

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

RSA-2038-2016(O&M)

Date of decision : 06.08.2018

Satpal Kaur and another

... Petitioners

Versus

Joginder Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Chander Shekhar, Advocate
for Mr. D.R.Punia, Advocate
for the petitioners.

AMOL RATTAN SINGH, J.

This regular second appeal has been filed by the two plaintiffs in a suit that was first decreed in their favour by the learned Civil Judge (Jr.Div.), Nakodar, on 13.12.2012, but with that judgment and decree reversed by the Ist Appellate Court vide its judgment and decree dated September 23, 2015, thereby dismissing the suit.

2. The appellants-plaintiffs had sought a decree to permanently injunct and restrain the respondents-defendants from interfering in their 'peaceful possession of land measuring 106 kanals 14 marlas', fully described in the head note of the plaint. They specifically sought that no construction should be raised over the suit property without partition of the land in dispute, by metes and bounds, as may be ordered by a Court or competent authority.

In the alternative, they sought a decree of mandatory injunction, directing the defendants to remove the foundation of the land in dispute,

land without getting the land partitioned.

3. As per the case of the plaintiffs, they are co-sharers in possession of the suit land but not being able to derive full benefit of the unpartitioned land, they had also filed a case for partition in the Court of the Assistant Collector Ist Grade, Nakodar, which was still pending at the time of filing of the suit out of which this second appeal arises.

The defendants were stated to have purchased land from a co-sharer, over which they had started threatening to raise construction, despite partition of the jointly held *khewat* not having taken place.

4. Notice in the suit having been issued, the respondents-defendants filed their written statement in which, on merits, they stated that they were in possession of the suit land qua their own share and had not threatened the plaintiffs in any manner.

With a replication having been filed, the following issues were framed by the learned Civil Judge (Jr.Div.), Nakodar:-

- “1. Whether plaintiff is entitled for permanent injunction as prayed for?OPP
2. Whether plaintiff is estopped by his own act and conduct from filing the present suit?OPD
3. Whether suit is not maintainable?OPD
4. Whether the plaintiffs has not come to the Court with clean hands?OPD
5. Whether plaintiff has no locus standi to file the present suit?OPD
6. Whether plaintiff has no cause of action to file the present suit?OPD
7. Relief.”

The five plaintiffs examined the present appellants Sat Pal Kaur

(record of rights) for the year 2003-04 (Ex.P1), as also a certified copy of the application seeking partition of the land (Ex.P2), in support of their suit.

The respondents-defendants examined defendant no.1 Joginder Singh and one Gurbax Singh, further relying upon two sale deeds dated 16.01.1979 and 01.09.1993 (Exs.D1 and D2 respectively).

5. The learned trial Court, relying upon the *jamabandi* as also the application for partition of the land, further relying upon the statement of the defendant in his cross-examination, to the effect that the suit land was still to be partitioned, held that in such a situation the defendants could not raise any construction over any specific side or portion of the land, till it was partitioned.

Thus the suit was decreed in favour of the plaintiffs.

6. The learned Ist Appellate Court on the other hand found that even as per the *jamabandi* Ex.P1, the parties to the *lis*, were shown to be co-sharers to the extent of a half share in *khasra* no.6//25/2 min (to the extent of 5 kanals and 2 marlas and 2 kanals and 6 marlas), with plaintiff no.2, Kamlesh (not an appellant in this appeal but an appellant before the learned Ist appellate Court), also shown to be in specific possession of the said *khasra* number (to the extent of 5 kanals and 2 marlas), with the defendants shown to be in possession of 2 kanals and 6 marlas.

A similar situation was found to be existent qua other *khasra* numbers in the joint *khewat*.

7. It was also found that plaintiff no.5 (present appellant no.2), i.e. Mohinder Kaur, in her testimony as PW-1 had admitted that the defendants had sown paddy crop in the land falling to their share and that Satpal Kaur and one Gurdial Singh (not party to the *lis*) were also cultivating the land

falling to their share. Similarly, the plaintiff-appellant Sat Pal Kaur, in her testimony as PW-2, admitted that she owned 11 kanals of land of which she had sold 5 kanals 8 marlas to two persons (Sucha Singh and Surjit Singh), with other co-sharers also having sold some land to different vendees, with possession of specific *khasra* numbers also shown to have been handed over.

Similarly it was found that the defendants (appellants before that Court) were also in possession of specific *khasra* numbers, i.e. 6//25/2 min (2-6), 7//22 min (3-6), 7//21(8-0), 22//10 (8-0), 22//11(8-11), 23//6 (8-0).

8. Consequently, relying upon judgments of this Court in *Mukhtiar Singh vs. Tara Singh and another*, 2000(4) RCR (Civil) 379; *Bachan Singh vs. Swran Singh*, 2000(3) RCR (Civil) 70; *Arun Kumar and another vs. Kulwant Kaur and another*, 2007(3) RCR (Civil) 641; *M/s DCM Sriram Consolidated Ltd. vs. Jai Singh*, 2006(2) RCR (Civil) 118; and *Surjit @ Surjit Singh Kataria and others vs. Raj Hans and Ors.*, 2008 (1) *Law Herald* 284, it was held that where it is shown that co-sharers are in specific possession of particular parts of jointly held property, they are entitled to an injunction in their favour qua such possession, subject of course to the order to be eventually passed in partition proceedings, by the revenue Court.

9. An argument having been raised that the defendants were also changing the nature of the land from agricultural to non-agricultural, that contention was rejected by holding that even in the *jamabandi* relied upon by the present appellants-plaintiffs, *khasra* no.7//21 was agricultural land to the extent of 6 kanals, with the remaining 2 kanals comprised therein being

gair mumkin abadi. The same position was also found as regards *khasra* nos.6//17 and 6//24, as also three other *khasra* numbers.

Consequently, finding that the entire *khewat* was not an agricultural holding, with part of it being also *gair mumkin abadi*, the appeal of the defendants was allowed and suit of the plaintiffs dismissed.

10. Before this Court, the learned counsel for the appellants raised the following two questions of law:-

- i). Whether the party to the litigation who are co-sharers and partition proceedings are pending between the party can raise construction without partition?
- ii) Whether the impugned judgment and decree passed by the Id.ADJ Jalandhar is against the spirit of principles of natural justice, equity and fair play?

He essentially reiterated what was held by the learned Civil Judge, and on query as to why the case of the respondents would not be covered in their favour by even the judgment of the Full Bench of this Court in ***Bhartu vs. Ram Sarup, 1981 PLJ 204***, he actually could not refute the ratio of the said judgment.

11. In ***Bhartus'*** case, upon a reference made to a Full Bench in view of divergent opinions on the rights of co-sharers in unpartitioned land, it was held by their lordships as follows:-

“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 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.

5. The rights of a transferee from a co-owner are not entirely dependent on judicial decisions but are

regulated by section 44 of the Transfer of Property Act which provides that where one or two or more co-owners of the immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. According to this statutory provision also what transferee gets is the right of the transferor to joint possession and to enforce a partition of the same irrespective of the fact whether the property sold is fractional share or specified portion, exclusively in possession of the transferor. Again, it cannot be disputed that when a co-sharer is in exclusive possession of the specified portion of the joint holding, he is in possession thereof as a co-sharer and all the other co-sharers continue to be in its constructive possession. By the transfer of that land by one co-owner, can it be said that other co-sharers cease to be co-sharers in that land or to be in its constructive possession. The answer obviously would be in the negative because any of the other co-sharers can either seek a declaration from the Court as held in Sukh Dev's case (supra) that the vendee is in possession only as a co-sharer or can initiate proceedings for partition of the joint holding including the land transferred. If the other co-sharers continue to be co-sharers in the land transferred even though comprised of specific khasra numbers how can it be said that what is sold is something other than the share out of the joint holding. That the sale of specific portion of land out of joint holding by one of the co-owners is nothing but a sale of

a share out of the joint holding, would be further elucidated if we take the example of a sale where a co-owner sells the land comprised of a particular khasra number which is not in his possession but is within his share in the joint holding. For example, 'A' who is joint owner of one-fourth share in the joint holding measuring 100 bighas sells the land measuring 10 bighas bearing khasra numbers 'X' and 'Y' which are not in possession. On the basis of this sale, the vendee can neither claim himself to be a transferee of the said land nor can he claim its possession from other co-owners in possession thereof. The effect in law of such a transfer would be only that the vendee shall be entitled 10 bighas of land out of the share of his vendor at the time of partition or prior thereto a decree for joint possession to the extent of the land purchased by him. Consequently, the effect in law of sale of even of specified portion of joint land is that it is only a sale of portion of share by one of the co-owners.”

(All emphasis applied only in the present judgment).

12. In view of what has been held by the Full Bench, though undoubtedly the basic principle governing any unpartitioned property is that each and every co-sharer thereof owns and would be deemed to be in possession of every square inch of the land, however where it is proved that the co-sharers are actually in exclusive possession of their respective shares in specific parcels of the property, the general principle would not apply.

In this case, learned counsel for the appellants not having been able to refute the finding of fact recorded by the learned Ist appellate Court, with regard to even revenue record showing the co-sharers in possession of specific parts of the suit land and the rest of the joint *khewat*, to the extent

per the needs of each co-sharer, I see no reason to interfere with that finding of fact, with the first question of law answered in terms of the ratio of the Full Bench as discussed hereinabove. The second question, being subservient to the first, it is consequently answered to the effect that even natural justice, equity and fair play cannot be stated to have been given a go by, by the learned Ist Appellate Court, when even the plaintiffs were found to be in possession of specific parcels of the jointly owned *khewat*.

13. That being so, this appeal is dismissed in *limine*, upholding the judgment and decree of the Ist appellate Court.

No notice having been issued in the appeal, there shall be no order as to costs.

(AMOL RATTAN SINGH)
JUDGE

August 06, 2018.
D.K./dinesh

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No