

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

1) RSA No.1562 of 2012
Date of Decision: 28.05.2019

Arvind Kapoor ...Appellant
versus

Kumud Kapoor and another ...Respondents

2) RSA No.1626 of 2012

Arvind Kapoor ...Appellant
versus

Sangeta Chopta and another ...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Rahul Sharma, Advocate, for the appellant.

Mr. V. K. Jindal, Senior Advocate, with
Mr. Gopal Soni, Advocate, for the respondents.

Amol Rattan Singh, J.

These two appeals arise out of two suits consolidated and heard together from the stage of the trial itself, they having been filed by the plaintiff in one against the plaintiff in the other, qua the same property; the parties to the *lis* being siblings, i.e. one brother and two sisters.

The brother, i.e. Arvind Kapoor, is seen to have instituted his suit first, on 14.03.2003, impleading his two sisters as defendants therein, with one sister, i.e. Sangeeta Chopra (*nee* Kapoor), having instituted her suit on 27.04.2004, impleading Arvind Kapoor and the other sibling, i.e. Kumud Kapoor, as defendants.

The bone of contention, as is subject matter of the *lis*, is the property of the parties left behind by their mother who died on 10.02.2000, the main dispute being with regard to the house left by her, i.e. house no.2174,

Sector 44-C, Chandigarh, measuring 8 marlas (about 200 'non-standard' sq. yards).

However, in Arvind Kapoors' suit, he also sought a 1/3rd share in the bank accounts and jewellery of the mother; with him further seeking a declaration that the family settlement relied upon by his sisters, dated 13.06.2000, was obtained by fraud and that he had been discriminated in the distribution of property therein, with such settlement being null & void and not binding on him.

2. As already stated, both the suits were consolidated and heard together, with the suit filed by the sister, i.e. by Sangeeta Chopra, taken to be the 'main suit' and the evidence led in that suit having been accepted as the evidence in both.

Vide her suit, Sangeeta Chopra sought a declaration that she is the owner of the first floor of the said house and that she be given possession of the said property alongwith *mesne* profits/damages, as the brother, i.e. Arvind Kapoor, had illegally occupied it since November 2003. The other sister, i.e. Kumud Kapoor who was impleaded as a defendant in both the suits, filed a written statement in each, conceding the claim of Sangeeta Chopra on the basis of the aforementioned family settlement dated 13.06.2000, which was shown to be a registered document.

3. The issues framed in the consolidated suits were as follows:-

- “1. Whether the plaintiff is entitled to the declaration as prayed for? OPP
2. Whether the plaintiff is entitled to the permanent injunction as prayed for? OPP
3. Whether the plaintiff is entitled to recover the *mesne* profits/damages, if so, to what and at what rate? OPP
4. Whether the present suit is liable to be stayed under Section 10 CPC as alleged? OPD

5. Whether no cause of action arose to the plaintiff to file the present suit against the defendant as alleged? OPD
 6. Whether the suit has not been properly valued for the purpose of court fees and jurisdiction if so what is the exact valuation? OPD
 7. Whether the settlement dated 13.06.2000 is a result of fraud, misrepresentation, null and void and is not binding on defendant No.1?
 8. Whether the plaintiff is entitled to possession of 1st floor of house No.2174, Sector 44-C, Chandigarh? OPD
 9. Whether the defendant No.1 is entitled to inherit 1/3rd share of House no.2174, Sector 44-C, Chandigarh? OPD1
 10. Whether the defendant no.1 is entitled to permanent injunction restraining the plaintiff and defendant no.2 from interfering in the peaceful possession and enjoyment of defendant no.1 and from dispossessing forcibly without process of law? OPD1
 11. Relief.”
4. Subsequently, Sangeeta Chopra modified her claim by not seeking a declaration of ownership but only one seeking possessory rights of the first floor of the house, because as per the statutory provisions applicable (essentially the Punjab Capital (Development & Regulation) Act, 1952 and Rule 14 of the Chandigarh (Sales of Sites and Buildings) Rules 1960), fragmentation of any site or building was not permissible and therefore she could not legally seek ownership of a single floor.
5. To prove her claim, she examined, other than herself, a Junior Assistant from the office of the Estate Office, a former tenant on the first floor of the house, two bank officials and a Notary Public amongst others, with the brother, i.e. Arvind Kapoor having examined only himself.

Defendant no.2 in both the suits, Kumud Kapoor, also examined

herself.

6. Upon appraising the evidence, including the documents on file, the learned trial court first recorded a finding that upon a statement made by his counsel, Arvind Kapoor had given up his claim to his 1/3rd share in the account of the parents of the parties with the Central Bank of India, as also 1/3rd claim to the articles lying in a locker with the Allahabad Bank, on the ground that the said properties were subject matter of another litigation (between the parties).

7. Thereafter, having considered the evidence led before it, the trial court recorded a finding that Arvind Kapoor had never denied his signatures on the family settlement but only submitted that he had been defrauded, inasmuch as the value of the three floors that the house consisted of, was wholly different.

Vide the agreement itself the ground floor of the house had been agreed to be given to Kumud Kapoor (who is stated to have been unmarried), the first floor to Sangeeta Chopra and the second floor to Arvind Kapoor, which according to him was an unfair distribution.

However, the learned trial court held that he not having proved as to how any fraud had been committed upon him, with the assistant from the office of the Registrar/Estate Office having proved the family settlement to be a registered document, and the Notary Public having testified that he had drafted it and was a marginal witness to it with the parties having signed voluntarily on the document.

A finding was also recorded by the trial court that even the Sub-Registrar had “given a note that the parties are present and admit the due execution and contents therein to be true and correct”.

Hence, with the document having been duly registered in the presence of a witness who testified, and the Sub-Registrar also having made an endorsement on it to the aforesaid effect, the family settlement was held to be binding on the parties.

8. Other than that, it was also found that a former tenant on the first floor of the premises, i.e. one Manmohan Singh Gill (PW2), had testified that he had remained a tenant in the property upto March 2003, which he had taken on rent from defendant no.2 Kumud Kapoor on behalf of Sangeeta Chopra who was not residing there, and that he used to pay rent to Kumud Kapoor vide bank cheques issued specifically to her (in her name).

The tenant also testified that he had handed over possession of the first floor of the house to Kumud Kapoor in March 2003.

Hence, upon the aforesaid testimony, the trial court also recorded a finding that as a matter of fact even Arvind Kapoor in his cross-examination had admitted that no rent agreement was ever executed in his favour and that it was Kumud Kapoor who used to receive the rent. Thus, it was found that he was also not the landlord qua tenant Manmohan Singh Gill, and he having occupied the property illegally after the tenant vacated it, he was also liable to pay *mesne* profits @ Rs.5000/- per month, to Sangeeta Chopra.

9. An argument having been raised on behalf of Arvind Kapoor that the family settlement was void being contrary to Section 15 of the Hindu Succession Act, 1956, and therefore not enforceable in terms of Section 23 of the Indian Contract Act, was also rejected; on the ground that Section 15 of the Act of 1956 does not prohibit a family settlement between family members qua their respective shares, on the principle of give and take. Hence, one succession opened upon the death of the mother of the parties, they were

always free to enter into a mutual settlement qua each other which they had done, and consequently Arvind Kapoor subsequently could not back out of it.

10. Thus, the contention on behalf of Arvind Kapoor that the word “inherited” used in the family settlement showed that it was to be inherited in terms of Section 15 of the Hindu Succession Act and no part of the property was to be “distributed” otherwise, was a contention also rejected by the trial court on the aforesaid reasoning.

11. The contention that he (Arvind Kapoor) had been defrauded by way of having been given the least valuable floor, i.e. the second floor, was rejected by that court on the ground that even as per the testimonies of the bank officials and documentary record (Exs.PW5/A to PW5/E), Arvind Kapoor had withdrawn amounts from two fixed deposits running in the name of his mother, for an amount of Rs.71,468/- each, and had also withdrawn an amount of Rs.7329/- from another bank account (Ex.PW7/A).

On the other hand, defendant no.2, Kumud Kapoor, had led evidence to show that she had taken a loan of Rs.1,05,000/- for construction of the house from one bank and a loan for an amount of Rs.60,000/- from another bank, with the help of which she constructed the first and second floors.

Yet further, it was found that even the family settlement, Ex.P1, itself stated as follows:-

“And whereas our mother Mrs. Lajwanti Kapur breathed her last on 10th February 2000 and it was her wish to share the above said house between the legal heirs in the following manner, hence the aforesaid parties agreed with each other on the following terms and conditions:-”

12. As regards the suit property not being partitionable in view of

Rule 14 of the Chandigarh (Sales of Sites and Buildings) Rules 1960 (framed under the Punjab Capital (Development & Regulation) Act, 1952), it was held by the learned Civil Judge that with Sangeeta Chopra having given up the ownership of the first floor of the suit property due to the fact that it could not be partitioned floor-wise, she therefore was only seeking possession of the first floor, as per her possessory rights in terms of the family settlement, which she was held entitled to.

13. Hence, on the basis of the aforesaid facts and findings, the suit instituted by Sangeeta Chopra was decreed in her favour, holding that she was entitled to possession of the first floor of the disputed house, as also *mesne* profits/damages @ Rs.2500/- per month w.e.f. November 2003 till the date that Arvind Kapoor vacated the premises.

The suit instituted by Arvind Kapoor, seeking a 1/3rd share in his mothers' property, was therefore dismissed.

14. Arvind Kapoor having filed two appeals against the aforesaid judgment and decrees, qua each suit, the learned Additional District Judge, Chandigarh, upon considering the pleadings of the parties and the evidence led by them, eventually came to the same conclusion; that the family settlement had been entered into willingly by Arvind Kapoor and that he had subsequently forcibly occupied the first floor of the house as fell to the share of Sangeeta Chopra.

Consequently, the judgment and decrees issued by of the learned trial court was upheld, with the appeals both dismissed.

15. Before this court, Mr. Rahul Sharma, learned counsel for the appellant, first submitted that a suit only seeking injunction without seeking a declaration is not maintainable and since the prayer of declaration of

ownership qua the first floor of the house had been withdrawn as a relief sought by Sangeeta Chopra in her suit, the trial court erred in not dismissing it.

In support of the aforesaid argument, Mr. Sharma relied upon a judgment of the Supreme Court in Anathula Sudhakar v. P. Buchi Reddy (Dead) By LRs & Ors. 2008 (4) SCC 594, from which he pointed to paragraph 11, wherein it was held that where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

On that point, he next relied upon a judgment of a co-ordinate Bench of the Madras High Court in Durai v. Kamala and another 2010 (55) RCR (Civil) 223, wherein it was held as follows:-

“33. It is a settled proposition of law that when the possession and enjoyment of the property is with the defendant, without establishing the title to the property, plaintiff cannot claim recovery of possession of the property, however, if the title of the plaintiff to the property is admitted by the defendant or established by the plaintiff, relief of recovery of possession is maintainable. Declaration of title is mandatory, when the defendant is disputing the title to the property claimed by the plaintiff and the relief sought for is for recovery of possession of the property from the defendant, when the defendant has disputed the title claimed by the plaintiff.”

16. Mr. Sharma next submitted that a suit for possession of a specific part of a joint property against a co-owner, without seeking a relief of partition, is not maintainable.

He thus submitted that, admittedly, the appellant, Arvind Kapoor, is a co-owner in the suit property and therefore with Sangeeta Chopra seeking

only possessory rights, without either seeking a declaration of title or seeking partition of the suit property, her suit could not have been decreed in her favour.

In this context, he cited a judgment of a Division Bench of this court in **Sant Ram v. Daya Ram and others AIR 1961 Punjab 528**, wherein it was stated that the remedy of co-owners' who do not agree among themselves, was to sue for partition and settlement of accounts.

To similar effect, he cited another judgment of another Division Bench, in **Santokh Singh and another v. Darshan Singh and others 2009 (4) RCR (Civil) 538**.

17. He next submitted that with the deed of settlement dated 13.06.2000 not speaking about possession and only inheritance, with Sangeeta Chopra to inherit the entire first floor, that was legally impermissible in terms of the statutory provision (already referred to hereinabove) i.e. Rule 14 of the Chandigarh (Sales of Sites and Buildings) Rules 1960 (referred to hereinabove).

Consequently, he submitted that the settlement itself was inexecutable, with floor wise partition not permissible and further, a suit seeking partial partition of the estate of the deceased in any case not being maintainable.

18. Learned counsel for the appellant then submitted that the word 'inheritance' used in the family settlement in question, could not have been used, the rights of the mother of the parties, i.e. Smt. Lajwanti Kapoor, not being a divisible right as regards the ownership of the suit property (an 8 marla house), fragmentation of which is impermissible in law.

He therefore submitted that the settlement itself is unenforceable

and consequently the decree could not have been issued.

19. Last, Mr. Sharma submitted that even the *mesne* profits @ Rs.5000/- per month awarded to Sangeeta Chopra, have been erroneously so awarded, because it admittedly being unpartitionable property, Arvind Kapoor is a 1/3rd owner thereof and occupation by him of one floor of that property would not entitle his sister to any damages or *mesne* profits for such occupation.

Consequently, Mr. Sharma submitted that the appeals be allowed.

20. *Per contra*, Mr. Vijay Jindal, learned senior counsel appearing for the respondents, referred to the order of this court dated October 30, 2018, wherein this court had recorded his contention (alongwith the arguments of Mr. Sharma), such contention of Mr. Jindal being that the issue of partial partition never having been raised before the courts below, it cannot be raised in a second appeal.

He further submitted that in any case withdrawal of the prayer for a declaration of ownership qua the first floor of the house, was only due to the statutory provision not allowing fragmentation of a building in Chandigarh, with the right to possession of all signatories to the family settlement, in terms thereof, not disturbed by such withdrawal (of the prayer of declaration of ownership).

21. Mr. Jindal next pointed out that Arvind Kapoor, in his cross-examination, was confronted with an affidavit, Ex.PY, on which he had admitted his signatures and the attestation of the Notary on 04.12.2004, such affidavits having been executed by him, stating that he was the owner of the second floor of the house in question.

Mr. Jindal pointed out that the said affidavit was dated 04.12.2000, with the family settlement having taken place about 6 months earlier, i.e. on 13.06.2000. Hence, the contention of the appellant that the family settlement was obtained by a fraud is wholly belied, he having accepted entering into a settlement accepting the second floor of the house, even in his affidavit dated 04.12.2000.

22. Mr. Jindal next pointed to the fact that the appellant had also applied for a succession certificate alongwith his sisters, qua the entire estate of their mother, wherein he claimed a 1/3rd share on the basis of the family settlement, with him also having admitted that Manmohan Singh Gill was a tenant on the first floor, paying rent to Kumud Kapoor.

23. Other than the above, Mr. Jindal reiterated what has been already held by the learned courts below, to submit that seen from any point of view, the appellant having entered into the registered agreement with his eyes open, he cannot be allowed to resile therefrom.

24. Though Mr. Jindal also cited a judgment of the Supreme Court and another of this court to buttress his contentions, it is seen that the said judgments are actually on the right of a person in possession of a suit property, to continue to retain such possession and the right of a person in adverse possession.

Obviously, with respondent Sangeeta Chopra, in her suit, having prayed that possession be handed over to her, the said judgments are inapplicable and are therefore not being referred to.

25. Be that as it may, having considered the matter, in my opinion, these appeals cannot succeed.

This is for the reason that though at first blush it would seem to

be unreasonable that in a house that is unpartitionable as per law, one of the siblings should be given possessory rights of only the top floor, with the ground and the first floor given to his two sisters (one floor each), with obviously the top floor having a lesser value than the lower floors, yet, what cannot be overlooked by this court is that the family settlement is a registered document on which the appellant admitted his signatures.

As regards his contention that he was duped into signing that document, by him presuming that he was getting a 1/3rd share in the settlement; firstly, it not having been shown in any manner that he was a minor at the time when the document was signed, he cannot be accepted to have not thoroughly read the document before signing it.

This would be especially so when there was found to be, by the learned trial court, an endorsement on the settlement at the time of its registration, that the parties were all present.

26. Secondly, as has been submitted by Mr. Jindal, even an affidavit was executed by the appellant, as is stated to have been led by way of evidence before the trial court (Ex.PY), in which he stated, 6 months after the family settlement (04.12.2000), that he was the owner of the second floor of House no.2174, Sector 44-C, Chandigarh.

Very obviously that statement on affidavit was made in terms of the registered family settlement entered into on 13.06.2000, by which the second floor of the house was accepted by the appellant, to be his share.

Hence, he having willingly signed the settlement, he cannot subsequently resile from it by taking a plea that a fraud was played upon him.

27. As regards the argument of Mr. Sharma that a suit seeking only possession without a declaration of a title is not maintainable, the judgment of

the Supreme Court that he himself relied upon, in *Anathulas'* case (supra), holds as follows immediately after the lines quoted by Mr. Sharma:-

“12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiffs's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient, where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.”

28. Hence, in the present case, there actually being no doubt on at least a 1/3rd title of the house vesting in each of the parties to the *lis*, including Sangeeta Chopra, in my opinion the quotation from the judgment relied upon by Mr. Sharma, would be wholly inapplicable, because as regards title to the suit property, all three parties to the *lis* obviously hold a joint title thereto.

The question only is with regard to right to possession of specific parts of that property, which they had agreed to in terms of the family settlement dated 13.06.2000. Even though in the settlement titles to each floor may have been decided, with the 2nd floor going to the appellant, however, the statutory bar not allowing such fragmentation and Sangeeta Chopra having withdrawn her claim for such declaration, claiming instead only possession of the 1st floor instead, as was falling to her vide the agreement, Mr. Sharmas' contention, in my opinion, is misplaced.

It is to be noticed that it is nobodys' case that there is a statutory bar on any specific person occupying/possessing any particular floor. There is also not shown to be any statutory bar on individual floors being let out on rent. The bar only is on ownership of individual floors, thereby resulting in fragmentation of a property.

Hence, withdrawal of the relief of declaration of ownership of one floor which had earlier been sought by Sangeeta Chopra in her suit, would not, in my opinion, render the suit to be non-maintainable, she claiming only possession of a part of the house, title of the whole of which already vested in her alongwith her two siblings, to the extent of a 1/3rd share each.

29. As regards the question of partial partition raised by Mr. Sharma, firstly of course I agree with Mr. Jindal that the said argument never having been raised at any earlier stage with not even an issue framed on it, the appellant would be precluded from raising it at the stage of a second appeal.

Yet, even if it were to be presumed that a purely legal question can be raised even at this stage, with this court itself to decide on it as a substantial question of law, I would hold that as a matter of fact legal partition

of the suit property has not been sought by respondent Sangeeta Chopra once she withdrew her claim to ownership of the first floor thereof because of the statutory bar on such partition. Seeking possession of a particular floor of the property, in terms of the family settlement reached voluntarily between the parties, would not legally amount to partial partition, especially in the face of the fact that such partition in any case is statutorily barred by the aforementioned rule, i.e. Rule 14 of the Chandigarh (Sales of Sites and Buildings) Rules, 1960.

[It is to be specifically noticed that the applicability of the said rule or the enactment under which the rules have been promulgated, is not denied by either party.]

Further, as noticed above, there is no statutory bar on possession/occupation of individual floors, as long as joint ownership is not partitioned.

Hence, I would hold that seeking of possessory rights of an unpartitionable property, without seeking a partition of title of that immovable property, with no other immovable property that formed a part of the estate of the deceased sought to be partitioned, would not amount to seeking partial partition.

30. Coming last to the argument of Mr. Sharma as regards *mesne* profits for occupation of one floor of the house not being payable by the appellant.

Whereas that was an argument this court would have otherwise accepted in the face of the fact that all three siblings, i.e. the parties to the *lis*, continue to be equal owners of the suit property to the extent of a 1/3rd share therein each, yet, Mr. Sharma has not been able to dislodge the specific

finding of fact recorded by the learned trial court, that the appellant was actually in possession of both, the second floor as also the first floor, he already being in occupation of the 2nd floor, and he having occupied the first floor with effect from either March or November 2003 after it was vacated by the tenant. *Mesne* profits have, of course, been awarded to Sangeeta Chopra only with effect from November 2003, by the learned courts below.

Had he continued to be in possession of only the first floor and not the second floor, the argument of Mr. Sharma may have been acceptable till the question of right of possession of each floor was settled. However, he having occupied two floors instead of one, which in any case is in excess of his 1/3rd share in the suit property, and definitely not in terms of the family settlement that this court has also held to have been voluntarily entered into (as had the learned courts below), that argument also has to be rejected.

31. In view of the aforesaid discussion, I find no merit in these appeals which are consequently dismissed; but looking at the nature of the relationship between the parties as also the fact that the appellant in any case has been held liable to pay *mesne* profits as had been awarded to respondent Sangeeta Chopra by the learned courts below, the parties are left to bear their own costs as regards the present appeals.

May 28, 2019
dinesh

(AMOL RATTAN SINGH)
JUDGE

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |