

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-3898-2018 (O&M)
Reserved on: 23.12.2022

Pronounced on: March 21, 2023

Narmala Rao and another

...Appellants

Versus

Narender Singh Rao and ors.

...Respondents

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Ashish Aggarwal, Senior Advocate, with
Mr. Karan Singla, Advocate,
Mr. Abhayjeet Singh, Advocate,
for the appellants.

Mr. Akshay Jindal, Advocate, with
Ms. Anna Thakur, Advocate, for respondent No.1.

Mfr. Tanmoy Gupta, Advocate,
for respondents No.3, 9 and 10.

Mr. Aditya Jain, Advocate, and
Mr. Rahul Vohra, Advocate, for
respondents No.5 (i) to (iv) and 7.

Mr. Pradeep Goyal, Advocate, for respondent No.8.

HARKESH MANUJA, J.

By way of present appeal challenge has been made to the judgment and decree dated 15.02.2018 passed by the learned Additional District Judge, Gurugram, affirming the judgment and decree dated 23.11.2016 passed by the Court of Additional Civil Judge (Senior Division), Gurugram, thereby passing final decree of partition on an application moved by respondent No.1.

The facts leading to the present case are that property

855 Sq. yard, became an apple of discord between the legal heirs of deceased Rao Gajraj Singh. Arising out of a suit for separate possession by way of partition, judgment dated 21.05.2010 came to be passed in RSA No.3937 of 2005 titled as **Air Vice Marshal Mahinder Singh Rao (Retd.) Vs. Narender Singh Rao and others**, granting preliminary decree, whereby the 9 legal heirs of Rao Gajraj Singh were held entitled for $1/9^{\text{th}}$ share each. Further, based on a Will, $1/9^{\text{th}}$ share inherited by Smt. Sumitra Devi i.e. wife of Rao Gajraj Singh was ordered to devolve upon respondent No.1 herein thereby holding him entitled to the extent of $1/9^{\text{th}}$ share out of the suit property. The aforesaid judgment dated 21.05.2010 was later affirmed by the Hon'ble Supreme Court vide order dated 22.03.2013 passed in SLP No.6918 of 2011.

Based on the aforesaid preliminary decree dated 21.03.2010, respondent No.1 moved an application before the trial Court for grant of issuance of final decree of partition stating there that he was in possession of eastern side of the suit property and may be allowed his $2/9^{\text{th}}$ share separately towards the eastern side having front on northern side. In furtherance thereof, the trial Court, ordered for appointment of local commissioner so as to suggest mode of operation and demarcate the suit land as per respective shares of parties to the suit. Accordingly, concerned *Halqa partwari* who was appointed as a local commissioner, submitted his report dated 15.09.2015 recording, *inter-alia*, that it would be appropriate to give 190 Sq. yards on the north west side of the property in question to respondent No.1 against his $2/9^{\text{th}}$ share and rest of the owners having $7/9^{\text{th}}$ share be given 665

Sq. yards towards north east direction which as per Local Commissioner would even save their ancestral house.

Aggrieved against the report submitted by local commissioner, respondent No.1 filed his objections, *inter-alia*, submitting that the partition was required to be effected by protecting possession; the local commissioner never afforded opportunities to the parties to lead evidence before it; the western side of the property was in possession of appellants and other co-sharers; the report was prepared without carrying out actual and valid measurement of the suit property and finally prayed for setting aside the same besides seeking allotment of 2/9th share separately towards eastern side of the suit property.

A detailed reply to the objections was submitted by all other co-sharers including the appellants. In short the basic substance of the reply was that no details were pointed out in the objections to show as to how the report of the local commissioner was illegal or against facts. Besides it, the appellants submitted that the shops in question were rented out by their mother Sumitra Devi and the rent was being collected by respondent No.1 on behalf of entire family. A rejoinder to the aforesaid reply was also submitted at the instance of respondent No.1.

Trial Court vide judgment and decree dated 23.11.2016 passed final decree, granting respondent No.1 his 2/9th share of the suit property towards eastern side by raising a wall from north east to south east by covering 190 sq. yards area. Learned Trial Court also recorded that the mode of partition as suggested by the local commissioner was not practically feasible as the same required major

demolition, resultantly, the objections raised by respondent No.1 to the report were even allowed.

Faced with this, all other co-sharers besides respondents No.1 to 4 filed first appeal before the Court of learned District Judge, Gurugram, besides filing of two separate applications seeking permission to lead additional evidence as well as for framing of issues regarding pointing out value as well as possession of the suit property. Two applications as well as the main appeal were dismissed by the Court of learned Additional District Judge, Gurugram vide judgment and decree dated 15.02.2018. It is the aforesaid two judgments dated 23.11.2016 passed by the Court of Additional Civil Judge (Sr. Divn.), Gurugram and 15.02.2018 passed by the Court of learned Additional District Judge, Gurugram, which have been impugned by way of present appeal.

Learned counsel for the appellants submits that once the preliminary decree is the basis of the final partition proceedings vide which all the legal heirs of deceased Rao Gajraj Singh were held entitled for their $1/9^{\text{th}}$ share each, the same could not have been altered while passing the final decree even with the consent of co-sharers by granting a separate $2/9^{\text{th}}$ share to respondent No.1 and remaining $2/9^{\text{th}}$ share jointly to all other co-sharers. He further submits that even if the silence on the part of the appellants was to be taken up as consent, the same could only be treated for the purpose of acceptance of report made by the local commissioner and once the same was discarded by the Courts below, the preliminary decree declaring all the co-sharers to be entitled for $1/9^{\text{th}}$ share each was required to be followed while passing the final decree. Learned counsel

further submits that appellants including the other co-sharers filed their reply to the application made at the instance of respondent No.1 for grant of final decree for partition, *inter-alia*, disputing the factum of possession of respondent No.1 over the north-east portion of the property in question and also stating that respondent No.1 in fact chose the best portion of the suit property and thus, intended to occupy the best portion without adopting the procedure of law which thus required the appointment of Local Commissioner under Order 13 and 14 of Order 26 CPC. In addition, learned counsel also submits that once the report made by the Local Commissioner was not even accepted by Courts below, a fresh Local Commissioner was required to be appointed by following the procedure laid down under Rule 13 and 14 of Order 26 CPC. In the end, it was submitted that from a perusal of the judgment dated 15.02.2018 passed by the learned Additional District Judge, Gurugram, it could be found that the same was totally non-speaking as even the specific pleas raised by the appellants which were required to be dealt with by first appellate Court in detail being a final Court of fact and law, as enjoined under Order 41 Rule 33 of the Code of Civil Procedure were not even discussed therein.

On the other hand, learned counsel for respondent No.1 submits that the report dated 15.09.2015 consisted of two conclusions; firstly respondent No.1 would be entitled for 2/9th share and the remaining co-sharers would get 7/9th share; secondly respondent No.1 would be given his 2/9th share towards the north west of the property in question. Based thereupon, he further submits that the passing of the impugned order by the Courts below by directing respondent No.1 to

be entitled for his 2/9th share towards north-east of the property in question would in fact amount to mere variation of the report and not setting aside of the same and thus, the Courts below were well within their right to avoid appointment of fresh commission. Learned counsel also submits that the preliminary decree only determines the entitlement of the co-sharers in the joint property and as such, all further steps regarding the preparation of mode of partition and final partition are to follow and as such, mere recording of entitlement of 1/9th share to each co-sharers would not mean that the property was required to be divided into as many separate portions by bifurcating the same into 9 separate shares. Learned counsel again submits that the Courts below on appreciation of pleadings and the evidence available on record exercised their judicial discretion of allotting north-east portion to respondent No.1 and considering the facts and circumstances of the case, there was no valid scope of interference with the aforesaid discretion exercised by the Courts below as the value of two portions i.e. one towards the north-west and the other towards north-east was equivalent and the Courts were even conscious of the fact that the portion towards north-west was under occupation of tenants with the appellants which would have created further litigation for respondent No.1 and would have also lead to demolition of some of the shops existing over the spot.

I have heard learned counsel for the parties and gone through the paper-book as well as records of the case. I find substance in the contentions made on behalf of the appellants.

Partition of joint holding is a valuable right vested amongst the joint owners and thus, it has to be dealt with, considering the

location and value of the joint property so as to avoid any injustice to any of the co-sharers.

In the present case, the trial Court while passing the judgment and decree, discarded the report dated 15.09.2015 made by the Local Commissioner primarily on two counts; firstly, the shops situated towards western portion of the joint property were in possession of tenants and the allotment of said portion to respondent No.1 would have resulted in another round of litigation for him; and secondly, the allotment of eastern portion to respondent No.1 would have lead to minimum demolition.

Based on the aforesaid two reasonings discarding the mode of partition as suggested by the Local Commissioner, the trial Court directed allotment of 2/9th share of suit property in favour of respondent No.1 by raising a wall from north east corner to south east corner on the eastern side of the suit property, thereby covering an area of 190 sq. yards having side road on the eastern side and frontage on the main Gurudwara road.

Aggrieved thereof, the appellants filed first appeal specifically disputing the aforestated two reasonings recorded by the trial Court, besides praying for appointment of fresh Local Commissioner as well as submitting that the shops situated towards western portion of the joint property were let out by the mother of the parties i.e. widow of Late Rao Gajraj Singh and thus, were required to be clubbed with the share of respondent No.1, who was held entitled to inherit 1/9th of her mother's share as well under the preliminary decree. The aforementioned contentions were specifically and categorically raised before the first Appellate Court at the time of hearing as noticed

in para 7 of the impugned judgment. Relevant portion thereof is reproduced hereunder:-

"It has been submitted that the applicant/ respondent No.1 N.S. Rao had earlier claimed exclusive ownership over the entire suit property but at the time of passing of final decree has changed his stand and has started claiming his possession over Eastern side of the portion of the suit property i.e. house and asserting that the respondent are in possession. Interestingly he is not residing in the house rather, residing in the Govt. accommodation at Delhi for his posting as member of Cauvery Water Tribunal, so question of occupying the Eastern side which is more valuable and front portion on the main road is unjustified. The appellant/ respondent No.1 has maintaining the suit property since long. The shops have been given on rent, which are on the Western side of the suit property. It was under the administration and control of the respondent No.1, who being the eldest of the family and after the demise of the parents was taking care of the entire property as an administrator, the applicant cannot himself choose the best portion of the suit property without adopting the essential procedure. It has been further submitted that the Local Commissioner report has suggested the mode of partition of the suit property and the report has wrongly been discarded by Id. Lower court by allowing the objection of the applicant/objector without having any basis. Id. Lower Court should have appointed another local commissioner for suggesting the mode of partition or should have called the parties for adducing the evidence in support of their claim. But no evidence has been called no issues have been framed. Neither any local commissioner has been appointed so Id. Lower Court has caused the miscarriage of justice. More so, the present appellant was never remained in possession over the Western portion of

the house rather, her mother Sumitra Devi were in possession on the entire property as well as rented out the shops in the Western portion of the house, so after the death of Sumitra Devi her 1/9th share has been given to the respondent/appellant No.1. Therefore, his share as clubbed with that of share of his mother Smt. Sumitra Devi which has rightly been determined by the local commissioner. He has never remained in possession over western side so given him that portion is also unfair.”

A careful perusal of the impugned judgment dated 15.02.2018 passed by learned first Appellate Court shows that the specific contentions raised by the appellant were never dealt with or discussed therein. The operative portion of reasoning recorded by the first Appellate Court which forms part of para 11 thereof, is reproduced hereunder:-

“The report of Local Commissioner dated 15.09.2015 cannot be relied upon and the mode of partition as suggested was rightly been observed as impractical as the shops on the west sides as per the site plan of both the parties were admitted in the possession of the tenant of defendant No.1 who is receiving rent for the same for the purpose of maintaining the property. Meaning thereby that he has administration as well as in control over that area. More so, giving of eastern side to the applicant/respondent by raising the wall from North East to South East corner was passed only through one bed room and Varandha which will result into minimum demolition, otherwise, the mode as suggested by Local Commissioner the wall has to be raised passing through two shops store and another room and consequently leading to more demolition, therefore, the report of Local Commissioner is not practical feasible and has rightly been discarded.”

The first appeal being a valuable statutory right, all questions of fact and law being open for consideration, the Appellate Court was required to specifically dealt with all the issues and contentions raised by the appellants by recording reasons in support thereof also being the requirement of Order 41 Rule 31 CPC. The aforesaid view can be derived from the judgment passed by Hon'ble Supreme Court in ***Manjula and others Vs. Shyamsundar and ors.***, 2021 (1) RCR (Civil) 866 and ***Malluru Mallappa (D) Thr. LRs Vs. Kuruvathappa and ors.***, (2020) 4 SCC 313. For convenience, relevant extract of para 8 of **Manjula's** case (supra) as well as para 14 of **Malluru's** case (supra), are reproduced as under:-

“PARA 8 OF MANJULA’S CASE

8. *Section 96 of the Code of Civil Procedure, 1908 (for short, ‘CPC’) provides for filing of an appeal from the decree passed by a court of original jurisdiction. Order 41 Rule 31 of the CPC provides the guidelines to the appellate court for deciding the appeal. This rule mandates that the judgment of the appellate court shall state (a) points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled. Thus, the appellate court has the jurisdiction to reverse or affirm the findings of the trial court. It is settled law that an appeal is a continuation of the original proceedings. The appellate court’s jurisdiction involves a rehearing of appeal on questions of law as well as fact. The first appeal is a valuable right, and, at that stage, all questions of fact and law decided by the trial court are open for re-consideration. The*

judgment of the appellate court must, therefore, reflect conscious application of mind and must record the court's findings, supported by reasons for its decision in respect of all the issues, along with the contentions put forth and pressed by the parties. Needless to say, the first appellate court is required to comply with the requirements of Order 41 Rule 31 CPC and non-observance of these requirements lead to infirmity in the judgment."

PARA 14 OF MALLURU MALLAPPA (D)'S CASE

- 14.** *It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see: Santosh Hazari v. Purushottam Tiwari (Deceased) By Lrs.3, Madhukar and others v. Sangram and Others4, B. M. Narayana Gowda v. Shanthamma (Dead) By Lrs. and Another5, H. K. N. Swami v. Irshad Basith (Dead) By Lrs.6 and M/s. Sri Raja Lakshmi Dyeing Works v.*

*Rangaswamy Chettiar]. (2001) 3 SCC 179
(2001) 4 SCC 756 (2011) 15 SCC 476 (2005)
10 SCC 243 (1980) 4 SCC 259.”*

Applying the aforesaid principle of law to the facts and circumstances of the present case, it is clearly made out that while deciding the first Appeal, the Appellate Court failed to record its independent reasons while upholding the findings recorded by the trial Court as regards the setting aside of the mode of partition as suggested by the Local Commissioner while holding that it was impractical to allot shops situated towards western side of the suit property to respondent No.1, and the allotment of eastern portion was to result in minimum demolition.

More than that, the other contentions, *inter-alia*, raised by the appellants as regards the appointment of fresh Local Commissioner or the shops situated towards western side of the property being rented out by the mother of the parties and thus, required to be clubbed with the share of respondent No.1 were not even dealt with in any manner.

In view thereof, the first Appellate Court having failed to exercise the jurisdiction vested in it in consonance with the provisions of Order 41 Rule 33 CPC, the judgment and decree dated 15.02.2018 passed by learned Additional District Judge, Gurugram is hereby set aside. The matter is remanded back to the first Appellate Court so as to decide the first appeal afresh after hearing both the sides in detail as well as upon consideration of all the pleas raised on their behalf.

Disposed of in the above terms.

It is, however, clarified that since the matter has been

remanded back, therefore, this Court has restrained itself from

expressing its opinion upon the merits of the contentions raised by the respective parties lest it may prejudice their rights in the Court below. It shall be open for both the sides to raise all the pleas before the first Appellate Court at the time of final hearing.

(HARKESH MANUJA)
JUDGE

March 21, 2023
anil/sanjay

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