

**IN THE COURT OF VIVEK KUMAR, CIVIL JUDGE, JUNIOR DIVISION,
PANIPAT, UID CODE NO. HR0471**

CIS No. CS-590/2018
CNR No. HRPP02-000941-2018
Case No. 100/2018
Date of Institution. 25.04.2018
Date of Decision. **03.05.2023**

1. Surjeet Singh son of Sh. Makhan Lal,
2. Balwan Singh son of Sh. Makhan Lal, both residents of Village Bhandari, Tehsil Madlauda, District Panipat.

.....*Plaintiffs*

Versus

1. Shamsher Singh son of Sh. Ajit Singh son of Sh. Nathu Ram
2. Manjeet son of Dalip Singh,
3. Sheela widow of Dalip Singh, all residents of Village Bhandari, Tehsil Madlauda, District Panipat.

....Defendants.

**SUIT FOR FOR SEPARATE POSSESSION BY WAY OF PARTITION WITH
CONSEQUENTIAL RELIEF OF PERMANENT INJUNCTION.**

Argued by: Sh. R.S. Bairagi, Advocate for plaintiff.
Sh. Anand Dahiya, Advocate for defendant no.1.
Sh. P.R Bairagi, Advocate for defendants no. 2 & 3.

JUDGMENT:-

1. Instant suit has been filed by the plaintiffs seeking decree for separate possession by way of partition by metes and bounds of the residential house measuring 170 sq. yds which is bounded as under:-

East:- House of Suba son of Jhanda Ram

West:- Pucca Street

North:- House of Krishan

South:- House of Inder

situated within the abadideh/lal dora of Village Bhandari, Tehsil Madlauda, District Panipat and also sought decree for permanent injunction restraining the defendants no. 2 & 3 from alienating any specific portion of suit house or more than their own shares to defendant no.1 or to any other person by way of sale, mortgage, lease etc. or in any manner whatsoever.

2. The brief facts of the plaint are that the plaintiffs and defendants no. 2 & 3 are related to each other as defendant no.2 is nephew of plaintiffs and defendant no.3 is brother's wife of plaintiffs. Father of defendant no.2 and husband of defendant no.3 namely Dalip Singh son of late Sh. Makhan Lal was the real brother of plaintiffs who expired leaving behind defendants no. 2 & 3 as his legal heirs. Late Sh. Makhan Lal was owner in possession of the ancestral suit property/residential house constructed over 170 sq. yds situated within the abadideh (Laldora) of Village Bhandari, Tehsil Madlauda, District Panipat. The father of plaintiffs and Dalip Singh had constructed the residential house over the suit property. During his life time, Sh. Makhan Lal partitioned the constructed suit property between his three sons i.e. the plaintiffs and Dalip Singh in equal shares i.e. 56.6 sq. yds each by way of family settlement. The house of 56.6 sq. yds was given to Dalip Singh in the backside portion, in front of it 56.6 sq. yds. land was given to plaintiff no.1 Surjeet and front portion of 56.6 sq. yds was given to plaintiff no.2 Balwan Singh. An affidavit dated 21.06.2013 was also executed in this regard in presence of plaintiffs and late Sh. Dalip Singh. In the said affidavit, it is clearly mentioned that Dalip, his wife Sheela Devi (defendant no.3) and son Manjeet (defendant no.2) cannot sell their share from the suit property without the prior permission and consent of his two sons i.e. plaintiffs. Possession of the suit property was also delivered

by Sh. Makhan Lal to his three sons i.e. plaintiffs and Dalip Singh respectively. But now the defendants no. 2 & 3 became greedy and they in collusion with each other entered into full and final payment agreement to sell dated 17.08.2016 with defendant no.1 in respect of the entire suit property including the shares of the plaintiffs without the consent and knowledge of the plaintiffs and without giving even a single penny to the plaintiffs. Thereafter, on the basis of the alleged full and final payment agreement to sell, defendant no.1 filed a civil suit for permanent injunction against Dalip Singh, his wife Sheela (defendant no.3) and Manjeet (defendant no.2) titled as Shamsher Singh vs. Manjeet & ors. The said suit was dismissed by the court vide judgment dated 10.08.2017 and no appeal was filed against the said judgment. The plaintiffs and defendants are having 1/3rd share each in the suit property. On 20.04.2018, plaintiffs requested the defendants no.2 & 3 to get the suit property partitioned but they refused to do so. Hence, the present suit.

3. Notice of this suit given to the defendants. Defendant no.1 appeared and filed his written statement taking preliminary objections as to maintainability, cause of action etc.

On merits, answering defendant submitted that the suit property is in possession of answering defendant by way of full and final payment agreement dated 17.08.2016 which was executed by defendant no.2 in his faovur for amount of ₹ 7 lacs. Plaintiff and defendants no.2 & 3 have no right, title and interest over the suit property. Plaintiffs and defendants no. 2 & 3 want to grab suit property which is in possession of answering defendant. It is further submitted that it is correct that plaintiffs moved an application under Order 1 Rule 10 CPC but court did not consider the same

and gave directions to file suit for specific performance. In the meantime parties entered into compromise, therefore, defendant no.1 did not file any suit against them. Plaintiff and defendants no.2 & 3 want to grab money from answering defendant and now want to dispossess answering defendant by filing the present suit.

4. Separate written statement was filed by defendants no. 2 & 3 wherein they filed admitted written statement and prayed for allowing/decreeing the present suit.

5. Replication filed by the plaintiffs wherein pleas taken in the plaint were reiterated and all the averments made in the written statement were denied. From pleadings of the parties, the following issues were framed v.o.d. 18.09.2019:-

1. Whether the plaintiff is entitled to a decree for separate possession by way of partition and permanent injunction as prayed for ?OPP
2. Whether the instant suit is not maintainable? OPD.
3. Whether the plaintiffs have no cause of action and locus standi to file the instant suit?OPD
4. Whether the instant suit is bad for mis-joinder and non-joinder of necessary parties? OPD
5. Whether plaintiffs have not approached the court with clean hands and have concealed material fact? OPD
6. Relief.

6. In order to prove his case, the plaintiffs themselves appeared as PW1 & PW2. Thereafter, plaintiff evidence closed by court order. It is pertinent to mention that PW2 did not appear for his cross-examination although his affidavit was tendered in file on 26.02.2020. During pendency of trial on 16.09.2021 defendant counsel brought the fact in the knowledge of the court that plaintiff no.2 has expired. No application for impleading his Lrs

was filed by the plaintiff no.1 after that.

7. The plaintiffs have relied upon the following documents in support of his case:-

- Ex.P1 : Affidavit dated 21.06.2013
- Ex. P2 : Copy of written statement filed by defendants in civil suit no. 209/2016 titled as Shamsher Singh vs. Manjit etc.
- Ex. P3 : Copy of application under order 1 rule 10 CPC in civil suit no. 209/2016 titled as Shamsher Singh vs. Manjit etc.
- Ex. P4 : Reply filed by the plaintiff on the application for setting aside exparte order dated 20.09.2016 in civil suit no. 209/2016 titled as Shamsher Singh vs. Manjit etc.
- Ex. P5 : Copy of Voter Card of Balwan
- Ex. P6 : Copy of Aadhaar Card of Surjeet Singh

8. To rebut the case of plaintiff, defendant no.1 Shamsher Singh himself appeared into the witness box as DW1 and got examined Parveen Kumar as DW2 and Bansi Lal as DW3. The defendant has relied upon the following documents in support of their case:-

- Ex. D1 : Property ID Details
- Ex. D2 : Full and final payment agreement dated 17.08.2016

Thereafter, defendant evidence closed by court orders.

9. No rebuttal evidence is present and same was closed.

10. I have heard learned counsel for the plaintiff and learned counsel for the defendant and have perused the case file and documents on record carefully. Issues-wise findings along with reasons thereof are as under:-

ISSUES NO.1 to 5

11. Issues No.1 to 5 taken up together being interlinked. Onus to prove issue No.1 is on the plaintiff and onus to prove issues no. 2 to 5 is on the defendants.

12. Learned counsel for the plaintiff argued that plaintiffs and defendants no. 2 & 3 are related to each other as defendant no.2 is nephew of plaintiffs and defendant no.3 is brother's wife of plaintiffs. Learned counsel for plaintiff further argued that earlier property was owned and possessed by Sh. Makhan Lal (father of plaintiffs) being ancestral suit property. Learned counsel for plaintiffs further argued that during his life time, father of plaintiffs partitioned the constructed suit property between his three sons i.e. the plaintiffs and Dalip Singh in equal shares i.e. 56.6 sq.yds each by way of family settlement and in this regard an affidavit dated 21.06.2013 was also executed. Learned counsel for plaintiff further argued that the possession was also delivered to plaintiff to the extent of their shares. Learned counsel for plaintiff further argued that defendants no. 2 & 3 in collusion with each other entered into full and final payment agreement to sell dated 17.08.2016 with defendant no.1 in respect of the entire suit property including the shares of the plaintiffs without the consent and knowledge of the plaintiffs and without giving even a single penny to the plaintiffs. Learned counsel for plaintiffs further argued that plaintiffs requested the defendants no.2 & 3 to get the suit property partitioned but they threatened the plaintiffs to alienate the house in favour of defendant no.1.

Learned counsel for plaintiff further submitted that to prove their case,

plaintiffs Surjeet Singh and Balwan Singh got examined themselves as PW1 & PW2, who tendered their affidavit Ex.PW1/A & PW2/A in their evidence, in which they reiterated the version of the plaint in toto. They also proved documents Ex. P1 to P6.

Learned counsel for plaintiff further argued that decree for separate possession by way of partition of the suit property by metes and bounds of residential house measuring 170 sq. yds marked by letter ABCD shown with red colour in the site plan be passed in favour of the plaintiffs along-with decree for permanent injunction restraining the defendants no. 2 & 3 forever from alienating specific portion of their share of the suit property to defendant no.1 or any other persons.

13. On the other hand, to rebut the case of the plaintiff, learned Counsel for defendant no.1 contended that the suit property is in possession of answering defendant by way of full and final payment agreement dated 17.08.2016 which was executed by defendant no.2 in his faovur for amount of ₹ 7 lacs. Learned counsel for defendant no.1 further contended that plaintiff and defendants no.2 & 3 have no right, title and interest over the suit property. Learned counsel for defendant no.1 further contended that possession of suit property was also handed over to defendant no.1 in view of full and final payment agreement dated 17.08.2016 and now present suit is filed by the plaintiffs and defendants no. 2 & 3 in collusion with each other only to cause irreparable loss to defendant no.1.

Learned counsel for defendant no.1 further got examined defendant no.1 Shamsmer Singh as DW1 who tendered his evidence Ex. DW1/A in which he reiterated the version of written statement in toto and further proved documents Ex. D1 & D2.

DW2 Parveen Kumar and PW3 Bansi Lal tendered their affidavits Ex. DW2/A & Ex. DW3/A respectively. They deposed in their affidavits that on 17.08.2016

agreement was executed between Manjeet son of Dalip Singh and Shamsher Singh defendant no.1 regarding suit property. The said Manjeet sold the said property to Shamsher Singh for total sale consideration of Rs. 7 lacs and received the same amount in cash. Witnesses further deposed that possession of property in dispute was handed over to Shamsher Singh and Shamsher Singh is now residing along-with his family members. Witnesses further deposed that the agreement was signed by Manjeet, Shamsher and Dalip Singh and deponent Parveen put his signatures at Point-B and deponent DW3 Bansi Lal put his signatures at Mark-A.

Learned Counsel for defendant no. 1 further contended that plaintiffs are not entitled for asked relief and suit of the plaintiff be dismissed with costs.

14. Learned counsel for defendants no. 2 & 3 have admitted the claim of the plaintiff in toto and prayed for decreeing the suit.

15. No other contention raised. Arguments heard. Record perused. After hearing the arguments of both the counsels and perusing the record carefully this court is of the considered view that in the present case, plaintiff has sought decree for separate possession by way of partition of the suit property by metes and bounds of residential house measuring 170 sq. yds marked by letter ABCD shown with red colour in the site plan be passed in favour of the plaintiffs along-with decree for permanent injunction restraining the defendants no. 2 & 3 forever from alienating specific portion of their share of the suit property to defendant no.1 or any other persons.

This court also draws attention from the documents submitted by the plaintiff in support of his arguments:-

Ex.P1 : Affidavit dated 21.06.2013

Ex. P2 : Copy of written statement filed by defendants in civil

suit no. 209/2016 titled as Shamsher Singh vs.
Manjit etc.

Ex. P3 : Copy of application under order 1 rule 10 CPC in
civil suit no. 209/2016 titled as Shamsher Singh vs.
Manjit etc.

Ex. P4 : Reply filed by the plaintiff on the application for
setting aside exparte order dated 20.09.2016 in civil
suit no. 209/2016 titled as Shamsher Singh vs.
Manjit etc.

Ex. P5 : Copy of Voter Card of Balwan

Ex. P6 : Copy of Aadhaar Card of Surjeet Singh

16. On the other hand, Ld. Counsel for defendant no.1 argued that suit of the plaintiff is not maintainable as defendant no.1 is owner in possession of the suit property and plaintiffs and defendants no. 2 & 3 have no concern with the same in view of full and final payment agreement dated 17.08.2016.

Ld. Counsel for the defendants also relied upon following documents in support of his case:-

Ex. D1 : Property ID Details

Ex. D2 : Full and final payment agreement dated 17.08.2016

17. In the present case the point for determination is that:- whether the plaintiffs have any right in the suit property being its owners and whether they are entitled for partition of joint suit property as well as for decree for permanent injunction pertaining to suit property as prayed for.

18. It is observed that present suit is filed by plaintiffs seeking

decree for separate possession by way of partition of the suit property and also sought decree for permanent injunction restraining the defendants forever from alienating specific portion of their share of the suit property.

19. In the present case, plaintiffs have alleged that suit property earlier belong to Sh. Makhan Lal who was father of plaintiffs and it was ancestral suit property/residential house of Sh. Makhan Lal measuring 170 sq. yds. situated within abadideh/laldora of Village Bhandari, Tehsil Matlauda, District Panipat. To prove this, plaintiffs got examined themselves as PW1 & PW2 as well as alleged affidavit dated 21.06.2013 Ex. P1 of Sh. Makhan Lal. It is observed that the said statement of Sh. Makhan Lal as recorded has been alleged to be an affidavit of Sh. Makhan Lal. It is observed that this alleged affidavit Ex. P1 is neither a judicial affidavit as it is not written on any judicial paper and not properly stamp with court fee. It is also not a non judicial affidavit as those are written on non judicial stamp paper having different stamp paper value. The affidavit is also required to be attested a notary public with a valid license in order to be considered valid. The attestation must be signed by the notary with both his seals and a notary stamp and it shall be entered in the register maintained by notary public.

In the present case the alleged affidavit Ex. P1 has not been attested by any person who is authorized to attest an affidavit such as any court, magistrate, oath commissioner, notary public etc. Affidavit must be certified by any of the above which is a proof that affidavit was made before him. In the present case at hand, the affidavit has not been attested either by notary public, magistrate or oath commissioner etc. The necessary requirement of attestation of affidavit by any of the above has not been complied with, therefore, the document Ex. D1 cannot be called as an affidavit.

Moreover, affidavit is not an evidence under the Indian Evidence Act. If a fact is allowed to be proved by affidavit by CPC or any other law then only it can be proved by affidavit notwithstanding the provisions of the Indian Evidence Act.

In the present case, plaintiffs have alleged that the suit property was ancestral property of their father Sh. Makhan Lal and he executed an affidavit Ex. P1 as per which he partitioned the suit property measuring 170 sq. yds. between plaintiffs and late Sh. Dalip Singh.

20. In the present case, no evidence has been led on the point as to how father of the plaintiffs or his predecessors became owner of suit property. Whether they purchased it from someone. Whether government allotted them the suit property. Nothing has been mentioned anywhere in the plaint. It is only mentioned in para no.3 of the plaint and same is reproduced:- “That late Sh. Makhan Lal son of late Sh. Matu Ram was owner in possession of the ancestral suit property/residential house constructed over 170 sq. yds. situated within the abadideh (Laldora) of Village Bhandari, Tehsil Matlauda, District Panipat”.

It is nowhere mentioned except these lines as to how either Sh. Makhan Lal or his predecessor in interest became owner of suit property.

21. Plaintiff PW1 Surjeet Singh sated in cross-examination that he has given his affidavit in the court but he is not aware what is mentioned in his affidavit and his counsel must be aware about the contents of the affidavit. PW1 further stated that they are four brothers. Out of those brothers, one of his brother reside at Matlauda. Remaining three brothers are residing in Village Bhandari, Matlauda, Panipat in different residential houses. He further got recorded in cross-examination that the house in which they are residing is at a distance of 100 meter from the house where Shamsher

is residing. He further stated in cross-examination that the house in which Shamsher Singh is residing, earlier his brother Dalip was residing in the same and he has no document to prove that he had any share in disputed house. In cross-examination PW1 further stated that the affidavit Ex. P1 of his father is not notarized. In cross-examination PW1 further stated that he never took possession of his share in disputed property as his brother was residing in the same. PW1 further stated in cross-examination that except the affidavit Ex. P1 there is no other document on the court file which can prove that the disputed house/suit property is there joint property. In cross-examination PW1 further stated that at present Shamsher Singh is residing at the disputed house/suit property.

22. From the above mentioned version of cross-examination of PW1, it is clear that suit is bad for non-joinder of necessary party i.e. the fourth brother of plaintiffs and late Sh. Dalip Singh as admitted by PW1 in his cross-examination that they are four brothers. In the present case suit was filed by plaintiffs Surjeet Singh and Balwan Singh and Lrs of Dalip Singh were made defendants no. 2 & 3. The fourth brother is not joined in the present suit although present suit is filed seeking partition of joint property. It is a settled principle of law that suit for partition cannot be maintained unless all the co-sharers are joined as parties in the suit. In absence of any co-sharer, no effective decree can be passed in a partition suit. In this regard this court is guided by decision of Hon'ble Punjab and Haryana High Court in **Bhom Singh & ors. vs. Kishan Chand & ors. decided on 08.02.2012** and **Sanjay & ors. vs. Smt. Rajrani and Ors. decided by Hon'ble Punjab and Haryana High Court on 10.05.2012.**

23. In the present case, the defendant no.1 has alleged that he is in possession of suit property being its owner in view of full and final payment agreement Ex. D2 which has been executed by Manjeet. In the said agreement Ex. D2, it is mentioned that

Manjeet got the disputed property measuring 170 sq. yds. as per family settlement/agreement dated 28.06.2013 from his grandfather Sh. Makhan Lal. It is observed that here the date of family settlement is mentioned as 28.06.2013 although the alleged affidavit relied upon by the plaintiffs as Ex. P1 is bearing date 21.06.2013. DW1 Shamsher Singh stated in his cross-examination that he purchased house in dispute from Manjeet and he used to reside in the same. It is also observed that defendant no.1 has placed on record Ex. D1 i.e. property ID Details of disputed property which is in the name of Smt. Ganga Devi wife of Shamsher. This coupled with clear version of PW1 in cross-examination corroborate the case of defendant no.1 that he is in possession of disputed house. This coupled with version of PW1 Surjeet Singh in cross-examination that Shamsher is residing in the house in which earlier his brother Dalip Singh is residing and the three brothers namely plaintiffs, Balwan and Dalip are also residing in village in their different house in laldora suggest that plaintiffs and their brother are already residing as per their mutual family partition and possibility of the same cannot be ruled out. It is also further corroborated by perusal of document Ex. D2 i.e. full and final payment agreement in favour of Shamsher wherein it is mentioned that as per some family settlement dated 28.06.2013 disputed property came in the share of Manjeet Singh son of Dalip Singh. No such family settlement dated 28.06.2013 has been placed on record by the plaintiffs coupled with the fact that present suit is filed in absence of fourth co-sharer i.e. fourth brother of plaintiff Surjeet, Balwan and late Sh. Dalip Singh. So, the present suit in the present form is not maintainable.

24. It is also a settled law that burden of proof in civil cases is preponderance of probabilities. The phrase “preponderance of probability” appears to have been taken from **Charles R. Cooper Vs. F.W. Slade, (1857-59) 6 HLC 746**. The observations

made therein make it clear that what “preponderance of probability” means is “ more **probable** and rational view of the case”, not necessarily as certain as the pleading should be.

On the basis of definition of the words “Proved”, “disproved” and “not proved” as contained in Section 3 of the Evidence Act, a similar inference can be drawn.

The term “proved” is defined as below:-

“A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so **probable** that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”

25. In the present case plaintiff has failed to prove his case to the extent of preponderance of probabilities that plaintiff is entitled for separate possession by way of partition of joint disputed property in view of above mentioned detailed in judgment.

26. Issue no.1 is decided against the plaintiff accordingly. Issues no. 2 to 5 are decided in favour of the defendants as plaintiffs have not come to the court with clean hands and have suppressed material facts. They did not join the fourth co-sharer i.e. their fourth brother in the present suit as party. Even in para no. 3 of the plaint it is mentioned by the plaintiffs that Sh. Makhan Lal partitioned the suit property between his three sons. Here also it is not mentioned that they have one more brother i.e. fourth son of late Sh. Makhan Lal. Accordingly, the suit at hand is not maintainable and also bad for non-joinder of necessary party.

27. In view of the above said discussion, issue no.1 is decided against the plaintiffs. Issues no. 2 to 5 are decided in favour of the plaintiffs.

RELIEF:-

28. In view of findings on aforesaid issues, present suit of plaintiffs fails and is dismissed with no order as to costs. Decree sheet be prepared accordingly. File be consigned to the Record room after due compliance.

Pronounced in open court:
Dated: 03.05.2023

(Vivek Kumar)
Civil Judge, (Jr. Divn.),
Panipat

Note:- This judgment consists of (-15-) pages and each page checked and signed by me.

(Vivek Kumar)
Civil Judge (Jr. Divn)
Panipat, (UID-HR0471)
03.05.2023