

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

RSA No.5588 of 2019 (O&M)

Date of Decision: 06.12.2019

Ashwani Kumar Malhotra

.....Appellant

Versus

Sushma Dhawan and others

..... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Rabinder Singh, Advocate
for the applicant-appellant.

LISA GILL, J.

Appellant-defendant, has filed this appeal being aggrieved of judgment and decree dated 05.09.2018, passed by the learned Civil Judge (Jr. Division), Rohtak, as well as judgment and decree dated 28.08.2019, passed by the learned Additional District Judge, Rohtak, whereby suit filed by the plaintiffs-respondents, seeking separate possession by way of partition, has been decreed.

Brief facts necessary for the adjudication of the case are that the plaintiffs-respondents filed a suit for separate possession by way of partition. It is pleaded that Sainapati Malhotra, father of the plaintiffs and appellant-defendant, was the owner of the house as described in the plaint. Sainapati Malhotra, passed away on 04.01.2015 and the mother of the parties passed away on 22.01.2015. It is further claimed that the plaintiffs and appellant-defendant were co-sharers to the extent of 1/5th each. As the property was joint, the parties could not enjoy the same and moreover the defendant-appellant was alleged to be attempting to change the nature of the property. Therefore, the suit was filed, seeking partition.

Defendant-appellant resisted the suit. Various preliminary

objections were raised in the written statement. On merits, it is admitted that the parties are the children of Sainapati Malhotra, who was the owner of the property in question. It is however denied that the plaintiffs and the defendant were co-sharers. Defendant claimed to be the exclusive owner in possession of the property on the basis of a family settlement executed in the presence of one Neeraj Malhotra on 08.05.2010. It is further stated that Sainapati Malhotra, relinquished all his rights, title and interest in the suit property in favour of his only son i.e. the defendant and since then the defendant was the exclusive owner in possession of the house in dispute. The plaintiffs, are denied to have any right or title to the property in question and they had duly accepted the family settlement. Furthermore, a will is also claimed to have been executed by Sainapati Malhotra in favour of his grandson. The plaintiffs, are alleged to have taken away their parents forcible along with the jewelery and the original will. Dismissal of the suit was prayed for.

Replication was filed. From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether the plaintiffs are entitled to a decree for partition, on the grounds, as prayed for?OPP
2. Whether the suit of the plaintiffs is not maintainable? OPD
3. Whether the plaintiffs are estopped by their own act and conduct to file the present suit?OPD
4. Whether the suit of the plaintiff is false and frivolous? OPD
5. Relief.

Both the parties led evidence in support of their respective claims/stands.

Learned trial Court on considering the evidence on record, facts and circumstances of the case, concluded that the plaintiffs had successfully proved their case on the basis of the evidence led by them. Accordingly, the suit was decreed. A preliminary decree of partition was passed to the effect that all the plaintiffs and defendant, are entitled to 1/5 share each.

Appeal preferred by the defendant-appellant was dismissed by the learned Additional District Judge, Rohtak, vide impugned judgement and decree dated 28.08.2019.

Aggrieved therefrom, present appeal has been filed by the appellant-defendant.

Learned counsel for the appellant vehemently argues that both the learned Courts below have grossly erred on facts and in law in decreeing the suit filed by the respondents-plaintiffs, who are none other, but the real sisters of the appellant. It is submitted that the defendant is the owner of the property in question pursuant to a family settlement arrived at between the parties and also on the basis of a will dated 30.05.2011. Learned counsel submits that in-fact, the parents of the parties, were taken away by the respondents on 05.12.2014 in a forcible manner. The appellant's father died on 05.09.2015 and his mother passed away on 22.01.2015. The original will dated 30.05.2011 was taken away by the plaintiffs in a surreptitious manner. It is thus prayed that the present appeal be allowed and the judgements and decrees passed by the learned Courts below be set aside. Consequently, suit filed by the plaintiffs-respondents be dismissed throughout.

I have heard learned counsel for the appellant and have gone through the file with his assistance.

Relationship between the parties, is not in dispute. It is further a matter of record that Sainapati Malhotra, was the owner of the suit property as per sale deed dated 03.09.1990, Ex.P-1. Death of the parents of the parties, on the dates mentioned in the foregoing paras, is admitted. Defendant has denied the claim of the plaintiffs on the ground of a family settlement dated 08.05.2010 and a will dated 30.05.2011. It is a matter of record that the said family settlement has not been placed on record. In-fact, it is not even clarified as to whether the settlement was oral or written. DW-1-Ashwani Kumar Malhotra, defendant himself, in his cross-examination stated that the family settlement was oral, but the witness Neeraj Malhotra in whose presence the same was entered, was not produced for cross-examination. It is duly observed by the learned Civil Judge (Jr. Division), Rohtak, that merely an affidavit of the said witness was tendered in evidence, but despite 16 effective opportunities, Neeraj Malhotra, was not produced to face cross-examination. There is no other evidence on record to indicate the existence of any such family settlement on 08.05.2010. Defendant further relies upon will dated 30.05.2011, which is alleged to have been executed by Sainapati Malhotra, whereby 6/10 share was bequeathed upon the grandson of Sainapati Malhotra i.e., the son of the defendant-appellant and a share of 1/10 each given to the four plaintiffs. Apart from the fact that such a stand is contrary to the family settlement, the said will was never produced on record, though it is mentioned in the written statement by the defendant that the original will was taken away by plaintiff no.2, when their parents were taken by them forcibly. Admittedly, no complaint in this regard was lodged by the defendant. DW-1, in his

testimony went to the extent of stating that the will was oral. It is further admitted by DW-1, the defendant, that parents of the parties were living with the plaintiffs in the evening of their lives.

Learned counsel for the appellant refers to the statement of the accounts of the parents to submit that the plaintiffs have tried to usurp and grab the property of their parents without any right. Moreover, the suit property is in-fact the self acquired property of the defendant-appellant as the same was purchased out of the personal funds and finances of the appellant. It is further contended that parents of the parties were taken away forcibly by the plaintiffs only with a view to grab their property. However, learned counsel for the appellant is unable to deny that the documents/bank account statements so referred to by learned counsel for the appellant, are not a part of the record before the learned trial Court. Admittedly, no application has been preferred by the appellant, even with the present appeal, for leading additional evidence. The evidence on record, does not in any manner substantiate the arguments raised by learned counsel for the appellant.

Learned counsel for the appellant, is unable to point out any question of law much less a substantial question of law which may be involved for consideration in this regular second appeal. Both the learned Courts below, after proper appreciation and consideration of the evidence on record have returned concurrent findings, vide impugned judgements, which calls for no interference.

Hon'ble Supreme Court in **Gurnam Singh (D) By Lrs and others Vs. Lehna Singh (D) By LRs 2019 (7) SCC 641** has observed as under:-

“Before parting with the present judgment, we remind the High Courts that the jurisdiction of the High Court, in an appeal under Section 100 of the CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 of the CPC, it is not permissible for the High Court to reappreciate the evidence on record and interfere with the findings recorded by the Courts below and/or the First Appellate Court and if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal.”

No other argument has been raised.

Keeping in view the facts and circumstances as discussed above, impugned judgments and decrees dated 05.09.2018 and 28.08.2019 passed by the learned Civil Judge (Jr. Division) Rohtak and learned Additional District Judge, Rohtak, respectively, are upheld.

There is a delay of 6 days in filing of this appeal. Keeping in view the fact that the matter has been adjudicated on merits, question of delay in filing of this appeal is rendered academic. Application is disposed of accordingly.

Present appeal is, consequently, dismissed with no order as to cost.

06.12.2019
s.khan

[LISA GILL]
Judge

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