

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**RSA No.4109 of 2012 (O&M)
Date of Decision: 11.01.2016**

Sudesh Kumari

.....Appellant

Versus

Darshana Devi

... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. O.P. Gupta, Advocate for the appellant.

Mr. S.S. Dinarpur, Advocate for the respondent.

RAJ MOHAN SINGH, J.

[1]. Plaintiff is in second appeal against concurrent judgments and decrees passed by the Courts below in a suit for declaration and in alternative for separate possession of half share as owner by way of partition with a consequential relief of permanent injunction restraining the defendant from alienating the existing possession of the suit land by way of raising construction or otherwise till the partition of the suit land.

[2]. Plaintiff Sudesh Kumari filed suit for declaration to the effect that she be declared exclusive owner in possession of the plot situated at Gandhi Dham, Jagadhri measruing 133.6 Sq. yards bounded as under:-

North : Plot of the plaintiff

South : Plot of defendant

East : Gali

West : House of Mangat Ram.

[3]. Plaintiff alleged that Bir Singh was the original owner. He sold the plot to Harbans Lal and Sham Sunder vide registered sale deed 28.04.1976 in equal shares. Plaintiff has purchased plot measuring 2 marlas situated adjacent to the north portion of the plot purchased from Bir Singh by Harbans Lal and Sham Sunder. Aforesaid 2 marlas was purchased by the plaintiff by registered sale deed dated 29.09.1998 from Pawan Kumar. At that time, suit land was lying vacant. Plaintiff had purchased one half share of the suit property from co-sharer Sham Sunder for consideration of Rs.73,500/- vide registered sale deed dated 01.05.2000. Vendor handed over actual physical possession to the plaintiff towards northern side of the plot i.e. adjacent to the plot measuring 2 marlas purchased by the plaintiff from Pawan Kumar on 29.09.1998. At that time, Sham Sunder vendor of the plaintiff and another co-share Harbans Lal told the plaintiff that Harbans Lal had already sold half share of the land in question to the defendant and had also delivered the possession to the defendant towards south side of the plot. After purchase of share of Sham Sunder, plaintiff intended to raise construction over the suit land. Both the parties consented to partition the suit land privately on the

spot and southern half portion came to the share of defendant whereas half portion towards north side was acknowledged in favour of plaintiff. Plaintiff constructed boundary wall of the plot including his plot of 2 marlas and filled earth on the spot. Since then, plaintiff is in exclusive possession of half share of the plot purchased from Sham Sunder. Defendant became dishonest and threatened the plaintiff that she will raise construction over the norther side of the property which is in exclusive possession of the plaintiff.

[4]. Suit has been contested by the defendant from all counts. Defendant alleged that previously plot No.114 was jointly owned and possessed by Harbans Lal and Sham Sunder. Sale deed dated 29.09.1998 is claimed to be illegal, null and void because Pawan Kumar was not the owner of the property situated towards northern side of the plot, in fact, i.e a nala of Municipal Committee. Sham Sunder was not in possession of northern side of the plot because the plot was orally partitioned between Sham Sunder and Harbans Lal. Northern portion of the plot came to the possession of Harbans Lal and defendant purchased the same from Harbans Lal with dimensions:-East-road, West-house of Mangat Ram, North-nala and South-remaining portion of plot No.114 vide registered sale deed dated 16.05.1980. Defendant claimed that she is in exclusive

possession of the plot as her vendor Harbans Lal was in exclusive possession. After demolishing old foundation, she had filled up the cemented foundation and small boundary wall of his plot in northern portion about 2 years ago and also put soil in the nala and merged the same in his own plot. Sale deed dated 01.05.2000 regarding northern portion of the plot executed by Sham Sunder is claimed to be illegal and null and void because Sham Sunder was not owner or not in possession of northern portion of the plot in question.

[5]. Both the parties went to trial on the following issues:-

“1. Whether the plaintiff is entitled to the separate possession by way of portion to the extent of half share of the suit property as prayed? OPP

2. Whether the sale deed dated 29.09.1998 and 01.05.2000 are illegal, null and void etc. if so its effect? OPD

3. Whether the defendant is owner of the suit property by virtue of sale deed dated 16.08.1980 is so, its effect? OPD

4. Whether the suit of the plaintiff is false and frivolous and is liable to be dismissed as such? OPD

1A Whether the plaintiff is entitled to north portion of the property in dispute after partition? OPP

*2A Whether suit of the plaintiff is time barred?
OPD*

*3A Whether plaintiff is stopped from filing the
present suit by his own act and conduct? OPD*

*4A Whether the plaintiff has no locus standi to
file the suit? OPD*

5. Relief.”

[6]. Trial Court took exception of the pleadings of the parties and held that the plaintiff has taken contradictory plea by alleging mutual partition between her vendor and his brother and also between the plaintiff and defendant on the one hand and on the other hand seeks partition of the land in alternative. Trial Court took cognizance of the dimension shown in the sale deed Exs.P1, P3 and D3. Vide Ex.P1 Bir Singh sold land to Harbans Lal and Sham Sunder Lal vide registered sale deed dated 28.04.1976. According to sale deed, the dimensions of the plot in question is shown in the following manner:- East: road, West: property of Mangat Ram, North: nala, South: property of Tikal Raj. The boundary mentioned in the sale deed dated 01.05.2000 Ex.P3 executed by Sham Sunder in favour of plaintiff is shown by the following configurations:- East road, West property of Mangat Ram, North nala, South property of Tilak Raj. Trial Court concluded that if area purchased by the plaintiff is taken to be the north portion of the joint plot

purchased by Harbans Lal and Sham Sunder from Bir Singh then towards south side, remaining portion of plot No.114 should have been mentioned in the sale deed Ex.P3. Towards north side where nala exists or the property of plaintiff exists on the strength of sale deed dated 29.09.1998 would remain contested issue. Trial Court dismissed the suit, thereby declaring the sale deed dated 01.05.2000 in favour of plaintiff to be null and void. Since the sale deed dated 29.09.1998 was not the subject matter of dispute between the parties, therefore, under issue No.2, sale deed has not been commented upon. On the basis of statement of PW 3 Dr. J.P. Dhiman, trial Court held that possession over northern portion of the property is that of defendant and dismissed the suit vide judgment and decree dated 04.02.2010. Plaintiff-appellant remained unsuccessful before the Lower Appellate Court who dismissed the appeal vide judgment and decree dated 09.08.2012.

[7]. In the present appeal, appellant has formulated following substantial questions of law in para No.12 of the grounds of the appeal:-

“1. Whether in view of sale deed Ex.P3 dated 01.05.2000 and possession of the appellant on northern ½ of plot No.114 of the appellant, she is entitled to a decree for declaration that she is owner in possession thereof?

2. Whether, in the alternative, because of a gap of 20 years between the sale deeds in favour of the two parties, and in case of declining of first relief, the alternative relief of partition of plot No.114 is made out?

3. Whether the Courts below have fallen in error in dismissing the suit of the appellant for the first relief claimed and the relief in the alternative?”

[8]. I have heard learned counsel for both the sides and have perused the record.

[9]. Admittedly, Bir Singh was the original owner of the plot Ex.P1 which was purchased by Harbans Lal and Sham Sunder vide registered sale deed 28.04.1976 in equal shares. Harbans Lal sold half share of the plot in question to Darshana Devi vide registered sale deed dated 16.05.1980. Similarly, Sham Sunder also sold his half share to the plaintiff Sudesh Kumari vide registered sale deed dated 01.05.2000. In this way, plaintiff and defendant purchased equal shares in the property from Harbans Lal and Sham Sunder.

[10]. The only dispute is with regard to private partition Ex.P1 which has been suggested by both the parties in the suit. Both the parties have failed to prove partition by metes and bounds. Conflicting evidence has given viz-a-viz the possession by either of the party on north portion of land in question. Trial Court

disbelieved the plea of the plaintiff that she is in possession of northern portion of the property in question and admitted the possession of defendant on the strength of statement of PW-3 Dr. J.P. Dhiman. Trial Court also declared sale deed dated 01.05.2000 to be null and void. I have perused the material on record. There is no bar in purchasing specific portion out of joint land. If the partition is not proved, the said purchase would be deemed to be purchase of share. Trial Court had no occasion to declare the sale deed dated 01.05.2000 of the plaintiff to be illegal, null and void. Even if the possession is not to be opined viz-a-viz assertion of the plaintiff over northern portion of the plot No.114, in that eventuality the sale could have been opined to be, that of share, out of joint land. The evidence of possession is also conflicting inasmuch as that defendant claimed possession on the basis of statement of PW3 Dr. J.P. Dhiman whereas plaintiff claimed her possession on the basis of notice Ex.P5 issued by the Municipal Council, Jagadhri when plaintiff sought to construct the site without getting the plan sanctioned. On the strength of Ex.P5, notice dated 04.06.2001 and reply to notice Ex.P6 dated 02.09.2002, plaintiff sought to establish her possession.

[11]. Apparently, original sale deed Ex.P1 shows the following dimensions:- East road, West property of Mangat

Ram, North nala, South property of Tilak Raj. Now dispute is with regard to property situated towards north side of this joint property whether northern portion was purchased by the plaintiff or by the defendant? The sale deed of the plaintiff Ex.P3 has the following recital of dimensions:- East road, West property of Mangat Ram, North nala, South property of Tilak Raj. There is an anomaly with regard to showing property of Tilak Raj towards southern side, if plaintiff had purchased northern portion of the joint property Ex.P1 i.e. plot No.114. In the event of purchasing north portion, remaining portion of plot No.114 should have been shown towards south in the sale deed Ex.P3. Similarly, if the sale deed dated 16.05.1980 Ex.D3 of defendant is appreciated then the dimensions are:- East: road, West: property of Mangat Ram, North: Nala, South: remaining portion of plot No.114. The aforesaid dimensions are in consonance with the actual position after bifurcation of plot No.114. Both the parties are claiming north portion of the property to be the subject matter of Ex.P1. According to the stand of both the parties, if South portion of the property Ex.P1 was sold to either of the party then one of the dimension given in both the sale deeds should have been in following manner:- East: road, West: property of Mangat Ram, North: remaining portion of plot No.114, South: property of Tilak Raj. Since the aforesaid

dimensions are neither present in the sale deed of the plaintiff nor present in the sale deed of defendant, therefore, both the parties are staking their claims of actual possession on the northern portion of property Ex.P1. Admittedly both the parties have purchased the share out of the joint land of Harbans Lal and Sham Sunder. One anomaly remains, if, any of the party is proved to have purchased south portion of the property Ex.P1 i.e. plot No.114, none of the sale deed has the recital of North remaining portion of plot No.114, South property of Tilak Raj, West property of Mangat Ram and East road.

[12]. In view of anomalous situation, I am of the view that any of the party cannot be held to be in exclusive possession of northern portion of the plot No.114 Ex.P1. Since both the parties have purchased the share from their vendors. Now evidence has been given with regard to private partition except the bold statement of the parties and PW2. No evidence has come forth on record showing that alleged private partition was given effect in the record of the Municipality. In **Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram AIR 1961 Punjab 528**, the concept of co-sharership, their rights and liabilities were considered and were highlighted. With regard to rights and liabilities of co-sharers in all, nine propositions were formulated, which are highlighted as under:-

“(1) A co-Owner has an interest in the whole property and also in every parcel of it.

(2) Possession of the joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession, of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as, when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not

open to any one to disturb the arrangement without the consent of others except by filing a suit for partition.

(8) The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition Or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

(9) Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.”

[13]. The aforesaid principles were subsequently endorsed by the Full Bench judgment of this Court in **Bhartu Vs. Ram Sarup 1981 PLJ 204**. In the light of aforesaid and in the absence of any proof of partition or evidence to show that any alleged private partition has been given in the revenue record, this Court is of considered view that plot No.114 is still joint of the party and has not been partitioned by metes and bounds. Though as per recital of sale deed, both the parties have claimed their respective possession over the northern portion of the plot No.114. Sale deed of either of the parties cannot be

declared to be illegal, null and void, in view of purchase of share out of joint land.

[14]. Questions of law as formulated by the appellant do not arise inasmuch as that question No.1 cannot be answered in the manner as suggested by the appellant. Even if sale deed Ex.P3 dated 01.05.2000 is proved, the same is of half share of joint plot No.114. No such declaration of exclusive possession can be given in the absence of any proof of separate possession over the northern side of joint plot. Question No.2 has been held in the aforesaid manner that both the parties are co-sharers in the joint plot No.114. None of the party is in exclusive possession of the property and they are held entitled to get the partition effective in due course of law. Question No.3 is not substantial question of law and the same is does not arise.

[15]. In view of aforesaid crystal position, I am of the view that suit of the plaintiff is liable to be dismissed. No such declaration can be given nor any of the party is proved to be in exclusive possession of northern portion of the plot No.114. A co-sharer cannot claim injunction against another co-share unless and until the plaintiff co-sharer is proved to be in exclusive possession of the defined portion of joint land to the exclusion of other co-sharer. It is a settled principle of law that in

case of joint land, co-sharers would be deemed to be in possession of every inch of land unless and until joint land is partitioned by metes and bounds. In view of aforesaid, the suit filed by the plaintiff is liable to be dismissed thereby upholding the judgments and decrees passed by the Court below. However, it has to be held that parties to the suit are co-sharers in the joint land and they would be at liberty to seek partition of the land in accordance with law. The findings recorded by the Courts below in the aforesaid aspect are modified.

11.01.2016

Prince

**(RAJ MOHAN SINGH)
JUDGE**