

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 319 of 2019 (O&M)

Date of Decision: 02.03.2020

Jai Pal and Another

... Appellant(s)

Versus

Ram Kumar and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal

Present: Mr. Lalit Yadav, Advocate
for Mr. Sandeep Sharma, Advocate
for the appellants.

Anil Kshetarpal, J.

The plaintiff/appellants have filed the regular second appeal against the judgment & decree passed by the learned first Appellate Court while reversing the judgment & decree passed by the learned trial Court.

The plaintiffs had filed a suit on 08.06.2012 seeking decree for separate possession of the suit property by way of partition. The plaintiffs claim that they are co-sharers in the suit property which is situated within “abadi deh” of the village and they are entitled to possession by way of partition. The suit property has been described in the following manner:-

“(I) A residential old house in dilapidated condition bearing Ahata No. 38, Ghar No. 48, situated within Lal Dora of village Wazirabad, Tehsil and District Gurgaon shown in site plan attached with the plaint as Annexure-A and bounded as under:-

North-west : Khandar Haveli of Ramesh South

West : House of Mangal, Bhartu etc.

South east : Raasta Sare Aam

North East : Raasta Sare Aam

(II) A residential property bearing Ahata No. 209, Ghar No. 255, situated within Lal Dora of Village Wazirabad, Tehsil and District Gurgaon shown in site plan attached with the plaint as Annexure-B and bounded as under:-

North West : House of Dharam Singh and house of Maru Ram Jaildar

South West : Raasta

South East : Raasta

North East : Property of Jeet Ram”

The plaintiffs No.1 & 2 claimed that they have 1/30th share, whereas plaintiff No.3 claimed that he has 1/18th share. All the parties to this litigation are the members of a family having common ancestor.

The defendants No. 1 to 5 have contested the suit, whereas defendants No. 6 to 35 did not choose to contest the suit. On completion of the pleadings, the following issues were framed:

“5. From the pleadings of the parties, following issues are hereby framed:

- 1. Whether the plaintiff is entitled for separate possession by way of partition as prayed for? OPP*
- 2. Whether the suit of the plaintiff is time barred? OPD*
- 3. Whether the suit of the plaintiff is not maintainable? OPD*
- 4. Whether the present suit is bad for non-joinder of necessary parties? OPD*

5. *Relief*".

The plaintiffs, in order to prove their case, examined Ram Parkash as PW.1 and produced *shijra khasra paymaish*, revenue layout plan (Ex.P1 and Ex.P2) and layout plans (Ex.P3 and Ex.P4). Whereas the defendants No.1 & 2 appeared in evidence.

The learned trial Court, on appreciation of evidence, decreed the suit whereas the learned first Appellate has reversed the judgment passed by the learned trial Court.

On appreciation of the evidence of the plaintiffs, the learned first Appellate Court in para 19 has recorded as under:

"19. In the present case plaintiffs apart from the testimony of Ram Parkash as PW1 and the site plan have not adduced any evidence to establish the jointness of the property and also material admissions have been made during his testimony before the court which admissions have been ignored by the Ld. lower court. Plaintiff has admitted that his portion of 80/90 yd.² is lying vacant towards the eastern side which has been left in a mutual arrangement which has taken place between the parties. Plaintiff has also admitted that the share of the plaintiffs is not more than the area which has been left however this material admission has been ignored by the Ld. lower court thereby the plaintiff has himself admitted the mutual arrangement which has taken place between the parties as has also been contended by the defendants and no explanation has been provided by the Ld. lower court for the same for which reason also the

impugned judgment is erroneous and is against the evidence introduced on the record. Plaintiff has also admitted Ram Kumar and Ram Chander to be residing in the suit property since their birth and have also admitted the construction to have been raised thereupon and during further cross examination has made a rather strange admission that a suit for partition has not been filed by him rather he has filed a case for his share on the spot. Plaintiff has showed ignorance regarding any settlement which has taken place in the year 1971 but admitted that the heirs of Nathu are in possession of 1/3 share since then and also admitted that Jai Mal has left his 1/3 share in favour of Ram Chander. Plaintiff has also admitted that he has no dispute with the heirs of Nathu defendants No. 1 and 2 but the dispute is there with defendant No. 2 Ram Chander and he does not have dispute with any other defendant. Plaintiff has also admitted that Devkaran son of Jaimal is residing separately in his 1/6 share and no person has raised any objection upon the same. Also, material admission has been made by the plaintiff that after the mutual settlement which has taken place between the parties, the parties have been coming in possession of their share as per the same. Thus, material admissions have been made by the plaintiff during his cross examination before the court which has been ignored by the Ld. lower court and the finding of the learned lower court with respect to the jointness of the properties is thus erroneous.

Admission of the plaintiff is binding upon him as it is against the interests of the maker and therefore the judgment of the Ld. lower court is erroneous as the plaintiff has himself admitted the mutual partition which has taken place between the parties. Also, the mutual arrangement which has taken place between the parties having been admitted, it cannot be said that the suit properties were joint between the parties and thus the authorities cited by Ld. counsel for the plaintiffs are not applicable on the facts of the case though the proposition cited therein is not disputed.

Also, this court is of the considered view that the Ld. lower court has wrongly observed that defendant No. 1 has appeared as a witness and has admitted the joint ownership of the parties whereas defendant No. 1 has not stepped into witness box and for this reason also the finding of the learned lower court is not sustainable. It is defendant No. 2 who has appeared into witness box and even if his evidence is read in its entirety, the same reflects that the property was a part of the joint family property however a mutual settlement had taken place in the year 1971 and the statement by him that the settlement of the year 1971 has not been recorded in revenue document does not mean that the property is joint between the parties as no revenue documents are prepared with respect to the land situated in the Lal Dora as has also been discussed herein above. Defendant No. 2 has admitted that no written

partition has been made but at the same time has clarified in his statement that after the mutual partition the parties have raised construction on their respective shares. Though, no evidence has been adduced by the defendants that the property in which Ram Parkash is residing has been purchased from the joint Hindu family funds but the same would not entail a decree in favour of the plaintiffs as plaintiffs have himself admitted the oral partition which has been effected between the parties and that his share is lying on the spot”.

This Court has heard learned counsel for the appellants and with his able assistance, gone through the judgments passed by the Courts below and the record.

Learned counsel for the appellants submitted that the first Appellate Court has erred in reversing the finding of the learned trial Court and, therefore, the judgment passed by the learned first Appellate Court is erroneous.

This Court has considered the submissions, however, finds no merits therein. Learned counsel for the appellants has failed to convince this Court that there is any error in the judgment of the learned first Appellate Court. On appreciation of oral evidence, the learned first Appellate Court, which is a last Court of findings of fact, has arrived at a conclusion. The aforesaid conclusion is not proved to be suffering from any error. Still further, with the able assistance of learned counsel for the appellants, this Court has carefully read the statement of PW.1 Ram Parkash, who is the only witness appeared on behalf of the plaintiffs. It is apparent from the

reading of the statement of Ram Parkash that the learned first Appellate Court has correctly drawn conclusion that the parties had entered into a family settlement in the year 1971 and thereafter, they are in exclusive possession of the properties which have fallen to their shares. It will be noted here that the present suit was filed in the year 2012. The entire property of the family has not been included. The plaintiff has only filed a suit with regard to the property situated within the “abadi deh” of the village having no record of title. Still further, PW.1-Ram Parkash, when appeared, has admitted that his portion is lying vacant. Still further, the learned first Appellate Court has correctly held that from the reading of the entire statement, it is apparent that the parties had divided the property by a family settlement in the year 1971, particularly when the plaintiffs have admitted that they have no dispute with the heirs of Nathu, Prehlad and Jaimal, but the dispute is only with defendant No.2-Ram Chander. It is also admitted by the plaintiffs that Dev Karan son of Jaimal is residing in his 1/6th share and no one has ever raised any objection.

The jurisdiction of this Court, while examining the regular second appeal, is regulated by Section 41 of the Punjab Courts Act, 1918 (hereinafter referred to as “the Act”), which is extracted as under:-

“41. Second appeals—*(1) An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court on any of the following grounds, namely :*

- (a) the decision being contrary to law or to some custom or usage having the force of law.*
- (b) the decision having failed to determine some material*

issue of law or custom or usage having the force of law.

- (c) *a substantial error or defect in the procedure provided by the Code of Civil Procedure 1908 (V of 1908), or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.*

Explanation—A question relating to the existence or validity of a custom or usage shall be deemed to be a question of law within the meaning of this section.

- (2) *An appeal may lie under this section from an appellate decree passed ex parte”.*

On plain reading of Section 41 of the Act, it is apparent that before a regular second appeal can be entertained, it is required to be established that the case falls within the parameters of Section 41 of the Act. In this case, learned counsel for the appellants has failed to draw attention of this Court to any substantive misreading or non-reading of the evidence or towards any error of law or the procedure followed. Hence, no ground to interfere.

Dismissed.

(Anil Kshetarpal)
Judge

March 02, 2020
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No