

(1999) 08 P&H CK 0004
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 4146 of 1999

Akshey Kumar

APPELLANT

Vs

Rakesh Kumar

RESPONDENT

Date of Decision : 30-08-1999

Acts Referred:

Citation : (1999) 08 P&H CK 0004

Hon'ble Judges : M.L. Singhal, J

Bench : Single Bench

Advocate : Ashok Singla, for the Appellant; Ashok Jindal, for the Respondent

Final Decision : Allowed

Judgement

M.L. Singhal, J.—Akshey Kumar minor plaintiff (Petitioner-herein) is the son of Mukesh Kumar son of Ram Sarup. Through his mother, he instituted suit for permanent injunction restraining his uncle Rakesh Kumar son of Ram Sarup defendant (respondent-herein) from making construction on portion of house bearing NC No. 4370 situated in Kikar Bazar. Bathinda beyond his 1/2 share and particularly on any specific portion of this house without getting it partitioned and further restraining Rakesh Kumar from demolishing any construction on the excess and specific portion of the house and also restraining him from alienating the excess and specific portion of the house without getting the same partitioned. Basis of his claim was that this house was originally owned by his grand-father Ram Sarup. Ram Sarup died on 3.2.1998. During his life time, he had executed will dated 4.1.1998 where through he had bequeathed this house to him and Ms uncle Ramesh (Rakesh) Kumar in equal shares and this house is still their joint property and is King unpartitioned by metes and bounds. Some portion is in his possession. Rakesh Kumar respondent-defendant forcibly demolished the front portion of the premises which abuts the road side and he had threatened to demolish the remaining portion and to reconstruct the demolished portion so that he occupies the excess and valuable portion abutting the bazar side and thus the plaintiff would be deprived of the occupation of that

more valuable portion abutting the bazar side. It was alleged by him in the plaint that Rakesh Kumar was bent upon raising construction on the excess and specific portion which is more valuable and also bent upon alienating that excess and specific portion of the house which is more valuable to some body else without getting the same partitioned.

2. Rakesh Kumar contested the suit urging that during his life time Ram Sarup had executed a registered Will on 12.6.96 vide which he had willed away area measuring 18" x 38" situated on the back side to the plaintiff while he had willed away the front portion situated towards the Kikar Bazar measuring 18" x 38" to him. Ram Sarup died on 3.2.1998. It was further pleaded that this will dated 12.6.96 is the last will and testament of Ram Sarup and on account of this will, he is in possession of the front portion of the house situated towards the Kikar Bazar and therefore, he has the right to demolish any construction lying constructed on this portion and raise construction afresh thereon. It was further urged that the Will set up by Akshey Kumar plaintiff is false forged and fabricated. Alongwith the plaint, Akshey Kumar moved an application for the grant of temporary injunction to the said effect.

3. Vide order dated 16.4.99 Addl. Civil Judge (Sr. Div.) Bathinda declined the prayer for the grant of temporary injunction. At the same time, he observed that the defendant shall raise construction at this own risk and shall not make any right or claim on the front portion simply because he has raised construction and shall remove that construction at his cost if plaintiff's suit succeeds ultimately.

4. Akshey Kumar went in appeal to the learned Additional District Judge, Bhatinda. Learned Addl. Distt. Judge. Bhatinda dismissed the appeal holding that the order refusing temporary injunction is of discretionary character which shall not be interfered with by Appellate Court unless the discretion exercised by the trial Court had been exercised arbitrarily, capriciously and in disregard of the sound legal principles or without considering all the relevant records.

5. Aggrieved from this order dated 27.7.1990 of learned Addl. Distt. Judge, Bathinda, Akshey Kumar has come up in revision to this Court.

6. I have heard both the sides and have gone through the record.

7. Learned counsel for the petitioner submits that temporary injunction should have been allowed in his favour, assuming but no conceding that defendant-respondent is in exclusive possession of the portion where he wants to raise construction, he is in exclusive possession as co-sharer and partition has not taken place so far. In support of this contention, he has drawn my attention to Om Parkash and others vs. Chhaju Ram (1992) PLR 75 where it was held that a co-sharer who is in exclusive possession cannot be permitted to raise construction on the land in his possession as every other co-sharer is also a joint owner of every inch of the entire joint holding till the same is regularly partitioned in the instant case arc ready and willing to give and undertaking to remove the malba in case the plaintiff succeeds in establishing his case, cannot

be considered to be a cogent ground to permit the defendants to raise further construction over the land in suit.

8. He has drawn my attention to Ashok Kumar vs. Jai Kumar and others. 1998 (1) PLJ 680 where it was held that there is a dispute between the parties and the pleas taken by the parties are based on certain documents. Suit property has to be preserved. He has drawn my attention to Nazar Mohd. Khan vs. Arshad Ali Khan and others. (1996) PLR 334 where it was observed that co-sharer has no right to raise the construction till the land is partitioned by metes and bounds. So even when one of the co-sharers is in exclusive possession of a particular piece of land, any other person can seek injunction restraining the others from raising construction till the matter is finally decided. Learned counsel for the petitioner submits that the respondent wants to appropriate to himself better portion which has commercial value. By raising construction, he will try to urge at the time when partition takes place since he has raised construction on this portion he should be allowed to retain this portion and also further the other co-owner even if that portion falls to his lot, may not be able to have that portion as he may not be able to pay for that portion.

9. Learned counsel for the respondent, on the other hand, submits that the learned Courts below have exercised discretion in favour of defendant-respondent and that discretion should not be interfered with particularly when he has collected building material and is raising construction on the portion which is in his ownership and exclusive possession in view of the registered Will dated 12.6.1996 which is the last will and testament of Ram Sarup. He submits that there will be no irreparable injury to the petitioner-plaintiff if injunction allowed to the respondent-defendant is made to operate till the disposal of the suit when his rights have been amply safeguarded by the Courts below that in case the plaintiff succeeds in the suit he will demolish the construction raised without any demur and will not claim any compensation. Suffice it to say, at this stage, as to whether the earlier Will prevails or the later will prevails or no will prevails, these are the points to be adjudicated by the learned trial Court.

10. Keeping in view the overall view of the case, I think it would be just and equitable to keep the property preserved in its present state. So, this revision is allowed and the temporary injunction as prayed for as allowed to the plaintiff-petitioner.

11. Nothing said above shall be an expression of opinion on any aspect of the case which will be adjudicated by the learned trial court on evidence. Learned trial Court will try to decide the suit as early as possible possibly within 6 months.