



IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

CMPMO No. 366 of 2014.
Decided on: 5th October, 2015.

Gopal Chand**Petitioner/Defendant No.2.**
Versus
Mohender Malhotra & Ors**Respondents.**

Coram:

The Hon'ble Mr. Justice Sureshwar Thakur, Judge.

*Whether approved for reporting?*¹ Yes.

For the Petitioner: Mr. Atul Jhingan, Advocate.
For respondent No.1: Mr. Sanjeev Kuthiala, Advocate.

Sureshwar Thakur, Judge (oral)

The plaintiff/respondent No.1 herein instituted a suit against the defendants for partition of the suit property held by them as co-owners, besides the relief of rendition of accounts qua the suit property was claimed in the suit instituted by the plaintiff/respondent No.1 herein. On the learned trial Court having struck apposite issues, on the pleadings set up by the parties in their respective plaint, written statement, besides in the replication furnished by the plaintiff/respondent No.1 herein to the written statement instituted by the defendants, the

¹ Whether reporters of the local papers may be allowed to see the judgment?

plaintiff/respondent No.1 herein instituted an application under Order 6, Rule 17 of the CPC before it seeking its leave to incorporate in the plaint the amendments comprised in paragraph No.2 of the application which stand extracted hereinafter:-

“ The plaintiff-applicant seeks to add para No.2(c) & (d) after para no.2(b) as under:

2(c) That the property comprised in Khata-Khatauni No. 157 min/175 under khasra No.171, measuring 00-08-02, situated in mauja Shila Keepas/341, Tehsil Sadar, District Mandi, H.P. which is owned by the State of H.P. but Sh. Nihal Chand Malhotra, predecessor-in-interest of parties to this has been recorded as Kabiz Najayaj, as per copy of jamabandi for the year 2005-2006. It is also to be partitioned amongst the parties to the lis. This property is adjoining to the self acquired possession of plaintiff, wherein the plaintiff has been doing his business.

(d) That the property comprised in khata-khatauni NO.154/123 under Khasra Nos. 1178, 1179, 1184, kita 3 measuring 48-31 sq. meters situated in mauja Suhra/366/6, Tehsil Sadar, District Mandi, H.P. was co-owned and possessed by the parties to the lis to extent of $\frac{1}{4}$ th share equally, as indicated in the copy of jamabandi for year 1996-1997 & 2001-2002. The plaintiff was asked to sell his share in the said property by defendant No.1 & Defendant No.3 and the sale consideration was also kept by them in joint kitty, to be allocated latter on, at the time of settlement of account.

The plaintiff is thus seeking the partition of all the aforementioned property by metes and bounds and also their allocation to each party to lis equal distribution keeping in view of valuation of each property. The plaintiff is also seeking the share in income of Standard Hotel.

The plaintiff-applicant seeks to add para NO.6(a) after para No.6 of the applicatgion as under:-

6(a) The plaintiff has always supported and contributed in every manner for the development of the premises mentioned in para No.2 and strengthening, expanding and running the family business of Standard Hotel as well as managing the litigation (from lower Courts till the Hon'ble Supreme Court of India) with co-sharers of his father Sh. Nihal

Chand, during life time and even after death of his father Sh. Nihal Chand. It is worthwhile to mention here that whenever Defendant No.2 was not in position to manage the affairs of joint family business of Standard Hotel due to his ill-health and Defendant No.1 was not able to manage the family business due to his out of station service limitations, thus leaving only plaintiff to look after standard Hotel from time to time, till his own fatal accident. Then, the family members of defendant No.2 unlawfully and forcibly took over the business of Standard Hotel as well his share in the said property. Further defendant No.2 has forcibly occupied the office and stores of plaintiff for the said joint Hotel Business, without the consent and permission of Plaintiff. The defendant No.2 has unlawfully and illegally taken the Bar License, without taking prior consent and permission of the plaintiff, which is necessary from the co-sharers of the joint property, under law. The plaintiff is also entitled to use and occupation charges and/or mesne profit @ Rs.50,000/- per month at increasing market value qua his share in the property in para No.2(b) to the plaint.

The plaintiff seeks to add few words "and also their allocation in equal distribution keeping in view the valuation of each property" in para No.11 (b) after words metes and bounds and before words and the share of the plaintiff. The said sub para 11(b) shall be read after its modification as under:-

(b) The suit property may be partitioned by metes and bounds and also their allocation in equal distribution keeping in view the valuation of each property and the share of the plaintiff be separated and delivered to him after such preliminary decree and final decree as is envisaged under the law.

The plaintiff seeks to add few words at the end of para 11(c) as under:

The plaintiff is also entitled to the share of sale consideration of the property mentioned in para 2(d) from defendants No.1 &3. The plaintiff is further entitled to Rs.50,000/- per month, with interest @ 18% pa as the use and occupation charges and/or mesne profits, with successive increase in view of at increasing market value qua his share in the property in para 2(b) from the defendant No.2 & 3, till the date of allotment of possession of the share of the plaintiff to the plaint."

2. The application as preferred by the plaintiff/respondent No.1 herein before the learned trial

Court was opposed by the petitioner herein/defendants by filing a reply to it.

3. The Counsel for the defendant No.2/petitioner herein at the bar has acquiesced to the fact that the amendments proposed to be incorporated with the leave of the Court reflected and occurring in paragraph No.2(c), in the application under Order 6, Rule 17, CPC preferred by the plaintiff/respondent No.1 before the learned trial Court while encompasses besides, takes within its ambit joint property or undivided property in which the parties at contest as co-owners, have hence a right to seek partition thereof by metes and bounds, as such, he has submitted before this Court when besides the entire undivided holdings inter se the parties at contest the one occurring at paragraph No.2(c) is also partitionable amongst them, as such, the order rendered by the learned trial Court permitting the incorporation in the plaint of the property comprised therein be not interfered with by this Court. The said submission addressed by the learned counsel for the petitioner herein necessarily ought to be carried

forward as leaving any part of the joint estate or joint holdings which the parties at contest hold jointly, hence, have a right to seek partition thereof by metes and bounds, if omitted to be incorporated in the suit for partition inter se them would beget the sequel of the plaintiff/respondent No.1 herein being untenably driven to institute a separate suit for its partition. To obviate the aforesaid eventuality of multiplicity of litigation occurring, besides to facilitate the partition by metes and bounds of the entire undivided holdings held jointly inter se the parties at contest, the incorporation in the plaint of the properties reflected and occurring in the application at hand at paragraph 2(c) would mete the requirement of law of the entire joint partitionable estate held by the parties at lis as co-owners being subjected to partition by metes and bounds in a compact consolidated suit instituted qua all undivided holdings held jointly by them as co-owners. Consequently, the impugned order rendered by the learned trial Court so far as it permits the incorporation in the plaint of the averment occurring at paragraph

No.2(c) of the application at hand does not warrant any interference, as such, it is maintained and affirmed.

4. A perusal of paragraph No.2(d) of the application at hand unfolds the factum that one of the parties to the lis has alienated his share in the undivided holdings held jointly inter se the parties at lis yet it emanates on a reading of the aforesaid paragraph of the application at hand that the sale consideration received by the co-owner who sold his share in the joint property has been kept in the joint kitty. Obviously, then when on the suit for partition/rendition of accounts instituted by the plaintiff/respondent No.1 being decreed, the amount of sale consideration derived by a co-owner by selling his share in the property reflected in paragraph No.2(d) of the application at hand, would in proportion to their share in the joint property be allotted to each of the co-owners. Hence, when the counsel for the petitioner herein/defendant No.2 does not contest the factum of the property depicted in paragraph No.2(d) of the application at hand being partitionable inter se the parties at lis, it being an

undivided holding jointly held by them as co-owners, as such, even if a co-owner in the joint property reflected in paragraph No.2(d) of the application at hand has sold his share therein and has received the sale consideration thereof which stands constituted in a joint kitty, it is deemed fit and appropriate that the order rendered by the trial Court permitting the incorporation in the plaint the averments comprised in paragraph No.2(d) of the application be not interfered with, especially when on a decree for partition by metes and bounds of the joint holdings as also for rendition of accounts having come to be rendered by the learned trial Court, the property manifested in paragraph No.2(d) of the application, would not only come to be subjected to its partition by metes and bounds amongst them besides, in proportion to the share held by each of the co-owner in the joint property or undivided holdings, they would receive a share in the sale consideration derived by a co-owner by his alienating his share in the joint property.

5. Besides, given the fact that in the plaint

instituted by the plaintiff/respondent No.1 herein before the learned trial Court , the relief of a decree for partition by metes and bounds being rendered by the learned trial Court qua the property mentioned in paragraph 6(a) of the application at hand stands canvassed therein necessarily then the property which is displayed in paragraph No.6(a) of the application at hand qua which leave has been accorded by the learned trial Court for its incorporation in the plaint for its hence being subjected to partition by metes and bounds, is analogous to the property qua which averments already exist in the plaint qua its being held jointly by the parties at lis besides, a relief has been prayed of its being along with other undivided holdings jointly held by the parties at lis, liable to partition by metes and bounds, renders the proposed amendment existing at and manifested in paragraph 6(a) of the application at hand to be wholly redundant. Naturally then, its incorporation in the amended plaint cannot be permitted. Yet an acid contest exists inter the parties at lis before this Court qua the factum of the tenability of

the impugned order permitting the incorporation of the amendment existing at paragraph No.6(a) of the application at hand. In the suit instituted by the plaintiff/respondent No.1 herein before the learned trial Court, there is a palpable occurrence therein of the property reflected in paragraph No.6(a) of the plaint being a joint estate or an undivided holding held jointly by the parties at contest and its hence being amenable to the rendition of a decree for partition by metes and bounds as also a decree for rendition of accounts qua it qua the co-owners/co-owner holding exclusive possession thereof and theirs hence deriving profit by operating the property bearing the nomenclature of "Standard Hotel" situated over Khata/Khatauni No.308/348, khasra No. 150 measuring 192.13 sq. Meters situated in Mauja Magwain/366/8, District Mandi, H.P.. Given the aforesaid ascription borne by the property occurring in paragraph No.6(a) of the plaint and with its in the plaint standing reflection to be also a property jointly held by the parties at contest qua which relief of its amenability to partition amongst

co-owners by metes and bounds is urged therein, necessarily then hence it would not be apt to permit its incorporation in the amended plaint. However, the counsel for the plaintiff/respondent No.1 submits that the defendant No.2/petitioner herein is only one of the co-owners in Standard Hotel yet his being exclusively possessing it, besides with his operating hotel business therefrom, his deriving profits therefrom which profits as derived therefrom by him while being exclusively appropriated by him, has concomitantly sequelled, the deprivation to the other co-sharers of a right to share with him profits as derived by defendant No.2 from his operating hotel business from the property situated over Khata/Khatauni No.308/348, khasra No. 150 measuring 192.13 sq. Meters situated in Mauja Magwain/366/8, District Mandi, H.P, nomenclatured as "Standard Hotel". Consequently, the learned counsel for the respondent No.1 herein submits that the relief as portrayed in paragraph No.6(a) of the application at hand of the plaintiff/respondent No.1 while being a co-owner therein along with defendant No.2 is entitled to

mesne profit quantified at Rs.50,000/- per month is liable to be incorporated in the amended plaint. Nonetheless, the aforesaid claim as manifested in paragraph No.6(a) of the application at hand when within the domain or the knowledge of the plaintiff at the time of his instituting the suit and his omitting to claim therein the mesne profits qua the property aforesaid, now defacilitates or dis-empowers him to at this belated stage seek the incorporation of the said relief in the amended plaint. Even otherwise when the suit of the plaintiff/respondent No.1 herein is both for partition of the joint estate held as co-owners by the parties at contest and is also for rendition of accounts, necessarily then the relief of rendition of accounts takes within its amplitude and ambit as also encompasses within its scope the claim of the plaintiff/respondent No.1 of his along with other co-owners in proportion to their share being entitled to profits along with defendant No.2 while his exclusively possessing and managing the property reflected in paragraph No. 6(a) of the application at hand. Moreover, when the learned

trial Court proceeds to enjoin by an apposite decree the defendant No.2/petitioner herein to render accounts qua Standard Hotel exclusively possessed by the former then the plaintiff/respondent No.1 herein would be in proportion to his share in the joint property aforesaid entitled to receive his share in the profits derived therefrom by defendant No.2/petitioner herein. Consequently, hence, the anguish of the plaintiff/respondent No.1 herein that he would be deprived of any share of the profits reared by defendant No.2/petitioner herein from his exclusively possessing the property reflected in paragraph No.6(a) of the application stands mitigated. As such, the impugned order in so far as it has permitted the incorporation of the averments comprised in paragraph No.6(a) of the application stands interfered with. In face thereof, the relief as urged by the counsel for the plaintiff/respondent No.1 herein that he be permitted to seek with the permission of this Court the incorporation in the plaint of paragraph 6(a) of the application at hand reflecting therein, the claim of use and occupation

charges from the defendants in exclusive possession of any party of the joint holdings cannot come to be countenanced by this Court. Moreover, with this Court having ordered for the incorporation in the plaint of the amendment reflected in paragraph No.2(d) of the application at hand besides, it having held that the sale consideration derived by a co-owner, who has sold his share therein being liable on a decree for rendition of accounts being rendered by the learned trial Court, for its being shared by all the co-owners in commensuration to their share, necessarily then also the averment existing at paragraph No.11(c) of the application is repetitive besides redundant.

6. The amendment constituted in paragraph No.11(b) while being in consonance with the principle of ensuring parity amongst the co-owners qua the valuation borne by the properties to be allotted to them on partition of the joint estate occurring by metes and bounds, as such, the amendment constituted in paragraph 11(b) of the application at hand is permitted to be incorporated in the plaint. The order of the

learned trial Court permitting its incorporation in the plaint is not interfered with.

7. For the fore going reasons, the impugned order in so far as it has permitted incorporation in the plaint of the amendments comprised in paragraphs No.2(c), 2(d) and 11(b) of the application at hand does not warrant any interference by this Court. However, for the reasons aforesaid, the amendments in the plaint of averments enunciated in paragraphs No.6(a) and 11(c) of the application at hand are declined. Accordingly, the order impugned before this Court whereby the learned trial Court permitted the incorporation in the plaint of the aforesaid averments therein, is to that extent interfered with.

8. With the aforesaid observations the instant petition stands disposed of. All pending applications also stand disposed of. The parties are directed to appear before the learned trial Court on 28th October, 2015. However, it is made clear that any observations made hereinabove shall not be taken as an expression of opinion on the merits of the case and the learned

trial Court shall decide the matter while remaining uninfluenced by any observations made hereinabove.

5th October, 2015.
(jai)

(Sureshwar Thakur),
Judge.

High Court of H.P.