

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

**RSA No. 399 of 2016 (O&M)
Date of Decision: 20.01.2017**

Parminder Singh

... Appellant

vs.

Harjinder Singh & Anr.

... Respondents

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Present:- Mr. M.S. Sachdev, Advocate
for the appellant.**

ANITA CHAUDHRY, J.

The defendant has filed the instant regular second appeal, challenging the concurrent findings returned by the Courts below decreeing the suit of the plaintiff who was asserting 1/3rd share in the suit property and seeking partition.

The plaintiff filed a suit for partition against his brothers seeking separate possession of property bearing No. MCJ-2530. It was claimed that the suit property was jointly purchased by the parties vide registered sale-deed dated 26.04.1994 and he wanted his share to be separated.

The suit was contested by the defendants. It was admitted that the suit property was purchased by them along with plaintiff, but it was claimed that in lieu of the suit property, a shop at Hans Kalan

village was given to the plaintiff in a family settlement in 2000 and plaintiff relinquished his right therefrom and he was not in possession of the suit property.

The trial Court vide judgment and decree dated 05.08.2014 decreed the suit and a preliminary decree for separate possession of suit property by way of partition to the extent of 1/3rd share was passed.

The appellant failed in appeal, leading to the filing of the instant regular second appeal.

Along with appeal, an application under Order 41 Rule 27 read with Section 151 CPC has been filed for producing and proving the copy of family settlement dated 14.08.2000 (Annexure A-1).

I have heard learned counsel for the appellant and have gone through the paper-book carefully.

It is apparent that the parties did not dispute the joint ownership in respect of the suit property. It was not disputed that the plaintiff was co-sharer in the suit property by dint of registered sale-deed dated 26.04.1994. The plea of family settlement was not proved by the appellant and respondent No.2. Except their self-serving statements, no cogent and convincing evidence was produced by them to substantiate their plea. The shop which was claimed to have been given in family settlement was found to be on rent with the plaintiff. While affirming the findings of the trial Court, the Appellate Court in para no.10 of its judgment held as under:-

“10. After hearing the Ld. counsel for the appellant and Ld. counsel for the respondent I am of the opinion that it is admitted fact that suit property was jointly purchased by parties to the suit vide registered sale deed dated 26.04.1994 from Ramesh Kumar. However, it is the case of the appellant that respondent no.1 was separated from joint business and one property was purchased from the common fund in the name of respondent no.1 at village Hans Kalan for doing business of medicine by spending Rs.2 lac. Thereafter, there took place a family partition and the shop at Hans Kalan came to the share of respondent no.1 and the disputed property came to the share of appellant and respondent no.2. Further, it has been alleged by the appellant that respondent no.1 in fact has relinquished the share in the disputed property. However, the onus was upon the appellant first of all to prove, if any shop at Hans Kalan was purchased by spending Rs.2 lac for doing business of medicine by respondent no.1. In case, it was purchased then to disclose in the name of whom, it was purchased and from whom, the same was purchased. But, no such evidence has been produced on the record. Secondly, the appellant was also supposed to prove in the presence of whom the oral family partition took place. A part from his own statement and statement of his another brother respondent no.2 who is also interested in the suit property no other person has been examined or their name has been disclosed. However, inconsistent to his own version the appellant in his statement recorded in the court has taken a summer soult(?) and alleged that family

settlement was reduced into writing in the presence of all the panches of the villages since died and it was scribed by Surjit Singh, Sarpanch. However, neither the name of the panches in the presence of whom, any family settlement was effected or reduced into writing has been mentioned nor their death certificate has been produced, from which, an inference could be drawn that they have already died. Thirdly, even Surjit Singh Sarpanch the alleged scribe of writing has not been examined to even orally say that family partition took place between all the three brothers in his presence and it was scribed by him in writing, but it was handed over to respondent no.1 being elder in family. So, as such in the absence of any such evidence, it will be assumed that family settlement with regard to the property in dispute had never taken place amongst the three brothers. Therefore, being a co-sharer even out of possession respondent no.1 is entitled to get his share separated by way of partition. So, the trial court has rightly decided all the issues no.1 to 4 and 5 in favour of respondent no.1 and against the appellant and respondent no.2. Finding no illegality or irregularity in the findings of trial court, so the same are affirmed.”

Coming to the prayer for additional evidence first, there is no substance in it. The general principle governing Order 41 Rule 27 CPC is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. It is an exception. The parties are not entitled, as of right, to the admission of such evidence. 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. The provision does not apply when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly and additional evidence can only be permitted if the conditions laid down in this rule are found to exist. At the same time, the inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the import of a document does not constitute 'substantial cause' within the meaning of the rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. **(See. Union of India Vs. Ibrahim Uddin 2012(8) SCC 148.**

Adverting to the facts of present case, the foundation of the claim of appellant and respondent No.2 was laid on the family partition, but they had failed to prove it. As noticed above, they failed to examine the scribe of the family settlement. No sufficient cause had been shown as to why the evidence with regard to family settlement was not adduced when the evidence of defendants was being led. A perusal of Annexure A-1 would reveal that the same is not in the nature of a settlement, but only reveals the intention of its author i.e. the father of the parties about apportionment of the property. It was not signed by any of the parties to the suit and would not bind them. In the considered opinion of this Court this document would not help the Court in pronouncing the judgment. There is no reason to upset the

concurrent findings which are neither illegal nor suffer from perversity. The findings are affirmed. No substantial question of law arises for consideration in this appeal.

The application is dismissed. The appeal is dismissed in limine.

(ANITA CHAUDHRY)
JUDGE

Jiten

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No