

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

RSA No.5431 of 2018
Decided on:08.01.2019

Pawan Kumar

.....Appellant

versus

Sham Lal and others

....Respondents

CORAM : HON'BLE MR.JUSTICE DR.RAVI RANJAN

Present: Mr.Ashok Aneja, Advocate,
for the appellant.

DR.RAVI RANJAN, J. (Oral)

I have heard the learned counsel for the appellant and have perused the records of this Case.

This appeal is directed against the Judgment and decree dated 09.02.2018 passed by the Additional District Judge, Fazilka, in Civil Appeal No.440 of 2015 by which he has affirmed the findings recorded by the trial Court in its Judgment and decree 07.10.2015 passed in Case No.514-I dated 23.11.2015.

Briefly stating, the plaintiffs/respondents filed suit seeking separate possession by partition of the property in dispute with consequential relief of permanent injunction restraining the defendants from alienating in any manner more than his share and without partition of the said property.

The plaintiffs claimed that the parties to the suit are co-owners *qua* the suit property as no partition of whatsoever kind had ever been effect between them. The plaintiffs several time requested the defendants to get

the suit property partitioned and to deliver separate possession after partition to each other. But the defendants put a deaf ear to such request. Hence, the suit was filed.

2. The defendants no.1 and 2 appeared and filed their joint written statement-cum-counter claim alleging that defendants no.1 and 2 are in possession of the property measuring 10 ft x 22.6 ft out of their share as shown in the *jamabandi* for the year 2007-08 and similarly, plaintiffs no.1 and 2 are also in possession of the property measuring 10 ft x 22.6 ft out of their share as per the said *jamabandi* and so was the defendants no.3 and 4 over the suit property measuring 10 ft x 32.6 ft. Defendants no.1 and 2 had admitted that defendants no.3 and 4 are owners to the extent of 1/4th share only out of the suit property which has also been shown in the concerned *jamabandi* and site plan of shops under possession of co-owners at the spot. By way of counter-claim the defendants also requested to get the suit property partitioned as per their share.

3. The defendants no.3 and 4 also appeared and filed their joint written statement. They actually contested the suit on the ground that the shop in possession of defendant no.3 and 4 was constructed by Smt.Binni Devi wife of Sh.Sagar Mal son of Sh.Chanan Mal after getting separate possession as per private partition with the then co-sharer/co-owner Subhash Chander son of Het Ram in the year 1981 after considering the location value of the property. She got sanctioned a site plan from Municipal Council, Abohar, for the property which fell into her share upon partition. The other specific portion which were now in possession of the plaintiffs and defendants no.1 and 2 had fallen in the share of aforesaid Subhash Chander after partition with Smt.Binni Devi. In the portion

purchased by the plaintiffs and defendants no.1 and 2 there were tenants and there was some litigation between them claiming themselves exclusive landlords/owners of that portion, however, rear portion had fallen into the share of Smt.Binni Devi. It is further averred on behalf of defendants no.3 and 4 that the plaintiffs also admitted and consented to partition earlier effected between Smt.Binni Devi and Subhash Chander, thus, no partition was required once again and hence, the suit was liable to be dismissed. It is further the case of defendants no.3 and 4 is that they purchased a specific constructed portion from Bhagirath son of Smt.Binni Devi and Ram Niwas son of Sagar Mal respectively and all persons are in separate possession of their purchased property since long, admitting each other's possession to be in exclusive in nature as per their share on the basis of private partition effected on 29.07.1981.

4. The trial Court, upon consideration of rival pleadings, framed following issues for determination in the suit:

1. Whether the plaintiffs are co-owners of the suit property?OPP.
2. Whether the plaintiffs are entitled to relief of separate possession by way of partition of the suit property as prayed for?OPP.
3. Whether the plaintiffs are entitled for permanent injunction as prayed for?OPP.
4. Whether the suit of the plaintiffs is within period of limitation?OPP.
5. Whether the suit of the plaintiffs is not maintainable in the present form?OPD.
6. Whether the suit of the plaintiffs have not been properly valued for the purpose of Court fees and jurisdiction?OPD.
7. Relief.

5. An additional issue was framed later on vide order dated 23.09.2015 as issue No.6A, which is as under:

- 6A. Whether the counter claimants are entitled for relief of separate possession as claimed for in the counter claim?OPCC.

6. The plaintiff no.1, namely, Sham Lal examined himself as PW1 and has also produced original *jamabandi* for the year 2007-08 which has been brought on record as Ex.P1.

The defendants examined DW1 Pawan Kumar, DW2 Raj Pal Sokhal who is a Document Writer who had proved the site plan dated 09.04.2012 as Ex.D2 and DW3 OM Parkash who is defendant no.1 and the counter-claimant. The Sale deed dated 24.12.1999 as Ex.D3, Mortgage Deed dated 27.07.2007 as Ex.D4 and the site plan as Ex.D1/A and Ex.D1/B were also brought on record. DW4 Jaspal Singh, who is Clerk, Municipal Council, Abohar has also been examined. DW5 Rohtash son of Sh.Devi Raj, i.e. respondent no.4, has been examined and had identified the site plan as Ex.D2.

7. According to the plaintiffs the suit property is jointly owned by the parties in which plaintiffs have 1/4th share. Defendants no.1 and 2 have also admitted the case of the plaintiffs that though the parties have purchased a specific area from previous co-owners still that would not deprive the plaintiffs to get separated their share. They have also sought partition by way of counter-claim.

8. Learned counsel appearing for respondents no.1 and 2 accepted that the suit property is still joint between the parties as no partition could be effected between them. He admitted that though the claim of plaintiffs is for getting relief of partition but have alleged that during pendency of the suit the plaintiffs have sold some of their share in the suit property.

The case of defendant no.3 and 4 is that they had purchased a specific area from previous co-owners and earlier partition was duly effected between ancestors of their vendors who were co-owners, namely

Binni Devi and Subhash Chander. Since parties have purchased specific share from previous co-owners there is no jointness between the parties as the partition was already effected on 29.07.1981, thus, no fresh partition with respect to the suit property can be effected.

9. The trial Court took up issues no.1, 2 and 6A together for consideration as they were interconnected and has held after consideration of materials on record that the defendants no.3 and 4 could not prove the previous partition all as no cogent evidence could be led by them in that regard. The trial Court has noticed that the defendants no.3 and 4 are in possession of area slightly greater than their share, i.e. 1/4th share in the suit property, however, they have claimed that they purchased specific plots through the sale deed executed by heirs of Binni Devi, thus, the entry in *jamabandi* to the extent of shares in the name of different co-owners/persons, would be meaningless. However, the trial Court has held, in view of the fact that no evidence could be led on this behalf by defendants no.3 and 4, that their case has failed. In the result, the plaintiffs' case for partition of share was accepted and the shares of the parties have been determined by the trial Court in the following manner:-

Sr. No .	Particulars of Share holder	Khasra number of property	Khewat No./ Khatoni No.	Share
1.	Sham Lal Plaintiff no. 1	1295/1 (112-2) 1295/2(10-0)	26/26 and 27	1/8
2.	Raj Kumar plaintiff no. 2	1295/1 (112-2) 1295/2(10-0)	26/26 and 27	1/8
3.	Om Parkash defendant no. 1/counter claimant	1295/1 (112-2) 1295/2(10-0)	26/26 and 27	1/8

4.	Neeraj Kumar defendant no. 2/counter claimant	1295/1 (112-2) 1295/2(10-0)	26/26 and 27	1/8
5.	Pawan Kumar defendant no. 3	1295/1 (112-2) 1295/2(10-0)	26/26 and 27	1/4
6.	Rohtash defendant no. 4	1295/1 (112-2) 1295/2(10-0)	26/26 and 27	1/4

The trial Court has further held that the parties have transferred their share during the pendency of the suit, then the purchaser would step into the shoes of the seller. In view of the carving out of share as aforesaid, the relief for plaintiffs of permanent injunction was denied.

10. The defendants no.3 preferred appeal bearing Civil Appeal No.440 of 2015 which was also dismissed by the Additional District, Fazilka, vide the impugned Judgement and Decree dated 09.02.2018. The lower Appellate Court also accepted the findings recorded by the trial Court and has held that the appeal is devoid of any merit.

11. Before this Court also learned counsel for the appellant has taken his stand identical to that which was taken before the trial Court and the lower Appellate Court.

Upon consideration of the materials on record this Court is of the opinion that the appellant has failed to make out a case warranting interference of this Court in the impugned Judgments and Decrees of the Courts below. Both the Courts below have noticed that from the sale deed produced by defendants no.1 and 2 it appears that the transfer by the descendants of Subhash Chander was to the extent of 1/4th share only to the concerned defendants.

12. It is well settled that the party who is pleading previous partition has to prove his case, however, defendant no.3-appellant and

defendant no.4 have miserably failed to prove their case. They could have produced their sellers as witnesses or Binni Devi and Subhash Chander to establish their case of previous partition in the year 1981 but that could not be done by the plaintiffs.

That apart, they could have produced copies of their sale deeds before the Courts below to establish from the recitals therein that a specific plots were sold in their favour, but they withheld the sale deeds and did not produce it as documentary evidence before the trial Court. In such a situation, an inference has to be drawn that there was no such recital in the sale deeds of defendants no.3 and 4, else that could have easily been brought on record by them.

Since the appellant alongwith defendant no.4 was unable to prove the previous partition, there would be no reason for not accepting the contents of the *jamabandi* created in favour of the parties which has been brought on record as Ex.P1 and according to which the parties have been found entitled for 1/4th share each.

In view of the aforesaid discussion, this appeal, being devoid of any merit is destined to fail and is, accordingly, dismissed. However, there would be no order as to costs.

January 08, 2019
dharamvir

(DR. RAVI RANJAN)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes
Yes