

Before : S. S. Grewal, J.

OM PARKASH AND OTHERS,—Petitioners.

versus

CHHAJU RAM,—Respondent.

Civil Revision No. 1047 of 1992.

1st April, 1992.

*Code of Civil Procedure, 1908—O. 39 rls. 1 & 2—Temporary injunction to restrain co-sharer in exclusive possession of specific portion of land from raising construction—Co-sharer cannot be allowed to raise construction on land in his possession—Every other co-sharer also a joint owner of every inch of land till same partitioned by metes and bounds.*

*Held, that it is quite obvious that a co-sharer who is in exclusive possession cannot be permitted to raise construction on the land in his possession, as every other co-sharer is also a joint owner of every inch of the entire joint holding till the same is regularly partitioned by metes and bounds.*

(Para 7)

*Petition under Section 115 C.P.C. for revision of the order of the Court of Shri P. C. Gupta, Addl. District Judge, Kurukshetra, dated 18th March, 1992 reversing that of Shri Dewan Chand, HCS, Senior Sub Judge, Kurukshetra, dated 10th March, 1992 accepting the appeal and setting aside the order dated 10th March, 1992 under appeal with costs, and restraining the defendants from raising any sort of construction over the suit land till the decision of the suit on merits, and directing the learned lower court to decide the case expeditiously not later than by six months.*

*Claim:—Suit for permanent injunction.*

*Re : Application under Order 39, rules 1 and 2 read with S. 151 of the Code of Civil Procedure.*

*Claim in Revision:—For reversal of the order of lower appellate Court.*

CIVIL MISC. NO: 2666-CII of 1992:—

*Application under Section 151 Civil Procedure Code, praying that application may kindly be allowed and the operation of the impugned order be stayed pending disposal of the revision. It is further prayed that any other order which this Hon'ble Court deem fit in*

*the circumstances of the case be passed permitting the petitioners to complete the construction.*

V. K. Jain, Sr. Advocate with S. K. Kapoor, Advocate, for the petitioners.

Rakesh Jain, Advocate, for the respondents.

#### JUDGMENT

S. S. Grewal, J.

This revision petition is directed against the order of Addl. District Judge, Kurukshetra, dated 18th of March, 1992, whereby the order passed by Senior Sub Judge, Kurukshetra, dated 10th of March, 1992, was set aside and temporary injunction was granted restraining the defendants from raising any sort of construction over the suit land till the decision of the suit on merits. The trial court was directed by the Appellate Court to decide the case expeditiously not later than six months.

(2) In brief, facts relevant for the disposal of this revision petition are that Chhajju Ram plaintiff filed a suit against Om Parkash and other defendants for grant of permanent injunction restraining the defendants from raising any type of construction over the suit land measuring 12 Kanals 15 Marlas situated in Village Pir Pipli, District Kurukshetra, on the averments that Ram Saran Dass was owner in possession of the suit land, which, after his death was inherited by his widow Smt. Rameshwari Devi and his daughters. Smt. Rekha, one of the heirs, sold her 1/6th share out of the suit land to the plaintiff.—*vide* registered sale deed dated 28th of May, 1991 and as such the plaintiff is in joint possession of the suit land. It was further pleaded that defendant Nos: 1 and 2 in collusion with defendant No. 3 Halqa Patwari got the suit land partitioned by playing fraud upon the plaintiff and therefore the plaintiff was constrained to file present suit for declaration that the mutation on the basis of the partition is illegal, void and is an act of fraud, which is still pending. It was further pleaded that defendant Nos. 1 and 2 in collusion with defendant No. 3 are adamant to raise construction on the front portion of the land in suit and in case the defendants are not restrained from doing so, the plaintiff shall suffer irreparable loss. On similar grounds, application for grant of temporary injunction was moved.

(3) The defendants pleaded that,—*vide* Mutation No. 1092 sanctioned on 16th August, 1991, the land in suit stands partitioned between

the co-owners and each co-owner has become exclusive owner in possession of land which fell to his share. It was pleaded that in partition plaintiff got plot No. 5 measuring 1 Kanal comprised in khasra No. 28/21/4 and had no right or title in the remaining suit land which fell to the share of other co-owners. Even otherwise, the plaintiff has no right to file the suit and cannot seek injunction prayed for as Jiwan Dass defendant No. 2 purchased specific land measuring 2 Kanals 1 Marlas situated in Rect. No. 28 Khasra No. 20/6(1-1), 20/3(0-7), 21 min north (0-13) from Smt. Rameshwari Devi widow of Ram Saran Dass, for a sum of Rs. 1,40,000,—vide registered sale deed dated 3rd of May, 1991. It was further pleaded that in the partition defendant No. 2 was allotted some land out of which plot measuring 70 square yards (2 Marlas) was sold to defendant No. 3 and thus defendant Nos. 2 and 3 are exclusive owners in possession of the said land and have every right to raise construction thereon. It was next pleaded that the partition took place with the consent and free will of all the co-owners and that the construction work is going on at the spot and building material is also lying there.

(4) The learned counsel for the parties were heard. On behalf of the defendant petitioners, it was mainly submitted that after the private partition took place between the co-owners on 15th June, 1991, the defendants are in exclusive possession of specific portion of land which had fallen to their share in the partition proceedings and as such the plaintiff has no right or title in the suit land which is in exclusive possession of defendant Nos: 2 and 3 and that the Appellate Court had erred in law in reversing the well considered judgment of the trial court.

(5) The parties are at variance as far as the question of partition of land in suit amongst all the co-owners including the plaintiff is concerned. Thus the partition deed, which admittedly, is not a registered document, is yet to be proved on the record. Entries in the latest jamabandi for the year 1986-87 produced before this Court by the learned counsel for the petitioners do not in any manner indicate that any private partition has taken place between the co-owners. Rather, Ram Saran Dass is shown to be in exclusive possession of the entire suit land. Copy of khasra girdawari for kharif 1990-91 does indicate that partition of land measuring 7 Marlas comprised in khasra No. 28/20/3 (0-7), came to the share of Jiwan Dass (defendant-vendee) in partition proceedings. However, in the absence of other legal and cogent material on the record at this stage, it can not be reasonably inferred that any partition has taken place with regard

to the entire suit land, between all the co-owners or that the joint owners became exclusive owners in possession of specific portions of suit land. Admittedly, the defendants want to construct/give finishing touches to the partially constructed shops on the front portion of the suit land. The entire land in suit being chahi, as such the construction would obviously change the user of the land in suit. Such an eventuality would also prejudice the rights of the plaintiff and other co-sharers in the suit land. Mere fact that defendants are ready and willing to give an undertaking to demolish such construction and taking away *malba* (if plaintiff succeeds), would not be sufficient to compensate loss or damage caused to the plaintiff. Rather, balance of convenience at this stage would be to restrain the defendants from raising any new/further construction over the land in dispute during the pendency of the suit. Thus the balance of convenience is also in favour of the plaintiff who has approached this Court for the redressal of his grievances at the earliest and has also been able to make out a *prima facie* case for the grant of temporary injunction. I find support in my view from the Full Bench Authority of this Court in *Bhartu v. Ram Sarup* (1). In the latter authority reliance was placed on the Division Bench Authority of this Court in *Sant Ram Nagina Ram v. Daya Ram Nagina Ram and others* (2), wherein *inter se* rights and liabilities of the co-owners were settled as follows:—

- (1) A co-owner has an interest in the whole property and also in every parcel of it.
- (2) 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.
- (3) A mere occupation of a larger portion, or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
- (4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not

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(1) 1981 P.L.J. 204.

(2) A.I.R. 1961 Punjab 528.

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.

- (5) 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.
- (6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.
- (7) Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.

In the abovesaid Full Bench authority in *Bhartu's case*, it was further observed that when a co-sharer is in possession exclusively of some portion of the joint holding, he is in possession thereof as a co-sharer and is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. It is also undisputed that a vendor cannot sell any property with better rights than he himself has. Consequently, when a co-sharer sells his share in the joint holding or any portion thereof and puts the vendee into possession of the land in his possession, what he transfers is his right as co-sharer in the said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all the co-sharers.

(6) Dealing with the rights of transferee from a co-owners, it was observed by the Full Bench in *Bhartu's case supra*, as follows:—

“The rights of a transferee from a co-owner are not entirely dependent on judicial decisions but are regulated by Section 44 of the Transfer of Property Act which provides that where one or two or more co-owners of the immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same but subject to the conditions and liabilities affecting

at the date of the transfer, the share or interest so transferred. According to this statutory provision also what transferee gets is the right of the transferor to joint possession and to enforce a partition of the same irrespective of the fact whether the property sold is fractional share or specified portion, exclusively in possession of the transferor. Again, it cannot be disputed that when a co-sharer is in exclusive possession of the specified portion of the joint holding, he is in possession thereof as a co-sharer and all other co-sharers continue to be in its constructive possession. By the transfer of that land by one co-owner, can it be said that other co-sharers cease to be co-sharers in that land or to be in its constructive possession. The answer obviously would be in the negative."

It was further held by the Full Bench of this Court in *Bhartu's case* (supra) that "the effect in law of sale of even of specified portion of joint land is that it is only a sale of portion of share by one of the co-owners".

(7) Thus it is quite obvious that a co-sharer who is in exclusive possession cannot be permitted to raise construction on the land in his possession, as every other co-sharer is also a joint owner of every inch of the entire joint holding till the same is regularly partitioned by meets and bounds. I find support on this point from the Single Bench authority of this court in *Mst. Parsini alias Mano v. Mohan Singh and others* (3), wherein it was held that a co-sharer in exclusive possession of a part of joint land cannot raise construction on the land as every co-sharer is a joint owner of every inch of the whole land. To the same effect is the latest Single Bench authority of this Court in case *Daulat Ram v. Dalip Singh and others* (4).

(8) The learned counsel for the defendant-petitioners placed reliance on Single Bench Authorities of this Court in *Jiwan Singh and others v. R. Kant and another* (5) and *Pishora Singh v. Shrimati Lajo Bai and others* (6), in support of the proposition that a co-sharer in exclusive possession of part of the land which is not in excess of his share can raise construction thereon and a joint owner not in

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(3) 1982 P.L.J. 280.

(4) 1989 (1) R.L.R. 523.

(5) 1985 P.L.J. 193.

(6) 1974 R.L.R. 644.

possession of the same cannot restrain him from raising the construction.

(9) The view expressed in *Mst. Parsini's case* (supra) was not noticed in the aforesaid authority in *Jiwan Singh's case*. Even otherwise, the view taken by the Full Bench of this Court in *Bhartu's case* (supra) and by the Division Bench in *Sant Ram Nagina Ram's case* (supra) has to be followed. Thus the view expressed in Single Bench Authorities of this court in *Amar Singh and others v. Hira Singh and others* (5), *Babu Ram and others v. Harjit Kaur and others* (6) and *Pishora Singh v. Shrimati Lajo Bai etc.* (7), which runs counter to the views expressed by Full Bench in *Bhartu's case* (supra) and Division Bench in *Sant Ram Nagina Ram's case*, cannot be relied upon.

(10) Mere fact that the defendant-petitioners in the instant case are ready and willing to give an undertaking to remove the *malba* in case the plaintiff succeeds in establishing his case, cannot be considered to be a cogent ground to permit the defendants to raise further construction over the land in suit.

(11) In the present case, as already discussed above, in the absence of any legal, cogent and reliable evidence about partition of the joint holding, the defendants cannot be permitted to raise construction over the suit land during the pendency of the present suit. The view taken by the Appellate Court cannot be said to be illegal. Nor the same suffers from any material irregularity. This revision petition is without any merit and is hereby dismissed with no order as to costs. However, it is clarified that nothing herein observed for disposal of this petition, shall in any manner be construed to affect the rights of the parties on merits. The trial court is further directed to dispose of this case expeditiously (as already directed by the lower Appellate Court). Copy of this order be sent to the Trial Court for compliance.

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(5) 1986 P.L.J. 41.

(6) 1987 P.L.J. 122.

(7) 1974 Curr.L.J. 626.

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