

103

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

**RSA No.2945 of 2014 (O&M)
Date of Decision: 27.07.2016**

A.S. Nagpal

.....Appellant

Vs

Ganga Vishnu and others

.....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Adish Gupta, Advocate
for the appellant.

RAJ MOHAN SINGH, J.

[1]. Defendant No.8/appellant has filed this Regular Second Appeal against concurrent judgments and decrees passed by the Courts below in a suit for partition filed by the plaintiff seeking his share separated from the joint land.

[2]. Brief facts as gathered from the record are that the plaintiff filed suit for partition on the ground that the defendant Nos.1 to 4 were owners in possession of plot bearing No.1077/2 marked by letters ABCD total measuring 348 sq. yds. as depicted in red colour in the site plan. The suit land was the part of *Khasra* No.1552 (1-7), *Khewat* No.79, *Khata* No.186 situated within the revenue estate of village Faridabad and the same was purchased by defendant Nos.1 to 4 vide sale deed

dated 06.03.1981. The shares of defendant Nos.1 to 4 were in the following ratio:-

- (i) Defendant No.1 was owner of $1/3^{\text{rd}}$ share equivalent to 116 sq. yds.,
- (ii) Defendant No.2 was owner of $1/3^{\text{rd}}$ share equivalent to 116 sq. yds.,
- (iii) Defendant Nos.3 and 4 were joint owners of $1/3^{\text{rd}}$ share equivalent to 116 sq. yds.

[3]. It was alleged that defendant No.1 sold 56 sq. yds. out of his share of 116 sq. yds., in favour of defendant No.5 vide sale deed dated 03.01.1991 and also sold 60 sq. yds. i.e. remaining share to the plaintiff vide registered sale deed dated 04.01.1993. In this way defendant No.1 exhausted his total share. Defendant No.2 also sold his entire share in favour of defendant Nos.6 and 7 vide registered sale deed dated 02.01.1992. The share of the plaintiff was to the extent of 60 sq. yds measuring $13\frac{1}{2}$ ft. x. 40 ft. which was bounded as under:-

North	:	Plot of Khajan Singh
South	:	Rasta
East	:	Road
West	:	Plot of defendants No.3 and 4.

[4]. It was further alleged that defendant No.8 started claiming that he had also purchased the share of the remaining

part of the land of defendant Nos.3 and 4 and started raising construction without getting the land partitioned by metes and bounds. Plaintiff opposed the move of defendant No.8 and ultimately the suit for partition came to be filed.

[5]. Defendant Nos.1 and 2 did not file any written statement and were proceeded against *ex parte*. Remaining defendants contested the suit. The respective shares of defendant Nos.1 to 4 were admitted, however, plaintiff being owner of land to the extent of 60 sq. yds. was denied.

[6]. After filing replication, parties went to trial on the following issues:-

- “1. *Whether the plaintiff is co-sharer in the suit property, if so to what is the share? OPP*
2. *Whether the suit is not maintainable? OPD*
3. *Whether the suit is bad for non-joinder of necessary parties, as alleged? OPD*
4. *Whether the suit is false and frivolous, as alleged? OPD*
5. *Relief.”*
6. *Whether the defendant No.8 is the exclusive owner of land in question measuring 347 sq. yds. by virtue of sale deed executed by Udham Singh as alleged? OPD.*

[7]. Both the parties led their respective evidence on the

aforesaid issues to prove their case.

[8]. After appraisal of the evidence, trial Court decreed the suit vide judgment and decree dated 20.03.2001 and the same was upheld by the lower Appellate Court in appeal vide its judgment and decree dated 20.01.2014.

[9]. I have learned learned counsel for the appellant.

[10]. In para 14 of the grounds of appeal, appellant has framed following substantial questions of law:-

- “a) *Whether a suit for possession by way of partition can be filed with respect of portion of land out of the total land in question?*
- b) *Whether a suit for partition is maintainable qua a specifically demarcated property?*
- c) *Whether a suit for partition deserves to be dismissed for non-joinder or mis-joinder of necessary parties?*
- d) *Whether the court can treat two similar documents with different legal principles?*
- e) *Whether the courts have passed the decree in contravention to the principle of Evidence Act and Registration Act?”*

[11]. Admittedly, share of defendant No.1 Rupal Singh was 116 sq. yds. Out of his share, he sold 56 sq. yds to defendant No.5 and 60 sq. yds to the plaintiff vide sale deed (Ex.P-2). The

land sold by other defendants to the contesting defendants was not relevant so far as the entitlement of the plaintiff viz-a-viz. 60 sq. yds of land was concerned. Evidence of PW-1 Rimal Singh is relevant in the context that his share was $\frac{1}{3}^{\text{rd}}$, equivalent to 116 sq. yds. Share of defendant No.2 was also $\frac{1}{3}^{\text{rd}}$ equivalent to 116 sq. yds., and share of defendant Nos.3 and 4 jointly was $\frac{1}{3}^{\text{rd}}$ equivalent to 116 sq. yds. Rimal Singh sold land measuring 56 sq. yds to Khajan Singh vide sale deed dated 03.01.1992 (Ex.P-1) out of his share of 116 sq. yds. and remaining 60 sq. yds of land was sold by him to the plaintiff vide sale deed dated 04.01.1993 (Ex.P-2). The possession was duly handed over to the plaintiff at the time of execution of sale deed.

[12]. Secondly, defendant No.8 could not prove the sale deed (Ex.DW2/1) in accordance with the requirement of Section 68 of the Indian Evidence Act (for short 'the Act'). The document was required to be attested and could not be used in evidence unless one of the attesting witness was examined. Section 68 of the Act is mandatory and was not controlled by Section 90 of the Act. Mere fact that the only surviving witness was considered hostile, did not absolve the party from an onerous duty cast by the law to examine him as a witness. Such presumption did not absolve the party from examining the material witness as per requirement of law and, therefore, it was not enough that the

summons and warrants issued to such witness did not yield to secure his presence. Resultant effect was that the witness did not appear and, therefore, in such eventuality the Court could have secured the presence of witness in terms of Order 16 Rule 10 CPC. As the summoned witness did not appear, the process of the Court could have been availed for by adopting coercive method to secure presence of the witness. Apparently, defendants did not take any step to summon the attesting witness of the sale deed Ex.DW-2/1. Neither the vendor of the sale deed was examined by defendant No.7, nor the attesting witness could have been examined. Marking of document alone could not dispense with the proof of execution. The validity of document could not be held by mere exhibition of document.

[13]. Plaintiff examined the vendor Rimal Singh in his evidence as PW-1, who proved the sale deed Ex.P-2. Since the vendor admitted the sale deed, therefore, in case of plaintiff, requirement of Section 68 of the Act was not attracted as the attesting witness was required only where execution of sale deed was denied by the vendor. Therefore, so far as the sale deed in respect of 60 sq. yds. of land by the plaintiff was concerned, the same was admitted by its vendor Rimal Singh.

[14]. The question Nos.(a) to (b) are to be answered in the manner that plaintiff on account of purchase of land of Rimal

Singh was also co-sharer in the joint land, therefore, he had all the right to get his share separated from the joint land. Therefore, suit for partition was maintainable and the plaintiff was entitled to get his portion of land separated from the total joint land. Question No.(c) did not arise for consideration inasmuch as that all the necessary parties were before the Courts below. The defendant/appellant could not point out as to which of the necessary party was not joined in the litigation.

[15]. Question Nos.(d) and (e) have no effect as no evidence was led by the defendant/appellant to prove as to which of the two similar documents were treated differently, rather the document of sale in favour of defendant No.1 was hit by requirement of Section 68 of the Act. Whereas, sale of the plaintiff was admitted by the vendor Rimal Singh, therefore, question Nos.(d) and (e) could not be answered in favour of the defendant/appellant.

[16]. During the course of arguments, a new argument was raised by the learned counsel for the appellant that the suit was bad for partial partition. First of all, no such plea was raised in the written statement on the said premise. Secondly, no issue was framed on the aspect of alleged partial partition. Even, no evidence was led by the defendants during the trial.

[17]. On 17.11.2015, during hearing of this appeal, learned

counsel for the appellant requested for a date to produce certified copy of plaint and written statement to support his argument regarding partial partition. Even, from the aforementioned document, the learned counsel could not point out as to how the suit for partition was bad for partial partition. No such plea was raised in the written statement, nor any issue was struck and also no evidence was led by the defendants. On the other hand, the plaintiff has successfully brought on record the factum of sale to be a lawful transaction and with the title over the portion of land, he had all the right to get his share separated from the joint land.

[18]. Both the Courts below have deliberated upon the factual issues between the parties. Factual findings of fact have been recorded by the courts below. In Regular Second Appeal, re-appreciation of evidence cannot be made. Both the Courts have not misread the evidence in any manner, nor the reasoned finding recorded by them can be held to be suffering from vices of any perversity. Resultantly, this appeal is found to be totally devoid of merits and the same is accordingly dismissed.

July 27, 2016

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**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether reportable

Yes / No