is remanded back to the lower Appellate Court, in essence, the appeal is restored to its original number. The substantial questions of law are left open for adjudicating and determining by the lower Appellate Court by invoking the provisions of Order 41 Rule 31 CPC, in essence, the questions of law as noticed above would be treated as point of determination by the Lower Appellate Court for deciding the appeal. It is expected that the lower Appellate Court shall decide the appeal as expeditiously as possible, preferably within four months.

Learned counsel for the parties/parties are directed to appear before the lower Appellate Court on 18.07.2016.

The original record is sent back to the lower Appellate Court for the decision of the appeal.

With the aforesaid observations, the appeal stands disposed of.

26.05.2016
yogesh

(AMIT RAWAL)
JUDGE