

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.1689 of 2007 (O&M)

Date of Decision: September 11, 2018

Bhura Singh & others

...Appellants

Versus

Ranjit Singh (since deceased) through L.Rs & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr. Ashok Singla Advocate &
Mr. Aakash Singla, Advocate,
for the appellants.

None for the respondents.

AMIT RAWAL, J.

Appellants Bhura Singh and Bikkar Singh (legal heirs of defendant No.6- Sher Singh) and Amarjit Singh (legal heir of defendant No.4- Chand Singh) have preferred the present Regular Second Appeal against the judgment and decree dated 28.02.2005, whereby the Lower Appellate Court had partly decreed the suit of the respondent-plaintiff.

Ranjit Singh plaintiff instituted the suit for joint possession and permanent injunction in respect of the suit land on the premise that Sobha Singh and Santa Singh along with defendants No.1 to 4 were owners in possession of the suit property. After the death of Sobha Singh and Santa Singh, Jai Kaur, their sister, inherited their share. Jai Kaur filed a Civil Suit bearing No.73 of 21.06.1960 for possession qua land measuring 131 bighas 7 biswas for 1/4th share and 51 bighas 10 biswas to the extent of 2/9th share and vide judgment and decree dated 23.08.1960, she was declared in joint possession of 1/8th share in the land measuring 131 bighas 7 biswas and 1/9th

share in total land measuring 51 bighas 10 biswas. It was alleged that Jai Kaur with the help of revenue officials entered into joint possession of the suit land. She died on 22.07.1976 and after that, mutation No.5619 was sanctioned in favour of the plaintiff on 23.08.1982. Plaintiff filed an application for partition before the Assistant Collector 1st Grade, Barnala, but the same was dismissed on 08.11.1985. The Collector Sub Division, Barnala, vide order dated 07.12.1986, relegated the plaintiff for getting the question of title decided from the civil court. Even the revision preferred against the said order was dismissed. It is in these circumstances, the suit was filed. It was further averred that during the pendency of the suit, few of the respondents had sold land measuring 30 kanals 18 marlas to defendants No.13 to 16 and, therefore, they were impleaded as defendants.

The aforementioned suit was contested by all the defendants except defendants No.7 and 10, who were proceeded ex-parte as they failed to appear in the court despite service. An objection qua maintainability of the suit as per the provisions of Section 11 and Order 2 Rule 2 of CPC was taken. It was averred that the second suit on the same point, in which Jai Kaur has already availed the decree, cannot be agitated as her share was confined as per the decree of 1960. The aforementioned decree was not executed within twelve years, therefore, the application before the revenue authorities seeking partition of the land did not lie. Subsequent vendors, i.e., defendants No.13 to 16 also objected to the maintainability of the suit and claimed to have become owners in possession by virtue of the sale deed No.602 dated 05.05.1998.

Since the parties were at variance, the trial Court framed the following issues:-

- 1) Whether Jai Kaur had got 1/3 share in the suit property as alleged and she had got joint possession of the suit in execution No.73 of 21.6.60 decided on 23.8.60 as alleged? OPP
- 2) Whether father of defendants No.1 to 4 and 5 to 6 had been paying chakota/batai to Jai Kaur as alleged? OPP
- 2-A) Whether the suit property has been carved out against the property comprised in decree dt.24.7.59 in suit No.68/113 of 27.5.58/5.6.59? OPP (This issue was framed on 3.11.99).
- 3) Whether decision of AC I Grade, Barnala dt. 8.11.85, of Collector Sub Division Barnala dt. 8.12.86 and of Commissioner Patiala dt. 9.5.90, vide which application of the plaintiff for partition of the suit property has been dismissed is illegal, null and void and not binding upon the plaintiff? OPP
- 4) Whether defendant No.4 Chand Singh, defendant No.5 Jagan Singh and defendant No.6 Sher Singh were dead before the filing of the suit, if so to what effect? OPD
- 5) Whether the suit is barred U/S 11 of CPC and U/O 2 Rule 2 of the CPC as alleged? OPD
- 6) Whether the suit is within limitation? OPP
- 7) Whether plaintiff is estopped by his act and conduct from filing the present suit as alleged? OPD
- 8) Whether the suit is bad for non-joinder of necessary parties and mis-joinder of the parties? OPD
- 9) Whether this court has no jurisdiction to try the present suit? OPD
- 10) Whether the name of defendant No.10 has been written incorrect, if so to what effect? OPD
- 11) Whether the defendants are entitled for special costs? OPD
- 12) Whether the plaintiff is entitled for joint possession of the suit property? OPD
- 13) Whether the plaintiff is entitled for the injunction prayed for? OPP
- 14) Relief.

The trial Court, on the basis of the evidence brought on record,

decided issues No.1 and 2A, i.e., whether Jai Kaur had 1/3rd share in the suit property and had got the joint possession in execution No.73 of 21.06.1960 and vis-a-vis carving out of the property against the property comprised in the decree, in pursuance to the decree, however, dismissed the suit on issue No.5 as it was hit by doctrine akin to *res judicata* as per the provisions of Section 11 of CPC. The aforementioned judgment and decree was assailed by the plaintiff. It is a matter of record that the appellants- contesting defendants did not file any cross objections vis-a-vis the findings on issues No.1 and 2A.

Lower Appellate Court by upholding the findings of the trial Court on issue No.5 regarding maintainability of the suit by implication of bar under Section 11 and Order 2 Rule 2 of CPC, partly decreed the suit by setting-aside the order of the revenue court declining the application for partition.

Mr. Ashok Singla, learned counsel representing the appellants submitted that once both the courts below held that the suit was not maintainable as it was hit by doctrine akin to *res judicata* as per provisions of Section 11 of CPC, there was no occasion for the trial Court to accord the status of 1/3rd share to Jai Kaur while rendering findings on issues No.1 and 2A. Jai Kaur had asserted the right in claiming more share in the parcel of the land which was not granted, but confined to 1/8th share and 1/9th share in the suit property. By setting-aside the order of the revenue court, it tantamounts to giving leverage to the plaintiff to commence the partition proceedings again. Decretal of the suit by the Lower Appellate Court amounts to even upsetting the earlier judgment and decree Ex.P17 and Ex.P18, which had attained finality. Plaintiff could not be accorded the right

to claim 1/3rd share which was against the judgment and decree Ex.P17 and Ex.P18 passed in Civil Suit No.68/113 of 1958. Judgment and decree of the Lower Appellate Court is not sustainable as it has not determined the share of the parties.

There is no representation on behalf of the respondents.

The appeal was admitted on 10.02.2012 by framing the following substantial question of law:-

- 1) Whether suit of the plaintiff could be decreed especially when the issue regarding the suit of the plaintiff being barred under Section 11 CPC and under Order 2 Rule 2 CPC was decided against plaintiff?
- 2) Whether the impugned judgment and decree are self contradictory and are sustainable in the eyes of law?
- 3) Whether the suit of the plaintiff could be decreed to the extent of 1/3rd share being a co-sharer in the suit property especially when Jai Kaur, predecessor-in-interest was declared as owner in joint possession in previous judgment dated 24.07.59 to the extent of 1/8th share in the suit property?
- 4) Whether the suit of the plaintiff could be decreed when there is a bar for the ld.civil courts to entertain suit to challenge the orders passed in the partition proceedings under the provisions of Punjab Land Revenue Act?

I have heard the learned counsel for the appellants, appraised the paper book, records of the courts below and am of the view that there is no force and merit in the submissions of Mr. Singla, for, the appellants did not challenge the findings on issues No.1 and 2A rendered by the trial Court and upheld by the Lower Appellate Court by filing any cross-objections and precisely this is the observation of the Lower Appellate Court, but despite that, suit was dismissed. It is settled law that even if the decree is passed in favour of an effected party but findings on certain issues are otherwise,

effected party is not precluded to assail the same.

The apprehension expressed during the course of hearing and as well as in the memorandum of appeal is farfetched. Throughout this period, there was no interim order in the present appeal. If at all, the other party had to arm twist the plaintiff, some steps should have been taken by the revenue authorities. As and when some steps are taken, the appellants would be at liberty to take action in accordance with law. In other words, they are precluded to defend their claim in terms of the judgment and decree Ex.P17 and Ex.P18.

The partition proceedings probably were initiated in terms of the judgment and decree Ex.P17 and Ex.P18 and, therefore, the authorities cannot relegate the party for claiming title which had already attained finality. A co-owner cannot be prevented to keep jointness of the land and can always ask for partition. That right cannot be taken away. It is in that context, the Lower Appellate Court correctly set-aside the orders rejecting the claim of partition and the impact of findings on issues No.1 and 2A resulting into dismissal of the suit, in such circumstances, would not adversely effect the right of the appellant- defendants.

As an upshot of my aforementioned findings, the questions of law framed on 10.02.2012 are answered against the appellant-defendants. The judgment and decree of the Lower Appellate Court does not suffer from any illegality or perversity. Appeal is accordingly dismissed.

September 11, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No