

**IN THE PUNJAB & HARYANA HIGH COURT AT
CHANDIGARH**

**RSA No.1013 of 1988
Date of decision :7.11.2017**

Chattar Singh

... Appellant

Versus

Randhir Singh

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr.Kabir Sarin, Advocate
for the appellant.

Mr.S.K.Jain, Advocate,
Mr.Deepak, Jain, Advocate,
for the respondent.

AMOL RATTAN SINGH, J.

This is the second appeal of the plaintiff in a suit instituted by him on 21.12.1983, seeking possession of the suit property after its partition.

The suit having been dismissed by the learned Sub Judge IInd Class, Rohtak, on 11.09.1986, and the first appeal against that judgment and decree also having been dismissed by the learned Additional District Judge (II), Rohtak, vide his judgment and decree dated 14.01.1988, the present second appeal came to be instituted.

2. The facts of the case are being taken from the judgments of the learned Courts below, a perusal of which reveals that as per the appellants' plaint, he and the defendant are brothers, who owned and possessed various immovable property, including a double storeyed house (*Haveli*), a parlour

(described in the judgment of the learned Sub Judge as a *Darwaja*), some plots and agricultural land.

3. It was further stated that the agricultural land had been partitioned since long but the rest of the property, the full details of which were given in paragraph 2 of the plaint, continued to be jointly held. However, for the sake of convenience, the plaintiff had started using the *Darwaja* described in para no.2 (b) of the plaint, and the defendant had started using the rest of the house.

Similarly, a plot described in paragraph 2 (b) (i) of the plaint was also stated to be possessed by the plaintiff, whereas the plot mentioned in paragraph no.2 (d) was jointly possessed by the parties.

It was further contended that a settlement had been arrived at on 05.05.1957 between the parties, qua all the properties detailed in paragraph no.2 of the plaint. However, the settlement was ignored and was subsequently cancelled and in proceedings under Section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, the parties had again arrived at a settlement, which was reflected in the orders of the Director, Consolidation, and the Consolidation Officer, Rohtak, dated 26.05.1975 and 05.01.1976 respectively. The parties had thereby been held to be joint owners of plots no.226 and 227, detailed in paragraphs no. 2-c and 2-d of the plaint.

4. The plaintiff is further stated to have got residential plot no.224 in exchange of his agricultural land, upon which he had constructed a house with his own earnings (as per the averment in the plaint).

The opening of this house was stated to be in plot no.226, which was again stated to be in possession of the plaintiff.

Thus, it was further contended that the plaintiff continued to be in

possession of a part of the *Haveli* and *Darwaja*, and plots no.226 and 227. Yet, (again as per the plaintiff), he and the defendant were facing great difficulty in actually using this joint property and therefore he had requested the defendant a number of times for an equitable settlement to the effect that plot no.226 and half of the *Haveli*, including the *Darwaja*, should be acknowledged to be in his (plaintiffs') ownership and possession, with the rest of the property to be in the ownership and possession of the defendant.

However, the defendant not having agreed to the proposal, the suit was instituted.

5. Upon notice issued, the defendant appeared and filed a written statement denying the allegations of the plaintiff except that the parties were brothers and that there had been a family settlement on 05.05.1957. The joint nature of the house and the plots was specifically denied.

As per the defendant, the house and a *gher* were separately owned and possessed by the parties, though agricultural land was admitted to have been partitioned between them during the process of consolidation of land. It was further contended that "the alleged *Darwaja* is not separate property but in the part of the house". The defendant further contended that the *Darwaja* was not jointly used and that in fact, the whole property was in his (defendants') exclusive possession.

It was further contended that plot no.226 was owned and possessed by him and that the plaintiff had no concern with it. On the other hand actually plot no.227 was owned and possessed by the plaintiff. According to the defendant, these plots were also demarcated during consolidation proceedings, though prior to that, they were separately owned and possessed.

6. The family settlement dated 05.05.1957 was admitted but it was denied that it was being ignored, with the defendant contending that it was actually being followed.

Still further, it was stated that the defendant had given Rs.1,000/- to the plaintiff for construction of his house, whereas the defendant had spent a huge amount for the “extension repairs of the old house”. As regards the house mentioned in paragraphs no.2 to 2-c, it was stated to have fallen to the share of the defendant, with the property mentioned in paragraph no.2-d falling to the share of the plaintiff, upon which he had built his house.

It was further averred in the written statement that the parties had since been residing in their own houses as owners thereof, but when the plaintiff interfered in the family settlement, one Raj Singh had settled the matter as an Arbitrator and the northern part of plots no.226 and 227, towards the *mandir and johar*, as also the residential house, were given to the plaintiff, with the southern side falling towards the road to Meham, given to the defendant. Thus, according to the defendant plots no.226 and 227 were treated to be a single plot.

It was again denied that the plaintiff had constructed his house with his own earnings but in fact, as per the contention of the defendant, the money for construction was given by him, being obtained from the brick kiln owned by their father.

7. Yet further, the defendant averred that the land deducted by the Consolidation Authorities in lieu of the residential house of the plaintiff, was given to the plaintiff from the land of the defendant, in the family settlement, after which the parties were enjoying separate possession of their respective properties as per the said settlement and therefore, there was no question of

asking for any further partition.

The defendant also took a preliminary objection on the partition sought being only a partial partition, as the plaintiff had not included the house in which he resided, in the suit.

On the aforesaid averments, dismissal of the suit was prayed for.

8. A replication having been filed to the written statement, repudiating the contents thereof and reasserting those of the plaint, the following issues were framed by the learned Sub Judge:-

- “1. Whether the suit properties are jointly owned and possessed by the parties? If so what are their shares? OPP
2. Whether any family settlement dated 5.5.57 took place between the parties with respect to the suit property? If so whether the said family settlement was ignored and cancelled by the parties later on as alleged? If so its effect? OPP
3. Whether the plaintiff constructed a house in plot no.224 in exchange of his agricultural land as alleged. If so its effect? OPP
4. Whether the plaintiff has no cause of action? OPD
5. Whether the suit is bad for partial partition? OPD
6. Whether the suit is not maintainable in the present form? OPD
7. Relief.”

9. Upon the parties having led evidence in terms of their pleadings, the learned Sub Judge took up issues no.1 & 2 and went on to decide issue no.2 first, pertaining to whether a family settlement took place between the parties on 05.05.1957 and if so, whether it was later ignored or cancelled, as contended by the plaintiff.

Having considered the arguments and the evidence led by the

plaintiff, by examining himself and one Jagat Singh as witnesses and tendering various documents as exhibits, including a *jamabandi* for the year 1979-80, the order of the Director of Consolidation, Haryana, dated 26.06.1975, and of the Consolidation Officer, Rohtak, dated 05.01.1976, that Court eventually held that the aforesaid family settlement had taken place and was duly acted upon, with the property therefore not remaining joint any longer.

10. This was held to be so as, firstly, the settlement in any case was not denied, but as regards whether it was acted upon or resiled from, it was found that it had been reached upon the intervention of one Amar Singh, who was also the scribe thereof. It was held that no rights of the parties were settled by the said agreement (Ex.P4), which was only a memorandum of partition and therefore did not require registration. It was also held to be an agreement with regard to the receipt of money in future.

Thereafter, there arose some dispute with regard to the settlement which was again settled by one Raj Singh (DW2), who had been appointed to act as a “referee”, vide a writing, Ex.DW2/1. (Raj Singh is said to be the son of the aforesaid Amar Singh).

Though the plaintiff had denied his signatures on it, however that was considered to be immaterial by the Court, as eventually he had admitted its execution by suggesting to Raj Singh during his cross-examination, that the second agreement took place because the first one could not be implemented.

11. The learned Sub Judge also held that the plea that the property was joint, was further negated from the fact that partition of the agricultural land was admitted, and it had not been averred by the plaintiff that only a

partial partition had taken place, with the rights of the parties kept intact in the suit property.

12. Yet further, it was held that though the defendant had moved an application, Ex.P4/1, before the Director, Consolidation, Haryana, however the explanation given by his counsel seemed probable to the Court, to the effect that the said application was filed only because when the suit property was partitioned, there were no numbers allotted.

On the aforesaid reasoning it was held that it was proved that the suit property had been fully partitioned on the basis of the family settlement dated 05.05.1957, which was duly acted upon.

13. Issues no.3 & 5, pertaining to whether the plaintiff had constructed a house on plot no. 224 in exchange of his agricultural land, and whether the suit was bad on account of partial partition respectively, were taken up together. It was found by the learned Sub Judge that as per the *jamabandi* for the year 1979-80, Ex.P1, the plaintiff was shown to be the sole owner of the land comprised in khasra no.224, which was also admitted by the defendant to the extent that 'plot no.224' was allotted to the plaintiff in lieu of his agricultural land.

It was held by the learned Court that since agricultural land of the parties had been admittedly separated and it was in lieu of agricultural land that a residential house was given, and the plaintiff had also admitted that he had been living separately for the last 30 years, it all showed that the said house was given to him at the time of the family settlement itself on 05.05.1957.

Hence, it was held that it should have been included as a part of the suit property and therefore, the suit was bad, it seeking only a partial

partition.

Yet, in the last line, while deciding issues no.3 & 5, it was held that they were decided in favour of the plaintiff and against the defendant (seemingly erroneously).

14. On issues no. 4 & 6, pertaining to lack of cause of action and non-maintainability of the suit, it was held that in view of the findings on issues no.1, 2, 3 and 5, the suit was actually not maintainable.

It was consequently dismissed.

15. The said judgment and decree having been appealed against, the learned first appellate court also, after noticing the averments in the pleadings and the issues framed, thereafter first noticed the contention of counsel for the appellant-plaintiff to the effect that the parties had been living separately for more than 30 years and that their agricultural land had also been partitioned long ago. However, the contention on behalf of the appellant that the *Haveli*, *Darwaja* and plots no.226 and 227 were still joint properties, was not accepted by that Court also.

It was found that eventually counsel for the appellant had candidly admitted that a family settlement had been arrived at in respect of the suit property vide the document Ex.P4, dated 05.05.1957.

Though it was then contended on behalf of the appellant-plaintiff, that the said settlement was only a proposal. Eventually the argument was that even if it was accepted as an agreement which had been reduced into writing, it was necessary that it be registered under the provisions of the Registration Act, for it to be admissible in evidence.

That contention was however rejected on the ground that Ex.P4 was not a compulsorily registrable document, because it was apparent

therefrom that the parties had orally made their family arrangement before its execution and only thereafter it was reduced to writing and hence it was merely a memorandum.

Inference on an oral family arrangement having already taken place, was also taken by the first appellate Court on seeing that the plaintiff had admitted in the plaint itself that the agricultural land already stood partitioned and though he contended that the rest of the property, i.e. the suit property, 'remained joint', however, it showed that in fact the agreement Ex.P4, was a memorandum that reduced into writing the agreement, for the record or for information.

16. Further, it was held that the parties had unequivocally intimated to each other their desire to sever themselves from the joint property and therefore, with the agricultural land also partitioned, the contention of the appellant that the rest of the property remained joint, was not acceptable.

Hence, citing a judgment of the Supreme Court in **Tek Bahadur Bhujil Vs. Debi Singh Bhujil and others AIR 1966 SC 292**, it was held that such a memorandum does not require compulsory registration.

17. Next, giving the same reasoning as had been given by the learned Sub Judge, it was held that since it was an admitted case of the parties that they had been residing separately for 30 years, with the respondent-defendant residing in the *Haveli*, it could not be accepted that the *Darwaja* (which in common parlance would translate to be a door or a gate), would be a part which was separate from the *Haveli*, in possession of the plaintiff.

It was further noticed by the first appellate Court that the plaintiff, further in his cross-examination, had stated that the defendant had not acted upon the partition made by Amar Singh and therefore Raj Singh son

of Amar Singh had again got the matter decided, thereafter.

Raj Singh was found to have been appointed as an arbitrator by the Director, Consolidation, vide an order dated 26.06.1975, but such appointment was for giving a decision in respect of the *ghers* (plots) only. (This finding is shown to be factually completely erroneous because the said order, Ex.P2, appoints no arbitrator but remands the matter to the Consolidation Officer, with directions).

18. Thereafter, referring to the application filed by defendant Randhir Singh, Ex.P4/1, and the order of the Consolidation Officer thereupon, dated 05.01.1976 (Ex.P3), it was inferred by that Court that it was not only the agricultural land of the parties, but the suit property also, that was partitioned in the year 1957 and that partition had been acted upon and followed in letter and spirit by the parties.

19. Further, referring to the consolidation proceedings, it was found that it was contended before the learned Director, Consolidation, as also before the Consolidation Officer, that plot no.226 be allotted in equal shares. However, the first appellate court went on to hold that that by itself, did not prove non-partition of the aforesaid plot, and that the order was perhaps in the context of keeping the *ghers*/plots intact, as part of the said *ghers* were found to be outside the *lal dora* during the consolidation proceedings and some part of the plots were also allotted to persons other than the plaintiff and the defendant.

It was also recorded by that Court that it was not disputed that the “old *ghers*” mentioned in the agreement Ex.P4, were the same property as khasra nos.226 and 227.

20. Further, it was found by that Court that it had come in evidence

that the plaintiff had constructed his own separate house on plot no.224 with 7000 bricks that had fallen to his share and raising of the said construction, alongwith the partition of bricks, was also admitted by the plaintiff in his cross-examination, as also in paragraph 5 of his replication, the said partition stated to have been made about 27 to 28 years ago as per the plaintiffs' deposition on 05.09.1984 (as PW1).

Thus, that Court concluded that the plaintiff had raised construction of a separate house on plot no.224 in the year 1957-58, which was after the writing of the document, Ex.P4, dated 05.05.1957.

21. Yet further, it was found by the first appellate Court that in paragraph 5 of his replication, the plaintiff had also categorically admitted that even movable property of the parties had been partitioned (including the bricks that he had utilized in the construction of his house).

22. On the aforesaid findings it was concluded that it could not be held that the partition effected in the year 1957 was not acted upon by the parties.

Consequently, the first appeal of the present appellant-plaintiff was dismissed.

23. Before this Court, though no questions of law have been framed in the grounds of appeal on behalf of the appellant, however, Mr. Kabir Sarin, learned counsel appearing for the appellant has essentially argued that the Courts below have reached a perverse finding that the family settlement dated 05.05.1957 had been acted upon, whereas, in reality, it was never acted upon, because if that were the case, then there would be no need to bring in another arbitrator, i.e. Raj Singh son of the original arbitrator who had scribed the agreement dated 05.05.1957 (Amar Singh).

In the opinion of this Court, the three questions that arise in this case, are as follows:-

- (i) Whether the judgments of the Courts below are wholly perverse by having ignored the evidence led that a second arbitrator/person was brought to settle the dispute in the year 1966, because the family settlement, Ex.P4, dated 05.05.1957, was never acted upon, as also because the evidence led with regard to the orders passed by the Consolidation Authorities, Exs. P2 and P3, and the application made to them by the plaintiff and the defendant, Ex.PW4/1, have been wholly erroneously read?
- (ii) Whether or not the partition deed dated 05.05.1957 was required to be registered or not, for it to be admissible in evidence?
- (iii) Whether the learned Courts below have correctly held the suit to be bad/not maintainable because the plaintiff only sought partial partition of the property that devolved upon him and the defendant, from their father?

24. Mr. Kabir Sarin, learned counsel for the appellant, first submitted that admittedly the father of the parties had died before 1957 and the partition deed, Ex.P4, was executed on 05.05.1957, which is not a registered document.

He further submitted that consolidation of agricultural land in the village took place in the year 1965-66, and an arbitrator thereafter appointed in 1966 for final settlement of the share of the parties, who gave an oral award which again was not acted upon.

25. Thereafter, a dispute arose on khasra nos.226 and 227 in the year 1975, with both these plots allotted to one Nihala and his brothers by the Consolidation Authorities, with an application under Section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948,

moved by the respondent-defendant, a copy of which duly exhibited as Ex.P4/1.

Mr. Sarin further submitted that the vide the order of the Director, dated 26.06.1975 (Ex.P4/2), the matter was remanded to the Consolidation Officer, who vide his order dated 05.01.1976 (Ex.P3), allotted plot no.226 to the appellant and defendant in equal shares, as per the agreement reached by them with the aforementioned Nihala etc., in lieu of which those persons were given land in a different rectangle, which would be deductible from the land of the respondent-defendant, who in turn would be given land from two killa numbers, i.e. 151/19/1 and 151/20/1.

26. Thus, Mr. Sarin submitted, after settling the dispute with Nihala etc., qua the partition of land of the parties *inter se* each other, the suit was filed on 21.12.1983, for the partition of plot nos. 226, 227, the *Haveli* and the *Darwaja*.

He next submitted by pointing from paragraph 10 onwards of the judgment of the lower appellate Court that the Court, had simply conjectured to state that the application filed by the parties before the Consolidation Authorities, under Section 42, was only to keep the plots intact. He submitted that even the lower appellate Court itself has used the word “perhaps”, to come a conclusion that the application was only for that purpose.

Learned counsel thereafter referred to the cross-examination of DW1 to submit that he admitted that he had asked for plot no.226 only, and further admitted that from plot no.224 the appellants' own share alone was cut, with nothing contributed by the respondent himself.

Yet further, Mr. Sarin submitted that respondent no.1 also admitted that plot no.226 was divided and not given to him exclusively.

Hence, the argument is that the respondent-defendant having admitted plot nos.226 and 227 were divided equally in 1975, with his application itself saying so, therefore, it is very obvious that the 1957 partition agreement was not acted upon.

27. Learned counsel, lastly, submitted that the order passed by the Consolidation Officer dated 05.01.1976, Ex.P3, had become final between the parties with no challenge thereto and hence, the respondent-defendant cannot wriggle out of it, which fact the learned Courts below wholly lost sight of.

28. In support of his arguments, Mr. Sarin has also relied upon the following judgments:-

(i) **Babita v. Bala Devi & Ors. 2016(2) CCC 336 (P&H).**

On the issue of there being no better evidence than the admission of a party on a disputed question of fact.

(ii) **Tek Bahadur Bhujil v. Debi Singh Bhujil and others AIR 1966 SC 292.**

On what family arrangement is necessary to be registered and what is not.

29. Mr. S. K. Jain, learned counsel for the respondent-defendant, first submitted that the appellant-plaintiff has to stand on his own legs and has to show that the agreement of 1957 was not acted upon. He submitted that the only reason why the Consolidation Authorities had to be approached was because in consolidation proceedings, the aforesaid plots/khasra nos.226 and 227 were allotted to some other persons and therefore, the dispute was not *inter se* the brothers (the plaintiff and defendant) but with such other persons, and was not for the reason of non-implementation of the agreement of 1957.

He further submitted that the order of the Director Consolidation,

Ex.P2, wherein it is noticed that the brothers had sought equal partition of plot no.226 between them, upon it being re-allotted to them, was only because it had been allotted to other persons.

In the said order, it was also noticed by the Director that plot no.227 stood in the revenue record as equally divided between the plaintiff and the defendant, i.e. the applicants before the Director.

He further submitted that any fault in what was stated in the application made by the respondent-defendant before the Consolidation Authorities, would not negate the partition.

30. Mr. Jain next submitted that as has been correctly held by the Courts below, the parties having lived separately for 30 years and the property having been partitioned 8 years after their fathers' death, showed that there was actually no dispute qua the agreement dated 05.05.1957 which is also the reason why no suit was filed right till 1983.

31. Lastly, Mr. Jain, learned counsel for the respondent, submitted that with the plaintiff not including plot/khasra no.224, as part of the suit property for partition thereof, as he had constructed his own house on it, the suit seeking partition was not maintainable in any case.

32. Mr. Kabir Sarin, learned counsel appearing for the appellant-plaintiff, in rebuttal submitted that as regards partial partition, the suit being for both, the residential house comprising the *Haveli* and *Darwaja*, as also khasra nos.226 and 227, it was not a suit seeking partial partition; and as regards plot/khasra no.224, on which the plaintiffs' house stood, it was in his sole ownership, as has been also stated by the learned Sub Judge. Consequently, there was no need to include it as a part of the suit property.

As regards agricultural land, he submitted that in any case it was

not in dispute, that it already stood partitioned by separate proceedings between the parties.

Hence, Mr. Sarin submitted that the suit was very much maintainable and the fact that the applications were filed before the Consolidation Authorities, by both, the plaintiff and the respondent, showed that the deed dated 05.05.1957 had never been acted upon.

33. Having considered the arguments raised on both sides and the judgments of the learned Courts below, the first question that needs to be decided is as to whether the suit was indeed bad for not including the entire property belonging to the father of the parties, of which partition was to have been made upon the death of the father.

The learned Courts below have both held that the suit is actually bad, seeking only partial partition.

34. In the opinion of this Court, the learned Courts below correctly arrived at that conclusion, in view of the fact that admittedly the appellant-plaintiff was living on a house constructed by him on a plot that fell to his share, even as per his contention in the plaint itself, which he claimed was in lieu of agricultural land that fell to his share.

Whether or not that plot was given to him in lieu of such agricultural land given by him, was a matter to be determined by the Court and therefore, correctly, even the plot that the plaintiff was admittedly occupying, upon which he had constructed his house, should have been made part of the suit property, if he sought a fair partition of the entire property.

Had that plot (plot no.224) been included as part of the suit property, evidence could have been led by both sides as to whether it was indeed given to the plaintiff in lieu of agricultural land that he gave up for the

plot, or it was a plot given to him, alongwith Rs.1000/bricks, to enable him to construct his house upon it, in lieu of the *Haveli* given to the defendant, as per the family settlement dated 05.05.1957 (Ex.P4).

Thus, that not having been made a part of the suit property, I fully agree with the learned Courts below that the suit was indeed bad for seeking only a partial partition of the property, instead of a complete partition of the property held jointly by them.

Hence, as regards 3rd question of law framed hereinabove, it is held that the Courts below made no error in holding that the suit of the appellant-plaintiff was bad for seeking only partial partition, without including the entire property that would devolve upon the parties from their father, the plaintiff having excluded plot no.224 from the ambit of the suit.

35. Coming then to the 2nd question of law, as to whether the family settlement Ex.P4, was admissible in evidence or not, it not having been registered.

In this context, it is to be noticed first that this question was never framed as an issue in the suit itself by the learned Sub Judge, but it is seen that while discussing issues no.1 and 2, an argument was noticed by that Court, raised on behalf of the plaintiff, to that effect that the document in any case could not be relied upon as having settled the rights of the parties, it not being a registered document in terms of Section 17 of the Registration Act.

As already noticed, that contention was rejected by the learned Sub Judge, holding that the document was only a memorandum of settlement of an agreement reached between the parties and as such, required no registration in terms of the judgment of the Madras High Court in **Nadiammai**

Achi and another v. Mariappa Thevar AIR 1951 Madras 625.

36. On this issue, the judgment cited by Mr. Sarin, learned counsel for the appellant-plaintiff in *Bhujils'* case (supra) needs to be first referred to, in which it was held as follows:-

“12. Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.”

(Law Finder DocId # 110080)

In that case, it was held by their Lordships that the statement recorded by three brothers who were parties to *lis* there, simply stating that they had agreed to the statement made by them in the presence of the *Panch*, which had been signed by them and kept as documentary proof, would not require registration, as it was simply a memorandum of acknowledgement/settlement.

37. Subsequently, in **Kale v. Deputy Director Consolidation (1976) 3 SCC 119**, it was held as follows:-

“10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

“(1) The family settlement must be a bona fide one so

as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a persons and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the

settlement.”

38. In the present case, undoubtedly the document Ex.P4 is settlement of rights between the parties on the intervention of an arbitrator/mediator (Amar Singh) who has recorded that it was settled that the constructed house was agreed to be given to the defendant and a plot (*ghair*) was agreed to be given to the plaintiff (the appellant herein), alongwith Rs.1000/- (contended to be for the purpose of constructing the house thereupon).

39. However, before going on to finally determine as to whether the said document was simply a memorandum requiring no registration, or was a document by itself creating rights for the parties, which therefore required compulsory registration, the relevant provisions of Section 17 of the Registration Act, 1908, i.e. Section 17 (1) (b) and (c), and (2) (v), are reproduced hereinunder:-

“17. Documents of which registration is compulsory.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

XXXXXX

XXXXX

XXXXX

XXXXX

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

XXXXX

XXXXX

XXXXX

XXXXXX

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

XXXXX XXXXX XXXXX XXXXX

(v) [any document other than the documents specified in sub-section (1A)]
not itself creating, declaring, assigning, limiting or extinguishing any
right, title or interest of the value of one hundred rupees and upwards
to or in immovable property, but merely creating a right to obtain
another document which will, when executed, create, declare, assign,
limit or extinguish any such right, title or interest; or”

XXXXX XXXXX XXXXX XXXXX

40. The question is therefore as to whether the aforesaid document, Ex.P4, would fall within the purview of Section 17 (1) (b) or clause (v) of sub-section 2 of Section 17.

It needs to be noticed that the execution of the document itself was not denied by either party, though with the plaintiff contending that the said agreement was not acted upon and the defendant contending that actually it had been acted upon, with the learned Courts below agreeing with the latter.

Undoubtedly, it is a document that does settle, (if the settlement is accepted), the rights between the two parties, i.e. brothers, in property jointly held by them, presumably having devolved upon them from their father, with no issue specifically raised on that question by either party.

However, seeing that even in *Bhujils'* case (supra), the document in question there was not eventually held to be one that required registration, on the ground that it was simply a statement made in the presence of a *Panch*, between three brothers, recorded by them and kept as a documentary proof, in my opinion, an agreement therefore reached in the present case also, though through an arbitrator/mediator between brothers, agreeing to division of property between them as was jointly held, reduced to writing thereafter, would also not be required to be compulsorily registered, in terms of Section

17 (1) (b) and (c), but would in fact fall with the ambit of the exception carved out in sub-clause (v) of sub-section (2).

This would also flow from the fact that in *Kales'* case also (supra), in clause (iv) of the conclusion drawn by their Lordships, a distinction has been drawn between a document containing terms and recitals of a family arrangement made under the document, and a mere memorandum prepared after the arrangement had already been made.

Undoubtedly, the line of distinction in the two situations would be very thin, and in the present case it could also be interpreted that the division of the property having been settled through an arbitrator/mediator, the extremely short document, Ex.P4, created titular rights to the joint property by itself, (i.e. by the document itself).

Yet, seeing the document, of about a half page, as pointed out from the record, simply reducing to writing what even by that document is stated to be the terms of settlement reached between the parties, I would agree with the learned Courts below, that it was a merely memorandum that reduced into writing what had already been agreed upon orally in the presence of Amar Singh, a family friend/relative, just as in *Bhujils'* case, it was a settlement reduced into writing before a village *Panch*.

Therefore, the Courts below did not err in holding that it was not a compulsorily registrable document in terms of Section 17 of the Indian Registration Act, 1908.

41. Consequently, the second question of law framed in the present appeal, is answered to the above effect.

42. Coming then to the first question of law framed in paragraph 23 of this judgment, i.e. as to whether the judgments of the Courts below are

wholly perverse, having ignored the evidence to the effect that another person was brought in to settle the dispute on the property again in the year 1966, because the family settlement dated 05.05.1957 (Ex.P4) was never acted upon; and even as per the order of the Director Consolidation, Ex.P2, the parties had agreed that plots no.226 and 227 continued to remain jointly held by them to the extent of a half share each, in each plot.

In this regard, even though, in fact, the plaintiff had not even stated in his plaint that a second family settlement was entered into in 1966, however, he eventually did not deny the same, because while cross-examining the defendant, he was found by the learned Sub Judge, to have asked him as to whether the second arrangement with Raj Singh as an intervenor, was arrived at because the first arrangement could not be implemented.

That obviously suggested that there was a dispute existing even on 10.02.1966, i.e. about 8 years and 9 months after the settlement dated 05.05.1957 was arrived at.

Even presuming that settlement again reiterated what was agreed to in the earlier settlement, though no detailed arguments have been raised by learned counsel on either side with regard to what is stated in the second settlement (Ex.DW2/1), yet, the very fact that even in the defendants' own application before the Consolidation Authority, Ex.P4/1, as pointed to by Mr. Sarin, he admitted that plot no.226 was owned by him and his brother, i.e. the plaintiff Chattar Singh, and the Director Consolidation, vide his order Ex.P2, is shown to have recorded that both the plots even in the revenue records stand in the name of both the brothers, i.e. the plaintiff and the defendant, to the extent of a half share each, shows that the agreement dated 05.05.1957 was not adhered to fully, with not even mutation entries got entered in the

individual names of the brothers, pursuant to the agreement/ settlement.

43. Further, the Courts below (also as a conjecture), observed that the said plots were found to be lying outside the *lal dora* (residential boundary of the village), and that is why the matter came before the Consolidation Authorities again.

Firstly of course, that observation by those Courts is not wholly accurate; because as is obvious from a plain reading of the aforesaid applications, referred to by both learned counsel, the necessity for such applications arose because in consolidation proceedings, these jointly held plots were allotted to a 3rd party, i.e. Nihala etc., which both the brothers opposed, even agreeing to give up agricultural land in favour of Nihala and party, in order to retain the aforesaid two plots with themselves, to the extent of a half share each, in each plot.

Thus, though no doubt, as Mr. Jain, learned counsel for the respondent-defendant, rightly stated, that the applications were on account of a dispute with both the brothers in the present *lis* on the one side and Nihala etc. on the other, that does not alter the fact that the brothers continued to hold both the plots jointly and even applied to the Consolidation Authorities to retain them jointly to the extent of a half share each.

44. Consequently, in the opinion of this Court, it becomes very obvious that the Courts below wholly misread the evidence on the face of it, as regards the documents Exs.P2, P3 (orders of the Consolidation Authorities) and P4/1 (application of the respondent-defendant before the Director, Consolidation), and therefore, it has to be held that the family settlement dated 05.05.1957 was not fully acted upon, even till the orders were passed by the Consolidation Authorities in 1975-76.

45. The observation of the Courts below, to the effect that no suit having been brought for 30 years after the agreement dated 05.05.1957 (actually 26 years), showed that the agreement was acted upon, though is otherwise not incorrect to the extent that no suit was actually brought by the plaintiff for 26 years, till 1983, however, they overlooked what has been discussed hereinabove, i.e. that a second arbitrator/mediator to settle the dispute was brought in 1966, obviously because despite the settlement, part of the property continued to remain unpartitioned, as seen from the applications of the parties before the Consolidation Authorities (Ex.P4/1), as also from the orders of those authorities, referred to hereinabove.

Hence, non-filing of the suit for 26 years after the agreement Ex.P4, did not, in the opinion of this Court, prove that the agreement was actually acted upon in toto, though definitely partly acted upon, with the appellant-plaintiff occupying and constructing upon the plot given to him by the said agreement, (stated to be plot/khasra no.224), but with the other two plots continuing to be jointly held.

Hence, the finding on issues no.1 and 2, specifically on issue no.2, are wholly perverse in my opinion, being completely against the evidence on record and therefore, are set aside.

46. Consequently, the first question of law framed in this appeal is answered to that effect, in favour of the appellant.

47. Even having held so, as regards the outcome of this appeal, it is still to be dismissed, in view of the fact that this Court has already held, while answering the 3rd question of law, that the suit of the appellant-plaintiff was bad for seeking only partial partition of the jointly held property, inasmuch as, he obviously partly acted upon the agreement dated 05.05.1957 and occupied

what came to be known as plot/khasra no.224 and constructed a house upon it, but with plots no.226 and 227 not having been actually partitioned, even as per the applications made before the Consolidation Authorities. Therefore, if the plaintiff was desirous of getting any of those plots, as also getting a part of the *Haveli/Darwaja* partitioned, with possession thereafter to be given to him, then it was necessary for him to include plot no.224 as part of the suit property, for the learned trial Court to determine as to what would fall to each party's share, with that plot already occupied by the plaintiff. Hence, he needed to prove his contention, as made in the plaint, that the said plot was given to him in lieu of agricultural land earlier given up by him. As already observed by this Court while discussing that issue, with no evidence led whatsoever to that effect, but undoubtedly that plot being part of the agreement dated 05.05.1957, the respondent-defendant had obviously no chance to prove that the said plot was given not in lieu of any agricultural land, but in lieu of the constructed house (*Haveli* and *Darwaja*), given to him (respondent-defendant Randhir Singh), as per the aforesaid settlement.

The finding of the learned courts below on issue no.3 is therefore, maintained.

48. That being so, this appeal is dismissed, maintaining the findings of the learned Courts below on issues no.3, 5 and 6, but with the findings of those Courts on issues no.1 and 2 reversed.

The finding on issue no.4, that the plaintiff has no cause of action, is also reversed, cause of action definitely being there with him, (but with the appeal still dismissed, essentially on account of the findings on issues no.3 and 5 having been maintained by this Court).

Parties are left to bear their own costs.

A decree-sheet be prepared accordingly.

(AMOL RATTAN SINGH)
JUDGE

November 7, 2017.
Davinder Kumar/Dinesh

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No