IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

1. Civil Revision No.206 of 2019
Date of Decision:29.01.2019

Mukesh Kumar and others ......Petitioners
Vs
M/s Saini Developers and Promoters Pvt. Ltd. and others
....Respondents

2. Civil Revision No.189 of 2019

Vipin Singla and others ......Petitioners
Vs
M/s Saini Developers and Promoters Pvt. Ltd. and others
....Respondents

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Arun Jain, Sr. Advocate with
Mr. Amit Jain, Advocate
for the petitioners in CR No.189 of 2019.

Mr. Ashwani Kumar Chopra, Sr. Advocate with
Mr. Akshit Chaudhary, Advocate
for the petitioners in CR No.206 of 2019.

Mr. Akshay Bhan, Sr. Advocate with
Mr. Santosh Sharma, Advocate
for the caveator/respondent No.1.

****

RAJ MOHAN SINGH, J.

[1]. Vide this common order CR Nos.206 and 189 of 2019 are being disposed of. Since common issue is involved in both the petitions, therefore, for brevity, facts are being culled out from CR No.206 of 2019.

[2]. Petitioners have preferred this revision petition against the order dated 02.11.2018 passed by the Addl. District Judge, SAS Nagar (Mohali), whereby the order dated 23.07.2018 passed by the Civil Judge (Jr. Divn.) Dera Bassi was set aside. The District Judge, Patiala accepted the appeal thereby allowing the application under Order 39 Rules 1 and 2 CPC preferred by the plaintiff/respondent No.1 in a suit for permanent injunction restraining the defendants/petitioners from changing the nature of the suit property by way of raising any construction over the suit land.

[3]. Brief facts are that the plaintiff filed a suit for permanent injunction on the ground that the defendants/petitioners are co-sharers in the suit land and they are bent upon encroaching the land measuring 9 *Bighas* 3 *Biswas* without getting the same partitioned by metes and bounds. Plaintiff pleaded that a day before yesterday (i.e. date of filing of the suit), defendants came to the spot and threatened the officials of the plaintiff to raise construction over 9 *Bighas* 3 *Biswas* of land. Plaintiff pleaded that the land is joint and the defendants without being in exclusive possession have no right to raise construction over any part of the land till the same is partitioned in a lawful manner. Plaintiff pleaded in the suit that cause of action accrued to the plaintiff a day before yesterday from the date of filing of

the suit, when the defendants did not adhere to the genuine request of the plaintiff and threatened to raise construction. Along with the suit, an application under Order 39 Rules 1 and 2 CPC was filed.

[4]. Defendants contested the suit as well as the application by pleading that they have purchased the suit property by different sale deeds and they were put in possession over the specific part of the land and since then they are in exclusive possession. Defendants along with other co-vendees have been continuing in possession of the land measuring 9 *Bighas* 3 *Biswas*. Along with the written statement, sale deeds Annexures D-1 to D-13 were attached by the defendants/petitioners. By virtue of aforesaid sale deeds, defendants/petitioners pleaded exclusive possession over 9 *Bighas* 3 *Biswas* of land. They were put in possession of the khasra numbers mentioned in the sale deed and are continuing in exclusive possession of the same till date. Defendants/petitioners had raised the construction in the part of the suit property in their exclusive possession. Other co-purchasers had also raised construction in the remaining part of the suit land. Defendants/petitioners raised objections that other co-sharers were not made party to the suit. As far as defendants No.1 and 2 are concerned they had raised construction of showrooms in the year 2000 and

2011. They have also obtained water and electricity connections in the construction so raised by them over the suit land. Electricity bills and receipts regarding payments were duly attached with the written statement as Annexures D-14 to D-17.

[5]. It was further pleaded that defendants No.1, 2 and 6 before raising the said construction of showrooms over the suit property had got the sanction from the Municipal Council, Zirakpur. The documents viz. sanctioned site plan, fee receipts and building permits were also attached with the written statement as Annexures D-18 to D-26. Defendants No.1 and 2 had deposited fee with the Municipal Council, Zirakpur for raising further construction. Copy of receipt regarding deposit of the amount was also attached with the written statement. Defendants No.1 and 2 made structural changes in the construction of old showrooms. Photographs were also attached with the written statement as Annexures D-27 to Ex.D-31.

[6]. Defendants pleaded their exclusive possession in terms of construction over the suit property since 2000 and 2011. They further asserted that the plaintiff was aware of the said construction raised by the defendants and they had raised no objection whatsoever at any point of time. Defendants/ petitioners also pleaded that part of the land was acquired by the NHAI on the basis of four lanning project of Zirakpur-

Parwanoo NH-21. Portion of land comprised in khasra No.1477/973 and 969 were acquired and the compensation was paid to defendants No.1 and 2 as they were found in exclusive possession over the suit property for the last many years. The compensation in respect of khasra No.1474/968 and 2014/969 was also received by Shyama Rani, Renu and others as they were also found in exclusive possession of the said property. The proof regarding release of compensation in favour of defendants No.1 and 2 and Shama Rani and others were also attached with the written statement as Annexures D-32 onwards.

[7]. It was submitted that defendants No.3 to 5 had raised construction of tin sheds in the suit property in the year 2003 and they were carrying business of trading of saria and manufacturing of gate, grill and sheds under the name and style of M/s Singla Steels Sales. Proof regarding the aforesaid business was also attached as Annexures D-34 to D-39. Photographs showing the above said construction were also attached as Annexures D-40 to D-44. Three phase electricity connection attached to the premises, was obtained by defendants No.3 to 5 in the name of their father Sh. Satpal Singla. Electricity bills were also attached with the written statement as Annexures D-45 and D-48. Photocopy of property

tax deposited in respect of the aforesaid land for the year 2014-2015, 2015-2016, 2016-2017 and 2017-2018 were also attached as Annexures D-49 to D-52.

[8]. As regards defendant No.6, he along with his wife Shyama Rani, his sister-in-law Renu were in exclusive possession of the part of the suit property and had raised construction since the date of its purchase. They had constructed room and shops. Photographs were attached as Annexures D-53 to D-56. Defendants also got copies of khasra *girdawaries* and *jamabandies* attached with the written statement as Annexures D-57 to D-74. On the basis of aforesaid voluminous record, defendants pleaded their exclusive possession. Defendants also pleaded that the orders passed by K.S. Minhas, the then Director, Consolidation of Holdings, Punjab was unsuccessfully challenged in the CWP, LPA and SLP whereby no incriminating material have come to fore in the orders passed by the Courts.

[9]. Replication was filed by the plaintiff in which action of the K.S. Minhas, Director Consolidation was highlighted with reference to the report of Hon'ble Justice Kuldeep Singh (retd.), who inspected the matter and found incriminating material against K.S. Minhas in respect of incorporating his own name. The report of Hon'ble Judge was published in the newspaper on

11.11.2013. The inquiry was in respect of land acquired by K.S. Minhas, the then Director Consolidation, his son and his relatives. The land was shown as *shamlat deh* in the jamabandi for the year 1950-51. In subsequent jamabandies for the year 1959-60, the land was shown to be of Nagar Panchayat. The total land of Panchayat was 1489 *Bighas* 14 *Biswas.* After consolidation in the year 1959-60, the total land was shown to be 1104 *Bighas* 7 *Biswas* including *shamlat deh* measuring 55 *Bighas* 19 *Biswas*.

[10]. Vide order dated 09.05.1985, Sh. K.S. Minhas, Director Consolidation passed the order that the Panchayat land be distributed amongst the *Patidars* as per their shares in the *shamlat deh* prior to initiation of consolidation proceedings. The officer remanded the case to the Consolidation Officer with the aforesaid direction that the shares of *Patidars* and right holders be worked out and area be distributed amongst them as per their shares based on *Hasab Rasad Raqba khewat*. He also ordered that mutation No.311 on the basis of which the land was shown under the ownership of Gram Panchayat to be ignored. The Consolidation Officer determined the shares of each right holders. Mutation No.822 was entered and sanctioned on 15.01.1986 and the shares of each share holders were reflected in the said mutation. At the back of mutation

register in the mutation No.822 under column No.9 names of Smt. Meeto, Ajmer Kaur, Paramjit Kaur, Baljit Kaur, Shyama Rani and Naurang Singh were shown. Elaborate details were made in the report by the Special Tribunal with reference to the aforesaid mutation and mutation No.1523 dated 28.07.1993, mutation No.1524 dated 28.07.1993, mutation No.17362 dated 30.03.2007, mutation No.1745 dated 18.07.1994, mutation No.4579 dated 21.11.1997, mutation No.6015 dated 17.09.1998, mutation No.4662 dated 30.12.1997. In para No.4 of the replication exclusive possession of the defendants over the suit property was denied and plaintiff further reserved its right to file separate suit with regard to the aforesaid false sale deeds of the defendants and their vendors.

[11]. The trial Court dismissed the application under Order 39 Rules 1 and 2 CPC after discussing the material on record. In paras No.10, 11 and 12 of the order, the Court held that the defendants can retain their possession of the portion transferred to them and if they raise the construction upon the specific portion of the joint holding, they would do so at their own risk. In case specific portion where construction is raised falls to the share of some other co-sharers during partition, the same shall have to be demolished and the defendants will not claim any damages. In nutshell, defendants were allowed to raise

construction subject to their own risk and responsibilities and in the event of allotting the said portion to some other co-sharers in partition proceedings, the defendants will demolish the same and will not claim any compensation.

[12]. The lower Appellate Court vide the impugned order reversed the order passed by the trial Court on the ground that the report of inquiry commission has implicated the then Consolidation Director and sale deeds executed by the persons in favour of the defendants were without any title. That is how, aggrieved against the aforesaid order, different vendees have come to this Court by way of filing the aforesaid petitions against the order of reversal passed by the lower Appellate Court.

[13]. Learned Senior counsel for the petitioners vehemently submitted that huge construction has come up on the spot. The said construction was raised after satisfying necessary parameters. The steps have already been demonstrated with the documentations along with the written statement. Plaintiff has filed the suit by alleging that cause of action accrued to the plaintiff just one day prior to filing of the suit. By referring to the photographs of huge construction, learned Senior counsel contended that such construction cannot be made in one day, rather the construction was raised without there being any

objection on the part of the plaintiff and others. The said construction was done after sanctioning of the site plan, electricity and water connections. Plaintiff has not filed any suit for title, rather filed a simpliciter suit for permanent injunction. Even issues were framed where no issue of title was framed by the Court. In the replication filed by the plaintiff, the plaintiff specifically averred that he would reserve his right to file a separate suit with regard to false sale deeds in favour of the defendants and their vendors.

[14]. By referring to the aforesaid, learned Senior counsel further submitted that the suit does not involve any dispute with regard to title, nor any issue has been framed to that effect. Status of defendants being that of co-sharers was admitted by the plaintiff even in the suit itself. Plaintiff being not in exclusive possession cannot restrain the other co-sharers from using the property in their possession. Learned Senior counsel highlighted that existence of *prima facie* case, balance of convenience and irreparable loss in the event of not granting injunction are in their favour. Defendants are in exclusive possession and they can enjoy the property. Such a suit for permanent injunction against co-sharers is not maintainable.

[15]. Learned Senior counsel at last submitted that against the order passed by K.S. Minhas, the then Director, the plaintiff

party remained unsuccessful in the writ petition, LPA and SLP.

[16]. On the other hand, learned Senior Counsel for the respondent No.1/caveator submitted that the factum of order passed by K.S. Minhas was mentioned by the defendants in para No.6 of the written statement and the act of the then Director Consolidation was found to be fraudulent in the commission of inquiry. The lower Appellate Court has taken cognizance of the fraud committed by the then Director.

[17]. Learned Senior counsel further submitted that fraud vitiates all solemn acts and the beneficiary of fraud can be thrown at any stage of litigation. No separate mutation was sanctioned in favour of K.S. Minhas and in mutation No.822, the names of K.S. Minhas, his son and other relatives were added in different ink. Fraud was not the subject matter of order passed by K.S. Minhas which was challenged in Writ Petition, LPA and SLP, rather it was detected after sanction of mutation No.822, wherein unfounded ownership of K.S. Minhas, his son and other relatives was incorporated without there being any origin. Subsequent vendee of such vendors would not derive any lawful title in respect of land which was never owned by the vendors.

[18]. I have considered the submissions made by learned

Senior counsel for the parties at the bar.

[19]. Suit is pending adjudication before the trial Court. At the stage of consideration of application under Order 39 Rules 1 and 2 CPC, three golden principles are to be kept in mind i.e. existence of *prima face* case, balance of convenience and irreparable loss to be suffered by the parties in case of grant or non-grant of temporary injunction. Rights and liabilities of co-sharers have been defined in ***Sant Ram Nagina Ram vs. Daya Ram Nagina Ram, AIR 1961 Punjab 528.*** The said view was endorsed by the Full Bench of this Court in ***Bhartu vs. Ram Sarup, 1981 PLJ 204 (Full Bench)*** and also by another Full Bench of this Court in ***Ram Chander vs. Bhim Singh and others, 2008(3) RCR (Civil) 685.*** The rights and liabilities of the co-sharers are settled to the following effect:-

"(i) A co-owner has interest in the whole property and also in every parcel of it.

(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 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 pre-emption 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.

(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 co-owner has a right to use the joint property in a husband like manner not inconsistent with similar right 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.

(viii) Co-sharer in possession exclusively of some portion of joint holding not more than his share is entitled to continue in possession till joint holding partition and can transfer that portion subject to adjustment at the time of partition.

(ix) Transferee under Section 44 of Transfer of Property Act gets right of transfer to joint possession and to enforce partition irrespective of the fact whether property sold is fractional share or specified portion."

[20]. A mere occupation of larger portion of the joint property does not necessarily mean ouster as the possession of one of the co-sharers would be deemed to be possession on behalf of all the other co-sharers. Unless and until ouster is proved by way of exclusive and hostile possession of the co-sharer to the very knowledge of others and the said co-sharer openly asserts

his own title by denying the title of others. In the present case the position is otherwise. Plaintiff has not pleaded its exclusive possession, rather admitted the defendants to be co-sharers. No plea of ouster was taken and no title suit was filed.

[21]. Perusal of the photographs would show that a huge construction has come up at the site in question in both the cases. The cause of action pleaded in the suit if read in conjunction with the aforesaid photographs and existence of construction at the site, the same would question cause of action in favour of the plaintiff as pleaded in the suit. Co-owners cannot injunct and restrain the other co-owners from raising construction. The remedy is to seek partition. It is true that fraud vitiates all solemn acts. A fraudulent transaction can be thrown at any stage of litigation. Even a decree passed by the highest court on fraud can be nullified by the court at feeder level on detection of fraud. There is no limitation to seek declaration, if the transaction is found to be fraudulent. The limitation starts on the date on which fraud is detected. The principles have been well defined by the Hon'ble Apex Court in catena of judgments viz. ***S.P. Changalvaraya Naidu (dead) by LRs. vs. Jagannath (dead) by LRs., 1994 AIR (SC) 853; Hamza Haji vs. State of Kerala and another, 2006(7) SCC 416; A.V. Papayya Sastry and ors. vs. Government of A.P. and ors, 2007(2) RCR***

(Civil) 431; ***Balwant Rai Tayal vs. M/s Subhash Oil Company, Hisar through Sh. Raghunath Sahi, 2003(2) RCR (Rent) 148;*** ***Badami (deceased) by her LR vs. Bhali, (2012) 11 SCC 574;*** *and* ***Ramesh Kumar and another vs. Furu Ram and another, (2011) 8 SCC 613*** and authoritatively held that aforesaid propositions to the disadvantage of the person committing fraud.

[22]. Learned Senior counsel for respondent No.1/caveator has also highlighted the factum of fraud when handwritten ink entries were made in column No.10 of the mutation No.822, thereby adding name of K.S. Minhas, his son and relatives in the column of ownership. Such entries were made without there being any lawful order in favour of the aforesaid persons. The entitlement of aforesaid persons was based on fraud.

[23]. At this stage of the suit, no firm finding in respect of entitlement of both the sides can be made with reference to any conclusive findings, lest it may prejudice the case of either side during trial. A consideration can only be made with regard to the *prima facie* case, balance of convenience and cause of irreparable loss in the event of passing the order of injunction. On the one hand, act of K.S. Minhas the then Director Consolidation was found to be incriminating in the inquiry and allegations of fraud have come to fore. On the other hand, the

orders passed by the then Director Panchayat was not interfered in CWP, LPA and SLP. The report of inquiry was given in the year 2012. The plaint is silent about the action taken by the competent authority on the basis of report submitted by the court of inquiry. In such a scenario, it would not be appropriate to comment upon merits of the case. Existence of huge construction material on the site cannot be ignored. It is also found that some construction work is in progress for which building material is lying and machinery is in operation.

[24]. The issue involved can only be decided on the golden principles of Order 39 Rules 1 and 2 CPC leaving the parties to adduce relevant evidence before the trial Court at appropriate stage, so as to assist the Court to pass an appropriate order on merits. The trial Court has passed the order that in the event of allotting the land in question to some other co-sharer, the defendants would remove the construction without claiming any compensation. The order passed by the lower Appellate Court has commented upon the merits of the case.

[25]. Defendants have constructed the site and building is in existence. The renovation and finishing/furnishing work of the construction would not mean that no construction is being done. In case such a course is prevented, the defendants may suffer irreparable loss as building material collected on the site may be

spoiled or damaged. *Prima facie* case can only be considered in favour of the defendants. Balance of convenience is also in favour of the defendants as the construction cannot be raised in one day. In the event of grant of stay of further construction to the earlier existing site would cause irreparable loss to the defendants only. Filing of simpliciter suit for permanent injunction and its maintainability would be a debatable issue before the trial Court.

[26]. In view of law laid down in ***Jangir Singh vs Naranjan Singh and others, 2015(1) R.C.R. (Civil) 49,*** mere making of construction of common land would not amount to ouster of other co-sharers. A co-sharer cannot seek injunction against other co-sharers from raising construction. The only remedy available to the aggrieved is to file a suit for partition. The view expressed in Full Bench of this Court in ***Bachan Singh vs. Swaran Singh, 2003(3) R.C.R. (Civil) 70*** can be appreciated, wherein following observations were made in para 15.

> *""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."

[27]. The possession of the defendants is *prima facie* proved with reference to material on record. A co-sharer out of possession is required to seek partition. The principles highlighted in ***Bachan Singh's*** case (supra) particularly in view of opinion at serial No.(iv) the acts of co-sharer in possession should not be detrimental to the interest of other co-sharers and in such a situation co-sharer out of possession can seek injunction to prevent such an act. Since the construction has come up in a long way on the site and only finishing work is said

to be completed by the defendants, therefore, at this stage the aforesaid consideration cannot be made where the act of the defendants would be detrimental to the interest of the plaintiff in any manner. In order to safeguard such a contingent factor, the trial Court has protected the interest of the plaintiff by ordering that in case the property is allotted to other co-sharer the defendants would demolish the construction and would not claim any damage thereof. In my considered opinion both the parties can be left to lead their respective evidence during trial.

[28]. On the basis of observation made hereinabove, the impugned order dated 02.11.2018 passed by the Addl. District Judge, SAS Nagar (Mohali) is set aside, and the order dated 23.07.2018 passed by the Civil Judge (Jr. Divn.) Dera Bassi is hereby restored. Both the revision petitions are allowed. The trial Court shall make every endeavour to decide the suit at the earliest.

January 29, 2019 **(RAJ MOHAN SINGH)**
Atik **JUDGE**

Whether speaking/reasoned Yes/No

Whether reportable Yes/No