

(2010) 11 SHI CK 0272

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 269 of 1995

Smt. Anita Devi and Others

APPELLANT

Vs

Smt. Sanjana and Others

RESPONDENT

Date of Decision : 29-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 13

Citation : (2010) 11 SHI CK 0272

Hon'ble Judges : Surinder Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Surinder Singh, J.—Appellants herein are the Defendants in the trial Court. They were unsuccessful before the first appellate Court, which affirmed the judgment and decree passed by the learned trial Court in favour of the Respondent-Plaintiffs. Hence this Regular Second Appeal by them which was admitted on 11.8.1995 for hearing, on the following substantial questions of law:

1. Whether the suit for partition was not liable to be dismissed on the ground that one of the share-holders Lachman Singh was not impleaded as a party?
 2. Whether a decree for partition can be passed without giving proper opportunity to one of the Defendants who was serving in the Army?
 3. Whether the learned Courts below were justified in partitioning the property without considering their (Appellants) possession?
 4. Whether the learned Court below were justified in deciding the partition suit without deciding the title between the parties?
2. Heard the learned Counsel for the parties and considered the record.
3. As a matter of fact, Khasra No. 918 measuring 0-11-75 hectares of Muhal and Mauza Moondhi, Tehsil Palampur, as detailed in the plaint, as per Jamabandi for

the year 1989-90 to be referred to as the "land in dispute" was joint inter se the parties to the lis. Admittedly, the share of Respondents/Plaintiffs in the land is 1/3rd while that of the Defendants/Appellants as 2/3rd.

4. The parties shall be referred hereinafter, as they were before the trial Court:

(i) The Plaintiffs had filed a suit claiming separate possession to the extent of their shares in the land in dispute by seeking partition. The Defendants, pursuant to the notice issued in the suit, put in appearance and did not dispute rather admitted 1/3rd share of the Plaintiffs in the land in dispute and agreed for the partition thereto by metes and bounds. As such the learned trial Court passed the preliminary decree in Civil Suit No. 15-P/XIII of 1995 on 11.5.1994 for separate possession by way of partition to the extent of 1/3rd shares of the Plaintiffs and remaining 2/3rd shares of the Defendants.

(ii) Thereafter, Plaintiffs filed an application under Order 26 Rule 13 of the CPC on 8.6.1994 for appointing a Local Commissioner to effect the partition in accordance with the preliminary decree aforesaid and also for passing final decree for possession.

(iii) The Defendants were served but they failed to put in appearance before the learned trial Court as such they were proceeded against ex parte. Accordingly the said application was allowed and vide order dated 20.10.1994 Naib Tehsildar, Palampur was appointed as Local Commissioner to effect the partition of the land in dispute and to deliver the possession to the extent of the shares of both the parties, as per preliminary decree.

(iv) The spot was witnessed by the said Local Commissioner in presence of the parties. The partition was effected by him on the spot by metes and bounds.

(v) Since the parties had agreed to the mode of partition, their statements were recorded and Local Commissioner finalized his report on 19.11.1994 and submitted it to the learned trial Court.

(vi) Defendants neither put in appearance before the trial Court nor preferred to file objections, as such final decree was passed as per report of the Local Commissioner.

5. Defendants felt aggrieved and dissatisfied by the final decree as such challenged it before the learned first appellate Court alleging that no reasonable opportunity was afforded to them to file objections and that the final decree passed by the learned trial Court was in variance to its preliminary decree. Further that the other joint property was not made subject matter of the partition. Therefore, the claim of the Plaintiffs for partial partition was not maintainable.

6. Learned first Appellate Court examined both the points taken in appeal and on the perusal of the record and hearing the parties, came to the conclusion that the preliminary decree was passed with the consent of the parties and notices

were issued to the Defendants for 26.7.1994 on the application moved by the Plaintiffs for appointment of the Local Commissioner. Defendants Jaiwant, Purshotam and Gian Singh were present on the said date and Defendant No. 2 Gandharv Singh was served for 24.9.1994 on the adjourned date. He was also present along with Purshotam and Gian Singh whereas Jaiwant Singh who was present on earlier date was absent as such he was proceeded against ex parte. Even Jaiwant Singh, who was present did not put in appearance therefore, he was also proceeded against ex parte. Therefore, against the above stated facts, learned first appellate Court held that now it did not lie in their mouth when they voluntarily absented themselves and not raised any objection to the report of the Local Commissioner that no reasonable opportunity was given to them and further that Defendants had specifically agreed, before the Local Commissioner on the mode of partition by metes and bounds to the extent of their shares. Even no objection was raised before him regarding the mode adopted for the actual partition nor any objection was filed in the learned trial Court rather they preferred to remain absent. The learned first appellate Court also held that even Defendants had not raised any objection before the trial court that whole of the joint property inter se them was not made a subject matter of the partition. Therefore, on examining the entire background facts, the appeal filed by Defendants was dismissed.

7. Ms. Shubh Mahajan, learned Counsel appearing for the Appellants argued that the suit was bad for non-joinder of necessary parties, i.e., Lachman Singh and proper and reasonable opportunity was not afforded to one of the Defendants, who was serving in the Indian Army. The courts below were not justified in partitioning the joint property without considering the possession of the Defendants as question of title was involved.

8. As a matter of fact, Defendants did not raise any such plea before the Courts below. These pleas were taken for the first time in this Regular Second Appeal which otherwise cannot be allowed to be raised now. Further, record also reveals that a proper and reasonable opportunity was accorded to the Defendants. Not only this, Defendants had put in appearance before the learned trial Court and admitted the shares of the parties and agreed for the partition and also the mode of partition before the Local Commissioner. At no point of time they raised the objection against the mode of partition. Their statements were duly recorded by the Local Commissioner. They did not choose to file objections before the court below.

9. There is no statutory provision that objections are essentially required to be invited by the Court. If any party has any objection, they are at liberty to file objections, but in the instant case, proper and reasonable opportunity was accorded to the Defendants but despite service, they chose to remain absent. Therefore, I do not find any fault in the judgment and decree passed by the Courts below.

10. Therefore, against the above stated facts, no question of law much less a

substantial question of law has arisen in the instant appeal which requires any determination. As such the appeal merits dismissal and is accordingly dismissed with costs throughout.