IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Date of decision: 19.12.2018

1. RSA No.303 of 2015 (O&M)

Balbir Singh and another **..... Appellants**

Versus

Gurmanpreet Singh and others **..... Respondents**

2. RSA No.361 of 2015 (O&M)

Kartar Singh and another **..... Appellants**

Versus

Gurmanpreet Singh and others **..... Respondents**

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Satpal Singh, Advocate
for the appellants (in RSA-303-2015).

Mr. B.P.S. Virk, Advocate
for the appellants (in RSA-361-2015).

Mr. Amarjit Markan, Advocate
for the respondent.

Mr. I.S. Brar, Advocate
for respondent No.3 (in both cases).

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ANIL KSHETARPAL, J.(ORAL)

Vide this judgment, RSA No.303 of 2015 and RSA No.361 of 2015 shall stand disposed of, arising from a single suit filed which was disposed of by the trial Court and First Appellate Court by a common judgment.

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Defendants-appellants are in the regular second appeal against the judgments passed by the Courts below.

Learned First Appellate Court has partly accepted the appeal filed by the defendants by declaring that the findings of the trial Court to the effect that the plaintiffs are owner of 1/4th share in the property has been wrongly granted by the trial Court. However, two sale deeds executed by Kartar Singh-defendant No.1 in favour of defendants No.2 and 3 i.e. Balbir Singh and Darshan Singh, his sons have been declared illegal and void on the ground that the property is co-parcenary property and therefore, Kartar Singh had no right to sell the property without legal necessity.

Some facts are required to be noticed. Kehar Singh was owner of the property. Kehar Singh had three sons namely Kartar Singh, Bahal Singh and Kirpal Singh. There was a family partition between the family members in January, 1980 and three plaintiffs namely Kartar Singh, Bahal Singh and Kirpal Singh all sons of Kehar Singh were acknowledged joint owners to the extent of equal share. This family partition was duly recognized in a Civil Court decree dated 02.08.1982. After passing of the decree, all the three brothers namely Kartar Singh, Bahal Singh and Kirpal Singh sons of Kehar Singh were recorded co-owners of the property to the extent of 1/3rd share each.

On the date the decree was passed, Kartar Singh had three sons-Jagsir Singh, Balbir Singh and Darshan Singh. Kartar Singh had executed two sale deeds in favour of two sons namely Balbir Singh and Darshan Singh dated 21.04.1998 and 27.04.1998 which are subject matter of challenge in the present suit and set aside by both the Courts below.

Learned trial Court decreed the suit in entirety whereas First

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Appellate Court partly accepted the appeal and refused to grant declaration that the plaintiffs are owner to the extent of 1/4th share.

In the present case, Kartar Singh is defendant No.1 in the suit and has admitted execution of the sale deed, payment of sale consideration and existence of bona fide legal necessity. It has further been pleaded that all his children are residing separately and he was in need of money for treatment of his wife Malkiat Kaur who used to remain ill.

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

In the considered opinion of this Court, the question which needs consideration is "Whether in the facts and circumstance of the present case, the Courts were justified in recording a finding that even after partition of the property by way of a family partition which was recognized through a Civil Court decree dated 02.08.1982, a smaller co-parcenary i.e. of Kartar Singh as Karta existed or not?"

Learned counsel for the appellants has submitted that the suit itself was not maintainable. He further submitted that the revenue official i.e. Sadar Kanungo had not brought the original record to prove excerpt prepared by him and therefore, the excerpt cannot be read in evidence in view of the fact that the excerpt is only a summary of revenue record prepared by the revenue official in accordance with Chapter 9 of Volume I of High Court Rules and Orders. He further submitted that the legal necessity in the present case is proved as in the sale deed, it is specifically mentioned that sale is on account of necessity and Kartar Singh while filing the written statement has specifically stated that he was having legal

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necessity as he was to get his wife treated who used to remain ill and the sons were not providing him financial help as they were residing separately. The separate appeal has been filed by defendants No.2 and 3 who had claimed to be bona fide purchasers for consideration. On the other hand, learned counsel appearing for the respondent has submitted that the decree passed by the Court would result into division of the property in between a larger co-parcenary but smaller co-parcenary would continue as the property which came to Kartar Singh pursuant to a decree dated 02.08.1982 would still remain co-parcenary property with Kartar Singh as Karta. He has relied upon a judgment passed by the Hon'ble Supreme Court in the case of *Rohit Chauhan Vs. Surinder Singh and others, 2013(4) RCR (Civil) 40*.

This Court has analyzed the arguments of learned counsel for the parties and gone through the judgment cited by learned counsel for the respondents.

Certain facts which have come on record does not support the contention of learned counsel for the respondents-plaintiffs. Facts are as under:-

1. On the date, the partition took place i.e. January, 1982, Kartar Singh had three sons namely Jagsir Singh, Balbir Singh and Darshan Singh. As per the decree passed on 02.08.1982, only Kirpal Singh, Bahal Singh, and Kartar Singh were declared co-owners of the property to the extent of equal share. There were no pleadings or evidence that Kartar Singh, Bahal Singh and Kirpal Singh would be constituting a smaller co-parcenary along with their children. Still further, it is nowhere recorded that in a family partition, the property has fallen to the shares of co-parcenaries headed by

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these three brothers respectively. It is also not provided that Kirpal Singh, Bahal Singh and Kartar Singh would be holding the property on behalf of their family members. In such circumstance, once pursuant to a decree passed on 02.08.1982, these three brothers had become co-owners in equal share, their specific shares in the property stood identified and all the three were declared owners of 1/3rd share in the property measuring 200 kanals and 12 marlas. The property in dispute is 71 kanals and 11 marlas which comes to little more than 1/3rd share.

2. On the day, the family partition took place on January, 1980, Jagsir Singh, Balbir Singh and Darshan Singh sons of Kartar Singh were alive and they were not made part of the family partition. As per old Hindu law, the son get right to the property by birth. In such circumstance, Jagsir Singh, Balbir Singh and Darshan Singh who were alive on that day, were also part of the larger co-parcenary. The decree passed in the year 1982 has never been challenged. The plaintiffs i.e. Jagsir Singh and his two children through the present suit are claiming the property in the hands of Kartar Singh to be co-parcenary.

3. It has come in evidence that all the family members were residing separately and Jagsir Singh was posted as a constable in the Punjab Police and residing at Barnala whereas two other brothers were residing in the village. Still further, there is no cogent evidence that the parties were treating the property to be co-parcenary property and not exclusive property of Kartar Singh.

Now let us discuss the judgment passed by the Hon'ble Supreme Court in the case of Rohit Chauhan (supra). In the aforesaid case, no doubt, pursuant to a partition decree, defendant No.2 got the property.

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However, it was at that time when Rohit Chauhan was not born. After Rohit had come into the world, the Court held that co-parcenary revived. The Court held that the sole surviving co-parcener was absolute owner but the moment Rohit Chauhan was born, he got a share in the father's property and became a co-parcener. The facts of the aforesaid case are entirely different. In the present case, on the day, the family partition took place, all the three sons of Kartar Singh had already come into the world and were part of the family.

It may be noted here that Hon'ble Supreme Court in the case of *Balhar Singh Vs. Sarwan Singh and another 2015(2) RCR (Civil) 1012* after noticing apparent conflict between the various judgments passed by the Hon'ble Supreme Court referred the matter to a Larger Bench. However, Larger Bench could not decide the case as the appeal in which the reference was made was withdrawn on 12.01.2017. Para 6 of the reference order is extracted as under:-

> *"It would thus appear from a careful reading of the above pronouncements that there is an apparent conflict in the views taken by this Court in the above decisions. This conflict needs to be resolved authoritatively by a larger Bench especially when the subsequent decisions of this Court in Rohit Chauhan's case and Vellikannu's case (supra) have not noticed the earlier decisions of this Court in Chander Sen's case (supra) and Yudhishter v. Ashok Kumar 1987(1) RCR (Rent) 225 : (1987) 1 SCC 204. We accordingly refer the matter to a larger Bench comprising three judges for an authoritative pronouncement on the subject. The papers shall be placed before Hon'ble the Chief Justice of India for constituting an appropriate Bench."*

Keeping in view of the aforesaid discussion, this Court is of the view that the judgments passed by both the Courts below are erroneous

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and therefore, liable to be set aside. This Court is deliberately not opining on the merits/demerits of other arguments of learned counsel for the appellants as in the considered view of this Court, on this sole point, these appeals deserve to be allowed.

Hence, both the appeals are allowed.

The pending miscellaneous application, if any, shall stand disposed of accordingly.

(ANIL KSHETARPAL)
JUDGE

19.12.2018
Dinesh Bansal

Whether speaking/reasoned Yes / No

Whether Reportable Yes / No

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