

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

107

RSA No.4517 of 2014 (O&M)

Date of decision: 17.04.2018

Poonam Arya and others

..... Appellants

Versus

Rukmani Devi and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Ashish Aggarwal, Sr. Advocate with
Mr. Vijay S. Kajla, Advocate
for the appellants.

Mr. Ashwani Verma, Advocate
for respondent No.1.

Mr. Parshant Garg, Advocate, for
Mr. Mohit Garg, Advocate
for respondent No.37.

ANIL KSHETARPAL, J.

Defendants-appellants are in the regular second appeal against the concurrent finding of fact arrived at by the Courts below.

Plaintiff filed a suit for separate possession by way of partition claiming that the property in question is joint and she is having 1/7th share in the same. It is pleaded case of the plaintiff that originally there was a business firm i.e. M/s Minaxi Ginning Pressing and Oil Mills, a partnership firm. The said firm was closed and the plaintiff has already shifted to the State of Maharashtra. It is further pleaded case of the plaintiff that the factory building was demolished and the land was converted into plots and some of the co-sharers have already sold their share in the suit property.

She prayed that she has not sold any share and hence, she is co-sharer to the extent of 1/7th share. The suit was contested by some of the defendants. They pleaded that the property is not joint as the same has already been partitioned. It was pleaded that the entire property has been converted into plots and the defendants have purchased specific plots through registered sale deeds and constructed boundary wall. Some of the defendants even pleaded that they have raised the construction. The plaintiff impleaded 45 defendants.

Both the Courts while relying upon inter-parties judgment dated 24.07.2010 concluded that in the previous suit, the plaintiff has been held to be co-sharer and the aforesaid finding is res judicata between the parties. The Courts have further held that since private partition as alleged has not been incorporated in the revenue record, therefore, there is no severance of status as a co-sharer. Hence, the preliminary decree of partition has been passed which affirmed by the learned First Appellate Court.

In the considered opinion of this Court, the following substantial questions of law arise for consideration:-

1. Whether an incidental finding given in the previous suit particularly when the issue was not directly and substantially in issue in the previous suit, operates as res judicata in a subsequent suit?
2. Whether partition of the property mutually agreed upon between the parties in absence of its having been incorporated in the revenue record cannot be recognized by the Courts?

Question No.1

- (i) *Whether an incidental finding given in the previous suit particularly when the issue was not directly and substantially in issue in the previous suit, operates as res judicata in a subsequent suit?*

Judgment passed in the previous suit is Ex.P-1 on the file. In the previous suit, learned Court had framed the following issues:-

- “1. Whether the plaintiff is entitled to the declaration as prayed for? OPP*
- 2. Whether plaintiff is entitled in the permanent injunction as prayed for? OPP*
- 3. Whether the suit of the plaintiff is not maintainable in the present form?OPD*
- 4. Whether the plaintiff has no locus standi or cause of action to file the present suit?OPD*
- 5. Whether the plaintiff has not come to the court with clean hands and concealed the material facts?OPD*
- 6. Whether the plaintiff is estopped by her own act and conduct from filing the present suit? OPD*
- 7. Whether the suit of the plaintiff is bad for non-joinder and mis-joinder of necessary parties? OPD*
- 8. Relief.”*

A reading of the issues would show that issue of plaintiff being co-owner/co-sharer was not directly and substantially in issue in the previous suit. No doubt, while deciding the previous suit, the Court has held that the plaintiff is co-sharer and hence, she has locus standi to file the suit but in the considered opinion of this Court, such finding cannot be treated as an issue which is directly and substantially in issue. Res judicata is defined in Section 11 of the Code of Civil Procedure which is extracted as under:-

“11. Res judicata – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them

claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been

subsequently raised.”

A reading of the aforesaid, it is clear that before returning a finding that a particular decision in a previous suit operates as res judicata in the subsequent suit, the Court must examine whether in the previous suit between the same parties, the point for determination was directly and substantially in issue or not. This Court finds that in the previously instituted suit, the issue of plaintiff being co-sharer was not directly and substantially in issue. Still further, in the previously instituted suit, the private partition between the parties was not subject matter of adjudication. In the present case, the defence of the defendants is that the property has been already partitioned. It is admitted case of the plaintiff that the property has been converted into plots and sold so owners have divided the property into plot, converted into a colony and sold the plots to the defendants. Such being the position, the crucial issue which needs determination is whether the property has been already partitioned or not. This was not in dispute in the previously instituted suit. Hence, the previously instituted suit cannot operate as res judicata.

In view of the aforesaid discussion, question No.1 is answered in favour of the appellants.

Question No.2

(ii) *Whether partition of the property mutually agreed upon between the parties in absence of its having been incorporated in the revenue record cannot be recognized by the Courts?*

Courts have held that since partition of the property has not been incorporated in the revenue record, therefore, it cannot be recognized by the Courts. In the considered opinion of this Court, the view of the Courts below is against the decision of this Court in the judgment reported

as Ajmer Singh Vs. Dharam Singh, 2006(1), PLJ 442. This Court has held that the private partition carried out by the parties even if it has not been incorporated or affirmed by the revenue authorities, still it is legal and valid and cannot be ignored by the Courts. This Court has dealt with the provisions of Punjab Land Revenue Act and have concluded that the affirmation of private parties by the revenue authorities is only directory and it is open to the parties to prove private partition de-hors the affirmation of partition by the revenue authorities. The conclusion drawn by this Court in the aforesaid judgment is extracted as under:-

“Keeping in view the fact that the judgments of the Supreme Court referred to above are the subsequent judgments, then the judgments relied upon by the learned counsel for the appellant and the fact that the jurisdiction of the revenue authorities in respect of private partition is only of affirmation of partition and that too is directory, I find that it is open to the parties to prove private partition de hors the affirmation of partition by the learned authorities in terms of Section 123 of the Act. Thus, in respect of the third substantial question of law, it is concluded that non affirmance of private partition in revenue record will render such partition as nugatory.”

Still further, in the present case, evidence of the plaintiff makes an interesting reading. The plaintiff appeared as PW-1. In the very first line of the cross-examination, she states that “land has been partitioned seven years back” but later on, she stated that she is not well and thereafter, resiled from the aforesaid statement. However in the subsequent part of the cross-examination, she has stated as under:-

“Some one has been in possession of a specific portion. We have got the back portion...”

In view of the aforesaid statement coupled with the fact that the

plaintiff herself has pleaded that the property has been divided into plots and already sold, this Court has reached at a conclusion that in fact co-owner have already partitioned the property. The plaintiff appears to have become greedy because she has given share towards back portion.

Hence, question No.2 is also answered in favour of the appellants.

In view of what has been discussed above, the judgments passed by the Courts below are set aside and the suit filed by the plaintiff is dismissed.

Regular Second Appeal is allowed.

17.04.2018
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

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