
(2015) 10 P&H CK 0213
In the Punjab And Haryana At Chandigarh
Case No : RSA No. 3264 of 2010 (OandM)

Balbir Kaur and Others

APPELLANT

Vs

Ram Pal and Others

RESPONDENT

Date of Decision : 13-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2015) 10 P&H CK 0213

Hon'ble Judges : Amit Rawal, J.

Bench : Single Bench

Advocate : Akshay Bhan, Senior Advocate and Santosh Sharma, Advocate, for the Appellant; Ashish Aggarwal Advocate and Fateh Saini, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Amit Rawal, J.—Legal representatives of Dharam Pal, are in Regular Second Appeal against the concurrent findings of facts and law, whereby, the suit claiming possession by partition by metes and bounds in respect of House No. 6251-52, Chauthai Ahata, D.C. Road, Ambala Cantt and shop No. 6256, D.C. Road, Ambala Cantt and for rendition of accounts and share in the business of M/s. Gainda Ram and Sons being run in the said shop, has been dismissed on two grounds:--

"i) partial partition

ii) Dharam Pal did not step into the witness box."

2. Mr. Akshay Bhan, learned Senior counsel assisted by Mr. Santosh Sharma, Advocate, confines his prayer, in the present regular second appeal in respect of 1/5th share in Shop No. 6256, D.C. Road, Ambala Cantt, on the premise that as per the evidence brought on record, House No. 6251-52, aforementioned, was purchased by Gainda Ram in the name of Dropadi Devi - defendant No. 5. He further submits that both the Courts below have committed illegality and

perversity in dismissing the suit vis-?-vis aforementioned property, though there is no other evidence except Ex. D2, which is an attested copy of sale deed dated 28.10.1968, whereby, shop was owned by Gainda Ram.

3. It is a matter of record that Gainda Ram died intestate. Gainda Ram expired leaving behind two sons and three daughters and defendant No. 5- Dropadi, his widow. The claim of the appellants before the Courts below was for 1/5th share. He further submits that the Courts below had rendered the findings on the basis of conjectures and surmises inasmuch, as no evidence has come forth at the behest of the defendants that the suit was bad for partial partition. In essence, no evidence except Ex. D2, i.e., copy of sale deed, has brought on record. Non-appearance of Dharampal before the trial Court could not have been fatal for adjudication of the suit, as it was for seeking partition and not for specific performance. There is a stark distinction between the principal, i.e., executant of attorney in case of vendor or co-sharer. In essence, in a suit for partition, all the plaintiffs and defendants are having their respective shares. He further submits that documentary evidence, Ex. D2 has not been noticed or referred and, thus, the following substantial questions of law arise for determination by this Court:--

"i) Whether the judgments and decrees by both the learned Courts below have been passed on the basis of total misreading and non appreciation of evidence on record?

ii) Whether the judgments and decrees by both the learned Courts below are legally sustainable in the eyes of law?

iii) Whether the property purchased by Gainda Ram from his own funds is an ancestral property from the present parties and therefore, all the parties have equal shares in the said property?"

4. Mr. Ashish Aggarwal, learned Senior counsel assisted by Mr. Fateh Saini, Advocate, submits that both the Courts below have arrived at concurrent findings, after appreciating oral and documentary evidence as non-appearance of Dharampal was most important fact as his son could not have divulged knowledge qua nature of the property owned by father-Gainda Ram. PW-1 Pawan Saini, in his cross-examination, admitted that there was certain other properties owned by Gainda Ram. Thus, both the Courts below have rightly dismissed the suit being bad for partial partition.

5. In support of his aforementioned contentions, he relied upon the judgments of the Hon''ble Supreme Court in Man Kaur (dead) by LRS. Vs. Hartar Singh Sangha, and S. Kesari Hanuman Goud Vs. Anjum Jehan and Others, . Vis-?-Vis non-maintainability of suit being hit by partial partition, he relied upon the judgments of the Hon''ble Supreme Court in Kenchegowda (Since Deceased) by Legal representatives Vs. Siddegowda alias Motegowda, and S. Satnam Singh and Others Vs. Surrender Kaur and Another, .

6. He has drawn attention of this Court to the cross-examination of Pawan Saini,

to contend that it has admitted, that Gainda Ram owned other agricultural land which was sold on the basis of the power of attorney executed by defendant No. 5- Dropadi Devi. Since both the Courts below have rendered a concurrent finding, though there is very little scope of interference while exercising power under Section 100 CPC.

7. I have heard learned counsel for the parties and appraised the impugned judgments and decrees of the Courts below.

8. There is no dispute with regard to ratio decidendi culled out by the Hon''ble Supreme Court in Man Kaur's case (supra) and S. Kesari Hanuman Goud's case (supra) as both suits pertain to the contract entered between the principle-vendee and vendor and in the absence of the principle, agent cannot divulge personal and vendor is deprived to put a specific question in cross examination vis-?-vis readiness and willingness to perform the part of the contract. The facts of instant case, do not fall within the same footings as it was a case for partition where all the parties are branded as co-shares. In the present case, no such evidence has been brought on record on behalf of the respondents, that Gainda Ram owned many other properties other than mentioned in the suit. Even from the perusal of the cross-examination, nothing has surfaced that Gainda Ram owned the more property, which, after his death, had fallen to the share of Dropadi Devi.

9. There is another aspect of the matter. As per the cross-examination of Pawan Saini, the property was sold on the basis of the power of attorney, allegedly executed by Dropadi Devi, thus, it cannot be believed, that property belonged to Gainda Ram. The lower Appellate Court, being the last Court of fact and law, is required to frame the point of determination and decide the same. There is no reference to the sale deed Ex. D2, *ibid*. The contents of the sale deed reveal that Gainda Ram was the owner of shop bearing No. 6256. Since Gainda Ram died intestate, the property devolved on his legal heirs, as per their respective shares.

10. This Court has been apprised, that during the pendency of the appeal, Dropadi Devi has also died. In my view, Dropadi Devi would have 1/5th share in the aforementioned shop, i.e., 6256. In the absence of any other evidence that Gainda Ram owned the property, in my view, the Courts below have committed illegality and perversity in dismissing the suit holding it was for partial partition, onus to prove the same on the shoulders of the defendants, which had not been discharged, therefore, could not be rebutted, by the plaintiff.

11. In view of what has been observed above, both the judgments and decrees of the Courts below are set aside, i.e., vis-?-vis claim of the plaintiff for partition in respect of the share in shop No. 6256, D.C. Road, Ambala Cantt. Accordingly, the suit is partly decreed. The appellants-plaintiff are entitled to 1/5th share in the aforementioned shop.

12. The application to bring on record LRs had been moved on behalf of Gaurav Saini, vendor of the alleged Will executed by Dropadi Devi. Mr. Bhan, submits

that Gaurav Saini instituted the civil suit claiming declaration to the effect that he is the owner of the land to the extent of 1/3rd share of his deceased grandmother Dropadi Devi, which is subject matter of the decision of the suit on the basis of the Will dated 04.01.2006 executed by Dropadi Devi and the same has been discarded, by the Courts below vide judgment and decree dated 01.05.2015, though the appeal is stated to be pending. In case, Gaurav Saini, is able to prove genuineness of the Will in question vis-?-vis, 1/5 share with regard to claim of Dharam Pal, 1/6th share shall be kept open. In case, Will is proved, Dropadi Devi would be entitled to 1/6th share, if otherwise, 1/5th share.

13. Accordingly, the appeal is allowed.

14. Decree sheet be prepared accordingly.