

(2010) 05 P&H CK 0247

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Shri Sham Singh (since deceased
through his LRs.) and Others

APPELLANT

Vs

Sarwan Singh and Another

RESPONDENT

Date of Decision: May 25, 2010

Acts Referred:

- Punjab Land Revenue Act, 1887 - Section 123
- Registration Act, 1908 - Section 17(1)

Citation: (2010) 159 PLR 513

Hon'ble Judges: Mahesh Grover, J

Bench: Single Bench

Judgement

Mahesh Grover, J.

This Regular Second Appeal is directed against judgments and decrees dated 29.8.1980 and 24.11.1984 passed respectively by the Sub Judge Ist Class, Phillaur (hereinafter described as "the trial Court") and the Additional District Judge, Jalandhar (referred to hereinafter as "the first appellate Court") whereby the suit of the plaintiff-respondent No. 1 was decreed and the appeal of the defendant Nos. 1 to 3-appellants was dismissed.

2. The plaintiff filed a suit for declaration to the effect that he is owner in possession of 81 kanals and 19 marlas of land as described in the headnote of the plaint. It was averred that defendant No. 1-Sham Singh (since deceased) was father of the plaintiff; that defendant No. 1 along with other defendants, namely, Jhalman Singh and Jarnail Singh, as also the plaintiff constituted a joint Hindu family which had land to its credit; that the land so held by the family was ancestral in nature; that defendant No. 1 had partitioned the property held by joint Hindu family and the land in question was given to the plaintiff and he was asked to pay Rs. 5000/- to defendant Nos. 2 & 3 which he did; that defendant No. 1 had retained one Khasra

number with him while defendant No. 2-Jhalman Singh was given seven acres of land and defendant No. 3-Jarnail Singh was given six acres of land; that memorandum of partition was also reduced in writing which was written by a regular deed-writer and the original was kept by defendant No. 1, although in the revenue record the land still remained in his name, whereas the cultivation was shown separately as per the partition deed; that the plaintiff improved the land in dispute at a great expense of Rs. 60,000/- and because of this improvement, defendant Nos. 1 to 3 became jealous of him as the land had become superior and cultivable; that on that account, defendant Nos. 1 to 3 tried to wriggle out of the partition and wanted to have the land in dispute back; that defendant Nos. 1 to 3 mortgaged some portion of the land in dispute with defendant No. 4 which affected the ownership of the plaintiff and, therefore, the suit had to be filed.

3. Upon notice, defendant Nos. 1 to 3 appeared and filed their written statement contesting the suit. The relationship between the parties as stated in the plaint was admitted, but it was denied that they constituted a joint Hindu family. It was pleaded that the plaintiff was residing separately for the last many years; and that they were agriculturists and Jats of Jalandhar district and were governed by custom. It was alleged that no partition as pleaded by the plaintiff had taken place and no writing to that effect was ever prepared. It was pleaded that even if some writing of partition is proved, the same was result of fraud and the partition was actually never acted upon. The improvement on the land in question as claimed by the plaintiff was also denied.

4. Defendant No. 4, in his separate written statement, denied the allegations of the plaintiff and inter-alia pleaded that the property in the hands of defendant No. 1 was self-acquired and that a portion thereof has rightly been mortgaged with him.

5. The parties went to trial on the following issues:

1. Whether the plaintiff and defendant Nos. 1 to 3 formed Joint Hindu Family? OPP
2. Whether the property in dispute is the Joint Hindu Family property of the plaintiff and defendants No. 1 to 3 and is ancestral? OPP
3. Whether the suit property had fallen to the share of the plaintiff in partition, as alleged. If so, to what effect? OPD
4. Whether the plaintiff is in possession of the suit property? OPP
5. Whether the alleged writing effecting partition is the result of fraud, mis-representation and undue influence? OPD
6. Whether the defendant No. 1 mortgaged the suit property for consideration. If so, to what effect? OPD
7. Whether the suit is not maintainable in the present form? OPD

8. Whether the plaintiff has no locus standi to file the present suit? OPD 1 to 3
9. whether the plaintiff and defendants No. 1 to 3 are governed by custom? OPD 1 to 3
10. Relief.

6. After appraisal of the entire evidence on record, the trial Court decreed the suit and in appeal, the findings recorded by it were affirmed by the first appellate Court.

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7. This is the reason that the instant second appeal has been filed.

8. Learned Counsel for the appellants has contended that the alleged partition deed, even if accepted to be correct, does not show that the partition had been acted upon. He referred to Exhibit P1 which is the entry of the register of the deed-writer wherein the partition had been entered and contended that there were various conditions which had to be satisfied before the partition could have been effected in totality and since some of the conditions were to be complied with by the plaintiff and there is no evidence to show that such compliance was made by him, it cannot be said that it was acted upon. He further contended with reference to statement of defendant No. I-Sham Singh, who was examined as DW2 that he had denied the fact that the partition had been effected between the parties. He, thus, submitted that cumulative impact of all these pieces of evidence is that the partition never took place. It was further submitted that even looking at it from another angle, substantial justice required that all the three brothers should succeed to the estate of their father-Sham Singh and there should not be any lop-sided partition. Learned Counsel for the appellants urged that the appellants shall be satisfied if the property is divided equally amongst the brothers. He further urged that the plaintiff was set up a plea that the land in dispute was ancestral, but if the evidence on record is to be seen, then the ancestral property and the self-acquired property of defendant No. I-Sham Singh are mixed up and more than 1/3rd of the property is self acquired and in such a situation, the entire property ought to be treated as ancestral and, therefore, the succession should be in equal shares between his heirs. It was argued that the partition was never entered into the revenue record nor it was got registered and consequently, on both these counts, the same cannot be accepted.

9. In support of his contentions/submissions/arguments, Learned Counsel for the appellants placed reliance on [Mara and Others Vs. Nikko and Others](#), ; [Shiromani and Others Vs. Hem Kumar and Others](#), ; Dhoom Singh and Anr. v. Ram Kumar and Anr. 1988(2) All ILLR 371 (P&H); Chander Settlor etc. v. Des Raj etc. (1989-2) 98 P.L.R. 393 (P&H) and Mihan and Anr. v. Inder and Anr. (2008-3) 151 P.L.R. 354 (P&H).

10. On the other hand, Learned Counsel for the plaintiff-respondent No. 1 contended that no question was put to defendant No. 1-Sham Singh when he appeared in the witness as DW2 regarding the fact that the partition had been acted

upon or not and the statement of this witness cannot be relied upon because in the written statement, it was denied that any partition was effected, but in his testimony as DW2, he admitted this fact. It was next contended that the revenue record consistently showed that the suit property as reflected in the partition was being cultivated by the respective parties and which lent credence to the plea that the partition had been acted upon. It was lastly contended that the contention of the Learned Counsel for the appellants regarding some property being ancestral and some being self-acquired of defendant No. I-Sham Singh cannot be accepted as there is no pleading to that effect and only plea that was raised in the written statement was that the suit property was not Hindu joint family property, but it was self-acquired property of Sham Singh. He, thus, prayed for dismissal of the appeal.

11. In support of his contentions, Learned Counsel for the plaintiff placed reliance on [S. Shanmugam Pillai and Others Vs. K. Shanmugam Pillai and Others](#), ; Smt. Kesar Bai (Dead) through L.Rs. v. Ran Singh (2003-3) 135 P.L.R. 580 and Ajmer Singh v. Dharam Singh (2006-2) 142 P.L.R. 25 (P&H).

12. I have thoughtfully considered the rival contentions and have examined the record.

13. The fore-most question that is to be determined is as to whether the suit property was ancestral or self-acquired of defendant No. I-Sham Singh. For this, one has to traverse to the pleadings of the parties.

14. The plaintiff has merely stated that the suit property was ancestral in the hands of defendant No. I-Sham Singh. He has neither detailed the pedigree table nor has he cared to trace out his lineage through which the suit property travelled. There is also no reference to any property being self-acquired by defendant No. I-Sham Singh. Likewise, the plea as raised in the written statement is also totally vague. Apart from denial that the property is not ancestral, there is no evidence to prove that it was self acquired of defendant No. I-Sham Singh. It is a settled proposition of law that no amount of evidence can be looked into beyond pleadings. In view of the vague pleadings regarding ancestral character of the suit property being ancestral or self-acquired, I am of the view that merely because the property has been stated to be ancestral without there being any collateral evidence to support such a plea, the Court cannot delve upon the suggestive evidence to this effect. It necessarily, therefore, has to be discarded.

15. Whatever the nature may be of the property in the hands of defendant No. I-Sham Singh, the next question that is to be decided is as to whether the partition had been effected or not.

16. Exhibit P1 shows that some sort of settlement had been made by defendant No. I-Sham Singh along with his sons. But, if the contents thereof are minutely evaluated, then it transpires that it was contingent upon many conditions to be fulfilled by the respective parties and it is in this background that the statement of

DW2-Sham Singh assumes more significance. In his examination-in-chief, DW2 admitted the existence of such a document, but he denied that the partition had been acted upon. Even if his cross-examination is to be seen, then also, it is established that this is a document of partition, but at the same time, he has admitted that this was merely an arrangement to manage the cultivation of the land and the partition had not been acted upon because of the reason that the parties thereto had failed to perform and commit themselves to the contingencies which were contemplated therein. Exhibit P1, when translated into English, reads as under:

I, the executant have partitioned my entire movable and immovable property amongst my sons, namely, Jhalman Singh, Sarwan Singh and Jail, the details of which is as under:

About 10 fields of Barani land have been given to Sarwan and these fields are situated between eastern passage known as Ismpurwala and Western drain. The share in well will not be given to him. Besides, he would pay a sum of Rs. 1000/- to Jhalman and Jail. Out of this land, I, the executant, would take one field from Sarwan Singh. I would irrigate this field through the well. When Sarwan would install his well, I would irrigate this field through his well.

Jhalman would get land measuring 7 field towards the east of first Dandi, 2 kanals Chhapparwali land measuring 4-1/4 field and remaining land out of 7 fields situated on the other side of drain. The remaining due land would be taken from inner side of drain. I, the executant would take area measuring 11 kanal out of this land.

Jail : Chahwala field measuring 6 kanal besides plot, land measuring 5 kanal situated near the well (chah) known as Drainwali, 3 fields towards the west of Dandi, 5 kanal land near the field of the boundary of Dandi and two fields one kanal towards the east across the drain. I, the executant would take one field of this land, which is situated in front of the field of Jhalman. Jhalman Singh would take water course from the field known as Patharwala. Two watercourse would be constructed through the field of Jhalman. Jhalman Singh and Jhail would leave common plot measuring 2 kanals. Out of this plot, I, the executant, would take a plot measuring 5 marla.

A pukhta house is situated in the abadi of Rurka Kalan, which is bounded as under:

East	: Passage and street.
West	: House of Kabil Singh
North	: House of Amar Kaur
South	: Passage and street.

This house would remain joint property of all the three sons and I, the executant, would have no concern with the same. Besides, all the three sons would be joint owners of Phirniwali land measuring 1 kanal 13 marla and I would have no concern with this land. One Haveli situated in the abadi of Rurka Kalan has been given to

Sham Singh, meaning thereby I have kept the same with me. My all the three sons would get constructed 4 khans of above said Haveli. 1 would vacate Pukhta house and shift to the Haveli when my sons would get completed the construction of khans. Sarwan would be responsible to repay the loan taken from Bhag Singh and Cooperative Bank. The total amount which is to be paid till date is Rs. 3915/-. The amount of Rs. 1000/- which Sarwan would give to Jhalman and Jail, would be adjusted in this amount of loan. In this way, Sarwan would have to give Rs. 78/- more and the same would be realized together. The remaining amount of loan taken from Karam Singh, Mehanga Singh, Karma, Master Daljit Singh would be repaid by Jhalman. I have partitioned this land, houses and plots amongst my sons and my sons have affixed their thumb marks with their consent. In case any of my son does not comply with the terms of this document, I would personally take the charge of his property and he would be disowned from the property. Therefore, this memorandum has been got scribed, so that it may serve as an authenticity.

17. The statement of DW2-Sham Singh also goes to show that the terms of the aforementioned partition were not complied with the parties and, therefore, the same could not be relied upon to arrive at a conclusion that the suit property was the ownership of the plaintiff. The relevant portion of the statement of DW2-Sham Singh, when translated in English, reads as under:

DW2- Sh. Sham Singh, defendant, aged 80 years...on S.A.

...I have given the said land to my sons for cultivation. I have not transferred the said land in their names. A writing was prepared in respect of giving this land to them. The possession was to be delivered after preparation of the writing.

XX XX XX XX

My three sons were to give me a kotha after constructing the same of four khans. After that, I was to leave the house. They did not give me a kotha after constructing the same. Nobody made the payment of land. I was to take fourth share out of the said land, but my sons did not agree to the same on account of which I destroyed the said writing.

Cross-examination:

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Now, the plaintiff cultivates the said land. The plaintiff has levelled the said land which is under the possession of plaintiff after the partition. I had purchased the said land. I had purchased the same after selling the land of my father. I had spent rupees 6,000/- from my own pocket. It is incorrect that I had given the said land as owner. The plaintiff had started living separately 20 years ago. At the time of partition, again said that the plaintiff was given six fields when he started living separately. When the plaintiff requested that the number of his family members has increased, I gave him three fields more.

18. From a perusal of the above, the Court is of the opinion that even though a partition deed had been drafted and the parties had to bind themselves to it, but, at the same time, it was never carried out and what was effected ultimately was an arrangement between the father and the sons to take care of the agricultural operations as an act of better management and it was not a partition. It is a settled proposition of law that even a partition if effected, would also have the effect of alienation of the property in favour of the person, who is bound by the partition deed and who benefits from obtaining a share as defined thereunder. Such a document also necessarily has to be registered in the eyes of law. In *Siromani v. Hemkumar and Ors.* (supra), the Supreme Court laid down that according to provisions of Section 17(1)(b) of the Registration Act, 1908, a document effecting partition by metes and bounds of joint family properties of which the value is more than Rs. 100/-, the registration is compulsory and in absence of such registration, it is inadmissible to prove title of any of the coparceners to any of the property.

19. In this eventuality when partition deed was unregistered, the same could not be relied upon.

20. Further, the evidence on record shows that the parties had partially acted upon the instrument of partition which is impermissible in the eyes of law. A partition to attain conclusiveness has to be acted upon in its entirety and not in parts which apparently seems to be the case herein.

21. Besides, the partition never had the sanction of law. It was not got affirmed from the revenue authorities in accordance with Section 123 of the Punjab Land Revenue Act, 1887 (for short, "the Act"). In *Dhoom Singh and Anr. v. Ram Kumar and Anr.* (supra), this Court observed that when no steps were taken to give effect to the alleged private partition in accordance with the provisions of Section 123 of the Act, the land will be treated as joint ownership and the co-sharers will continue to be joint owners.

22. Considering the evidence on record and the law as mentioned above, this Court concludes that the partition document, even though was prepared, but was never acted upon so as to fructify conclusively into the right of ownership by vesting and divesting all co-sharers in the suit property.

23. The questions of law, therefore, which arise in the instant case are:

1. Whether the partition, if not acted upon, would still have the deeming effect of a partition deed?
2. Whether the partition deed, if unregistered, can be accepted in law or not?
3. Whether a partial partition can be valid in the eyes of law or not?

24. The questions of law stand answered in view of the discussion made hereinabove.

The appeal is accordingly accepted and the impugned judgments and decrees are set aside.