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

**RSA-1757-1988 (O&M)
Date of decision : 05.12.2018**

Ravinder Singh and others

... Appellants

Versus

Tara Chand and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Onkar Singh, Advocate
for the appellants.

Ms. Alka Chatrath, Advocate
for the respondents.

AMIT RAWAL, J.

The present regular second appeal is directed against the concurrent findings of fact, whereby the suit of the respondents-plaintiffs for injunction against the appellants-defendants has been decreed by the trial Court and affirmed by the lower Appellate Court.

The respondents-plaintiffs instituted the suit for directing the defendants to remove the wall A, B, C & D set up by defendant No.4 and foundations at EFGH by defendant Nos.5 to 8 and permanent prohibitory injunction directing the defendants not to raise any construction or structure of any type on the site JKCI and not interfere in the ownership and possession of the plaintiffs and other proprietors. The plaintiffs alleged that they were the descendants of the original owner and were co-proprietors of abadi deh bearing khasra No.74 of Village Hajipur, Tehsil

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Dasuya, District Hoshiarpur. Defendant Nos.4 to 10 claimed to have purchased of part of the site JKCI from defendant Nos.1, 2 and 3. Defendant No.4 claimed to have purchased site ABCD and defendant Nos.5 to 8, EFGH and defendants No.9 & 10, IFG from defendant Nos.1, 2 and 3, who were none-else, but the legal heirs of Kessar Singh and migrants from Village Gurdaspur. In fact, Kessar Singh had no share and interest in abadi deh and therefore, could not sell part of the site in the manner and mode as mentioned above. It was alleged that plaintiffs were co-sharers and co-proprietors of the suit property and filed the suit for the benefit of all the proprietors/plaintiffs.

The defendants opposed the suit by raising objection qua its maintainability, non-joinder of all the proprietor and being barred under Section 4 of the Punjab Village Common Lands (Regulation) Act, 1961. The status of the plaintiffs as co-proprietors was denied. It was further denied that it was being used for common purpose and benefit of the proprietors, but the factum of co-proprietorship was admitted. It was asserted that defendant Nos.1 to 3, their ancestors and predecessors including the defendants, have been sole owners in exclusive possession of the suit land and therefore, the plaintiffs had no right to disturb their possession and their transferees except through partition of joint khata of land of Khasra No.74 measuring 201 kanals 1 marals. The defendants had every right to enjoy and to retain the possession as well as transfer the land. The locus of the plaintiffs to challenge the same was objected.

Since the parties were at variance, the trial Court framed the following issues:-

1. Whether the suit is barred under Section 4 of the Punjab

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Village Common Land Act? OPD (ours objected to).

2. Whether the suit is not maintainable as alleged? OPD
3. Whether the plaintiffs are the descendants of the founders/settlers of the village Hajipur and as such, are co-proprietors of the abadi deh of the village Hajipur? If so, to what effect? OPP
4. Whether defendants No.1 to 3 are proprietors of the abadi deh of village Hajipur? If so, to what effect? OPD
5. Whether defendants No.4 to 10 are bona fide purchasers of the suit land? OPD
6. Whether the plaintiffs are entitled to the injunction prayed for? OPP
7. Relief.

On the basis of preponderance of evidence, the trial Court decreed the suit and the appeal taken before the lower Appellate Court was also dismissed.

Learned counsel appearing on behalf of the appellants-defendants submitted that along with the appeal the appellants-defendants also filed an application under Order 41 Rule 27 of CPC bearing CM No.2214 of 1988, seeking indulgence of this Court to place on record *Wajib-ul-Arz* for the year 1960-61 (Annexure A-1), reflecting that every co-sharer was given a right for determining of his share in abadi deh, in other words, he submitted that *Wajib-ul-Arz* relied upon the by the Courts below for the year 1911, whereas the suit was filed in 1981. It was further submitted that every co-sharer has a right to alienate the property as status of the subsequent vendee would be of a co-sharer. A co-sharer cannot seek

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injunction until and unless found to be in exclusive possession. The said evidence is conspicuously wanting. In support of his contentions, he relies upon the ratio decidendi culled out by the Full Bench of this Court in **"Bhartu V/s Ram Sarup" 1981 PLJ 204**. In such circumstances, remedy for the parties was to seek the partition and not the injunction, as noticed above.

Ms. Alka Chatrath, learned counsel appearing on behalf of the respondents-plaintiffs supported the judgments and decrees by submitting that the concurrent findings of fact and law cannot be interfered with until and unless there is gross illegality and perversity. She opposed the application for additional evidence, though no reply has been filed, on the premise that the aforementioned piece of evidence would have been placed on record, when the trial was going on, as no "due diligence" has been expressed in support of the averments made in the application, thus, urges this Court for dismissal of the present regular second appeal.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the view that there is force and merit in the submissions of Mr. Onkar Singh, for, the law on injunction amongst the co-sharers is no longer *res integra*. The relevant paragraph 4 culled out in the judgment rendered in **Bhartu's case** (supra), reads thus:-

"4. The inter se rights and liabilities of the co-sharers were settled by a Division Bench of this Court in a very detailed judgment in Sant Ram Nagina Ram v. Daya Ram Nagina Ram, A.I.R. 1961 Pb. 528, and the following propositions, inter alia, were settled :-

(1) A co-owner has an interest in the whole property and

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also in every parcel of it.

(2) 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.

(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 by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.

It is evident from the said propositions that when a co-sharer is in possession exclusively of some portion of the joint holding, he is in possession thereof as a co-sharer and is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. It is also undisputed that a vendor cannot sell any property with better rights than he himself has. Consequently when a co-sharer sells his share in the joint holding or any portion thereof and puts the vendee into possession of the land in his possession, what he transfers is his right as co-sharer in the said land and the right to

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remain in its exclusive possession till the joint holding is partitioned amongst all the co-sharers. It was on this basis that a Division Bench of the Lahore High Court in Sukhdev v. Parsi plaintiff and others, AIR 1940 Lahore 473, held that a co-sharer who is in exclusive possession of any portion of a joint khata can transfer that portion subject to adjustment of the rights of the other co-sharer therein at the time of partition and that other co-sharer's right will be sufficiently safeguarded if they are granted a decree by giving them a declaration that the possession of the transferees in the lands in dispute will be that of co-sharers, subject to adjustment at the time of partition. As is well-known, a declaratory decree is nothing but a judicial recognition of the existing rights and such a decree does not tend to create any rights. The passing of the declaratory decree, therefore, shows beyond doubt that what the vendee gets in the transfer from a co-sharer is the right of that co-sharer and not exclusive ownership of any portion of joint land. It is also undisputed that the right of pre-emption is available not only when a co-sharer sells the whole of his share but also when he sells a portion thereof. When a co-owner describes the land sold out of his share not in terms of a fractional share of the holding but in terms of measurement and khasra numbers even then he sells nothing but his rights as co-sharer in the joint holding i.e. a portion of his share therein. The share in the joint holding according to the dictionary meaning also does not mean a fractional share and instead means a definite portion of property owned by a number of persons in common."

The aforementioned judgment was reiterated by the Division Bench of this Court in **"Bachan Singh V/s Swaran Singh" 2000 (3) RCR (Civil) 70.**

The additional evidence i.e. *Wajib-ul-Arz* for the year 1960-61

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(Annexure A-1), in my view, would be essential and necessary for the purpose of the adjudication of the appeal, therefore, the application bearing No.2214-C of 1988 is allowed and *Wajib-ul-Arz* is taken on record.

The aforementioned document has not been controverted. As per normal prudence, the Court below ought not to have relied upon *Wajib-ul-Arz* for the year 1911, but proximate to filing of the suit i.e. for the year 1960-61. The relevant portion of *Wajib-ul-Arz* for the year 1960-61 reads thus:-

"Every co-sharer can get his share partitioned from the khewat. If once there is partition either through private settlement or through Govt. Agency and possession is given, then it cannot be repartitioned and other party cannot claim partition of this khewat. IF in future any such situation arises, where the party requires the land for the purpose of constructing a source of irrigation for the repair of a well or for any other purpose of irrigation and this land will be treated as Barani land till this land is exempted from water charges by the Government."

On plain and simple reading of the aforementioned document, it is clear that there is no emphatical bar amongst the co-proprietors to seek partition. In such circumstances, the Courts below should not have entertained the suit, but relegated the parties to seek partition.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **"Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213"**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the

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Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. Gurdial Singh Mann (dead) by LRs and others” 2001(4) SCC 262**, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi 's case** (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

27. *Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab*

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Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the judgments and decrees of the Courts below are not sustainable in the eyes of law and the same are hereby set aside. Resultantly, the present regular second is allowed.

However, observation of mine will not prevent the parties to the *lis* to seek partition for redressal of their grievance.

05.12.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓

Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**