

In the High Court of Punjab and Haryana at Chandigarh

Regular Second Appeal No. 1655 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.

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. Defendants No. 3 to 5 are said to have purchased property from Rama. It is not known when the purchase was made. Whether it was a share from disputed khasra number or different khasra number?

Balbir Singh, defendant No. 1 approached the Assistant Collector, Ist Grade seeking partition of the joint 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.

that the plaintiff had not been served and he was in the Army and proclamation was illegally ordered. His appeal was dismissed. The plaintiff filed a suit in 1991 pleading that the order was passed behind his back and he was in the Army and taking advantage of his absence, Balbir Singh 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 house existed over khasra No. 640 and 779/1 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 had no jurisdiction to decide the controversy and the order of partition had been acted upon and mutation was entered 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 the plaintiff had also sold land which had fallen to his share i.e. allotted to him. It was pleaded that service had been effected in the partition proceedings according to law.

Defendants No. 2 and 3 were proceeded *ex parte*. The suit as against defendant No. 4 was dismissed under Order 9 Rule 2 CPC. No one appeared on behalf of respondent No. 5 after 10.6.1992.

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

“1. Whether the impugned order dated 24.11.1988 confirmed as it is by the order of Collector dated 4th

- March 1991 is liable to be set aside on the grounds mentioned in the plaint ? OPP*
2. *If issue No. 1 is proved, whether the plaintiff is entitled for declaration as prayed ? OPP*
3. *Whether the plaintiff is entitled to partition of his share in the house described in the cause title of the plaint ? OPP*
4. *Whether this Court has no jurisdiction to try this suit? OPD*
5. *Whether this plaintiff is entitled to injunction as prayed for? OPD*
6. *Relief."*

The lower Court held the impugned order to be illegal as Jit Singh had not been served. The lower Court though noticed the provisions of Section 20 of the Punjab Land Revenue Act but 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. It went on to observe that the provisions of Section 20 of the Punjab Land Revenue Act had not been apparently followed. How these observations were made are difficult to comprehend. It noted that 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 12 of the judgment reads as under:-

"Assistant Collector while proceeding to pass impugned order also ventured into prohibited areas and thus transgressed his jurisdiction and assumed into himself the jurisdiction which did not vest in him in terms of Punjab Land Revenue Act. It is Section 111 of Punjab Land Revenue Act which empowers an Assistant Collector to try and decide partition matter between co-owners but all that he can partition is joint holdings which

are assessed to Land Revenue. Those parts of agricultural lands which have constructions raised thereupon, more especially in the shape of residential houses, cease to be agricultural lands assessed to land revenue and thus are beyond the purview of Assistant Collector. In the instant case, Assistant Collector overlooked this aspect and went ahead to treat houses also as part of agricultural lands assessed to land revenue and ordered partition in such a manner that house constructed and inhabited by one party has been put in the proposed pool of another party. It is clearly an error on his part of such a magnitude that cannot be overlooked by this Court. In Kalyan Dass Vs. Som Nath reported at 1987 PLJ 4, Khushal Singh versus Gurdip Singh reported at 1987 PLC 369 and Rameshwar Nath versus Jageshwar Dass AIR 1953 PB 250 it has been that lands which have been built upon and have houses and factories are not covered by the estate assessed to payment of revenue to the government. Once part of the properties put to partition by the AC I herein is found to be beyond the definition of 'estate', his order is found to be illegal and unsustainable.”

Aggrieved by the judgment, an appeal was preferred which was also 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 dated 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 vests in 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 the plaintiff chose to stay away from the proceedings and *ex parte* order was passed but was visiting the village on long leave. It was urged that and the plaintiff filed an application for setting aside the *ex parte* order and his application was rejected and the plaintiff did not choose to lead any evidence here and the only evidence is his own statement and that of the draftsman who proved 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 ceased to be agricultural land. It was urged that mutation was entered in the revenue record and the plaintiff has admitted in his statement that he had sold 8 kanals of land which had fallen to his share and he accepted the partition but later filed the suit raising a new plea altogether. It was urged that the plaintiff had asserted that the houses existed for 30 years, but did not chose to lead 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 they had tendered the zimni orders to show how the case proceeded and Ex. D8 to Ex. D14 are the orders which show that firstly summons then registered cover and lastly munadi was effected. 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 passed without jurisdiction is a nullity and a defect of jurisdiction whether pecuniary or territorial strikes at the authority of the Court to pass a 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 Civil Court seeking partition of those plots. It was urged that the respondent (plaintiff) had 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 and these documents were necessary for determination of the

dispute. It was urged that the plot is entered in the passbook issued by the revenue department showing khasra numbers 640 and 779/1 as part of *abadi deh gair mumkin* plot. 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 existed in 2011 or 2012 or later. It was urged that the photographs 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.

In the first instance 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 the 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 preposition. 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 and that the property was constructed. He had to produce evidence to support his pleadings. He had taken a new plea here but failed to lead any evidence. Now in this second 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.

It has been held by the Supreme Court in the case of *State of J & K vs. Hindustan Forest Company, 2006 (12) SCC 198*, wherein it was held 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.

The defendants had placed on record copies of the zimni orders pertaining to this case. A perusal of the orders show that summons were initially sent and Jeet Singh was not served and there was a reference from the side of the applicant that Jeet Singh was a Military Man and summons be sent through registered envelope and the case was adjourned twice for furnishing of registered envelope. The subsequent orders show that registered envelopes were sent but they were not received back and a note was given that service could not be effected through the normal process and summons be served through beat of drums in village and thereafter munadi was effected and Jeet Singh was proceeded *ex parte*. Plaintiff's brother Bachan Singh was initially proceeded *ex parte* but he appeared on 8.4.1988 and joined the proceedings. The plaintiff had not led evidence to show that his family was residing with him at the place of posting nor he had been able to prove that he was still in service or on leave when he was proceeded *ex parte*. He had intentionally kept back information from the Court with a purpose as it would have exposed him and adverse inference should be drawn against him.

Though, it is not disputed that the plaintiff was in the Army but it was to be shown when he retired and whether he was on duty or on leave during the relevant period. There is no report available to show that any report was received that the plaintiff was in the Army. The plaintiff did make a statement indicating the year of his retirement and did not place on record any document to show when he had actually retired. It is a case where no evidence was led by the plaintiff. A perusal of the order passed by the Collector in appeal falsifies the claim of the plaintiff. It had noticed that subsequent to the partition, mutation was effected and the property which had fallen to the share of the plaintiff had been sold by him on 14.6.1989. He had notice and knowledge of the partition proceedings and accepted the partition and sold his property. He was not content since his property had been allotted to respondent No. 1. The plaintiff has accepted that he had sold the land after the partition. The Court below noticed this fact but chose to ignore it. Both the Courts have dealt the case as if presuming what the plaintiff had stated was the gospel truth without checking its correctness.

The jamabandis of the relevant year show that the property was assessed to land revenue. Only the three brothers are shown as owner. One of the co-sharers had approached the revenue officer for separate possession impleading the other two brothers. Section 12 of the Punjab Land Revenue Act, 1887 places restrictions and limitations on partition. It is necessary to first notice the definition of estate as defined in Section 3 and Section 112 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 ;"*

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

revenue papers and assessed to land revenue can be partitioned by the Revenue Officer or by the Civil Court. 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, the plaintiff claims for the first time in the civil suit that the land which was partitioned was part of the *abadi* and houses were constructed on it and the land had lost its character but failed to lead any evidence or examine any person from the village. None would have supported him. It is only when the agricultural land loses its nature by some act of the parties it is that land, which cannot be partitioned by the Revenue Court as held in *Surjit Singh versus Financial Commissioner Appeals-II, Punjab* (supra).

Much stress of the respondents was on the documents 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. As noticed above it is not the position which exists now which is relevant. The position as it existed when the appellant 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 did not raise this plea before the Assistant Collector or before the Collector in appeal. He had approached the Assistant Collector on the plea that he had not been served. The order had been passed *ex parte* after due service. The property was assessed to land revenue and the Revenue Officer had the jurisdiction to partition the land. The Civil Court had no jurisdiction in the matter nor should have entertained the suit. Therefore,

suit is dismissed. Decree sheet be prepared accordingly.

The appeal is allowed.

Summoned record be sent back.

(ANITA CHAUDHRY)
JUDGE

June 01, 2017
Gurpreet

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes