

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

CR-1390-2021 (O&M)

Date of decision: 17.08.2021

Satish Kumar and others

....Petitioners

Versus

Mukesh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.M.K.Garg, Advocate for the petitioners
Mr. Sushil Gautam, Advocate for the respondents
no. 1 to 4

ANIL KSHETARPAL, J

The petitioners (plaintiffs) assail the correctness of the order passed by the First Appellate Court on 12.02.2021 while reversing the order passed by the trial court on an application Order 39 Rules 1 and 2 CPC.

Some facts are required to be noticed. The suit was filed by as many as five plaintiffs. They claim to be co-owners in joint, physical possession of land comprised in khasra no.14//19/1 measuring 3 kanal 16 marlas. In substance, their case is that they have purchased undivided share of the aforesaid piece of land from the defendants. Thereafter, in the partition proceedings, the suit land has fallen to their share and they are in the possession of the same. It has further been asserted that tubewell installed in khasra no.14//22/1 (0-2) has been left joint by the Assistant Collector First Grade, Ganaur, while deciding the partition proceedings. The plaintiffs pray that the respondents be restrained from creating any obstruction in the irrigation of the land in question. The defendants contested the suit and pleaded that no doubt the plaintiffs

have purchased the land out of the joint land, even so, the correctness of the partition proceedings was disputed and it was asserted that an appeal against the final order of partition is pending before the Collector, Ganaur (Sonapat). It is further asserted that the tubewell in question was installed by their grandfather and therefore, the plaintiffs have no right, title or interest in the aforesaid tubewell.

Learned trial court on appreciation of the pleadings and the material brought on record held that the plaintiffs have made out a prima facie case in their favour. Thus, the defendants were restrained from creating any obstruction/hindrance in the irrigation of the land from the joint tubewell and dispossessing the plaintiffs. However, in appeal, the First Appellate Court has reversed the order and dismissed the application for grant of injunction.

Heard learned counsel for the parties at length and with their able assistance perused the paper book. Learned counsel for the petitioners while drawing attention of the Court to the Daily Diary Report dated 09.09.2019, submits that after the conclusion of the partition proceedings the plaintiffs were recognized to be in exclusive possession of land comprised in khasra no. 14//19/1. He further submits that First Appellate Court has erred in taking the adverse inference on account of failure to produce a copy of the sale deed. He further contends that the First Appellate Court has also erred while observing that there is no evidence of delivery of possession.

Per contra, learned counsel representing the respondents while drawing attention of the Court to the affidavit of the plaintiffs- Sunil Kumar, Vinod Kumar, Parveen Kumar and Satish Kumar submits

that there was no delivery of possession through aforesaid Daily Diary Report and therefore, the First Appellate Court has correctly accepted the appeal.

After having heard the learned counsel for the parties at length, this Bench proceeds to analyze the material available. It is apparent from the careful reading of the pleadings that the sale deed of the suit land by the defendants in favour of the plaintiffs is not disputed. It is also not disputed that at that time the plaintiffs had purchased the undivided share. It is not the case of the defendants that at the time of sale deed the plaintiffs were put in possession of some other piece of land or they were not delivered possession at all. Furthermore, it is not in dispute that the competent authority has ordered partition and the land in dispute has fallen to the share of the plaintiffs. No doubt, an appeal against the same is pending. However, mere pendency of the appeal does not take away the possession of the plaintiffs. Further, it is apparent from the Daily Diary Report dated 09.09.2019 that in execution of the partition when the authorities went to the spot, the plaintiffs made a statement that they do not need delivery of physical possession because they are already in actual physical possession. In the affidavit dated 06.09.2019, relied upon by the learned counsel for the respondents, it is apparent that the plaintiffs have sworn in affidavit that they are in possession of the property.

Moreover, the First Appellate Court has committed material irregularity in drawing adverse inference against the plaintiffs on account of non-production of a copy of sale deed. In the present case, execution of the sale deed by the defendants in favour of the plaintiffs is

not in dispute. In such circumstances, the court erred in drawing adverse inference against the plaintiffs at the stage of deciding application for grant of injunction. In addition, the court erred in observing that there is no evidence that the plaintiffs were delivered possession of killa no.14//19/1 after partition. It is not the case of the plaintiffs that they have been delivered possession. On careful reading of the plaint, it is apparent that the plaintiffs have claimed that they are in possession and the suit land has fallen to their share in the partition proceedings. It is not the case of the plaintiffs that previously they were in possession of any other piece of land or they were not at all in possession of any piece of joint land. In such circumstances, first Appellate Court has committed error.

Learned First Appellate Court has also erred in giving undue importance to the pendency of appeal against the order of partition. It may be noted here that it is well settled that mere pendency of the appeal only keeps the impugned order under the cloud. However, in the absence of interim order by the appellate authority, the order under appeal continues to be enforceable.

Keeping in view the aforesaid facts, the order under challenge is not sustainable. Hence, the order passed by the First Appellate Court is set aside while restoring the order by the learned trial court.

Hence, the revision petition is allowed.

17.08.2021

rekha

Whether speaking/reasoned :

Whether reportable :

Yes/No

Yes/No

(ANIL KSHETARPAL)
JUDGE