

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

R.S.A.No.463 of 2013

Karan Singh

....Appellant

Versus

Sujan Singh and Ors.

....Respondents

Date of Order: 26.3.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Gopal Sharma, Advocate for the appellant.

Mr. Ajay Jain, Advocate for the respondents.

AMIT RAWAL, J (ORAL)

Appellant-defendant No.1 is in appeal against the concurrent findings of both the courts below whereby the suit of the plaintiff-respondent No.1 for possession by way of partition has been decreed vide judgment and decree dated 14.5.2009 passed by learned Addl. Civil Judge (Sr. Divn.), Rewari and the appeal filed by defendant No.1 against the same has been dismissed by lower Appellate Court vide judgment and decree dated 31.8.2012.

Plaintiff instituted a suit for possession by way of partition of land measuring 10 kanal 14 marla bearing Rect.No.116, Killa No.16 Min West (2-13) and 17/1 (8-1) situated at Village Rewari, Tehsil and District Rewari. It was averred that the plaintiff and defendant Nos.1 & 2 were co-sharers to the extent of 1/6 share each whereas defendant No.3 to the extent of half share. It was further averred that there is total land measuring 52 kanal 4 marla and for remaining land measuring 41 kanal 10 marla, they had filed a separate suit for partition before the Assistant Collector, Ist Grade,

Rewari. On the suit property, the construction existed in the shape of boundary wall, shops etc and was being used for residential purposes and that the suit property was not partitioned so far and therefore only the Civil Court would have the jurisdiction to try the suit.

Appellant-defendant contested the suit by filing written statement and took the preliminary objections with regard to jurisdiction of the court, locus standi of the plaintiff besides pleading the suit being bad on account of partial partition. On merits, it was averred that the defendant was exclusive owner in possession over the portion shown in red color in Killa No.115/20 and that he had constructed the Samadhi (monument) of his father. It was averred that a family settlement was arrived between the plaintiff and defendant Nos.1 & 2 whereby the plaintiff became owner of the blue portion falling in Killa No.17/1 western part and also of 115/20 and after the family partition, in the year 1982, he had constructed three shops and residential house in the year 1986. He had also an electric connection in the year 1987 and obtained a telephone connection in the year 2002. Thereafter he constructed a boundary wall and a latrine on the western portion of 17/1 in the year 1990 and so on.

Defendant Nos.2 & 3 filed their separate written statements and prayed for dismissal of the suit.

The trial Court on the basis of pleadings of parties, framed the following issues:

“1. Whether the suit land is joint between the plaintiff and defendants?OPP

2. Whether the plaintiff is entitled to separate possession of his 1/6th share by way of partition of the suit land?OPP

3. Whether the civil court has no jurisdiction to

entertain and try the present suit?OPD

4. Whether the suit is not maintainable in the present form?OPD

5. Whether the plaintiff is estopped from filing the suit by his own act and conduct?OPD

6. Relief.”

The trial Court on the basis of preponderance of evidence available on record decreed the suit of the plaintiff and the findings were affirmed by the lower Appellate Court in appeal.

Learned counsel for the appellant submitted that the parties were co-owners of the total land measuring 52 kanal 4 marla whereas the plaintiff sought partial partition of the suit land i.e 10 kanal 14 marla. He submitted that both the courts below have not appreciated the facts as well as documentary evidence brought on record while decreeing the suit of the plaintiff as the appellant-defendant was in exclusive possession of his share after the family settlement and constructed his residential house and shops. The suit land is agricultural land as per jamabandi (Ex.P.18) and Aks Sajra (Ex.P.21). He submitted that the civil Court had no jurisdiction to entertain and try the suit when partial partition was sought and that two separate proceedings cannot be initiated at the same time. In support of his contentions, he relied on a Division Bench judgment of this Court reported as **Surjit Singh Vs. Financial Commissioner Appeals-II, Punjab and Others 2012(5) RCR (Civil) 683** and another judgment of this Court reported as **Mohan Lal Vs. Purshotam Kumar and Others 2017 (3) RCR (Civil) 467**. Emphasis was also laid to the judgment of Hon'ble Supreme Court reported as **Kenchegowda (since deceased) by legal representatives Vs. Siddegowda alias Motegowda, 1994(3) RRR 340 (1994) 4 Supreme**

Court Cases 294.

Per contra, learned counsel for the respondent-plaintiff submitted that both the courts below have rightly decreed the suit of the plaintiff. The Civil Court would not have jurisdiction to partition the land assessed to land revenue and the only remedy is available before the Revenue Court. In support, he relied on judgments of this Court reported as **Jagga Singh Vs. Surjeet Singh and Others, 2000(3) RCR (Civil) 52** and **Kaushal Singh and Ors. Vs. Gurdip Singh and Ors, 1987 PLJ 369.**

After hearing learned counsel for the parties and appraising the paper book, I find force in the contentions of learned counsel for the appellant. It has come on record that the parties were co-owners of the total land measuring 52 kanal 4 marla whereas the plaintiff sought partial partition of the suit land i.e 10 kanal 14 marla by filing a separate suit for partition under Section 111 of the Punjab Land Revenue Act. The question which arises for determination in such cases is whether a person can be permitted to avail two remedies or pursue the same in one Court. Similar situation arose before this Court in **Surjit Singh's case (supra)** wherein it has been held that the land in dispute in such circumstances cannot be partitioned by the revenue Court and the only Civil Court would have the jurisdiction.

Paragraphs 8 to 11 of this judgment are reproduced hereinbelow:

8. After considering the submissions made by the counsel for the appellant, we do not find any force in the same. It is uncontroverted fact that after filing the partition application, the appellant himself has carved out plots on the land in their possession for residential purposes on which construction has been raised by the

purchasers. This factum of large scale construction in and around the land in dispute and construction of roads and houses on the plots carved out has been confirmed by the Local Commissioner. Undisputedly, the subsequent development had taken place before the final order of partition was passed. Initially, at the time of confirmation of the mode of partition, the respondent raised objections in this regard.

*9. It is true that the agricultural land, which is part of an estate, which has been defined under the **land revenue act**, cannot be partitioned by the Civil Court in view of Section 158(2) of the said Act. But, when the agricultural land before partition loses its nature as such by the acts of the parties, particularly, who is seeking partition, then such land cannot be partitioned by the revenue Court. During the partition before the Revenue Officer, a co-sharer can raise an objection that the land, which has been shown in the revenue record as agricultural and assessed to land revenue, should not be partitioned as the same due to the acts of the other co-sharer, who is seeking partition, loses its nature as an agricultural land. Exactly this thing has happened in the present case and by taking into consideration the subsequent development and the acts of the appellant himself, the revenue Court refused to partition the land with liberty to the appellant to seek the remedy of partition before the Civil Court. In Auja Singh's case (supra), cited by the learned counsel for the appellant, some observations have been made by the Division Bench of this Court which do not support the case of the appellant, rather those observations support the case of the respondent. These observations read as under:-*

"No doubt, if a particular property is a abadi land and does not fall under the definition of land, the revenue authorities have no jurisdiction to partition the same but in this case, there is no evidence to prove that at the time the land in dispute was ordered to be partitioned by the Revenue Officer, it

was abadi land and was not agricultural land. The order of partition was passed by the Revenue Officer on 22.9.1970, Exhibit D11. The suit land at that time was entered in the revenue papers and it was assessed to land revenue. So, apparently the Revenue Officer, who partitioned the land, had the jurisdiction to partition the same and as such, the order of partition is valid. Before this order could be held to be invalid, the plaintiff, we think, was required to produce evidence which could show that at the time the order of partition was passed, the suit land was not being used for agricultural purposes, but was being used as abadi land. There is, however, no evidence in this behalf nor any such evidence was referred to by the learned counsel for the appellant. Learned counsel for the appellant plaintiff has simply tried to press into service the written statement filed by defendant No.1. No doubt, defendant No.1 in his written statement alleged that the installations and structures on the suit land raised by defendant No.1 were existing for the last 20 years, but this averment made by defendant No.1 was not binding on defendant No.2 who had raised the plea that the suit land had already been partitioned. So, qua defendant No.2, the plaintiff cannot take advantage of any averment made in the written statement filed by defendant No.1. The plaintiff was required to produce some evidence which could show that at the time the suit land was ordered to be partitioned, it was no more an agricultural land, but was being used as abadi land."

(Emphasis Added)

10. In view of the aforesaid observations made by the Division Bench, in our opinion, in the instant case the revenue authorities were fully justified while coming to the conclusion that with the subsequent wide constructions raised, the land in dispute cannot be partitioned by the revenue Court. By the impugned

*order, the revenue Court has specifically given liberty to the appellant to seek his remedy for partition of the land before the Civil Court. Therefore, the appellant is not remediless. If he feels that the co-sharers have unequal possession of the joint land or some portion of the land property has not been given the passage, he is not remediless. He can approach the Civil Court for seeking partition. Since the revenue Court itself has held that the appellant can approach the Civil Court, the bar created by **section 158(2) of the land revenue act** will not come in the way of the appellant.*

11. In view of the above, we do not find any merit in the appeal and the same is hereby dismissed.”

In view of aforesaid, I am in agreement with the submission of learned counsel for the appellant that the suit was hit by the doctrine of partial partition. Since the revenue Court itself has held that the appellant can approach the Civil Court, the bar created by Section 158(2) of the Land Revenue Act will not come in the way of the appellant. There is every possibility of having different findings if a party is permitted to avail two remedies at the same time. I am of the view that the partition should have been sought for the entire property and not qua particular part thereof.

Learned counsel for the respondent-plaintiff pointed out that similar objection was taken before the Revenue Court with regard to the petition being barred by partial partition which had attained finality by virtue of order of the Financial Commissioner.

I am afraid that the finding of the Revenue Court could not be binding on the verdict of this Court.

An attempt has been made by pleading that the land was subjected to land revenue. Even applicability of land revenue in the State of Haryana has been repealed long time back. In my opinion, the respondent-

plaintiff should have availed the remedy of seeking partition qua the entire land in one suit and he was not prevented to do so in law.

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 LR's and others Vs. 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 the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LR's 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 appeal, aforementioned.

Keeping in view the aforementioned, the present appeal is allowed. The judgment and decree passed by both the courts below are set aside and the suit of the respondent-plaintiff stands dismissed. However, it is made clear that in case parties have already compromised the matter then nothing survives for execution.

March 26, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No