

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

RSA No.4840 of 2016

Date of Decision: 19.09.2016

Mukhtiar Singh

... Appellant

Vs.

Pritam Singh and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?
3. Whether the order is speaking/reasoned?

Present:- Mr. Amandeep Saini, Advocate,
for the appellant.

Amol Rattan Singh, J.

This is the second appeal of the 1st defendant in a suit filed by his brother (presently respondent no.1), seeking separate possession of the suit property by way of partition in metes and bounds. The property is stated to be a house allocated within the village Abadi of village Khara, Tehsil and District Faridkot, fully described in the impugned judgment of the learned Civil Judge (Senior Division), Faridkot. The respondent-plaintiff sought exclusive possession of a 3 marla plot out of the total suit property, in which 15 marlas were stated to be occupied by the 3rd brother, respondent no.2 (presently a proforma respondent in this appeal), on which defendant no.2 was stated to have also constructed a separate house.

It was contended by the plaintiff that he was, in fact, residing in

the joint house constructed by him with defendant no.1 and that now he wished to have his separate possession over his share, to which the 1st defendant was not agreeing and was bent upon constructing further on the property.

Consequently, a decree of permanent injunction was also sought.

2. In reply to the notice issued to him, defendant no.1 filed a written statement stating that the plaintiff was neither a co-sharer nor in possession of any part of the suit property and that it had not even been properly described, with no site plan attached thereto.

It was further contended that the property was, in fact, owned by defendant no.1, on which he had constructed his residential house by spending a huge amount 20 years earlier (the suit having been filed on 13.08.2010).

The plaintiff had raised no objection to the construction and in fact, the defendant had raised it believing that he was himself the owner thereof and as such, he claimed protection under Section 51 of the Transfer of Property Act, 1882.

Yet further, it was contended that the defendant and his family are illiterate whereas the plaintiff is residing in the USA since long and that he (plaintiff) had allured the defendant and his wife with migration to USA and he had obtained their thumb impressions on various papers.

Taking benefit of their illiteracy, he got executed sale deeds of their land, which they challenged by filing a civil suit, after which a family settlement/compromise was effected between the parties in the USA itself, in respect of which a memorandum was executed.

As per the terms of the compromise, the defendant and his wife

were to withdraw the suits filed by them and the plaintiff was not to harass them in the USA and not to claim any share or right in agricultural land, residence or other immovable properties in India.

3. Acting on that compromise, it was further stated in the written statement, that the defendant and his wife withdrew the civil suit filed by them and therefore, in terms of the compromise, the plaintiff has no right or interest in the suit land, which remained with the defendant and as such, he was not entitled to seek separate possession or partition of the property and further, that the suit was also bad in view of the partial partition sought.

Preliminary objections with regard to valuation, jurisdiction, maintainability etc. were also taken by the present appellant-1st defendant.

4. A replication having been filed by the respondent-plaintiff, denying the contents of the written statement, the following issues were framed by the learned Civil Judge:-

- “1. Whether plaintiff is entitled to separate possession through partition of the suit land as alleged? OPP
2. Whether plaintiff is entitled to permanent injunction, as prayed for? OPP
3. Whether plaintiff is not in possession of any part of suit land as per family settlement effected between the parties? OPD
4. Relief.”

5. By way of evidence, the plaintiff examined himself as PW1 and by way of documentary evidence, produced the following documents:-

Ex.P1 Copy of *jamabandi*

Exs.P2 & P3 Sale deeds

Exs.P4 & P5 Mutations

Ex.P6	Judgment in appeal
Mark P1	Grounds of appeal

The present appellant-defendant no.1 examined his son and Power of Attorney as DW1 and one one Harpreet Singh Pawar as DW2 and by way of documentary evidence, produced the following documents:-

Ex.D1	Special Power of Attorney
Exs.D1 to D7	Electricity bills
Ex.D8	Certified copies of order dated 20.10.2005
Ex.D9	Statement
Ex.D10	Compromise
Ex.D11	Plaint
Ex.D12	Plaint dated 2.3.2005
Ex.D13	Order dated 20.10.2005
Ex.D14	Statement of Shri Amrit Bansal, Advocate
Ex.D15	Valuation
Ex.D16	Site plan
Mark-DB	Compromise
Mark-DX	Attested copy of Ration Card
Mark-DY	Attested copy of Aadhar Card
Mark-DD	Copy of family settlement

6. Upon appraising the aforesaid evidence and the pleadings, the learned Civil Judge found that as per the revenue record (*jamabandi*, Ex.P1), the parties to the *lis* were all co-sharers in joint possession of the suit land, which was described in the said *jamabandi* (record of rights) as *gair mumkin*

abadi.

It was further found that though the contesting defendants' case rested mainly on the compromise entered into between him and his brother (the plaintiff), the compromise deed had not been produced in Court by way of evidence, other than a photocopy thereof as Mark-A/DD.

Further, observing that even if that (non-ignorable) fact could be overlooked, a perusal of the said photocopy revealed that nothing was stated therein that the plaintiff would give his own land to defendant no.1.

Paragraph 4 of the photostat copy of the compromise deed was referred to, in which it was found that the plaintiff had agreed to return the land in India to the appellant-defendant, which could not be interpreted to mean that he had agreed to give his own land to Mukhtiar Singh.

Hence, also in view of the above, it was held that the photostat copy of the deed was not admissible in evidence.

7. A sale deed executed by the plaintiff in favour of one Rashpal Chand and another in favour of Sukhjit Kaur and the mutations in pursuance to such sale deeds, were the other documents which were led by way of evidence by the plaintiff but it was held that the said documents had no relevance to the controversy in hand.

Similarly, an order passed on a stay application (Ex.P6) and the grounds of appeal on which that order had been passed, were also held to be not binding on the findings in the suit, they being simply orders passed on applications during the pendency of the suit.

As regards the documents produced by the appellant-defendant, the Power of Attorney in favour of his son was accepted, as was his sons' testimony; the electricity bills, Exs.D2 to D7 were also not doubted by the

trial Court, in view of the fact that because the possession of the appellant-defendant as a co-sharer, was not in doubt.

Exs. D8 to D14 were seen by that Court to be the statements of the counsel for the appellant and his wife, in the suits filed earlier by them against the plaintiff and the orders passed in those suits, showing that they were dismissed, as withdrawn.

These documents were found to be relied upon to support the compromise documents Mark-A/DD, inasmuch as, the order of dismissal of the suits, referred to compromise entered into.

However, with the compromise deed itself not having been produced, it was further held that even the documents Ex.D8 to D14, did not show that the orders were actually in respect of the same compromise deed, the photostat copy of which was Mark-A/DD.

Further reiterating that even that compromise (Mark-A/DD) did not show that the plaintiff had to give his own land to Mukhtiar Singh, or that he did not want to keep his own share in the joint property, it was held that he was entitled to the partition thereof.

8. As regards the possession, it was held that though admittedly the respondent-plaintiff was residing abroad, he could not be held to have been ousted from his own property, of which he was a co-sharer.

Hence, as regards the relief of partition and declaration of possession, the issues were decided in favour of the respondent-plaintiff.

However, as regards the decree of injunction sought by the plaintiff, restraining the defendants from raising any construction in the suit plot, it was found that the plaintiffs' own case was that he had also raised construction thereupon. Hence, holding that a person who was himself raising

construction, cannot seek a restraint on a co-sharer to raise such construction, that issue was decided against the plaintiff, in favour of the appellant-defendant.

9. Holding as above, a preliminary decree for separate possession by way of partition of the suit property by metes and bounds was passed by the learned Civil Judge, whereas as regards the relief of permanent injunction, the suit was dismissed.

10. The respondent-plaintiff is not shown to have filed any appeal against the dismissal of his suit as regards the relief of permanent injunction, though the present appellant, of course, filed an appeal against decreeing the suit by way of a preliminary decree for partition.

The learned first appellate Court, upon considering the facts and the evidence led, as also the judgment of the learned Civil Judge, eventually dismissed the appeal, on the same grounds as given by the lower Court.

11. Before this Court, Mr. Saini, learned counsel for the appellant, first of all, submitted that the learned lower appellate Court had hardly exercised its own judgment on the facts and circumstances, in view of the fact that the judgment of that Court, is also almost echoing what was stated by the learned Civil Judge, though in a slightly different language.

Other than that, learned counsel submitted that the respondent-plaintiff having executed a compromise deed in the USA, and having kept the original with himself, there was no way that the appellant could have produced the said deed. As such, he submits that the learned Courts below wholly erred in not appreciating that fact and decreeing the suit of the plaintiff, whereas actually it was he who had raised construction on the suit property 20 years earlier.

12. It needs to be noticed here that the 2nd defendant, i.e. the 3rd sibling of the appellant-respondent no.1, though impleaded as defendant no.2 in the suit, neither filed a reply to the plaint, nor even appeared before the first appellate Court, and as noticed by that Court, he had also been proceeded against *ex parte* before the learned Civil Judge. Even in the (first) appeal filed by the appellant, defendant no.2 was shown to be only a proforma respondent. Thus, he was proceeded against *ex parte* by the first appellate Court also.

13. Having heard learned counsel, though it may be possible that his contention with regard to the respondent having taken advantage of the appellants' illiteracy is correct, as is also seen to have been raised before the learned lower appellate Court, as per its judgment; however, the fact remains that firstly, no application for leading secondary evidence seems to have been filed before the Courts below, in respect of the photostat copies of the compromise deed, if at all they could have been accepted as secondary evidence also, not being certified copies.

Other than that, I find no ground to interfere with the finding of fact by both the Courts below, that even the photostat copy of the compromise deed, as was sought to be exhibited as Mark-A/DD, did not specifically state that the respondent-plaintiff was giving up his share in the suit land. Nothing has been shown to this Court that the terms of the compromise were anything other than withdrawal of the suit filed by the appellant and his wife against respondent no.1 herein, in exchange of the said respondent not harassing the appellant in the USA and with regard to return of the appellants' land to the appellant, in India. Returning land which was allegedly sold off by respondent no.1, leading to the filing of the civil suit by the appellant and his wife, would

not amount, even in the opinion of this Court, to the plaintiff having given up his claim to his own share in the suit property. If, of course, there had been a recital specifically to that effect in the compromise deed, that in lieu of the appellant and his wife withdrawing their civil suits filed against respondent no.1, the respondent-plaintiff even gave up his own share in the suit property, obviously, that would have been a different matter altogether.

That not having been found to be so, by the learned Courts below, I find no grounds to proceed further with this appeal.

14. Consequently, finding no merit in it, the appeal is dismissed *in limine*, with no order as to costs.

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15. It is also seen that the appeal has been filed after a delay of 320 days, the reason given in this application being that it was the fault of the Clerk of the learned counsel, who had misplaced the documents pertaining to this case given to him.

However, since the appeal has been dismissed on merits, the issue of condonation of delay is not being gone into, as it would only be an academic exercise at this stage, with this Court having seen no ground to issue notice on the merits of the appeal itself.

September 19, 2016
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(AMOL RATTAN SINGH)
JUDGE