

Baldev Singh Vs. Smt. Darshani Devi and anr.

Baldev Singh Vs. Smt. Darshani Devi and anr.

SooperKanoon Citation : sooperkanoon.com/889279

Court : Himachal Pradesh

Decided On : May-21-1993

Reported in : AIR1993HP141

Judge : Devinder Gupta, J.

Acts : [Transfer of Property Act, 1882](#) - Section 44

Appeal No. : Second Appeal No. 4 of 1986

Appellant : Baldev Singh

Respondent : Smt. Darshani Devi and anr.

Advocate for Def. : B.K. Sood, Adv. for; K.D. Sood, Adv.

Advocate for Pet/Ap. : Anand Sharma, Adv. for; Chhabil Dass, Adv.

Disposition : Appeal dismissed

Judgement :

Devinder Gupta, J.

1. The question of law, which can be said to have arisen for determination in this Second Appeal is that whether a co-owner can transfer a valid title in a specific portion of land owner which he is not in exclusive occupation.

2. The plaintiff is the appellant, who has challenged the judgment and decree passed on 30th Sept. 1985, by District Judge, Solan and Sirmaur Districts at Nahan, allowing the appeal of the defendants-respondents and dismissing the plaintiffs suit for possession and thereby setting aside the judgment and decree passed on 28th February, 1984 by Sub Judge, Nahan, decreeing the plaintiffs suit for possession.

3. On 5th June, 1981, a suit for possession of 65 square metres of land comprised in Khasra No. 120 and 137/9/2/2/2/1 as entered at Khewat No. 56 min, Khatauni No. 78 in Misal Haqiat Bandobast of Nahan town was filed by the plaintiff, on the basis of title alleging that a valid title to this part of the property had been acquired by him through its previous owner, Kanwar Narbir Singh, by means of a registered deed of sale dated 12th May, 1981. A small hut was also constructed thereupon after spending Rs. 500/- but for the last 1 1/2 year, the defendants in his absence and in the absence of the previous owners, without their consent and permission, had made forcible entry in the land, including the hut standing thereupon and had dispossessed the plaintiff, for which they had no right, title and interest. It was alleged that the despite requests the defendants failed to deliver back the possession and as such the plaintiff, on the basis of title was entitled to a decree for possession.

4. The suit was contested by the defendants, who alleged that they got the possession of the suit land from late Shri Ramesh Kumar, the brother of Kanwar Narbir Singh, aco-owner in the suit land about 15 years ago through an oral agreement of sale and ever since the defendants have been in occupation of the property continuously, openly and in assertion of their rights as owners. In fact, they had constructed a Kacha residential house over the suit land. After the death of Ramesh Kumar, his widow Smt. Sidheshwari Devi for herself and as general attorney of her daughter Smt. Neeraj Kumari and with the consent of her son Vikram Singh, executed an agreement to sell in pursuance to the earlier oral agreement of sale and received a part payment of Rs. 400/- as consideration from the defendants. The consideration of sale was duly paid to the heirs of Ramesh Kumar. Only formal act of getting registered a document of transfer was to be done and completed on 12th May, 1981 but the Sub Registrar declined to register

the same and returned the same, which had been duly presented before him by Vikram Singh.

5. The trial court held the plaintiff to have acquired a valid title to the property and found the defendants to be in unlawful occupation of the property having acquired no title therein. A decree for possession was passed. In appeal, the lower appellate court reversed the finding of facts recorded by the trial court. It was found that possession of defendants had originated from a valid agreement by one of the co-owners. The defendants were found to be in actual occupation of the property prior to the execution of deed of sale in favour of the plaintiff by Kanwar Narbir Singh, the other co-owner. The defendants were held not to be in unauthorised occupation of the property. The construction raised by them about 6 years prior to the date of sale, which finding of fact was recorded after noticing the statement of Kanwar Narbir Singh, who admitted this fact. Consequently, the appeal was allowed and the plaintiff's suit was dismissed. It is this judgment and decree, which is under challenge.

6. I have heard the learned counsel for the parties and also gone through the record.

7. It is not in dispute that the suit land, along with other property, was jointly owned by two brothers, namely, Kanwar Narbir Singh and Ramesh Kumar. The defendant's case has been that they were put in possession of the property by Ramesh Kumar, during his lifetime. The plaintiff's case has been that he was duly put in possession of the property in pursuance to the deed of sale executed by Kanwar Narbir Singh. Kanwar Narbir Singh, while appearing as witness, in clear and unequivocal terms admitted that prior to the execution of deed of sale, the defendants had already occupied the property and raised the construction. Thus on the date of sale, Kanwar Narbir Singh was not in actual possession of the property. In view of this statement, finding of fact recorded by the lower appellate Court that the construction had been raised by the defendants is not capable of interference. There is one more reason for upholding the findings of fact. Plaintiff claims to have acquired title through sale deed Ex. PA dated 24th April, 1981 (though scribed on 27th April, 1981) and registered on 12th May, 1981, which

recites delivery of possession through this deed of sale. It is neither recited that possession had been delivered earlier, nor that the actual possession was delivered. The suit was filed on 5th June, 1981, in which it was alleged that defendants had occupied the property about 1 1/2 years ago. In his statement, plaintiff Baldev Singh also admitted that as on the date of sale in his favour, defendants were in occupation. In case Kanwar Narbir Singh, a co-owner was not in actual physical and exclusive possession of the disputed property, it was not permissible for him to have conferred a valid title upon this parcel of joint land on the plaintiff. A Division Bench of Punjab High Court in Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punj 528, after considering a catena of judgments evolved certain principles relating to and in respect of the rights of co-owners in joint property. In para 78 of the judgment, the principles have been culled out as under:--

'The weight of the authorities and the principles which have been discussed above, give 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 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 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.'

8. One of the principles is that a co-owner, in case he is in possession of separate parcel of joint land, under an arrangement, consented to by the other co-owners, it is not open to anyone to disturb the arrangement without the consent of the others, except by filing a suit for partition. Another principle is that the remedy available to a co-owner, not in possession of any part of the joint property or not in possession of a share of joint property is only by way of a suit for partition or for a decree for joint possession but not for ejectment. This principle would equally be applicable where a co-owner sets up an exclusive title in himself.

9. A single Judge of the Delhi High Court (Himachal Bench) in Smt. Murtu v. Smt. Giari, (1972) 2 Sim LJ 209, also, after noticing a few judgments held that a member of the joint family, whose share has been defined is in possession of a specific portion of the landed property than the said portion of the property has to be allotted to him during partition being effected by metes and bounds.

10. In view of the aforementioned two decisions and the principles laid down therein, the question posed has to be answered by holding that a co-owner, who is

not in actual physical or exclusive occupation over a parcel of land cannot transfer a valid title to that portion of the property. The remedy of the transferee, in case the transfer is made, would be to get a share from out of the property to be allotted to that co-sharer in partition or to get a decree for joint possession or claim compensation from the co-sharer, as the case may be.

11. In the instant case also, when it is the defendant's case, which has also been supported by the heirs of Ramesh Kumar that defendants were permitted by them to occupy the property, possession will be deemed to be that of Ramesh Kumar, co-sharer and not that of Kanwar Narbir Singh. It has also to be held that Kanwar Narbir Singh was out of possession of the suit property as on the date of sale in favour of the plaintiff. Thus, Kanwar Narbir Singh could not have transferred a valid title with respect to the specific portion of the property, which was in exclusive occupation of Ramesh Kumar or his heirs through the defendants.

12. As a result of the discussion, it has to be held that the plaintiffs remedy, if any, would be against the property of Kanwar Narbir Singh to get compensation out of the share to be allotted in partition to him or to claim compensation or damages from him but he has no right to claim a decree for possession against the defendants.

13. In view of the aforementioned, while answering the question posed in the negative, the appeal deserves dismissal and the same is hereby dismissed with no order as to costs.