

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 21.12.2022

Pronounced on: 30.12.2022

CM(M) No.292/2022

CM No.7332/2022

MST. ZAIBA

... PETITIONER(S)

Through: - Mr. Qazi Ayaz, Advocate

Vs.

GHULAM AHMAD ZARGAR & ORS.

...RESPONDENT(S)

Through: - Mr. Sheikh Hilal, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order dated 13.12.2022 passed by learned Additional District Judge, Budgam (hereinafter referred to as the appellate court), whereby, in an appeal filed against the order of Munsiff, Budgam (hereinafter referred to as the trial court), the respondents(hereinafter referred to as the defendants) have been permitted to raise construction over the suit land subject to an undertaking that they will dismantle the construction in case the petitioner(hereinafter referred to as the plaintiff) succeeds in the suit and at the same time, the defendants have been directed not to create any third party interest in the suit property.

2) It appears that the plaintiff has filed a suit against the defendants seeking a declaration that she is entitled to 42 kanals and 10 marlas of land situated at Zooribagh, Budgam. A decree of partition of the suit land measuring 61 kanals along with the decree of possession in respect of the remaining share of 06 kanals and 10 marlas in the suit land has also been sought. The plaintiff has also sought an injunction against the defendants restraining them from interfering in the exclusive possession of the suit property which falls in her share.

3) The case of the plaintiff before the trial court was that 61 kanals of land belonging to the predecessor-in-interest of the parties was inherited by her and the defendants as per the law of inheritance. According to the plaintiff, she is a Khana Nisheen daughter whereas proforma defendants are Khana Beeron daughters. It has been pleaded that the plaintiff has inherited two shares from the property of her father and mother respectively measuring 42 kanals and 10 marlas from the suit land measuring 61 kanals. It has been further pleaded that the plaintiff is in exclusive ownership and possession of the aforesaid property but on spot she has possession of only 36 kanals of land whereas the remaining portion of the land is in possession of the contesting defendants No.1 to 6. According to the plaintiff,

she asked the contesting defendants to partition the suit land and handover possession of her remaining share to her but they refused. It is also pleaded that the contesting defendants are raising construction on the suit land and are trying to create third party interest.

4) The contesting defendants filed their written statement in which it has been pleaded that the plaintiff and her sisters are entitled to only 17 kanals and 11 marlas of land and there is no question of the plaintiff holding land measuring 36 kanals out of the suit land. It has been pleaded by the contesting defendants that they are entitled to get 17 kanals and 11 marlas of land from the estate left behind by the predecessor-in-interest of the parties and another 11 kanals and 02 marlas of land under the provisions of Agrarian Reforms Act. According to the contesting defendants, their entitlement is 28 kanals and 13 marlas of land out of the suit land. It has been further submitted that the land falling under Survey No.15 has fallen to the share of defendant No.3 and when he started construction of his residential house, the plaintiff filed the suit in order to restrain him from enjoying his share of the property.

5) The learned trial court after hearing the parties decided the application of the plaintiff for grant of interim

injunction vide order dated 29.06.2021. The learned trial court, while allowing the application of the plaintiff, directed that status quo on spot be maintained till disposal of the main suit. While passing the aforesaid direction, the learned trial court opined that the plaintiff has successfully shown that there is a prima facie case in her favour, that there is a threat regarding violation of her right and that an irreparable loss and injury will be caused to the plaintiff in case the injunction is not granted in her favour.

6) The aforesaid order came to be challenged by the contesting defendants by filing an appeal before the learned appellate court. The learned appellate court, while holding that the balance of convenience tilted in favour of the contesting defendants because they were in the process of raising construction of the house on the suit property which is in their possession and that they had dumped construction material on spot, set aside the order of the trial court and directed that contesting defendants shall not create any third party interest over the suit property but allowed them to raise construction on spot subject to furnishing of an undertaking that they will demolish the said construction in case the plaintiff succeeds in the main suit.

7) The plaintiff has challenged the order passed by the learned appellate court on the ground that the contesting defendants had nowhere pleaded that they had raised construction of house upto the slab level or that they have raised any construction on spot but in spite of this, the learned appellate court has come to the conclusion that the construction of one of the houses is complete upto the slab level whereas construction of other house is complete upto plinth level. It has been further contended that the suit property is joint and is yet to be partitioned and in view of this, the learned appellate court could not have allowed the contesting defendants to raise construction on spot. It has been further contended that if the contesting defendants are allowed to raise construction on a portion of the suit land, it would have adverse consequences upon rights of the plaintiff.

8) Heard learned counsel for the parties and perused the record of the case.

9) It has been admitted by the plaintiff in her plaint that the contesting defendants are in possession of some portion of the suit land. According to the plaintiff, though she is entitled to 42 kanals and 10 marlas of land out of 61 kanals of the suit land but on spot she is only in possession of 36 kanals out of the suit land and that the

remaining portion is in possession of the contesting defendants, which means that the contesting defendants are in possession of 25 kanals of land out of the suit land.

10) There is no dispute to the fact that the plaintiff and the contesting defendants are co-sharers of the suit property as they have inherited the same from a common ancestor. The question that arises for consideration is whether a co-sharer can stop another co-sharer from raising construction on a portion of the joint property which is in exclusive possession of the said co-sharer.

11) The law on this aspect of the matter is no longer *res integra*. The Punjab & Haryana High Court in the case of **Sardari Lal Gupta vs. Siri Krishan Aggarwal**, AIR 1984 P&H 439, has held that only because the plaintiff is co-sharer, he cannot restrain the other co-sharer from making construction on the joint property, unless he can specify that he would suffer damage if the injunction is refused. This Court in the case of **Khatoon Magray and others vs. Subhan Magray and others**, (2005) 2 JKJ 210, has, while relying upon the aforesaid judgment of Punjab & Haryana High Court, held that a decree of permanent injunction in favour of a co-sharer cannot be granted against another co-sharer preventing him from enjoying the joint property.

12) Again, in the case of **Kuldeep Singh bs. Sant Nirankari Mandal & Ors.** (CIMA No.501/2013 decided on 16.11.2017), this Court has, while dealing with the above aspect, observed as under:

“9. The factual position by and large is clear from the pleadings of the parties, averments in the memorandum of appeal and submissions made at Bar on behalf of the parties. Legal position in regard to the competence of a co-owner to transfer a specific portion of the joint holding by sale or otherwise, consequences of such a transfer and rights of the transferee by now and since long is well settled. A co-owner in exclusive possession of a specific portion of the joint holding can transfer that portion to a third person but such transfer should not exceed his share in the entire joint holding. In the case of sale of a specific portion of a joint holding, the vendee will get the right of possession of the property sold to him and status of a co-sharer qua the said property and the sale would be subject to partition at the time of partition among the co-owners. Likewise, legal position in regard to the exclusive use of a portion of joint holding in possession of a co-owner, in particular, permissibility of raising construction on the said portion is also well settled. It is permissible for a co-owner to raise construction on that portion of the joint holding of which he has been in exclusive possession without any objection from the other co-owners. This right of the co-owner, however, is not totally unfettered and is subject to some conditions, which need not be discussed here (See Mst. Rahti v. Wali Ganai and ors. AIR 1966 J&K 39, Mohammad Akram Siah v. State and ors, 2009 (2) SLJ 466, Kabla Singh and anr. v. Pari Ram and ors, 2009 (2) JKJ 313 and Din Dayal Kapoor and ors. v. Kusum Kapoor, 2014 (1) 351). Suffice to say, briefly, the vendee of a portion of a joint holding will get rights in that portion to the extent of the rights held by the vendor.”

13) From the foregoing enunciation of the law on the subject, it is clear that a co-sharer, who is in exclusive

possession of a joint holding, cannot be restrained from raising construction on that portion of the joint holding of which he is in exclusive possession. Therefore, applying this ratio to the present case, the contesting defendants, who even as per admission of the plaintiff, are in possession of a portion of the suit property, cannot be restrained from raising construction over the same.

14) The learned trial court while passing an order of status quo has not dealt with this aspect of the matter. The said court has also not taken into account the fact that the contesting defendants were in the process of raising construction on spot, which they have specifically pleaded in para (6) of their written statement. Because of the fact that the contesting defendants were in the process of raising construction on a portion of the suit land and they had dumped construction material on the site, passing of order of status quo against them by the trial court would have resulted in irreparable loss to them. In spite of these pleadings, the learned trial court held that the balance of convenience lies in favour of the plaintiff. In these circumstances, the learned appellate court has rightly set aside the order of the learned trial court and while protecting the interests of the plaintiff, allowed the

contesting defendants to raise construction on spot subject to furnishing an undertaking.

15) For the foregoing reasons, I do not find any illegality, much less a gross illegality in the impugned order passed by the learned appellate court. The same does not call for any interference from this Court. The petition lacks merits is dismissed accordingly.

16) A copy of the order be sent to the learned trial court for information and compliance.

(SANJAY DHAR)
JUDGE

Srinagar,
30.12.2022
"Bhat Altaf, PS"

Whether the order is speaking: **Yes/No**
Whether the order is reportable: **Yes/No**

