

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

R.S.A. No. 457 of 2016

Date of decision: 27.09.2019.

Amar Singh

....Appellant

Versus

Balbir Singh

....Respondent

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting ?¹ No.

For the Appellant : Mr. Amit Singh Chandel, Advocate.

For the Respondent : Mr. R. L. Chaudhary and Mr. H. R. Sidhu, Advocates.

Tarlok Singh Chauhan, Judge (Oral)

The defendant is the appellant, who after having suffered decree of permanent prohibitory injunction at the hands of the learned Trial Court and as affirmed by the learned first Appellate Court, has filed the instant second appeal.

The parties shall be referred to as the 'plaintiff' and the 'defendant'.

2. The brief facts of the case are that the plaintiff filed a suit for permanent prohibitory injunction and joint possession with respect

¹ *Whether reporters of Local Papers may be allowed to see the Judgment ? Yes*

to land comprised in Khata No. 6 min, Khatoni No. 14 min, Khasra Nos. 379, 380 and 381 Kita 3 measuring 0-02-30 hectares situated in Tika Morsu Datyalan, Tappa Pahalu, Tehsil Barsar, District Hamirpur as per jamabandi for the year 2008-09. It was averred that suit land was joint between the parties and other co-sharers and was a valuable piece of land. The defendant was a headstrong and quarrelsome person and was bent upon to cover best portion more than his share and started digging suit land in order to raise construction and had also collected raw material to that effect. The defendant by way of construction of cattle shed over the suit land had already covered his share in the suit land. The defendant was requested to refrain till the suit land was partitioned, but in vain. Hence the suit.

3. The defendant filed written statement raising preliminary objections of maintainability and cause of action. On merits, it was averred that the suit land was given to him by his mother Saviti Devi by way of Will dated 25.04.2000 and he as such is in exclusive possession thereof. Smt. Saviti Devi by way of her will allotted suit land alongwith other land exclusively in favour of defendant and the land comprised in Khasra No. 255 in equal share to defendant and Duni Chand, the father of the plaintiff. The defendant wants to raise construction of his latrine pit over the suit land which is in his exclusive

possession. The plaintiff with malafide intention just to harass defendant had filed this suit. Hence prayed for dismissal thereof.

4. In replication, the plaintiff controverted the case of the defendant and denied that any such Will was executed in favour of defendant whereas the parties alongwith other are co-sharers in the suit land.

5. On the basis of the pleadings, the learned trial Court on 27.08.2012 framed the following issues:

1. *Whether the plaintiff is entitled for a relief of permanent prohibitory injunction as prayed for?OPP*
2. *Whether the plaintiff is entitled for a decree of joint possession in case defendant succeeds in raising construction over the suit land during the pendency of suit?OPP*
3. *Whether the suit of the plaintiff is not maintainable?OPD*
4. *Whether the plaintiff has no cause of action to file the present suit?OPD*
5. *Whether Smt. Saviti Devi had executed a valid Will in favour of defendant on 25.04.2000 as alleged?OPD*
6. *Relief.*

6. After recording the evidence and evaluating the same, the learned trial Court partly decreed the suit of the plaintiff by restraining the defendant by way of permanent prohibitory injunction from raising any type of construction, changing the nature, digging, collecting any raw material over the suit land i.e. the land comprised in Khata No. 06 min, Khatauni No. 14 min, Khasra Nos. 379, 380, 381, Kitas-03, area

measuring 0-02-30 hectares, situated in Tika Morsu Datyalan, Tappa Pahu, Tehsil – Barsar, District Hamirpur, H.P, till partition.

7. Appeal filed against the same by the defendant was also came to be dismissed vide judgment and decree passed to this effect on 13.04.2016, constraining the defendant to file the instant appeal.

8. On 01.11.2016, the appeal was admitted on the following substantial question of law:

1. *Whether learned first Appellate Court below misread and mis-appreciated documentary and oral evidences, more especially Will dated 25.04.2000 Ext. DW-3/A and statement of DW-2 and PWR-1 as well as entire revenue record pertaining to suit land, thereby vitiating the impugned judgment and decree?*

I have heard learned counsel for the parties and have gone through the records of the case carefully.

Substantial question of law No.1

9. Adverting to the Will Ext. DW-3/A, it would be noticed that the same is alleged to have been executed by Saviti by bequeathing the land in favour of the defendant. It is not in dispute that at the time of the execution of the Will Saviti Devi was only co-sharer and being so, she had no authority to execute Will of the entire land in favour of anyone that too by mentioning specific khasra number, as the land had to be partitioned. She had right to bequeath her share in the suit land, however, perusal of the Will Ext. DW-3/A shows that Saviti Devi had bequeathed the entire Khasra numbers, and once that be so,

obviously then Will cannot be held to be a valid document and, therefore, has rightly been discarded and kept out of consideration by the learned Courts below.

10. Coming to the testimonies of DW2 and PWR-1, DW-2 Kishori Lal, in his sworn affidavit Ext. DW-2/A had only stated that he had seen the disputed land, which is in possession of the defendant as a co-sharer. He has stated that plaintiff was not in possession of the same and the land had been given to the defendant by Saviti Devi by executing a Will. He further deposed that Saviti Devi was known to him and in his presence had executed the Will. He identified his signatures on the Will encircled Ext. DW2/B. During cross-examination, he admitted that the defendant had started collecting sand, gravel and bricks etc. over the suit land for raising construction but he denied that said work was done by the defendant on 18.05.2011 and stated that this work was executed prior to the aforesaid date in the month of April. He stated that no partition had taken place between the parties. He denied that Saviti Devi was not the owner of the suit land on 25.04.2000. He denied that the defendant Amar Singh had constructed a room and latrine/toilet over the suit land and stated that at present the suit land is vacant, however, self stated that there was one toilet over the same which was very old. He denied that the defendant grabbed the suit land by raising construction and volunteer to state

that the suit land was in possession of the defendant. He further stated that on 25.04.2000 Saviti Devi had not given the shares of Duni Chand and Kesari Devi by way of Will and the same was executed in favour of only of the defendant.

11. As regards testimony of PWR-1 Tarun Sethi, Patwari, he only proved on record the revenue record i.e. Jamabandi for the year 1999-2000. He stated that as per record Khata No. 03, Khatauni Nos. 10, 11, 12, 13 is having co-sharers i.e. Duni Chand (six shares), Amar Singh (five shares), Keshri Devi (one share) and Saviti Devi (eight shares) and total 20 shares. He further stated that Saviti Devi had expired and she was not the exclusive owner of any Khasra numbers, rather she was a co-sharer. He further stated that mutation qua the Will of Saviti Devi was effected vide mutation No. 26, which was with regard to her share i.e. 2/5 share. He further stated that Duni Chand was having 06/20 in Khasra Nos. 287, 297, 302, 379, 381, 382, 380 and the same was succeeded by Balbir Singh and Suresh Kumar vide mutation No. 92. During cross-examination, he admitted that in the jamabandi Ext.P1, the suit land had been mentioned in separate possession of Amar Singh (defendant).

12. Now, in case the testimonies of both these witnesses i.e. DW2 and PWR-1 are minutely perused then one fact which clearly emerges is that the property was not partitioned and Saviti Devi had

only co-sharer in the same, therefore, could not have executed the Will.

13. The rights and liabilities of co-owners have been considered by this Court, in detail, in ***Ashok Kapoor vs. Murtu Devi, 2016 (1) SLC 207***, wherein, after taking into consideration the entire law on the subject, this Court laid down the following principles:

“41. The exposition of law as enunciated in the various judgments referred above including those of this High Court, insofar as the rights and liabilities of the co-owners are concerned, gives rise to the following propositions:-

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 only be exclusive but also hostile to the knowledge of either 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 by the other co-owners, it is not open to any body to dispute 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 joint possession, but not for ejectment. 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 show that special damage has been suffered."

14. It was further held as under:-

"42. It can further be safely concluded that co-owners hold property by several and distinct titles but by unity of possession. Actual physical possession is not indispensable, the requirement being of the right to possession of the common property.

43. As a corollary to the aforesaid right, any co-owner, in the absence of any agreement to the contrary, has a right to enter upon the common property and take possession of the whole, subject to the equal right of the other co-owners with whose right of possession he has no right to interfere.

44. A co-owner's possession of the common property is not prima facie adverse against another co-owner, because such possession is considered as one on behalf of all the co-owners, except when there is clear proof of ouster or assertion of a hostile title.

45. As each co-owner is entitled to possess every bit of the common property and is not restricted to enjoyment according to his share so long as he does not deny to the other co-owners an equal right of possession and enjoyment of the common property, he is under no obligation either to account for or to

pay compensation to such co-sharers. The matter is different if there is objection from the other co-sharers and no amicable arrangement is arrived at. That would equally be the case where there is ouster or denial of the title of the other co-owners and an assertion of a hostile title in himself.

46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the 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.

(v) Before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) The question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

15. Now, the moot question is whether a co-owner who admittedly is not in possession of the property in dispute can claim a decree for permanent prohibitory injunction without seeking the consequential relief of possession, as it is more than settled that a plaintiff not in possession is not entitled to relief without claiming recovery of possession.

16. It shall be profitable to refer a learned Division Bench judgment of this Court in ***State of H.P. & Ors. vs. Baldev and others, 2016 (1) SLC 361***, wherein it was observed as under:-

14. The plaintiffs had to prove that they were in possession of the suit land, have failed to prove the same. Both the Courts below have held that the road was constructed in the year 2000 and the plaintiffs were not in possession on the date of the filing of the suit, i.e. 10.08.2005.

15. It is apt to reproduce relevant portion of para 25 of the impugned judgment and decree herein:

"25. In such a situation, this Court has no hesitation to hold that the plaintiffs are not entitled for the relief for permanent prohibitory injunction as the road has already been constructed by the defendants in this case over the suit land. PW1 Dile Ram himself admitted the fact that the road was constructed in the year 2000. The plaintiffs have not been able to prove the fact that the construction was raised during the pendency of the suit....."

16. It is beaten law of land that when the plaintiff fails to prove possession in a suit for permanent prohibitory injunction or mandatory injunction, the suit is to be dismissed.

*17. Our this view is fortified by the decision of the Apex Court in the case titled as *Ramji Rai & Anr. Versus Jagdish Mallah (Dead) through L.Rs. & Anr.*, reported in 2007 AIR SCW 599. It is apt to reproduce paras 10 and 11 of the judgment herein:*

"10. On the finding of facts, we do not wish to interfere. There is no reason to reverse the concurring findings. However, suffice it to state that the lower appellate court should have dismissed the suit filed by the appellants only on the ground that the appellants had failed to prove that they were in possession of the disputed lands. Under Section 38 of the Specific Relief Act, 1963 an injunction restraining disturbance of possession will not be granted in favour of the plaintiff who is not found to be in possession. In the case of a permanent injunction based on protection of possessory title in which the plaintiff alleges that he is in possession, and that his possession is being threatened by the defendant, the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights [See: Mulla's Indian Contract and Specific Relief Acts, 12th Edn., page 2815]

11. In the case of A.L.V.R. Ct. Veerappa Chettiar v. Arunachalam Chetti and others, AIR 1936 Madras 200, it has been held that mere fact that the question of title may have to be gone into in deciding whether an injunction can be given or not is not any justification for holding that the suit is for a declaration of title and for injunction. There can be a suit only for an injunction. The present suit is only for permanent injunction and, therefore, the lower appellate court should have, on the facts and circumstances of this case, confined itself to its dismissal only on the ground that the appellants have failed to show that they were in possession. This has been done but the declaration that the appellants are not the owners, was not necessary."

18. The Apex Court in the case titled as Thimmaiah versus Shabira and others, reported in (2008) 4 Supreme Court Cases 182, held that if plaintiff is not in possession, he is not entitled to relief of permanent injunction without claiming recovery of possession. It is apt to reproduce para 10 of the judgment herein:

"10. Undisputedly, the suit was one for permanent injunction and in such a suit the plaintiff has to establish that he is in possession in order to be entitled to a decree for permanent injunction. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief without claiming recovery of possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession."

19. It would also be profitable to reproduce para 11 of the judgment rendered by the Apex Court in the case titled as *Anathula Sudhakar versus P. Buchi Reddy (Dead) By L.Rs. & Ors.*, reported in 2008 AIR SCW 2692, herein:

"11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

11.1 Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2 Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3 Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

20. Applying the test to the instant case, the plaintiffs - respondents have not proved the possession and the findings to this effect have not been questioned by them, the suit was to be dismissed.

17. The plaintiff admittedly is not in a possession of the suit land and was, therefore, not entitled to a decree for permanent prohibitory injunction without seeking consequential relief of

possession. Hence, the suit was not maintainable and was required to be dismissed as such.

The substantial questions of law are answered accordingly.

18. Consequently, I find merit in this appeal and accordingly the same is allowed. The judgments and decrees passed by the both the learned Courts below are set aside and the suit filed by the plaintiff is ordered to be dismissed, leaving the parties to bear their own costs.

27th Sept., 2019.
(Sanjeev)

(Tarlok Singh Chauhan)
Judge