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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-3516-2016 (O&M)
Date of decision : 28.02.2018

Hari Mohan Prashar

... Appellant(s)

Versus

Jugal Kishore Prashar

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Harsh Bunker, Advocate
for the appellant(s).

AMIT RAWAL, J. (ORAL)

CM No.9206-C of 2016

For the reasons stated in the application, which is duly supported by an affidavit, the application is allowed and the delay of 94 days in re-filing the appeal is condoned.

RSA-3516-2016

The appellant-plaintiff is aggrieved of the concurrent findings of fact, whereby the suit claiming mandatory injunction against the defendant for removal of the Wall 'AB' constructed in House No.XXXIV/293, jointly owned, with a consequential relief of permanent injunction restraining the defendant from further raising the said wall marked 'AB' and for separate possession by way of partition by metes and bounds to the extent of half share in the house shown in yellowish green and blue colour in the site plan, had been dismissed by the trial Court and

upheld by the lower Appellate Court.

It would be apt to give preface of the matter before adverting to the rival contention of learned counsel for the appellant.

The appellant-plaintiff instituted the suit on the premise that late Kashmiri Lal, father of the parties, had three sons, namely, Hari Mohan Prashar, Jugal Kishore Prashar and Ram Lubhaya and three daughters, namely, Santosh Dada, Indira Dada and Kusum Tiwari and his wife, namely, Ram Piari. Kashmiri Lal, during his lifetime, executed the Will dated 03.02.1986 and unfortunately, died on 05.02.1986. He had executed a Will dated 03.02.1986 bequeathing the property owned by him in the manner and mode described therein. It was pleaded that the parties as per wish of the testator, their father, entered into an agreement dated 07.02.1986 accepting the contents of the Will (Ex.DW-1/C). As far as the property situated in Chandigarh i.e. House No.1253, Sector 18-C, Chandigarh, the other brother i.e. defendant No.1 instituted a suit, which was decreed vide *ex parte* judgment and decree dated 04.06.1988. The agreement and Will are the part and parcel of the *ex parte* judgment and decree, aforementioned. It is, in this background of the matter, injunction and partition of the property was sought, which was according to the Will in joint possession/ownership of the appellant and defendant.

The aforementioned suit was contested by the defendants by raising the preliminary objection of *locus standi* and possession of separate share as per the Will, estoppel, court fees etc. and on merits, it was stated that Kashmiri Lal had bequeathed the property as per actual possession and the plaintiff had no right, title or interest in any portion on the ground floor, first floor or their roofs, other than the portions in his exclusive possession,

therefore, there could not be any violation of easementary right. The trial Court on the basis of the pleadings framed the following issues:-

- “1. Whether the plaintiff is entitled to the permanent injunction as prayed for? OPP.*
- 2. Whether the plaintiff is entitled to the mandatory injunction as prayed for? OPP.*
- 3. Whether the plaintiff is entitled to separate possession by way of partition as prayed for? OPP.*
- 4. Whether the suit is not maintainable? OPD.*
- 5. Whether the plaintiff has no locus standi to file the present suit? OPD*
- 6. Whether the suit is time barred? OPD*
- 7. Relief.”*

The plaintiff stepped in the witness box as PW-1 and tendered his affidavit Ex.PW1/A and relief upon the site plan Ex.P1, the will dated 03.02.1986 Ex.P2, agreement dated 07.02.1986 Ex.P3, copy of judgment dated 07.02.1986 in the matter of Civil Suit No.300 of 13.08.1986 in respect of House No.1253 Sector 18-C, Chandigarh as Ex.P4, the photographs Ex.P5 to Ex.P21, negatives hereof as Ex.P5/A to ex.P21/A, whereas the defendant examined Anina, Clerk House Tax Department M.C., Jalandhar as DW1, who produced the record death certificate of Kashmiri Lal Ex.DW1/A, copy of Will Ex.DW-1/B, copy of agreement Ex.DW-1/C and various other documents.

The trial Court on the basis of the preponderance of evidence dismissed the suit on the ground that the appellant-plaintiff is not entitled separate possession of the property by partition as the property was not joint between the parties and has already been partitioned and also declined the injunction on the premise that the wall 'AB' had already raised, but the

plaintiff had not sought the claim for compensation and the appeal preferred thereto before the lower Appellate Court gave a different tinge colour, though while upholding the same, it was held that the entire property was joint and the suit was, thus, bad for partial partition as the Will Ex.P2 and agreement Ex.P3, had not been proved. Hence, the present regular second appeal.

Learned counsel for the appellant-plaintiff submits that the Will and agreement (Ex.P-2 and Ex.P-3) have not been denied by the defendant, thus, there was not requirement of law to prove the same in accordance with law. It is, in that background, the document was exhibited, though objected to. The judgment dated 04.06.1988 was also based upon the Will and the agreement, which had not been disputed. The other brother, namely, Ram Lubhaya, had already taken his property and therefore, he did not have any claim and for that reason, he was not impleaded in the suit. If the findings of the lower Appellate Court have to be accepted, then the plaintiff/appellant should be granted a liberty to avail partition of the entire property by metes and bounds. That right cannot be taken away as the decree of the lower Appellate Court has conferred the status of co-owner in respect of the entire property, thus, urges this Court for setting aside the judgments and decrees, under challenge, by formulating the substantial questions of law as drawn in the memorandum of appeal.

I have heard the learned counsel for the appellant and appraised the paper book and of the view that there is no merit and force in the submissions of Mr. Bunger, for, concededly the Will and the agreement in the present suit claiming mandatory injunction, permanent injunction and the partition have not been proved in accordance with law. It is a settled

law that mere exhibition of the documents does not dispense with its proof. Reference is invited to *ratio decidendi* culled out by Hon'ble Supreme Court in “Sait Tarajee Khim Chand and other Vs. Yelamarti Satyam and others” 1971 AIR SC 1865, which has subsequently been followed by the various other judgments. It was incumbent upon the appellant-plaintiff to prove the contents of the Will and the agreement. On going through the contents of the agreement, shown to this Court, during the course of hearing, it is not only the property, in dispute, which is in joint ownership of the appellant-plaintiff and defendant, but another property i.e. 60-A situated in Model Town, Jalandhar. It is, in this backdrop of the matter, the Court below held that the suit was bad for partial partition. It is a settled law that even legal plea being not pleaded, can always be taken at any stage of the Court, much less, noticed. The defendant in the present suit had disputed the jointness of the property by observing that the property was in separate possession, which continued prior to the death of the father-Kashmiri Lal, therefore, there was no occasion for partition, in fact the father had executed the Will by protecting the possession of the parties so that there may not be any litigation, post his death, but as the thing would have, one of the brothers had already laid a claim on the basis of the agreement acknowledging the Will in respect of the property situated in Chandigarh and if I going-by the findings of the lower Appellate Court, that property including the other property would be joint. The factum of property i.e. 60-A Model Town, Jalandhar, in joint ownership of Hari Mohan Prashsar with Ram Lubhaya, has not been disputed. In my view, the appellant-plaintiff ought to have sought partition of the entire property, which according to the Will was kept joint as the Will has been respected and honoured and not

challenged by any of the party so far.

For the foregoing reasons, I do not find any illegality and perversity in the judgments and decrees rendered by both the Courts below as the same are based upon the appreciation of oral and documentary evidence, much less, no substantial question of law arises for determination.

With the aforesaid observations, the regular second appeal stands disposed of.

28.02.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No