

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

RSA No.841 of 2009 (O&M)

Date of decision : 31.08.2016

Shibban (deceased through LRs) and others

...Appellants

Versus

Bhule Ram (deceased through LRs) and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

1. Whether reporters of local newspapers may be allowed to see judgment ?
2. To be referred to reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present: Mr. Ashish Aggarwal, Sr. Advocate with
Ms. Neeti Gupta, Advocate for the appellants.

Mr. Adarsh Jain, Advocate for the respondents.

AMIT RAWAL, J. (Oral)

The appellants-plaintiffs are aggrieved of the concurrent findings of fact in suit seeking declaration and consequential relief of permanent injunction challenging the order in appeal dated 19.03.1990 Ex.P5, whereby D.R.O. dismissed the appeal by giving liberty to file a separate partition proceedings.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Ms. Neeti Gupta, learned counsel appearing on behalf of the appellants-plaintiffs submits that Village Panhera Khurd, Tehsil Ballabgarh, District Faridabad

had land measuring 239 kanals 5 marlas as “Shamlat Patti Jatan”. The defendant Nos.1 to 26 had filed the petition against the defendant Nos.27 to 30 for partition on 30.12.1987 by relying upon the list of proprietors prepared for the year 1939-1940 (Ex.D1). The Assistant Collector, Grade-I, on the basis of the consent given by the defendant Nos.27 to 30 in those petitions passed an order of partition dated 19.03.1990 Ex.P5. Plaintiff Nos.1, 3, 4, 6 and 7 aggrieved of the aforementioned order preferred an appeal before the Collector. The Collector vide order dated 20.12.1991 Ex.P3 dismissed the appeal by giving the liberty to them to seek the separate partition. It is the aforementioned order which has been challenged on the premise that even as per the list of 1939-40, proprietors shown at Sr. Nos.24 to 28 (Ex.D1) (but mentioned as Sr. Nos.24 to 30 in the judgment of both the Courts below) were not made party, therefore, it is case of partial partition, much less, in the absence of all the proprietors, the entire land had been partitioned at the back of the plaintiff.

He further submits that in the written statement of defendant Nos.1 to 9 and 11 to 30, para No.1 was contested that plaintiffs were not proprietors of the property but they were occupancy tenants and their right converted into ownership in view of Punjab Occupancy Tenants (Vesting Of Proprietary Rights) Act 1952. Additional claim of adverse possession was also set up. The trial Court dismissed the suit vide judgment and decree dated 22.11.2000. Before the Lower Appellate Court, two application for additional evidence were filed which were allowed but the lower Appellate Court dismissed the appeal vide judgment and decree dated 31.10.2006 and Regular Second Appeal No.4270 of 2006 was filed and this Court vide

order dated 15.01.2008 set aside the judgment and decree of the lower Appellate Court and remanded the matter back. After dismissal of the appeal, appellants had approached this Court.

He further submits that before the Courts below, list of proprietors for the year 1987-88 Ex.PW5/1 had also brought on record to show that it had burgeoned to 121 from 28. He submits that contesting defendants intentionally did not place on record the list of proprietors of the year 1987-88 but instead chose to place it on record of the year 1939-40. DW3 Indraj Singh, when appeared in cross-examination, admitted the factum of increasing of the number of proprietors and also admitted that persons at Sr. Nos.24 to 28 (Ex.D1) were proprietors as per the list of proprietors and, they were not impleaded as parties, therefore, it is the sufficient evidence to set aside the judgment and decree and remanded the matter back to the Lower Appellate Court to decide the appeal afresh.

He also submits that the lower Appellate Court though after discussing the matter on merits had also held the suit being not maintainable by invoking the provisions of Section 158 of Punjab Land Revenue Act. In support of his contentions, he relies upon the Full Bench Judgment of this Court rendered in *State of Haryana and others Vs. Vinod Kumar and others, 1986 PLJ 161*, to contend that where the order of the partition has been passed at the back of the owner, Civil Court would have jurisdiction. There is no adjudication of the document Ex.PW5/1, despite having been referred to in the arguments of the appellants. Lower Appellate Court abdicated in not performing its duty being the last Court of facts and law, therefore, it is fit case of remand back matter on the premise that plaintiffs

have been deprived of the right of the statutory appeal as per the provision of Section 96 of Code of Civil Procedure, by formulating following substantial questions of law:-

1. Whether the judgment and decree of the lower Appellate Court being the last Court of facts and law without referring to the documents Ex.PW5/1 and another submissions suffers from capricious or perversity or not?
2. Whether there has been misreading and misconstrual of the documentary evidence on record?

Per Contra, Mr. Adarsh Jain, learned counsel appearing on behalf of respondents (Contesting) submits that all the plaintiffs are not original proprietors. They had purchased the property from the owners i.e. occupancy tenant who have given right of ownership as per 1953 Act. In this regard, the property had been sold by the Occupancy Tenants being owners to the subsequent purchaser vide sale deeds dated 24.10.1972 and 02.07.1984 Ex.P2 and Ex.PW4/A, respectively. One of such person had claimed the declaration being proprietor on the basis of the aforementioned sale deeds, but the same was dismissed vide judgment and decree dated 10.03.1999 Ex.D16. He submits that purchaser from the occupancy tenants being owner owing to 1953 Act, cannot have a right of proprietorship and share in "Shamlat Patti Jatan" i.e. the land belonging to the proprietors. He has also drawn the attention of this Court to the findings rendered by the Courts below, in this regard, particularly paragraph No.23 and thus urges this Court for affirmation of the findings under challenge.

Mr. Ashish Aggarwal, Sr. Advocate in rebuttal submits that in

para No.27, the lower Appellate Court had again given the liberty to the appellants to file afresh appeal for partition without noticing the fact that the order Ex.P5 passed by the Collector on the similar line had been challenged.

I have heard learned counsel for the parties and appraised the paper book and of the view that it is a fit case where matter should be remitted back to the lower Appellate Court as there had been no adjudication of documentary evidence particularly Ex.PW5/1. For the sake of brevity, I would refer to the arguments of the counsel for the appellant before the Lower Appellate Court as noticed in paragraph No.13 in the impugned judgment, which reads thus:-

“13. Learned counsel for the plaintiffs referring to the jamabandi for the year 1954-55 Ex.PM and the subsequent jamabandis Ex.P6 for the year 1987-88, pointed out that the plaintiffs were also recorded as co-sharers alongwith the defendants in the suit land. The list of proprietors of the village of the year 1939-40 had been substituted by the list of proprietors prepared in the year 1987-88 on the basis of MISAL HAKIYAT of the year 1954-55 Ex.P5/1. In the said list of proprietors the plaintiffs had been named at Sr. Nos.48, 49, 57, 60, 72, 74 and 91 etc. Apart from being named in the column of owners in the revenue record pertaining to the suit land, they were also recorded as “MALIK KAMIL” (absolute owners). A separate jamabandi of the land comprised in SHAMLAT PATTI JATTAN bearing khewat No.238, Khatoni No.306 to 340 had been prepared in the year 1954-55 Ex.PM/1 in which their names had been recorded as co-owners co-sharers. The said record prepared in discharge of their official duties by the revenue officials, proves that at the time of filing of application for partition by the defendants, there

were number of other co-sharers including the plaintiffs who were not impleaded as party to the application.”

On going through the aforementioned findings, I have not been able to find out whether there has been adjudication or discussion/reference about the aforementioned document. Ex.PW5/1 is a list of proprietors of the year 1987-1988. There are 121 proprietors for the year 1987-88 wherein according to the plaintiff they are the proprietor. I would be refraining myself from delving upon whether the status of the appellant being proprietor as it would be the domain of the lower Appellate Court but the fact remains that once the appellant-plaintiff has been deprived to refer to the documents in first appeal, both the parties shall be at liberty to address the arguments and again to comment upon the documents which can be examined or not but the decree under challenge cannot be sustained.

I am also of the view that lower Appellate Court after discussing the merit of the case could not have non-suited the appellant with regard to the jurisdiction of the Civil Court as case set out by the plaintiff was/is within the ratio decidendi culled out by Full Bench of this Court in State of Haryana and others (Supra).

There is another aspect of the matter. Even the list of the year 1939-40 Ex.D1, the proprietors shown at Sr. Nos.24 to 28 though not impleaded as party and at Sr. No.1 is plaintiff No.3. Though, lower Appellate Court had occasion to refer to Ex.D15, order of SDO (Civil), and formed an opinion that same list was corrected in the year 1997 but remained oblivious of the fact that partition proceedings at the behest of the contesting defendant was initiated on 30.12.1987. It is for the revenue

authorities to show which list would be looked into for the adjudication of the partition proceedings particularly when the consensual order of partition has been passed.

In view of what has been expressed above, judgment and decree of the lower Appellate Court is set aside. Matter is remitted back to the lower Appellate Court to decide the appeal afresh. Parties through their counsel are directed to appear before the lower Appellate Court on 03.10.2016.

The present appeal is accordingly, disposed of.

This Court is sanguine of the fact that lower Appellate Court shall decide the appeal as expeditiously as possible within a period of six months.

Both the parties can raise all the legal possible pleas in accordance with law.

31.08.2016

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**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No