

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

**R.S.A. No. 2518 of 2019
Date of Decision: 18.08.2023**

Gyarsi Lal and others

.....Appellants

Versus

Mahipal and others

.....Respondents

BEFORE: HON'BLE MR. JUSTICE SANJAY VASHISTH

Present:- Mr. Harsh Aggarwal, Advocate
for the appellants.

SANJAY VASHISTH, J.(Oral)

The present Regular Second Appeal has been filed by Gyarsi Lal-defendant No.1, Rajpal-defendant No.2 and Ravinder Kumar-defendant No.3 sons of Smt. Mishri Devi, daughter of Hira Lal against the concurrent finding of decretal of suit in favour of the plaintiffs.

2. The plea taken by the contesting defendants i.e. appellants herein was that originally Hira Lal was owner in possession to the extent of 1/4th share out of the total land. Rights in the disputed property was further succeeded by three daughters of Hira Lal, namely, (1) Smt.Mishri Devi, (2) Smt. Champa and (3) Smt. Sunehari Devi. Plaintiffs claimed their right in the property as owners in possession on the basis of sale deed dated 30.05.2002 executed in their favour by Champa and Sunehari, daughters of Hira Lal.

Plaintiffs filed a suit for possession by way of partition being co-sharers of the land described in appeal. Status as co-sharers of the plaintiffs and the defendants is not in dispute. However, defendants pleaded that earlier suit filed by the plaintiffs for seeking a decree of mandatory injunction was dismissed on the ground that injunction cannot be granted against the other co-sharers.

3. Another plea taken by the defendants is that on the basis of the oral partition, Champa and Sunehari relinquished their rights qua their respective shares in favour of their third sister Smt. Mishri and, therefore, defendants constructed their houses in the year 1995. Apart from this, defendants took a plea of adverse possession claiming their possession over the property in exclusive and specific share for the last more than 12 years.

4. In the absence of any evidence, both the Courts below have found that the execution of the sale deed dated 30.05.2002 in favour of the plaintiffs is not in dispute, however, defendants took a plea of relinquishment of share by the vendors in the sale deed, in favour of their third sister Smt. Mishri, prior to the execution of the sale deed in favour of plaintiffs. Thus, the status of being co-sharers in the land in dispute was no more a question before the Court below. Both the Courts have further held that oral partition, prior to the year 1995, as pleaded by the defendants, remains unproved because no substantive/admissible evidence is led by the defendants on record.

5. There is another finding that on the one hand, the defendants are taking a plea of relinquishment of rights in favour of the ancestors of

the defendants i.e. third and elder sister Mishri and on the other hand, the plea of adverse possession is taken. Thus, the plea taken by the defendants is found to be contradictory to the stand taken in the earlier part of the written statement regarding the relinquishment of interest in the property by Champa and Sunehari daughters of Hira Lal.

6. Even there is a finding that required ad valorem Court fee has not been affixed. Relevant findings recorded by the First Appellate Court in paragraphs 10 to 16 are reproduced herein-below:-

“10. After hearing learned counsels for the parties, it can be ascertained from the perusal of file that, in order to prove their case, the plaintiff no.1 besides examining himself as PW2 has also examined Birender Singh as PW1 and Mahavir Yadav as PW3, the draftsman.

11. To rebut the evidence led by the plaintiffs, Rajpal, the defendant no.2 besides examining himself as DW1 has also examined Babu Lal, the defendant no.6 as DW2, Subhash Chand as DW3, the record keeper and Om Parkash as DW4, the draftsman.

12. Mahipal PW2, the plaintiff No.1 has deposed by way of affidavit as Ex.PW2/A tendered in his examination-in-chief, reiterating the contents of the plaint. He has further deposed that, plaintiffs had purchased 1/6th share out of the property in dispute from Smt. Champa and Chand Singh vide sale deed bearing Vasika No.340 dated 03.05.2002 and mutation no.625 as Ex.P1 is on record in this regard. He has further deposed that, plot bearing Khasra no.165 was partitioned orally; however after above said purchase, the defendants are not delivering possession on the spot, as a result thereof are entitled to possession through partition of the property in dispute by metes and bounds through process of law.

13. It is apt to mention here that, Mahipal, the plaintiff no.1 had filed suit for permanent injunction against Gyarsi Lal etc. and the same was dismissed vide judgment and decree as Ex.D1 and as Ex.D2 passed by the then learned Civil Judge (Junior Division), Rewari, in Civil Suit no.641 of 2005/2008 on the grounds that suit for permanent injunction filed by a co-sharer against co-sharer is not maintainable without claiming the relief of partition. The claim of the defendants is based on the plea of abandonment as well as adverse possession, but in the

considered opinion of this court, these pleas cannot be taken simultaneously being mutually destructive. Moreover, Raj Pal DW1 in his affidavit as Ex.DW1/A himself admits that, after the death of Heera Lal his property was inherited by his daughters namely Smt. Mishri, Smt. Champa, Smt. Sunhari and admittedly, Champa and legal heirs of Smt. Sunhari are vendors of the plaintiffs. It is settled law that, possession of one co-sharer is deemed to be possession of all the co-sharers and there is lack of evidence on record to establish ouster of plaintiffs or their vendors from the land in suit. It is held in **Smt. Biro & Ors. Vs. Amar Singh 1996(1) Civil Court Cases 427 by Hon'ble Punjab & Haryana High Court** that "co-sharer in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees. Raj Pal DW1 during cross-examination has deposed that, Smt.Sunhari and Smt. Champa had given the land in dispute to Smt. Mishri; in this regard decision was taken in the Panchayat, but neither any writing in this regard has been produced on record nor it stands pleaded in the written statement; accordingly evidence beyond pleadings cannot be looked into.

14. It is true that, plaintiffs who are not in possession of the land in dispute to the extent of their share have not affixed ad valorem court fee on the market value of the land, but in the considered opinion of this court, they need not affix the court fee as alleged since they are not strangers to the suit land; rather co-sharers and as discussed above, it is settled law that, possession of one co-sharer is deemed to be possession of all the co-sharers. Reference can be made to **Raghubir Krishan Dass vs. Narain Dass and Ors. 1992(1) Recent Revenue Reports 146**, wherein Hon'ble Punjab & Haryana High Court has held that "in a suit for possession by partition of joint property, the court fee payable would be under Schedule-II of Article 12(vi) of the Haryana Court-fees Act which prescribes a fixed court fee of Rs.25/-."

15. It is also true that, Krishna, one of the co-sharer has not been impleaded in the suit and Satbir Sachdev has been impleaded as defendant no.12 instead of Satyavir and Satyadev; however in the considered opinion of this court, on this ground, suit need not fail since partition suit stands disposed off with the passing of a final decree and until the final decree is passed, application under Order 1 Rule 10 CPC is maintainable and necessary corrections are also permissible. The learned counsel for the plaintiffs in support of arguments has relied upon **Nima Kaur Vs. Surjith Singh & Ors. 1997(2) Civil Court Cases 528**, wherein Hon'ble Andhra Pradesh High Court has held

*that, “partition suit is deemed to be pending till a final decree is passed and a party can be impleaded even during final decree proceedings.” Moreover, where partition is claimed as between the branches of the family only, heads of the branches alone are necessary parties and in the instant case they have already been arrayed on record. Reference can be made to **Balagouda Alagouda Patil & Ors. Vs. Babasaheb Ramagouda Patil 1999(1) Civil Court Cases 489 (Karnataka High Court).***

16. Further, neither earlier alleged family arrangement has taken place between the present parties nor has been given effect in the revenue record; therefore it will be in the interest of parties to maintain peace and harmony between them if the suit property is partitioned by metes and bounds as has also been rightly held by learned lower court.”

7. After hearing the counsel for the appellants and perusing the findings recorded by the Courts below, I do not find any irregularity, illegality or perversity in the same. Besides this, even no law point has arisen for consideration before this Court. Therefore, impugned judgment and decree is worth to be maintained and appeal being devoid of any merit stands dismissed.

August 18, 2023
poonam

(SANJAY VASHISTH)
JUDGE

Whether speaking/reasoned:

Yes

Whether Reportable:

Yes