

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

RSA No.4049 of 1999

Date of Decision.13.03.2018

Smt. Shanti Devi and others

.....Appellants

Vs

Vidya Wati and another

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Anish Setia, Advocate
for the appellants.

Mr. G.S. Nagra, Advocate
for respondent No.1.

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AMIT RAWAL J.(ORAL)

The appellant-defendant is in regular second appeal against the judgment and decree dated 6.8.1999 rendered by the Additional District Judge, Jalandhar whereby the suit of the respondent-plaintiff, which was dismissed vide judgment and decree dated 11.01.1996 claiming partition, has been decreed.

It would be apt to narrate facts arising from the pleadings of the parties for adjudication of the present appeal. The respondent-plaintiff instituted the suit for claiming possession by partition of 1/4th share in House No.NH-206 bounded as East Street, West House of Jhandu, North Street, South property of Hira and others situated in Neela Mahal, Jalandhar City on the premise that he has 1/4th share in the house in dispute whereas defendant No.1 to the extent of 1/4th share and defendant No.2 to the extent of half share in the suit property, as the plaintiff had purchased the share of Surinder Kumar vide registered sale deed dated 3.12.1975. The plaintiff instituted the suit for injunction whereby it was held that she was owner of

1/4th share only and defendant No.2 was owner of half share.

The aforementioned suit was contested by the appellants-defendants. Defendant No.1 appeared and filed the written statement taking preliminary objections of non-maintainability, much less, non-joinder of necessary party. On merits, ownership of the plaintiff over the property in dispute to the extent of 1/4th share was denied. A sum of ₹1,50,000/- was spent on the construction of the house, which was in his possession since long. All the parties had partitioned the property and were in exclusive possession since long. Defendant No.3 to 8 filed separate written statements and stated that they were in specific portion of the property in dispute, whereas, defendant No.2 was proceeded against ex parte.

Replication was filed controverting the averments made in the written statement by reiterating the contents of plaint.

The trial Court on the basis pleadings framed the following issues:-

- “1. Whether the plaintiff is joint owner to the extent of 1/4th share in the disputed property? OPP*
- 2. Whether the suit is bad for non joinder of necessary parties? OPD*
- 3. Whether the plaintiff is estopped from filing the suit by his act and conduct? OPD*
- 4. Whether the plaintiff is entitled to a decree for possession by way of partition? OPP”*

In support of averments in plaint, the respondent-plaintiff examined PW-1 Didar Chand and tendered into evidence Ex.P1 power of attorney, Ex.P2 copy of sale deed, Ex.P3 certified copy of judgment dated

22.8.1983, Ex.P4 site plan and Ex.P5 another judgment and closed the evidence in affirmative. On the other hand, defendants examined DW-1 Bhushan Kumar, DW2 Hans Raj, DW3 Ram Lal and DW4 Dwarka Dass.

The trial Court on the preponderance of evidence dismissed the suit by holding that the partition had already been effected as there was an admission on the part of the plaintiff in the cross-examination, much less, in the Ex.P3 i.e. judgment rendered in Civil Suit bearing No.442 of 1981 titled as “Parmod Kumar Sharma and another Vs. Shanti Devi and another” decided on 22.08.1983. The lower Appellate Court in appeal reversed the finding as indicated above, hence regular second appeal.

Mr. Anish Setia, learned counsel appearing on behalf of the appellants submitted that the judgment and decree of the lower Appellate Court is erroneous and perverse, for, in the Ex.P3 i.e. the suit referred *ibid*, there was a categorical admission of the plaintiffs Parmod Kumar Sharma, who is defendant No.2 in the instant suit and Vidya Wati, who is plaintiff in the instant suit that local commissioner was appointed, who in pursuance of the partition proceedings had given possession to the parties of their respective portions and that itself was the clincher. Even in the present plaint, there was a reference to the same. All these facts have been gravely ignored, otherwise the suit was liable to be dismissed.

This Court while issuing notice of motion on 14.10.1999 had passed status quo order but while admitting the appeal on 21.05.2002, there was no interim stay. However, the status quo order is deemed to have continued. All the parties have been enjoying their respective possession of the land and there had not been any disturbance. Even otherwise, oral partition can always be looked into by the implied conduct of the parties and

this is a fit case where such inference is liable to be drawn, thus, urges this Court for setting aside the judgment and decree under challenge.

Per contra, Mr. G.S. Nagra, learned counsel appearing on behalf of respondent No.1 submits that the judgment and decree of the lower Appellate Court being last court of fact and law is perfectly legal and justified and does not call for interference as in the suit Ex.P3 i.e. the judgment rendered in Civil Suit bearing No.442 of 1981 decided on 22.8.1983, the plea of the plaintiff qua partition was not accepted and the injunction was rejected, in essence, the suit was dismissed. It is in that background, the present suit claiming partition had been filed. Rather the appellant-defendant, Shanti Devi, who was arrayed as defendant No.1 in that suit stated therein that the property was joint and not partitioned. Pleadings of the previous suit are admissible in evidence, therefore, urges this Court for upholding the judgment and decree under challenge.

In rebuttal, Mr. Setia relied upon the ratio decidendi culled out by Hon'ble Supreme Court in *Anathula Sudhakar Vs. P. Budhi Reddy (dead) by LRs and others 2008(4) SCC 594; 2008(2) RCR (Civil) 879* to contend that where in a suit for injunction, the parties had omitted to claim declaration, cannot be debarred from claiming declaration in subsequent suit as the suit for injunction, thus, urges this Court for allowing the appeal by setting aside the judgment and decree under challenge.

I have heard learned counsel for the parties, appraised the paper book, records of the Courts below and of the view that there is no force and merit in the submissions of Mr. Setia. In the previous suit filed by Vidya Wati, who is also the plaintiff in the present suit, though a plea of partition was set up but fact of the matter is that the appellants-defendants (herein)

and the defendants (therein) denied the partition. On the preponderance of evidence, the trial Court in the judgment dated 22.08.1983, Ex.P3, did not grant injunction holding that the suit property was not partitioned, for, no injunction could be granted against the co-owner. It would be apt to reproduce the finding of the trial Court in the previous suit to that effect:-

“....The oral evidence produced by the plaintiffs to the effect that partition of the property in dispute took place amongst the various co-owners and the final decree was passed by the Court is of no avail in the absence of documentary evidence having been produced on the record. It is, therefore, not proved from the evidence on record that the property in dispute was ever partitioned amongst the various co-owners. Since it has not been proved that the property in dispute was partitioned amongst the various co-owners the same has to be treated as the joint property of all the co-owners. All the co-owners, therefore, have got right and interest in every inch of the property in dispute. No co-owner can appropriate a part of the property to his exclusive use. Since the plaintiffs and defendant No.1 are co-owners in the property in dispute, they have right in every inch of the property in dispute and no owner can say that a particular portion of the property is his ownership.”

In view of the aforementioned finding, cause of action accrued in favour of the respondent-plaintiff namely Vidya Wati to claim the partition. Section 33 of the Indian Evidence Act permits the parties to place on record evidence of the previous suit rendered between the same parties. The judgment Ex.P3 was also between the same parties as in the present suit. There is no dispute to the ratio decidendi culled out in the judgment cited supra by the counsel for the appellants, for, it is a settled law that in a suit for injunction, the question of title does not arise or it would only be

incidental and collateral. If a person had earlier filed the suit seeking injunction in which his ownership had been denied and, thereafter, cannot be abstained to file the suit for declaration and the objection with regard to maintainability of the suit on the principle akin to res judicata would not be sustainable and liable to be rejected. The facts in the present case are the one as noticed in the judgment cited supra.

As regards the status quo order granted by this Court, I am of the view that the same had continued as none of the parties are unable to apprise this Court with regard to outcome of the proceedings initiated, if any, for preparation of the final decree.

In view of the aforementioned, I am of the view that the judgment and decree rendered by the lower Appellate Court is perfectly legal and justified as the same is based upon correct appreciation of fact and law, much less, no substantial question of law arises for determination by this Court. No ground for interference is made out. Resultantly, the second appeal stands dismissed.

(AMIT RAWAL)
JUDGE

March 13, 2018

Pankaj*

Whether reasoned/speaking Yes

Whether reportable No