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*Before G.S. Singhvi & T.H.B. Chalapathi, JJ*

BACHAN SINGH,—*Petitioner*

*versus*

SWARAN SINGH,—*Respondent*

C.R. No. 4549 of 1997

The 6th March, 2000

*Code of Civil Procedure, 1908—0.39 Rls. 1 & 2 and S. 151—Joint Property—Co-owners—Exclusive possession—Whether a co-owner can seek injunction against another co-owner—Held, no—However, circumstances where injunction would be, stated.*

*(Nazar Mohd. Khan v. Arshad Ali Khan and others, 1996 P.L.J. 33, Mst. Pārsini @ Mano v. Mahan Singh, 1982 P.L.J. 280, Om Parkash and others v. Chhaju Ram, 1992 P.L.J. 546 and Daulat Ram v. Dalip Singh, 1989 R.L.R. 523, over-ruled)*

*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 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.

(Para 17)

Pritam Saini, Advocate, *for the petitioner.*

R.S. Mamli, Advocate, *for the respondent.*

### JUDGMENT

*T.H.B. Chalapathi, J*

(1) Injunctive relief, permanent or temporary is very commonly sought and granted; hardly a day passes without the Civil Courts dealing with questions concerning this relief. If the principles governing

the grant or refusal of this common statutory relief are not well understood, injustice ensues. This prompted one of us (T.H.B. Chalapathi, J.) to refer this revision to a Division Bench after noticing an apparent conflict in the decisions rendered by Single Judges of this Court.

(2) The controversy for our consideration is whether a co-owner of the property is entitled to seek an injunction against other co-owner who has been in exclusive possession of the entire or part of the property restraining him from making any construction in that part of the property.

(3) In the case of common property the joint tenants or tenants-in-common, all of them are entitled to the said property and are entitled to enjoy the same. If one of them alone holds or occupies the entire property or part of it, his possession cannot be said unlawful. His physical possession is that of an owner of his own interest and also that of an agent as to the other co-owners. Therefore, the possession of one of the co-sharers is the possession of all of them. At the same time, it cannot be said that the person who has been in possession of the property is holding the property not only for himself but also in favour of other co-sharers. A co-sharer who is in possession of the property is also entitled to the enjoyment of the same. The possession of one of them is possession of all in the eye of law unless the person who has been in exclusive possession asserts his title in himself to the exclusion of the other co-sharers which may amount to ouster. We need not dwell upon this aspect of the matter in this revision petition. suffice to say, it is for the co-sharer who claims or asserts ouster to prove the same. The point with which we are concerned is: Should a co-sharer abuse the joint property, or otherwise infringe the rights of his co-sharer, what is the remedy available to the other co-sharer? The remedies open to the other co-sharers are :

- (i) Partition
- (ii) declaration of right, damages and account of profits :
- (iii) decree for joint possession; and
- (iv) injunction.

(4) There cannot be any problem with the first three remedies open to the co-sharers. The difficulty arises only in the case of remedy of injunction which can be availed of by one co-sharer and under what circumstances the co-sharer who is not in possession of the property can avail the remedy of injunction.

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(5) The English Courts have considered it to be against the policy of law to entertain claims for injunctions between joint-tenants or tenants-in-common, a remedy being open to the parties in the form of partition. The Court interposes to restrain the party in possession in the case of coparceners, joint tenants and tenants-in-common, unless the act of co-sharer in possession amounts to destruction, waste or spoliation or unless the wrong doer is insolvent or incapable of paying to the other the excess of the value beyond his own share. If one tenant-in-common is doing merely what any other co-owner might do, the other cannot have an injunction merely on the ground that he does not choose to do so, since each tenant-in-common has a right to enjoy as he pleases. Therefore, a joint owner cannot prevent by injunction the carrying out of the necessary work by another co-owner in property held in common. But if the act amounts to destruction, the Court will interfere since the destruction of the thing itself is (or amounts to) an ouster. When there are acts of positive and actual destruction, an injunction has to be granted since such acts are not done in the legitimate exercise of the enjoyment arising out of the nature of the party's title to that which belongs to him and the other party.

(6) In *Watson & Co v. Ram Chand Dutt* (1) the Privy Council laid down the following rules :—

- (a) That the Court should be cautious of interference with the rights of co-sharers :
- (b) that the circumstances of this country and its law were to be considered:
- (c) that where a co-sharer is in actual occupation of land not actually used by another cultivating in a proper course of cultivation, and that sharer resists a co-sharer, not in denial of title, but with a view to self-protection there should be no decree for joint possession or injunction, but damages only should be given.

(7) This Court in *Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram* (2) laid down the following propositions after considering the various authorities and principles :—

- (1) A co-owner has an interest in the whole property and also in every parcel of it.

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(1) ILR 18 Cal. 10 (1890)

(2) AIR 1961 Pb. 528

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- (2) The possession of the 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 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 one to disturb the arrangement without the consent of others except by filing a suit for partition.
  - (8) The remedy of a co-owner not in possession or not in possession of a share of the joint property, is by way of a suit for partition or for actual possession, but not for ejection. Same is the case where a co-owner sets up an exclusive title in himself.
  - (9) Where a portion of the joint property is by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner; if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to that special damage has been suffered.
- (8) The above propositions have been approved by a Full Bench of this Court in *Bhartu vs Ram Sarup* (3)
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(9) In a recent decision in *Kochkunju Nair v Koshy Alexander & Others* (4) the apex Court held as follows :—

“Ownership imports three essential rights namely (i) right to possession, (ii) right to enjoy and (iii) right to dispose. If an owner is wrongly deprived of possession of his property he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and co-ordinate interest in the property though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory interest in every infinite small portion of the subject matter and each has the right irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with others (vide *Mitra's Co-ownership and Partition, Seventh Edn.*)”

Having regard to the rights of the co-owners, *qua* the common property, the question for consideration is whether one co-owner restraining another from enjoying the property which has been in his possession can be interfered with by granting an injunction. A Full Bench of the Allahabad High Court in *Chhedi Lal and another vs. Chhotey Lal* (5) after considering the various decisions held as follows :—

“As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore, a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately

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(4) III 1999 SLT 183

(5) AIR 1951 Allahabad 199

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compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

(10) In *Bhartu vs. Ram Sarup (supra)* it has been held that a co-sharer who 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 to be in possession till the joint holding is partitioned. It has also been held that 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. The Full Bench referred to a Division Bench decision of Lahore High Court in *Sukhdev vs Parsi and others (6)* wherein it was held that a co-sharer who is in exclusive possession of any portion of a joint khata can transfer that portion subject to adjustment of the rights of the other co-sharer therein at the time of partition and that other co-sharers's right will be sufficiently safeguarded if they are granted a decree by giving them a declaration that the possession of the transferees in the land in dispute will be that of co-sharers subject to adjustment at the time of partition and that a declaratory decree is nothing but a judicial recognition of the existing rights and such a decree does not tend to create any rights.

(11) A single Judge of this Court in *Jiwan Singh and others vs R. Kant and others (7)* held that raising of construction on the disputed land could not be said to cause any injury as the rights of other co-sharers could be protected by making suitable adjustments at the time of partition.

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(6) AIR 1940 Lah. 473

(7) 1985 PLJ 193

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(12) In *Mst. Parsini alias Mano vs. Mahan Singh and others* (8) a Single Judge of this Court 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. The same view was followed in *Daulat Ram vs. Dalip Singh* (9) and also in *Om Parkash and others vs. Chhaju Ram* (10)

(13) The real controversy whether a co-sharer is entitled to an injunction against the one who has been in exclusive possession of a part of the common property is noticed in the following decisions :—

- (i) *Satish Chander Sethi vs. M/S Chuni Lal-Sunder Lal* (11) wherein it was held as follows :—

“Thus, whereas the authorities are consistent that each co-sharer has a right in each parcel of land till it is partitioned have all the same held that a co-sharer in exclusive possession has a right to maintain it and enjoy the property till the same is partitioned by metes and bounds.”

- (ii) *Nazar Mohd. Khan Vs. Arshad Ali Khan and others* (12) wherein Hon'ble Mr. Justice N.K. Kapoor held that there is no denying of the fact that a co-sharer has no right to raise construction till the land is partitioned by metes and bounds and so even when one of the co-sharers is in exclusive possession of a particular piece of land, any other person can seek injunction restraining the others from raising the construction till the matter is finally decided.

- (iii) *M/S R.C. Sood Company Vs. M/S R.Kant & Company* (13) wherein it has been held that the plaintiff is not entitled to grant of an injunction if he puts the defendants to hardship and be oppressive and causes the defendants an irreparable loss.

(14) In *Maman Chand vs. Smt. Kamla* (14), one of us (G.S.Singhvi J) held that “if the petitioner defendant is prevented from enjoying the property in his possession, he would suffer irreparable loss and if he alters the possession of the property during the pendency of the

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- (8) 1982 P.L.J. 280  
 (9) 1989(1) P.L.R. 523  
 (10) 1992 P.L.J. 546  
 (11) 1995 P.L.J. 529  
 (12) 1996 P.L.J. 33  
 (13) 1996 (2) P.L.R. 559  
 (14) 1996 (2) P.L.R. 147

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suit, the competent Court is entitled to take notice of it and pass appropriate order at the time of the decision of the same.”

(15) In *Jage Ram vs. Amar Singh* (15) learned single Judge of this Court held that in the decisions of this Court in *Om Parkash vs. Chhaju Ram* (16) and in *Nazar Mohd. Khan vs. Arshad Ali Khan* (supra), the decision of the Full Bench of this Court in *Bhartu v. Ram Sarup* (supra) has not been noticed. Accordingly, the learned single Judge set aside the order granting injunction.

(16) It is also useful to refer to the decision of the Apex Court in *P. Lakshmi Reddy vs. L. Lakshmi Reddy* (17) wherein it has been held that “the possession of a co-heir is considered in law as possession of all co-heirs. When one co-heir is found in possession of the property, it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heirs’s title. It is settled rule of law that as between co-heirs, there must be evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.”

(17) 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 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.



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(18) 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.

(19) In this view of the matter, we are unable to agree to the propositions laid down by the learned single Judge of this Court in *Nazar Mohd. Khan vs. Arshad Ali Khan and others (supra)* wherein his Lordship broadly stated that there is no denying the fact that a co-sharer has no right to raise construction until the land is partitioned by metes and bounds and so even when one of the co-sharers is in exclusive possession of a particular piece of land any other person can seek injunction restraining the other co-owner from raising construction. We accordingly overrule the said decision of the learned single Judge of this Court and also the decisions in *Mst. Parsini alias Mano vs. Mahan Singh (supra)*, *Om Parkash and others vs. Chhaju Ram (supra)* and *Daulat Ram vs. Dalip Singh (supra)*

(20) Since we have answered the Reference, we direct the Registry to place this revision petition alongwith the other connected revision petitions before the learned single Judge for appropriate orders after obtaining necessary orders from the Hon'ble the Chief Justice.

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R.N.R.

*Before Swatanter Kumar, J*

KISHORI LAL,—*Plaintiff/Appellant*

*versus*

JAGMAL,—*Defendant/Respondent*

*R.S.A. No. 1555 of 1999*

20th July, 2000

*Specific Relief Act, 1963—S. 19—Agreement to sell off immoveable property—Plaintiff paying earnest money to the defendant—Defendant also borrowing an amount on the same date from the plaintiff in execution of a separate pronote—Trial Court deciding all issues in favour of the plaintiff but still denying the relief of specific performance & granting the alternative relief—1st Appellate Court affirming the finding of the trial court—Defendant taking different stand in his written statement & evidence—Neither the defendant pleaded in the written statement that the agreement was a security or collateral security for execution of pronote nor any issue had been framed by the learned*