

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

RSA No. 2240 of 2017 (O&M)

Date of decision : July 27, 2018

Sube Singh

.....Appellant

Versus

Om Parkash

....Respondent

CORAM:- HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. S.S. Khurana, Advocate
for the appellant.

LISA GILL, J.

Appellant-plaintiff is aggrieved of judgment and decree dated 21.09.2016 passed by the learned Additional District Judge, Gurgaon, vide which the appeal filed by the respondent-defendant has been allowed and judgment and decree dated 16.08.2014 passed by the learned Civil Judge (Junior Division), Gurgaon in favour of the appellant has been set aside.

Brief facts necessary for adjudication of the case are that appellant-plaintiff filed a suit for permanent injunction for restraining the defendant-respondent from raising any kind of construction on the suit property or changing the nature of the same till the partition of the property in question by metes and bounds.

At this stage, it is relevant to note that the property in question belonged to one Hargobind who had three sons namely Bane Singh, Mohan Lal and Narayan Singh. Bane Singh had four sons, one of them being the present appellant - Sube Singh. Mohan Lal had three sons. Narayan Singh had five sons. Respondent – defendant Om Parkash is the son of Dhare Singh son of Narayan Singh. It was pleaded by the appellant that the suit

property initially belonged to Hargobind. Defendant – respondent and other co-sharers are stated to be co-owners in possession of the agricultural land as detailed. Many of the co-sharers had constructed their houses. The suit property was still joint property, not partitioned by metes and bounds. Partition proceedings were pending before the learned Assistant Collector First Grade, Manesar. It was stated that killa No. 9/1 of Rectangle 34 was adjacent to the phirni of the village. It was more valuable than the other part of the land especially for the purpose of residence. Respondent, it was pleaded, had constructed on half of killa No. 9/1 and now he wanted to raise further construction on the remaining half as well only with a view to defeat the valuable rights of the appellant. It was further pleaded that in case the respondent succeeded in his illegal motive of constructing on the land without getting it partitioned, the appellant would suffer irreparable loss and injury. As the respondent had refused to desist from raising construction, present suit was filed.

The suit was resisted by the respondent. Written statement was filed taking various preliminary objections regarding maintainability, locus standi, cause of action, estoppel, non joinder of necessary parties not approaching the Court with clean hands etc. Averments of the plaintiff on merits were denied. Respondent admitted that the plaintiff was a co-owner, however, the said property, it was stated, already stood partitioned between three sons of Hargobind. The appellant and his three brothers were stated to be in exclusive possession of killa No. 1 of Rectangle 34. Three brothers of the appellant, it was stated, had already constructed their residential house 4-5 years ago after mutual partition on the portion falling to their share. The appellant, it was averred, had raised a boundary wall. Three sons of Mohan

Lal had also constructed their residential houses in their respective portions. The respondent claimed himself to be in exclusive possession of part of the land comprised killa No. 9/1 of Rectangle 34. His other brothers had already raised their residential houses 7-8 years ago. None including the appellant had ever raised an objection to the raising of the residential houses by any of the above. Mutual partition of the land had taken place long time ago though the same was not incorporated in the revenue records. Therefore, taking undue advantage of wrong entries in records, the appellant it was averred had filed the present suit. Partition proceedings were stated to be pending before the Assistant Collector First Grade, Manesar in which the appellant had admitted and stated that the co-sharers were in possession of their respective shares. Replication to the written statement was filed.

Following issues were framed on the basis of the pleadings of the parties by the learned trial Court:-

1. Whether the plaintiff is co-owner in joint possession of the suit property? OPP
2. If issue No. 1 is proved, whether plaintiff is entitled to the decree of permanent injunction as prayed for? OPP
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiff has neither locus standi nor cause of action to file the present suit? OPD
5. Whether the plaintiff is stopped by his own act, conduct and acquiescence to file the suit? OPD
6. Whether the suit is bad for non-joinder of necessary parties? OPD
7. Whether the plaintiff has not come to the court with clean hands and concealed true and material facts? OPD
8. Whether the suit of the plaintiff has not been properly valued for the purpose of court fee and jurisdiction? OPD

9. Relief.

Learned trial Court concluded that until and unless partition was reflected in the revenue record, it cannot be recognised, even if the parties might be using the properties separately. It was further observed that the respondent – Om Parkash DW1 had admitted that the land in question was not partitioned by metes and bounds and the partition proceedings were pending. Learned trial Court held that there was nothing on record to show that the appellant had raised any construction on the land in question whereas the respondent had constructed his house on the said land, therefore, he cannot be permitted to raise further construction to the detriment of the plaintiff. Consequently, issues No. 1 and 2 were decided in favour of the plaintiff-appellant and against the defendant. Suit was, accordingly, decreed in favour of the plaintiff-appellant.

Aggrieved therefrom respondent – defendant preferred an appeal which was allowed by the learned Additional District Judge, Gurgaon vide judgment and decree dated 21.09.2016, consequently setting aside judgment and order dated 16.08.2014. It was held by the learned Additional District Judge, Gurgaon that though partition by metes and bounds may not have taken place, the co-sharers were in possession of their separate shares. Admittedly, the defendant and others had also constructed residential houses thereon. Thus, the appeal was allowed.

Appellant – plaintiff being aggrieved of judgment and decree dated 21.09.2013 has filed the present appeal. Learned counsel for the appellant argues that the learned Additional District Judge, Gurgaon has grossly erred in setting aside well reasoned judgment and decree dated 16.08.2014 passed by the learned Civil Judge (Junior Division), Gurgaon. It

is contended by learned counsel for the appellant that the learned Additional District Judge, Gurgaon has erred in concluding that the appellant-plaintiff has raised any construction on his share or he has admitted the same. The appellant, it is submitted, has not constructed any residential house on the property in question and the said finding has been wrongly returned. Reference is made to the statement of PW1 – Sube Singh, the appellant. It is not disputed that the suit property initially belonged to the appellant's grandfather Hargobind who had three sons as narrated in the foregoing paras. Their progeny is also not in dispute.

It is further contended that in para 13 of the judgment dated 21.09.2016 of the learned Additional District Judge, Gurgaon, it is observed that “It is a specific plea of the defendant that Killa No. 9/1 had fallen to his exclusive share and this fact is admitted by the plaintiff in most ambiguous terms”.

Learned counsel for the appellant argues that once it is observed by the learned Additional District Judge, Gurgaon that the admission is in 'ambiguous terms', there is no question of returning any finding against the appellant as there is no clear admission. Partition proceedings, it is submitted, are pending between the parties, therefore, until and unless partition by metes and bounds is carried out, the respondent should be restrained from raising any construction on the property in question, which is admittedly joint property of the appellant, respondent and other co-sharers. It is, thus, prayed that impugned judgment and decree 21.09.2016 passed by the learned Additional District Judge, Gurgaon be set aside and judgment and decree dated 16.08.2014 passed by the learned Civil Judge (Junior Division), Gurgaon be upheld.

I have heard learned counsel for the appellant and have gone through the file with his able assistance.

It is not in dispute that the land in question belonged to Hargobind i.e. the grandfather of the appellant. The property devolved on three sons of Hargobind namely Bane Singh (father of the appellant), Mohan Lal and Narayan Singh. Details of their progeny has been narrated in the foregoing paras. Suffice it to say that the appellant is son of Bane Singh son of Hargobind. Defendant – Om Parkash is son of Dhare Singh son of Naryana Singh son of Hargobind. A perusal of the file reveals that though the property may still be joint, the shareholders are in possession of separate parcels of land since long. The plaintiff – appellant has admitted that the land which devolved on their father Bane Singh from Hargobind has further been partitioned amongst the appellant and has three brothers. Om Parkash is a nephew of the appellant. Learned counsel for the appellant read out the statement of PW1 Sube Singh - appellant in Court today. The appellant in his statement before the learned trial Court specifically states that the property in dispute is ancestral property which had fallen to their share after the death of his father who died in the year 1926. The appellant admitted that the share of his father Bane Singh was further partitioned amongst his four sons i.e. the appellant and his three brothers. It is admitted that the appellant's three brothers have constructed their residential houses on their shares though the appellant himself has not raised any construction on the suit land. Perusal of the statement of PW1 Sube Singh reveals that possession of the respondent - Om Parkash over the land in killa No. 9/1 is admitted by the appellant. Argument that the learned Additional District Judge, Gurgaon while referring to the admission has used the term

'ambiguous', therefore, there is no question of an admission is clearly fallacious and misconceived. It is crystal clear on a bare reading of the statement of PW1 and a wholesome reading of the para in question that learned Additional District Judge, Gurgaon intended to use the word 'unambiguous' rather than 'ambiguous'. The appellant cannot derive any kind of benefit from an apparent error as is sought to be projected by the learned counsel for the appellant.

Similarly, the argument that the learned lower appellate Court has been swayed by a misconception that the appellant has raised constructed on his portion is of no avail to the appellant. This is so for the reason that there is a clear cut admission by the appellant that the land in question belonged to his grandfather Hargobind, devolved upon his father Bane Singh and his two brothers (i.e. uncles of the appellant). The appellant alongwith his three brothers came in possession of the suit property after the death of their father Bane Singh. The appellant and his three brothers came in possession of their respective shares. The appellant has admitted that three of his brothers have raised the construction on the suit land. It is, thus, apparent that though partition by metes and bounds may not have taken place, each of the co-sharer is in possession of specific parcels of property. Therefore, even if the appellant himself may not have raised construction on the parcel of land in his possession, the same is irrelevant and immaterial. In this situation, no injunction can lie against a co-sharer to deprive him of the use of the property.

Learned Additional District Judge, Gurgaon has clearly observed that the construction raised by the respondent-defendant shall be at his own risk and responsibility and further subject to final decision of the

partition proceedings admittedly pending between the appellant, respondent and other co-sharer.

In this view of the matter, learned Additional District Judge, Gurgaon has rightly allowed the appeal filed by the respondent vide judgment and decree dated 21.09.2016 and set aside the judgment and decree dated 16.08.2014 passed by the learned trial Court.

No other point has been raised or argument addressed by learned counsel for the appellant.

In my considered opinion, no question of law much less a substantial question of law is involved in this appeal for the consideration of this Court.

Appeal is, accordingly, dismissed with no order as to costs. Needless to say any construction, which may be raised by the respondent, shall necessarily be at his own risk and responsibility besides being subject to final decision of the partition proceedings pending before the competent authority.

July 27, 2018
rts

(Lisa Gill)
Judge

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