

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

**RSA No.4199 of 2011
Date of Decision.03.05.2018**

Gurdev Singh and others

.....Appellants

Vs

Ajmer Singh and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. J.S. Gill, Advocate
for the appellants.

Mr. I.S. Brar, Advocate
for respondent No.1 to 3.

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AMIT RAWAL J.

C.M. NO.12153-C of 2011

For the reasons stated in the application, delay of 31 days in re-filing the appeal is condoned.

Application is allowed.

RSA No.4199 of 2011

The appellants-defendants are in regular second appeal against the concurrent finding of fact whereby the suit for partition at the instance of the respondents-plaintiffs claiming half share in respect of the suit property described in the head note has been decreed by the trial Court and upheld by the lower Appellate Court.

Succinctly facts as emanated from the pleadings are that the plaintiffs instituted the suit by pleading that the plaintiff and defendants were/are the co-sharers and in joint and undivided possession of the suit/*gair mumkin land* on the premise that Harnam Singh had two sons namely Jangir Singh and Gurmail Singh. The plaintiffs Ajmer Singh, Naib Singh and Major Singh are the sons of Jangir Singh whereas defendants Gurdev Singh,

Sukhdev Singh, Jaswinder Singh and Guddi are sons and daughter of Gurmail Singh and are entitled to equal shares in the property i.e. one half. It was categorically stated that in the previous suit for partition, the defendants had taken the plea of partial partition, therefore, the decision in the previous suit would not come in the way of the plaintiffs for seeking partition of the property. It was also averred that during the pendency of the previous suit, the defendants had taken forcible possession of 1 kanal 8 marlas whereas out of khasra No.812/1-17, the possession over 1 kanal 8 marlas was of the plaintiffs and on remaining 9 marlas, the defendants were in possession of 1 kanal ancestral house belonging to Jangir Singh and Gurmail Singh as described in para (v) of the head note of the plaint. The previous partition suit was filed regarding 2 kanals 19 marlas of gair mumkin land being half share titled as "Ajmer Singh Vs. Gurdev Singh". Thereafter, an application was filed before the Assistant Collector 1st Grade wherein the Revenue Court did not entertain the application by holding that the land was gair mumkin and in this background, the aforementioned suit was filed.

Upon notice, Defendant No.4 refused to accept the notice and was served through affixation but he did not appear and was proceeded ex parte. The suit was contested by the defendant No.1 to 3 by raising the plea of non-maintainability of the suit as in the absence of any possession, the simplicitor suit for partition was not maintainable. The suit was bad for partial partition as whole of the residential house of 18 marlas had not been included in the suit which was in possession of the plaintiffs but was purchased by the defendants. The plaintiffs had earlier filed a suit which was dismissed and the appeal preferred against the same was also dismissed, therefore, the suit was barred by doctrine akin to *res judicata*. There was

already partition between the parties as the parties had been living separately since long owing to the oral family settlement, which was reduced in writing on 8.4.1979. Even pedigree table extracted in the plaint was incomplete. Rest of the paras of the plaint had been denied.

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

- “1. Whether the plaintiff is entitled to partition by metes and bounds? OPP*
- 2. Whether suit of the plaintiff is not maintainable? OPD*
- 3. Whether suit is not properly valued for the purpose of court fee and jurisdiction? OPD*
- 4. Whether the suit is barred by principles of res judicata? OPD*
- 5. Whether suit is barred under Order 2 Rule 2 CPC? OPD*
- 6. Whether this Court has no jurisdiction to try and decide the present case? OPD*
- 7. Relief.”*

The respondents-plaintiffs examined in support of averments made in the plaint, examined Ajmer Singh as PW1, Nek Singh as PW2, Rajinder Singh PW3 whereas defendant had examined Vijay Pal as DW1, Darbara Singh as DW2, Harnek Singh as DW3, Gurdev Singh as DW4 and tendered into evidence documents Ex.D1 to Ex.D14 and Mark A to Mark C.

The trial Court on the basis of aforementioned evidence decreed the suit and the appeal preferred against the same was also dismissed.

Mr. J.S. Gill, learned counsel appearing on behalf of the appellants submitted that the appellants are in peaceful possession of the suit

land since long owing to the family settlement, which has been continuous

and within the knowledge of the respondents. The appellant-defendant No.1 had constructed the residential house but there was no protest or any objection at the behest of the respondents-plaintiffs. Even the family partition was also admitted by the parties, therefore, the suit after lapse of 21 years for partition was not maintainable. The lower Appellate Court had not appreciated the fact that whole joint holding of the parties was not included in the suit for partition i.e. the residential house of 18 marlas which was purchased by the father of the appellant from Kaka Singh @ Godhi Singh vide agreement to sell dated 14.07.1981. The lower Appellate Court has wrongly observed that Kaka Singh @ Godhi was known as Major Singh. There is no application of mind or admittance to the document brought on record. The suit of the plaintiffs was barred by principles akin to res judicata as the previous suit was dismissed vide judgment and decree dated 28.01.1999 and the appeal preferred against the same was also dismissed on 06.09.2001, thus, urges this Court setting aside the judgments and decrees under challenge.

Mr. I.S. Brar, learned counsel appearing on behalf of the respondents-plaintiffs submitted that judgments and decrees rendered by both the Courts below are perfectly legal and justified. The property at the hands of the parties was joint holding. Since the previous suit for partition was bad in law, the subsequent suit for partition could not be said to be barred by doctrine akin to res judicata and rightly so has been decreed. The concurrent finding of fact cannot be interfered unless and until there is gross illegality and perversity.

In the previous round of litigation, the appellants-defendants did not deny the cosharership of the land. The defendants have not been able to

co-sharers can be set up, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of Mr. Gill, for, in the previous round of litigation, the property amongst both co-sharers was not denied to be joint. The suit was dismissed for partial partition. The dismissal of the suit for partial partition would not bar the party to seek separate possession by way of partition. The relationship of the parties as stated by the plaintiffs had not been rebutted by the defendants by bringing on record the evidence. The previous suit was only dismissed for want of partition and therefore, the subsequent suit could not be barred by principle akin to *res judicata* or under Order 2 Rule 2 CPC. The status of the co-sharers remained in tact even after dismissal of the suit for want of complete partition i.e. by partial partition. Living separately without recording any family settlement in the revenue record would not lead to conclusion that the property had been partitioned by metes and bounds.

In view of the aforementioned, the argument of Mr. Gill is not able to cut ice to render a finding different than the one already arrived at by both the Courts below. I do not find any illegality and perversity in the judgments and decrees rendered by both the Courts below, much less, no substantial question of law arises for determination. No ground for interference is made out. The second appeal stands dismissed.

(AMIT RAWAL)
JUDGE

May 03rd, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No