

(9) In the opinion of this Court, 'No Confidence Motion' cannot be moved within next two years if earlier 'No Confidence Motion' is lost. In the present case, 'No Confidence Motion' is hereby held illegal, therefore, fresh legal notice can be issued and proviso has no application in the present case.

(10) In view of the statement made by the learned Deputy Advocate General, Punjab, as well as counsel for respondents No.5 to 7 present petition is allowed. However, respondents shall be at liberty to issue fresh notice to convene meeting to discuss 'No Confidence Motion'.

M. Jain

Before Jitendra Chauhan, J.

SHANTI PARKASH,—Appellants

versus

OM PARKASH,—Respondents

RSA No.2475 of 1984

27th May, 2011

Code of Civil Procedure, 1908 - O.20, 41 RI.20, 27 & S. 2(2), 100 - Punjab Land Revenue Act - S. 158 (2) (xvii) - Indian Stamp Act, 1989 - Art.45 Sch.1 - Plaintiff co-sharer in suit property to the extent of half share - sale by other co-sharer - whether plaintiff has right to Pre-empt property not partitioned by metes & bounds - Being co-sharer, plaintiff has right to pre-empt - No proof property falls in urban Area - Punjab pre-emption Act applicable - No interference required - Appeal dismissed.

Held, That till the final partition is carried out by metes and bounds, the property remains a joint property and the plaintiff being a co-sharer had a right to pre-empt the sale-deed.

(Para 20)

Further held, That no Government notification has been brought on record to prove that the property falls within the territorial jurisdiction of the urban area. In the absence of any positive evidence in this regard, this Court cannot infer that the property falls within the urban area. So, it is held that the Punjab Pre-emption Act is applicable to the land in dispute.

(Para 21)

Ashwani Talwar, Advocate, *for the appellant*.

Harkesh Manuja, Advocate, *for the respondent*.

JITENDRA CHUAHAN, J.

(1) The present appeal is directed against the judgment and decree dated 23.08.1984, passed by the Additional District Judge, Ambala, whereby the appeal, against the judgment and decree dated 30.11.1982, passed by the Sub Judge, I Class, Ambala City, decreeing the suit of the plaintiff, Om Parkash, for possession by way of pre-emption to the extent of 1/2 share in the property as fully detailed in the head note of the plaint was dismissed.

(2) The brief facts of the case are that Om Parkash, plaintiff, and Ahluwalia Panchayat, the Vendors, were co-sharers of the suit property to the extent of ½ share each, vide compromise decree, Exhibit P.5, dated 3.3.1979. The Ahluwalia Panchayat sold the property, including the shop, for a consideration of Rs.9,000/-, vide registered sale deed, Exhibit D.4, dated 21.7.1980. It is alleged that the plaintiff is entitled to pre-empt the sale, being co-sharer in the property, which had not been partitioned by metes and bounds and was still a joint property.

(3) Defendant Shanti Parkash, the Vendee, contested the suit on the grounds that the vendor was the absolute owner of the property; the plaintiff is not co-sharer in the property; it is an urban property situated in a town, where the Punjab Pre-emption Act is not applicable. It was further pleaded that the suit is not within time; the vendee, defendant has made material improvements in the property and the suit was not maintainable.

(4) From the pleadings of the parties, the following issues were framed:-

- (i) Whether the plaintiff is entitled to pre-empt the suit property if so, on what basis ? OPP
- (ii) What is the market value of the property pre-empted by the plaintiff. If so, to what amount ? OPD
- (iii) Whether the non pre-emptable property included in sale deed is of more than value shown in the sale deed ? OPD
- (iv) Whether the defendant is entitled to the cost of Registration etc. If so, to what amount? OPD
- (v) Whether the suit is within time? OPP Whether the defendant has effected improvements on the suit property. If so, of what nature and of what amount and to what effect? OPD
- (vi) Relief.

(5) The learned trial Court decided issue No.1 in favour of the plaintiff, holding that the plaintiff was the co-owner of the suit property to the extent of 1/2 share and the property is not an urban property. The learned trial Court decided issues No.2 and 3 in favour of the defendant holding that the market value of the shop in dispute is Rs.5,000/-. The learned trial Court decided issue No.4 in favour of the defendant holding that the defendant had spent Rs.625/- as stamp charges, Rs.185/- as registration charges and Rs.20/- as miscellaneous charges, which he is entitled to receive. While deciding issue No.5, the suit was held to be within time. Under issue No.6, it was held that the defendant could not prove any money spent on the improvement of the suit property. In view of the issuewise findings, the learned Sub Judge, II Class, Ambala, vide judgment and decree dated 30.11.1982, decreed the suit of the plaintiff for possession by way of pre-emption of 1/2 share in the property as fully described in the judgment and decree-sheet.

(6) Feeling aggrieved against the same, the defendant preferred appeal before the Additional District Judge, Ambala, which was also dismissed.

(7) Not satisfied with the judgments of the Courts below, the defendant preferred this appeal, which was admitted on 26.4.1985.

(8) The learned counsel for the appellant submits that the plaintiff has failed to prove himself to be a co-sharer in the enclosure ('bara') and house in dispute. He submits, one Mrs. Jatan was the widow of Sunder Lal, who after the death of Sunder Lal, adopted Om Parkash, plaintiff, as son. Lateron, Mrs. Jatan gifted the whole property i.e. agricultural land measuring 361 kanal 10 marlas, one enclosure ('bara') and three shops and one house to 'the Panchayat Ahluwalia Ambala City. Om Parkash challenged this gift in the Civil Court by filing a civil suit, which was decreed. In the appeal, a compromise was effected between Ahluwalia Panchayat at, Ambala and Om Parkash, in which, Om Parkash was given ½ share out of the property, specifying the sides of his share vide consent judgment Ex.P.4 dated 3.3.1979 and decree, Ex.P.5, passed by the Additional District Judge, Ambala City, in Civil Appal No.319/13 of 1972. Thus by virtue of judgment and decree, Ex.P.4, and Ex.P.5 respectively passed on the basis of statement Exhibit P.6 of the parties, the Ahluwalia Panchayat and Om Parkash ceased to be a co-sharer. It was partitioned by metes and bounds and the side that fell into the share of Om Parkash was specified. The learned counsel for the appellant further argued that Ramgarh, where the property is situated is a town and not a village, where right of pre-emption is not available. The counsel further submits that the suit is barred by limitation. At the end, he submits that the judgments and decrees of both the courts below are against law and facts, and thus, are liable to be set aside.

(9) On the other hand, the learned counsel for the respondent submits that 'no substantial question of law' arises for determination in this case and the judgments and decrees of both the Courts below are legal and correct based on proper appreciation of evidence.

(10) Vide order dated 24.04.2009, this Court framed the following substantial questions of law:-

1. Whether both the Court below have erred in passing the orders, which are beyond the evidence brought on record in as much as the respondent-plaintiff Om Parkash had already sold a part of the property i.e. his share of Bara situate in village Ramgarh

to third parties i.e. one Naseeru son of Khairu and Banarsi son of Rulia and thus, could not have asked for pre-emptory right in respect of sale deed executed on 21.7.1980 vide Ex.P1 ?

2. Whether the property between the parties stood partitioned as per the judgment and decree dated 3.3.1979 and thus the property was no more a joint property and the plaintiff-respondents did not have any pre-emptory right ?
3. Whether the property is situated in an urban area and thus no pre-emptory rights can be exercised ?
4. Whether the judgment and decrees passed by both the Courts below are perverse, the same being not based upon the documentary evidence brought on record ?
5. Whether the judgment and decrees, which have been passed by the Courts of competent jurisdiction subsequent to the filing of the present Regular Second Appeal are liable to be taken on record for just and fair adjudication of the present appeal ?

(11) I have heard the learned counsel for the parties and carefully gone through the evidence on record.

(12) I first propose to take up question No.1. Ex.D.5 is the saledeed, dated 8.12.1972, executed by Om Parkash in favour of one Nasiru and Banarsi, regarding sale of ½ share in the enclosure ('bara'). Ex. D7 is a mortgage deed, executed by Om Parkash in favour of Lakhmi Singh regarding the shop. The arguments advanced by the learned counsel for the appellant have no force keeping in view the fact that this point is being raised for the first time in this Regular Second Appeal. A perusal of the written statement filed by the appellant/defendant, and the grounds of appeal taken in the first appeal before the Ist Appellate Court would reveal that no such plea was taken therein. The documents Ex.D.5 and Ex.D7 were already in existence at the time of the filing of the written statement. This Court in the present appeal would not travel beyond the pleadings of the parties. Therefore, this Court feels that there is no plausible ground to entertain this plea which has been raised before this Bench at the stage of second appeal when the same could have been taken at an earlier stage also.

(13) The second question is as to whether the property stood partitioned as recorded in the judgment and decree, Ex.P4 and Ex.P5 and is no more a joint property. It has come in the statements of PW1, Om Parkash; PW3 Lal Chand; DW2 Gurbachan Singh and DW1 Raj Kumar, President of the Ahluwalia Panchayat that the property is still joint. Only shares of the plaintiff to the extent of ½ was determined by the parties by way of compromise, Ex.P.6 on the basis of which, the consent judgment Ex.P.4 and decree Ex.P.5 were passed. Only the shares, each party would get on actual partition, was specified and it was not partitioned by metes and bounds. The civil court can decide the question of title regarding the ownership and the extent of share in the agricultural land, but the jurisdiction to carry out the partition of the agricultural land which is to be dealt with by the revenue authority, is specifically limited under section 158 (2)(xvii) of the Punjab Land Revenue Act, which reads as under:-

“158(2)(xvii) Any claim for partition of an estate, holding or tenancy or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought.”

(14) In **Jagga Singh versus Surjeet Singh & others (1)**, it was held that the civil court cannot partition land assessed to land revenue. Land assessed to land revenue can be partitioned only by the revenue officer.

(15) At the most, judgment Ex.P.4 and decree sheet Ex.P.5 can be termed as ‘preliminary decree’ determining the shares of the parties.

(16) The word ‘decree’ has been defined in section 2(2) of the Code of Civil Procedure, 1908 to mean”

“Decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final, it shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default

Explanation-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

(17) Order XX rule 20 of the Code of Civil Procedure is reproduced as under:-

“18. Decree in suit for partition of property or separate possession of a share therein-

Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then-

- (1) If and in so far as the decree relates to an estate assessed to the payment of revenue to the government, the decree shall declare the rights of the several parties interested in the property but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;
- (2) If and in so far as such decree relates to any immovable property or to movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required”

(18) After declaration of rights in the land assessed to land revenue, the parties have to go to revenue court for separation of their respective shares by way of partition by metes and bounds under the Punjab Land Revenue Act. No specific area was allotted or earmarked to any of the parties in the compromise Ex.P.6. No plan was attached with the compromise Ex.P.6. The decree Ex.P.5 cannot be termed as an Instrument of Partition. The Instrument of Partition is drawn after the final decree is passed separating

the shares of the parties. Article 45, Schedule 1 of the Indian Stamp Act, 1899 reads as under:-

“Partition Instrument of (as defined by S.2(15). The stamp duty as a Bond (No.15) for the amount of the value of the separated share or shares of the property.”

“2(15) “Instrument of Partition” means any instrument whereby co-owners of any property divide or agree to divide such property in severality, and includes also a final order for effecting a partition passed by land revenue authority or any civil court and an award by an arbitrator directing the partition.”

(19) Still further, the decree of partition granted by the civil court was required to be sufficiently stamped in view of Article 45 of the Indian Stamp Act, 1899 as reproduced above. This is done where ‘final decree’ by metes and bounds is passed.

(20) While addressing the question No.2, it is, therefore, held that till the final partition is carried out by metes and bounds, the property remains a joint property and the plaintiff being a co-sharer had a right to pre-empt the sale-deed, Ex.D.4.

(21) The third question that arises for consideration is as to whether the property is situated in an urban area and thus no pre-emptory rights can be exercised within that area. The onus to prove this fact was on the defendant DW3, Dussehra Lal and DW4 Om Parkash. Both these witnesses deposed that the property in dispute is situated in the area having village panchayat. No Government notification has been brought on record to prove that the property falls within the territorial jurisdiction of the urban area. In the absence of any positive evidence in this regard, this Court cannot infer that the property falls within the urban area. So, it is held that the Punjab Pre-emption Act is applicable to the land in dispute.

(22) Now coming to issue No.4. After going through the entire record, it is held that the judgments and decrees of both the courts below are well reasoned. This Court finds no perversity. The judgment is based on the correct appreciation of the evidence. There is no scope to interfere in the findings of fact arrived at by both the courts below. Hon’ble the Supreme Court in **Madvan Nair versus Bhaskar Pillai (2)**,

Harjeet Singh versus Amrik Singh (3), H.P. Pyareja versus Dasappa (4), and Gurdev Kaur and others versus Kaki and others (5), while interpreting the scope of Section 100 of the Code of Civil Procedure, laid down the principle of law that the High Court, has no jurisdiction to interfere with the findings of fact, arrived at by the trial Court and the first Appellate Court, even if the same are grossly erroneous, as the legislative intention was very clear that the legislature never wanted second appeal to become a “third trial on facts” or “one more dice in the gamble.” It was further held that the jurisdiction of the High Court in interfering with the judgments of Courts below, is confined only to the hearing of substantial questions of law.

(23) Coming to the last question as to whether this Court can take on record the judgments and decrees dated 30.4.1997 and 10.12.1999, passed by Civil Judge (Jr.Divn.) and the Additional District Judge, which are subsequent judgemnts. There is no dispute about the discretionary power of this Court under Order 41 Rule 27 CPC. The learned counsel opposed this prayer on the ground that these judgments have no relevancy at all to the present controversy. The argument of the learned counsel for the appellant to the effect that the plaintiff has tried to conceal the material fact of sale dated 8.12.1972, made by Om Parkash in favour of Nasiru and Banarsi Dass is of no avail. The parties were fully aware of the sale and certified copy of the sale-deed dated 8.12.1972 and the plan attached thereto was already on the record of the trial Court as Ex.D5 and Ex.D6, respectively. The above referred judgments and decrees sought to be produced, relate only to validity of the sale-deed, Ex.D5. The right of the pre-emption is to be seen on the date of sale and not on the date of filing of the suit. So, the subsequent judgments and decrees have no relevancy to decide the issues raised in the present regular second appeal. Both the courts below have already considered the effect of sale dated 8.12.1972, Ex.D5.

(24) Keeping in view the totality of the circumstances as stated above, this appeal fails and is hereby dismissed without costs. The impugned judgments and decrees of the courts below are hereby affirmed.

A. Agg.

(3) 2005 (12) S.C.C. 270

(4) AIR 2006 SC 1144: (2006) 2 SCC 496

(5) J.T. 2006(5) S.C. 72