

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

RSA No. 5485 of 2017 (O&M)

Date of decision : October 23, 2018

Jagdev Singh

.....Appellant

Versus

Shamsher Singh

....Respondent

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Kuldip Sanwal, Advocate for
Mr. C.M. Munjal, Advocate
for the appellant.

LISA GILL, J.

Appellant – defendant is aggrieved of judgment and decree dated 18.01.2016 passed by the learned Civil Judge (Senior Division), Sri Muktsar Sahib as well as judgment and decree dated 04.01.2017 passed by the learned Additional District Judge, Sri Muktsar Sahib.

Suit for possession filed by the plaintiff – respondent by way of partition of the property as well as suit for permanent injunction restraining the present appellant from raising any construction on the suit property or alienating the same without partition was decreed by the learned trial court and upheld by the learned first appellate court.

Brief facts necessary for adjudication of the case are that the plaintiff – respondent filed the above said suit while pleading that the plaintiff and the defendant are both residents of village Bhullar, Tehsil and District Sri Muktsar Sahib and are co-sharers of the suit property. Suit property was stated to be gair mukmin abadi area measuring two kanals. The plaintiff claimed to have 67/312 share out of two kanals i.e. 8 marlas 5 sirsai. Defendant, it was stated, had 245/312 share out of the suit land. As

the defendant belongs to a political party, it was averred that he started raising construction on one side of the plot without any notice to the plaintiff. It was further pleaded that the appellant – defendant wanted to raise construction over the land situated in the main street whereas he had no right to do so without partition of the land. The plaintiff claimed to be in possession of the suit land as a co-sharer. As a dispute had arisen, the plaintiff did not want to continue with the joint ownership and possession of the land. Defendant was requested a number of times to admit the claim of the plaintiff but he refused. Hence, the suit was filed.

Appellant – defendant resisted the suit. Written statement was filed, taking various preliminary objections. It was stated that the plaintiff was not the owner of the suit land, as there had been a family partition of the whole of the property belonging to the plaintiff and his brother Gurmail Singh on 03.07.2006. According to the said partition, two kanals of land fell to the share of the plaintiff's brother Gurmail Singh. A memorandum to that effect was executed between the plaintiff and his brother. However, the writing was not reported to the revenue authorities and mutation in this respect was also not entered. Thus, the plaintiff was entered as owner of 67/312 share. It was further stated that the appellant – defendant purchased an area of 1 kanal 11 marlas i.e. 245/312 share for an amount of Rs.1,91,000/- vide registered sale deed dated 22.01.2007 from Gurmail Singh. Gurmail Singh on the same very day transferred his remaining ownership i.e. 67/312 share i.e. 8 marlas 5 sirsai to the defendant in khasra No. 554. As Gurmail Singh had not been reflected as owner of this share, sale deed could not be effected in respect to the said part of the land.

Writing dated 22.01.2007 in this respect was drafted and executed by

Gurmail Singh. Photostat copy of the said document dated 22.01.2007 was handed over to the defendant by Gurmail Singh. The same was duly attested by the witnesses on a stamp paper and attested by Notary and an amount of Rs.1,80,000/- as consideration for this transaction was given to Gurmail Singh at that time. Thus, the defendant – appellant claimed to have become the owner in possession of the total area of khasra No. 554. The land which was purchased by the registered sale deed was a low lying water logged area. The defendant had put earth thereon for levelling the same and had spent Rs.2 lakhs for the same. Construction was being raised by the defendant as he had purchased the same. Dismissal of the suit was prayed for.

Replication was filed.

Following issues were framed by the learned trial Court on the basis of the pleading:-

1. Whether plaintiff is entitled for possession by way of partition of property land measuring 8 marlas 5 sirsai out of land measuring 2 kanla 0 marlas as detailed in the head note of the plaint, situated in the area of village Bhullar?OPP.
2. Whether the plaintiff is entitled to permanent injunction restraining the defendant from making construction over the suit property or alienating the suit property without partition?OPP
3. Whether suit of the plaintiff is not maintainable as the plaintiff is not the owner of the suit land?OPD
4. Whether the defendant has become owner of the suit property by way of writing dated 22.01.2007?OPD
5. Relief.

Evidence was led by both the parties to substantiate their respective stand.

Learned trial Court on considering the evidence on record, facts and circumstances concluded that the plaintiff had succeeded in proving his case whereas the defendant had failed to prove that he was the owner in possession of the entire land in khasra No. 554. Therefore, the suit filed by the plaintiff was decreed. Appeal filed by the appellant was dismissed by the learned Additional District Judge, Sri Muktsar Sahib vide judgment dated 04.01.2017. Aggrieved therefrom, present appeal has been filed.

Learned counsel for the appellant vehemently argues that both the learned courts below have grossly erred in decreeing the suit filed by the plaintiff – respondent. It is contended that the present appellant has duly proved on record that the suit land was partitioned and fell to the share of Gurmail Singh @ Gopi i.e. predecessor - in - interest of the appellant. Writing (Ex. D1) was duly proved by the marginal witnesses DW1 and D2, therefore, findings of the learned courts below on issues No. 1 and 2 are incorrect. It is, thus, prayed that this appeal be allowed, impugned judgment and decree dated 18.01.2016 passed by the learned Civil Judge (Senior Division), Sri Muktsar Sahib as well as judgment and decree dated 04.01.2017 passed by the learned Additional District Judge, Sri Muktsar Sahib be set aside. Consequently suit filed by the plaintiff – respondent be dismissed throughout.

I have heard learned counsel for the appellant and have perused the file.

The entire foundation of the appellant's case rests upon his stand that partition of the land stood effected between the plaintiff and his brother Gurmail Singh. Reliance has been placed on document Ex. D1 i.e.

photostat copy of the alleged memorandum of family partition. The appellant sought to lead secondary evidence to prove the said document (Ex.D1) on the ground the original had been kept by the plaintiff and it was only a photostat copy, which was given to his brother Gurmail Singh (predecessor - in – interest of the appellant). His application to lead secondary evidence was allowed by the learned trial court on 03.10.2015 subject to proof of existence and loss of the said document.

It is relevant to note at this stage that Gurmail Singh (predecessor – in – interest of the appellant) and the brother of the plaintiff, who is alleged to have handed over the photostat of the said document has not been examined by the defendant. Needless to say Gurmail Singh is a material witness and his non examination is detrimental to the appellant's case. Merely to say that Gurmail Singh was won over by his brother cannot in any manner advance the case of the present appellant.

DW1 Nazar Singh and DW2 Jaskaran Singh who have been examined to prove the photostat copy of the alleged memorandum of partition (Ex.D1) have not given any detail whatsoever regarding the photostat copy. None of the said witnesses even stated that the said photostat copy (Ex.D1) was made from its original. There is nothing forthcoming as to when and by whom the said copy was prepared. Authenticity of the said photocopy has not been proved on record. Therefore, the learned courts below have rightly held that Ex.D1 was not duly proved on record.

It is noticed at this stage that the learned trial Court has rightly held that even if the memorandum of partition is taken in consideration, it is of no avail to the appellant. Details of the land in question do not find

mention in this document. Moreover, there is nothing on record to show that the alleged memorandum was ever acted upon. A detailed discussion in this respect has been carried out by the learned trial Court.

Furthermore, the appellant has relied upon document (Ex.D3) stated to have been executed on the same day when sale deed (Ex. D2) was executed on 22.01.2007. Ex.D3 has been referred to as the sale deed executed by Gurmail Singh @ Gopi in favour of the appellant. It is stated therein that Gurmail Singh has become owner of the suit land i.e. 8 kanal 5 sarsai by way of a family partition. However, even the date, month or year of the alleged family partition has not been mentioned. Gurmail Singh is stated to have sold the same for a sum of Rs. 1,80,000/- to the appellant and it is further mentioned that Gurmail Singh would get the sale deed registered by bringing his brother (Jagdev Singh) or by taking power of attorney from him. In case, Gurmail Singh was the owner of the said land, there was indeed no necessity of the recital that he would bring his brother for execution of the sale deed or would take power of attorney of his brother for execution of the sale deed in favour of the defendant – appellant. It is, thus, rightly concluded by learned courts below that Gurmail Singh @ Gopi himself was not the owner of property in question on 22.01.2007, therefore, there was no question of Gurmail Singh conveying title thereof to the appellant – defendant. There is further no dispute that the defendant – appellant had purchased 1 kanal, 11 marlas and 4 sarsai from Gurmail Singh by way of sale deed (Ex.D2). In this situation, it is rightly observed by the learned trial Court that there is no reason why the appellant would not have insisted upon Gurmail Singh to ensure the execution of the sale deed directly from his brother or to furnish the power of attorney and get the

sale deed registered. It is not possible that from 2007, till the filing of the suit on 25.02.2016, the defendant would not have taken any action for execution of the said sale deed.

Both the learned courts below have rendered concurrent findings of fact against the appellant on a wholesome and proper appreciation of evidence on record which warrants no interference. In my considered opinion, no question of law much less a substantial question of law is involved in this appeal.

No other argument was addressed.

Learned counsel for the appellant is unable to point out any illegality and infirmity in impugned judgment and decree dated 18.01.2016 passed by the learned Civil Judge (Senior Division), Sri Muktsar Sahib as well as judgment and decree dated 04.01.2017 passed by the learned Additional District Judge, Sri Muktsar Sahib which calls for any interference by this Court.

Accordingly, this appeal is dismissed with no order as to costs.

October 23, 2018
rts

(Lisa Gill)
Judge

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No