

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

RSA-2451-2019 (O&M)

Reserved on: 17.05.2023

Date of pronouncement: 25.05.2023

Sukhdarshan Singh

...Appellant

Versus

Neelam Khosla and another

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S. MADAAN

Present: Mr. Ivan Singh Khosa, Advocate for the appellant.

Mr. Raman Mahajan, Advocate for respondent No.1.

Respondent No.2 ex parte,
vide order dated 04.09.2019.

H.S. MADAAN, J.

Briefly stated facts of the case are that plaintiff Sukhdarshan Singh son of Karnail Singh, R/o House No.3510, Sector 23-D, Chandigarh had brought a suit against defendants Neelam Khosla and Usha Chopra seeking a declaration besides partition of House No.3511, Sector 23-D, Chandigarh and actual physical possession of ½ share of the house; in the alternative, craving for grant of permanent injunction restraining defendant No.1 from alienating the house and dispossessing the plaintiff from actual and physical possession thereof.

2. As per version of the plaintiff, the defendants were exclusive owners of the house in suit to the extent of 50% share each; defendant No.2 Usha Chopra had sold her 50% share to the plaintiff, vide a

registered sale deed dated 28.07.2011 for an amount of Rs.30 lacs and put the plaintiff in possession, therefore, the plaintiff became owner of the house in suit to the extent of 50% share; defendant No.1 is claiming possession of the entire first and second floor and is not allowing the plaintiff to use barsati portion, thus depriving him of his right to use and occupation as per his entitlement; at the time of purchase of share in the house, it was orally pointed out to the defendant No.2 that plaintiff will have entire ground floor and one room on the top floor for use and occupation; when the defendants refused to accept the claim of plaintiff and defendant No.1 was negotiating with some person for the sale of top floor, feeling aggrieved, the plaintiff brought the suit in question.

3. On notice, both the defendants put in appearance. Defendant No.1 had filed a written statement cum counter claim contending that both the defendants had become owners of the house in question in equal shares after the death of their parents; it is a residential house and fragmentation of a residential unit is not permissible within urban limits of Chandigarh; the plaintiff could not have entered into any deal with defendant No.2 without getting specific consent of defendant No.1 because a stranger to a family cannot purchase un-partitioned share of the residential unit from any of the co-owner; furthermore, the plaintiff is not in possession of any portion of the residential unit and in fact, he being stranger to the family cannot claim the right to possession of any portion of the house; the alleged sale deed by defendant No.2 in favour of the plaintiff does not confer any right, title or interest in favour of the

plaintiff; according to defendant No.1, she is ready and willing to pay Rs.30 lacs to the plaintiff paid by him to defendant No.2 for purchase of 50% share and then the plaintiff be directed to execute the sale deed in favour of defendant No.1. In the end such defendant prayed for dismissal of the suit.

4. In the written statement filed by defendant No.2, she admitted having sold 50% share in the house to the plaintiff contending that no partition by metes and bounds had taken place at the time of registration of the sale deed on 28.07.2011 and the plaintiff is residing in House No.3510, Sector 23-D, Chandigarh and not in House No.3511, Sect' 23-D, Chandigarh. Defendant No.1 is in possession of first and second floor of the house in question whereas the ground floor is in possession of a tenant. Defendant No.2 denied having made any statement to the plaintiff that one room on top floor will be used by the plaintiff. In the end such defendant also prayed for dismissal of the suit.

5. From the pleadings of the parties, following issues were framed:-

1. Whether the plaintiff is entitled for declaration as prayed for? OPP.
2. Whether the plaintiff is entitled for decree for partition of House No. 3511, Sector 23-D, Chandigarh and actual physical possession of ½ share of the property? OPP
3. Whether the plaintiff is entitled for permanent injunction as prayed for? OPP
4. Whether the suit of the plaintiff is not maintainable? OPD
5. Whether the defendants are entitled for counter claim as prayed for? OPD

6. Whether the suit is filed within limitation? OPP
7. Whether the defendant No. 1 is liable to pay ad-valorem court fee on the counter/claim? OPP
8. Whether the defendant No. 1 is liable to deposit Zare Panjim in order to claim preferential right in the property? OPP
9. Relief.

6. The parties were afforded sufficient opportunities to lead evidence in support of their respective claims.

7. After hearing arguments, the trial Court of Civil Judge (Jr. Divn.) Chandigarh, vide judgment and decree dated 19.05.2016 dismissed the suit of the plaintiff, whereas decreed the counter claim of defendant No.1 to the effect that she is entitled to purchase share of the plaintiff in the house in question for a consideration of Rs.35,80,000/- subject to payment of Court fee. It was clarified that defendant No.1-counter claimant shall make the payment of Rs.35,80,000/- to the plaintiff within a period of two months from the date of judgment and the plaintiff shall execute the sale deed forthwith after receipt of consideration amount of Rs.35,80,000/- and in case he refused to receive the consideration amount within the prescribed period, then the counter claimant-defendant No.1 shall deposit the amount in the Court and get the sale deed executed through Court.

8. Feeling aggrieved by the judgment and decree passed by the trial Court, the plaintiff had preferred an appeal before District Judge, Chandigarh, that appeal was assigned to Addl. District Judge, Chandigarh, who vide judgment and decree dated 23.01.2019 upheld the

judgment and decree passed by the trial Court and dismissed the appeal with costs.

9. Still feeling dissatisfied, the plaintiff 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, however, only respondent No.1 has put in appearance through counsel, whereas respondent No.2 did not appear despite service and was proceeded against ex parte.

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

11. In this case, both the Courts below in the light of pleadings of the parties, other surrounding facts and circumstances, after analyzing the evidence brought on record by the contestants, in view of the legal position, have come to the conclusion that defendants No.1 and 2 in the suit being real sisters had inherited the house in suit from their parents, becoming co-sharer to the extent of 50% each. The house in question had not been partitioned between the defendants and was joint property when 50% share was sold by defendant No.2 to the plaintiff. The contention raised by learned counsel for the plaintiff that defendant No.2 had let out ground floor of the house to a tenant as admitted by Neelam Khosla in her cross-examination while appearing as DW1 further stating that she is in possession of the first floor, therefore, the suit property is not a dwelling house because defendant No.1 is not permanently residing in the house in question was considered but rejected, observing that it is not necessary that family should have consistently lived in the dwelling house, therefore, the house in question was found to be covered by definition of

a dwelling house within meaning of Section 4 of the Partition Act, 1893 (for short 'the Act'). The objection by learned counsel for the plaintiff that defendant No.1/counter claimant had not challenged the sale deed by defendant No.2 in favour of the plaintiff, therefore, the counter claim is liable to be dismissed was also taken into consideration in the light of legal position and then it was observed that in any case, that does not affect the maintainability of the counter claim because defendant No.1 being member of the family having undivided share in the dwelling house has pre-emptory right to purchase the share of such transferee in view of Section 4 of the Act. The counter claim filed by defendant No.1 was found to be within time and not time barred. The trial Court did not find any merit in the claim of the plaintiff and his prayer for declaration and partition of house in question was rejected so was prayer for grant of alternative relief of decree for permanent injunction.

12. The Ist Appellate Court of Addl. District Judge, Chandigarh found itself in agreement with the conclusion arrived at by the trial Court by giving detailed reasoning and making reference to the various judgments on the subject. Learned Addl. District Judge has observed that in Chandigarh in view of the provisions of Capital of Punjab (Development and Regulation) Act, 1952 and rules framed thereunder, the dwelling unit like the house in suit cannot be partitioned or fragmented and in view of Section 44 of the Transfer of Property Act where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in that Section

shall be deemed to entitle him to joint possession or other common or part enjoyment of the house, therefore, the plaintiff could certainly not obtain possession of specific portion of the house in question.

13. Learned Addl. District Judge in para No.32 of the judgment has mentioned that to precise query put to learned counsel for the appellant during the course of argument, no plausible answer came from his side and the plaintiff appearing as PW1 had admitted in his cross-examination that as per condition No.6 of the letter Ex.P2, pertaining to transfer of ownership, the house cannot be fragmented in any manner, therefore, it has been observed that the plaintiff would not be able to enjoy the property purchased by him. Under those circumstances, it would be just and proper to allow defendant No.1 a real sister of defendant No.2 to pre-empt the sale made in favour of the plaintiff. The objection raised by counsel for the appellant that counter claim was barred by limitation in terms of Article 97 of the Limitation Act, 1963 which provides limitation period of one year from when the sale deed is registered and in this case, sale deed was registered on 28.07.2011 while counter claim was filed on 17.12.2013, Learned ADJ has observed that this Article is not applicable because Section 4 of the Act provides that cause of action to enforce right of pre-emption arises only when the transferee sues for partition to obtain possession of specific portion of the dwelling house and in that way, the suit is within limitation.

14. I find that the impugned judgments and decrees passed by the Courts below are based upon proper appraisal and appreciation of

evidence and correct interpretation of law. There is no illegality or infirmity therein which might have called for interference by this Court in Regular Second Appeal. No substantial question of law arises in this appeal. The appeal is found to be without merit and is dismissed accordingly.

25.05.2023
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(H.S. MADAAN)
JUDGE

Whether speaking/reasoned :	Yes	No
Whether Reportable :	Yes	No