

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

102

1. RSA No. 3688 of 2019 (O & M)
Date of decision : 4.11.2022

Om ParkashAppellant

Vs.

Shiv Charan (deceased) through LRsRespondents

2. RSA No. 4678 of 2019 (O & M)

Om ParkashAppellant

Vs.

Shiv Charan (deceased) through LRsRespondents

CORAM: HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA

Present: Mr. Govind Rana, Advocate, for the appellant

Mr. Harish Bhardwaj, Advocate, for the caveators/respondents

TRIBHUVAN DAHIYA, J. (Oral)

1. Both the above appeals are being decided by this judgment since the same have been filed against the common judgments passed by the lower Appellate Court as well as the trial Court.

2. These are defendant's appeals against the judgment and decree dated 28.2.2019 passed by the lower Appellate Court, whereby the trial Court's judgment and decree, dated 27.1.2017, was reversed, and the plaintiff's suit was decreed while dismissing the counter claim filed by the appellant/defendant (hereinafter referred to as 'the defendant').

3. The facts in brief are, the respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for possession by way of partition with

consequential relief of permanent injunction restraining the defendant from raising any construction in the portion falling to the former's share, and from interfering in his possession of that portion. The plaintiff pleaded that he along with defendant is owner in possession of the suit property comprised in *khasra* no. 66980/4791/3826, 6691/4793, 6692/4793/2, situated in the area of Sonapat *Patti Jatan* . The suit property has been inherited by both, the plaintiff and the defendant, in equal shares from their father Jai Dayal. In a portion of the property towards North-East direction, the parties have raised construction, which is being used by them for residential and commercial purposes. Apart from the constructed portion, there is a vacant land of the plaintiff and the defendant, shown in the site plan, and both are in possession of the same. Towards North-East of the property, there exists a passage being used by the parties as well as Amar Singh son of Dalip, as a private common street pursuant to a compromise arrived at between them in Civil Suit No. 925 of 1995, decided on 5.4.2003, titled *Amar Singh v. Om Parkash and Shiv Charan* . The said passage is meant for access to the plaintiff's house, adjoining the main street on the other side. Although parties to the suit have been using the property under reference as per their respective shares and possession, but the same has not been partitioned so far by meets and bounds. The defendant, it has been pleaded, intends to carve out plots in the vacant land and has started negotiations with the colonizers for the purpose of selling the property. He wants to add the land of passage, which is used for access to the plaintiff's house, to the vacant land. Despite requests, the defendant has refused to get the property partitioned by meets and bounds or desist from carving out the plots.

4. The suit was contested by the defendant by pleading that the property is not joint and it has already been partitioned in April 2003 as a result

of oral family partition. Prior to partition, the parties had equal shares in the suit property, which was inherited by them from their father Jai Dayal. After partition, the parties are in exclusive possession of their respective shares. The street/passage in question is exclusive property of the defendant.

5. The defendant also filed a counter claim seeking declaration that the property has been partitioned by meets and bounds in April 2003, as a result defendant became owner in possession of the portion allotted to him in the counter claim, which was opposed by the plaintiff by filing a separate reply.

6. On the pleadings, the trial Court settled the following issues between the parties:

1. Whether the plaintiff is entitled for a preliminary decree by way of partitioning the suit property along with possession of his share, as claimed? OPP
2. Whether the plaintiff is entitled for a decree of permanent injunction against the defendant restraining him from interfering in possession of plaintiff over his share by way of construction etc. as claimed? OPP
3. Whether the suit of the plaintiff is not maintainable in the present form? OPD
4. Relief.

7. The suit was dismissed by the trial Court, vide judgment dated 27.1.2017, by returning findings on Issues no.1 and 2. In view of the findings on these Issues, Issue no.3 was also decided in favour of the defendant. Counter claim filed by the defendant was decreed to the effect that the suit property stood partitioned by meets and bounds in April 2003, and the defendant became exclusive owner in possession of the portion allotted to him, as detailed in the counter claim. The appeal preferred against the judgment and decree by the plaintiff was accepted by the lower Appellate Court.

8. Learned counsel for the defendant has contended that partition between the parties already stood effected in April 2003. Pursuant thereupon, both of them are in exclusive possession of their shares. The fact of partition, stands established on record by way of writing/*ikrarnama* dated 2.4.1995 (Ex.D-1), clearly mentioning that the parties have partitioned their houses and shops. Learned counsel for the respondent/caveators, on the other hand, contends that there is no infirmity with the judgment passed by the lower Appellate Court.

9. Learned counsel for the parties have been heard, and judgments of the Courts below perused.

10. Undisputedly, the property has been jointly inherited by the parties from their father and this fact is as per the revenue record. However, the fact of partition having taken place in April 2003, could not be established on record. The *ikrarnama*/writing (Ex.D-1) dated 2.4.1995, said to have been executed between the parties to partition their properties, cannot taken into consideration since there is no pleading to that effect in the written statement, which only states that the partition took place in April 2003. Testimony the defendant with regard to partition has also been disbelieved by the lower Appellate Court for valid reasons. Paragraph 15 of the judgment in this regard reads as under:

15. Before proceedings further, it would be relevant to note that defendant Om Parkash as DW14 deposed that the suit property is about 3 bigha and in the partition they got 1500/1600 Sq. yards each. At that time, the land was demarcated but he has no copy of the same. Admittedly, there was writing of the partition. At another place in cross-examination he stated that according to him (Om Parkash) his father had partitioned the land during his life time between the two brothers (parties to the suit). As per mutation of the land in favour of

the parties Ex.P7, Jai Dayal, father of the parties died on 10.11.1988 whereas according to defendant Om Parkash the partition took place in April 2003. So alleged partition of 1988 as referred by DW14 Om Parkash, the defendant, is not believable nor it is so pleaded.

11. Learned counsel for the appellant has also referred to the rent petition bearing Rent Petition No. 9 of 2003 titled *Shiv Charan Om Parkash v. Ishwar Kumar Ranjan* to establish the partition of the land between the parties. But the title of the rent petition itself establishes that it has been jointly filed in the name of both the parties which only points to their joint possession. Besides, it has also been recorded by the lower Appellate Court that in the rent petition dated 22.4.2003 (Ex.P-18) and affidavit of Bittu son of Om Parkash/defendant dated 26.11.2003 (Ex.P-19), the shop in question has been referred to as belonging to both, Om Parkash and Shiv Charan, defendant and plaintiff respectively.

12. Learned counsel has further contended that the ejectment petition, in fact, was filed prior to partition between the parties that took place in April 2003, therefore, it has been wrongly relied upon by the lower Appellate Court. Assuming his assertion to be correct, it could not be disputed by him that there is no other evidence on record to establish partition of the land in question by meets and bounds, as claimed by the defendant. The defendant has claimed that partition took place in April 2003, whereas it is established on record that Jai Dayal, father of the parties, died on 10.11.1988. Therefore, the said partition was rightly not believed by the Court below. Further, as aforesaid the partition on the basis of *ikrarnama* dated 2.4.1995 (Ex.D-1) cannot be believed in the absence of any pleading.

13. Therefore, in view of the aforesaid, there is no ground to interfere

with the well reasoned findings of the lower Appellate Court, decreeing the plaintiff's suit and dismissing the defendant's counter claim. No substantial question of law arises for consideration.

14. Dismissed.

15. Pending applications, if any, are disposed of as having been rendered infructuous.

16. A photocopy of this order be placed on the file of the connected case.

(TRIBHUVAN DAHIYA)
JUDGE

4.11.2022

Ashwani

Whether Speaking/Reasoned : Yes/No
Whether Reportable : Yes/No