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**(2010) 02 P&H CK 0083**  
**In the Punjab And Haryana At Chandigarh**

Arya Mittar and Another

APPELLANT

Vs

Dr. Ashok Kumar Goel

RESPONDENT

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**Date of Decision :** 11-02-2010

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

**Citation :** (2010) 2 CivCC 410 : (2010) 158 PLR 75

**Hon'ble Judges :** Rakesh Kumar Garg, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## Judgement

Rakesh Kumar Garg, J.—This is defendants' second appeal challenging the judgment and decrees of the courts below, whereby suit of the plaintiff-respondent for declaration to the effect that he and the appellants are owners in joint possession in equal shares of the land with consequential relief of permanent injunction, was decreed.

2. As per the averments made in the suit, appellants and plaintiff respondent with one Swaran Lata constituted a joint Hindu family. Appellant No. 2 being karta of the joint Hindu family, purchased the properties in dispute in the name of appellant No. 1, who was minor at the time of purchase of the suit land and had no source of income to purchase the same. It is the further case of the plaintiff-respondent that as the suit property was purchased from the funds of the joint Hindu family, so he being the co-parcener in the said joint Hindu family had every right, title and interest in the suit property as the suit property retained the character of joint Hindu family property. The suit property cannot be alienated without legal necessity or consideration without the prior permission of other coparceners including the plaintiff-respondent. The defendants were bent upon to alienate the suit property with a view to deprive the plaintiff respondent from a share in the same. Hence, the suit.

3. In the written statement, various preliminary objections were raised by the

appellants. It was further pleaded that a family settlement took place between the parties on 1.10.1986 regarding the suit land. It was specifically mentioned that the above stated settlement was accepted by the persons concerned who signed the same as correct. Relationship between the parties was admitted, however, it was submitted that there was no joint family at present as the plaintiff-respondent was living separately and he had no concern with the appellants. It was further pleaded that partition took place between the parties on 31.12.1970 in which cash amount was divided amongst the family members and family settlement regarding the land was made on 1.10.1986 in which the ownership of land including the suit land was decided. Thus, the plaintiff was not co-parcener as alleged nor there was any joint Hindu family. It was denied that the suit property retained the character of joint Hindu family property. All the disputes regarding the land in dispute were settled between the parties by virtue of family settlement dated 1.10.1986. Plaintiff was owner of the land which was standing in his name and the defendant-appellants were the owners of the land which was standing in their name and therefore, the plaintiff respondent had no concern with the suit land and the appellants could deal with the suit land as they like being owners in possession of the same. Remaining averments made in the plaint were specifically denied and dismissal of the suit was prayed for. Replication was filed by controverting the stand taken in the written statement and re-asserting the averments made in the plaint. From the pleadings of the parties, the following issues were framed:

1. Whether the suit property of joint Hindu family property and the plaintiff is joint owner in possession of the same? OPP
2. If issue No. 1 is proved, whether plaintiff is entitled to a decree for declaration with consequential relief of permanent injunction as prayed for in the plaint?" OPP
3. Whether the present suit is not maintainable in its present form? OPD
4. Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD
5. Whether the plaintiff has not come with clean hands and has twisted the material facts? OPD
6. Whether the present suit is barred u/s 49 of the Benami Transaction (Prohibition) Act? OPD
7. Relief.

4. On the conclusion of the evidence and after hearing learned Counsel for the parties, the trial court held that the parties to the suit constituted a Joint Hindu family and appellant No. 2 was its karta. It was further held that the suit land was the joint Hindu family property of the parties and the plaintiff- respondent was joint owner in possession to the extent of equal share of the same. The trial court further held that the appellants had failed to produce on record the family settlement dated 1.10.1986 and the partition deed dated 31.12.1970 could not

help the appellants to corroborate their version as the same was not registered. The trial court further held that even otherwise the aforesaid partition deed dated 31.12.1970, according to the pleadings of the appellants, pertains to cash amounts only and the suit land was not the subject matter thereof. Thus issues No. 1 & 2 were decided in favour of the plaintiff-respondent. Issues No. 3 to 5 were decided against the appellants. Issue No. 6 was decided against the appellants being not pressed. Resultantly, suit of the plaintiff respondent was decreed by the trial court.

5. Aggrieved by the same, the appellants preferred an appeal which was also dismissed by the lower appellate court vide its impugned judgment and decree dated 28.10.2009.

6. It is relevant to point out that during the pendency of the appeal before the lower appellate court, the appellants filed an application under Order 6 Rule 17 of the CPC for amendment of the written statement. In the aforesaid application, it was averred that the appellants wanted to plead as under:

that HUF was constituted with appellant No. 2 as its karta having four members, i.e., the parties to the suit as well as Smt. Swaran Lata. The karta purchased several pieces of land vide different sale deeds in his own name as well as three other members of the HUF situated in different villages in District Kurukshetra and Ambala. In the year 1970, plaintiff-respondent pressurized the karta for partition of his share in the HUF and in order to avoid any further dispute, appellant No. 2 made oral partition of the HUF properties, whereby the properties purchased in the name of each member of the HUF was given to him as his individual property and consequently, the suit land, which stands registered in the name of appellant No. 1, was given to him as absolute ownership. Similarly, the other properties standing in the name of other members of the HUF including the plaintiff-respondent were given to them. The cash amount was also distributed equally amongst all the four members of the HUF. Consequently, the said oral partition was recognized by a memorandum of partition dated 31.12.1970. It was further sought to be pleaded that there was yet another memorandum of partition dated 15.10.1986.

7. The further plea sought to be taken was that in case the aforesaid family settlements were not taken into account, then all the properties purchased in the individual names of the HUF should be treated as joint. The said application was resisted by the plaintiff-respondent. After hearing learned Counsel for the parties, the aforesaid application to seek amendment at the appellate stage was dismissed. It was observed that the case cannot be allowed to be reopened at the appellate stage on vague averments as the trial had already concluded and the pleas sought to be taken were well within the knowledge of the appellants and therefore, the appellants could not be allowed to amend their pleas and the aforesaid application was dismissed. It was also observed that once the trial has commenced, amendment cannot be allowed.

8. The lower appellate court, while dismissing the appeal, also found that the appellants admitted the fact that the suit land was purchased by appellant No. 2 being karta of the joint Hindu Family in the name of appellant No. 1 from the funds of the joint Hindu family property. In fact, the plea of the appellants was that the suit land had fallen to the share of appellant No. 1 in the family settlement which took place on 31.12.1970. However, the aforesaid family settlement could not be relied upon as according to the pleadings, the aforesaid family partition was related only to cash amount. Moreover, the aforesaid family settlement dated 31.12.1970 (Ex.D2) was found to be inadmissible in evidence as its original was not produced on the record. Neither any permission of the court was sought to prove the same by secondary evidence. Moreover, the said family settlement pertains to landed properties as well. The aforesaid copy of partition deed Ex.D2 is unstamped deed and the same cannot be used to corroborate the oral evidence as held by this Court in *Sarimati Shanti Devi and Anr. v. Jagdish Parshad and Anr.* (1986) 89 P.L.R. 26 and, thus, the plea of the appellants to the effect that there was a family partition between the parties with regard to the suit land remained unproved. Still not satisfied, the appellants have filed the present appeal challenging the judgment and decrees of the courts below.

9. Shri Puneet Jindal, learned Counsel appearing on behalf of the appellants, has vehemently argued that the lower appellate court has illegally declined the application under Order 6 Rule 17 CPC as the amended provisions of Order 6 Rule 17 CPC which have come into force with effect from 1.7.2002 are not applicable to the present case as the written statement, the amendment of which was sought, had been filed on 19.2.2001, i.e., prior to coming into force of the Amendment Act and, therefore, the reasons given by the lower appellate court rejecting the amendment application cannot be sustained and the provisions of Order 6 Rule 17 CPC existing prior to the Amendment Act, which permits liberal amendment in the written statement are to be applied. Learned Counsel for the appellants further argued that the plaintiff-respondent was estopped by his own act and conduct from filing the present suit as he had not come to the court with clean hands. He himself was signatory to the family settlement of 1986 and was a party to the family settlement of 31.12.1970 under which he was given the lands standing in his name and, therefore, once he had taken the benefit on the basis of the aforesaid family settlements, he was estopped from disputing the factum of the aforesaid family settlements.

10. On the basis of the aforesaid argument, learned Counsel for the appellants has submitted the following substantial questions of law arise in this appeal:

1. Whether the courts below failed to take into consideration the principle of estoppel as plaintiff- respondent after receiving immovable properties under the partition dated 31.12.1970 could not have denied the same?

2. Whether the application filed by the appellants under Order 6 Rule 17 CPC could be declined by applying the parameters of amended provisions as amended

vide Act of 2002?

11. I have heard learned Counsel for the appellants and perused the impugned judgments and decrees and the other material attached with this appeal.

12. It is not in dispute that the parties to the suit along with one Smt. Swaran Lata, i.e., wife of appellant No. 2 constitute a joint Hindu Family. It is also admitted fact that properties in dispute standing in the name of appellant No. 1 were purchased by appellant No. 2 from the funds of joint Hindu family at the time when appellant No. 1 was minor. The plea taken by the appellants in their pleadings is that the aforesaid joint Hindu family properties stood divided on the basis of family settlements which took place on 31.12.1970 and 1.10.1986. However, the aforesaid family settlements, according to which the lands standing in the name of appellant No. 1 as well as plaintiff-respondent were given to them, has not been produced on the record. Thus, the appellants failed to prove before the court that whole of the properties of the family were divided among the parties and plaintiff-respondent also received his due share. It may also be noticed that partition deed dated 31.12.1970 (Ex.D2) cannot be used to corroborate the stand of the appellants as the plea taken in the written statement is that partial partition took place between the parties on 31.12.1970 in which cash amount was divided between the family members, whereas on the basis of the aforesaid partition deed dated 31.12.1970, the appellants want to prove that the suit land was also divided between the parties, which is beyond pleadings. Moreover, the aforesaid family settlement dated 31.12.1970 has been rightly ignored by the courts below being inadmissible in evidence as admittedly, the original of the aforesaid document has not seen the light of the day. Admittedly, there is no permission of the court to prove the aforesaid document by way of secondary evidence. In fact, the aforesaid document has not been proved in accordance with law. It is well settled that mere exhibition of a document on record will not dispense with its mode of proof. It is not the case of the appellants that the aforesaid document is per se admissible. Thus, I find no fault with the findings of the courts below which have recorded a concurrent finding that the appellants have failed to prove that partition took place between the parties on the basis of oral settlement as aforesaid.

13. The argument of the learned Counsel for the appellants that the plaintiff-respondent is estopped from disputing the factum of family settlement as he had taken benefit under the same is without any force. Despite the fact that a specific issue was framed to the effect that, "whether the plaintiff is estopped by his own act and conduct from filing the present suit", yet no such argument, as raised before this Court, was raised by the appellants before the trial court. It may also be noticed that the appellants have not raised any argument on this issue before the lower appellate court.

14. Lastly, it may be seen that even the argument of the learned Counsel for the appellants raised with regard to the declining of amendment in the written statement by the lower appellate court, is also without any merit. Even if the

provisions of Order 6 Rule 17 CPC, which were applicable prior to the Amendment Act, 2002, are applicable in the present case, yet the lower appellate court was right in law while rejecting the aforesaid application for amendment as it is well settled that amendment in the written statement cannot be allowed to fill up the lacunae in the case of the defendant. In this case, admittedly on the basis of the pleadings the parties went to the trial which culminated into passing of a decree and it was only at the appellate stage that the aforesaid amendment in the written statement was prayed. It is not the case of the appellants that the amendment sought on the basis of the facts was not to their knowledge. Rather, it was their specific plea before the trial court that family settlement dated 31.12.1970 pertains to cash amount only whereas the suit property in this case was landed property. The amendment sought was not a sort of clarification but in fact contrary to the stand already taken by the appellants. For the reasons recorded above, i find no merit in this appeal. No substantial questions of law, as argued by learned Counsel for the appellants, arise in this appeal.

Dismissed.