

Nagesh Kumar Vs. Kewal Krishan

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Court : Himachal Pradesh

Decided On : May-12-2000

Reported in : AIR2000HP116

Judge : M.R. Verma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rules 1 and 2

Appeal No. : Civil Revn. Petn. No. 23 of 2000

Appellant : Nagesh Kumar

Respondent : Kewal Krishan

Advocate for Def. : Janesh Mahajan, Adv.

Advocate for Pet/Ap. : Sharwan Dogra, Adv.

Disposition : Revision allowed

Judgement :

ORDER

M.R. Verma, J.

1. This revision petition is directed against the judgment of the District Judge, Chamбу dated 7-1-2000 whereby C.M.A. No. 15 of 1999 preferred by the respondent-defendant (hereafter referred to as 'the defendant') against the order

dated 13-9-1999 passed by the learned Senior Sub-Judge, Chamba thereby allowing an application of the petitioner-plaintiff (hereafter referred to as 'the plaintiff') under Order 39, Rule 1 and 2 C.P.C., has been set-aside and on the undertaking given by the defendant, he has been allowed to raise construction over the suit land.

2. Brief facts leading to the presentation of the petition are that the plaintiff had instituted a suit for permanent injunction restraining the defendant from raising any construction and for mandatory injunction to remove the Malwa or any other construction raised during the pendency of the suit, over the land comprising Khasra No. 1206/ 271, measuring 10 Bighas and 8 Biswas Khata Khatauni No. 374/425, situate in Mohal Sultanpur, Pargana Sach, Tehsil and District Chamba (hereafter referred to as 'the suit land'). The case of the plaintiff as made out in the plaint is that the suit land is joint and undivided and the parties are eo-sharers in the suit land. Therefore, the defendant has no right to raise construction thereon, but he has started raising construction over the said piece of land, hence the suit.

3. The defendant contested the claim on the ground that the plaintiff has separated his share from Chini Lal and Dhani Ram privately in the year 1992, but the entries could not be made in the record, that the plaintiff had sold the suit land through his power of attorney to one Heminder Singh and delivered possession thereof to him. Said Heminder Singh covered the suit land by erecting pucca brick wall around it in the presence of the plaintiff and his attorney and after making such development, he sold the suit land to the defendant by a registered sale deed. The defendant started raising construction in March, 1999 and till raising of the construction up to plinth level, no objection was raised by the plaintiff, and that the suit had been instituted with a view to harass defendant and delay the construction work.

4. It was at the time of institution of the aforesaid suit that the plaintiff filed an application under Order 39, Rule 1 and 2 C.P.C. praying for restraining the defendant from raising construction over the suit land on the basis of the facts averred in the plaint and further claiming that in case the construction is not stopped, he would suffer irreparable loss which cannot be compensated in terms

of money and that the balance of convenience is in favour of the plaintiff and there is likelihood of his winning the case.

5. The defendant contested the application and denied the contents thereof and claimed that, he had no other shelter to live at Chamba and the material collected by him for the purpose of construction will be rendered useless putting him to great financial loss for which he cannot be adequately compensated in terms of money.

6. The learned trial Judge vide his order dated 13-9-1999 allowed the application and thereby granted the temporary injunction as prayed for.

7. Feeling aggrieved, the defendant preferred appeal before the learned District Judge, Chamba who vide the impugned judgment set-aside the order passed by the Senior Sub-Judge subject to the condition that the defendant would give an undertaking before the trial Court 'that in case of partition, the land where he intends to raise construction is allocated to some other co-sharer, he would demolish the construction at his own costs'. It is this order which has now been challenged by the plaintiff in this revision petition.

8. I have heard learned counsel for the parties and have also gone through the records.

9. It was contended for the plaintiff that the material placed before the Courts below clearly reveals that the plaintiff has a prima facie good case, balance of convenience is in favour of the grant of the injunction prayed for and refusal thereof is going to cause irreparable loss to him which cannot be adequately compensated in terms of money and that the trial Court had after arriving at the aforesaid conclusions rightly granted the injunction prayed for. However, the appellate Court failed to properly appreciate the factual position and the law as applicable to the dispute between the parties and thus passed the erroneous and unsustainable impugned order which is liable to be set aside.

10. On the other hand the learned counsel for the defendant has contended that the defendant had purchased a specified piece of land from its previous owner Haminder Sen who himself was a purchaser of that land from the plaintiff himself

though his power of attorney Ishwari Prashad and before such purchase by Haminder Sen, the plaintiff had separated his share from other co-sharers privately and the favour of the plaintiff had already raised a three-storeyed Pucca house just adjacent to defendant's house. It is further contended that the plaintiff did not raise any objection when Haminder Sen, before selling the land to the defendant, had covered the land by raising a Pucca brick wall thereon. Therefore, according to the learned counsel, the plaintiff has no case much less a prima facie case and the impugned judgment thus calls for no interference.

11. The plaintiff has filed the latest copy of Jamabandi of the suit land for the years 1996-97. As per the entries therein, the suit land is shown jointly owned by the co-sharers including Haminder Sen and the plaintiff. Said Haminder Sen who is a co-sharer to the extent of four shares out of 84 shares, has, admittedly sold his share to the defendant. A note in the remarks column of the Jamabandi reveals that mutation of the share of Haminder Sen in the suit land had been attested In favour of the defendant. However, as per the note the mutation is in respect of share and not about any specific portion of the suit land. Another note in the remarks column shows that the plaintiff had mortgaged his entire share in the suit land with a bank. This note also does not show that any specific portion of the land had been so mortgaged. Thus, the latest entries in the revenue records show that the suit land is jointly owned by the co-sharers and has not been partitioned.

12. It is averred in para 5 of the revision petition that the plaintiff has instituted Civil Suit No. 227/1997 in the Court of the learned Senior Sub-Judge, Chamba against all the co-owners of the suit land in which notices had been issued to the defendants. Vide para 6 of the reply to CMP. No. 23/2000 in this revision petition the defendant had admitted pendency of such suit by necessary implications. It is not his case that such suit is collusive or not maintainable. Therefore, the only prima facie inference which can be drawn from the act of institution of suit for partition of the suit land is that the suit land is jointly owned and has not been partitioned.

13. The contention for the defendant that the father of the defendant had constructed a house on the land in suit is of no help to the defendant. The plea

that plaintiff's father had constructed a house on the suit land is raised vide para 3 of the written statement. The plaintiff vide para 3 of the replication has averred that such construction was with the consent of the other co-sharers. There is nothing on the record as yet to repel this averment.

14. The contention for the defendant that he had purchased a specific portion of the suit land is also, prima facie, not tenable in view of the above discussion as also for the reason that had the defendant or his predecessor-in-interest a specified portion of the suit land, it would have been so mentioned in the respective sale deeds and Tatima must have been attached therewith to specify portion. However, the defendant has not brought on record till date such sale deeds or copies thereof despite the fact that he could do so at the time of filing of the written statement before framing of the issues or at the time of filing reply to the application under Order 39 Rules 1 and 2 of the Civil Procedure Code.

15. It has been pleaded vide para 2 of the written statement that the defendant was handed over the peaceful and hostile possession of 10 Biswas of land. There are no averments in the written statement that his possession on any specific portion of the suit land is hostile.

16. A co-sharer is entitled to claim Injunction when another co-sharer threatens to exclusively appropriate joint land to himself to the detriment of other co-shares by constructing a structure thereon.

17. In view of the above, the plaintiff has made out a case for grant of temporary injunction as prayed for by him and as was granted by the learned Senior Sub-Judge.

18. In a cause when a co-sharer has sued for permanent prohibitory Injunction restraining the other co-sharer from raising any construction over the land jointly owned by them, it is not just and proper to permit the co-sharer against whom the relief of injunction has been claimed, to continue/ complete construction of a house/structure on such land.

19. The Apex Court while dealing with a similar situation in Harish Chander Verma v. Kayastha Pathshala Trust, 1988 (1) JT (SC) 625 has held as follows :

'I.....In appeal against the decree for permanent injunction the High Court by the impugned order has permitted the defendant-respondent herein to raise construction subject to the condition that In the event of the decree being affirmed the construction shall have to be pulled down.

2. Apart from the convenience the parties and equity arising in the facts of the case, a larger principle is involved in the matter. On the face of a decree for permanent injunction is it appropriate for the appellate Court to allow it to be nullified before the appeal is disposed of. We are of the view that the answer has to be in the negative.'

20. Similar view has been taken by this Court in Parduman Singh v. Narain Singh, 1991 (2) Sim LC 215.

21. In view of the above, the impugned judgment is not sustainable.

22. As a result, this revision petition is allowed and the impugned judgment is set aside and the order dated September 13, 1999 passed by the learned senior Sub Judge confirming the order dated July 3, 1999 restraining the defendant from raising construction over the suit land till the disposal of the suit, is restored.

23. The observations made here-in-above are strictly for the purpose of disposal of this revision petition and nothing contained therein shall be construed as expression of opinion on any controversy between the parties on merits of the suit.

24. The parties, through their learned counsel, are directed to appear before the trial Court on 7-6-2000. Records of the Courts below be returned forthwith.