

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Pronounced on : 28.02.2024

Case No : OWP No. 1425/2018
CM No. 9303/2021 &
IA No. 01/2018
c/w
CPOWP No. 68/2019

Vijay Singh S/o Charan Singh,
R/o Ratno Chak Tehsil and District Jammu.

.....Petitioner(s)..

Through :- Mr. Rameshwar P. Sharma, Advocate with
Mr. Vishal Kotwal & Mr. Nigam P. Saraf,
Advocates.

Vs

1. Surjit Singh
2. Jagdev Singh
Both sons of Saran Singh
3. Kulwant Singh
4. Tajeshwar Singh
Both sons of Jameet Singh
All residents of Village Ratnuchak,
Tehsil and District, Jammu.
5. Surinder Singh S/o Charan Singh,
R/o Sangwali Mandi Tehsil and
District Samba.

...Respondent(s)..

Through :- Mr. Sidhant Gupta, Advocate.

Coram: HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT
28.02.2024

1. The petitioner-plaintiff filed a suit for declaration with the averments that plaintiff and defendants are joint owners and in possession of land comprising Survey No.167 min measuring 43 kanals 18 marlas and Survey No. 168 measuring 26 kanals 7 marlas situate at Village Raipur Koller Tehsil and District Samba and is un-partitioned one and the property is to be enjoyed by all till it is partitioned with a further consequential relief of permanent prohibitory injunction restraining the respondents-defendant Nos. 1 to 5 from forcibly and illegally causing ouster of the plaintiff by raising permanent structures over portion of land

abutting the road with construction of shed & shops so as not to diminish the value of rest of land. The defendant Nos. 6 to 9 are also stated to have rights in the property in question and have been arrayed as proforma defendants only. The plaintiff has based his suit on the basis of revenue record which is annexed with the plaint.

2. The defendants have filed the written statement wherein the defendants have stated that an agreement and adjustment of their portion of land in certain khasra numbers was made and the agreement was reduced into writing and the defendant Nos. 1 to 4 also put their signatures on the same. The front portion is in possession of defendant Nos. 1 to 4 and had a pathway for egress and outgress for going towards the land of the plaintiff and defendant No.5. Infact the shares of the parties have been ascertained in the revenue record. As the plaintiff and defendant No.5 got their piece of land by way of mutual agreement, therefore, there is no question of seeking declaration in the suit. The defendant No.5 is the real brother of the plaintiff and had already disposed of the land measuring 18 kanals 10 marlas to one Charan Singh Choudhary and the defendant Nos. 1 to 4 have already raised construction about 20 years ago of shops, houses etc. to which the plaintiff never raised any objection.
3. In the interim application filed by the petitioner-plaintiff, the trial court vide order dated 19.09.2016 directed the parties to maintain status quo with regard to the possession of the suit land. The defendants aggrieved by the said order preferred appeal before the learned District Court. The court vide impugned order modified the order of the trial court and allowed the defendant to raise construction in the suit property. It may be noticed herein that the earlier order passed by the appellate court was set aside by this Court and the appellate court was directed to pass fresh orders in the matter.
4. The main argument of the counsel for the petitioner-plaintiff is that in case the defendants are allowed to raise construction, the same shall change the nature of the land and the same could not be allowed when the suit property is yet to be partitioned. Further the proceedings pending

before the revenue courts shall get effected in view of the order passed by the appellate court. The other side has contended that the plaintiff is himself party to the agreement and that partition has taken place of 18 kanals of land. The respondents also referred to the report of the Tehsildar wherein he had mentioned of the oral partition having taken place between the parties.

5. The petitioner-plaintiff is aggrieved of the order passed by the appellate court which allows the defendants to raise construction in their own share being in exclusive possession of the same for a long time as mentioned in the order. It may be mentioned herein that the court while allowing the defendants to raise construction also directed that in case the final decree is passed in favour of the plaintiff the defendants will have to dismantle all construction and no claim regarding the expenses incurred upon such construction shall be raised.
6. The objections to the petition have been filed by the respondent Nos. 1 to 4 wherein the respondents have infact relied upon the stand taken by them in the written statement.
7. The court before proceeding further in the matter has to keep in mind that Article 227 of the Constitution of India cannot be invoked merely because one party is not satisfied with the order passed by the court below or that some other interpretation could be given to the facts otherwise than what was given by the court below. Neither the question of fact determined by the court below nor even a mistake in law committed by the court will invoke Article 227 of the Constitution. Of course where this court finds that there is gross miscarriage of justice in a given case only then the court can exercise the discretion to upset the order of the court below.
8. The plaintiff has pleaded that the suit property is not partitioned and, therefore, any interference in the suit property in any manner may be by way of construction only shall change the nature of the suit and cause irreparable loss to the plaintiff. The property till partitioned belongs to all the joint holders and have right to enjoy the same. The value of the

property cannot be allowed to be diminished by any party to the suit by raising construction.

9. The case of the defendants on the other hand is that the plaintiff is himself signatory to an agreement executed in the year 2010 and further the brother of the plaintiff has disposed of 18 kanals of land which itself shows that the partition has taken place. The mutual division has already taken place as per the report of the Tehsildar dated 12.12.2017 which was made on the directions of the appellate court dated 05.10.2017.
10. It is trite proposition of law that every co-sharer has right in the property till the same is partitioned and can enjoy every inch of the same also. Where the parties are in settled possession of the property, they can enjoy the same but not to the detriment of the other co-sharers. The co-sharer can also sell his share in the property and hand over the possession to the purchaser though the purchaser cannot claim that he is entitled to a certain specific piece of property as his entitlement to enjoy the property will depend upon the partition as and when it takes place. Mere raising of construction by one co-sharer in the property does not mean that the other co-sharer will lose his interest in the same because of the aforesaid fact if the property where the construction has been raised on partition otherwise falls in his share. This is well settled proposition of law and needs no further elaboration by the court.
11. Mere assertion in the suit that the property is un-partitioned and therefore the defendant cannot raise construction in any portion of the land is without any basis. The defendants are in possession of certain piece of property exclusively and to the exclusion of the plaintiff is *prima facie* made out from the fact that the plaintiff does not aver in the plaint that he is in possession of the property where the defendants intend to raise the construction. The agreement of 2010 also *prima facie* reveals the participation of the plaintiff in it and that further 18 kanals of land already stands sold out to one Charan Singh by the brother of the plaintiff. The oral partition report given by the Tehsildar though may not be final word of partition but it does at this juncture favour the assertion of the

defendants that the oral partition had already taken place and the parties are in possession of their share. The appellate court while modifying the status quo order of the trial court and allowing the defendant to raise construction has adequately passed directions keeping the interest of the parties including the plaintiff. The appellate court has even directed the defendants not to raise the construction on a pathway also as is mentioned in the order which should satisfy the petitioner herein.

12. The Court finds that there is no exceptional circumstance which may require interference by this Court in the order passed by the appellate court. However, in addition to the directions passed by the appellate court in the appeal it is also directed that the defendants shall not raise any construction beyond the land which is in their possession or dispose of any portion of suit property during the pendency of the suit. The trial court while dealing with the suit shall not get influenced by any observation made by this court or the appellate court.
13. The petition is, accordingly, disposed of.
14. The connected applications as well as the contempt petition also stand disposed of.

(PUNEET GUPTA)
JUDGE

Jammu:
28.02.2024
Pawan Chopra

Whether the Judgment is speaking: Yes/No
Whether the Judgment is reportable: Yes/No