

Prithi Singh Vs. Bachitar Singh

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Court : Delhi

Decided On : Dec-05-1968

Reported in : 5(1969)DLT583

Judge : T.V.R. Tatachari, J.

Appeal No. : Regular Second Appeal No. 91 of 1967

Appellant : Prithi Singh

Respondent : Bachitar Singh

Advocate for Pet/Ap. : Sushil Malhthora and; K.C. Sud, Advs

Judgement :

T.V.R. Tatachari, J.

(1) This second appeal has been filed by Pirthi Singh and tohers against the judgment and decree of the Senior Subordinate Judge, Hoshiarpur, date 28th November 1963, in Civil Appeal No. 197 of 1963 on his file, whereby the leartied Senior Supordinate Judge confimed the judgment and decree of the Subordinate Judge, First Calss, Una, dated, 19th August, 1963, passed in Civil Suit No. 326 of 1962.

(2) The aforesaid suit was filed by the appellants herein for a permanent injunction restraining the respondents herein from raising any construction in the suit land of

the extent of 2 Kanals and 2 Marlas, situate in village Basoli, Tehsil Una. The case of the appellants- plaintiffs was that said land was jointly owned and possessed by them and respondents Nos. 1 and 2, that the said respondents Nos. 1 and 2 had exchanged portions of the said land with respondents Nos 3 to 6, that the respondents had no right to raise any construction on the suit land, and that, therefore, they should be restrained from raising any construction. The suit land comprised these fields, Nos. 5461/251, 5878/250 and 5898/250. The case of the respondents defendants was that the said fields Nos. 5878/250 and 5398/250 were not joint fields, that the said fields were gifted to respondents Nos. 1 and 2 by their father, that the field No 5461/251 however, was jointly owned by the appellant No. 1 and respondents Nos. 1 and 2, that by agreement among the parties portions of the field No. 5461/251 have been in exclusive possession of appellant No. 1, Pirthi Singh, and respondents 1 and 2, that respondents 1 and 2 had exchanged their portion in the said field with respondents Nos. 3 to 6, that they had a right to build on the portions in their possession, and that the appellants-plaintiffs, if at all, could only file a suit for partition and could not sue for an injunction.

(3) The trial Court, by judgment, dated 19th August, 1963, held that the portions of field No. 5878/250 were gifted separately to each of the appellants and respondents Nos 1 and 2, and respondent No. 1 being a donee from his father could use the portion in his possession in any manner he liked As regards field No. 5898/250 and field No. 5461/251, the trial Court took the view that the said fields were joint fields and the parties were co-owners of the same, that the raising of structures' by respondents Nos.1 and 2 or their transferees does not in any way adversely affect the rights of the appellants, the co-owners, that the possession of the respondents was subject to partition and until the partition is effected the other co-owners could not disturb the possession and that the appellants-plaintiffs could not merely sue for an injunction restraining respondents Nos. 1 and 2 from raising any construction on the portions of the fields in their possession. In the result, the trial Court dismissed the suit.

(4) Against that judgment and decree, the appellants herein preferred an appeal. Civil Appeal No. 197 of 1963, to the Court of the Senior Subordinate Judge,

Hoshiarpur. The learned Senior Subordinate Judge in his judgment, dated 28th November, 1963, stated that the appellants plaintiffs had given up their claim in the suit with regard to khasra No 5898/250 min as, according to respondents Nos. 1 and 2, it was not exchanged and the said respondents had no intention to raise any construction upon it. As regards field No 5898/250, the learned Senior Subordinate Judge held that as the said field was gifted to respondents Nos. 1 and 2 by their father, they and their transferees could raise a construction thereon. As regards the field No. 5461/251, the learned Senior Subordinate Judge found that the said field, was a joint field, that under an arrangement between the parties, appellant No. 1, Pirthi Singh, as respondents Nos. 1 and 2, have been in exclusive possession of 4 Marlas each, that the 8 Marlas which were in the exclusive possession of respondents Nos. 1 and 2 were exchanged by them with respondents Nos. 3 to 6, that since respondents Nos. 1 and 2 or their transferees have been in exclusive possession of specific portions of the joint land under an arrangement between the parties, it was open to them to raise a construction thereon, and that it was not open to the appellants to seek for an injunction restraining the respondents from raising a construction without filing a suit for partition. The learned Senior Subordinate Judge also pointed out to an averment in the plaint that the land in question was valuable as it was fit for being used as abadi. In the result, the learned Senior Subordinate Judge dismissed the appeal. It is against that judgment and decree that the present second appeal has been preferred by the appellants-plaintiffs.

(5) Shri S. Malhotra, the learned counsel for the appellants, stated before me that the appellants do not press their claim for injunction as regards fields Nos. 5898/250 min and 5878/250, and that they press their claim in this second appeal only as regards the field No. 5461/251. As regards this field, Shri Malhotra contended that as the said field is a joint land and the parties are co-owners of the same, even though the respondents are in exclusive possession of portions of the same under an arrangement between or by consent of all the co-owners, it is not open to the respondents to raise any construction thereon as they, as co-owners, cannot change the user of the land so as to impair similar rights of the other co-owners like the appellants. Admittedly, the field in question is joint land and by an arrangement between the parties, appellant No. 1, Pirthi Singh and respondents

Nos. 1 and 2, have been in exclusive possession of 4 Marlas of land each. As pointed out by Tek Chand J. in Sant Ram Nagina Ram v. Daya Ram Nagina Ram, exclusive possession of a co-owner, in the absence of any evidence to the contrary, has to be deemed to be with the consent of the other co-owners. In fact, both the lower Courts have proceeded on the footing that the appellant No. 1 and respondents Nos. 1 and 2 have been in exclusive possession by virtue of an arrangement between the parties. The question then is as to whether the co-owners who are in exclusive possession of portions of the joint land under an arrangement or by consent of all the other co-owners, can raise a construction on the portion of the land in their exclusive possession, and whether the other co-owners, before any construction is raised, can file a suit for injunction instead of filing a suit for partition of the joint land. It is now well-settled that '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'. It is also well-settled that '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' The said two propositions emerge from the various decisions of the different High Courts, as pointed out by Tek Chand J at page 539 in the aforesaid decision. It follows as a corollary from the said two propositions that when a co-owner is in possession of a separate portion of the joint land under an arrangement consented to by the other two co-owners, he can use the said portion of land only in a manner not inconsistent with similar rights of the other co-owners. In the present case, respondents 1 and 2 have been in possession of 4 Marlas of land each. As already pointed out above the said possession was under an arrangement between the parties. There is no definite evidence on the record to show what exactly was the arrangement. Shri K. C. Sud, the learned counsel for the respondents, therefore, contended that the said arrangements might as well have been that respondents Nos. 1 and 2 could use the portion of land in their possession as they liked. I do not think so. Admittedly, there was an arrangement between the parties, in the absence of any evidence to the contrary, the reasonable or proper inference that can be drawn is that the arrangement or the consent of the other co-owners was to the nature of exclusive possession which respondents Nos. 1 and 2 have been enjoying till they

entertained the idea of raising a construction thereon. A Similar view was taken by Radha. Krishana. J. in Radhey Lal v. Mahraj Kuni Behari Lal. The learned Judge expressed his view as follows '-

'THE right of a co-sharer to continue in exclusive possession of those portions of joint land of which he was allowed to acquire exclusive possession arises on the assumption that it was consented to by his toher co-sharers. Such a consent, in my opinion, in case of pltos in exclusive possession of one co-sharer in a village must be confined to the nature of exclusive possession already enjoyed. If the nature of the exclusive possession which has been submitted to, or consented to by toher co-sharers, is changed then the toher co- sharers have a right to object to the change.'

(6) In the present case, it appears from the Jamabandi Exhibit P.I, that the land in question has been in the personal cultivation of the co-owners. The said entry in the jamabandi shows at least that the, land was being used or intended for purposes of cultivation It is nto the case of the respondents that the said land was at any time used for building purpose or that a building or any toher construction was raised on the said land before the present dispute arose between the parties. In toher words, the land has been an agricultural land, and the respondents now desire to raise a construction thereon and thus change the use from cultivation to one of raising a construction. Such a change of the user will obviously be inconsistent with similar rights of the toher co-owners. If a construction had already been raised by co-owner in the land which has been in his exclusive possession and the toher co-owners merely keto silent. without raising any objection the Court might take that circumstance into consideration and appropriate cases decline to direct the demolition of the said constrution. But, in the present case, the respondents merely threatened raise a construction, and the appellants-plaintiffs promptly raised objection thereto and filed immediately the suit out of which the second appeal has been arisen. When the respondents have no right to chart the user to the detriment of the appellants-plaintiffs, and when the pellants have promptly raised an objection to the said change of use they are entitled to an injunction restraining the respondents free changing the said user by raising a construction on the land in disput Btoh the Courts below assumed that as the

respondents were in excessive possession under an arrangement they were entitled to use the in such a manner as they liked and, therefore, could raise a construct thereon. The said assumption was clearly wrong, and respondents, as co-owners, had no right to use the land in their possession, even though under an arrangement, to a user which would be inconsistent with similar rights of other co-owners. The lower appellate Court referred to and relied upon the averment in the plaint that the land in question was a valuable land as it was fit for the purposes of abadi. The learned Senior Subordinate Judge treated that averment as an admission on the part of the plaintiff, that the best use to which the land in question can be put was to construct a structure thereon. The learned Senior Subordinate Judge was obviously in error in construing the averment in that manner. The averment only meant that the piece of land was a valuable one as it was fit for purposes of abadi. The averment does not amount to an admission that the land was intended to be used or was best used for purposes of construction of structures thereon. As already pointed out above, the land was an agricultural land and was never used for construction purposes

(7) For the aforesaid reasons, I hold that the appellants-plaintiffs are entitled to a permanent injunction restraining the respondents from raising any construction on the field No. 5461/251. The second appeal is, accordingly, allowed, the judgments and decrees of the lower Courts are set aside, and the suit is decreed as prayed for in respect of field No-5461/251. The suit is dismissed as regards the other two fields, Nos 5898/250 and 5878/250. In the circumstances, I direct that the parties shall bear their own costs throughout.

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