

the land as shown in the plaint is jointly owned and possessed by the parties and they were the co-sharers in the land in dispute. The land in question was not partitioned till such time. Plaintiff further alleged that the defendants intended to raise construction on the front portion of Khasra No.9//11/2 which was situated on the road and was a valuable piece of land which was going to be occupied by way of raising construction. The defendants have started digging foundation in *Khasra* No.18//11/2. The entries of land of cultivation in the names of defendants were also claimed to be illegal and against the factual position. The land in question was claimed to be agricultural land and raising of construction on agricultural land by the defendants was claimed to be detrimental to the interests of the parties as the same would amount to change of nature of suit land.

[3]. The defendants contested the suit by way of filing written statement on the ground that no injunction can be granted against the co-owner/co-sharer. The defendants pleaded that the plaintiff along with his brothers Dharam Singh, Dayal Singh, Randeep Singh and defendant and one Joginder Singh etc. were the joint owners of land measuring about 260 *Kanals*. Since the year 1970, the plaintiff along with his brothers, said Joginder Singh along with his family members and the

defendants were in separate possession of the total land as per their shares. Plaintiff, defendants and other co-sharers were in separate possession as per mutual adjustment/partition effected between them at the time of their forefathers.

[4]. Along with the aforesaid suit, an application under Order 39 Rules 1 and 2 CPC was also moved by the plaintiff.

[5]. The trial Court allowed the said application thereby restraining the defendants from raising construction over the suit property on the premise that they were not proved to be in exclusive possession of portion of the joint land.

[6]. Defendants went in appeal before the Addl. District Judge, Yamuna Nagar at Jagadhri, who vide order dated 08.12.2017 accepted the appeal and set aside the order dated 23.10.2017 passed by the trial Court. It was also observed that in case the land under construction comes to the share of the plaintiff in partition, the defendants would remove the construction at their own cost. That is how the present revision petition came to be filed before this Court.

[7]. Learned counsel for the petitioner submitted that a co-sharer cannot be allowed to raise construction before getting the land partitioned by metes and bounds, particularly on the agricultural land as it would change the nature of the land. Even if, the same ultimately comes to the share of plaintiff after

partition by that time, the land would have been converted into *gair mumkin* and the same cannot be restored as agricultural land in normal circumstances. Raising of construction by co-sharer on specified portion of the joint land would deprive the other co-sharers from using the same. By doing such an act, the defendants would violate the concept of co-sharership without they being in exclusive possession. As per revenue record viz. jamabandi for the year 2014-15, the defendants were not in exclusive possession of the land over which they intend to raise construction i.e. Khasra No.9//11/2 and Khasra No.18//11/2 as shown in para no.2 of the plaint. In column No.4 of the jamabandi all the co-sharers with 1/3rd share are recorded as owners.

[8]. Learned counsel by relying upon **Rishal Singh and ors. vs. Shri Bhagwan & Anr., 2007(5) R.C.R. (Civil) 393; Maharwal Khewaji Trust (Regd.) Faridkot vs. Baldev Dass, (2004) 8 Supreme Court Cases 488; Sant Ram Nagina Ram vs. Daya Ram Nagina Ram, AIR 1961 Punjab 528; Bhartu vs. Ram Sarup, 1981 PLJ 204 (Full Bench) and Ram Chander vs. Bhim Singh and others, 2008(3) R.C.R. (Civil) 685** contended that all the three ingredients viz. existence of *prima facie* case, balance of convenience and irreparable loss in the event of not granting temporary injunction are in favour of the

plaintiff.

[9]. Learned counsel further submitted that in **Bachan Singh vs. Swaran Singh, 2000(3) R.C.R. (Civil) 70**, in para No.15, following opinion was given by the Division Bench of this Court:-

“15. 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.

[10]. Learned counsel for the respondents however opposed the arguments of learned counsel for the petitioner by referring to **K.M. Partap vs. K.M. Gourish and Anr., 2017(2) JT 320** and contended that perusal of aforesaid judgment would show that the same was involving some different controversy. In the aforesaid case, the conditions were made that the respondents would not create any third party interest in respect of construction being without express permission of the Court. The plea shall not to be used for any other purpose, even after completion without leave of the Court and the co-sharer constructing the same shall not be entitled to any claim or equity in respect of construction, in case the same comes to share of respondent not in possession and they will remove the entire construction at their own cost.

[11]. I have considered the submissions made by learned counsel for the parties.

[12]. Perusal of sub paras nos.(iii) and (iv) of para No.15 of **Bachan Singh's** case (supra) would show that if the act of co-sharership in possession diminishes the value and utility of the property, then the co-sharer out of possession can seek injunction to prevent diminution of the value and utility of the property, if the act of a co-sharer is detrimental to the interests

of other co-sharers. The co-sharer out of possession can seek injunction in order to prevent such an act, which is detrimental to his interest. The aforesaid are the exceptions in which a co-sharers can be restrained otherwise in all other cases, remedy of the co-sharer out of possession is only to seek partition. Cumulative effect of aforesaid precedents is that a co-sharer in joint possession in normal circumstances cannot seek injunction against co-sharer. Even if, a co-sharer is in exclusive possession, the other co-sharer, who is in possession of the property cannot use the property to the detrimental to other co-sharers so as to render the property unfit for use in case such portion of the property comes to the share of co-sharer out of possession in partition. Principle Nos.(iii) and (iv) as culled out in **Bachan Singh's** case (supra) would show that the defendant, who intend to construct agricultural land would change the nature of the property by way of such construction without partition. Even if said portion of land is ultimately allotted to co-sharer out of possession that would be received by the co-sharers as *gair mumkin* land/construction. Even if the construction raised by the defendants is demolished or removed by them so as to facilitate delivery of land to other co-sharers in that eventuality the receiving co-sharer would not be able to use the property for agriculture purpose as the same would be

received as *gair mumkin* land.

[13]. In the aforecited case factum of land being agricultural in nature was not in issue. As per the ratio of **Bachan Singh's** case (supra), the exceptions are recorded in conditions No.(iii) and (iv). In all other cases remedy available to the co-sharer out of possession is to seek partition. In my considered opinion, the case falls under conditions No.(iii) and (iv) of **Bachan Singh's** case (supra) as the proposed construction would change the nature of agricultural land to *gair mumkin*. Even if in the partition the said portion is allotted to the plaintiff, the same would be received as *gair mumkin* land. It will not be possible to convert the same to agricultural land after removing the construction.

[14]. Consequently, for the reasons recorded hereinabove this revision petition is accepted. The impugned order dated 08.12.2017 passed Addl. District Judge, Yamuna Nagar at Jagadhri is set aside and the order dated 23.10.2017 passed by the Civil Judge (Jr. Divn.) Yamuna Nagar at Jagadhri is restored.

July 03, 2018

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No