

(1976) 12 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : Second Appeal No. 18 of 1971

Gian Chand

APPELLANT

Vs

Krishen Singh and Another

RESPONDENT

Date of Decision : 14-12-1976

Acts Referred:

Specific Relief Act, 1963 — Section 42, 42(2)

Citation : AIR 1978 J&K 16

Hon'ble Judges : Mian Jalal-ud-din, C.J.; Ghulam Mohd. Mir, J

Bench : Division Bench

Advocate : S.P. Gupta, for the Appellant; V.S. Malhotra, for the Respondent

Final Decision : Allowed

Judgement

Mian Jalal-ud-din Ag., C.J.—This is the Defendant's second appeal and arises out of a suit for declaration. The suit was dismissed by the

trial court but on appeal was decreed by the District Judge, Jammu.

2. Sarab Singh, Krishen Singh and Hazra Singh were three brOrs. . They owned land jointly in village Kotli, Mian Fateh, Tehsil R.S. Pora Out of

the land so held, Sarab Singh disposed of his 1/3rd share of a kanals and 11 marlas of land by sale in favour of Gian Chand, the Appellant. The

land so sold fell under survey Nos. 283, 608/286, 606/286 and 421/284. The sale deed was executed for a consideration of Rs. 9,000/- on 4-1-

1961 Krishen Singh and Hazra Singh brought a suit for declaration challenging the legality of the sale in favour of the Appellant. They averred that

the three brOrs. constituted a joint family and the entire land was joint. The sale was without consideration. Gian Chand Appellant resisted the suit

on the ground that the sale was for consideration and the land was not held jointly between the brOrs. but had been partitioned Sarab Singh could

legally alienate his own share out of the land which had fallen to his share. A number of issues were raised by the trial court. The first issue related to the joint character of the land. The second issue was whether the sale was for consideration. The third and fourth issues related to legal necessity and relief respectively. The learned Sub-Judge Jammu who tried the suit held that there was no partition between the brOrs. and that the land was joint held by them. He also found that the sale was for a consideration. On the question of legal necessity is decided against the Plaintiff. He however, found that the vendor Sarab Singh had sold 10 marlas of land to excess of his share and therefore the sale of ten marlas made by Sarab Singh being in excess of his share was set aside. The sale in respect of 9 kanals and 1 marla was allowed to remain intact. The trial court observed that as the vendor had sold specific survey numbers of the joint property. The sale of the specific numbers was not valid and was therefore, set aside. The trial court observed that as the Appellant is already in possession of the land sold to him by Sarab Singh, the vendor, his possession could not be disturbed. Any one of the Plaintiffs or the vendee could bring a suit or partition if they so choose. With these observations the suit was disposed of. On appeal the District judge set aside the judgment and the decree of the trial court. He held that the sale of 9 kanals and 11 marlas or specific numbers made by Sarab Singh in favour of the Appellant was invalid and ineffective and was therefore liable to be set aside. He, therefore decreed the suit. Aggrieved by this judgment of the first appellate court, the Defendant has come in second appeal.

3. The matter once came up before Dr. Justice D.D. Thakur (as he then (sic) as). Twofold arguments were raised before him. Firstly the finding of the District Judge on the issue regarding possession of Sarab Singh over the disputed land was against the weight of evidence and secondly the suit was (sic) rred by proviso to Section 42 of the Specific Relief Act as during the pendency of the suit the Plaintiff was dispossessed from the suit land. According to the Plaintiffs-Respondents was not necessary for them to have (sic) ended the plaint and asked for a subsequential relief of possession under proviso to Section 42 of the Specific Relief Act. The maintainability of the suit even in the absence of such amendment remained unaffected. The Plaintiffs could be awarded the session in spite of proviso to Section 42. The learned Judge therefore, formulated the following

question and relied the entire case to a larger bench for consideration:

Does the proviso to Section 42 of the Specific Relief Act stand attracted to (sic) it for simple declaration if the Plaintiff, who is in possession of the

property on the date of the suit is possessed during the pendency of suit and whether the Plaintiff can in possession forcibly or file a separate suit

for possession in the event of his success in the declaratory suit?

It is in these circumstances that the appeal has come before us.

4. We have heard the learned Counsel for the parties at length.

5. Appearing for the Appellant, Mr. S.P. Gupta has submitted that the lower appellate court has gone on a wrong track in construing and

appreciating the evidence led by the parties in the case. According to him there is ample material on the record to prove that the possession of the

disputed land was given to the Appellant by the vendor at the time the sale deed was executed and the 'Nishandehi' of the land was effected by the

revenue agency. Although the trial court observed that Sarab Singh was not in exclusive possession of the joint land, it did not follow from that that

he was out of possession. Sarab Singh admittedly being a co-owner was undoubtedly in possession of the joint property. His possession was over

specific survey numbers which he had sold to the Appellant. The remedy of the other co-owners i.e. the Plaintiffs was not by way of filing a suit for

declaration but by seeking partition from the revenue court. The sale so effected in favour of the Appellant could be subject to the result of

partition. Suit for declaration could not lie when the Plaintiffs were not in possession of the disputed land at the time of the sale, or at any rate had

admittedly lost possession during the pendency of the suit. Without praying for consequential relief suit u/s 42 was not maintainable. This the lower

appellate court had failed to appreciate.

6. Mr. V.S. Malhotra the learned Counsel for the Respondents has on the other hand submitted that Sarab Singh could not dispose of specific

survey numbers of the land in favour of the Appellant by sale. The property being joint every owner thereof had interest in every inch of the joint

property. In view of this Sarab Singh had no authority to dispose of particular survey numbers which were not at all in his possession. He has

further submitted that the possession of the disputed land was never given to the Appellant at the time of the sale but it was only after the institution

of the suit that the Appellant forcibly got the possession of the said land without the consent and against the will of the Plaintiffs Respondents. For

the high-handed action of the Appellant, the Respondents could not suffer. The Court in such circumstances had the power to restore possession

of the suit land to the Plaintiffs Respondents at the time of the passing of the decree notwithstanding the fact that the Plaintiff did not ask for

possession.

7. There is no gainsaying the fact that the property is jointly held by the three brOrs. . Indeed the proposition was not made subject of any debate

before us that the property had been partitioned amongst the brOrs. . Both the courts below have found that undoubtedly the property is held

jointly by all the three brOrs. and has not been partitioned so far. The fact that the sale in favour of the Appellant was without consideration or was

without any legal necessity has also been negated by the courts below and found against the Plaintiffs. The only two important questions with

which we are concerned in this appeal are : (1) Whether Sarah Singh could dispose of by sale the specific survey numbers regarding the

possession of which the parties are in dispute Plaintiffs affirming that the Appellant was not in possession, the Defendant-Appellant pleading that

Sarab Singh was in possession and that he transferred the possession thereof to the Appellant at the time of the sale and (2) whether the suit of the

Plaintiffs-Respondents u/s 42 of the Specific Relief Act is maintainable without consequential relief (the admitted position being that the Plaintiffs

lost possession during the pendency of the suit) and whether in such circumstances the court could award relief of possession to the Plaintiffs

without their expressly asking for it.

8. In order to determine the first question the statement of Krishan Singh Plaintiff. Th. Karam Singh PW and Girdhari Lal PW are very material.

Krishan Singh, the Plaintiff, himself stated that the Appellant cultivated the land on 20-10-1967 when he took the possession of the land in absence

of the Plaintiffs. Th. Karam Singh stated that the Appellant forcibly took the possession of the land after institution of the suit but in cross-

examination admitted that the possession was given to the Appellant after the sale deed was executed. He further admitted that the Defendant No.

2 i.e., Sarab Singh held the land in his separate cultivation for the last nine years

when he parted from the Plaintiffs. Girdhari Lal Anr. witness of the Plaintiffs categorically stated that the possession of the suit land was given to Gian Chand the Appellant at the time of the sale from this evidence of the (sic) witnesses of the Plaintiffs include the Plaintiff himself and also the recitals made in the sale deed, it manifestly clear that Sarab Singh held the specific survey numbers (sic) his personal cultivation although the property remained joint with his brOrs. and that he delivered the possession of the suit land to the vend(sic) Appellant after the sale was executed. In view of these admissions of the Plaintiff and his witnesses referred above, it is not necessary to refer to the Defendants evidence. Holding the land separately for purposes of cultivation might be because of convenience or with the consent of the other brOrs. or otherwise. In this opinion therefore there is no merit in the argument of the learned Counsel for the Respondent that Sarab Singh could not dispose of the land held to him separately in his possession in favour of Gian Chand, Appellant although the property continued remain joint with his brOrs. .

9. A Division Bench of this Court in AIR 1960 J and K 39 (Sic) observed ""that a co-sharer can transfer a specific portion of his share in a particular survey number if he is in actual possession of any portion of the (sic) holding but he cannot transfer where he is not in possession. When a co-sharer is in exclusive possession of a piece of a joint holding which does not exceed his share either inconvenience or without any hindrance from other co-sharer, he can transfer this interest but the transfer with subject to the rights of other sharers at the time of partition such cases a co-sharer is entitled transfer only his share in the hold and cannot exceed his share. The possession of a co-sharer in exclusive possession of a portion of a land cannot be disturbed by or at the instance of other co-sharer who can only do so by seeking partition. No prejudice is caused to other co-sharer by transfer in favour of the vendee in so far as the law sets those rights which the Vendor himself possesses. The right of the vendee is subject to the rights which the other co-sharer had at the time of partition"". Also a full bench of this Court has had an occasion to expatiate; upon this aspect of the matter. It enunciated the following proposition of law while discussing the rights and liabilities of a co-owner in the joint land. Vide 1971 (sic)K LR 517 : AIR 1972 J and K 28 (sic)B): the following observations

made are relevant (at p. 35 of AIR):

The transferee steps into the shoes of his transferor and has all the rights and privileges and is subject to all the capabilities that his transferor had.

In case of joint undivided property every co-sharer or co-owner is the owner of each particle of the property along with his other co-sharers co-

owners. No co-owner or co-sharer can so long as the property is not claim any specific interest in any particular portion of the joint property.

However a co-owner in possession of some portion of property in transfer the same subject to the rights of other co-owner and he can only

transfer joint property to the tenant of his share therein. If he transfers more than his share in the (sic)nt property, the transfer to that (sic)ent would

be void. The transfer any portion from joint property in our of a stranger would be subject the rights of partition of the property by any one of the

joint-owners.

In fact the propositions enunciated have also found support from AIR (sic) Lah 473.

10. It, therefore, follows that Sarab Singh the vendor, having held the land in his separate cultivation the last 9 years before the execution of the

sale deed could transfer share in the land in favour of the Appellant but his transfer would be subject to adjustment in a suit for partition which any

of the parties could maintain before a revenue court. But to say that Sarab Singh had no right to dispose of his share in his possession will not be a

correct proposition of law.

11. It having been found that the possession of the land in question was delivered to purchaser the Appellant at the time of the execution of the sale

deed, it is difficult to see how the Plaintiffs' suit for mere declaration under proviso to Section 42 of the Specific Relief Act would be maintainable

without the Plaintiff praying for consequential relief for possession. Plaintiffs being out of possession of the suit land at the time of institution of the

suit cannot maintain the suit for declaration unless they expressly sought consequential relief of possession. The position would not be altered if

during the pendency of the suit the Plaintiffs were dispossessed. The court could take notice of the subsequent event and allow them to add prayer

for consequential relief. If a Plaintiff is dispossessed during the pendency of the suit his remedy is to apply for amendment of the plaint and to add

prayer for consequential relief which the court can readily grant in the circumstances of the case. As in the present case it has been found that the Plaintiffs were out of possession at the commencement of the suit, their suit would be barred under proviso to Section 42(2) of the Specific Relief Act.

12. For the foregoing reasons the result is that the appeal is allowed. The suit of the Plaintiffs is dismissed. The Plaintiffs may choose to bring a suit for partition before the appropriate forum in case they choose to do so and are accordingly advised. In the circumstances of the case. I leave the parties to bear their own costs.

G.M. Mir, J.

13. I agree.