

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.872 of 2010

Date of Decision:14.12.2018

Joginder Singh

...Appellant

versus

Tara Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Satinder Khanna, Advocate
for the appellant.

Mr. Vikas Behl, Senior Advocate, with
Mr. Abhilaksh Grover, Advocate and
Mr. A. S. Miglani, Advocate,
for respondents no.14 and 15.

Amol Rattan Singh, J.

This is the second appeal filed by the plaintiff in a suit instituted by him on 14.10.2000, seeking separate possession of a 1/4th share of the suit land, by means of partition thereof, in *khewat* no.225, *khatauni* no.289, *khasra* no.253 (as per the *jamabandi* for the year 1998-99), in the revenue estate of village Khotran, Tehsil & District Nawanshahr. As per the plaintiff that was his share of the suit property.

13 defendants having been originally impleaded in the suit, none of them appeared to contest it and were consequently proceeded *ex parte* (by the trial Court itself), whereas at the initial stage itself an application was filed by present respondents no.14 and 15, seeking to be impleaded as defendants no.14 and 15 in the suit, which application was allowed by that Court.

2. The aforesaid two defendants having filed their written

statement, they first challenged the locus of the plaintiff to file the suit, and on merits contended that he was neither a co-sharer, nor was in possession of any part of the suit property and in fact they were the owners thereof, to the extent of 7½ marlas, on the basis of a deed of relinquishment executed by the plaintiff himself on 17.05.1971 (in favour of the said defendants), for a consideration of Rs.1500/-, on the basis of which they entered into possession as owners and had consequently raised construction of a huge building by spending lacs of rupees from their own resources.

3. On the aforesaid pleadings, the following issues were framed by the trial Court:-

- “1. Whether the plaintiff is entitled for separate possession by way of partition by metes and bounds? OPP
2. Whether the plaintiff has got no locus-standi to file the present suit? OPD
3. Whether the site plan is incorrect? OPD
4. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD
5. Relief.”

4. Upon evidence being led, the plaintiff in fact was represented by his attorney (his son), Nirmal Singh, who testified as PW1, with defendant no.14 (also presently respondent no.14 in this appeal), Harbhajan Lal, having testified as DW1, the defendants also having examined one Baldev Singh Saini, Draftsman, as DW2 and one Satpal as DW3.

Documentary evidence was also produced by both sides, as was discussed by the learned courts below in the impugned judgments.

5. In terms of the evidence led, the learned trial court came to the conclusion that though the revenue record, including the *jamabandi* (record of rights) for the year 1998-99, as also the *khasra girdawari* (annual record) for

the year 1999-2000, did not reflect the possession of defendants no.14 and 15 on the suit property, the said documents could not be looked at to prove possession in the case of the property as it fell within the *abadi* area (populated area).

It was further noticed that even in his cross-examination the plaintiffs' own attorney, i.e. his son, had admitted that defendants no.14 and 15 were in possession of the suit property since 1972, with construction having also been raised upon it, never resisted either by the plaintiff or his son, i.e. PW1.

PW1 also admitted that he had never entered the suit property, nor was he in a position to tell its market value.

6. The trial Court thus held that the writing, Ex.DC/Ex.D5, dated 17.05.1971, which though termed as a relinquishment deed, was in fact a sale of the plaintiffs' share of 7½ marlas of land situated within the *phirni*, to defendants no.14 and 15.

7. The contention of counsel for the plaintiff before the trial Court, to the effect that in the aforesaid document the *khasra* number had been omitted, as also the argument that the consideration given in the document being Rs.1500/-, it was a compulsorily registrable document, were both arguments not accepted by the trial Court.

It was held that though the said document would be compulsorily registrable in terms of Section 17 of the Registration Act, 1908, however, it being a 30 year old document, coming from property custody, with its existence and execution admitted by PW1, it could not be held to be inadmissible in evidence.

The admission of PW1 to the effect that the plaintiff had in fact

only recently come to know that he had a share in the suit property, was also noticed by the trial Court.

8. Thus, on the basis of the aforesaid evidence, it was found by that Court that the plaintiff vide the said document had put defendants no.14 and 15 in possession of 7½ marlas of joint property, which area corresponded with the share of the plaintiff in that property.

9. The contention of the counsel for the plaintiff that defendants no.14 and 15 could not be presumed to be possession on the share of the plaintiff alone (it being jointly held property), and that his share was required to be set off against the shares of all the co-owners thereof, was also rejected by the trial Court, holding that it was the plaintiff himself who had put defendants no.14 and 15 into specific possession of 7½ marlas of the property, with such possession being duly reflected in the site plan relied upon by the plaintiff himself, with “much construction having been raised by the said defendants on the plot”.

The defendants were also found to be residing in the plot for the past more than 30 years, which fact was also admitted by PW1, Nirmal Singh.

10. On the aforesaid facts, it was held that whatever title, if any vested in the plaintiff, had come to an end due to the open, continuous and peaceful possession of defendants no.14 and 15, and by lapse of time they had been clothed with title to the suit property.

Thus, the primary issue no.1 was decided against the plaintiff, with the second issue of the plaintiffs' *locus* also decided against him, by holding that with the plaintiff having executed the document, Ex.DC, in favour of defendants no.14 and 15, and having accepted their possession on the property, he in fact had no *locus standi* to file the suit.

The remaining two issues, on the site plan being incorrect and the suit being bad for non-joinder and mis-joinder of necessary parties, were struck off as not having been pressed.

11. On the basis of the aforesaid evidence, the suit of the plaintiff was dismissed.

12. Against the aforesaid judgment and decree, the plaintiff filed an appeal that came up before the learned Additional District Judge, Nawanshahr, who also dismissed the same. In doing so, it was held by that Court that the plaintiff had intentionally not stepped into the witness box in order "to avoid document Ex.DC/D5", as then he would have had to admit his signatures on it, because he had in fact relinquished his share in the suit property in favour of the contesting defendants and was thereafter left with no share in it.

The said document was also found to have shown that the plaintiff had delivered possession of his share of 7½ marlas to defendants no.14 and 15, Harbhajan Lal and Lehmbhar Ram, for a sum of Rs.1500/- on 17.05.1971, with the plaintiffs' son and attorney, Nirmal Singh, having admitted that his father signed in the Persian script, with the signatures seen on the said document also being in the said script.

The witness was also found to have admitted that the plaintiff was able to speak and make a statement, and that he came to Nawanshahr to execute a power of attorney in favour of Nirmal Singh.

Therefore, it was held by the first appellate court that if Joginder Singh could come to Nawanshahr to execute a power of attorney in favour of his son, he could also have appeared as a witness which he intentionally avoided, so that he would not be confronted with the document and his

signatures thereupon.

13. Thereafter, the 1st appellate court also held that though the plaintiffs' name continued to be reflected in the *jamabandi*, he had in fact relinquished his share in the suit property in the year 1971, with him never having also objected to construction being raised on the property by respondents no.14 and 15, who were otherwise not co-sharers therein.

Again agreeing with the finding of the trial Court that the aforesaid deed Ex.DC/D5 was not otherwise admissible in evidence, being an unregistered document showing a consideration of more than Rs.100/- to have been paid, however, it was held to be capable of being considered for a collateral purpose to prove the possession of the contesting defendants.

14. Next, citing from a judgment of this Court in **M/s Ram Gopal Dula Singh v. Sardar Gurbax Singh Jiwan Singh and others AIR 1955 Punjab 215**, it was held that in a suit for partition where the plaintiff alleges that he is in joint possession and the court finds that it was not so, the suit would ordinarily be dismissed on the ground that the plaintiff being out of possession was not entitled to partition without seeking the relief of possession. To similar effect, a judgment of the Lahore High Court in **Asa Ram and others v. Jagan Nath and others AIR 1934 Lahore 563**, was also referred to by the first appellate court.

15. On the aforesaid findings, that court held that the plaintiff not being in possession of any part of the suit property, even as per the site plan, Ex.P2, which was proved by the plaintiff himself, but with a suit for partition only having been filed by him without seeking the relief of possession, it was a suit not maintainable and had been therefore correctly dismissed by the trial Court.

The 1st appeal was consequently dismissed.

16. In this 2nd appeal before this Court, the following questions of law have been framed by learned counsel for the appellant-plaintiff:-

- “i) Whether an unregistered document which creates a right in an immoveable property worth more than Rs.100/- for the first can be read into evidence?
- ii) Whether a suit for partition and separate possession can be dismissed by holding that the plaintiff should have filed a suit for partition (*sic* possession)?
- iii) Whether the courts below can pass a judgment without looking at the contents of the plaint?
- iv) Whether the judgments/decrees impugned in the present RSA is perverse in as much as the findings have been given without reference to the plaint?”

17. Mr. Satinder Khanna, learned counsel for the appellant, essentially reiterated the arguments raised before the courts below, to the effect that the document dated 17.05.1971 (document in Urdu/Persian script), not being a registered document showing the value of the property to be more than Rs.100/-, could not have been admitted in evidence to reject the claim of the appellant, especially in the face of the fact that even the revenue record (Ex.P3) continued to reflect the ownership of the appellant as a share holder in the suit property, with the respondents not shown to be so.

He relied upon a judgment of the Supreme Court in **Raghnath and others v. Kedarnath** AIR 1969 SC 1316, in the context of an unregistered document as was required to be registered, not being admissible in evidence.

To the same effect, he relied upon a judgment of a co-ordinate Bench of the Madras High Court in **Ammamuthu Ammal (Died) and others v. Devaraj and others** 2011 (6) RCR (Civil) 2637, from which he pointed out

that a person cannot claim right or title to a property that is being looked into only for co-lateral purposes.

Thus, the contention is that once the courts below had held that the document Ex.DC was to be seen as a document only for co-lateral purposes, it could not have been admissible as evidence of ownership/title of the respondents/defendants to the suit property.

He further submitted that simply because the appellants' son stepped into the witness box instead of the appellant, an adverse inference could not have been taken by the courts below.

18. In reply thereto, Mr. Abhilaksh Grover, learned counsel for the respondents-defendants, first referred to the testimony of PW1 Nirmal Singh, to submit that he had admitted that construction existed on the suit property for 40 years and that he also admitted the possession of the defendants over the suit property, as duly noticed by the learned first appellate court.

Mr. Grover next relied upon the proviso to Section 49 of the Registration Act to submit that a relinquishment deed could be termed to be a co-lateral transaction in a suit for partition, where title to the property was not being sought by the person relying on the document, as in the present case. He submitted that the defendants not having filed any suit or counter claim seeking title to the property on the basis of the said relinquishment deed, therefore in a suit filed by the plaintiff seeking partition thereof, where the plaintiff in his testimony admitted both, the document as well as the fact that the defendants were in possession of the property ever since the execution of the document, it would be a document that could be relied upon for the co-lateral purpose of disproving the right of the plaintiff to the property, in terms of the proviso to Section 49.

In this context, he also relied upon a judgment of a co-ordinate Bench of the Madras High Court in Ruckmangathan v. Ramalingam 1998 (1) MLJ 114, wherein it was held that though such a non-registered document would not be admissible to prove title to the property but could be referred to for the co-lateral purpose of showing that the parties were dealing with the property in their separate possession, “on the footing that there had been a partition between the members of the family”.

Mr. Grovers' contention was that though the document in question was not related to a partition between members of the family, the suit of the appellant-defendant definitely being one seeking partition of the suit property, when he had actually lost all interest in it by virtue of the relinquishment deed, the defendants had a right to rely on the said document to oust the plaintiffs' claim.

19. In further support of his argument on the document in question being admissible to prove a collateral transaction of possession, learned counsel relied upon a judgment of the Supreme Court in S. Kaladevi v. V. R. Somasundaram and others (2010) 5 SCC 401 from which he pointed to what was held as follows:-

“Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.”

20. Lastly, learned counsel relied upon a judgment of the Supreme Court in Suraj Bhan and others v. Financial Commissioner and others

(2007) 6 SCC 186, to submit that simply because the revenue record continued to show the appellant-plaintiff in possession of the suit property, that did not prove either the ownership or such possession, in the face of the fact that the possession of the respondents-defendants in any case was admitted by the plaintiffs' son and attorney, PW1.

21. Having considered the judgments of the courts below as also the arguments of learned counsel for the parties, though I cannot agree with the finding of the trial court at the end of its discussion on issue no.1, to the effect that the respondents-defendants had perfected their title over the suit property because they had been in “open, peaceful possession thereof”, for the reason that the respondents-defendants never took a plea of adverse possession and the aforesaid reasoning would be based actually on that principle; yet, what cannot be lost sight of is that a finding of fact was recorded that PW1, standing in fact as the plaintiff being his attorney and son, admitted that “we did not resist the construction raised by the defendant over the suit property after 1972”. (That finding was also substantiated by learned counsel for the respondents pointing to the testimony of PW1 from the record of evidence led before the lower court).

Thus, with that admission as to the possession of the defendants over the suit property for about 30 years, seen with the fact that the respondents were not relying upon the relinquishment deed to claim their title to the suit property but only to show that they had been put in possession thereof by the plaintiff himself about 29½ years prior to the institution of the suit on 14.10.2000, with the plaintiff thereby having relinquished his interest in it, with him also admitting to non-possession thereof, I would not interfere with the judgments of the learned courts below.

22. Though Mr. Khanna, learned counsel for the appellant, would otherwise be right that an unregistered document in respect of transfer or assignment of any property of a value more than Rs.100/- cannot be accepted as evidence for conferring title thereof on the person who claims such transfer in his favour on the basis of that instrument (as per Section 17(1)(e) of the Registration Act, 1908), however, I would accept the argument of Mr. Grover, learned counsel for the respondents, that the respondents-defendants never having set up a right of title to the suit property on the basis of the said document, but having defended the suit to submit that the appellant himself had put them in possession thereof, he also never having resisted construction thereupon for almost 30 years, the document could have been accepted to prove the collateral transaction of he having put the respondents in possession thereof, for consideration, thereby extinguishing his right to seek partition of the suit property and consequent possession thereof, in terms of the proviso to Section 49 of the Act of 1908. The provision is reproduced here:-

“49. Effect of non-registration of documents required to be registered.-No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—

- (a) affect any immovable property comprised therein, or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected

by registered instrument.]”

In my opinion, the case of the respondents-defendants no.14 & 15 would stand covered in their favour by the proviso to Section 49, even though the last words of the proviso read to say “not required to be effected by registered instrument.”

23. Therefore, on that question of law, as framed by learned counsel, I would hold that the document, though not *per se* admitted by PW1, but with his admission that neither he nor his father had entered the suit property for 30 years, even at the time that the respondents were constructing upon it, the document was not incorrectly relied upon by the learned first appellate court, to be sufficient for the purpose of proving a collateral transaction, of the plaintiff having put the respondents in possession of the property on 17.05.1971, having accepted consideration of Rs.1500/-, in consequence of which he extinguished his own rights therein; and as such could not seek possession by partition thereof almost 30 years later.

24. It may also be appropriate to observe here that with the appellant never having stepped into the witness box himself, it would seem very obvious that it was his son, who upon coming to know that his father earlier had a share in the suit property, got the suit filed and pursued it even as the attorney of his father, and also testified on his behalf.

25. As regards the 2nd question of law framed by learned counsel, I agree with Mr. Khanna that the finding of the first appellate court, that the suit for partition has been filed by the appellant-plaintiff without seeking the relief of possession, is a wholly erroneous finding. That is obvious from a plain reading of the suit filed by the appellant, seeking separate possession of the suit property by way of partition thereof by metes and bounds.

However, that erroneous finding/observation of the 1st appellate court would not affect the outcome of this appeal in view of what has been held hereinabove on the 1st question of law that arose for consideration herein.

26. The 3rd and 4th questions framed by learned counsel are actually not questions of law but essentially of fact, related to question no.(ii), and therefore are also to answered to the same effect.

In this context it has also to be held here that even as regards the finding of the learned trial court on the document Ex.DC/D5 being more than 30 years old, that finding is also not sustainable, inasmuch as the document is shown to be dated 17.05.1971 even as per that court, with the suit having been instituted on 14.10.2000; hence, it was about 7 months short of being a 30 year old document, to come within the ambit of Section 90 of the Evidence Act.

Yet, with the admission of the attorney and son of the plaintiff in his testimony on his behalf, that his father signed in the Persian script, with the document having been signed in that script, seen with his admission as regards the possession of the respondents-defendants over the suit property for almost 30 years, including that they had constructed upon it a long time ago, this appeal can still not succeed in my opinion, in view of what has been held hereinabove on the 1st question of law framed by learned counsel for the appellant, that the said document was admissible in evidence to prove the collateral transaction of respondents-defendants no.14 & 15 having bene put in possession thereof by the plaintiff, almost 3 decades earlier (as has already been said).

I would therefore not interfere with the judgments of the courts below in the aforesaid set of circumstances.

27. This appeal is consequently dismissed, but with no order as to costs.

December 14, 2018
dinesh

(AMOL RATTAN SINGH)
JUDGE

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| 1. Whether speaking/reasoned? | Yes/No |
| 2. Whether reportable? | Yes/No |