

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

**RSA-4416-2012 (O&M)
Date of decision : 27.09.2016**

Bishamber Dayal

... Appellant

Versus

Phoolo Devi and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rakesh Nehra, Advocate
for the appellant.

Mr. Sandeep Kotla, Advocate
for respondent Nos.1 to 5.

AMIT RAWAL, J. (ORAL)

The appellant-plaintiff is aggrieved of the concurrent findings of fact and law, whereby the suit seeking the following relief:-

“for permanent injunction and mandatory injunction be passed in favour of the plaintiff against the defendants directing the defendants No.1 to 3 (iii) to remove the wall mark IH and restore it in previous condition and defendants be permanently restrained to construct it further and in case plaintiff failed to prove the oral partition then decree for possession by way of partition of property bearing Khewat No.332/318, Khatoni No.410 Rect. No.76, Killa No.3/1/3 total area 2 Kanals 14 Marlas having 17/54 share which comes 0 kanal 17 marlas i.e. 514 sq. Gaj Mauja Dadri Toe Tehsil and District Jhajjar and property bearing khewat No.332/218, Khatoni No.410, Rect.

No.76, Killa No.3/1/3 total area 2 kanal 14 marla situated in Rakba Dadri Toe its eastern side 17/54 share specific part possession be given to the plaintiff”.

has been dismissed by both the Courts below.

Mr. Rakesh Nehra, learned counsel appearing on behalf of the appellant-plaintiff submits that both the Courts below have failed to advert to the very important fact that in case, the respondents-defendants had not been able to prove the encroachment, but the fact remains that he had become the co-share by virtue of registered sale deed dated 22.07.2003 as Phoolo Devi was the owner and in possession of the land. Defendant No.2-Krishan S/o Mangat purchased 1/54 share from Radhe son of Chander Mohan and he raised the construction towards the wall. The Courts below had erroneously adverted to the fact that the demarcation report was not objected to by the appellant-plaintiff.

He further submits that though, the demarcation report was at the back of the appellant-plaintiff and therefore, the same could not have been looked into. Dehors of the fact that the Courts below has not granted any relief qua injunction, but at least ought to have passed a preliminary decree viz-a-viz the partition as admittedly the parties to the *lis* are co-sharers as the respondents-defendants have failed to prove the oral evidence, in essence, the revenue record shows the joint 'khata', thus, urges this Court for setting aside the findings under challenge.

Mr. Sandeep Kotla, learned counsel appearing on behalf of the respondent Nos.1 to 5, submits that the concurrent findings of fact declining the relief qua permanent and mandatory injunction cannot be interfered until and unless there is a gross illegality and perversity. He submits that the site

plan (Ex.P-2) was not correct as per the actual and factual position. Even the appellant-plaintiff improved his version from the plaint that he had unauthorisedly raised the construction of wall by encroaching three feet. The Courts below have examined the affidavit and as well as demarcation report and found that there was no encroachment, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book and of the view that since, the respondents-defendants have failed to prove the encroachment, but the fact remains that he had become the co-sharer by virtue of the sale deed aforementioned. The thrust of the Courts below had been only with regard to the permanent and mandatory injunction. If at all, the appellant-plaintiff has failed to prove the same, nothing prevented the Court to pass preliminary decree in view of the fact that the 'khata' is joint. The factum of possession can always be proved while drawing the preliminary decree.

No doubt, this Court on earlier occasions had been framing substantial questions of law while deciding the appeal, but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi (dead) through LRs and others Vs. Chandrika and others” AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97 (1) CPC, whether the provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure. The Constitution Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others” 2001 (4) SCC 262**, applicability of Section 97 (1) of CPC was not

correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back and therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

For the foregoing reasons, the judgment and decree of the Courts below, viz-a-viz non-grant of permanent and mandatory injunction are upheld, but regarding partition, the same is set aside. The suit of the appellant-plaintiff is decreed viz-a-viz the partition. The preliminary decree is ordered to be drawn.

The appellant-plaintiff shall be at liberty to move an application for drawing the final decree.

With the aforesaid observation, the appeal is partly allowed.

27.09.2016
yogesh

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No