Himachal Pradesh High Court
Kuldeep Kumar vs Reeta Rani on 1 November, 2023
Bench: Rakesh Kainthla
IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA RSA No. 515 of 2007 Reserved on: 10.10.2023 Date of Decision: 01.11.2023 .

Kuldeep Kumar ... Appellant Versus Reeta Rani ....Respondent Coram Hon'ble Mr. Justice Rakesh Kainthla, Judge.

Whether approved for reporting?1 Yes
For the Appellants
r : Mr. Bhupender Gupta, Sr. Advocate

with Ms. Rinki Kashmiri, Advocate.

For the Respondent : Mr. Neel Kamal Sharma, Advocate.

Rakesh Kainthla, Judge

The present appeal is directed against the judgment and decree dated 31.7.2007 passed by learned District Judge, Bilaspur, vide which the appeal filed by the appellant (plaintiff before learned Trial Court was dismissed. (Parties shall hereinafter be referred to in the same manner as they were arrayed before learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the plaintiff filed a civil suit seeking a permanent Whether reporters of Local Papers may be allowed to see the judgment? Yes.

prohibitory injunction for restraining the defendant from interfering with the land comprised in Khewat No. 67 Khatauni No. 73 Khasra No. 738/562 measuring 15-9 bighas situated in Mauja Nalag, Tehsil Sadar, District Bilaspur (hereinafter .

referred to as the suit land). Mandatory injunction for demolition of the structure, if any, raised on the suit land during the pendency of the suit and restoring the vacant possession to the plaintiff was also prayed. It was pleaded that the plaintiff and his brothers are co-owners in possession of the suit land.

The co-sharer Rajinder sold 0-3 Bigha of land vide sale deed dated 3.12.2003 to the defendant. The defendant being a transferee from a co-sharer can only seek possession by partition. The defendant is out of possession and she is trying to occupy the valuable portion of the suit land. She was requested not to do so but in vain. Hence, the suit was filed to seek the relief mentioned above.

3. The suit was opposed by filing a written statement taking preliminary objections regarding lack of maintainability and the plaintiff being estopped from filing the present suit by his act and conduct. The contents of the plaint were denied on merits. However, it was admitted that the plaintiff is a co-sharer of the suit land. It was specifically denied that the family partition had taken place and the plaintiff and his brothers were allotted the suit land. It was asserted that the co-sharers were necessary parties to the suit land and the present suit is not maintainable in their absence. The suit has been filed for harassing the defendant. The father of the plaintiff had also .

executed a sale deed of 9 biswa in favour of the father-in-law of the defendant on 8.2.1994. The suit has been filed without any basis; hence, it was prayed that the same be dismissed.

4. A replication denying the contents of the written

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r to statement and affirming those of the plaint was filed.

The learned Trial Court framed the following issues on 19.5.2005:

1. Whether the plaintiff is entitled to the relief of injunction as prayed for? ...OPP.

2. Whether there has been family partition? ...OPP

3. Whether the plaintiff along with other co-sharers is owner in possession of the suit land by way of family partition as alleged? ...OPP

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

5. Relief

6. The parties were called upon to produce the evidence and the plaintiff examined himself (PW1). The defendant examined herself (DW1), Rajesh Kumar @ Rajender (DW2) and Ram Lal (DW3).

7. Learned Trial Court held that a co-sharer could sell a share out of the joint land. The plaintiff admitted that his father had sold his share to many persons. The plaintiff admitted that he had filed a suit to restrain the co-sharers from alienating the suit land. Rajesh Kumar was in possession of the suit land and he had delivered the possession to the defendant. Brij Lal, father-

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in-law of the defendant constructed a house over the suit land about 12 years ago and since then the defendant has been residing in the said house. The plea of family partition was not established; hence, the learned Trial Court answered all the

8. to issues in the negative and dismissed the suit of the plaintiff.

Being aggrieved from the judgment and decree passed by the learned Trial Court, the plaintiff filed an appeal, which was decided by learned District Judge, Bilaspur. Learned First Appellate Court held that the plaintiff failed to establish his plea of private partition. No report was made to the Revenue Authorities regarding the partition. The defendant purchased the share from a co-sharer. She is legally entitled to get the mutation attested in her favour. The partition proceedings regarding the suit land were pending. There was no infirmity in the judgment and decree passed by the learned Trial Court, hence, the appeal was dismissed.

9. Being aggrieved from the judgments and decrees passed by learned Courts below, the plaintiff filed the present appeal asserting that learned Courts below erred in deciding Issues no. 1 to 3 against the plaintiff. Learned Courts below ignored the admissions made by the defendant. The defendant admitted the plea of family partition. A presumption of .

correctness is attached to the revenue record and this presumption was not rebutted. The remedy of the defendant was to get the suit land partitioned and not to file the present suit.

The defendant had no right to take a forcible possession. Hence, it was prayed that the present appeal be allowed and judgments and decrees passed by learned Courts below be set aside.

10. The appeal was admitted on the following substantial questions of law vide order dated 20.10.2008:

> 1. Whether the plaintiff claimed exclusive possession over the suit land on account of family partition, which fact was admitted by the defendant, have not both the Courts below acted in an erroneous and perverse manner to decline the decree of permanent prohibitory injunction, especially when the defendant has admitted to have purchased only undivided share from a recorded co-sharer?
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> 2. Whether both the Courts below committed grave error of law and jurisdiction in ignoring the principles of Evidence Act regarding admissions and acted in erroneous and perverse manner in ignoring such admissions and relying upon revenue entries which stood rebutted on account of respective stand taken by the parties to the suit?

11. I have heard Mr. Bhupinder Gupta, learned Senior Counsel assisted by Ms. Rinki Kashmiri, learned counsel for the appellant/plaintiff and Mr. Neel Kamal Sharma, learned counsel for the respondent/defendant.

12. Mr. Bhupinder Gupta learned Senior Counsel .

submitted that the learned Courts below erred in dismissing the suit. He further submitted that defendant admitted that the co-

sharers had partitioned the land. This corroborated the version of the plaintiff regarding the private partition. The defendant had purchased a share from the co-sharer and she is not entitled to take forcible possession. Her remedy lies in filing a suit for partition. Learned Courts below erred in ignoring these aspects.

He prayed that the present appeal be allowed, and the judgments and decrees passed by learned Courts below be set aside.

13. Mr. Neel Kamal Sharma, learned counsel for the respondent-defendants supported the judgments and decrees passed by learned Courts below and submitted that no interference is required with them. He submitted that the defendant had purchased the share from a co-sharer and the seller stated before the Court that he had delivered the possession to the defendant, hence, the plea taken by the plaintiff that the defendant was forcibly taking the possession was not proved. He prayed that the appeal be dismissed.

14. I have given considerable thought to the rival submissions at the bar and have gone through the records carefully.

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Substantial questions of law No.1 and 2:

15. These substantial questions of law are interconnected with each other and are being taken up together for consideration.

16. The plaintiff reiterated the contents of the plaint in his proof affidavit (Ext. PW1/A). He stated in his cross-

examination that all the co-sharers are in possession of the suit land. He admitted that Brij Lal, father-in-law of the defendant is in possession of the suit land. He admitted that the defendant also resides in the house constructed by Brij Lal. He admitted that Rajesh Kumar, one of the co-owners, had sold three Biswas of land to the defendant on 03.12.1999. He volunteered to say that this was sold out of his possession. He admitted that no specific portion was sold and only the share was sold. He admitted that the house in which the defendant is residing was constructed about 8-10 years ago. The plaintiffs are not in possession of the whole of the suit land but only a portion of the same. No partition was effected in his presence. He has also filed a suit for partition, in which, he had mentioned that all the co-

sharers should be allotted the land as per their share. The seller Rajesh had sold the land, which was in his possession. He volunteered to say that the land was sold to the father-in-law of the defendant. The defendant was raising construction of the .

house over the suit land. He filed the suit so that the co-sharers get the land partitioned and thereafter, sell their share. No co-

sharer should sell his land until the land is partitioned.

17. The admission made by the plaintiff that no partition had taken place in his presence shows that his plea that the suit land was partitioned and it fell into the share of the plaintiff is not proved. He had filed a suit for partition, which clearly shows that he acknowledges the joint status of the suit land. Therefore, in these circumstances, the learned Courts below had rightly held that the plea of the plaintiff regarding the partition was not established.

18. Heavy reliance was placed upon the cross-

examination of the defendant that Rajesh and Kuldeep had entered into a family arrangement for their convenience to submit that this admission establishes the plea of family partition. This submission cannot be accepted. There is a distinction between the family arrangement and family partition. It was laid down in Janku v. Nagnoo, 1985 SCC OnLine HP 12= AIR 1986 HP 10 that mere occupation of the property separately by a co-sharer in a family arrangement does not amount to partition. It was observed:

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> "14. In the written statement the defendants allege that a private partition took place about 47 years back, that is, in or about 1921. No deed/writing of partition was produced by the defendants and there is also no evidence to prove as to when this private partition took place between them or their ancestors. It is also not proved as to what property was put in the hotch-pot in the partition and which portions of the property were allotted to each of the co-sharers/co-owners. No report was given to, the revenue authorities with the result that no mutation of partition was sanctioned. There is also no entry in the revenue records to prove that any co-sharer is in possession of a separate parcel of land on account of partition the entries on the contrary show that separate possessions are recorded in the capacity of a co-sharer.
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> 15. In the case of co-sharers, every co-sharer has an interest in the whole property and also in every parcel of it and possession of the joint property by one-sharer is, in the eyes of the law, possession of all even if all but one are actually out of possession. A mere occupation of a larger portion or even of an entire joint property cannot necessarily amount to an ouster as the possession of one co-sharer is deemed to be the possession on behalf of all. If, however, the co-sharers are in possession of separate parcels of land under some arrangement, then such an arrangement cannot be disturbed except by filing proceedings for partition and during these proceedings, the proper mode of partition can be framed and respective possession of the parties/co-sharers can be respected to the extent to which it is possible."

19. This question was again considered in Leetho Versus Chamelo and Others 2001(2) Shim.LC 238 and it was held that mere arrangements regarding the cultivation of the land cannot be termed as a partition. It was observed:

"12. So far second substantial question of law is concerned, the learned Counsel for the plaintiff has taken .

this Court through the pleadings and evidence on record, oral as well as documentary, but has not been able to show that any part thereof has been misread and misinterpreted by the first appellate Court to come to the conclusion that the land in dispute stood already partitioned. In para 7 of the plaint, there is mention of family settlement without giving further particulars thereof, whereas, the oral evidence pertains to partition, which is not supported by the revenue record produced by the plaintiff. Partition, whether by way of family settlement or family arrangement or by the Revenue Officer by giving effect to the family partition or settlement by metes and bounds should be such which may conclusively establish the respective shares of the parties so as to stop further dispute in between them. Vague assertions in regard to the share of one party and that too which is not proved from the evidence, cannot be said to be sufficient to hold that a partition had taken place. Further, mere arrangement in regard to the cultivation of the land cannot be termed as partition though such arrangement at the time of final partition by the Revenue Officer should be given due consideration in order to maintain possession of the parties intact. Therefore, the first appellate Court has rightly set aside the findings of the trial court to hold that the land in dispute was not partitioned as alleged by the plaintiff. The Substantial Question of Law No. 2 is answered accordingly."

20. This judgment was followed in Mangat Ram Versus Gulat Ram (since deceased) through his LRs Jagdeep Kumar and others Latest HLJ 2011(1) (HP) 274 and it was held that mere arrangement between the parties for the cultivation of the land does not amount to a formal partition, especially when the same is not reported to the Revenue Authorities. It was observed:

"19. Prior to the passing of the order by the competent authority, no partition by metes and bounds ever took .

place between the parties. The court below rightly came to the conclusion that private partition was actually an arrangement for the purpose of cultivation of land. It was not a final partition of the land by metes and bounds so as to effect severances of joint holdings. Had it been so, parties would have definitely got this fact recorded in the revenue record and resorted to the mandatory provisions of Sections 35 and 135 of the Act. The act is a complete code in itself. It provides a procedure for preparing revenue records. Under Section 35, any person acquiring right in an estate as a landowner is required to report the same to the Patwari of the estate, who in turn, is obliged to enter this fact in the register of mutations maintained by him. Whenever there is partition without the intervention of the Revenue Officer, the Private party is required to apply to the Revenue Officer for an order of confirmation/affirmation of partition. The Act provides that in such like cases Revenue Officer is mandatorily required to inquire the fact as to whether in fact partition was ever effected upon or not. The Revenue Officer is required to comply with the statutory provisions laid

> down under Chapter 9 of the Act. Admittedly in the instant case, parties have not resorted to such measures. Partitions entered into in the year 1961 and 1972/74 is no partition in the eyes of the law.
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> 20. This Court in Leetho vs. Chamelo & Ors. 2001 (2) Shim. L.C. 238, while dealing with the question of jurisdiction of the Civil Court to entertain a suit filed by the plaintiff, assailing the order, of partitioning the land, passed by the competent authority, has specifically held that partition, whether by way of family settlement or family arrangement or by Revenue Officer by giving effect to the family partition or settlement by metes and bounds, should be such which may conclusively establish the respective shares of the parties so as to stop further dispute in between them. Mere arrangement in regard to the cultivation of land cannot be termed as partition though such arrangement at the time of final partition by Revenue Officer should be given due consideration in order to maintain possession of the parties intact."

21. Therefore, the submission that an admission .

regarding the family arrangement will establish the partition between the parties is not acceptable.

22. It was submitted that the co-sharer cannot sell the land co-owned by him. This submission is not acceptable. It was laid down by Rajasthan High Court in Chhatar Singh v. Arjun Singh, 1994 SCC OnLine Raj 46 : (1994) 1 RLW 636: AIR 1995 Raj 73 :

(1994) 1 RLR 696 : (1994) 2 WLN 9 : (1994) 2 WLC 533, that there is nothing in law that can debar a co-sharer from transferring his share. It was observed:

> "13. I have gone through these decisions carefully. There can be no two opinions that transfers by a person not authorised to dispose of the transferable properties not his own are void ab initio in law. The facts of the present case are slightly different. It is an accepted position that the defendant Arjun Singh has a share in the land in question. The agreements forming the basis of the suit have been proved a major portion of the amount of sale has been received by him. The land forming the share of other brothers and the mother is not being touched. There is nothing in the law that can bar the defendant from transferring his share in the land in question and on partition that share would be deemed to have been sold and agreed upon to be sold to the plaintiffs."

23. Therefore, a co-sharer has a right to transfer his share in the joint land and the sale in favour of the defendant is not bad.

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24. The plaintiff admitted in his cross-examination that Rajesh had sold the land in his possession to the defendant. This was also asserted by Rajesh (DW2), who stated that he had sold the land

measuring 3 Biswa to the defendant vide registered sale deed (Ext. PB) and he delivered the possession on the spot. He stated in his cross-examination that the partition proceedings were pending between the parties. He admitted that there was a family arrangement between the parties. He denied that the plaintiff was in exclusive possession of the suit land. He stated that he was in possession of 1 ½ - 1 ¾ bighas of land and the remaining land was in possession of the plaintiff. He delivered the possession in the year 2003 after calling Patwari Brij Lal. He denied that no possession was delivered to any person and he was making a false statement.

25. This witness has specifically stated that he was in possession of the land, which was sold by him to the defendant.

The plaintiff also admitted in his cross-examination that Rajesh had sold the land, which was in his possession. The plaintiff also admitted that he was not in possession of the whole of the suit land, which corroborates the version of this witness that the plaintiff was in possession of some portion of the land whereas, he was also in possession of some portion of the land. Therefore, learned Courts below had rightly held that the plaintiff had .

failed to prove that the seller was not in possession and the sale made by him was bad.

26. Heavy reliance was placed upon the copy of the Jamabandi, wherein, the parties are recorded to be the co-

owners. This revenue entry does not help the plaintiff because it does not show his exclusive possession. The entry in the copy of the Jamabandi for the year 2000-2001(Ext. PA) mentions Gair Mumkin Abadi. The plaintiff also admitted that the father-in-

law of the defendant had constructed a house in which the defendant was residing. This also corroborates the version of the defendant regarding her possession.

27. Reliance was placed upon the judgment passed by learned Civil Judge (Junior Division), Bilaspur, dated 31.03.2005 in Civil Suit No.122/1 of 2003 (Ext. DC) filed by Satya Devi against Rajesh Kumar and others, in which it was held that the plea regarding the separate possession of the suit land was not established. A similar finding was also recorded by learned Civil Judge (Junior Division), Bilaspur in Civil Suit No.2/1 of 2004 decided on 31.03.2005.

28. These suits were filed by Satya Devi against Rajesh .

Kumar@ Rajinder, Ram Pal, Shyam Lal and Bimla Devi. Kuldeep Kumar and Rajesh Kumar & others were proforma defendants.

Satya Devi is not party to the present proceedings and it is difficult to see how the findings recorded in a suit filed by a third party will be relevant in the present case.

29. Civil Suit No.2/1 of 2004 was filed by Satya Devi and Kuldeep Kumar against Rajesh Kumar & others . This suit was dismissed by the learned Trial Court. Therefore, Rajesh Kumar being a defendant had no right to file an appeal, as the appeal can be filed against a decree and not against a finding.

30. It was laid down by this Court in Sher Chand vs. Pritam Chand 1997 (1) Shim. L.C. 300 that an appeal does not lie against the findings when the suit is dismissed. It was observed:

> 6. In Madras Corporation v P. R. Ramachandriah, AIR 1977 Mad 25, a Division Bench of the said court held that when a party is not aggrieved by a decree, it was not competent to appeal against the decree on the ground that an issue is found against him Similarly in K. L. Bapuji v. State, AIR 1977 AP 427, a Division Bench of Andhra Pradesh High Court has also taken the similar view that if all the defendants have common interest in obtaining the dismissal of the suit filed by the plaintiff and if for dismissing the suit it is not necessary to decide the controversy between the defendants inter se, the findings recorded on the controversy between the defendants themselves would not be res-judicata No appeal in the aforesaid circumstances, when the entire decree is in favour of the defendants, would lie against the findings at the instance of the defendant aggrieved by it. To a similar effect is a Full Bench judgment of Patna High Court .
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> reported in Arjun Singh v. 71 D Ghosh, AIR 1974 Pat I, where amongst other things, it was observed that appeal would only be maintainable if the findings on the issues decided against the party appealing would operate as res-judicata Since the findings recorded against the appellants on issues in the suit out of which this appeal has arisen do operate as res judicata, therefore, this judgment squarely covers the case of the plaintiff regarding the maintainability of the appeal. No decision to the contrary has been brought to the notice of this Court by the learned Counsel for the appellants.
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> 7. Now coming to the facts of the case, admittedly the suit of the plaintiff was dismissed and further there is no executable decree in his favour wherefrom the plaintiff can derive any benefit against the defendants. The appeal, if any, in the facts of the present case could be maintained by the plaintiff and not by the defendants as filed by them before the lower appellate Court. From whatever angle the case may be viewed, the fact remains that the appeal by the appellants before the lower appellate Court was incompetent and consequently the present appeal is also not maintainable.

31. Similar is the judgement of the Hon'ble Supreme Court in Banarsi v. Ram Phal, (2003) 9 SCC 606: 2003 SCC OnLine SC 229, wherein it was observed:

> 8. Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one

> aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. (See Phoolchand v. Gopal Lal [AIR 1967 SC 1470 : (1967) 3 SCR 153], Jatan Kumar Golcha v. Golcha Properties (P) Ltd. [(1970) 3 SCC 573] and Ganga Bai v. Vijay Kumar [(1974) 2 SCC 393] .) No appeal lies against a mere finding. It is significant to note .
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> that both Sections 96 and 100 CPC provide for an appeal against decree and not against judgment.

32. It was laid down by this Court in Charan Dass v.

Thakur Dass Mast Ram, 1972 SCC OnLine HP 18: AIR 1973 HP 22 that the principle of res judicata cannot be applied to a successful party as it had no right to file the appeal. It was observed at page 24:

> 8. The learned counsel referred to AIR 1922 PC 241 (Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy). It was a case wherein a tenant was sought to be ejected, and he had taken two pleas 11) that he had acquired occupancy right, and (2) that the suit was premature. The trial Court held that there was no occupancy right, but the suit was premature. The High. The court affirmed the trial Court judgment. Subsequently, the zamindar brought another suit for possession over the land. The tenant again claimed occupancy rights. It was held that the question regarding occupancy rights was not res judicata in the subsequent suit for the tenant, having succeeded on the other plea, had no occasion to go further as to the finding against him. A similar situation has arisen in the present case because the petitioner-tenant had no occasion to go further from the finding of the learned appellate authority and it was the landlords who preferred revision before the High Court.
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> 9. In Debi Dayal v. Annu Singh. (AIR 1943 Oudh 231) a similar proposition was held to be correct. The principle of constructive res judicata applies only to a case in which the party against whom it is sought to apply was unsuccessful in the previous suit or proceeding. It cannot be applied against a person who in the previous suit or proceeding had been successful. In the instant case, the petitioner-tenant had been successful in the previous proceeding and the plea of constructive res judicata cannot be availed against him. Therefore, in my opinion, the plea of constructive res judicata was not at all open in favour of the landlords. The petitioner-tenant could not .
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> be debarred from raising the two specific pleas whereby he sought to defeat the claim of the landlords for ejectment.

33. Similar is the judgment in Deva Ram v. Ishwar Chand, (1995) 6 SCC 733, wherein it was held at page 740:

> 25. Let us now consider the plea regarding the effect of an adverse finding recorded by the court against a party in whose favour the suit or the appeal is ultimately decided.
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> 26. It is provided in Section 96 of the CPC that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear an appeal from the decision of such court. So also, Section 100 provides that an appeal shall lie to the High Court from every decree passed in appeal. Thus sine qua non in both the provisions is the 'decree' and unless the decree is passed, an appeal would not lie under Section 96 nor would it lie under Section 100 of the Civil Procedure Code.
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> Similarly, an appeal lies against an 'order' under Section 104 read with Order 43 Rule 1 of the Civil Procedure Code where the 'orders' against which the appeal would lie have been enumerated. Unless there is an 'order' as defined in Section 2(14) and unless that 'order' falls within the list of 'orders' indicated in Order 43, an appeal would not lie.
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> 27. Thus, an appeal does not lie against mere 'findings' recorded by a court unless the findings amount to a 'decree' or 'order'. Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the appellate court. (See Ganga Baiv. Vijay Kumar [(1974) 2 SCC 393 : (1974) 3 SCR 882] .)

28. In Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy[AIR 1922 PC 241: 48 IA 49, 55], it was observed as under:

> "Their Lordships do not consider that this will be found an actual plea of res judicata, for the defendants, having succeeded on the other plea, .
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> had no occasion to go further as to the finding against them: but it is the finding of a court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have now been able to perform."

29. A similar view was also expressed in an earlier decision in Run Bahadur Singh v. Lucho Koer[ILR (1885) 11 Cal 301: 12 IA 23 (PC)].

30. The Oudh Chief Court in Pateshwari Din v.

Mahant Sarju Dass[AIR 1938 Oudh 18: 1937 OWN 1127] held that where a decree in the previous suit is wholly in favour of a person and gives him all the reliefs sought by him, he has no right of appeal against the decree so as to enable him to contest any adverse finding against him in such suit. Hence, such an adverse finding cannot operate as res judicata as against him in a subsequent suit.

31. The High Court of Andhra Pradesh in Bansi Lal Ratwav.Laxminarayan[(1969) 2 An WR 246] and the Full Bench of the High Court of Patna in Arjun Singh v. Tara Das Ghosh[AIR 1974 Pat 1: 1974 BLJR 101] have taken the view that an appeal would not lie against mere adverse finding unless such finding would constitute res judicata in subsequent proceedings. We are, however, not concerned with this aspect of the matter in the present case nor are we concerned with the earlier aspect as the plea of res judicata having not been raised in the written statement, the appellant cannot be permitted to raise the plea here.

32. In view of what we have held above, the points canvassed before us are decided against the appellants.

34. It was noticed by Hon'ble Supreme Court in State of A.P. v. B. Ranga Reddy, (2020) 15 SCC 681, that one of the tests to determine whether the finding will constitute resjudicata or not is whether an aggrieved party could challenge it by way of .

appeal or not. When there is no right of appeal, the finding does not constitute resjudicata. It was observed:

> 30. In Ramesh Chandra[Ramesh Chandra v. Shiv Charan Dass, 1990 Supp SCC 633: AIR 1991 SC 264], the Court held that one of the tests to ascertain if a finding operates as res judicata is that the party aggrieved could challenge it by way of an appeal. The Court held as under: (SCC p. 635, para 4) "4. One of the tests to ascertain if a finding operates as res judicata is if the party aggrieved could challenge it. Since the dismissal of appeal or the appellate decree was not against Defendants 2 and 3 they could not challenge it by way of appeal. Even assuming that Defendant 1 could challenge the finding that the liability of rent was of Defendants 2 and 3 as they were in possession, he did not file any written statement in the trial court raising any dispute between himself and Defendants 2 and 3.
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> There was thus no occasion for the appellate court to make the observation when there was neither pleading nor evidence."

35. Therefore, no assistance can be derived from the findings recorded in the previous suit by the Courts.

36. Thus, the learned Courts below had rightly held that the plaintiff had failed to prove his exclusive possession and the defendant had purchased the property from Rajesh Kumar, who was in possession.

37. The admission made by the plaintiff in his cross-

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examination that he had filed a suit to restrain the other co-

owners from alienating the joint land until the same is partitioned shows that the suit was filed with an ulterior motive/ purpose and was not bona fide.

38. The plaintiff stated that his father had sold the land in favour of the father-in-law of the defendant. Thus, he was trying to restrain the other co-sharer from doing what his father had done. Section 41(i) of the Specific Relief Actm 1963 provides that where the conduct of the plaintiff or his agent has been such as to disentitle him to the assistance of the Court, the injunction can be declined. In the present case, the conduct of the plaintiff was not equitable because he was trying to restrain the defendant and other co-sharers from doing what his father had done; therefore, the learned Courts below had rightly declined the injunction to the plaintiff.

39. It was submitted that a purchaser from a co-sharer is not entitled to a separate possession and his remedy lies in partition. This is not acceptable. It was laid down by Punjab & Haryana High Court in Bhartu Versus Ram Swarup 1981 PLJ 204 that the sale of a specific portion of land amounts to the sale of share and the person in possession is entitled to remain so till partition. However, the land cannot be excluded from the partition on the grounds of sale. It was observed:

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> "5. The rights of a transferee from a co-owner are not entirely dependent on judicial decisions but are regulated by Section 44 of the Transfer of Property Act which provides that where one or two or more co-owners of the immovable property legally competent in that behalf transfer his share of such property or any interest therein, the transferee acquires as to such share or interest and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same but subject to conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. According to this statutory provision also what the transferee gets is the right of the transferor to joint possession and to enforce a partition of the same irrespective of the fact whether the property sold is a fractional share or a specified portion, exclusively in possession of the transferor. Again, it cannot be disputed that when a co-sharer is in exclusive possession of the specified portion of the joint holding, he is in possession thereof as a co-sharer and all the other co-sharers continue to be in its constructive possession. By the transfer of that land by one co-owner, can it be said that other co-sharers cease to be co-sharers in that land or to be in its constructive possession? The answer obviously would be in the negative because try of the other co-share can either seek a declaration from the Court as held in Sukh Dev's case that the vendee is in possession only as a co-sharer or can initiate proceed-- for a partition of the joint holding including the tend transferred. If the other co-sharers continue to be co-

sharers in the land transferred even though comprised of specific khasra numbers how can it be said that what is sold is something other than the share out of the joint holding. That the sale of a specific portion of land out of joint holding by one of the co-owners is nothing but a sale of a share cut of the

joint holding, would be further elucidated if we take the example of a sale where a co- owner sells the land comprised of a particular khasra number which is not in his possession but is within his share in the joint holding. For example, 'A' who is a joint .

owner of one-fourth share in the joint holding measuring 100 bighas sells the land measuring 10 bighas bearing khasra numbers 'X' and 'Y' which are not in possession. On the basis of this sale, the vendee can neither claim himself to be a transferee of the said land nor can he claim its possession from other co-owners in possession thereof. The effect in law of such a transfer would be only that the vendee shall be entitled to 10 bighas of land out of the share of his vendor at the time of a partition or prior thereto to a decree for joint possession to the extent of the land purchased by him. Consequently, the effect in law of the sale of even of a specified portion of joint land is that it is only a sale of a portion of the share by one of the co-owners.

6. Take another example where 'A' and 'B' jointly own a khewat in equal share measuring 200 bighas. 'B' is in separate possession of 100 bighas of land comprised of specific khasra numbers and transfers it to 'C'. This is not disputed that in spite of this sale, 'A' continues to be a co- sharer in the land transferred by 'B'. If that is so how can it be disputed that 'C would necessarily be a co-sharer in the remaining 100 bighas of land in possession of 'A' as otherwise, it would mean that 'A' is the exclusive owner of 100 bighas of land in his possession and also a co-

sharer with 'C in the remaining 100 bighas which obviously is not possible. The matter can further be illustrated by another example. 'A' and 'B' are co-sharers in the joint khewat, say of 100 bighas of land in equal shares. 'B' who is in exclusive possession of land measuring 40 bighas of land comprised of khasra Nos. 1, 2,3 and 4 transfers two khasra numbers, that is, 1 and 2, measuring 20 bighas to 'C specifically stating in the deed that he is in possession of these khasra numbers as a co-sharer and is transferring his interest as such. Can it be said on these facts that 'C has purchased anything except a co-sharer's interest in khasra Nos. 1 and 2 in spite of the fact that the sale is of specific numbers and of the specified area. The answer obviously would be in the negative and if so then the sale is obviously of a share by the co-sharer out of the joint land and nothing else."

40. This judgment was approved in Mange Ram vs. Ram .

Chander 2001 (2) PLJ 441 and it was observed:

> 3. The only contention raised is, whether a sale of a specific portion of Khasra is hit by the right of pre- emption under Section 15(1)(b) of the Punjab Pre- emption Act as applicable to State of Haryana. A Full Bench of Punjab and Haryana High Court in Bhartu v. Ram Sarup, 1981 PunLJ 204 held that a sale of a specific portion of the land described by the particular Khasra numbers by a co-owner out of the joint Khewat would be a sale of share out of the joint Khewat and pre-emptible under Section 15(1)(b) of the Act.
>
> 4. We are in agreement with the view taken by the Full Bench of the Punjab High Court in Bhartu v. Rain Sarup. Consequently, the appeal fails and is accordingly

dismissed. There shall be no order as to costs.

41. A similar view was taken in Ram Chander v. Bhim Singh, 2008 SCC OnLine P&H 754 and it was held that a co-sharer in possession can transfer a specific portion of the land and the transferee is entitled to remain in possession till the partition. It was observed:

> "19. Another attribute of joint property is that where a co-owner in possession of a specific portion of the joint holding and recorded as such in the revenue record, transfers any right, title or interest, from the portion in his specific possession, his vendee would be entitled to protect the portion so transferred, without, however, asserting exclusive ownership to the portion so transferred and possessed, till such time as the joint estate is not partitioned.
>
> 20. In order to place our above conclusion in perspective, we deem it appropriate to reproduce a paragraph from the judgment in Bhartu v. Ram Sarup's case (supra) that succinctly explains our opinion, as under: -
>
> "6. Take another example where 'A' and 'B' jointly' own a khewat in equal shares measuring 200 .
>
> bighas. 'B' is in separate possession of 100 bighas of land comprised of specific khasra numbers and transfers it to 'C. This is not disputed that in spite of this sale, 'A' continues to be a co-sharer in the land transferred by 'B'. If that is so how can it be disputed that 'C would necessarily be a co-sharer in the remaining 100 bighas of land in possession of' A' as otherwise it would mean that 'A' is exclusively the owner of 100 bighas of land in his possession and also a co-sharer with 'C in the remaining 100 bighas which obviously is not possible. The matter can further be illustrated by another example. 'A' and 'B' are co-sharers in the joint khewat, say of 100 bighas of land in equal shares. 'B' who is in exclusive possession of land measuring 40 bighas transfer two khasra numbers, that is, 1 and 2, measuring 20 bighas to 'C specifically stating in the deed that he is in possession of these khasra numbers as a co-sharer and is transferring his interest as such. Can it be said on these facts that 'C has purchased anything except a co-sharer's interest in khasra Nos. 1 and 2 in spite of the fact that the sale is of specific numbers and of the specified area. The answer obviously would be in the negative and if so then the sale is obviously of a share by the co-sharer out of the joint land and nothing else."
>
> 42 Therefore, there is nothing, which prevents a co-

sharer in possession from alienating his share in the joint land.

43 Thus, there is no misreading of evidence by the learned Courts below, hence, these substantial questions of law are answered accordingly.

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Final Order:

44. In view of the above, the present appeal fails and is dismissed. Pending miscellaneous application(s) also stand disposed of.

1st , November 2023
r to (Rakesh Kainthla)
Judge

(saurav pathania)