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

**RSA No. 3280 of 2009 (O&M)
Decided on: 08.12.2017**

Smt. Bimla Devi**.....Appellant**

versus

Smt. Dayalo Devi and others**.....Respondents****Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT****Present:** Mr.Pritam Saini, Advocate
for the appellant.

Mr. R.S. Mamli, Advocate and
Mr. R.S.Randhawa, Advocate
for the respondents.

Rajbir Sehrawat, J.(Oral)

1. The present appeal is filed by the plaintiff; challenging the judgment and decree passed by the lower Appellate Court, whereby the judgment and decree passed by the trial Court was reversed and the suit filed by the plaintiff was ordered to be dismissed.
2. For convenience, the parties would be referred herein as the plaintiff and defendants; as they were described in the original suit.
3. The brief facts of the case, as produced in the judgment passed by the lower Appellate Court, are that the plaintiff claims to be the owner in physical possession over the area measuring 13 marlas; with the boundaries given in the plaint; being part of the land measuring 4 Kanals 2 marlas comprised in Khasra No. 38//9 situated within revenue estate of Jagadhri, District Yamuna Nagar. It was claimed in the plaint that the land measuring 4 Kanal 2 Marlas is a joint

holding and the same has not been partitioned amongst co-sharers. The defendant No. 1 is also co-sharer to the extent of 20/82 share. The plaintiff had raised construction of a room and boundary wall over the suit land. The defendants wanted to forcibly dispossess the plaintiff without having recourse to law. It was further pleaded that the defendants were requested to desist from the illegal design. However, they had refused, therefore, the suit was filed.

4. On notice, the defendants contested the claim made by the plaintiff. It was claimed that the plaintiff did not have the physical possession over the land in dispute. It was further claimed that the land comprised in Khasra No. 38//9 had already been partitioned amongst the co-sharers. Defendant No. 1 purchased land measuring 20 Marlas; being 20/82 share; out of the land measuring 4 kanals 2 marlas from the plaintiff herself through a registered sale deed dated 26.10.1987 and mutation No. 3501 dated 14.03.1988 regarding the said sale deed had also been sanctioned and entered into revenue record. It was further claimed that the physical possession of the suit property was delivered to the defendant No.1; in the terms of the aforesaid sale deed. Thereafter, even defendant No. 1 had further sold to defendant No. 3 an area measuring land 5 marlas out of abovesaid purchased land measuring 20 marlas; through a registered sale deed dated 10.07.1996. The defendant No. 3 has raised construction of a boundary wall besides one room and tin shed over the land measuring 5 marlas; which was sold to him through a sale deed dated 10.07.1996. It was further pleaded that defendant No. 1 is the owner in physical possession of the remaining land measuring 15 marlas. Still further, an application for partition of the joint holding has already been filed by one Fakir Chand against the plaintiff and in that application, the defendant No. 1 has already been impleaded as a party and in those proceedings, the defendant No. 1

has already been impleaded as a party on his application. Therefore, it was

pleaded that the plaintiff is interested only to delay in the proceedings, by adopting delaying tactics.

5. Parties led their respective evidence.

6. After hearing the parties, the trial Court partly decreed the suit. While decreeing the suit, the trial Court recorded a finding that the property is a joint property of the plaintiff and the defendants. Therefore, the trial Court held that unless the property is partitioned by metes and bounds; none of the co-sharers can be said to be in exclusive possession. The trial Court also came to the conclusion that the plaintiff is not even in exclusive possession. However, in the next breath, the trial Court said that defendants have no right to dispossess the plaintiff from the suit land or to demolish the construction raised thereupon by any co-sharer. Aggrieved against the judgment and decree, the defendants filed two separate appeals.

7. The lower Appellate Court allowed the appeals filed by the defendants and held that the trial Court has recorded contradictory findings and, therefore, the same cannot be sustained. The lower Appellate Court held that on the one hand, the trial Court has held that the plaintiff is not in exclusive possession of the suit property; on the other hand, it has restrained the other parties from disturbing her possession. Therefore, the findings are perverse. Still further, while appreciating the evidence, the lower Appellate Court recorded that the plaintiff has not led any cogent evidence to prove her actual physical possession over the land in dispute. It was held by the lower Appellate Court that it has been proved on record that defendants are purchaser of the land from the plaintiff herself. Despite that the plaintiff has been making repeated efforts to wriggle out of the same by filing present suit and by making similar earlier attempts through her daughter Poonam; whose suit was also dismissed on 04.06.1996. It was further

held that the plaintiff, being a co-sharer, could be granted injunction only if she

proves her actual physical possession over the land in dispute, to the exclusion of the defendants, however, she has utterly failed in her attempt. Therefore, the judgment and decree passed by the trial Court were reversed and the suit was ordered to be dismissed.

8. Arguing the case, learned counsel for the appellant has submitted that partition proceedings regarding the land comprised in Khasra No. 38//9 are already pending; where the plaintiff and the defendants, all are the parties. Still further, it is argument of the learned counsel for the appellant that earlier, a suit was filed by the defendant No. 1. That suit was decreed by the trial Court and upheld by the lower Appellate Court as well. However, the plaintiff had filed an appeal before this Court and the same is now pending. In view of the above, learned counsel for the appellant has submitted that the present appeal be kept pending; till the decision of the partition proceedings and till the decision of the appeal filed by her against the judgment and decree passed in the abovesaid suit initiated by the defendant No. 1. Still further it is argued by the learned counsel for the appellant that the suit land measuring 13 marlas is a land different from the land sold to the defendants and that the plaintiff is in exclusive possession of the suit property.

9. On the other hand learned counsel for the respondents/defendants has argued that the plaintiff has utterly failed to prove her exclusive possession over the suit property. However, it is argued by the learned counsel that, admittedly, defendant No. 1 had purchased 1 Kanal (20 Marlas) of the land from the plaintiff, herself. The defendants are not in possession of even a single inch of the land over and above; what they had purchased from the plaintiff. Hence, the prayer is made for dismissal of the appeal.

10. Having heard learned counsel for the parties and perused the record with able

assistance of the learned counsel for the parties, this Court is of the considered

view that the argument raised by the learned counsel for the appellant are not sustainable. So far as, the pendency of the alleged connected appeal is concerned; that is in a suit for injunction filed by the defendant No. 1. That injunction also stands granted in her favour upto the level of the lower Appellate Court. This Court has also granted only the status quo. Therefore, by no means, it can be said that the plaintiff has been held to be in exclusive possession in those proceedings. Otherwise also, proceedings in the present case cannot be kept pending merely because of the pendency of the earlier proceedings. In both the cases, the parties claimed their possession only. Therefore, title is not in question, either in that appeal or in the present appeal. Otherwise also, even going by the argument raised by the learned counsel for the appellant, the present proceedings would be barred by principle of *res judicata*. However, since no plea has been raised in the present proceedings, therefore, this Court refrains from recording or any findings on that aspect. However, since in the present case only the possession is involved and the plaintiff has failed to prove her exclusive possession over the suit property, therefore, there is no perversity in the judgment and decree passed by the lower Appellate Court. The lower Appellate Court has already held that, as claimed by the plaintiff herself, the partition proceedings are already pending between the parties. The parties would be raising their respective pleas during the partition proceedings, as per law. Therefore, the lower Appellate Court has rightly declined the injunction to the plaintiff; who happened to be only one of the co-sharer in the joint holding. It is well established law that the injunction cannot be granted in favour of a co-sharer unless exclusive possession over some portion of the joint property, to the exclusion of other co-sharers, is duly established by the cogent evidence. In the present case, as held above, no such evidence has been led by the plaintiff. Hence, judgment and decree passed by

the lower Appellate Court are upheld.

11.No other argument was raised by the learned counsel for the parties.

12.In view of the above, the present appeal fails and the same is dismissed, being devoid of any merits.

8th December, 2017
shabha

[RAJBIR SEHRAWAT]
JUDGE

Whether speaking/reasoned	-	Yes
Whether reportable	-	Yes