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

**Civil Revision No.5717 of 2018 (O&M)
Date of Decision: 04.07.2019**

Om Parkash

.....Petitioner

Vs

Rohtash and another

....Respondents

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

Present: Mr. Akshay Jindal, Advocate
for the petitioner.

Mr. Amit Jain, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 04.08.2018 passed by the Addl. District Judge, Gurugram, vide which order dated 23.01.2018 passed by the trial Court was set aside and the application under order 39 Rules 1 and 2 CPC was dismissed.

[2]. Admittedly parties are co-sharers in the suit land. Plaintiff filed a suit for permanent injunction against the respondents on the ground that plaintiff is co-sharer in possession of 1/4th share of land measuring approximately 375

sq. yards shown in red and green colour in the site plan attached with the plaint. The aforesaid land is comprised in *Khewat* No.264/258, *Khatoni* No.307, *Khasra* No.318 (0 *Bigha* 10 *Biswa* 0 *Biswansi*) situated in revenue estate of village Islampur, Tehsil and District Gurgaon (now Gurugram) as per *jamabandi* for the year 2005-06. Plaintiff further alleged that the aforesaid land (though *Khasra* No.307 has been wrongly shown in place of *Khasra* No.318) was partitioned amongst the co-sharers orally and all the co-sharers are in possession of their respective shares. Plot of the plaintiff is adjacent to the plot of the defendants on the northern side of the plot and plot of the plaintiff is earmarked by letters 'EFRGHQ' in green and red colour in the site plan. Plaintiff further alleged that the defendants are adamant to encroach upon the portion shown in red colour of the land of the plaintiff by digging foundation and by collecting building material on the spot. With this background, the suit was filed seeking permanent injunction against the defendants/co-sharers. Along with the suit, an application under Order 39 Rules 1 and 2 read with Section 151 CPC was filed.

[3]. The written statement filed by the defendants was allowed to be amended. In the amended written statement, the defendants contested the suit of the plaintiff by pleading

following facts in para Nos.2 and 3:-

- “2. *That the para no.2 of the plaint is not admitted as stated. The possession over the joint land by the respective parties was done firstly by Maha Singh, Rohtash and Kanwar Singh shown in yellow and red colour in the site plan marked by letters ABEF. Thereafter, the plaintiff constructed his portion and then other co-sharers namely Deep Chand and Hari Singh till the last and of Khasra no.318 which is mark by letter EFGH. The area in portion A is around 722 Sq. yards and area in portion B 253 Sq. yards shown in Yellow and Red colour which comes to 975 Sq. yards as against 999 Sq. yards as per their share of A&B. Likewise the area under the plaintiff and co-sharer Hari Singh and Deep Chand comes to 505 Sq. yards in portion-C. Whereas their share come to 481 Sq. yards. Thus, an encroachment around 24 Sq. yards is done by the plaintiff from the share of the portion of A&B.*
3. *That the para no.3 of the plaint is not admitted as stated. It is correct that the property of the defendant is towards the Northern side but the portion shown in Red colour is not as per the spot. The partition shown HGQR in the site plan of the plaintiff is not a vacant portion but already of a pucca house belonging to the defendants which is marked as CDEF in the site plan submitted by the defendants which was constructed way back in the year 1996 by the defendants. When the plaintiff constructed his Four story house three years back, the back portion of the defendants was damaged is shown as CIEJ in the site plan and the defendants are now repairing the same after demolishing the back portion towards west fully shown in the site plan of the defendants marked as CIEJ and*

a Pucca Wall on this portion of around 10" height is there in portion. The rest of the portion of the house towards East is in existence since 1996 comprising four Rooms and staircase marked by letter IDJF in the site plan. As such, the site plan submitted by the plaintiff is completely wrong. It is pertinent of mention here that except the share of the plaintiff and Deep Chand and Hari Singh and M/s Shashank Builders the entire portion of Khasra no.318 is supposed to be in possession of the defendants and other co-sharers of portion A&B. But the co-sharers of portion A&B are in possession of 975 Sq. yards where is their share comes to 999 Sq.yards. So, the defendants and co-sharers of portion A are entitled to another 24 Sq.yards from portion-C in possession of the plaintiff and Deep Chand etc. The share of Kamal Singh, Partap Singh, Hukam Singh sons of Med Singh S/o Kanhya to the tune of $\frac{3}{4}^{\text{th}}$ share and that of Narayan Singh and Bhagat Singh son of Nawal Singh S/o Med Singh to the tune of $\frac{1}{28}^{\text{th}}$ share out of share of $\frac{1}{8}^{\text{th}}$ share and that of the company M/s Siba Proficiency to the tune of $\frac{1}{4}^{\text{th}}$ share and that of M/s Sukh Realtars is to the tune of $\frac{1}{20}^{\text{th}}$ share has been taken over by the defendants and Sh. Maha Singh S/o Sh. Deeg Ram who sons namely Nahar, Jawahar, Samay Singh, Fathe Singh and Hukam Singh are in portion of ABIJ in the site plan of the plaintiff. Maha Singh's sons are in possession of 722 Sq. yards (approximately), the defendants is in possession of 253 Sq.yards (Approx.) and the plaintiff $\frac{1}{4}^{\text{th}}$ share, Hari Singh $\frac{5}{96}$ share, Deep Chand $\frac{1}{48}$ share and M/s Shashank Builders $\frac{1}{480}$ share are in possession of around 505 Sq.yards, as per the site plan the total area on the spot which is around 1480 Sq.yards. So, if there is any encroachment of the share of the plaintiff i.e. to

be Southern side of the site plan as well as Aks Shijra is possessed by the Hari Singh, Deep Chand and M/s Shashank Builders. It is also important to bring to the notice of the Hon'ble court that share of Kamal Singh, Partap Singh and Hukam Singh sons of Med Singh, and Narayan Singh and Bhagat sons of Nawal Singh was taken over by the defendants and Kanwar Singh and Maha Singh in exchange from their land comprising in Khasra No.420. Thus, the share of these persons is also in ownership and possession of Maha Singh, Rohtash and Kanwar Singh in equal shares. Likewise the share holder Kanwar Singh had also surrendered his share in favour of his brothers Rohtash (defendant) and Maha Singh. So, the entire share of Kamal Singh others, Narayan Singh others and Kanwar Singh is now the ownership with possession of defendants Rohtash and Maha Singh. Maha also purchased the share of M/s Siba Proficiency and that of M/s Sukh Realtors. That in the year 1995, an oral family settlement and arrangement took place between Kanwar Singh and Maha Singh and defendant No.1. In the aforementioned family settlement, Kanwar Singh relinquished his 16 Biswansi share and Maha Singh relinquished his 4 Biswansi share out of the property comprising in Khasra No.318. The said family settlement was acted upon at the spot and requisite title was created in favour of the defendant No.1. That on account of close relations, the family settlement was not incorporated in the revenue records. That after the filing of the suit, in order to substantiate the family settlement and for updation of revenue records, the transfer deed bearing Vasika No.6528 dated 30.01.2018 was executed by Kanwar Singh and Maha Singh in favour of defendant No.1. Copy of the said

transfer deed is attached herewith for reference. That on the basis of the family settlement, the defendant No.1 has raised construction upon the property shown in Red in the attached site plan. That thereafter the plaintiff raised construction of ground plus 4 storey building towards south of the property of the defendants. That on account of raising of such huge construction, old construction of defendant No.1 became dilapidated. On account of such facts, the defendants started renovation work, where after the present suit was filed. This clearly shows that the construction of the defendant is old and all the allegations made by the plaintiff are false. That the Khasra No.318 was proposed to be acquired by the State Government and notifications in this regard were issued. Against the proposed acquisition, the present defendant No.1 and others preferred a Writ Petition bearing No.3507 of 2006 before the Hon'ble High Court. In the said Writ Petition, it was clearly stated by the Land Acquisition Collector and ultimately upheld by the Hon'ble High Court residential house of present defendant No.1 exists upon an area measuring 69 feet x 41 feet. The said area is none but the suit property in the present case wherein the defendant No.1 house had existed which was renovated by him. That all these facts have been concealed by the plaintiff. The orders of Hon'ble High Court have a material bearing on the merits of the present case and clearly shows that the construction of the present defendant No.1 and other petitioners of the said Writ Petition, namely, Maha Singh and Kanwar Singh was released. As already stated under a settlement, the defendant No.1 is holding a valid title with regard to an area under his possession in terms of settlement entered with Maha Singh and Kanwar

Singh. The entire paper book of writ No.3507 of 2006 is attached herewith.”

[4]. Perusal of the aforesaid stand taken by the defendants would show that the plaintiff has already constructed 4 story *pucca* house. Back portion of the defendants' house was damaged and the defendants sought to repair the same after demolishing the back portion towards western side as shown by letters 'CIEJ' in the site plan of the defendants where a back wall on this portion of around 10 feet height is existed. In order to ascertain the factual position, a Local Commissioner was appointed by the trial Court.

[5]. The Local Commissioner has endorsed that by fixing three *pucca* points, the demarcation was done by Local Commissioner. The details of land in dispute falling between the *khasra* numbers was accorded in the computer of the DGPS Operator namely Vikram Yadav. Every corner of the land comprised in *Khasra* No.318 was earmarked after marking of the aforesaid details of the house constructed in *Khasra* No.318. It has been found at Sr. No.1 that area measuring 33.44 sq. yds. has been utilized towards *rasta*. At Sr. No.2 it has been found that houses of Maha Singh etc. are in existence over 721.55 sq. yds. whereas they are owners of 881 sq. yds. according to revenue record. At Sr. No.3 house of defendant Rohtash is

found to have been constructed over 255 sq. yds., whereas as per revenue record, his entitlement is 123 sq. yds. At Sr. No.4 house of the plaintiff is found to have been constructed over 302.55 sq. yds. whereas his entitlement is of 370 sq. yds. as per revenue record.

[6]. There are some disputed facts that the defendants have improved their entitlement by purchasing shares of other co-sharers even after filing of the suit. The trial Court granted order of *status quo* till final disposal of the suit. In appeal the lower Appellate Court has reversed the order of the trial Court on the premise that the suit itself is barred by Section 47(h) of the Specific Relief Act as equally efficacious remedy for filing suit for partition is available to the plaintiff.

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

[8]. In view of report of Local Commissioner, construction by the defendants over 255 sq. yds. is found to be in existence. With the construction of house of the plaintiff, back portion of the house of the defendants towards western side has been damaged for which repair works are sought to be undertaken by the defendants by demolishing wall of 10 feet height and to reconstruct the same at its place. The ultimate entitlement of the

parties would be adverted to by the trial Court after leading of evidence. Admittedly, both the parties are co-sharers in the suit land.

[9]. 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 facie case, balance of convenience and irreparable loss to be suffered by a party 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 reiterated 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 as summarized in **Sant Ram Nagina Ram's case** (supra) are 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."*

[10]. Perusal of the aforesaid concept would show that mere occupation of larger portion of the joint property does not necessarily mean ouster by other co-sharers as the possession

of one of the co-sharers would be deemed to be possession on behalf of all the 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 co-sharers. It will be a situation where a co-sharer openly asserts his own title by denying the title of others. Evidently, no suit for partition has been filed by either of the parties. The trial Court would determine the exact entitlement of the parties at a later stage with reference to evidence to be led by the parties.

[11]. At this stage mere occupation of larger portion of a joint property cannot be termed to be ouster of the plaintiff. Both the parties have constructed their respective houses over the land in question. Defendants have also constructed building over 255 sq. yds. In case of repair of the construction over the aforesaid area, the plaintiff cannot be allowed to say that the defendants cannot renovate the already existing building.

[12]. In **Jangir Singh vs Naranjan Singh and others, 2015(1) R.C.R. (Civil) 49,** it was held that mere raising of construction over the 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.”

[13]. A co-sharer out of possession is required to seek

partition. Raising of construction by the defendants over 255 sq. yds. of land has been found as a matter of fact even by Local Commissioner. The said construction would not amount to ouster of the plaintiff. As per principle laid down in **Bachan Singh's** case (supra) since both the parties have constructed their houses, therefore, the construction of the defendants cannot be held to be detrimental to the interest of other co-sharers, however the same is subject to partition (if any). Since the construction has already been raised, therefore, even as per ground No.(iv) of **Bachan Singh's** case (supra), the act of co-sharers/defendants in renovating/constructing earlier constructed site cannot be held to be detrimental to the interest of the plaintiff, who is out of possession so far constructed area of the defendants is concerned.

[14]. At this stage, no consideration can be made on this aspect of the case. All the three golden principles cannot be held to be in favour of the plaintiff for the grant of any interim injunction. In case of grant of any injunction, the building material which is lying at the spot for the purposes of renovation of the house of the defendants would be damaged, therefore, there is every likelihood of suffering irreparable loss by the defendants in case of grant of any injunction/status quo by this Court. Existence of *prima facie* case and balance of

convenience are also answered in favour of the defendants.

[15]. For the reasons recorded hereinabove, I find no error in the impugned order dated 04.08.2018 passed by the Addl. District Judge, Gurugram. This revision petition is found to be totally devoid of merits and is accordingly dismissed.

July 04, 2019

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No