

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

**CM No. 3843-C-2016 in/and
R.S.A No.694 of 2016 (O&M)
Date of decision :31.03.2016**

Garja Singh and others

..... Appellants

Versus

Ram Singh and others

..... Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr.Amit Jain, Advocate
for the applicants-appellants.

DARSHAN SINGH,J

This Regular Second Appeal has been preferred by defendants no.3, 4, 5 and 7 against the judgment and decree dated 19.10.2015 passed by the learned Additional District Judge, S.A.S Nagar, Mohali, vide which the appeal filed by them against the judgment and decree dated 27.08.2013 passed by the learned Additional Civil Judge (Sr. Division), Kharar, has been dismissed.

2. Plaintiffs-respondents no.1 and 2 moved an application for passing the final decree for final partition by metes and bounds in respect of 5/9 share in the suit property. They had filed a suit for separate possession by way of partition. The preliminary decree was passed on 15.02.1992 by the learned trial Court. The appeal preferred against the preliminary decree was dismissed. Hence this application.

3. In the reply filed by the appellants-defendants, the factum

regarding passing of the preliminary decree was admitted. It was also admitted that Jita Singh @ Ajit Singh, the predecessor-in-interest of the appellants has purchased the share of Sham Kaur and Nachhattar Kaur. However, it was pleaded that the parties were already in separate possession of their respective shares as per the family settlement. They are in possession of the area adjoining the road upon which the construction in the form of huts has also been raised and the same has been given on rent. They pleaded that in these circumstances, the question of giving separate possession to the plaintiffs does not arise at all and the application was liable to be dismissed.

4. The application filed by respondents no.1 and 2 for passing the final decree was allowed by the learned trial Court vide impugned judgment and decree dated 27.08.2013. The final decree for partition by metes and bounds in respect of 5/9 share of the plaintiffs was passed.

5. Aggrieved with the aforesaid judgment and decree, the appellants preferred the appeal and the same was also dismissed by the learned Additional District Judge, S.A.S. Nagar, Mohali, vide impugned judgment and decree dated 19.10.2015. Hence, this Regular Second Appeal.

6. During the pendency of this appeal, the appellants have also moved CM No. 3843-C of 2016, the application under Order 41 Rule 27 Code of Civil Procedure, 1908 (for short 'C.P.C') for permission to place on record the certified copy of the order dated 03.06.1988 passed by the Assistant Collector Ist Grade, Kharar (Annexure A-2)

7. I have heard Mr. Amit Jain, Advocate, learned counsel for

the applicants-appellants and have carefully gone through the paper book.

8. Initiating the arguments, learned counsel for the appellants contended that the plaintiff-respondents have moved an application for partition of the disputed property comprised of Khasra No. 201(1-2) before the Assistant Collector Ist Grade, Kharar. In the said application, they have admitted that they are in possession of the red portion shown in the site plan attached with the application, which is away from the road. It has also been admitted that the huts are in existence in the blue portion, which have been let out by the appellants. Thus, he contended that the possession and construction of the appellants on the portion adjoining to the road was admitted.

9. He further contended that the learned trial Court while passing the preliminary decree has categorically held that if any *pacca* structure has been raised by either of the parties, the same would be kept intact as far as possible while finally partitioning the land and passing the final decree. He contended that the learned Courts below had passed the final decree in contradiction to the preliminary decree. The *pacca* construction raised by the appellants over the portion adjoining the road was admitted and was also proved from the report of the Local Commissioner and this portion should have been allotted in the partition to the appellants. But, the said portion has also been partitioned and allotted to plaintiffs-respondents no.1 and 2. Thus, he contended that the final decree passed by the learned Courts below is illegal being contrary to the preliminary decree and the existing possession of the suit property.

10. He further contended that the production of the order by the

Assistant Collector Ist Grade, Kharar in the additional evidence is essential as it will enable the Court to pronounce the judgment in a better way.

11. I have duly considered the aforesaid contentions.

12. Firstly, I take up the CM No. 3843-C of 2016 filed by the appellants under Order 41 Rule 27 CPC for producing the copy of the order dated 03.06.1988 passed by the Assistant Collector Ist Grade, Kharar in the additional evidence. As per the provisions of Order 41 Rule 27 CPC, the Appellate Court may allow the additional evidence where the Courts below had refused to admit evidence which ought to have been admitted, where the party seeking to produce the additional evidence establishes that notwithstanding the exercise of due diligence such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed and finally when the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment, or for any other substantial cause.

13. The application moved by the appellants does not satisfy any of the parameters laid down above. Teja Singh was a party to the application moved by respondents no.1 and 2 before the Assistant Collector Ist Grade, Kharar for partition. So, certainly, the order dated 03.06.1988 passed by the Assistant Collector Ist Grade, Kharar was in the knowledge of the appellants. No satisfactory explanation has been given as to why this document could not be produced at the time of trial after the exercise of the due diligence. This document is also not required by

this Court to enable it to pronounce the judgment or for any other substantial cause, because the learned Assistant Collector Ist Grade, Kharar has simply held in the order that in the disputed khasra number there exists constructions, the *Abadi* has been let out by the parties and no land is vacant in this khasra number, so the land of which the partition has been sought is *Abadi Deh*, which is beyond his jurisdiction and they should approach the Civil Court. The rights of the parties has not been decided by the Assistant Collector Ist Grade in the order dated 03.06.1988 on merits. Rather, he held that he has no jurisdiction to entertain the application. Thus, the copy of this order is not at all required by this Court to enable it to pronounce the judgment or for any other substantial cause. Hence the same is hereby dismissed.

14. Learned counsel for the appellants has vehemently contended that the construction raised by the appellants was in existence even at the time of filing the suit for partition and they were in possession of the land adjoining to the road. Mr. Ajit Singh Longia, the Naib Tehsildar was appointed as a Local Commissioner vide order dated 16.12.2002, who has furnished his report dated 30.04.2003, wherein he has reported that Garja Singh, Teja Singh etc were in possession of the front on the metalled road of the land in dispute. Learned counsel for the appellants has also drawn my attention to the order dated 12.02.2009 passed by the learned trial Court reproduced in the grounds of appeal, wherein also it has been mentioned that existence of the *pacca* construction at the time of filing the suit has not been disputed.

15. Sh.Ajit Singh Longia, the Naib Tehsildar who was appointed

as Local Commissioner by the learned trial Court had suggested the mode of partition for passing the final decree suggesting that the entire land abutting the main road should be given to the defendants. Respondents no.1 and 2 preferred the objections against that report and the said report was discarded by the learned trial Court vide order dated 30.03.2009. Thereafter, Tehsildar, Kharar was appointed as a Local Commissioner to submit the mode of partition after taking into consideration the construction and commercial aspect of the land abutting the main road. He submitted his report dated 16.07.2009 suggesting three different modes of partition. The appellants filed objection to the said report, which were dismissed vide order dated 01.12.2009 passed by the learned trial Court and the final partition was ordered vide judgment and decree dated 22.05.2010.

16. The appellants preferred the appeal against that order. The learned First Appellate Court remanded the matter to the learned trial Court as there was some mistake in giving the notes under the site plan prepared by the Local Commissioner with respect to the mode of partition. The learned First Appellate Court has directed the learned trial Court to decide the matter afresh after seeking the clarification from the Local Commissioner. The Local Commissioner has furnished the clarification vide application dated 28.05.2013 that inadvertently the note regarding the colours has been mentioned wrongly. In fact, the area shown in green colour in the site plan was to be allotted to the present appellants and the area shown in brown colour, which was more than the area shown in green colour was purposed to be given to the plaintiffs as

the plaintiffs were having 5/9 share in the suit property and defendants were having 4/9 share in the suit property.

17. The purpose of partition of the suit property between the co-sharers is to allot the separate portion of the land to the co-sharers taking into consideration the value of the land and the share of the parties, so that all the co-sharers get equal share in the valuable piece of land as well as the inferior quality of the land. There should be no gainer or looser in partition of the joint property. The interest of all the co-owners should be taken care of.

18. At the time of passing the preliminary decree, it was only mentioned that if any *pacca* structure has been raised by either party, the same would be kept intact as far as possible while finally partitioning the land and passing the decree. No doubt, while passing the final decree for partition, the possession of the respective parties is to be respected only to the extent possible in the manner without causing any prejudice to the rights of the other co-sharers. The appellants are claiming the entire land adjoining the main road, which is valuable piece of land simply on the ground that they were in possession of that portion and has also raised the huts therein. The said plea is not permissible under law, because even a co-sharer out of possession is entitled to the share in every inch of the land, otherwise a co-sharer out of possession or in possession of lesser share or inferior quality of the property would never be able to bear the fruits by getting the joint property partitioned. The learned Courts below have rightly relied upon case **M.L. Subbaraya Setty (dead) by L.Rs and others Vs. M.L.Nagappa Setty (Dead) By L.Rs and Ors 2002(4) SCC**

743, wherein it has been laid down as under:-

“We may also clarify that the direction that the present possession of the parties shall be respected as far as possible also does not mean that if the plaintiff is not in possession of any immovable property and the same are in possession of the defendants, he could not be allotted the immovable property even though he is so entitled as per his share. If that was so, the words "as far as possible" in the said direction would become redundant. When the Court directs that the present possession of the parties shall be respected, it means that if partition of the property is to be effected, then as far as possible the person in possession of a property should be allowed to retain it by equalization of share but it does not mean that a person out of possession of all immovable properties should not be allotted any part of the immovable property whatsoever.”

19. The learned First Appellate Court has also mentioned on the basis of the report furnished by Sh.Jaivir Singh Rangila, Advocate, who was appointed as Local Commissioner by the learned Civil Judge, Kharar that new construction has come up in the shape of four shops abutting the main road. The learned First Appellate Court has further observed that the appellants cannot be rewarded for their own wrong as they have raised the construction with impunity during the pendency of the litigation. Consequently, the existence of construction will not clothe the appellants with the right to claim that very portion.

20. The final decree for partition has been passed by the learned Courts below taking into consideration the reports of the Local Commissioner, which covered all the aspects regarding the location of the land, share of the parties, commercial angle, existence of the construction, its nature and value. The decree for final partition has been passed as per the mode of partition suggested in the site plan mark 'A' by

Tehsildar, Kharar, the Local Commissioner. The plaintiffs-respondents were held entitled for separate possession of the portion shown in brown colour and the defendants-appellants were held entitled for separate possession of the portion shown in green colour in the said site plan as per the share of the parties.

21. Thus, I have no reason to differ with the well reasoned findings recorded by the learned Courts below which do not warrant any interference by this Court in the Regular Second Appeal.

22. Consequently, the present appeal having no merits is hereby dismissed with no orders as to costs.

March 31, 2016

s.khan

(DARSHAN SINGH)
JUDGE