

**In the High Court of Punjab and Haryana at Chandigarh**

**Regular Second Appeal No. 1593 of 2000 (O&M)**  
**Date of Decision: 01.6.2017**

Balbir Singh (deceased) through LRs.

.....Appellant

Versus

Subedar Jit Singh and others

.....Respondents

**CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY**

Present: Mr. H.R.Nohria, Advocate  
for the appellant.

Mr. Subhash Aggarwal, Advocate  
for respondent No. 1.

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**ANITA CHAUDHRY, J**

This is the defendant's appeal aggrieved by the judgments passed by both the Courts below.

The dispute is between the co-sharers. Plaintiff Subedar Jit Singh, defendant No. 1 Balbir Singh and defendant No. 2 Bachan Singh are real brothers. They had inherited property from their father Rama alias Ram Singh. Balbir Singh, defendant No. 1 approached the Assistant Collector, Ist Grade seeking partition of land. An *ex parte* order for partition was passed on 24.11.1988. Plaintiff Jit Singh filed an application for setting aside the *ex parte* order which was dismissed. The order of the Assistant Collector, Ist Grade was challenged in appeal before the Collector. It was dismissed. The sole ground raised before the revenue authorities was that the plaintiff had not been served and was in the Army and proclamation was illegally ordered. After having failed before the revenue authorities, the plaintiff

and he was in the Army and taking the advantage of his absence from the village, Balbir Singh had approached the Assistant Collector. It was also pleaded that the petition was bad for partial partition as the transferees of part of the joint land were not made parties. It was pleaded that the dwelling houses existed over khasra No. 346/2 for the last 30 years and the Assistant Collector Ist Grade did not have the jurisdiction. It was claimed that he had been given poor quality of agricultural land. It was pleaded that Balbir Singh always resided with Rama and this fact was not disclosed in the partition application.

Defendant No. 1 took the plea that the civil Court did not have the jurisdiction to decide the controversy and the order of partition had been acted upon and the possession had been transferred. It was pleaded that a suit for injunction had been filed against the plaintiff restraining him from interfering in his possession which had been decreed. It was pleaded that defendants No. 3 and 4 and Harnam Kaur owned plots and had sold their share to the plaintiff and defendants No. 1 and 2. It was pleaded that the plaintiff had also sold his share out of the field number allotted to him. It was pleaded that service had been effected according to law.

Defendants No. 8 to 13 took the plea that they were *bona fide* purchasers for consideration and the suit was hit by the principle of *res judicata* and the Court had no jurisdiction.

On the pleadings of the parties following issues were framed by the trial Court:-

- “1. Whether the plaintiff is entitled to declaration prayed for ? *OPP*
2. Whether the plaintiff is entitled to partition of suit land as prayed for ? *OPP*

3. *Whether plaintiff is entitled to the injunction prayed for ? OPP*
4. *Whether this Court has no jurisdiction to try this suit? OPD*
5. *Whether this suit is barred by limitation ? OPD*
6. *Relief.”*

The trial Court noticed that subsequent to the partition mutation had been entered but it did not make any difference as possession was only delivered to Balbir Singh and other properties were lying vacant. The partition order was implemented in piecemeal manner which was not permissible. The order passed by the Assistant Collector, Ist Grade was held to be illegal as Jit Singh had not been served. The lower Court noticed the provisions of Section 20 of the Punjab Land Revenue Act and held that it was not incumbent upon the Assistant Collector to send summons to the plaintiff through his Commanding Officer as contemplated under Section 20 CPC, and went on to observe that the provisions of Section 20 of the Punjab Land Revenue Act had not been apparently followed and the order Ex. P3 was silent with respect to the mode adopted to secure the presence of Jit Singh. It was held that the plaintiff had not been legally served and the *ex parte* order was wrong and illegal. With respect to the existence of the houses, para 11 of the judgment reads as under:-

*“Ex. P3 further discloses that khasra number 346/2 is part of properties purportedly to be partitioned under the orders of AC. It has been the case of plaintiff, throughout, that houses do stand over this khasra number and although Balbir Singh tried to meet existence of constructed areas upon suit properties by terming them as post-partition constructions yet the fact remains that constructions do exist and he has not led any evidence, but for his bare and bald statement to substantiate this plea of his.”*

It was held that the Assistant Collector wrongly treated the houses as part of the agricultural land and ordered partition of the houses which were put in the proposed pool and allotted to the other side. Relying upon ***Kushal Singh versus Gurdip Singh reported 1987 PLJ 369*** and ***Rameshwar Nath versus Jageshwar Dass AIR 1953 Punjab and Haryana 250*** it was held that the lands for which the construction had been raised were not partible. The suit was decreed. The order of the Assistant Collector was set aside and the plaintiff was declared owner to the extent of 1/3<sup>rd</sup> share of the house and preliminary decree for partition was passed.

Aggrieved by the judgment, an appeal was preferred which was dismissed.

The present appeal was filed in the year 2000. The respondents moved an application for placing on record some documents and later on moved an application on 26.9.2016 seeking permission to lead additional evidence to place on record documents Ex. R-1 to Ex. R-5 by way of additional evidence.

I have heard both the sides.

Counsel for the appellant had submitted that the Assistant Collector is the only Authority which can partition agricultural land and when the properties are assessed to land revenue even if it is in the shape of plot the authority rests with him and not the civil Court. It was urged that an application for partition of land had been filed and as required under the Punjab Land Revenue Act, summons and registered covers were sent and lastly munadi was effected. It was urged that it was not the case of the plaintiff that his family was not residing there and the plaintiff chose to stay away from the proceedings and *ex parte* order was passed and partition was

effected and the plaintiff filed an application for setting aside the *ex parte* order which was rejected and the plaintiff did not choose to lead any evidence here and the only evidence is his own statement and the draftsman who proved the site plan Ex. P1. It was urged that no plea was taken before the Assistant Collector or before the Collector that the property was part of the *abadi* or had been constructed. It was urged that mutation was effected with respect to partition and the plaintiff has admitted in his statement that he had sold part of the property which had fallen to his share, meaning thereby that he accepted the partition but later filed the suit raising a new plea. It was urged that the plaintiff had asserted that the houses existed for 30 years, then he could have led evidence to show when electricity connection was taken or when the construction was raised and both the Courts below have assumed that the dwelling houses existed and have wrongly set aside the order passed by the Assistant Collector. It was urged that the plaintiff had also asserted that no munadi had been effected but he has not summoned the record nor examined any witness as it would have gone against him. It was urged that two separate suits were filed and inadvertently they had tendered the documents relating to service in the other case, therefore that record is not available in this case but it was the duty of the plaintiff to show that he had not been served. It was urged that the Division Bench in ***Fauja Singh versus Pritam Singh 1993 (2) PLR 335*** had held that if the suit land at the time of partition is entered in the revenue papers being assessed to land revenue then it is only the revenue officer who can partition the land and the order of partition would be valid. It was urged that it was for the plaintiff to show that the land was not being used for agricultural purpose but was being used as *abadi* land and there is no such

evidence. Reliance was placed upon **Khushal Singh and others versus Gurdip Singh and others 1987 PLJ 369**, **Kalyan Dass versus Som Nath and others 1987 PLJ 4**, **Bakhtawar Singh and others versus The State of Punjab and others 1987 PLJ 7**, **Jagga Singh versus Surjeet Singh and others 2003(3) RCR (Civil) 52**, **Surjit Singh versus Financial Commissioner Appeals-II, Punjab and others 2012(5) RCR (Civil) 683** and **Lal Chand versus Sunil Kumar and others 2014(2) L.A.R. 606**.

On the other hand the submission on behalf of the respondents was that any decree which is passed without jurisdiction is a nullity and a defect of jurisdiction whether pecuniary or territorial strikes at the authority of the Court to pass the decree and the defect cannot be cured even by consent of the parties. He supported the judgment of both the Courts below. It was urged that since the houses had been constructed the land had lost its character as agricultural land and could not be partitioned by revenue Court and therefore, the plaintiff had approached the Court for partition of those plots and for setting aside the orders passed by the revenue officers. It was urged that the respondent (plaintiff) moved an application for additional evidence and they wanted to place on record jamabandi for the year 2011-2012 where the disputed khasra number is shown as *abadi* and the site plan Annexure R-2 and the photographs would show the construction and the copy of the passbook issued by the revenue department by way of additional evidence and these documents were necessary for determination of the dispute. It was urged that the disputed plot khasra No. 346/1/2 is entered in the passbook issued by the revenue department and is shown within the *phirni*. Reliance was placed upon '**Kiran Singh and others versus Chaman Paswan and others 1954 AIR (SC) 340**', '**Surjit Singh versus Financial**

***Commissioner Appeals 2012(5) RCR (Civil) 683'.***

On the other hand the submission on behalf of the appellant was that the additional evidence cannot be allowed as the position as it existed in 1988 was relevant and not the position which now existed in 2011 or 2012 or later. It was urged that the photographs cannot speak for itself and they do not relate to the property in dispute. It was urged that additional evidence cannot be let in to fill up the lacuna nor it is required for the Court to pass a judgment and the respondents have been unable to prove due diligence. It was urged that a completely new case is being presented before the Court which was never the case before the revenue authority.

It is first necessary to deal with the application filed under Order 41 Rule 27 CPC. Order 41 Rule 27 CPC reads as under:-

***“27. Production of additional evidence in Appellate Court.-***

*(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—*

*(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*

*(aa) the party seeking to produce 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, or*

*(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.*

*(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission.”*

The general principle is that the Appellate Court should not travel outside the record of the lower Court and cannot take any evidence in appeal however an exception is carved in Order 41 Rule 27 CPC which enables the Appellate Court to take additional evidence but in exceptional circumstances the Appellate Court may permit additional evidence only and only when the conditions laid in the rule above are found to exist. The parties are not entitled as of right to the admission of such evidence. The discretion in the rule is to be used sparingly. It is a judicial discretion circumscribed by the limitation specified in the rule itself. The Apex Court in '**Union of India versus Ibrahim Uddin (SC) 2012(8) SCC 148**', had exhaustively dealt with the legal proposition. Para 26, 27 and 28 read as under:-

*“26. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: **Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798**).*

*27. Under Order XLI, Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh*

*evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].*

*28. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101). ”*

The provisions of Order 41 Rule 27 CPC only permit the additional evidence where the Court from whose decree the appeal is preferred has refused to admit evidence which is not the case here. The provision of Rule 1 (aa) is also not applicable. The respondent seeks to produce additional evidence under clause 1(b). The words “for any other substantial cause” must be read with the word “required” used in the beginning of the sentence so that it is only where, for any other substantial cause the Appellate Court requires additional evidence that this rule will apply. Additional evidence cannot be permitted to a party who is guilty of remissness. The plaintiff in this case had approached the Court with a plea that he had not been properly served. He had to produce evidence to

the property was part of the abadi but failed to lead any evidence. Now in this appeal he seeks to produce some documents which relate to the period 2011-2012 which are not relevant and are not required to dispose of the case. The position as it existed in 1988 i.e. the time when the application for partition was moved, was relevant. These documents are not required for pronouncing the judgment. Therefore the application cannot be allowed and is dismissed.

It is necessary now to notice the provisions of Punjab Land Revenue Act.

Section 20 of Punjab Land Revenue Act as it existed in 1989 reads as under:-

***Mode of service of summons:*** -(1) *A summons issued by a Revenue-officer shall, if practicable, be served (a) personally on the person to whom it is addressed, or, failing him (b) his recognized agent or (c) an adult male member of his family usually residing with him.*

(2) *If service cannot be so made, or if acceptance of service so made is refused, the summons may be served by posting a copy thereof at the usual or last known place of residence of the person to whom it is addressed, or if that person does not reside in the district in which the summons relates has reference to land in that district, then by posting a copy of the summons on some conspicuous place in or near the estate wherein the land is situate.*

(3) *If the summons relates to a case in which persons having the same interest are so numerous that personal service on all of them is not reasonably practicable, it may, if the Revenue-officer so directs, be served by delivery of a copy thereof to such of those persons as the Revenue-officer nominates in this behalf and by proclamation of the contents thereof for the information of the other persons interested.*

*(4) A summons may, if the Revenue-officer so directs, be served on the person named therein, either in addition to, or in substitution for, any other mode of service, by forwarding the summons by post in a letter addressed to the person and registered under Part III of the Indian Post Office Act, 1866.*

*(5) When a summons is so forwarded in a letter, and it is proved that the letter was properly addressed and duly posted and registered, the Revenue-officer may presume that the summons was served at the time when the letter would be delivered in the ordinary course of post.”*

Section 20 of the Punjab Land Revenue Act provides the mode of service of summons. The case of the plaintiff is that since he was in the Army then the summons should have been sent to his Commanding Officer. It was also his case before the Civil Court that a report had been received that he was in the Army then the summons should have been sent as provided in the Civil Procedure Code. It is the provision of Punjab Revenue Act which would be applicable and not the provisions contained in Section 20 CPC. There was no requirement to send notice to the Commanding Officer. Interesting, though the plaintiff claims that he was still in the Army. He did not give his official address in the plaint. It was the plaintiff's case that the order of proclamation was not passed in accordance with law. The onus to prove that service had not been effected was upon him. It was for the plaintiff to prove in the affirmative and summon the record and show that the procedure prescribed in the Act was not followed. The only evidence from the side of the plaintiff was his solitary statement. The plaintiff did make a statement indicating the year of his retirement but did not place on record any document to show that he had actually retired sometime in 1992. It is a case where no evidence was led by the plaintiff. A

the plaintiff as it noticed that subsequent to the partition of the property, mutation was effected and the property which had been fallen to the share of the plaintiff had been sold by him on 14.6.1989 meaning thereby that he had knowledge of the partition and accepted it but was not content since his property had been allotted to respondent No. 1 and that a larger share was given to him. The plaintiff has accepted that he had sold the land after the partition therefore he was aware of the proceedings.

The jamabandis of the relevant year show that the property was assessed to land revenue. One of the co-sharers had approached the revenue officer for separate possession. Section 12 of the Punjab Land Revenue Act, 1887 places restrictions and limitations on partition. Before that it is necessary to first notice the definition of estate as defined in Section 3 of the Act which reads as under:-

*"Estate" has been defined in Section 3 of the Punjab Land Revenue Act, 1887 (hereinafter called the Act), which reads as under:-*

*"(1) "estate" means any area --*

- (a) for which a separate record-of-right has been made ; or*
- (b) which has been separately assessed to land revenue, or would have been so assessed if the land-revenue had not been released, compounded for or redeemed ; or*
- (c) which the State Government may, by general rule or special order, declare to be an estate ;"*

*9. In Section 112 of the Act restrictions and limitations have been placed on partition, Section 112 reads as under :-*

*"Notwithstanding anything in the last foregoing section'--*

- (2) partition of any of the following properties, namely ;*
- (c) any land which is occupied as the site of a town or village and is assessed to land revenue ; may be refused if, in the opinion of the revenue officer, the partition of such property Is likely to cause inconvenience to the co-sharers,*

*or other persons directly or indirectly interested therein, or to diminish, the utility thereof, to those persons ;*

*10. The land, which is part of an estate, cannot be partitioned by the Civil Court in view of Section 158 of the Act, which reads as under :--*

*"Except as otherwise provided by this Act-*

*(J) a Civil Court shall not have jurisdiction in any matter which the State Government or a Revenue-officer is empowered by this Act to dispose or to take cognizance of the matter in which the State Government or any Revenue-Officer exercises any powers vested in particular-(2) a Civil Court shall not exercise jurisdiction over any of the following matters, namely :--*

*(xvii) any claim for partition of an estate, holding or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought ;"*

In *Fauja Singh's* case (supra) the Division Bench was considering the question as to whether the land which is entered in the revenue papers and assessed to land revenue can be partitioned by the revenue officer or by the Civil Court and it was held as under:-

*"12. No doubt, if a particular property is a abadi land and does not fall under the definition of land, the revenue authorities have no jurisdiction to partition the same but in this case, there is no evidence to prove that at the time the land in dispute was ordered to be partitioned by the Revenue Officer, it was abadi land and was not agricultural land The order of partition was passed by the Revenue Officer on 22-9-1970, Exhibit Dll. The suit land at that time was entered in the revenue papers and it was assessed to land revenue. So, apparently the Revenue Officer, who partitioned the land, had the jurisdiction to partition the same and as such, the order of partition is valid. Before this order could be held to be invalid, the plaintiff, we think, was required to produce evidence which*

*could show that at the time the order of partition was passed, the suit land was not being used for agricultural purposes, but was being used as abadi land. There is, however, no evidence in this behalf nor any such evidence was referred to by the learned counsel for the appellant. Learned counsel for the appellant-plaintiff has simply tried to press into service the written statement filed by defendant No. 1. No doubt, defendant No. 1 in his written statement alleged that the installations and structures on the suit land raised by defendant No. 1 were existing for the last 20 years, but this averment made by defendant No. 1 was not binding on defendant No. 2 who had raised the plea that the suit land had already been partitioned. So, qua defendant No. 2, the plaintiff cannot take advantage of any averment made in the written statement filed by defendant No. 1. The plaintiff was required to produce some evidence which could show that at the time the suit land was ordered to be partitioned, it was no more an agricultural land, but was being used as abadi land. There is, however, no such evidence on the record. That being so it is difficult to hold, simply on the basis of the averments made in the written statement filed by defendant No. 1, that the suit land at the time it was ordered to be partitioned by the revenue authorities, was being used as abadi land. Therefore, the order of partition passed by the Revenue Officer cannot be held to be illegal or invalid.”*

In the case in hand we have a similar situation where the plaintiff claims for the first time in the civil suit that the land which was partitioned was part of the *abadi* and there were houses constructed on it and the land had lost his character but he failed to lead any evidence or examine any person from the village who could support his case. It is only when the agricultural land loses its nature by the hands of the parties and it is that land which cannot be partitioned by the Revenue Court as held in the

case of *Surjit Singh versus Financial Commissioner Appeals-II, Punjab*

(supra).

The main submission of the respondents here was on the documents which they wanted to introduce by way of additional evidence to show that the area was fully built and the land had lost its character as agriculture land but as noticed above it is not the position which exists now which is relevant. The position as it existed when one of the co-sharer had approached the Revenue Court for partition was relevant. The jamabandis show that the land at that time was entered in the revenue papers and it was being assessed to land revenue and therefore it was only the revenue officer who could partition the land. The plaintiff had not raise the plea before the Assistant Collector or before the Collector in appeal that some part of the land was part of the *abadi* or had been constructed. He had approached the Assistant Collector again on the ground that he had not been served and the order had been passed *ex parte* for proper service. The plaintiff had failed to summon the record or show that he had not been served.

It has been held by the Supreme Court in ***J & K vs. Hindustan Forest Company, 2006 (12) SCC 198***, that the onus is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

The Courts below have illegally and erroneously failed not to cast this burden on the plaintiff/respondent No.1 by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse.

It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the

case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that. This basic principle, seems to have been missed not only by the trial Court in this case but by the first Appellate Court as well.

In the absence of any evidence from the plaintiff's side it is difficult to uphold the findings. The property was assessed to land revenue. The Revenue Officer had the jurisdiction to partition the land and the Civil Court did not have the jurisdiction and could not have entertained the suit. The judgments and decree passed by both the Courts below are set aside.

The appeal is allowed. The suit is dismissed. Decree sheet be prepared.

Summoned record be sent back.

**(ANITA CHAUDHRY)**  
**JUDGE**

**June 01, 2017**  
Gurpreet

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|----------------------------------|----------|------------|
| <b>Whether speaking/reasoned</b> | <b>:</b> | <b>Yes</b> |
| <b>Whether reportable</b>        | <b>:</b> | <b>Yes</b> |