

Before Amol Rattan Singh, J.

JASPAL KAUR AND ANOTHER—Petitioners

versus

HARBANS SINGH AND OTHERS—Respondents

CR No. 2025 of 2020

July 16, 2020

Code of Civil Procedure, 1908—Order XXXIX Rls. 1, 2—Revision petition—Suit for separate possession by way of partition of the suit property, which is in joint ownership of parties—the defendants/petitioners have a constructed house on it—the Courts below disallowed further construction and alienation of land by issuing temporary injunction—Challenge to, on the ground that already existed construction is being expanded, and that a co-sharer in possession should not be disallowed from doing so at his own risk—Held, allowing the defendants to complete any further construction would mean they would start living there, possibly completely ousting the plaintiffs from any part of the property—It would be against the ratio of Full Bench judgment in Bachan Singh case, as it would be detrimental to interests of other co-owners, who have already instituted a suit for partition in this very lis—Therefore, the lower courts have not erred in granting injunction to the plaintiffs.

Held, that thus, even as per the aforesaid parameters, what needs to be stated here, is that the contention of the respondent-plaintiffs in their plaint is that houses already stood constructed from the time of their predecessors-in-interest (who were brothers), with joint ownership of the suit property, and therefore, in the opinion of this court, allowing the completion of any further construction as may perhaps have been raised even during pendency of the suit or immediately prior thereto, would mean that the petitioners would also start living in the said new construction, thereby possibly completely ousting the respondent-plaintiffs from any part of the property, though of course as to how much property would still remain unconstructed/unoccupied cannot be stated by this court in the absence of any kind of averment to that effect.

(Para 26)

Vijay Lath, Advocate, *for the petitioner.*

AMOL RATTAN SINGH, J. (ORAL)

(1) By this petition, the petitioners challenge the orders passed by the learned trial court (Civil Judge, Jr. Divn., Roopnagar), and the appellate court (Additional District Judge, Roopnagar), dated 31.05.2019 and 05.12.2019 respectively, by which the application filed by respondent nos.1 to 5 herein (plaintiffs in the suit instituted by them), under the provisions of Order 39 Rules 1 and 2 of the CPC, has been allowed.

(2) The suit is one instituted by the said respondents herein seeking separate possession of the suit property by way of a partition thereof, the contention being that the respondent-plaintiffs, the petitioners and the other defendants in the suit (including the proforma defendant) are all co-sharers in the suit property, which is *Ghair Mumkin* in nature, i.e. it is for residential use, it having devolved upon the parties from their immediate ancestors, who too were joint owners thereof (those three immediate 'ancestors' being Hardiyal Singh, Gurdiyul Singh and Mani Singh).

(3) Even as per the case of the present petitioners, as is not denied by Mr. Lath, learned counsel appearing for them, the joint nature of the property is not in dispute, as is duly reflected in the *Jamabandi* for the year 2015-16 (copy Annexure P-5 with the petition).

(4) The bone of contention is that, as per the petitioners, they being in possession of the suit property and having constructed a house on it, the interim order restraining them from doing so and from alienating the property in any manner, is wholly erroneous and therefore needs to be set aside.

(5) Mr. Lath submitted before this court that, firstly, the petitioners are actually residents of the village where the property is situate, i.e. Village Railokalan, whereas the respondent-plaintiffs are resident in Village Cherrian (stated to be, as per the learned counsel, at a distance of about 15 k.m. from Railonkalan).

(6) Learned counsel next submitted that the petitioners are in fact in the process of expanding the already existent construction and consequently, with a wedding in the family also coming up, both the learned courts below have wholly erred in disallowing them the construction, which naturally would be at their own risk and costs.

(7) In support of his contention, Mr. Lath cites two judgments of coordinate Benches of this court, in ***Dr. Bhupesh Mangla versus Dr.***

Ravi Chander Mangla¹ and ***Mukesh Kumar and others versus M/s Saini Developers and Promotes Pvt. Ltd.***².

(8) In fact at the time when the petition came up for hearing a few days back on July 10, 2020, it had been pointed out to learned counsel for the petitioners by this court that even the coloured photographs annexed with the petition show that a fresh construction in progress, with obviously nobody living there, and consequently, simply because the respondent-co sharers are not living in the same village, if the said construction was allowed to continue, it would obviously complicate the matter as regards the partition of the suit property.

(9) To that observation, he had replied that this court, in the aforesaid judgments, has held to the effect that a co-sharer in possession of the suit property should not be disallowed from constructing upon it at his own risk and cost, with eventually any suit for partition to decide the shares falling to each share-holder.

(10) Mr. Lath had also submitted that, as is stated in the written statement filed in reply to the plaint, it has been specifically stated that there is a meter connection (presumably electricity meter), in the name of the first petitioner herein, Jaspal Kaur, as also in the name of her son Sarabjit Singh, on the suit property which is in their possession.

(11) As recorded in the order of this court dated 10.07.2020, since both the judgments had to be considered by this court, which by video conferencing was not fully possible looking at the number of cases listed on that date, the judgment in the present petition had been reserved.

(12) A perusal of the said judgments shows that as regards *Dr. Bhupesh Manglas' case (supra)*, it was a short order by a coordinate Bench of this court, by which that revision petition was disposed of with a direction that the defendants or any other persons claiming under them, could raise construction during the pendency of the suit, at their risk and responsibility, with them also held liable to remove the *malba* etc. if the partition proceedings were decided against them.

(13) Though that fact has not been specifically referred to for passing that direction, it is seen that (at that stage in 2003), that suit had remained pending before the trial court since 1995 or even before, with

¹ 2003 (4) RCR (Civil) 657

² 2019 (2) PLR 708

the impugned orders in that case having been passed on 18.02.1995 and 23.05.1998.

(14) In *Mukesh Kumars'* case (supra), which is no doubt a detailed judgment, a coordinate Bench of this court had held that, even in terms of the judgment of a Full Bench of this Court in *Bachan Singh* versus *Swaran Singh*³, and *Jangir Singh* versus *Naranjan Singh and others*⁴, raising construction on common land would not amount to ouster of other co-sharers and therefore it was held that a co-sharer cannot seek injunction against another co-sharer against raising construction, the remedy available to such co-sharer only being by institution of a suit for partition of the property.

(15) Thus, having considered the matter, what had been opined by the Full Bench was reproduced in *Mukesh Kumars'* case as follows:-

(16) Thus, at first blush it would seem that the contention of the learned counsel for the petitioners in the present case may be not without basis, but, naturally, each case (especially as regards an injunction to be granted), has to be seen on its own facts and circumstances, with the observations of the Full Bench as contained in sub-paras (iii) and (iv) as reproduced herein above, obviously equally applicable as are the observations made in sub-paragraphs (i) and (ii).

(17) It is to be further noticed that as per what is contained in paragraph 4 of the plaint (copy Annexure P-1), the suit property was earlier jointly held by the predecessors-in-interest of the current parties to the *lis*, i.e. by Hardiyal Singh, Gurdiyaly Singh and Mani Singh, who were brothers, with the averment therein being that even houses had been constructed thereupon, which were also jointly held by all co-sharers.

(18) Thereafter, after giving the details of who inherited the property from whom, it is averred in paragraph 10 of the plaint that the contesting defendants in the suit (including the present petitioners), taking advantage of the fact that the plaintiffs and proforma defendant were residing in Village Cherrian, wished to grab the share of the plaintiffs and the proforma defendant, thereby eventually leading to the institution of the suit.

³ 2003 (3) RCR (Civil) 70

⁴ 2015 (1) RCR (Civil) 49

(19) In the written statement filed by the present petitioners, it has been stated in reply to para 4 of the plaint that “The answering defendants are in possession of the suit property. There is meter connection in the name of Sarabjit Singh and also in the name of defendant Jaspal Kaur.”

(20) In reply to paragraph 10 (on merits) thereof, it has been stated as follows:-

“15. On a consideration of the judicial pronouncements on the subject, we are of 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 certainly 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.”

“That it is wrong and denied. The defendants Sarabjit Singh and Pavittar Singh are enjoying the possession of the suit property and they have also raised the construction therein. The plaintiffs are residing at separate place.”

(21) It is further necessary to notice that in the application filed under Order 39 Rules 1 and 2 of the CPC (copy Annexure P-3), no new construction has been referred to by the respondent-plaintiffs, with the present petitioner no.1, in her reply (along with two other defendants), to that application, has also not stated anything whatsoever with regard to any new construction, with the entire reply being contained in 10 lines, simply denying the contents of the application and stating that the contents of the written statement as regards paragraph 2 of the application be read into the reply.

(22) Hence, as regards the new construction shown by Mr. Lath by way of the photographs (Annexure P-7), this Court is also to notice that the plaint itself is seen to be dated 09.08.2018, with the impugned order passed by the learned trial court being dated 31.05.2019 and consequently this court is not in a position to give any opinion as to when the fresh construction as is shown in the said photographs, was begun, with it further to be observed that though the lintel is also shown to have been laid on the new construction, however, equally obviously it is not fit for inhabitation as yet, with the plastering work, doors, windows still to 'finished' and flooring still to be laid, and with no electricity fittings also seen to have been installed as yet anywhere, in such construction.

(23) Other than that, even if the ratio of the judgment of the Full Bench in *Bachan Singhs' case (supra)* is to be considered, what any court is to consider is that though a co-sharer in exclusive possession of the common property would not be entitled to seek an injunction against another co-owner, yet even clause (i) of those directions (as reproduced herein above), itself says that that would be subject to consideration of the fact that such construction should not amount to ouster of the other co-sharers or would be prejudicial or adverse to his/her interest.

(24) Further, as per what is contained in clauses (iii) and (iv), if the value or utility of the property is diminished, or if it is otherwise considered to be detrimental to the other co-owner, such co-owner who is not in possession, can seek an injunction.

(25) The final observation of their Lordships was that, in any other case, the remedy of the co-owner not in possession of the property would be to seek partition thereof but not an injunction restraining other co-owner from doing any act as was in exercise of his right to every inch of the jointly owned property.

(26) Thus, even as per the aforesaid parameters, what needs to be stated here, is that the contention of the respondent-plaintiffs in their plaint is that houses already stood constructed from the time of their predecessors-in-interest (who were brothers), with joint ownership of the suit property, and therefore, in the opinion of this court, allowing the completion of any further construction as may perhaps have been raised even during pendency of the suit or immediately prior thereto, would mean that the petitioners would also start living in the said new construction, thereby possibly completely ousting the respondent-plaintiffs from any part of the property, though of course as to how much property would still remain un-constructed/unoccupied cannot be stated by this court in the absence of any kind of averment to that effect.

(27) Further, since it has not been mentioned in either the plaint, the written statement or even the application made under Order 39, Rules 1 and 2 of the CPC and the reply thereto, that any new construction was being made, this court cannot say at all that the photographs (Annexure P-7) were of a construction already existing at the time that the suit was instituted in August 2018 (almost two years ago), because the photographs definitely show fresh construction.

(28) All in all therefore, in my opinion, the learned courts below have not erred in granting an injunction to the respondent-plaintiffs vide the impugned orders, with the learned appellate court having also observed that any construction now allowed could complicate the case for partition.

(29) Hence, the completion of any new construction and allowing the petitioners herein to even start residing therein would be also against the ratio of the judgment of the Full Bench (*supra*), inasmuch as, it would definitely be detrimental to the interest of other co-owners and yet further, in any case, with the said co-owners (respondent-plaintiffs) already having instituted a suit for partition (in this very *lis*), obviously it is not an injunction that they are seeking in a separate suit for that purpose and therefore, during the pendency of the suit seeking partition, further construction allowed would definitely not be in the interest of other co-sharers.

(30) Consequently, finding no merit in this petition, it is dismissed *in limine*.

(31) However, naturally, nothing observed hereinabove, will be taken to be a comment on the actual merits of the case for or against the

parties in the lis, with all such observations made being only in the context of an application filed under the provisions of Order 39, Rules 1 and 2 of the CPC.

Ritambra Rishi