

(1990) 12 P&H CK 0008

In the Punjab And Haryana At Chandigarh

Case No : Civil Regular Second Appeal No. 2031 of 1978

Gita Ram Kalsy and Others

APPELLANT

Vs

Arjan Singh Kalsy and Others

RESPONDENT

Date of Decision : 19-12-1990

Acts Referred:

Evidence Act, 1872 — Section 17, 21

Citation : (1990) 12 P&H CK 0008

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

G.R. Majithia, J.—The unsuccessful Plaintiffs have come up in the regular second appeal against the judgment and decree of the first appellate Court reversing on appeal those of the trial Judge and dismissing their suit of partition of the property in dispute.

Facts first:

2. I have referred to the parties in the body of the judgment as these were described in the plaint. The Plaintiffs and the defence are descendants of one common ancestor. Plaintiff Nos. 1 to 7 constitute one branch; Plaintiff Nos. 8 to 16 constitute second branch and Plaintiff No. 17 constitutes the third branch. Fourth branch is represented by defendant Nos. 1 to 3 and fifth branch by defendant Nos. 4 and 5. The residential house of the family was partitioned on 30-8-1892 and each branch of the common ancestors was given 1/5th share. Deori Kalan marked "X" in the site plan was left as a common entrance for the co-sharers to reach their respective portions in the Haweli. The room and the passage leading to it shown as red and marked "Y" in the site plan were stated to be left joint and also the bath room attached with the well mark. The garden areas adjoining residential Hawelli was partitioned on 23-6-1909. The Plaintiffs contended that in the second partition, well mark W and the area of the well

mark "Z"-in the site plan were left joint of the parties. With the passage of time the circumstances have changed and the area in which the property in dispute is situated has devolved into a shop-cum-residential-complex. The roof of Deori Kalan has fallen and the look of the Haweli from the front is deplorable. If the joint property Deori Kalan is partitioned, the cosharers could make proper use of the same.

3. The defendants controverted the allegations in the plaint and contested the suit, inter alia, on the grounds that the suit is bad for non-joinder of necessary parties; that the suit is not maintainable as it was for partial partition: that the proper court fee has not been paid; that the suit is bad for misjoinder of causes of action; that Plaintiff Geeta Ram Kalsy has no right to file the present suit; that the properties in suit are not partible; and that the bath room marked "Y" was actually allotted to the ancestors of defendants 1 to 3 and the Plaintiffs could not claim partition of the same.

4. On the pleadings of the parties the following issues were framed:

1. Whether the suit is bad for non-joinder of necessary or proper parties? O.D. (Onus objected to)

2. Whether the suit is for partial partition? If so, with what effect? O.D.

3. Whether the proper court fees have not been paid on the plaint? O.P. (Onus objected to)

4. Whether the subject matter of the suit has been properly valued for the purpose of jurisdiction? O.P.

5. Whether the suit is bad for mis-joinder of causes of action? O.D.

6. Whether Geeta Ram Kalsi, Plaintiff No. 12 (now No. 17) has a right to file the suit? O.P.

7. Whether the Plaintiffs can claim partition of Deori Kalan out of the property in suit in view of the partition-deed dated 30-8-1892? O.P.

8. Whether Mansa Ram father of Geeta Ram Kalsy Plaintiff had sold the property now in possession of Geeta Ram Kalsy Plaintiff No. 12 (now No. 17) to Bhag Singh and Sant Sinsfh? If so, with what effect? O.D.

9. What are the shares of the parties inter se in the property in suit? O.P.

10. Whether partition of the property shown as "Z" and bounded as CDEFH can be claimed by the Plaintiff in view of the partition-deed dated 30-8-1892? O.P. (Onus objected to).

11. Whether the bath room marked as "Y" in plan had been allotted to Shri Kharaka Mai grand-father of defendant ,Nos. 1 to 3 and as such the same is not partible? O.D.

12. Relief

The trial Judge decided all issues in favour of the Plaintiffs and passed a preliminary decree for partition of the joint property. The defendant challenged the judgment and decree of the trial Judge in first appeal. The first appellate Court after examining the material evidence including the two partition deeds dated 30-8-1892 and 23-6-1909, and the admissions made by one of the defendants in the earlier suit, came to the conclusion that Deori Kalan cannot be partitioned in view of the express conditions mentioned in the first partition deed dated 30-8-1892.

5. The counsel for the Plaintiffs submitted that the first appellate Court is in error in holding that the suit is bad for nonjoinder of necessary parties. The Plaintiffs have impleaded the heads of all branches of the family as defendants to the suit. The only requirement in law is that only heads of all the branches of the joint family should be impleaded as defendants in a partition suit. There is substance in the submission made. Anyone of several members of a joint family is entitled to require partition of joint family property and his demand to that effect, if not complied with, can be enforced by a suit, the Plaintiffs in a partition suit should implead as defendants the following:

- (i) the heads of all branches (c);
- (ii) females who are entitled to a share on partition:
- (iii) the purchaser of a portion of the Plaintiff's share, the Plaintiff himself being a coparcener:
- (iv) if the Plaintiff himself is a purchaser from a coparcener, his alienor.

The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed. A precise question arose for determination in AIR 1932 641 (Lahore) , as to two are the necessary parties in a suit for partition and it was held thus;

It is settled law that to such a suit the really necessary parties are the heads of each branch of the family and it is not obligatory on the Plaintiffs to implead all the members of the two branches. The suit can therefore proceed if the head of Plaintiff's branch is the sole Plaintiff and heads of defendant's branches the sole defendants and any decree passed in the suit would be binding upon their descendants. To the same effect is the ratio of the judgment in Ganapati Gopal Patil and Others Vs. Shankar Rama Patil and Others, . In the light of the legal position stated in paragraph 333 of Hindu Law by Mulla, a treatise of Hindu Law of unquestionable authority and the decision rendered in Bishamber Pass's case (supra), the finding of the first appellate Court that the suit is bad for non-joinder of necessary parties cannot be sustained. It was not suggested by the defendants that the heads of all the branches were not parties to the suit.

6. The counsel for the Plaintiff then submitted that the arbitration awarded dated

30-8-1892 under which the joint property was partitioned did not provide that Deori Kalan kept common entrance is impartible. There is substance in the submission made. The right of partition is as incident of jointness. There is no embargo in the award of the arbitrator dated 30-8-1892 pertaining to joint property that Deori Kalan cannot be partitioned. Deori Kalan was left as joint property of all the branches of the joint family for the purpose of ingress and egress to their respective parties. The situation has considerably changed and there is no bar in law that the property which was kept joint of the parties cannot be subsequently partitioned. The only safeguard to be provided is that a passage must be left out of the joint property-the Deori Kalan for the cosharers for access to their respective portions. Site plan Exhibit P-10 shows that Deori Kalan is spacious place abutting on the metalled road and adjoining bathroom marked "Y". The width of the outer and interior door of this Deori is not more than six feet. The trial Judge after taking note of the material placed on the record held that if six feet wide passage out of the Deori Kalan is earmarked for the ingress and egress of the residents of the interior portion, the remaining portion of the Deori Kalan can be put to more advantageous use by the cosharers who can use of the same by constructing shops. The finding was not disturbed by the first appellate Court and has to be affirmed.

7. The first appellate Court misread the award of the arbitrator dated 30-8-1892 under which the Haweli was partitioned amongst various branches of the common ancestors. He also did not correctly understand the admissions made by defendants No. 1 to 3 in the earlier litigation which was proved by producing a copy of the plaint Exhibit P-9 and the site plan Exhibit P-20 in which portion marked. "Z" (Deori Kalan) was shown as a passage belonging to five branches of the family. The admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible in evidence irrespective of whether the party making them appeared in the witness box or not and whether such party when appearing as a witness was confronted with those statements in case it made a statement contrary to those admissions. The first appellate Court ignored these admissions on the ground that all the branches of the joint family were not parties to the list and that these were not put to the concerned defendant when he appeared in the witness box. The approach of the first appellate Court is unwarranted. It has been settled by the apex Court in *Bharat Singh and Another Vs. Bhagirathi*, that the admissions are substantive evidence by themselves and they are admissible per se and it is not necessary to confront the party making those admissions when it appears in the witness box. Thus, it is proved on the record that Deori Kalan was the joint property of five branches and there was no limitation on the rights of the co-sharers of the joint property to get it partitioned.

8. For the reasons recorded above, the appeal succeeds, the judgment and decree of the first appellate Court are set aside and those of the trial Court are restored, but with no order as to costs.