

(2010) 1 RCR(Civil) 255**High Court Of Punjab And Haryana At Chandigarh****Case No:** Regular Second Appeal No. 2591 of 2008

Sher Singh

APPELLANT

Vs

Pyare and Others

RESPONDENT

Date of Decision: July 27, 2009**Citation:** (2010) 1 RCR(Civil) 255**Hon'ble Judges:** Sabina, J**Bench:** Single Bench**Advocate:** C.B. Goel, for the Appellant;**Final Decision:** Dismissed

Judgement

Mrs. Sabina, J.

Sher Singh-Plaintiff had filed a suit for mandatory injunction against the defendants. Additional Civil Judge (Senior Division), Jhajjar, vide judgment and decree dated 21.02.2007 decreed the suit of the plaintiff to the extent that the plaintiff is entitled to construct the Chhatri at the place of cremation of his father on the suit property up to the extent of his 1/27th share out of the total land. Aggrieved by the same plaintiff filed an appeal with the prayer that his entire suit was liable to be decreed. Vide judgment and decree dated 17.03.2008, Additional District Judge, Jhajjar maintained the judgment and decree dated 21.02.2007 and dismissed the appeal. Hence the present appeal.

2. The facts of the case, as notice by the learned Additional District Judge in paras 2 and 3 of its judgment are as under:-

"Briefly stated the facts of the case as emanating from the pleadings of the parties are that the plaintiff and the defendant No. 1 were co-sharers in the agricultural land measuring 7 kanals 6 marlas situated within the revenue estate of village Khanpur Khurd comprised in Khewat No.24 and bearing Khasra Nos.75/25/1(2-1) and 86/ 5/1 (5-5). This land was abutting the abadi of the village and could be used for residential purposes. The plaintiff had cremated his father on this land. He wanted to construct a Chhatri (a memorial) at that site. The defendants were objecting to the same. Accordingly, the

plaintiff brought the present suit seeking a decree of mandatory injunction directing the defendants to allow him to raise construction of Chhatri on the suit land where his father was cremated.

The defendants filed their joint written statement. Therein, they admitted the Khasra Numbers as well as the nature of the land. They denied that the plaintiff was co-sharer in this land. It was further pleaded that this land was partitioned by way of a family partition more than 35 years back and the plaintiff and his three real brothers and other co-sharers were given separate holdings. The parties have been continuing in possession of their separate holdings having fallen to their lot. With these pleadings the defendants pleaded that the plaintiff was not entitled to a decree of mandatory injunction as prayed for.

On pleadings of the parties, following issues were framed by the trial court:-

(1) Whether the plaintiff and defendant No.1 are co-sharers in the disputed property detailed in para No. 1 of the plaint? OPP

(2) Whether the plaintiff is entitled for relief as prayed for? OPP

(3) Relief

3. After hearing learned counsel for the appellant, I am of the opinion that the present appeal is devoid of any merit and deserves to be dismissed.

4. Plaintiff had filed a suit for mandatory injunction directing the defendants to allow him to raise construction of Chhatri in the suit land where his father had been cremated and further directing the defendants not to raise construction in the suit land without getting it partitioned.

5. So far as the case of the plaintiff with regard to raising of construction of Chhatri at the place where his father had been cremated, is concerned, the same was decreed by the trial court. The said part of the decree was not challenged by the defendants by way of appeal. It was only the plaintiff who had filed an appeal praying that his entire suit was liable to be decreed.

6. It has been held by this Court in the case [Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and Others](#), as under:-

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of 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. Case law reviewed.

7. Admittedly, the suit land is jointly owned and possessed by the parties. Courts below after going through the revenue record available on file held that the parties were co-sharers in the suit land and the same was agricultural land. No co-sharer can be permitted to utilise the joint holding to the exclusion of the other co-sharer and for the purpose which is detrimental to the interest of other co-sharers. Both the courts below have further held that by way of the present suit, plaintiff himself wanted to raise construction over the suit land without getting the land partitioned and the said relief could not be allowed to him. In these circumstance, courts below had rightly held that the relief of mandatory injunction could not be granted to the plaintiff and the only appropriate remedy available to the plaintiff is to seek partition of the joint property. No ground for interference is made out.

8. No substantial question of law arises in this appeal. Accordingly, this appeal is dismissed.