

Before M.M. Kumar, J.

DHAN KAUR (DECEASED) THROUGH HER L.RS
& OTHERS,—*Petitioners*

Versus

SHAMSHER SINGH & OTHERS,—*Respondents*

R.S.A No. 1619 of 1980

25th April, 2005

Code of Civil Procedure, 1908—Registration Act, 1949— Ss. 17 & 49— Plaintiffs seeking declaration that they were exclusive owners of the suit land— All defendants except two admitting the claim of petitioners— Trial Court after placing reliance on direct admission of private partition made by defendants decreeing the suit of plaintiff— Challenge by defendant No. 10—Ist Appellate Court discarding the bahi entries witnessing the factum of petition on the ground that these documents were not admissible in evidence nor the same were binding on the defendants because they were not signatory to those documents— Memorandum regarding oral partition— Whether require compulsory registration as provided by S. 17(1)— Held, no— There is no necessity for every co-sharer to thumb-mark, sign and acknowledge such a memorandum— Contesting defendant selling his share by various sale deeds— Once he has sold his whole share he can no longer be considered as co-sharer and cannot seek partition— Appeal allowed, findings of the Ist Appellate Court set aside while restoring the judgment and decree passed by the trial Court.

Held, that the learned lower appellant Court has fallen in a grave error by discarding documents Mark 'A' and 'B' which are mere memorandum of family partition. There is no necessity for everyone of the co-sharer to thumb-mark, sign and acknowledge such a memorandum. I am further inclined to hold that a family settlement once given effect to by the parties then the Courts should be very slow in interfering with the same. Learned lower appellate Court has also ignored admissions made by defendant Nos. 11, 12, 14 to 17 who have filed written statement admitting the claim of the plaintiff-appellants. The evidence on record support only one view that partition in fact has taken place and parties were in possession even earlier to

the oral partition. Therefore, the findings on this issue as returned by the lower appellate Court are not sustainable because there are categorical admissions made by defendants. Revenue record cannot be reckoned according to factual position. Possession of the parties in respect of their lands is long and settled. Therefore, the findings of the lower appellate Court are liable to be set aside and that of the trial Court deserve to be restored.

(Para 19)

Further held, that sale deeds unequivocally demonstrate that defendant No. 10 who had 9/33 share in the total land amounting to 148 kanal 1-½ marlas have already sold the land to various vendees. Once they have sold their whole share they can no longer be considered as co-sharer and they cannot as such seek partition. No useful purpose would be served by once again subjecting the parties to undergo the harassment of litigation concerning partition especially when the partition has already taken place.

(Para 20)

Vikas Behl, Advocate, *for the petitioners*

J.K. Sibal, Sr. Advocate with

Sapan Dhir, Advocate, *for the respondents*

JUDGMENT

M. M. KUMAR, J.

(1) This is plaintiffs appeal filed under Section 100 of the Code of Civil Procedure, 1908, challenging judgement and decree dated 25th April, 1980 passed by learned Additional District Judge, Ferozepur, who has reversed the findings of trial Court recorded in its judgement and decree dated 18th December, 1976. Learned Additional District Judge, has reversed the finding of the trial Court on the core issue by holding that partition infact had taken place amongst the plaintiff-appellants and defendant-respondents in respect of the land which has been owned by them as co-sharer. For the sake of clarity the parties are being referred to as plaintiffs and defendants in accordance with the original nomenclature given by the trial Court.

(2) The plaintiffs, namely, Nihal Singh and Gurmel Singh (now represented by their legal representatives) had filed a civil Suit No. 211 on 19th October, 1973, seeking a declaration to the effect that they were exclusive owners of the land measuring 242 Kanal 5 Marlas out of the total land measuring 540 Kanals 13 Marlas situated in the revenue estate of village Dhindsa, on the basis of private partition. It was also claimed that Harbans Singh, defendant No. 13 son of Avtar Singh alongwith the plaintiffs is also an exclusive owner and in possession of the suit land. A further prayer was made for permanent injunction restraining the defendants from getting the suit land repartitioned.

(3) According to the averments made in the plaint, the plaintiffs alongwith defendant No. 13 and defendant Nos. 1 to 17 were the owners of the whole land measuring 540 kanal 13 marlas. They are alleged to have effected a private partition and land measuring 242 kanal 5 marlas alongwith land measuring 13 kanal 4 marlas comprised in khewat No. 12 fell to their share and two other namely, Harbans Singh, defendant No. 13 and Ass Kaur defendant No.18. It has also been claimed that in pursuance to aforementioned private partition the parties have got exclusive possession of their respective share and assumed rights as exclusive owners. Various instances of sale, mortgage and exchange etc. have been quoted to build up the case that those transfer deeds indicate that the plaintiffs as well as defendant Nos. 13 and 18 became exclusive owners of the land. Those instances have been given in the plaint and are alleged to have taken place after partition those instances are as under :—

- (a) Gurmel Singh, plaintiff and Harbans Singh, defendant No. 13 sold 13 kanals 4 marlas of land to Chamkore Singh and Baloor Singh, etc. as exclusive owner.
- (b) Nihal Singh, plaintiff mortgaged the land measuring 38 kanals 4 marlas with Major Singh, Ajmer Singh, sons of Arjan Singh and possession was delivered to them as mortgagees.
- (c) Defendant Nos. 6 to 12 and Guljar Singh father of defendant Nos. 1 to 5, 19 and 20 got 285 kanal 4 marlas of land in partition and took possession of the same as owners.

(d) Banta Singh *alias* Balwant Singh, defendant No. 19 had sold 50 kanal 9 marlas of land as exclusive owner as had been done by number of other defendants. It was claimed that they did not describe themselves as co-sharers in any of the aforementioned transfer deeds because the private partition entered between the parties had been acted upon. Alleging that the defendants wanted repartition by taking advantage of the fact that no mutation of private partition was effected in the revenue record and for the reason that huge amount of Rs. 12,000 for improvement of the land had been spent. The question of title has arisen when defendant No. 10 Kartar Singh had filed an application for partition which led to the filing of the suit.

(4) The claim made by the plaintiffs was admitted by defendant Nos. 11, 12, 14 to 17 in their written statement. The other defendants did not contest the suit except defendant Nos. 10 and 33.

(5) Defendant No. 10, Kartar Singh son of Sunder Singh (now represented by legal representatives) and defendant No. 33 Bhag Singh son of Dara Singh have claimed that the suit land was joint with the total land measuring 540 kanal 13 marlas which was owned by defendant Nos. 1 to 13, 17 to 19, 28 and Dara Singh, defendant No. 33. The other defendants were transferees from the original co-sharers. The partition was totally denied and the possession of the plaintiff alongwith defendant-respondent Nos. 13 and 18 being the exclusive owner was also disputed. It was claimed that they were merely co-sharers. The transfer deeds were explained to assert that a share from the joint land was subject matter of transfer deeds and possession was delivered to vendees. It is asserted that the land continued to be in the joint khata.

(6) The trial Court interpreted the sale deeds Ex. P-1, Mortgage Deed Ex. P-2 and the Sale Deed Ex. P-3 which described vendor and mortgagor as exclusive owner and in possession to be adequate proof of the fact of partition. Apart from the sale deed Ex.P-1, P-2 and P-3 the trial Court was also influenced by the fact that except defendant Nos. 10 and 33, no one else has contested the suit. reliance has been placed by the trial Court on direct admission of partition made by defendant Nos. 11, 12, 14 to 17. On the basis of the aforementioned factors the trial Court decreed the suit in favour

of the plaintiffs by accepting private partition and restrained the defendants from seeking repartition of the land. The view of the trial Court is explicit from the perusal of para 10 of its judgement which reads as under :—

“I find that the partition did take place between the parties. It is so because in sale deed Ex. P-1 mortgage deed Exh. P-2 and in sale deed Exh. P-3 Banta Singh, Kartar Singh son of Sunder Singh and Ganda Singh respectively have mentioned there in that they are in possession of the property (given in the sale deed and mortgage deed) as exclusive owners and in the sale deed Ex. P-3 and mortgage deed Ex. P-2 it is further added that they are owners without any co-sharer therein. If partition not taken place the said recital would not have mention found in the sale deed and mortgage deed as discussed above, Exh. P-1 was executed on 20th May, 1960. Exh. P-2 was executed on 24th July, 1961 and Exh. P-3 was executed on 30th May, 1960. Further more except the contesting defendants other defendants as discussed above did not contest the suit and admitted the allegations of the plaintiff to be correct and if the partition had not taken place as alleged they would not have admitted the allegations of the plaintiff. I therefore decide this issue in favour of the plaintiffs and against the defendants.”

(7) When the matter was taken in appeal by defendant No. 10, Kartar Singh only learned appellate Court discarded the bahi enteries Mark 'A' and 'B' witnessing the factum of partition on the ground that those two documents were not admissible in evidence nor those documents were binding on the defendants because they were not signatory to those documents. It was further pointed out that only few co-sharers had signed documents Mark 'A' and 'B' and the respective share of the parties were not even specified, which cannot constitute a basis for a conclusion that the plaintiffs, defendant Nos. 13 and 18 had became the exclusive owners of the suit land. Learned appellate court also did not find anything extra-ordinary in transfer deeds executed by the co-sharers because to the extent of their share transfer/ mortgage of land could have been effected or even possession of specific khasra No. could be given to the vendees and the same was

always subject to the adjustment at the time of partition. The views of learned appellate Court are discernible from para 7 of its judgement which reads as under :—

“A perusal of the above mentioned evidence would show that the documents marked A and B are not admissible in evidence and moreover these are not binding on the defendant as they were not a party to this partition. Only a few co-sharers were parties to those documents and even their shares were not specified so on the basis of these documents it could not be urged that the plaintiffs and defendant Nos. 13 and 18 were the exclusive owners of the land in question. The plaintiff's witnesses admitted that the co-sharers were given possession of separate khasra numbers for cultivation, even at the time of consolidation proceedings and so on the basis of the separate possession it could not be said that there has been partition of the land. No report was made to the Patwari regarding the partition nor this partition was acted upon. As the co-sharers were in exclusive possession of certain khasra numbers they had been alienating this property considering it as their own. A co-sharer in possession of specific khasra numbers could alienate his share subject to adjustment at the time of partition and he could deliver possession to the transferee or mortgagee as the case may be. No interference of partition can be drawn by any recital in the deed of transfer that the transferor was the exclusive owner thereof. In the jamabandi the co-sharers were recorded in possession of the land as such and they were never described as exclusive owners. The onus of proving the issue is on the plaintiff and they failed to prove that any partition of land was effected amongst all the co-sharers. The findings of the trial Court to the effect that the joint holding had been partitioned are erroneous and are hereby reversed.”

(8) Mr. Vikas Bahl, learned counsel for the plaintiffs has argued that defendants No. 11, 14 to 26, 28, 29, 30 and 32 have admitted the factum of partition. He has also pointed out that only contestant is defendant No. 10 Kartar Singh, who himself has sold

his share of 148 kanals of land by various sale deeds which have been placed on record by C.M. No. 12819 of 2003. Those sale deeds are Annexures PX-1 to PX-6. A perusal thereof would show that the transfer deeds have been executed after the filing of appeal. According to learned counsel defendant No. 10 has lost the right to seek repartition after he has sold his entire share.

(9) Mr. Bahl, learned counsel has then argued that the learned lower appellate Court has reversed the finding without referring to various reasons recorded by the trial Court for recording the finding that the plaintiffs alongwith defendant Nos. 13 and 18 were the exclusive owner of the land measuring 242 kanals 5 marlas as per details given in para 2 of the plaint. According to learned counsel, the lower appellate Court has failed to advert to the reasons for accepting private partition between the parties on 20th June, 1958. Referring to the evidence of sale transaction Ex. P-1 executed by Banta Singh, mortgage deed Ex. P-2 executed by Kartar Singh and sale deed Ex. P-3 executed by Ganda Singh which are after the partition as entered in the Bahi Marked 'A' and 'B' learned counsel has argued that those instances have not been taken into consideration by the lower appellate Court. According to him the recitals in these documents would show that sale deeds and the mortgage deed categorically state that the executor of the documents were the exclusive owner and not co-sharer. Ex. P-1 was executed by Banta Singh on 20th May, 1960, Ex. P-2 was executed by Kartar Singh on 24th July, 1961 and Ex. P-3 has been executed by Ganda Singh on 30th June, 1960. The other reason which influenced the trial Court was that except defendant Nos. 10 and 13 (who are now represented by their L.Rs. defendant-respondent Nos. 1 to 6) no other person has contested the suit and had admitted the averments of the plaintiff-appellant to be correct.

(10) Learned counsel has also submitted that there is a world of difference between the deed of partition and memorandum of partition. The deed of partition as per the views taken by the lower appellate Court may require compulsory registration under Section 17 of the Registration Act, 1949 whereas memorandum of partition being record of past events would not require compulsory registration. As such the documents Marked 'A' and 'B' which have been discarded by both the Courts below deserved to be taken into consideration and read in evidence. Learned counsel has emphasized that once those

documents are looked into then it becomes evident that the land which has been relinquished by the plaintiffs have been reflected in document Marked 'A' and the same is duly signed by them. The land which has been relinquished by the defendant No. 10 (Now represented by respondent Nos. 1 to 6) have been duly signed by them as is evident from the perusal of the document Marked 'B'. Therefore, the documents Marked 'A' and 'B' deserved to be exhibited as they would be relevant and necessary for deciding the controversy raised in this appeal. In support of his submission, learned counsel has placed reliance on a judgment of the Supreme Court in case of **Munna Lal versus Suraj Bhan and others (1)**, and argued that even in the absence of signatures of any defendant to the memorandum of partition, execution of partition would not be defeated merely on account of absence of his signature. In any case the document is not required to be registered. He has also relied upon the judgments of this Court in the cases of **Bhagwan Singh versus Hardial Singh etc., (2)** and **Gram Panchayat and others versus Sukh Ram Dass and others (3)** and argued that under Section 49 of the Registration Act, 1908 an unregistered document can always be read in evidence for collateral purposes of showing the nature of possession. The memorandum of partition was entered in the Bahi. It can be seen from the documents Marked 'A' and 'B' for the purposes of delivery of actual possession. He has also cited **Kale and others versus Deputy Director of Consolidation and others (4)**.

(11) Another argument raised by learned counsel is that if the sale deed Ex. PX-1 to PX-6 are taken into consideration it would reveal that total area of 148 kanals 1-1/2 marlas of land being 9/33 share stand sold by defendant No. 10 (now represented by his L.Rs. defendant-respondent Nos. 1 to 6) which is their total share out of 540 kanals 13 marlas of land. Those sale deeds have been placed on record by the plaintiffs by C.M. No. 12819-C 2003 which has been allowed on 4th February, 2004. On the aforementioned basis, learned counsel has argued that by act and conduct of the parties in selling their entire land holding the principle of estoppel would be attracted and the partition which has been implemented cannot be considered as non-

(1) AIR 1975 S.C. 1119

(2) 1974 Cur. L.J. 466

(3) 1963 Cur. L.J. 507 (D.B.)

(4) AIR 1976 S.C. 807

est. Learned counsel has also submitted that admission made by defendants in the recitals of sale deeds executed by them to the effect that they were no longer co-sharer but were the exclusive owner of khasra Nos. which were subject matter of sale therein then such an admission becomes binding and the same cannot be rescinded. Learned counsel has emphasized that an admission is best piece of evidence as has been held by the Supreme Court in the case of **Narayan Bhagwantrao Gosavi versus Gopal Vinayak Gosavi and others (5)**, Referring to the mortgage deed Ex. P.2 executed by defendant No. 10 (translated copy of which has been brought on record by C.M. No. 8115-C of 2004) would show that defendant No. 10 clearly recites that the land which was being sold has no element of shirakat (co-sharer) and is exclusively owned and possessed by defendant No. 10 (the predecessor in interest of defendant-respondent Nos. 1 to 6). Such an admission cannot be rescinded. He has also pointed out that Kartar Singh defendant No. 10 has never come in the witness box to explain and rebut that admission. He has also referred to the statements of PW-4 (at page 71 of the record) to buttress his stand that partition has actually taken place and had been acted upon.

(12) Mr. J.K. Sibal, learned counsel for the defendants has argued that before the alleged partition dated 20th June, 1958, the parties were in their respective possession as they were found to be in possession later on. Had the partition been effected then there was no question of continuation of the possession as it existed earlier. Learned counsel has submitted that the documents Marked 'A' and 'B' even if admitted in evidence would not prove that the predecessor of defendants was a party to the partition. He has drawn my attention to para 5 of the judgement of the lower appellate Court to point out that numerous persons are the co-sharer in the land whereas Mark 'A' and 'B' have been signed only by very few of them. Such a document would further disprove the implementation of partition between the parties. Learned counsel has emphasized that the share of the defendants cannot be determined on the basis of arithmetical calculations. According to him it cannot be held that the defendant No. 10 was entitled to 48 kanals 1-1/2 marlas of land on the basis of his share of 9/33 because in the partition a number of things are taken into consideration which include the quality of land, proximity of the

same to the road so on and to forth. It is after working out the value of the particular land that it can be partitioned which in arithmetical calculation could be even more or less. Therefore, merely because the defendants have sold 148 kanals and 1-1/2 marlas of land would not constitute basis to conclude that the partition has taken place. Learned counsel has further argued that the revenue record continues to reflect that the parties were in joint possession as co-sharer. Such an entry cannot be doubted because a co-sharer can be in exclusive possession and the same can be sold alongwith possession by a co-sharer to a vendee but that will not still result into recording a finding that partition had taken place.

(13) The questions of law which require determination in the instant appeal are :—

- (a) whether documents Mark "A" and 'B' recording the past events of private partition require compulsory registration as provided by Section 17(1) of the Registration Act, 1908. If no registration is required then for the purposes of partition and possession could such documents be read as part of evidence.
- (b) whether defendant No. 10 who is represented by defendants No. 1 to 6 and had contested the suit, is left with any *locus standi* to seek partition in view of the sale deeds PX-1 to PX-6 executed by them.

(14) The question whether memorandum regarding past oral partition is required to be registered has been repeatedly considered by the Supreme Court and the preponderance of the judgements is that such a document is admissible piece of evidence and would not require any registration. In support of this proposition, the judgement of the Supreme Court in **Munna Lal's case (supra)** can be relied upon. In the concluding part of para 6 of the judgment, it has been observed as under :—

“As a memorandum of past event, the document could, therefore, be received in evidence though it is not registered.”

(15) It would further be pertinent to point out that in Munna Lal's case (supra) the Supreme Court considered the question as to whether the absence of signatures of any of the co-sharer would

invalidate the memorandum of partition. Holding that absence of signature on such document would not invalidate the memorandum their Lordship observed as under :—

“As regards the second contention that Ex. ‘Y’ is not binding on defendant 1, he not having signed it, the absence of defendant 1’s signature on the memorandum of partition will not invalidate the partition effected by the Panch. Besides, as held by the High Court, the conduct of the parties subsequent to the partition shows that the arrangement effected under the guidance of the Panch was mutually accepted and acquiesced in.”

(16) The same principle has been followed by the Supreme Court in **Kale’s case** (supra) wherein it has been held that even if a family arrangement which is reduced to a writing has not been registered it can still be used for collateral purpose to show the nature and character of possession of the parties. Pointing out the rationale of the principle as to why no registration was necessary in such cases their Lordships observed as under :—

“The family arrangement may be even oral in which case no registration is necessary. The registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made wither for the purpose of the record of for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and it therefore, not compulsorily registerable.”

(17) Further elaborating that for collateral purpose such documents could always be looked into it has been observed as under :—

“Even if the family arrangement was not registered it could be used for a collateral purpose, namely, for the purpose of showing the nature and character of possession of the parties in pursuance of the family settlement.”

(18) It is also well settled that there is no prohibition recognised by law about oral partition and that a memorandum of past oral partition is not required to be registered. In this regard, reliance may also be placed on various other judgements of the Supreme Court in the cases of **Bakhtawar Singh versus Gurdev Singh (6)**, **Hans Raj Agarwal versus CIT (7)**, and **Digambar Adhar Patil versus Devram Girdhar Patil (8)**.

(19) The facts of the present case are required to be examined in the light of the principles laid down by the Supreme Court in the abovementioned judgements. The learned lower appellate Court has fallen in a grave error by discarding documents Mark 'A' and 'B' which are mere memorandum of family partition. There is no necessity for everyone of the co-sharer to thumb-mark, sign and acknowledge such a memorandum. I am further inclined to hold that a family settlement once given effect to by the parties then the Courts should be very slow in interfering with the same. Learned lower appellate Court has also ignored admissions made by defendant Nos. 11, 12, 14 to 17 who have filed written statement admitting the claim of the plaintiff-appellants. Others did not contest the claim of the plaintiff-appellants except defendant Nos. 10 and 33. The evidence on record supports only one view that partition in fact has taken place and parties were in possession even earlier to the oral partition. Therefore, the findings on this issue as returned by the lower appellate Court are not sustainable because there are categorical admissions made by defendants, document Mark 'A' and 'B' memorandum of partition and the recitals in Ex. P-1, P-2 and P-3. There is no evidence to the contrary. Revenue record cannot be considered in isolation. It has to be reckoned according to factual position. It is also pertinent to mention that possession of the parties in respect of their lands is long and settled. Therefore, the findings of the lower appellate Court are liable to be set aside and that of the trial Court deserve to be restored.

Re : Question : B

(20) There is an other aspect of the matter. Sale deed PX-1 to PX-6 unequivocally demonstrate that defendant No. 10 who had 9/33 share in the total land amounting to 148 kanal 1-1/2 marlas have already sold the land to various vendees. Once they have sold their whole share they can no longer be considered as co-sharer and they

(6) 1996 (9) S.C.C. 370

(7) 2003 (2) S.C.C. 295

(8) 1995 Supp. (2) S.C.C. 428

cannot as such seek partition. No useful purpose would be served by once again subjecting the parties to undergo the harassment of litigation concerning partition especially when the partition has already taken place. This Court had granted status quo on 13th August, 1980 which has been continued till date.

(21) The argument of Mr. Sibal that this Court should not interfere with the findings of fact with regard to the factum of partition is devoid of any merit because once the Court has come to the conclusion that important piece of evidence has either been illegally discarded or inadmissible piece of evidence have been taken into consideration then after evaluating the admissible evidence this Court can always consider the effect of such evidence on the findings of fact. There is no blanket prohibition with regard to interference in a finding of fact by this Court under Section 100. In various judgements Supreme Court has indicated the cases where the findings of the fact can be interferred with. A reference in this regard may be made to the judgements of the Supreme Court in the cases of **Hafazat Hussain versus Abdul Majeed and others (9)**, **Kulwant Kaur and others versus Gurdial Singh Mann and others (10)**, **Yadarao Dajiba Shrawane versus Nanilal Harakchand Shah and others (11)**, **Deva versus Sajjan Kumar (12)**. All these judgements alongwith many others have been considered by this Court in RSA No. 1527 of 1999 decided on 19th January, 2005 titled as **Malkhan Singh and another versus Deep Chand and another** holding that if a finding is shown to be perverse, then it would be a question of law.

(22) For the reasons stated above, this appeal succeeds. The findings of the lower appellate Court that there was no partition are held to be perverse and are set aside and those of the trial Court are restored. As a consequence the judgement and decree passed by the trial Court stand restored.

R.N.R.

(9) (2001) 7 S.C.C. 189

(10) 2001 (4) S.C.C. 262

(11) 2002 (6) S.C.C. 404

(12) (2003) 7 S.C.C. 481