

Before Alka Sarin, J.

BABRUBHAN—*Petitioner*

versus

SURENDER PAL AND OTHERS—*Respondent*

CR No. 2034 of 2020

August 10, 2020

Civil Procedure Code, 1908—O. 39, Rls. 1 and 2—Blanket injunction against co-sharers—Held, where defendant is in exclusive possession of portion of suit land, plaintiffs on basis of their claim of being co-sharers, cannot restrain him from using portion of joint land in his possession in manner he likes—Only remedy which petitioner/plaintiff has is to seek partition of suit land—Amount being spent by defendant in raising construction on portion of land in his exclusive possession is at his own risk—Petitioner/plaintiff failed to show existence of prima facie case in his favour or balance of convenience being in his favour or him suffering any irreparable loss and injury if ad-interim injunction is not granted in his favour—Therefore, petitioner/plaintiff not entitled for injunction against co-sharers.

Held, that in the light of the facts of the present case and the judicial pronouncements mentioned above, the plaintiff-petitioner cannot seek a blanket injunction order against the defendant-respondents who admittedly are co-sharers with him. A co-owner cannot injunct and restrain the other co-owners from raising construction on portions of the joint land in the exclusive possession of the other co-owners. The remedy is to seek partition. In *Jangir Singh v. Naranjan Singh & Ors.*, 2015 (1) RCR (Civil) 49, it has been held that where the defendant is in exclusive possession of a portion of the suit land, the plaintiffs on the basis of their claim of being co-sharers, cannot restrain him from using the portion of the joint land in his possession in the manner he likes. The only remedy which the plaintiff has is to seek partition of the suit land. The amount being spent by the defendant in raising construction on a portion of the land in his exclusive possession is at his own risk. It is also now well settled that mere raising of construction on common land by a co-sharer would not amount to ouster of other co-sharers. The plaintiff-petitioner has also been unable to show the existence of a prima facie case in his favour or the balance of convenience being in his favour or him suffering any

irreparable loss and injury if the ad-interim injunction is not granted in his favour. There is no allegation that the defendant-respondents are raising any construction on any portion of the joint land in exclusive possession of the plaintiff-petitioner. The reports of the Local Commissioners Annexures P-7 and P-8 do not further the case of the plaintiff-petitioner as neither of them state anything about the defendant-respondents raising construction in portions of the suit land not in their possession or in exclusive possession of the plaintiff-petitioner. The construction raised by the defendant-respondents would in any event be subject to the outcome of the civil suit.

(Para 17)

Manish Mehta, Advocate, *for the petitioner.*

Vijay Pal, Advocate, *for the respondents.*

ALKA SARIN, J.

(1) The present revision petition under Article 227 of the Constitution of India has been filed by the plaintiff-petitioner challenging the order dated 25.06.2020 passed by the Court of Additional District Judge, Narnaul whereby the order dated 05.06.2020 passed by the Additional Civil Judge (Senior Division), Narnaul granting an ad-interim injunction in favour of the plaintiff-petitioner, has been set aside.

(2) In brief, the facts relevant to the present *lis* are that one Rohtas son of Matadin was the owner and in possession of 1/4th share of land situated in Village Balh Kalan, Tehsil Narnaul, District Mohindergarh, comprised in Khewat No.112 Khatoni No.173, Killa No.41//12 (8-0) measuring 8 kanals. Vide sale deed dated 20.11.2000, the said Rohtas sold an area measuring 1 kanal i.e. 20/160th share out of his 1/4th share in favour of Smt. Kamlesh wife of Babrubhan, the plaintiff-petitioner herein, and gave possession of a specific area to the purchaser i.e. Smt. Kamlesh wife of the plaintiff-petitioner. Vide another sale deed dated 20.11.2000, Rohtas sold another 1 kanal i.e. 20/160th share out of his 1/4th share to the defendants-respondents No.1 and 2 herein and gave possession of a specific area to the purchaser i.e. defendant-respondent Nos.1 and 2. Though the suit land is unpartitioned, however, the parties to the *lis* have been enjoying the property in their possession for the last 20 years. The plaintiff-petitioner became co-owner of the suit land to the extent of 1/8th share by way of a relinquishment deed No.5683 dated 20.03.2020 executed by his wife Smt. Kamlesh in his favour.

(3) The present suit was instituted on 05.05.2020 by the plaintiff- petitioner against the defendant-respondents seeking a decree of permanent injunction to the effect that the defendant-respondents may not interfere in the area abutting to the National Highway No.11 in the land comprised in Khewat No.125 Khatoni No.141 Mustil and Killa No.41//12 (8-0) and may not change its nature by raising construction and interfere in use and possession of the same jointly without getting it partitioned. As per the averments in the plaint, the plaintiff-petitioner claims to being owner in possession to the extent of 1/8th share vide relinquishment deed No.5683 dated 20.03.2020 [however, in the present petition the date of the relinquishment deed has been mentioned as 20.05.2020]. The case set up in the plaint is that the plaintiff-petitioner and the defendant-respondent Nos.1 and 2 are the co-sharers in the suit property and that the suit property is abutting to National Highway No.11 and is yet to be partitioned. It is alleged that the defendant-respondents are carrying on construction work on the suit property and hence the suit for permanent injunction for restraining the defendants-respondents from carrying on the construction. Along with the plaint, an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 was also filed by the plaintiff- petitioner.

(4) The defendant-respondents filed written statement as well as a reply to the application under Order 39 Rules 1 and 2 CPC. They *inter-alia* averred that the defendant-respondents were in exclusive possession since long and have raised pucca construction without any objection by the plaintiff-petitioner and thus the plaintiff-petitioner was estopped to file the suit; that a co-sharer cannot seek an injunction against another co-sharer; that the suit was a result of grudge because the defendant-respondents were proposing letting out a part of the constructed area to a Bank; because the defendant-respondents had approached the authorities for compensation of the land compulsorily acquired.

(5) Vide order dated 05.06.2020 the Trial Court allowed the application under Order 39 Rules 1 and 2 CPC and the defendant-respondents were restrained from raising any further construction on the suit property i.e. Khasra No.41//12. Aggrieved by the said order, the defendant- respondents approached the lower Appellate Court which, vide order dated 25.06.2020, accepted their appeal and set aside the order dated 05.06.2020 passed by the Trial Court and dismissed the application of the plaintiff- petitioner filed under Order 39 Rules 1 and

2 CPC. Hence, the present revision petition by the plaintiff-petitioner challenging the order dated 25.06.2020 passed by the lower Appellate Court.

(6) I have heard learned counsel for the parties and perused the petition as well as the reply filed on behalf of the defendant-respondents.

(7) The undisputed facts in the present case are that the wife of the plaintiff-petitioner and defendant-respondent Nos.1 & 2 purchased shares in the suit property from one Rohtas by way of registered sale deeds dated 20.11.2000. The plaintiff-petitioner became co-sharer in the suit property by way of execution of relinquishment deed dated 20.03.2020/20.05.2020 in his favour by his wife. The plaint itself is totally bereft of any details or a site plan indicating the portions of the suit property which are in the respective possession of the parties. The admitted case of the plaintiff-petitioner is that defendants-respondent Nos.1 and 2 are co-sharers in the suit property. In para 1 of the plaint, it is averred "*Defendants No.1 and 2 are also co-sharers in the above property and defendant No.3 has nothing to do with the above property*". In para 2 of the plaint, it is further averred "That the disputed property is irrigated type of land and is abutting to Highway No.1, which has not been partitioned legally by metes and bounds till date and is a joint property". In para 3 of the present petition, it is also averred "That the National Highway Authority of India has acquired certain land areas for building NH-11 from Delhi to Jaisalmer. For this road 5 marla land of aforesaid land has also been acquired. All the above named co-sharers as recorded have received the compensation from the competent authority in accordance with their respective shares without any dispute for objection from any side. This fact further reveal that the land is wholly joint and not yet partitioned".

(8) There is no averment in the plaint to suggest that the defendant-respondent Nos.1 and 2, who are co-sharers in the suit property, are raising construction on land in excess of their share. The plaintiff-petitioner is wanting a blanket stay on construction in the entire khasra number which is not permissible in law. The plaintiff-petitioner's own case is that some portion of the land abutting to National Highway No.11 comprised in Killa No.41//12 (8-0) was acquired by the National Highway Authority and the compensation was divided amongst the co-sharers. The stand of the defendant-respondents is that the construction being carried out by them is over their old construction part of which was demolished due to the acquisition by the

National Highway Authority of India.

(9) The orders passed by the Courts below reveal that two Local Commissioners were appointed. The first Local Commissioner was appointed vide order dated 12.05.2020 on an application by the plaintiff- petitioner and in the report of the Local Commissioner (Annexure P-7) it is *inter-alia* stated that “it was found at the spot that the defendant is raising construction upon the old plaster, which is doing inside his boundary”. The plaintiff-petitioner, not satisfied with the report of the Local Commissioner (Annexure P-7), filed objections and also moved another application under Order 39 Rule 7 read with Order 26 Rule 9 read with Section 151 CPC for appointment of a fresh Local Commissioner i.e. some Revenue Officer and building expert to conduct inspection on the spot and to report whether there was any alleged old construction existing. Vide order dated 19.05.2020 the Trial Court appointed Field Kanungo of Village Balaha Kalan as Local Commissioner to conduct inspection on the spot in Khasra No.41//12 with the help of a building expert/SDE PWD(B&R). The Building Inspection Report prepared by the SDE PWD(B&R) is Annexure P-8 and it is *inter-aliamentioned* therein that “During course of inspection it was noticed that the building in Khasra No.41/12 was raised with new construction on the old existing foundation only Left Hand side & back Side wall. The Right Hand side wall & Front Side wall was raised with new foundation work of the building. The middle wall is also constructed with new construction work no old construction work was found in the building. All the super structure work of the building is newly constructed”.

(10) Learned counsel for the plaintiff-petitioner has relied upon the judgment of a Full Bench of this Court in **Ram Chander versus Bhim Singhand others**¹ to contend that even if a specific portion of the land was sold in favour of a co-sharer, he would continue to be a co-sharer in every inch of land. To further buttress his arguments, learned counsel for the plaintiff-petitioner has relied upon the judgment of the Supreme Court in **Gangubai Babiya Chaudhary and others versus Sitaram Bhalchandra Sukhtankar and others etc.**² Learned counsel for the defendant-respondents on the other hand has relied upon the Division Bench’s judgment in **Bachan Singh**

¹ 2008 (3) RCR (Civil) 685

² 1983 (4) SCC

versus Swaran Singh.³

(11) It is not the case set up by the plaintiff-petitioner that the defendants-respondents were in any way interfering or raising construction on land in his exclusive possession. Nor is it his case that the defendant-respondents are raising construction on land in excess of their share. Admittedly, the defendants-respondents are co-sharers and in possession of part of the suit property and they have every right to construct as per their share.

(12) In the judgment of the Supreme Court in *Gangubai Babiya Chaudhary's case (supra)*, it has been held as under:

“6. When an interim injunction is sought, the Court may have to examine whether the party seeking the assistance of the Court was at any time in lawful possession of the property and if it is so established one would prima facie ask the other side contesting the suit to show how the plaintiffs were dispossessed? We pin-pointed this question and heard the submission. We refrain from discussing the evidence and recording our conclusions because evidence is still to be led and the contentions and disputes have to be examined in depth and any expression of opinion by this Court may prejudice one or the other party in having a fair trial and uninhibited decision. Having given the matter our anxious consideration, we are satisfied that this is not a case in which interim injunction could be refused. Similarly we are of the opinion that if respondents are allowed to put up construction by the use of the F.S.I. for the whole of the land including the land involved in dispute, the situation may become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter. If on the contrary injunction is granted as prayed for the respondents are not likely to be inconvenienced because they are in possession of about 9,000 sq. metres of land on which they can put up construction.”

(13) In the judgment by the Full Bench of this Court in *Ram Chander's case (supra)* it has been held:

“18. It is, therefore, apparent that a co-owner has an interest in the entire property and also in every parcel of the joint

³ 2000 (3) RCR (Civil) 70

land. When a co-sharer alienates his share or a part thereof in the joint holding what he brings forth for sale is what he owns i.e. a joint undivided interest in the joint property. A sale, therefore, of land from a specific khasra/killla number, forming part of a specific rectangle number, but being a part of a joint khewat, would, in view of the nature of the rights conferred upon a co-sharer, be deemed to be the sale of a share from the joint khewat and such a vendee would be deemed to be a co-owner/co-sharer in the entire joint khewat, irrespective of the artificial divisions of the joint land into different rectangles, khasra and killla numbers.

19. Another attribute of joint property is that where a co-owner in possession of a specific portion of the joint holding and recorded as such in the revenue record, transfers any right, title or interest, from the portion in his specific possession, his vendee would be entitled to protect the portion so transferred, without, however, asserting exclusive ownership to the portion so transferred and possessed, till such time as the joint estate is not partitioned.”

(14) It is trite that a co-owner is owner of every inch of the land till such time as the partition is not effected. In both the judgments referred to by learned counsel for the plaintiff-petitioner it is nowhere held that a co-owner can seek a blanket injunction against another co-owner.

(15) In *Bachan Singh's case* (*supra*), the Division Bench of this Court has held as under:

“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”.

(16) The suit is pending adjudication before the Trial Court. At the stage of consideration of an application under Order 39 Rules 1 and 2 CPC, the principles which need to be considered are the existence of a *prima facie* case, balance of convenience, and irreparable loss and injury that may be suffered. The rights and liabilities of co-sharers have been judicially interpreted in several decisions including *Sant Ram Nagina Ram versus Daya Ram Nagina Ram*⁴, *Bhartu versus Ram Sarup*,⁵ and in *Ram Chander's case (supra)*. The following principles stand culled out:

“(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.

⁴ AIR 1961 Punjab 528

⁵ 1981 PLJ 204 (FB)

(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.

(vi) 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.

(vii) 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.

(vii) 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.”

(17) In the light of the facts of the present case and the judicial pronouncements mentioned above, the plaintiff-petitioner cannot seek a blanket injunction order against the defendant-respondents who admittedly are co-sharers with him. A co-owner cannot injunct and restrain the other co-owners from raising construction on portions of the joint land in the exclusive possession of the other co-owners. The remedy is to seek partition. In *Jangir Singh versus Naranjan Singh & Ors.*,⁶ it has been held that where the defendant is in exclusive possession of a portion of the suit land, the plaintiffs on the basis of their claim of being co-sharers, cannot restrain him from using the portion of the joint land in his possession in the manner he likes. The only remedy which the plaintiff has is to seek partition of the suit land. The amount being spent by the defendant in raising construction on a portion of the land in his exclusive possession is at his own risk. It is also now well settled that mere raising of construction on common land by a co-sharer would not amount to ouster of other co-sharers. The plaintiff-petitioner has also been unable to show the existence of a *prima facie* case in his favour or the balance of convenience being in his favour or him suffering any irreparable loss and injury if the ad-

⁶ 2015 (1) RCR (Civil) 49

interim injunction is not granted in his favour. There is no allegation that the defendant- respondents are raising any construction on any portion of the joint land in exclusive possession of the plaintiff-petitioner. The reports of the Local Commissioners Annexures P-7 and P-8 do not further the case of the plaintiff-petitioner as neither of them state anything about the defendant- respondents raising construction in portions of the suit land not in their possession or in exclusive possession of the plaintiff-petitioner. The construction raised by the defendant-respondents would in any event be subject to the outcome of the civil suit.

(18) In view of the above, the present revision petition, which is devoid of any merit, is dismissed. It is however, made clear that any observation made above is only for the purpose of disposing of the present Revision Petition and is not to be construed as an opinion of this court on the merits of the suit.

Ritambra Rishi