

Jai Karan Sharma v. Ram Kumar

Punjab and Haryana High Court at Chandigarh

Civil Revision No. 5617 of 2007 | Decided 9 September 2008

Coram: Hon'ble Mr. Justice Vinod K. Sharma

Reported: (2009) 1 RCR (Civil) 546; (2009) 2 Civil Court Cases 83

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JUDGMENT - Vinod K. Sharma, J.

1. The petitioner has invoked jurisdiction of this court under Article 227 of the Constitution of India to challenge the order passed by the learned Civil Judge (Jr. Division), Gurgaon and that of learned Additional District Judge, Gurgaon allowing an application moved by the plaintiff respondent seeking injunction, under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure.
2. The plaintiff respondent filed a suit for permanent injunction restraining the defendant-petitioner from raising any sort of construction or encroaching upon valuable portion of the land in question without getting the same partitioned by metes and bounds.
3. Respondent plaintiff claimed that he is co-owner in joint possession of the land in dispute situated at village Samnka Tehsil Farrukhnagar District Gurgaon. Plaintiff respondent claimed that he purchased share in the suit land with Satpal Yadav vide registered sale deed bearing Vasika No. 232 dated 25.4.2006 and separately vide sale deed dated 15.2.2006 and since the date of purchase he is recorded as co-owner in joint possession. It is the case of the plaintiff that the land is still joint and has not been partitioned.
4. It is also the case of the plaintiff respondent that defendant petitioner purchased some land out of Khewat/Khata No. 73/75 and 74 Min/76. Thus, he is also co-sharer in the land in question. It was claimed that being co-sharer he has no right to change the nature of the suit property or to raise construction over the joint property without getting the same partitioned.
5. The defendant contested the suit and claimed that the plaintiff is not co-owner in joint possession of the land in suit, as, there has been an oral family partition between previous owners of the land and all the cosharers became owners in possession of their respective shares and specific share had fallen to the share of Ram Chander son of Budsha. The said land was handed over to the defendant and it has already fixed its board. It was claimed that specific portion has been purchased by the defendant petitioner that the plaintiff has also purchased specific share of co-owner and had taken physical possession to the extent of his share and he is in possession of share.
6. Learned trial court came to the conclusion that the parties are co-sharers in the suit land as per the revenue entries and the defendant, therefore, cannot change the nature of the land by raising construction.
7. The case set up by the plaintiff respondent was that in case the defendant raises construction the plaintiff is likely to suffer irreparable loss. The petitioner contested the case by raising a plea that the plaintiff is not co-sharer with the defendant and a specific portion has been purchased. The plea of family partition was also raised.
8. Learned trial court came to the conclusion that as per the revenue record the parties are cosharers as no partition has been reflected in the revenue entries. The court also came to the conclusion that unless and until family partition is reflected in the revenue record it has to be presumed that the parties are co-sharers. This

finding is not in accordance with law as mere non-reflection of partition can not lead to conclusion that there is no partition, which is otherwise proved.

9. Learned trial court also came to the conclusion that the co sharer has interest in the whole of the property and therefore, it was not open to the co-sharer to change the nature of the land to the detriment of other co-sharer. The court also came to the conclusion that the plaintiff was likely to suffer irreparable loss and thus, allowed the application moved under Order 39 Rules 1 and 2 of the Code.

10. The petitioner preferred an appeal. Learned lower appellate court also held that as partition was not reflected in the revenue record the parties are deemed to be co-sharers. It was also observed that in the sale deed no mention of oral partition was made. It was also held that Ram Chander was shown to be in possession of 1/4th share only. Learned lower appellate court also observed that though in the sale deed it is mentioned that physical possession was handed over, however, no mention was made about killa numbers. Thus, the learned lower appellate court came to the conclusion that as exclusion possession was not proved, learned trial court rightly allowed the application moved by the plaintiff respondent.

11. Mr. Akshy Bhan, learned counsel for the petitioner contended that a suit for injunction simpliciter was prima facie not competent as co-sharer was to file a suit for partition. The contention of the learned counsel for the petitioner is that the plaintiff respondent did not have a prima facie case as he failed to file a suit for partition. The contention of the learned counsel for the petitioner further is that the petitioner as well as respondent plaintiff have purchased the land by way of two separate sale deeds. In pursuance thereto they were handed over exclusive possession and therefore, co-owner cannot seek injunction against other co-owner from using the property in his exclusive possession.

12. Learned counsel for the petitioner, therefore, challenges the orders passed by the learned courts below on the plea that the findings recorded are contrary to the law laid down by this court in the case of Tarsem Singh v. Parkash Kaur, 2002 (1) RCR (Civil) 803 : AIR 2002 Punjab and Haryana 258, wherein this court has been pleased to lay down as under: "There should be no quarrel so far this proposition of law is concerned that a co-owner must use the joint property in a husband like manner and his use of the joint property is not in any manner inconsistent with the similar right of other coowners. In this case however, the case of the petitioners is that the property sold to them by Narinder Singh, Gurmit Singh and Harinder Singh sons of Ajit Singh was within the limits of their own share and further they had put the vendees from them in exclusive possession thereof. If that was so, vendees from them cannot be restrained from enjoying that property by raising construction thereon. So, this revision is allowed. Temporary injunction allowed to Smt. Parkash Kaur by the Courts below is vacated. It is, however, made clear that if the defendants raise any construction they will remove that construction without any demur if the portion purchased by them from Narinder Singh etc. vide sale deed dated 13.9.88 falls to the share of either Balwinder Kaur or Parkash Kaur.'

13. It is also the contention of the learned counsel for the petitioner that injunction against co-owner can only be granted if the act of co-owner amounts to ouster or adverse to interest of co-owner who is out of possession. The check on co-owner is only with regard to the act of waste, ouster or illegitimate use and not otherwise. Learned counsel for the petitioner also contends that the orders passed by the learned courts below are contrary to the decision of Division Bench of this court in the case of Bachan Singh v. Swarn Singh, 2000 (3) RCR (Civil) 70 : 2000 (2) PLJ 143, wherein this court was pleased to lay down as under: '17. On a consideration of the judicial pronouncements on the subject, we are of the opinion that: (i) A co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession. (ii) Mere making of construction or improvement of, in the common property does not amount to ouster. (iii) If by the act of the

co-owner, in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property. (iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest. In all other cases, the remedy of the co-owner out of possession of the property is to seek partition, but not an injunction restraining the co-owner in possession from doing any act in exercise of his right to every inch of it which he is doing as a co-owner.'

14. Mr. Mohan Jain, learned senior counsel appearing on behalf of the respondent contends that the sale deed on which reliance has been placed by the learned counsel for the petitioner is not within his knowledge or part of the file and therefore, the case should be adjourned for 10 days.

15. The document relied upon by the petitioner is in fact the sale deed on the basis of which the suit has been filed by the plaintiff respondent to seek injunction.

16. Learned senior counsel also contends that, if 10 days' adjournment is not granted then this court can pass any order as he would not be raising any submission nor he is bothered about the orders to be passed by this court.

17. When the statement of the learned senior counsel was recorded on his specific demand, he handed over three judgments and requested that the authorities handed over by him be taken into consideration, while deciding the matter.

18. The first authority relied upon by the learned senior counsel is the judgment of Hon'ble Supreme Court, in the case of *M Gurudas v. Rasaranjan*, 2007 (1) RCR (Civil) 341 : 2007 (5) RAJ 621 : (2006) 8 SCC 367 : AIR 2006 SC 3275, wherein the Hon'ble Supreme Court has been pleased to lay down that finding with regard to prima facie case is a finding of fact. However, while arriving at such finding of fact the court must not only arrive at a conclusion that a case for trial has been made out but would consider the question in regard to balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiff if the prayer for injunction is to be refused. While making endeavours to find out prima facie case, in a partition suit the court could take into consideration extent of share of the plaintiffs in the property, if any. The court would also take into consideration as to whether the plaintiffs have prevaricated their stand from stage to stage.

19. The proposition of law laid down by Hon'ble Supreme Court in *M. Gurudas v. Rasaranjan* (supra) is based on well established principle of law. However, this court is at loss to know as to in which context reliance was placed on this judgment as the learned senior counsel has refused to assist the court for non grant of adjournment.

20. In the present case as already observed above the authority has no application.

21. The Division Bench of this court in the case of *Bachan Singh v. Swarn Singh* (supra) has categorically held that remedy of co-owner is to seek partition and not injunction restraining co-owner in possession. It may further be noticed that in the present case both the parties have purchased the land from the co-owner and have been put in possession of specific portion of the land. Thus, the authority relied upon by the learned senior counsel has no application to the facts of the present case.

22. Second judgment which was handed over by the learned senior counsel is the judgment of Division Bench of this court in the case of *Bachan Singh v. Swam Singh* (supra).

23. The petitioner has also placed reliance on this judgment to challenge the impugned order.

24. Learned senior counsel referred to this judgment to show that if act of co-owner in possession are detrimental to the interest of other co-owners a co-owner out of possession can seek injunction to prevent such

act which is detrimental to his interest. This judgment rather goes against the respondent as the Hon'ble Division Bench of this Court was pleased to hold that raising of construction or improvement in the common property does not amount to ouster.

25. Third judgment on which reliance has been placed by the learned senior counsel is Balbir Singh v. Lumber Singh, 2004 (2) RCR (Civil) 843 : 2004 (3) CCC 129. In the said judgment this court has been pleased to lay down that cosharer enjoying possession can restrain other co-sharer from selling more than his share and raise construction.

26. It may be noticed that the said judgment is not applicable to the facts of the present case as the petitioner as well as the respondent have purchased the land by way of separate sale deeds and were put in exclusive possession of the share purchased by them. It may also be noticed that the plaintiff respondent did not choose to file a suit for partition and therefore he was not competent to seek injunction in view of the law laid down by this court in the case of Bachan Singh v. Swam Singh (supra).

27. Thus, there is no prima facie case in favour of the plaintiff/respondent nor the balance of convenience is in favour of the plaintiff/respondent.

28. For the reasons stated above the revision petition is allowed. The impugned orders of the learned courts below are set aside and injunction application filed by the plaintiff/respondent under order 39 Rules 1 and 2 of the Code is ordered to be dismissed.

Revision petition allowed.