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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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Date of decision: April 24, 2023

Vijay Aggarwal and others

....Petitioners

versus

Rajnish Gupta and others

....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA**Present:-** Mr. Akshay Kumar Jindal, Advocate for petitioners.

Mr. Pardeep Singh Poonia, Advocate,
 Mr. Pulkit Dhanda, Advocate,
 Mr. Gaurav Dhingra, Advocate for caveator-respondent No.1.

ARUN MONGA, J. (ORAL)

Petition herein is for setting aside the impugned order dated 28.03.2023 (Annexure P-1) passed by learned Additional District Judge, Ambala whereby order dated 03.03.2023 (Annexure P-10) passed by learned Additional Civil Judge (Junior Division), Naraingarh, District Ambala was set aside and petitioners/defendants No.1 to 3 were restrained from interfering or from raising construction over suit property alleged to be in possession of plaintiff/ respondent No.1.

2. The revision petition is premised on the averments that plaintiff/ respondent No.1 herein filed suit for mandatory injunction with the prayer that petitioners/defendants No.1 to 3 may be directed to remove encroachment/ construction raised by them over plot measuring 10 Marlas, being part of Khasra No.49//10 (8-0), situated in village Dera, H.B. No.190, Tehsil Narangarh, District Ambala. This portion was reflected as ABCD in the site plan. Further prayed to restrain defendants No.1 to 3/petitioners herein from interfering in peaceful possession of plaintiff.

2.1. Along with the suit, plaintiff had also filed an application under Order XXXIX Rules 1 and 2 read with Section 151 of Code of Civil Procedure, 1908 (for

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short 'CPC') for grant of *ad interim* injunction restraining defendants No.1 to 3 from interfering in peaceful and lawful possession of plaintiff over land in question. Said application was dismissed by learned trial Court vide order dated 03.03.2023 (Annexure P-10).

2.2. Aggrieved, plaintiff/respondent No.1 herein filed an appeal against aforesaid order, which was allowed by learned First Appellate Court vide impugned order dated 28.03.2023 (Annexure P-1).

3. Learned counsel for petitioners would contend that no dimensions of land purchased by plaintiff has been mentioned in the sale deed dated 05.09.2005 to establish that plaintiff was delivered possession of some specific portion by his predecessor. Also contends that under the garb of injunction suit and *ad interim* application, plaintiff is trying to take possession of area under possession of petitioners/defendants No.1 to 3.

3.1. Further contends that parties are co-sharers in Khasra No.49//10 and therefore, no injunction can be granted. He further contends that there is nothing pleaded in the plaint filed by plaintiff that construction raised by petitioners is on the portion of plaintiff. Suit is barred in view of provisions of Section 41(h) of the Specific Relief Act, 1963 since plaintiff has an equally efficacious remedy of filing suit for partition to get entire land partitioned.

3.2. He would further contend that by passing impugned order dated 28.03.2023 (Annexure P-1), learned First Appellate Court has become *functus officio* and cannot entertain any such application of plaintiff. Petitioners are already in possession of suit property and raised construction over portion in their possession in joint land.

4. On the other hand, learned counsel for caveator-respondent No.1/ plaintiff opposes the revision petition and submits that impugned order dated 28.03.2023 (Annexure P-1) passed by learned Additional District Judge, Ambala is a well-reasoned order and deserves no interference.

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5. I have heard learned counsel for parties and gone through the record.

6. Having heard rival contentions and after perusal of impugned order of the Appellate Court, I am of the view that in order to balance the equities, same warrants interference from this Court. More of it later.

6.1. Before advertizing further, it would be apposite to reproduce learned trial Court's order dated 03.03.2023 (Annexure P-10), set aside by learned First Appellate Court, which is as below:-

"18. Now, first of all, the plaintiff has sought the relief to restrain the defendants from interfering in to the peaceful possession of the plaintiff over the suit land. It is also well settled law that co-owner are in possession of each and every inch of the undivided property till the same is partitioned by metes and bounds and injunction cannot be granted against another co-owner restraining the one co-owner from interfering in possession of other co-owner. In this regard authority "Ram Niwas Vs. Jai Ram 2000(3) RCR (civil) 738" can also be relied upon.

19. At this stage, the plaintiff has failed to prove his exclusive possession over any specific portion of the joint property i.e. 49//10(8-0). As already discussed, apart from sale deed, the plaintiff has not placed on file any document to prove his exclusive possession over any specific portion of the joint land. The sale deed executed in favour of the plaintiff is of 2005 and he has not placed on file any demarcation report etc. to prove his exclusive possession over the suit land. The plaintiff being co-sharer with the defendant No. 3 is not entitled to seek any injunction against other co-sharer except in case of his exclusive possession over any portion of the joint land which at this stage, the plaintiff has failed to prove. Hence, no injunction can be passed against the defendants who are co-sharers in the joint land.

*20. Further, the plaintiff has sought the relief to restrain the defendants from raising any further construction over the suit land. Undoubtedly, a co-sharer can raise construction over the joint land being in possession of that parcel of the land. The law on the subject is quite uniform and Hon'ble Punjab and Haryana High Court in the case titled as **Surjeet @ Surjit Singh Kataria and others Vs. Raj Hans & Ors. 2008(1) Law Herald 284 (P&H)**, observed that, "co-sharer cannot be prevented from raising any construction over his share of land or any vacant piece of land in his exclusive possession even if the property is stated to be joint."*

*21. But, if raising of construction is shown to be detrimental to the interest of other co-sharers, in given peculiar facts and circumstances of a particular case, general rule shall not apply and there is nothing barring the Court from restraining the co-sharer from raising construction over the joint property. In this regard, I am guided by law laid down in case titled as "**Bachan Singh Vs. Swaran Singh (2000) 126 PLR 416 (P&H)**" wherein it is held 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 the 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.”

22. *Now, again adverting to the facts of the present case, in this case, at this stage, no document has been placed on file to prove the fact that act of the defendant No.1 to 3 is the detrimental to the interest of the plaintiff. Further, there is nothing on case file to establish the fact the raising of construction over the suit land by the defendant No. 1 to 3 is detrimental to the interests of the plaintiff or the value of the joint property will be diminished due to the act of the defendants. Further, there are no pleadings of the plaintiff that raising of construction by the defendants will amount to ouster of the plaintiff in the joint land or construction is detrimental to the interest of the plaintiff. As already discussed, merely raising of construction does not amount to ouster or detrimental to the interest of the co-sharers. Moreover, the construction raised by the defendants or other co-sharers will be subject to partition. Our Hon'ble High Court in the case of **Mukhtiar Singh Vs. Tara Singh and another, 2000(4) R.C.R. (Civil) 379 (P&H)** held that even if a co-sharer exceeds his share while raising construction on the joint land, he cannot be restrained from so doing because mere raising of construction itself does not amounts to 'ouster' of other co-sharer and the construction will be subject to the partition of joint property.*

23. *Even otherwise, in the present case, admittedly construction has already been raised upto lintel level and there is nothing on case file to prove the fact that any objection was raised by the plaintiff at the time of the filling of foundation stones of the suit land. As the construction work has been raised upto lintel level, so, at this stage, balance of convenience is in favour of the defendant No. 1 to 3 as his work has been stopped by the order dated 10.02.2023 passed by the court. Moreover, the suit land is in the nature of gair mumkin plot and this court has jurisdiction to partition the suit land, but, the plaintiff has not filed the suit for partition of the joint land. According to Section 41(h) of the Specific Relief Act, 1963, relief of the injunction can't be granted “When equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in*

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case of breach of trust". In this case, the plaintiff has alternative remedy to file civil suit for partition of the joint land but, he has not filed the suit for partition, so, relief of injunction can't be granted in his favour."

7. Having perused aforesaid, I am of the view that learned trial Court rightly declined injunction for the reasons already stated in the order above. I am unable to persuade myself that distinction drawn by learned Appellate Court in bringing legal fiction that when any khasra number of the land which is earlier agricultural in nature, comes in Abadi-deh, then it loses its identity of agricultural land and law of agricultural land does not apply in the said case where a colony has been set up. The conceded position herein is that none of the parties has resorted to any partition proceedings and claim of possession *qua* respective portion is merely based on self-proclamation of predecessor-in-interest, who were co-sharers and vendors, who sold their respective portions to plaintiff as well as petitioners/defendants No.1 to 3. While on one hand, plaintiff-respondent No.1 claims that he has been in possession of area depicted as ABCD on the site plan appended with the plaint and petitioners-defendants No.1 to 3 had purchased the area CDEF adjoining to it and under the garb of carrying out construction at CDEF, they have encroached ABCD. The defence of petitioners herein is that apart from 10 Marlas of suit land purchased by them, they are also owners of additional 15 Marlas of land and construction beyond 10 Marlas in CDEF is being carried out in the balance of 15 Marlas. They neither have any intention to encroach ABCD nor are they exceeding their construction beyond area of 25 Marlas owned by them.

8. Be that as it may, as already observed hereinabove, I am in agreement with the reasons recorded by learned trial Court for declining injunction. Therefore, learned Appellate Court's order dated 28.03.2023 (Annexure P-1) is set aside. However, learned trial Court order dated 03.03.2023 (Annexure P-10) is modified to the extent that in case, eventually, it is found out upon the outcome of suit by learned trial Court that area marked by letters 'ABCD' indeed was throughout in possession of

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plaintiff and he is owner of the same, subject of-course to the partition proceedings to be instituted by either of the parties, then petitioners shall have to raze the construction to ground level at their own peril, if it is found that it is in portion ‘ABCD’. However, petitioners shall not claim any damages and/or any special equity on the ground that they had raised construction on a *bona fide* belief that they would get the said area in their possession, in case, plaintiff or defendants No.1 to 3 institute(s) partition proceedings subsequently.

- 9. With these observations, instant revision petition stands disposed of.
- 10. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

April 24, 2023
mahavir

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