

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 1027 of 2017 (O&M)

Date of decision : 1.10.2019

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Harish Kumar

.....Appellant

vs.

Satish Kumar and another

.....Respondents

Coram: Hon'ble Mr. Justice H. S. Madaan

Present: Mr. Naresh Jain, Advocate for the appellant

Mr. P.S. Khurana, Advocate for respondent No.1

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H. S. Madaan, J.

Briefly stated facts of the case are that plaintiff Satish Kumar had filed a suit against his brothers Ramesh Kumar and Harish Kumar, seeking separate possession of 3/10 share by way of partition of constructed house over an area of 2 ½ marlas comprised in Khasra No. 464/141 (0-5), Khewat No. 834, Khatoni No. 1757, as per jamabandi for the year 2009-10, of village Sheikhu Mandi Malout, fully described in headnote of the plaint.

As per version of the plaintiff, earlier the house in suit was

owned by Mr. Harbans Lal, father of the parties. After death of Mr. Harbans Lal, the house was inherited by his five legal heirs i.e. four sons, namely, Satish Kumar – plaintiff, Ramesh Kumar – defendant No.1, Harish Kumar – defendant No.2, Jagdish Rai – son besides, widow Smt. Mohinder Kaur. Mutation No. 13849 was duly sanctioned in favour of all the legal heirs by way of natural succession and all of them became co-owners of the house in suit; that Smt. Mohinder Kaur sold her 1/10 share (half marla) to the plaintiff vide registered sale deed dated 11.6.2007 on the basis of which mutation No. 14692 was sanctioned, whereas Jagdish Rai sold his 1/10 share (half marla) to the plaintiff vide registered sale deed dated 8.4.2009, on the basis of which mutation No. 16165 was sanctioned. In that way, plaintiff became co-owner to the extent of 1-1/2 marla i.e. 3/10 share. The plaintiff was in possession of the portion described with letters EFCD and to protect his said possession he had filed a suit for permanent injunction against defendants with title 'Satish Kumar vs. Harish Bajaj' in the Court of Civil Judge, Malout. However, the suit was dismissed, since defendants had taken possession of the said portion from the plaintiff during pendency of the suit. According to the plaintiff, he is entitled to separate possession to the extent of his share in the house in suit and when defendants did not accede to his request to give separate possession of his share, he brought the suit in question.

On notice, both the defendants appeared and filed separate written statements. In the written statement filed by defendant No.1 he has taken up various legal objections, including one challenging

maintainability of the suit, contending that previously a family settlement had taken place between the parties, alongwith Jagdish Bajaj and Smt. Mohinder Kaur widow of Mr. Harbans Lal with regard to the house in suit; that the portion measuring 13 x 30 ft had fallen to the share of defendant No.1, whereas remaining portion of equal dimensions had gone to the share of defendant No.2 and an agreement to that effect was reduced into writing between the parties on 25.8.2006. The answering defendant is in possession of the said portion and is residing there with his family. Earlier the plaintiff had filed a suit for permanent injunction regarding this very property, which was dismissed by the Court on 25.9.2012, holding that the family settlement dated 25.8.2006 was valid and legal and plaintiff was debarred to file the suit under Order 2 Rule 2 CPC; that he had not approached the Court with clean hands and had suppressed the material facts; that no cause of action had arisen to him to bring the suit and he had no locus standi to do so; that the suit was not properly valued for the purpose of court fee and jurisdiction. On merits the defendant reiterated that a family settlement had taken place between the parties on 25.8.2006, in which half share in the house was given to defendant No.1 and the remaining half share to defendant No.2. In that way, the plaintiff has no concern with the house and he never came in possession of any portion of the house. Rather vide family settlement, he had relinquished his rights in the house in favour of the defendants, but he fraudulently got the sale deeds executed in his favour from Smt. Mohinder Kaur and Jagdish Rai. Those sale deeds are rather illegal, null and void and not binding upon the rights of the

defendants. Smt. Mohinder Kaur and Jagdish Rai could not execute the sale deeds in favour of the plaintiff in view of the previous family settlement and they do not create any title in favour of the plaintiff.

The written statement filed by defendant No.2 is also on the similar lines. It is contended that in terms of family settlement dated 25.8.2006, half share out of the total house was given to defendant No.1 Ramesh Kumar, whereas the remaining portion was given to defendant No.2 with a condition that defendant No.2 would pay Rs.1.50,000/- to the plaintiff and thereafter plaintiff and his mother Smt. Mohinder Kaur and his brother Jagdish Rai would transfer their shares in the name of defendant No.2. Since then the defendant No.2 is residing in house in dispute in portion having dimensions 13 x 30 ft and the plaintiff has violated the terms and conditions of the family settlement. He has fraudulently got the sale deeds executed from Jagdish Rai and Smt. Mohinder Kaur. The stand taken by defendant No.2 is almost similar to the one taken by defendant No.1 in his written statement. Both the defendants, prayed for dismissal of the suit.

The plaintiff filed replication, controverting the allegations in the written statements, whereas reiterating the averments made in the plaint.

From the pleadings of the parties, following issues were struck:-

1. Whether the plaintiff is entitled to suit for separate possession by way of partition, if so, to what extent, as prayed for ? OPP

2. Whether suit is not maintainable in the present form? OPD
3. Whether suit is barred under Order 2 Rule 2 CPC ? OPD
4. Whether the plaintiff has concealed the material facts and not come to the Court with clean hands? OPD
5. Whether the plaintiff has no cause of action or locus standi to file the present suit? OPD
6. Relief.

In order to prove his case, the plaintiff examined Harbans Lal Kalra, Deed Writer as PW-1, Mander Singh Ex Sarpanch as PW-2, Suresh Kumar as PW-3, plaintiff Satish Kumar himself stepped into the witness box as PW-4 (wrongly renumbered as PW-3), in addition to that he examined Ashok Kumar, Superintendent, The Fazilka Co-op. Sugar Mills Ltd., Fazilka as PW-5 (wrongly mentioned as PW-4), Bhajan Singh, Godown Keeper, The Fazilka Co-op. Sugar Mills Ltd., Fazilka as PW-6 (wrongly mentioned as PW-5), and thereafter the plaintiff closed his evidence after tendering mutation No.13949 as Exhibit PX, mutation No. 14692 as Exhibit PY and mutation No. 16163 as Exhibit PZ.

On the other hand, defendant No.2 Harish Bajaj got his statement recorded as DW-1 and defendant No. 1 Ramesh Kumar appeared as DW-2 and they further examined Burham Parkash son of Om Parkash as DW-3, Arjun Singh, Stamp Vendor as DW-4 and thereafter the defendants closed their evidence.

After hearing the arguments, the trial Court decided issues No. 1, 2 and 4 in favour of the plaintiff and against the defendants,

whereas issues No. 3 and 5 were decided against the defendants and in favour of the plaintiff. Resultantly, vide judgment and decree dated 29.1.2015, suit of the plaintiff was decreed with costs and plaintiff was held entitled to the relief of separate possession by way of partition to the extent of 3/10 share including 1/10 share of his own as well as 1/10 share each of his mother Smt. Mohinder Kaur and brother Jagdish Rai, which had been purchased by him vide sale deeds Exhibits P-1 and P-2.

Both the defendants, felt aggrieved by the judgment and decree passed by the trial Court and had preferred separate appeals before District Judge, Sri Muktsar Sahib. The appeal filed by defendant Harish Kumar having CA No. 37 of 2.3.2015 and one filed by defendant Ramesh Kumar having CA No. 39 of 3.3.2015. Notice of both the appeals was given to the respondents, who had put in appearance through counsel. Since both the appeals had arisen out of the same judgment and decree, those were decided together by District Judge, Sri Muktsar Sahib, vide judgment and decree dated 15.7.2016, in terms of which both the appeals were partly dismissed and partly allowed with no order as to costs and a preliminary decree was passed in favour of the plaintiff and against the defendants to the effect that the plaintiff shall be entitled to possession by way of partition of 3/10th share i.e. Including 1/10th share of his own, as well as 1/10th share each of his mother Smt. Mohinder Kaur and brother Jagdish Rai, which has been purchased by him.

Both the defendants, still felt aggrieved and Harish Kumar defendant has knocked at the door of this Court by way of filing the

present Regular Second Appeal, notice of which was given to the respondents and respondent No.1 has put in appearance through counsel.

I have heard learned counsel for the parties, besides going through the record.

In this case, parties are not at variance with regard to their father Mr. Harbans Lal, being previous owner of the house in suit and he having died intestate, leaving behind his four sons namely, Satish Kumar – plaintiff, Ramesh Kumar – defendant No.1, Harish Kumar – defendant No.2, Jagdish Rai – son and a widow Smt. Mohinder Kaur and a mutation on the basis of natural succession having been sanctioned in favour of all five of them. In that way, the five legal heirs acquired $\frac{1}{5}$ th share each in the house in question. The plaintiff has successfully proved that his mother Smt. Mohinder Kaur and brother Jagdish Rai had transferred their shares to him vide registered sale deeds. In that way his share had got increased to $\frac{3}{10}$. On the other hand, though the defendants do not dispute the fact that Mr. Harbans Lal, the previous owner had died without leaving any Will and he was survived by his widow and four sons and after his death mutation with regard to the house in suit was sanctioned in favour of all his five legal heirs, but then they have taken up a plea that a family settlement had taken place between the parties on 25.8.2006, in terms of which defendants Harish Kumar and Ramesh Kumar were given half share in the house in suit, whereas Harish Kumar was to pay Rs.1,50,000/- to the plaintiff and then plaintiff, Smt. Mohinder Kaur and Jagdish Rai were to transfer their share in the name of

defendant No.2 Harish Kumar. As per case of the defendants, as a result of family settlement, both the defendants are in possession of the house and plaintiff has no right or interest therein. Such stand taken up by the defendants does not deserve to be accepted.

The trial Court has rejected such plea of the defendants by giving detailed reasoning. For ready reference, the same is reproduced as under :-

“25. I have heard the contentions and counter contentions of the learned Counsel for the parties and have also gone through the judicial file very carefully and minutely and have also weighed the evidence produced by the parties. It is observed that after the death of Harbans Lal, the suit house constructed in 2 ½ Marla i.e. ½ share of 5 Marla was mutated in the names of 5 Legal heirs of deceased Harbans Lal, which including the plaintiff Satish Kumar, defendant no. 1 Ramesh Kumar, Harish Kumar defendant no. 2, Jagdish Kumar and Mohinder Kaur widow of Harbans Lal. It is also observed that Jagdish Kumar and Mohinder Singh have already sold their 1/10 share each to the plaintiff Satish Kumar vide sale deed Ex. P 1 and Ex. P2 on the basis of mutation Ex. PY/A and Ex. PZ/A have already been sanctioned in favour of the plaintiff. It is also observed that the family partition Ex. D 1, alleged to have been entered into between

the L.Rs of the deceased Harbans Lal, which including the plaintiff and defendants is not a memorandum of the previous partition rather the rights are created through the family partition Ex. D1, hence, the same was required to be registered. Moreover, the same has not been acted upon between the parties not the same has been entered into the revenue record. It is also observed that Mohinder Kaur was also one of the co-sharer in the suit property. But, she is not party of family partition as she was not present when the alleged family partition taken place nor she signed or thumb marked on the same. Hence, the family partition is not admissible in evidence, as the same is neither registered not acted upon nor entered into the revenue record.

26. As far as, the contentions of both the learned Counsel for the defendants regarding bar of the present suit under Order 2 Rule 2 CPC is concerned, it can be stated that when the suit for permanent injunction was filed by the plaintiff, the plaintiff may not be interested in the partition of the suit property. Hence, there is no bar for filing a suit for partition. Moreover, when he filed a suit for injunction, he was in possession of a part of suit property and his case was dismissed on the ground

that he is not in possession as he was dispossessed from the suit house. Moreover, even though for the sake of arguments, it is considered that he was not in possession even then he is a co-sharer in the suit house. Hence, he can seek the relief of partition of his share. Therefore, this contention of the learned Counsel for both the defendants regarding declaration of the family settlement Ex. D1 to be a valid document by the Court vide its judgment dated 25.09.2012 Ex. D2 is concerned, it is observed that in that judgment the Hon'ble Civil Court has given the observation that the sale deeds in favour of the plaintiff seems to be afterthought and before filing of that suit, the plaintiff was having knowledge of partition deed and he has admitted his signatures on the same. moreover, it was also observed by the court that the plaintiff was not in possession, hence, no injunction can be passed in favour of a person, who is not in possession. so, in this order the Court has nowhere held that the family partition is a valid document rather held that the plaintiff has admitted his signatures on the same. so, even if it is considered that the family partition Ex. D1 has been signed by the plaintiff Satish Kumar, however, the same is neither registered nor acted upon nor entered into revenue record, hence, is not admissible

in evidence. So, the judgment Ex. D2 passed by the Court of Shri Hem Amrit Mahi, PCS, Civil Judge (Jr. Division), Malout, which is passed in case for permanent injunction, has no effect on the present case. Moreover, I am fortified with the judgment of the Hon'ble Punjab & Haryana High in case titled Suresh Kumar (died) through L.R.s and another versus Shiv Kumar (died) through L.R.s, 2012 (2), Local Acts Reporter, 285, in which it has been held that:

"Family Partition --- Registration of --- Requirement of --- Admissibility in evidence ---- Contents of Ex. DW4/A show that the transaction recorded in the agreement was effected on the date of agreement --- It is not the record of any past transaction which would not require registration --- When the partition has been effected by way of document, the document required registration and in the absence of the same, court has rightly rejected the same as inadmissible in evidence".

Therefore, this contention of the learned Counsel for both the defendants is also not tenable.

27. In view of the above discussion of mine, the issue No. 1 is decided in favour of the

plaintiff and against the defendant. The plaintiff is held entitled to the relief of possession by way of partition to the extent of 3/10 share each including 1/10 share of his own as well as 1/10 share each of his mother Mohinder Kaur and brother Jagdish Rai, which has been purchased by him vide sale deeds Ex. P 1 and Ex. P2. As far as, the issue no. 3 is concerned, this issue is decided against the defendants and in favour of the plaintiff, as it is observed that when the suit for permanent injunction was filed by the plaintiff, the plaintiff may not having need to get the suit property partitioned. Moreover, these are two separates reliefs. Hence, the suit of the plaintiff can not be considered to have been barred Under order 2 Rule 2 CPC. As such, the defendants have failed to prove this issue and the same is decided against the defendants and in favour of the plaintiff.”

The trial Court has rightly observed that the family settlement Exhibit D-1 is not a memorandum of the previous partition, rather rights were created vide that document and it required compulsory registration. Furthermore, it was not got incorporated in the revenue record. Smt. Mohinder Kaur was not party to the said document which does not bear her signatures or thumb impressions.

The other plea taken up by the defendants was that the suit was barred under Order 2 Rule 2 CPC, the trial Court was justified in

not accepting the same. The plaintiff having earlier filed a suit for permanent injunction that could not be taken to be a bar for filing a suit for partition. In that suit he had taken up a plea that he was in possession of the portion of the house and during the pendency of the suit he had been dispossessed. The suit was dismissed observing that he was not in possession of any portion of the house. He cannot possibly be non-suited in this case for the reason that when he had sought for grant of permanent injunction, he had not sought separate possession by way of partition in that suit. Considerations for filing of suit for permanent injunction are entirely different. When a person feels threatened at the hands of others with regard to invasion of his valuable right in a property or may be his person, he may approach the Court seeking an injunction order that the persons threatening him should not indulge in any illegal act. In that suit he need not ask for separate possession by way of partition. Therefore, the suit cannot be held to be barred under Order 2 Rule 2 CPC.

With regard to the observations made by the Court finding the family settlement Exhibit D-1 to be a valid document, in judgment dated 25.9.2012, Exhibit D-2, again such observations cannot debar the plaintiff from enforcing his valuable right for seeking separate possession of his share in the joint property. The law is well settled that the question of title cannot be decided in a suit for grant of permanent injunction. Therefore, any observations made by the trial Court were strictly for the purpose of deciding the said suit and those cannot possibly operate as res judicata or estoppel against the plaintiff as regards his filing of the suit in question.

Learned counsel for the appellant has referred to judgments, first being **Dadu Dayalu Mahasabha, Jaipur(Trust) vs. Mahant Ram Niwas and another 2008 (2) RCR (Civil) 936**, by the Supreme Court, wherein it was observed that legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice.

The second judgment relied upon by him was **Hari Singh and others vs. Surjit Singh and others 2014 (4) RCR (Civil) 955**, by a Co-ordinate Bench of this Court.

Whereas the third judgment happened to be **Sulochana Amma vs. Narayanan Nair 1993 (3) R.R.R. 682**, by the Apex Court.

All these judgments do not help the appellant in any manner, due to different facts and the circumstances, as well as the context in which such observations had been made.

The plaintiff being one of the joint owners had every locus standi to file the suit for separate possession by way of partition of the joint property and suit as filed, is maintainable in the present form. There is nothing on record to show that the plaintiff has concealed any material facts or that he has not approached the Court with clean hands.

The judgments passed by the Courts below are well reasoned, based upon proper appraisal and appreciation of evidence and correct interpretation of law. Though the trial Court had committed a little error in decreeing the suit for separate possession without first passing a preliminary decree, but that mistake has been

rectified by the learned District Judge, in appeal. There is no reason to interfere with such judgments of the Courts below.

No substantial question of law arises in the present appeal.

In view of the above discussion, the appeal stands dismissed.

1.10.2019
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(H.S. Madaan)
Judge

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