

DIWAKER GULATI
2018.09.20 09:27

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

RSA No.353 of 2017(O&M)

Date of decision: 28.8.2018

Ashok Kumar

....Appellant

VERSUS

Luxmi and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Munish Mittal, Advocate for the appellant.

REKHA MITTAL, J.

The present appeal directs challenge against concurrent findings recorded by the Courts whereby suit for declaration, mandatory and permanent injunction filed by the appellant was dismissed vide judgment and decree dated 28.09.2013 and appeal preferred by the appellant did not find favour with the Additional District Judge, Kurukshetra.

The appellant/plaintiff claimed 1/8th share in the suit property i.e. shop No.406-407, detailed in head-note of the plaint. As per case set up by the appellant, his father namely Mam Chand and defendants No.3 to 5, brothers of Mam Chand were owners in possession of the shop in dispute. Defendants No.3 to 5 colluded with each other and officials of Municipal Committee, Ladwa and got made an entry in the assessment register qua the shop in question in the name of defendant No.3 without any notice to the plaintiff. Mam Chand was owner of 1/4th share in the suit shop. After death of his father, his 1/4th share has been inherited by the

plaintiff and his brother in equal shares i.e. 1/8th share. Taking advantage of wrong entry, defendant No.3 sold shop to defendants No.1 and 2 vide sale deed dated 06.08.2004 for Rs.6 lakhs. The appellant has also challenged sale deed No.703/1 being illegal, null and void, fraudulent and based upon forged record i.e. assessment register for the years 1998-99 and 2005-06.

Defendants No.1 and 2 filed their joint written statement and raised the averments that there was a family settlement on 07.04.1995 and since then defendant No.3 became exclusive owner in possession of the shop and he had sold the same to defendants No.1 and 2. All other material averments of the plaint have been denied with prayer for dismissal of the suit.

The trial Court framed the issues, permitted the parties to adduce evidence in support of their respective contentions and eventually dismissed the suit vide judgment and decree dated 28.09.2013. The Court in appeal has also accepted the factum of family settlement amongst joint owners of certain properties and as per the settlement, the shop in question had fallen to the share of defendant No.3.

Counsel for the appellant would argue that one of the grounds taken into consideration for dismissal of the suit and appeal is that the instant suit is barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure, 1908 (in short 'the Code') as earlier the appellant filed a suit for partition but the property in question was not included in the said suit. It is argued that the suit filed by the appellant for partition of joint property(s) has been withdrawn with the permission of Appellate Court in those proceedings and the appellant has been permitted to file a fresh suit on the same cause of action by the Additional District Judge, Kurukshetra

vide order dated 05.09.2016 (Annexure A-1). Counsel would further argue that in case the appeal filed by the appellant is dismissed, he may not be in a position to file another suit for partition by excluding the shop in question, therefore, a serious prejudice shall be caused to the appellant in case the judgments passed by the Courts below are affirmed.

I have heard counsel for the appellant, perused the paper-book particularly the judgments impugned.

The Court in appeal framed a question “Whether on 7.4.1995 a family settlement with regard to joint property of family of plaintiff as well as defendants No.3 to 5 had taken place?”.

On detailed consideration of oral evidence adduced by the parties particularly the statement of Vijay Kumar, real brother of the appellant, examined by the respondents/defendants, the Appellate Court has held that there was family settlement between parents of plaintiff and defendants No.3 to 5 in the year 1995 and in that family settlement the disputed property came to the share of defendant No.3. The Court has also noticed that Ramesh Lal PW-2 has admitted in his cross examination that defendant No.3 was exclusively running shop of vegetables on commission basis in the disputed property for the past 30-35 years which shows that even before the alleged family settlement, defendant No.3 was in exclusive possession of the disputed property.

Counsel for the appellant has not disputed correctness of the factual aspects noticed by the Court in appeal. Vijay Kumar, brother of the appellant made a statement prejudicial to his own interest as the appellant has claimed that Vijay Kumar, his brother, is entitled to 1/8th share for their predecessor in interest Sh. Mam Chand was co-owner in the suit shop to the extent of 1/4th share. Counsel has failed to advance any argument

much less meaningful to convince this Court that factual findings recorded by the Courts suffer from an error much less perversity warranting intervention. In the given scenario, even if the objection with regard to the suit being barred under Order 2 Rule 2 of the Code has become redundant because of the permission granted by the Court in appeal to withdraw the suit for partition filed by the appellant, it would not enure to benefit of the appellant to challenge the factual findings that the shop in question had fallen to the share of Sh. Mahavir Parshad in a family settlement.

For the foregoing reasons, the appeal fails and is accordingly dismissed in limine. No order as to costs. As the appeal has been decided on merits, application for condonation of delay in re-filing the appeal is of academic relevance only.

AUGUST 28, 2018

‘D. Gulati’

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no