(2008) 08 P&H CK 0183

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 3570 of 1986

Satish Chander and Others	APPELLANT
Vs	
Rattan Chand and Others	RESPONDENT

Date of Decision: Aug. 4, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 3, Order 8 Rule 5

Citation: (2009) 1 RCR(Civil) 318

Hon'ble Judges: Rakesh Kumar Jain, J

Bench: Single Bench

Advocate: K.S.Cheema and Mr. D.R. Mahajan, for the Appellant; R.K. Joshi, for the Respondent

Final Decision: Allowed

Judgement

Rakesh Kumar Jain, J.
The plaintiffs/appellants have filed a suit for partition by way of separate possession of 1/2 share of the joint property of the parties measuring kanals 9 marlas falling in Khewat No.90, Khatauni No.27, khasra No. 1580 situated in village Dohar, Had bast No.602, Tehsil Dasuya, District Hoshiarpur.

2. In order to establish the relation between the plaintiffs and the defendants the plaintiffs have given the following pedigree table:-

The plaintiffs are the descendants of Shobha Ram whereas the defendants are the descendants of Jangi, who were reals brothers and were owners of the suit property to the extent of 1/2 share each. They were the original proprietors of the village and therefore they had share in the shamlat as well as abadi deh. It is claimed by the plaintiffs that their ancestors as well as ancestors of the defendants had settled in khasa No. 1580 measuring 2 Kanals 9 marlas and started using it as abadi. The plaintiffs have asserted that they are in joint possession of the land which is subject matter of the dispute in which they had even planted valuable trees towards the

eastern corner. The allegation is that about two years back defendant Nos.2 to 6 had raised construction on the western corner of the suit property and again threatened one week before the filing of the suit, to raise new construction in the joint land in their possession by cutting the trees and by dispossessing them forcibly. The plaintiffs had asked for partition of the suit land, but the defendants had refused, hence this suit.

3. On notice of the suit, the defendants filed their written statement in which preliminary objection was taken that the suit is bad for non-joinder of necessary parties; the suit is not valued for the purpose of Court fee and jurisdiction and is bad for partial partition. On merits, so far Para No. 1 is concerned, pedigree table has been admitted but relation of plaintiff with Bhagat Singh was denied on the ground that he was not his adopted son. However, they have admitted that Jawala and others were proprietors of the village. They did not specifically deny that Shobha Ram and Jangi had 1/2 share each in the suit property. They further pleaded that actually their ancestors and now they have their houses in the site in dispute which is abadi deh and that Sant Ram had his abadi in khasra No.2241/1363. They have further claimed that trees have been plated by them in the suit property. They denied that Sant Ram had any share in the suit property.

4. The plaintiffs filed replication controverting the stand of the defendants and reiterated the stand taken by them in the plaint.

5. From the pleadings of the parties, the following issues were struck by the trial Court:-

1. Whether the plaintiffs are the owners to the extent of 1/2 share out of the suit property? OPP

2. Whether the suit is bad for non-joinder of necessary parties? OPD

3. Whether the suit is properly valued for the purpose of Court fee and jurisdiction? OPD

4. Whether the suit is bad for partial partition? OPD

5. Relief.

Both plaintiffs and the defendants led oral as well as documentary evidence in support of their respective contentions.

6. The trial Court while dealing with issue No. 1, split it into two parts, namely, whether plaintiff Satish Chander is the adopted son of Bhagat Ram and secondly as to whether plaintiffs have 1/2 share each in the" suit property?

7. On the basis of the evidence available on the file, it was found by the trial Court that Satish Chander is the adopted son of Bhagat Ram. So far as the second part is concerned with regard to the plaintiffs'' ownership to the extent of 1/2 share in the

suit property, it was held that the pedigree-table in Para No. 1 has been admitted by the defendants in the written statement and on the basis of the pleading of the parties, wherein, in Para 4 of the plaint, it is mentioned that the parties are descendants of Shobha Ram and Jangi Ram who were real brothers and in that way Shobha Ram and Jangi Ram were owners in their ancestral property to the extent of 1/2 share each. The paragraph in the written statement has not been denied specifically. However, it is denied the plaintiffs have no relationship with defendants. Therefore, in the absents of specific denial, it was presumed by the trial court that the defendants admitted that Shoba Ram and Jangi Ram were the owners in equal share of the suit property. The trial Court also took into consideration the arguments raised by the defendants that Exhibit P6 which is a copy of Jambabandi for the year 1979-80, khasra No. 1580 (2 kanals 9 marlas) has been mentioned as gairmumkin abadi and in column of possession, it is mentioned as abadi deh, therefore, the suit property belongs to all the proprietors of the village being misconceived argument as there was no such pleading rather in Para 4, pleading of the plaintiff was that Shobha Ram and Jangi Ram had 1/2 share in the property in question which was not specifically denied, not it was pleaded by the defendants that the suit property belongs to all the proprietors of the village and not exclusively by Shobha Ram and Jangi Ram, therefore, it was found to be an argument beyond pleadings and was not considered. It was also found by the trial court that abadi of the village Dohar.cannot be only 2 kanals 9 marlas. The trail court also discussed the statement of Satish Chander who appeared as PW1, who had categorically stated that they had 1/2 share in the suit property but no specific suggestion was given to him by the defendants to the effect that the plaintiffs did not have 1/2 share in the suit property. Onkar Singh PW3 and Munshi Ram had also stated that ancestors of the parties had joined khata. Rattan Chand appeared as DW1, who admitted that the property is joint with Sant Ram and Bhagat Ram and their ancestors did not purchase any property which is joint till today. In these circumstances, the trial court found that the property in dispute is joint property which is owned by the parties.

8. On the basis of pleadings on record, the trial court vide its judgment and decree dated 12.10.1985 decreed the suit and ordered for a preliminary decree holding the plaintiff to be entitled to a separate possession by way of partition. The defendants had filed an appeal in which the lower appellate court while interpreting Para No. 1 of the plaint with the corresponding paragraph of the written statement observed that no admission can be presumed in view of the averments made by the defendants in Para 4 of the written statement but it was also held that since the land in dispute is a gairmumkinabadi, therefore, no suit for partition can be filed in view of the law laid down in AIR 1934 327 (Lahore) . It was also held that in Para No.6 of the written statement, the defendant had taken the plea that Shobha Ram had settled in abadi deh site comprised in khasra No.2241/1363, therefore, in all probabilities, Sant Ram and his brother Bhagat Ram owned and possessed separate abadi sites whereas, Rattan Chand and others had the suit plot for their abadi. The

first appellate court thus allowed the appeal.

9. Mr.D.R.Mahajan, learned counsel for the appellants has argued that the finding recorded by the first appellate court is based upon misreading, non- reading and mis-interpreting the pleading as well as the evidence on record. It has been argued that the first appellate court has erred in law in observing that the plaintiffs have failed to prove that they had 1/2 share in the suit plot, though this fact is admitted by the defendants in view of the averments made in Para 4 of the plaint which may be read with the corresponding paragraph 4 of the written statement which are reproduced herein below for ready reference:

Para 4 of the plaint. That the parties are descendants of Shobha Ram and Jangi Ram, who were real brothers and in this way, Shobha Ram and Jangi Ram were owners in ancestral property to the extent of 1/2 share each.

Paragraph 4 of the written statement. Para 4 is mis-stated. The defendants are related to each other put the plaintiff has no relationship with the defendants or their ancestors.

Learned counsel for the appellants has referred to the provisions of Order 8 Rule 3 and Order 8 Rule 5 of CPC which is reproduced as under:-

3. Denial to be specific. - It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

Specific denial. - (1) Every allegation of fact in the plaint, specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have or has engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]

10. Mr.Mahajan has vehemently argued that Para 4 of the plaint was categoric in respect of two facts: i) that the parties are descendants of Shobha Ram and Jangi Ram who were real brothers and ii) that Shobha Ram and Jangi Ram were owners in ancestral property to the extent of 1/2 share each. Defendants did not categorically deny the averments to the effect that Shobha Ram and Jangi Ram were not owners in ancestral property to the extent of 1/2 share each. Rather it was vaguely replied and mis-stated and had been wrongly denied that the plaintiff had no relationship with the defendants or their ancestors, whereas pedigree table given in Para No. 1 of the plaintiff hap been admitted to be correct except for the relationship of the plaintiff-Satish Chander with Bhagat Ram who has been denied to be his adopted son, although appellate Court has held that he has been proved to be adopted son of Bhagat Ram. Therefore, learned counsel for the appellants has argued that non-denial in the written statement of the observations even in the plaint is also an admission and if there is vague denial that too is an admission which need not be proved. Learned counsel has referred to Sukhdev Sharma etc. v. State of Haryana, 1993 (1) PLR 107, in which it was held that written statement must deal specifically with each allegation of fact in the petition and when a respondent denies any such fact, he must not do so evasively but answers the point of substance, if his denial of fact is not specific but evasive. Such fact shall be taken to be admitted. In such an event, admission itself, being proved, no further proof is necessary Learned counsel further cited the decision of the Apex Court in the case of M. Venkataramana Hebbar (D) by L.Rs. Vs. M. Rajagopal Hebbar and Others, wherein it was held that in view of Order 8 Rule 3 and Orders 8 Rule 5 CPC, Section 58 of the Indian Evidence Act, 1872, if there is no denial of the averments of the plaint in the written statement, averments would be deemed to be admitted and the courts are entitled to draw an inference that the same has been admitted which fact is admitted and the fact of admission in terms of Section 58 need not to be proved.

11. Learned counsel further argued that the findings recorded by the first appellate court in respect of interpretation of Para 4 of the plaint and the written statement are patently erroneous where it has been observed that in the written statement, it was not admitted that Shobha Ram and Jangi Ram has 1/2 share in the suit plot. Learned counsel further argued that the first appellate court has not at all referred to the statement of Rattan Chand defendant who had appeared a DW1 and categorically admitted that his entire land is ancestral which had come to Sant Ram and Bhagat Ram. None of their elders had purchased the land and the same is joint till today. It was also admitted that the land in dispute falls in khasra No. 1580 which is 2 kanals 9 marlas which has also come to them from their ancestors. It was further admitted that the land other than Lai Lakir has not been partitioned and they have no other khasra No. in Lai Lakir. So far as the khasra No.2241/1363 is concerned, he has shown his ignorance about the source of that land as to whether it came to their ancestor Jawala. Counsel further argued that the finding recorded by the first appellate court that the land of abadi deh cannot be partitioned in view

of Bur Singh''s case (supra), which has no applicability to the facts of the present case.

12. Rebutting the arguments of learned counsel for the appellants, learned counsel for the defendants Mr.R.K.Joshi has argued that in the document Exhibit P6 which is a jamabandi for the year 1979-80, the land in question has been shown as abadi deh which according to the learned counsel for the defendants could not be partitioned in view of the law laid down in Bhur Singhs case (supra). He has further argued that the averment made in Para 4 of the written statement does not show that the defendants have admitted that Shobha Ram and Jangi Ram were the owner of 1/2 share each in the suit plot. It was also argued that an evasive plea has been taken in Para 6 of the written statement that Shobha Ram had settled in abadi deh comprised in revenue No.2241/1363, therefore, in both Shobha Ram and his brother Bhagat Ram owned and possessed separate abadi deh site whereas defendant possessed separate abadi deh which is the disputed plot. It was further submitted that the finding recorded by the first appellate court is just proper and does not call for any interference.

13. It is worthwhile to mention here that during the pendency of the aforesaid appeal, the appellant has placed on record substantial question of law involved in this appeal.

1. Whether non-dealing of the admission made by Rattan Chand defendant-respondent, who appeared at the trial of the suit as DW1, vitiates the judgment passed by the learned lower Appellate Court when the learned trial court has considered this admission while decreeing the suit of the plaintiff-appellant ?

2. Whether-the pleadings of the parties, the evidence on the record, jamabandi for the year 1979-80 (Annexure P6) have been misread and mis-interpreted by the learned lower Appellate Court while reversing the judgment of the learned trial court?

3. Whether the learned lower Appellate Court has made out a new case for the defendant respondents that the suit property is not partible whereas the case of the defendant-respondent was that the suit was bad for partial partition?

4. Whether the judgment in AIR 1934 327 (Lahore) is not at all applicable to the facts of the present case as it is not the case of the defendant-respondents that the suit property is not partible?

14. I have heard learned counsel for the parties and have gone through the file with their assistance.

15. There is no dispute that the defendant has admitted Para 1 of plaint to be correct which contains pedigree table. It is also admitted that the parties are descendants of Shobha Ram and Jangi Ram who were real brothers and they had 1/2 share in the ancestral property. Since this fact is not categorically denied,

therefore, it is deemed to have been admitted. Further, DW1 Rattan Chand has admitted in the cross-examination that the entire land is ancestral which has come to Shobha Ram and Bhagat Ram from their ancestors including the land in dispute which co-relates to the averments made in Para 4 of the plaint. Therefore, the finding that has been recorded by the first appellate court that there is no specific reference in these paragraphs that the suit plot is ancestral is patently erroneous and unsustainable in view of the law laid down in the case of Sukhdev Sharma etc v. State of Haryana, 1993(1) PLR 107 and M. Venkataramana Hebbar (D) by L.Rs. Vs. M. Rajagopal Hebbar and Others, . So far as the finding of the first appellate court that the portion of the abadi occupied by the houses of the villagers is not liable to partitioned is concerned, in view of Bur Singh''s Case (supra), in my view that has no applicability to the facts of the present case because in that case the plaintiff had owned 1/3rd share in the village dismissed on the ground that he had failed to prove that there was an empty site in occupation by any individual and not used by the community for any public purpose. This finding was not challenged by plaintiff Bur Singh before the High Court, therefore, the appeal was dismissed. It was then observed that portion of the abadi occupied by the houses of the villagers or used for public purposes are not liable to partition. In the present case, the facts are altogether different because the land in question is only 2 kanals 9 marlas belonging to the family of the parties to the suit and is not shamlat land for which proprietors can seek partition by way of dispossessing the persons having residential houses. Even otherwise, it is well settled that the joint property is liable to partition as the right to partition is an incident of joint ownership. Therefore, in my view the judgment rendered in Bur Singh''s case (supra) is not applicable to the facts of the present case.

In view of the above discussion, the present appeal is allowed. The judgment of the first Appellate Court is set aside and that of the trial Court restored.