



IN THE HIGH Court OF PUNJAB AND HARYANA AT CHANDIGARH

116

RSA-1895-2022 (O&M)

Date of decision: 18.03.2025

Joginder Pal Budhiraja and others

...Appellant(s)

Vs.

Dariyai Lal and others

...Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Tarun Dhingra, Advocate for the appellants.

NIDHI GUPTA, J.

CM-6659-C-2022

Prayer in this application filed under Section 5 of the Limitation Act is for condonation of delay of 1 day in filing the accompanying appeal.

Heard.

For the reasons mentioned in the application which is supported by an affidavit of the applicant/appellant No.1, the same is allowed and delay of 1 day in filing the accompanying appeal is condoned.

RSA-1895-2022 (O&M)

The plaintiff is in second appeal against the concurrent judgments and decrees of the Id. Courts below, whereby the suit filed by the appellants/plaintiffs for declaration and partition, as well as permanent injunction, has been dismissed with costs by both the Courts below.



2. The parties shall hereinafter be referred to as per their status before the learned trial Court i.e. the appellants are the 'plaintiffs'; and the respondents are the 'defendants'.

3. Brief facts of the case are that the appellants/plaintiffs filed the present suit seeking a decree of declaration to the effect that Gift Deed dated 15.09.1999 executed by defendant No.1 in favour of defendant No.2 is illegal, null and void. Further declaration was sought that the equitable mortgage created by defendant No.2 in favour of defendants No. 3 and 4 is also illegal, null and void; and prayer for grant of decree of partition and permanent injunction was made.

4. The facts as stated in the plaint are that vide Civil Court decree dated 28.11.1963, Gian Chand/father/predecessor-in-interest of the plaintiffs, became absolute owner of 1/3rd share of the suit property i.e. house No.308-L, Model Town, Karnal. After his death, the plaintiffs being his L.Rs are entitled to inherit his 1/3rd share. The present suit was filed by plaintiff No.1 in his own behalf as well as on behalf of others (L.Rs of deceased Gian Chand) plaintiffs being their General Power of Attorney Holder. Defendant No.1 was also owner to the extent of 1/3rd share i.e. 129.62 Sq. Yards but defendant No.1 transferred the land measuring 25 feet x 70 feet i.e. 194 Sq. Yards vide Gift Deed dated 15.9.1999 in favour of defendant No.2 and that Gift Deed is liable to be declared illegal, null and void as defendant No.1 was owner to the extent of 129.62 Sq. Yards only. Defendant No.2 further mortgaged the suit property with defendants No.3 and 4 on the basis of the aforesaid Gift Deed and thus the same is also



liable to be declared illegal as defendant No.2 was not competent to create an equitable mortgage. Defendants No.2 to 4 are intending to alienate the same. Despite requests and legal notices issued by the plaintiffs to the defendants, they have refused to accept the claim of the plaintiffs. Hence, the suit.

5. Upon notice, defendant No.1 appeared and resisted the suit by filing written statement *inter alia* pleading therein that in the family settlement that took place in the year 1969-1970, the house in question was partitioned and a portion measuring 25 feet x 70 feet came in the share of defendant No.1 upon which, defendant No.1 raised construction in the year 1971-1972. Moreover, Gian Chand, predecessor-in-interest of the plaintiffs had shifted to Ladwa and all the residential and other properties were divided amongst three brothers in which house in question was given to the defendant No.1 as per family settlement. Vide Gift Deed dated 15.9.1999, defendant No. 1 had relinquished his rights qua the said house in favour of his son i.e defendant No.2; whereafter defendant No. 2 was in actual and physical possession of the suit property. It was further pleaded that defendant No. 1 became owner in possession of the suit property by way of adverse possession.

6. Written statement was filed by defendant No.2 along the same lines. Defendants No. 3 and 4 filed separate written statement stating therein that the decree alleged by the plaintiffs has not been acted upon; and the execution of the Gift Deed and equitable mortgage was admitted being matter of record. All defendants in their respective written



statements denied the averments made in the plaint and prayed for dismissal of the suit.

7. No replication was filed.

8. From the pleadings of the parties, following issues were framed vide order dated 11.5.2011:-

“1. Whether the gift deed No.3502/1 dated 15.5.1999 executed by defendant No. 1 in favour of defendant No.2 is illegal, null and void and not binding upon the rights of the plaintiffs qua portion of measuring 8" 33" x 70 feet in the suit property?OPP

2. Whether plaintiffs are absolute owners of property measuring 8".33" x 70 feet, if so to what effect?OPP

3. If issues No.1 and 2 are proved in affirmative, whether the plaintiffs are entitled to a decree for partition and permanent injunction of the suit property?OPP

4. Whether the suit is not maintainable in the present form? OPD

5. Whether the plaintiffs have not come to the Court with clean hands and have concealed true and material facts from the Court?OPD

6. Whether the plaintiffs have no locus standi to file and maintain the present suit?OPD

7. Whether the plaintiffs are estopped from filing the present suit by their own act and conduct?OPD

8. Whether the suit is bad for mis-joinder and non-joinder of necessary parties?OPD

9. Whether the suit is not properly valued for the purposes of Court fee and jurisdiction?OPD

10. Whether the suit is time barred?OPD

11. Relief.”



9. Upon appraisal of the pleadings and the evidence led by the parties, the Id. trial Court decided issues No. 1, 2, 3 and 7 against the plaintiffs and in favour of the defendants; issues No. 4 to 6 and 8 to 10 against the defendants and in favour of the plaintiffs as they were not pressed during arguments; and accordingly vide judgment and decree dated 19.05.2015, the learned trial Court dismissed the suit of the plaintiffs with costs. The appeal filed by the plaintiffs was also dismissed with costs by learned Additional District Judge, Karnal vide judgment and decree dated 29.09.2018, thereby affirming the judgment and decree of the learned trial Court. Hence, the present second appeal.

10. Learned counsel for the appellants/plaintiffs submits that the learned Courts below failed to take into consideration the admitted fact that initially the property bearing House No. 308-L, Model Town, Karnal measuring 388 Sq. Yards was allotted in the names of Des Raj and Gian Chand in the year 1949 through a Deed of Conveyance dated 30.06.1949 issued by Deputy Commissioner, Karnal. On 28.11.1963, Des Raj and Gian Chand gave 1/3rd share i.e. 129.33 Sq. Yards from the total property to Dariyai Lal/defendant No.1 in pursuance to the order and judgment passed in a suit for declaration filed by Dariyai Lal in the Court of learned Civil Judge, Karnal bearing Civil Suit No. 278/1963 titled as '*Dariyai Lal Vs. Des Raj & Ors*'. Thus, Dariyai Lal became co-owner of the suit property to the extent of 1/3rd share only that comes out to be 129.62 Sq. Yards. Yet, according to the Gift Deed, executed by Dariyai Lal on September 15, 1999, in favour of his son Anil/defendant No.2, he claimed to be owner of the half



share of the suit property, which measures 194.44 Sq. Yards. However, this fact has been ignored by both the Courts below.

11. Learned counsel further submits that the respondent also asserts that a family settlement occurred in 1970. Whereas, the Gift Deed makes no reference of the 1970 oral settlement. Therefore, the Gift Deed foundation, which was used to declare respondent No. 2 the owner of the half share in the suit property is itself wrong.

12. Learned counsel for the plaintiffs further submits that the reasoning that the appellants have no concern with the property as they remained silent qua their shares in the suit property for more than 40 years is devoid of any rationale. It is important to note that there was no dispute ever, regarding the appellants' ownership of 1/3rd share in the property. The appellants used to visit the house on several occasions; a separate room and area was earmarked for the use of the appellants in which they used to stay whenever they used to visit Karnal. Appellants never objected to respondents using their portion of property out of good faith and out of sentiment of love and affection for their brother's family. In addition, the appellants occasionally paid the respondents/defendants expenses for routine upkeep and repair of the property. The law does not prescribe that if the joint owner does not demand his share in the joint family property, he ceases to be a joint owner of the said joint property. This proposition propounded by the learned Courts below is erroneous and non-est in the eyes of law. The appellants are in complete shock and disbelief since they came to know that respondent No.1 had transferred their share in the



name of respondent No. 2. It is accordingly prayed that the present appeal be allowed; and the impugned judgments and decrees of the Courts below be set aside.

13. No other argument is raised on behalf of the appellants/plaintiffs.

14. I have heard learned counsel for the appellants/plaintiffs and perused the case file in great detail.

15. I find no merit in the submissions made on behalf of the appellants/plaintiffs. It has been contended by learned counsel for the appellants that although Dariyai Lal became co-owner of the suit property to the extent of 1/3rd share i.e. 129.33 Sq. Yards, yet, vide the impugned Gift Deed, he had claimed to be owner of half share of the suit property which measures 194.44 Sq. Yards.

16. However, the said argument of the plaintiffs is liable to be rejected as, it is a matter of fact that the house measuring 50 feet x 70 feet (House No.308-L, Model Town, Karnal) was allotted on 30.6.1949. Ruldu Ram was having five sons namely Gian Chand, Munshi, Des Raj, Hans Raj and Dariyai Lal and two daughters. The plaintiffs are the L.Rs of Gian Chand who are claiming their 1/3 share in the house in question on the basis of the decree dated 28.11.1963 Ex.PW3/G; and the plaintiffs are seeking declaration for setting aside the Gift Deed dated 15.9.1999 Ex. PW3/H. On the other hand, Defendants No.1 and 2 are claiming that the oral partition had taken place in the year 1969-1970 and the half portion measuring 25 feet x 70 feet of the house in question came to the share of



defendant No. 1. However, as per the evidence on record, in particular from the cross-examination of PW1, PW2 and PW3 (plaintiff No.1), it is crystal clear that in the year 1970, a family partition had indeed taken place between three brothers i.e. Gian Chand, Des Raj and Dariyai Lal/defendant No.1; and as per the said family partition, half portion measuring 25 feet x 70 feet on the Western side of the house had fallen to the share of Dariyai Lal; and since then, Dariyai Lal remained in exclusive possession of the same. In the year 1999, defendant No.1 Dariyai Lal executed Gift Deed Ex.PW3/H in favour of his son i.e. defendant No. 2; and defendant No.2 further raised new construction after demolishing the old construction after obtaining loan from defendants No.3 and 4 by creating an equitable mortgage in favour of defendants No.3 and 4. From the above, it is clear that by way of oral family settlement, partition had taken place in 1969-1970 and half share of the suit house came in the share of defendant No.1. These facts are evident from the evidence of plaintiffs' witnesses themselves i.e. PW1, PW2 and PW3/plaintiff No.1. As such, by way of impugned Gift Deed dated 15.09.1999 Ex.PW3/H, defendant No.1 was competent to gift half share of the suit property to his son/defendant No.2.

17. I am further in agreement with the observation of the learned Courts below that mere non-mention of the oral partition in the impugned Gift Deed Ex.PW3/H would not render the said partition null and void, as under Section 58 of the Evidence Act, clear admission by



witnesses of the plaintiffs confirm the division of the property in 1970. As such, non mentioning of oral partition in Gift Deed is irrelevant.

18. It is also relevant to note that admittedly, predecessor-in-interest of the plaintiffs namely Gian Chand shifted to Ladwa in 1950 and never stayed in the suit house. During his lifetime, he never claimed his share in the suit house. Gian Chand died in the year 1989. Present suit was filed by the plaintiffs on 13.08.2010. Therefore, it was correctly held that the plaintiffs could not claim ownership of the suit.

19. Furthermore, even the Gift Deed dated 15.09.1999 Ex.PW3/H was proved to be valid. Admittedly, defendant No.2 has raised construction after mortgaging the property. It has been found that though the plaintiffs had prior knowledge of this, but they did not challenge it earlier. This is evident from the fact that in the year 2010, the plaintiffs themselves had executed Sale Deed Ex.D2 transferring their share. This Deed acknowledged that defendant No.2 was owner of the western portion of the suit property.

20. The relevant findings of the trial Court in judgment and decree dated 19.05.2015, read as under: -

“19. The present suit has been filed in the year 2010. In the considered view of this Court, the plaintiffs are estopped from claiming their alleged 1/3 share in the given facts and circumstances of the case as by virtue of oral family partition referred above, the predecessor of the plaintiffs namely Gian Chand no longer remained co-owner to the extent of 1/3 share. Even otherwise, from the statements of the witnesses examined by the plaintiffs, it is clear that Gian Chand had



shifted to Ladwa in the year 1950 and he never stayed at Karnal since then. Said Gian Chand expired on 26.11.1989, but during his lifetime, he never claimed any such right qua the house in question.

20. Furthermore, by executing Ex.D1, the L.Rs of Des Raj executed the release deed qua their 7/8 share in the house measuring 25 feet x 70 feet (House No.308-L, Model Town, Karnal) in favour of Surrender son of Des Raj (examined as PW2 in the present case). There is a clear recital in Ex.D1 (executed in the year 2002) that the executants transferred their 7/8 share of the house measuring 25 feet x 70 feet and on the Western side, house of Anil son of Dariyai Lal exists (defendant No.2 of the present case). Similarly, by virtue of Ex.D2, Surrender son of Des Raj and the present plaintiffs through their GPA i.e. plaintiff No.1 executed sale deed on 20.4.2010 qua half portion of the house measuring 25 feet x 70 feet in favour of Piare Lal. There is a clear recital to the effect that on the Western side, the house of Anil son of Dariyai Lal exists (defendant No.2 of the present case)."

21. Learned counsel for the appellants/plaintiffs is unable to dispute or controvert the above said facts and findings.

22. In view of the above, no ground to interfere in the impugned judgments and decrees of the learned Courts below is made out. The present regular second appeal is hereby **dismissed**.

23. Pending applications, if any, stand disposed of.

18.03.2025

Divyanshi

**(NIDHI GUPTA)
JUDGE**

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