

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

**CR No.266 of 2017 (O&M).
Date of Decision: 19.01.2017.**

Ashok

....Petitioner.

VERSUS

Mukesh Kumar and others

....Respondents.

CORAM: HON'BLE MRS. JUSTICE SNEH PRASHAR.

Present: Mr. S.K. Tripathi, Advocate for the petitioner.

SNEH PRASHAR, J.

CM-685-CII-2017

Allowed, as prayed for.

CR-266-2017

By way of this revision petition, judgment dated 14.12.2016 passed by learned Additional District Judge, Rewari dismissing the appeal filed by respondent-plaintiff Mukesh Kumar with modification and the order dated 24.10.2016 passed by learned Additional Civil Judge (Senior Division), Rewari by virtue of which the application under Order XXXIX Rules 1 and 2 read with Section 151 of the Civil Procedure Code (for short, “the CPC”) filed by respondent No.1-plaintiff seeking ad-interim injunction was dismissed, have been assailed.

The facts, as garnered from the record, are that respondent No.1

Mukesh Kumar, real brother of petitioner Ashok filed a suit for partition of

a house, details and boundaries of which were given in the pleadings (hereinafter referred to as the “suit property”) claiming 1/6th share in the same. He alleged that earlier he, his father Heera Lal and his brothers and sisters Dalip Singh, Rajender Prasad, Ashok, Kamla and Bimla (arrayed as defendants No.1 to 5) were owners in possession of the suit property by virtue of registered sale deed No.284 dated 23.05.1978. After the death of his father, he and the defendants became joint owners in possession in equal shares. The property had not been partitioned by metes and bounds and the defendants had started threatening to raise construction over the entire area of the suit property. He prayed for a permanent injunctive order restraining the defendants from raising construction.

In their written statement, defendants No.1 and 2 admitted that the suit property was still joint between the parties and pleaded that they have no objection if it is partitioned. However, they opposed that respondent No.1-plaintiff is entitled to any injunction.

Defendants No.3 to 5 (petitioner and defendants No.4 and 5) filed a site plan of the suit property and submitted that during the life time of their father, an oral family settlement had taken place according to which the land shown in pink colour had fallen in the share of respondent No.1-plaintiff, green had gone to defendant No.2, red to defendant No.1, blue to defendant No.3 and defendants No.4 and 5 (married sisters) had transferred their share in the suit property in favour of the petitioner-defendant No.3 vide transfer deed dated 3556 dated 20.08.2015. In that manner, petitioner-defendant No.3 claimed share in the suit property to the extent of 118 square yards. He also submitted that his brothers plaintiff (Mukesh Kumar)

respective shares and now he was raising construction over the area fallen in his share and the construction work had been completed upto lintel level. He also pleaded that the suit had been filed by respondent No.1 Mukesh Kumar with an ulterior motive.

The application filed by respondent No.1-plaintiff Mukesh Kumar under Order XXXIX Rules 1 and 2 read with Section 151 CPC praying to restrain the defendants including defendant No.3-petitioner was dismissed with specific directions to the petitioner by learned trial Court vide order dated 24.10.2016. The operating portion of the order reads as under:-

“For the reasons mentioned above, the injunction filed by the plaintiff is hereby dismissed. However in order to safeguard the interest of both the parties it is directed that the entire construction, if any, to be raised by the defendant no.3 over the suit property shall be subject to the final decision of this case and the defendant no.3 shall not claim any compensation on account of the same at the time of final partition and he shall not raise any construction beyond his share and the share received by him from his sister. The defendant no.3 is further directed to file an undertaking that at the time of final partition of the suit property he shall not claim any compensation regarding the construction being raised by him. The injunction application stands disposed of accordingly.”

The appeals filed by the plaintiff-respondent No.1 as well as by

the petitioner were dismissed by learned Additional District Judge, Rewari

vide judgment dated 14.12.2016 and the condition imposed by learned trial Court was held to be justified, but it was modified to the effect that the petitioner-defendant No.3 shall submit an undertaking on the next date of hearing fixed before learned trial Court i.e. on 07.02.2017 failing which the consequence shall follow.

Feeling aggrieved by the direction given to the petitioner-defendant No.3, he has preferred the instant revision petition.

The submissions made by Mr. S.K. Tripathi, learned counsel representing the petitioner have been considered.

Learned counsel for the petitioner contends that in the written statement filed by the petitioner as well his sisters (defendants No.4 and 5) it was specifically pleaded that during the life time of their father Heera Lal an oral family settlement had taken place. The married sisters (defendants No.4 and 5) had relinquished their shares in the suit property in favour of the petitioner. A site plan showing the portions fallen in share of the brothers (plaintiff and defendants No.1 to 3) separately had been filed. The plaintiff-respondent No.1 had already raised construction on the portion of the suit property fallen in his share and it is when the petitioner was raising construction on the portion of his share of the suit property that the plaintiff-respondent No.1 filed the present suit. Since the petitioner is raising construction by investing huge amount on the portion of the suit property that had fallen to his share, there was no occasion for learned trial Court to order that the construction raised by the petitioner-defendant No.3 shall be subject to the decision of the case and that he shall not claim any compensation for the construction raised during final partition. No direction could be given to the petitioner to file an undertaking that at the time of

final partition of the suit property he shall not claim any compensation for the construction raised by him. The time limit fixed by learned first appellate Court for submitting an undertaking was also erroneous and the order of learned trial Court as well as of the first appellate Court to that extent is required to be set aside.

The contention of the plaintiff-respondent No.1 that the suit property was still joint between him, his brothers and sisters was supported by his two other brothers namely Dalip Singh and Rajender Prasad (defendants No.1 and 2). It is only the petitioner (defendant No.3) and his sisters (defendants No.4 and 5) who alleged that an oral family settlement had taken place during the life time of their father by virtue of which the suit property stood partitioned and that the petitioner-defendant No.3 was owner in possession to the extent of his share and the share of his sisters (defendants No.4 and 5). Since the family settlement was alleged to be oral, the onus was on the petitioner and his sister (defendants No.4 and 5) to prove the same, but of course the onus was squarely on the plaintiff to prove that the property was still joint.

Admittedly, the petitioner was raising construction on a portion of the suit property and he pleaded that the construction had been raised upto lintel level. Considering the fact that construction raised by plaintiff-respondent No.1 is already in existence on the suit property and therefore, there was no reason to stop the petitioner-defendant No.3 also from raising construction, learned trial Court rightly allowed him to continue with the construction but with the condition that he will not raise construction on more than the share claimed by him in the suit property and that he shall

of final partition if the plea of the plaintiff that the property is still joint is accepted and a decree for partition is passed.

The condition that the petitioner will not claim compensation for the construction raised by him if the property is put to partition by metes and bounds as claimed by the plaintiff, was indeed justified as the petitioner was raising construction at his own risk and it could not be held at this juncture that the petitioner was entitled to the entire portion of the suit property on which he was raising construction. There could not be a predetermination of the fact that the constructed portion would be allotted to the petitioner during partition. The other party was not to be burdened with cost of construction in case some portion, on which the petitioner had raised construction ultimately, falls into his share at the time of partition by metes and bounds. The petitioner was spending money on construction by choice and not under compulsion from anyone.

Accordingly, there being no illegality or perversity in the order dated 24.10.2016 passed by learned trial Court and judgment dated 14.12.2016 of learned first appellate Court, which would call for intervention, the instant petition is dismissed.

(SNEH PRASHAR)
JUDGE

19.01.2017.
jitender sharma

Whether speaking/ reasoned : **Yes**

Whether Reportable : **Yes**