

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1848 of 2016 (O&M)
Date of Decision: 05.12.2017

Surender Kumar

... Appellant

Versus

Dharmender and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Minderjeet Yadav, Advocate,
for the appellant.

RAJIV NARAIN RAINA, J.

1. Plaintiff alleged in the suit that land was in joint ownership and had not suffered partition among the co-owners, although partition proceedings pending before the revenue court was in progress at the time of filing of the suit. The cause of action in suit was that defendants were raising construction on part of the land and were trying to dispossess the plaintiff. The suit was for permanent injunction for restraining defendants from interfering in the peaceful possession of the plaintiff and to dispossess him from his share of the land or changing the nature of the suit property.

2. On notice, defendants pleaded that about 15 years before the suit there was a family partition putting parties in exclusive possession according to their share and thus parties by consent are no more joint in ownership and possession. Defendants admitted that 11 Kanal 9 Marlas of land fall in the share of plaintiff which is in his possession while Mustil No.30, Killa No.3 Min East had come in possession of defendant No.6 and

defendants No.1 to 5 came in possession of Mustil No.30 Killa No.2/3 (3-0) and 3 Min West. Defendants No.1 to 5 had further divided their shares in land adjoining the firni towards West to Satyawar defendant No.2, the middle part to Ravinder defendant No.3 and land towards the East to defendant No.1 Dharmender. These joint owners have constructed their respective boundaries. The defendants pleaded that plaintiff has a tubewell in killa No.4/1 and he has 7 marlas of in excess of his share.

3. The most important issue No.5 was whether parties had by consent mutually partitioned the suit property according to their respective shares in the joint ownership of suit land. Plaintiff appeared as PW-1 and in his cross-examination admitted that defendant No.6 Dharampal had separate tubewell and house in Mustil No.30, Killa No.3. He admits exclusive possession of defendant No.1 Dharmender on Mustil No.30 Killa No.2/3. The plaintiff admitted that he is in exclusive possession of Mustil No.30, Killa No.4/1 and Mustil No.21, Killa No.23/2. He admitted that the possession of the suit property is from the time of the ancestors of the parties i.e. plaintiff and defendants.

4. In the face of this testimony, the learned trial Court at Rewari in his judgment dated February 06, 2014 has allowed himself to be swayed by the fact that there is no suggestion given by defendants at the time of cross-examination of the plaintiff that was exclusive possession of the respective shares of joint land an outcome of a family settlement between the ancestors of the parties some 15 years back. The trial Court had observed that the most material fact is that prior to the alleged family settlement there should have been joint possession of parties or of common ancestors. As long as

mutual settlement was not reflected in the revenue record only because the suit property has been in possession of the co-sharer, the factum of mutual family settlement cannot be drawn. For these reasons, the issue has been decided against the defendants and the suit has been decreed while issuing permanent injunction in favour of the plaintiff directing defendants not to change the nature of the land by raising any construction till partition proceedings become final.

5. Aggrieved, the defendants carried an appeal to the court of the learned District Judge, Rewari questioning the correctness of the reasons assigned and findings returned on the issue/s by the trial Court in decreeing the suit. The learned District Judge identified the primary question which fell for consideration in first appeal which was whether the parties are in possession of separate parcels of joint land under an arrangement consented to by them. To decide this issue, the learned District Judge Rewari carefully noticed the pleadings of the parties. The plaintiff asserted in the plaint that property was joint at the time of filing the suit. In the written statement, the defendants came up with the plea of family settlement in terms of which the parties were stated to be in possession of specific portions. The plaintiff filed a replication denying family settlement. The first appellate Judge found on reading the oral evidence of the plaintiff, a categorical admission therein that a family partition had as a matter of fact taken place between the elders of the disputing parties and that they are in separate cultivating possession as per that settlement.

6. The footprints of the defendants on their respective shares by way of sinking tubewells, raising constructions and pucca boundary walls is

in favour of the defendants upon the affirmative evidence. The arrangement between the plaintiff and Dharmender defendant No.1 in their respective portions and constructions raised, is an arrangement which has been in existence since the time of the elders of the families. This is how the learned District Judge, Rewari has set aside the cryptic and confusing reasoning of the trial Court committed due to misunderstanding and misreading the the evidence. The defendants would not fail by reason that no suggestion was put by them to the plaintiff at the time of cross-examination that exclusive possession of the parties was outcome of any family settlement. The reasoning of the trial Court is fallacious on the moot point. The learned District Judge was correct in commenting that when there was a categorical admission by the plaintiff a family partition had taken place during the time of the elders, in terms of which they are in separate possession, where was then the need to give him a suggestion that the exclusive possession was an outcome of a family settlement. The learned District Judge, Rewari was right in holding that the Lower Court allowed itself to be strayed into uncharted territory and in the process ignored principle No.7 laid down by the Full Bench of this Court in celebrated case Bhartu v. Ram Sarup, 1981 PLJ 204 which considered the rights and liabilities of co-owners. The following 7 principles were evolved:-

“(i) A co-owner has an interest in the whole property and also in possession of all even if all but one are actually out of possession.

(ii) Possession of 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.

(iii) 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.

(iv) 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 other as, when a co-owner openly asserts his own title and denies that of the other.

(v) 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.

(vi) Every owner has a right to use the joint property in a husband like manner and inconsistent with similar rights of other co-owners.

(vii) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition.”

7. The trial Court was swayed by Principal No.6 in preference to Principal No.7 but this was not the correct approach.

8. The learned District Judge also examined the site plan Ex.D-1/Ex.PW-1/C and found it clear that portions in possession of the respective parties had been clearly earmarked. In Gurdial Singh v. Harmaljit Singh, 2006 PLJ 290 this Court held that no injunction could be granted against a co-sharer in exclusive possession of share especially when the plaintiff himself had been in exclusive possession and utilizing his own share. The plaintiff himself had installed tubewell in Killa No.4/1 for his exclusive use and has raised barbed wire fencing in rectangle No.21, Killa No.23/2. Meaning thereby, he has himself accepted the family arrangement and has been using the share so allotted to his full personal enjoyment. Therefore, he cannot be heard to restrain the defendants from using their share in the

manner they like. The learned District Judge, Rewari was absolutely right in concluding that issuing injunction in favour of the plaintiff in the facts and circumstances was inequitable by virtue of mutual settlement. None of them can be allowed to disturb the family arrangement and the only way forward if the dispute persists is to seek partition to which proceedings parties are already involved independently of the suit.

9. For these reasons I have no ground to entertain this appeal and finding the same to be devoid of merit would order its dismissal with costs throughout in favour of the defendants.

(RAJIV NARAIN RAINA)
JUDGE

05.12.2017
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Whether speaking/reasoned *Yes*

Whether reportable *No*