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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 27.03.2018

1.

RSA-1686-1995 (O&M)

Jeet Ram (deceased through LRs) and others

... Appellant(s)

Versus

Smt. Daropadi Devi (deceased through LRs) and another

... Respondent(s)

2.

RSA-1687-1995 (O&M)

Jeet Ram (deceased through LRs) and others

... Appellant(s)

Versus

Smt. Daropadi Devi (deceased through LRs) and another

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Kuldip S. Chaudhary, Advocate
for the appellants.

Mr. Vijay Rana, Advocate
for respondent Nos.1 and 2.

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of two regular second appeals
one bearing **RSA No.1686 of 1995** titled as **"Jeet Ram (deceased through
LRs) and others V/s Smt. Daropadi Devi (deceased through LRs) and
another"** arising out of civil suit No.328 of 1993 titled as "Smt. Dropti Devi

V/s Bhagat Ram and others" (hereinafter called 'the first suit') seeking possession by way of pre-emption in respect of land measuring 4B-1B and the other bearing **RSA No.1687 of 1995** titled as **"Jeet Ram (deceased through LRs) and others V/s Smt. Daropadi Devi (deceased through LRs) and another"** arising out of the civil suit No.327 of 1988/93 titled as "Smt. Dropti Devi V/s Jeet Ram and others" (hereinafter called 'the second suit') seeking possession by way of pre-emption in respect of land measuring 4B-8B.

The facts are being taken from RSA No.1686 of 1995.

The respondent-plaintiff, Dropti Devi, instituted the suit against Bhagat Ram son of Kewal Ram, Jeet Ram, Karam Chand, Piara Ram, Soma Ram, Bhagat Ram, Ram Karan sons of Sita Ram for possession by way of pre-emption on the premise that Bhagat Ram son of Kewal Ram/defendant No.1 was recorded as a co-sharer in the land as mentioned in the para No.1 of the plaint, who sold the land measuring 4B-1B being 80/390 share out of the land total land measuring 19B-10B, vide sale deed dated 19.05.1987 registered on 27.05.1987, for an amount of ₹30,000/- recited in the sale deed to the vendees-defendant Nos.2 to 7. The plaintiff had a superior right of pre-emption to pre-empt the sale being a co-sharer in the land in dispute at the time of sale and continued to be so.

The aforementioned suit was contested by the defendants and thereafter, sought a permission of the Court to file amended written statement, which was filed on 23.02.1994, objecting the maintainability of the suit being barred by law of limitation and not properly valued for the purpose of court fee and jurisdiction and bad for partial pre-emption. It was

admitted that the suit land was sold by Bhagat Ram son of Kewal Ram, but the factum of the plaintiff being a co-sharer was denied. The recital of the amount in the sale deed was accepted, but the fact of the matter is that after purchase of the land in dispute, the defendants had spent an amount of ₹10,000/- on the improvement. It was alleged that the plaintiff had already gifted away the property in dispute through gift deed and therefore, the plaintiff had waived her right to exercise her pre-emption rights over the property.

On the basis of the pleadings of the parties, the trial Court framed the following issues:-

1. *Whether the plaintiff has superior right of pre-emption? OPP*
2. *Whether the sale price was fixed in good faith and actually paid? OPP*
3. *If issue no.2 is not proved what was the market value of the suit land at the time of sale? OPP*
4. *Whether the suit is time barred? OPD*
5. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD*
6. *Whether the suit is bad for partial pre-emption? OPD*
- 6-A. *Whether the defendants have alienated the suit property by way of gift? OPD.*
7. *Whether the plaintiff is not properly verified? OPD*
8. *Whether vendee=defendants are entitled to improvement charges and if so to what amount? OPD*
9. *Whether vendee defendants are entitled to stamp any registration charges and if so to what effect? OPD*
10. *Whether the plaintiff has waived his right of pre-emption? OPD*
11. *Relief.*

However, in the second suit, the respondents-plaintiff also sought the pre-emption in respect of land measuring 4B-8B. Even in the second suit, the same issues were framed. Both the suit were tried together by the same very Court, though not consolidated.

In the first suit, the plaintiff in order to prove her case, examined her attorney Rajinder Kumar a PW-1, whereas the defendants examined Bhagat Ram son of Sita Ram as DW-1 and Raghubir Singh as DW-2.

In the second civil suit, the same set of witnesses were examined.

The trial Court on the basis of the preponderance of evidence and pleadings of the parties, by noticing the jamabandi Ex.P-2 found that the plaintiff-Dropti Devi was a co-sharer and decreed both the suits. The plaintiff was directed to deposit the sale consideration within two months from the date of the decree with a caveat that on non-deposit of the amount the suit would be dismissed. Liberty to the plaintiff to withdraw 1/5th of the pre-emption amount deposited in the Court was also granted. The appeal preferred by the appellants-defendants also met with the same face.

Before the lower Appellate Court, the appellants-defendants also filed an application for additional evidence. The same was also dismissed vide order dated 07.03.1995 along with the appeal on the premise that the certified copies of the documents had not been placed on record as they were not available and the order of partition dated 09.06.1994 was passed about nine months back. The aforementioned order has also been challenged in the regular second appeal.

During the pendency of the appeal, an application bearing CM No.13797-C of 2017 in RSA No.1686 of 1995 under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure for grant of permission to produce the additional evidence for adjudication of the *lis* has been moved. It was averred that the respondent-plaintiff had been successful in obtaining the decree by playing a fraud upon the Court, for, it had withheld the proceedings of the partition held before the Revenue Court, which were already complete vide order dated 09.06.1994 before passing of decree on 22.10.1994 and a mutation bearing No.259 dated 21.07.1994 (Ex.D-2) had been sanctioned. Even an appeal against the order dated 09.06.1994 preferred before the Collector by the respondent-plaintiff, had been dismissed vide order dated 19.01.1995 (Ex.D-1). In such circumstances, it was held that since the status of Dropti Devi was not of a co-sharer, she did not have the right to claim pre-emption and a prayer was made to place on record judgment dated 19.01.1995 (Ex.D-1) passed by the Collector, Kalka , certified copy of the mutation dated 21.07.1994 (Ex.D-2).

The aforementioned application was contested by the respondents/non-applicant through Mr. Vijay Rana by filing a reply, averring therein that the contents of the sale deed revealed that the land in quest was jointly owned by Dropti Devi and Bhagat Ram son of Kewal Ram. It was admitted that during the pendency of the suit, the appellants-applicants filed an application for partition of the land before the Tehsildar-cum-Assistant Collector Grade-I, Kalka, District Ambala (now Panchkula) , who vide order dated 09.06.1994 ordered for partition of the land, even the dismissal of the appeal of Dropti Devi by the Collector vide order dated

19.01.1995 had not been denied. However, it was stated that the applicants/appellants failed to bring on record additional evidence during the pendency of the suit as these documents were not in existence and were in knowledge. In the appeal also, after passing of 22 years and 6 months, an application for additional evidence has been filed and therefore, prayed for dismissal of the application.

Mr. Choudhary, learned counsel appearing on behalf of the applicant/appellants/defendants submitted that the aforementioned documents are essential and necessary for adjudication of the case as the respondent-plaintiff had lost the status of a co-sharer. The order declining the additional evidence had specifically challenged in the present grounds of appeal by adding ground No.3-A in view of the provisions of Order 43 Rule 1-A CPC and therefore, the other side cannot be permitted to raise the objection.

Mr. Vijay Rana, during the course of hearing, by referring to the document Annexure R-2/T contended that the respondent-plaintiff had moved an application for issuance of *sanad taksim*, which was rejected on the ground that the decision of pre-emption suit had become final.

On merits, Mr. Choudhary, learned counsel appearing on behalf of the appellants-defendants submitted, that if both the Courts below have taken into consideration the aforementioned documents, particularly the lower Appellate Court, there would not have been any occasion for the appellants-defendants to approach this Court for, the status of a party seeking pre-emption is no longer that of a co-sharer. Once the decision of partition proceedings had already taken place and attained finality, rejection

of *sanad taksim* vide Annexure R-2/T was only based upon the decision rendered in the civil suit and was not an independent adjudication. During the pendency of the proceedings, Pre-emption Act had been amended taking away the right of pre-emption of a co-sharer, therefore, she had no right to seek the pre-emption. In support of his contentions, he relied upon the decision dated 15.09.2014 of this Court rendered in **RSA No.840 of 1988** titled as **“Zora Singh V/s Laxmi Narain and others”**, which has been relied upon decision passed by the Division Bench of this Court in **“Har Devi V/s Ram Jas and others” 1974 PLJ 345** and Single Bench judgment of this Court in **“Lala Ram V/s Financial Commissioner, Haryana” 1992 PLJ 45**, to contend that *naqsha jeem* is only for the purpose of passing of final decree, though preliminary decree had already been passed as owing to the decision rendered by both the Court below, the instrument of final partition could not be prepared.

Per contra, Mr. Rana, learned counsel appearing on behalf of the respondent Nos.1 and 2/plaintiffs submitted that as per the provisions of Sections 111 to 120 of the Punjab Land Revenue Act, the partition proceedings are only completed, when the revenue official shall cause an instrument of partition to be prepared and the date on which the partition is to take effect, to be recorded therein and thereafter, the instrument of partition is prepared. The joint status of parties comes when once the partition order is passed. Since in this case, no instrument of partition was drawn, therefore, *naqsha jeem* had not been prepared. In support of his contentions, he relied upon the *ratio decidendi* culled out by this Court in **“Pritam Singh V/s Jaskaur Singh” 1992 PLJ 435** and on similar lines,

“Rajesh V/s Smt. Bhateri” 1993 (3) PLR 434, to contend that mode of partition is not a final partition until and unless instrument of partition is not drawn. In other words, he submitted that even if the appeal is filed against the mode of partition, it automatically amounts to stay the proceedings. Despite the fact that even if the possession has been delivered to the parties before the partition is made effected, it will not extinguish the right of a co-sharer. He also relied upon the *ratio decidendi* culled out by this Court in **“Lala Ram V/s Financial Commissioner, Haryana” 1992 PLJ 45**.

I have heard the learned counsel for the parties, appraised the paper as well as the records of the Courts below and of the view that there is a force and merit in the submissions of Mr. Choudhary.

Before dealing with the rival contentions of learned counsel for the parties, I would deal with the application bearing CM No.13797-C of 2017 in RSA No.1686 of 1995 for additional evidence. After noticing the rival contentions of the learned counsel for the parties, I am of the view that the judgment and decree in the aforementioned case, the suit decided on 22.10.1994, whereas the partition proceedings were already complete vide order dated 09.06.1994 and mutation bearing No.259 was also passed before the decree i.e. 21.07.1994. However, the appellant-defendant could not place on records the material as copies were not available, but the fact of the matter is that even the aforementioned order dated 09.06.1994 was assailed by the respondent-plaintiff by filing an appeal, which was dismissed on 19.01.1995. In my view, the lower Appellate Court committed illegality and perversity in declining the similar application moved before it, vide order dated 07.03.1995, which is also under challenge in the present appeal

as the decision rendered in appeal preferred by the respondent-plaintiff came to be passed after the decision of the suit and during the pendency of the appeal, thus, the application suffice the requirement of law i.e. provisions of Order 41 Rule 27 CPC and there could not be any ground for non-suiting the applicant/appellant/defendant of not exercising due diligence, rather the lower Appellate Court ought to have allowed the application as it had direct bearing to the adjudication of *lis*.

Mr. Rana, has drawn the attention of this Court to the document (Annexure R-2/T) sought to be placed on record vide application bearing CM No.4575-C of 2018 in RSA No.1686 of 1995, to contend that once the revenue court had declined the application for preparation of *naqsha jeem* and the partition proceedings were not complete and therefore, the status of the plaintiff was of a co-sharer and there was no severance of co-sharership as the partition proceedings had not been culminated.

In a regular second appeal, the documents cannot be permitted to place on record under the provisions of Section 151 CPC, but be that as it may, while exercising the inherent powers, though it has not happily worded, should have been under Order 41 Rule 27 CPC, I do not bring into the motion or objection qua maintainability.

Keeping in view the aforementioned facts and circumstances, particularly the fact that the documents are very necessary and essential for the adjudication of the *lis*, the application bearing No.13797-C of 2017 in RSA No.1686 of 1995 and the applications bearing CM-4575-C-2018 IN RSA-1686-1995 and CM-4583-C-2018 IN RSA-1687-1995 are allowed and the additional documents i.e. (Ex.D-1 and Ex.D-2) and (Annexures R-1/T

and R-2/T) are taken on record.

On going through the contents of the order dated 12.10.1995 passed by the Assistant Collector, 2nd Grade, Kalka, the pith and substance of the decision for declining the preparation of the *naqsha jeem* had been only on the point that the suit for pre-emption had been allowed. For the sake of brevity, the order reads thus:-

“Mauza Dewal, H.B. No.114, Tehsil Kalka. The application for partition, the file put up. Counsel for the parties present. The arguments of the counsel for both the parties heard. Sh. Hardev Sharma, Counsel for Jit Ram etc. mentioned during his arguments that the Collector, Kalka has dismissed the appeal filed by Daropadi etc. and now the Sanad of partition of this case be issued. Sh. S.K. Thama, counsel for Daropadi etc. during his arguments mentioned that the suit for pre-emption has been decided by the civil court in favour of Smt. Daropadi etc. and its appeal has been decided by the Court of Sessions in favour of Smt. Daropadi etc. In these facts and circumstances, the judgment of pre-emption has already become final, the Sanad/instrument of partition cannot be issued. The counsel in support of his arguments relied upon the judgments of the Hon'ble Punjab and Haryana High Court, the reference of which are as under:- RSA No.1857 of 1992, RRR Vo.15, 1994 (i) page 495. RSA No.654 of 1990, RRR Vol. 13, 1993 (ii) page 389 and RSA No.113 of 1992 RRR Vol. 12, 1993 (1) page No.390.

After hearing arguments of both the parties, I came to this conclusion that there is force in the arguments of Sh. S.K. Thama and I agreed with him. Because the decision of pre-emption has become final. So that it is not appropriate to further proceed with the partition proceedings. In view of above mentioned decisions of the Punjab and Haryana High

Court, the application filed by Bhagat Ram etc. for issuance of Sanad Takseem is hereby rejected.”

Coming to the main appeal, Mr. Rana, has assiduously taken the aid of the judgment rendered by the Division Bench of this Court in Pritam Singh's case (supra), Rajesh's case (supra) and Lala Ram's case (supra). I am afraid that argument of Mr. Rana, has no force as similar issue came up for consideration before the Division Bench of this Court in “Har Devi's case (supra), wherein a suit for pre-emption of sale of land by Hari Singh and Jagir Singh to Ram Jas and others was filed. Hari Singh had initiated the partition proceedings on 21.10.1956. Later on, Ram Jas and others also initiated partition proceedings of land, in which, Har Devi and Kako were parties. In those proceedings, on 21.05.1968 the order was passed, whereas the partition was effected between the parties and the case was listed for *naqsha jeem*. However, in this case, both the suits, aforementioned, were filed in the year 1988 and decision rendered, as noticed above, was 22.10.1994, but during the pendency of the same, the order of partition was passed on 09.06.1994, which was not denied by the counsel for the defendants, much less, mutation (Ex.D-2). By ordering the separate shares of co-sharers, the right of the plaintiff, in my view, ceased to exist as that of a co-sharer. In fact it had come to end before the decree was passed, therefore, the suit of partition could not be decreed. The respondent-plaintiff had also availed the remedy of appeal, which had been dismissed, vide order dated 19.01.1995. For the sake of brevity, the operative part of the order dated 19.01.1995 reads as under:-

“I have heard the arguments of both the counsel for the parties

and has perused the record carefully, from the bare perusal of the record it has been proved that the applicant/appellant is filing the appeals to prolong the proceedings of partition and the appellant intentionally by not coming present in Court and by filing the appeals delaying the proceedings of partition.

Which photocopies of orders have been produced by the applicant/appellant from that it has proved that there is no base/truth in the application of condonation of delay. Therefore, on the basis of these facts, this application and appeal filed by the applicant/appellant is hereby dismissed by restoring the order of the Courts below dated 09.06.1994 and both the parties hereby direction to come present before the Court of Assistant Collector, Grade-I on 06.03.1994.”

On conjoint reading of the orders dated 19.01.1995 and 12.10.1995, whereby the *naqsha jeem* was rejected, I am of the view that final decree was required to be passed, but the mode of partition had already been suggested by metes and bounds way back on 09.06.1994 before the decision in the civil suit could be rendered or passing of the decree. It would be in the fitness of things to extract the relevant findings rendered by the Division Bench of this Court in Har Dev's case (*supra*), which reads thus:-

"It is not necessary for us to go into this matter because we are of the opinion that the order dated 21.5.1968 put an end to the joint relationship. That order was appealed against and that appeal failed; or to put it more accurately, was not pressed. Therefore, the order dated 21.5.1968 remained alive and whatever has happened in pursuance of it cannot be just wiped out."

In my view, both the Courts below, particularly the lower Appellate Court being last Court of fact and law has committed illegality

and perversity in not allowing the application for additional evidence as superior right of pre-emption of the plaintiff/respondent had lost a significance/ceased to exist, during the pendency of the suit i.e. before the decree could be passed, therefore, the respondent-plaintiff cannot gain any advantage to their contention from the decision rendered in **Rajesh's case** (supra) and **Lala Ram's case** (supra).

It is also a matter of record that the order dated 19.01.1995 passed by the Collector dismissing the appeal of the respondent/plaintiff had attained finality.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213”**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. Gurdial Singh Mann (dead) by LRs and others” 2001(4) SCC 262**, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi 's case**

(supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29] ”*

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the

Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeals, aforementioned.

For the foregoing reasons, judgments and decrees of both the Courts below are not sustainable in the eyes of law and the same are hereby set aside. The suits of the respondent-plaintiff are dismissed. Decree sheet is ordered to be prepared.

However,the plaintiff shall be entitled to seek the refund of the amount deposited by her in compliance of the decree passed by the trial Court in accordance with law.

Resultantly, the appeals bearing **RSA Nos.1686 & 1687 of 1995** are allowed.

27.03.2018
Yogesh Sharma

(**AMIT RAWAL**)
JUDGE

✓

Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**