
(2016) 06 SHI CK 0017
In the High Court Of Himachal Pradesh
Case No : CMPMO No. 30 of 2016

Naresh Kumar

APPELLANT

Vs

Tej Ram

RESPONDENT

Date of Decision : 14-06-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Constitution of India, 1950 — Article 227

Citation : (2016) 3 HimLR 1859 : (2016) ILRHP 1874 : (2016) LatestHLJ(HP) 732

Hon'ble Judges : Mr. P.S. Rana, J.

Bench : Single Bench

Advocate : Mr. G.R. Palsara, Advocate, for the Appellant; Mr. H.S. Rangra, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. P.S. Rana, J. (Oral) - Present petition is filed under Article 227 of Constitution of India against the order dated 30.11.2015 passed by learned Civil Judge (Senior Division) Mandi (H.P.) in CMA No.264-VI/15 in Civil Suit No. 129 of 2012 title Tej Ram v. Naresh Kumar & another.

Brief facts of the case:

2. Plaintiff Tej Ram filed civil suit for permanent prohibitory and mandatory injunction pleaded therein that land comprised in Khata No. 426 Khatoni No.493 Khasra No.1130 measuring 01-10- 01 situated in Mohal Nagchalla/219 Tehsil Sadar Mandi Distt. Mandi (H.P.) is jointly owned and possessed by plaintiff, defendants and other co-sharers as per jamabandi for the year 2009-2010. It is pleaded that suit land is joint un-partitioned property inter se parties. It is pleaded that defendants without consent of plaintiff started construction work over valuable portion of the suit land. It is pleaded that defendants have no right, title and interest to raise any construction over suit land till suit land is partitioned by metes and bounds. It is pleaded that decree for permanent

prohibitory injunction be passed against the defendants not to raise any type of construction till suit land is not partitioned in accordance with law. Additional relief also sought that if during pendency of civil suit defendants would succeed in raising construction then decree of mandatory injunction of demolition of structure be also passed.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit is not maintainable and plaintiff has no cause of action against the defendants. It is pleaded that plaintiff has no locus standi to file the present suit. It is pleaded that present suit is not valued properly for the purpose of Court fee and jurisdiction. It is pleaded that suit is bad for non-joinder of necessary parties. It is denied that defendants are threatening to raise construction over best portion of the suit land. Prayer for dismissal of suit sought. Plaintiff filed replication and re-asserted the allegations mentioned in plaint.

4. Learned Trial Court framed following issues on dated 22.08.2014:

(1) Whether plaintiff is entitled for the relief of permanent prohibitory and mandatory injunction, as prayed? OPP.

(2) Whether plaintiff is entitled to the relief of mandatory injunction, as prayed? OPP.

(3) Whether the suit of the plaintiff is not maintainable as alleged? OPD.

(4) Whether plaintiff has no cause of action against the defendants to file the present suit as alleged? OPD

5) Whether suit of the plaintiff is bad for non-joinder of necessary parties as alleged? OPD

(6) Whether suit of the plaintiff is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD

(7) Relief.

5. During pendency of the suit plaintiff Tej Ram filed application under Order 39 Rules 1 & 2 CPC for grant of ad interim injunction. Learned Trial Court dismissed the application filed by plaintiff Tej Ram under Order 39 Rules 1 & 2 CPC. Thereafter plaintiff Tej Ram filed appeal under Order 43 before learned District Judge Mandi (H.P.). Learned District Judge Mandi (H.P.) allowed the appeal filed by plaintiff Tej Ram and set-aside the impugned order passed by learned Trial Court. Learned first Appellate Court restrained the defendants from raising further construction over the suit land in any manner whatsoever till disposal of civil suit.

6. Feeling aggrieved against the order passed by learned District Judge Mandi (H.P.) Sh. Naresh Kumar and other defendants filed CMPMO No.4075 of 2013 before Hon''ble High Court of Himachal Pradesh. Hon''ble High Court of Himachal Pradesh decided CMPMO No.4075 of 2013 title Naresh Kumar and another v. Tej

Ram on 03.09.2013 with the directions that defendants would remove construction found in excess of their shares at their own costs from suit land. Thereafter plaintiff Tej Ram filed CMA No.264-VI/15 under Order 26, Rule 9 CPC for appointment of some senior revenue officer or retired Tehsildar as Local Commissioner to determine whether construction raised by defendants is within their shares or in excess of their shares. Defendants filed response to application filed under Order 26, Rule 9 CPC for appointment of Local Commissioner pleaded therein that appointment of Local Commissioner is not essential in the present case and prayer for dismissal of application filed under Order 26, Rule 9 CPC sought.

7. Learned Trial Court appointed Tehsildar Balh Distt. Mandi as Local Commissioner to determine the fact whether defendants have made encroachment on the share of plaintiff and other co-sharers. Learned Trial Court assessed the fee of Local Commissioner as Rs. 5000/- (Rupee five thousand). Feeling aggrieved against the order of learned Trial Court defendants filed present petition under Article 227 of Constitution of India.

8. Court heard learned Advocates appearing on behalf of petitioners and non-petitioner and Court also perused the entire record carefully.

9. Following points arise for determination in the present petition :

(1) Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

(2) Final Order.

Findings upon Point No.1 with reasons.

10. Submission of learned Advocate appearing on behalf of petitioners that learned Trial Court has committed illegality by way of appointing Local Commissioner in present civil suit in view of decision of CMPMO No.4075 of 2013 passed by Hon"ble High Court of Himachal Pradesh is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the order of Hon"ble High Court of Himachal Pradesh passed in CMPMO No.4075 of 2013 title Naresh Kumar and another v. Tej Ram. Hon"ble High Court of Himachal Pradesh has directed in positive manner in CMPMO No.4075 of 2013 that if any construction would found in excess of share of defendants then same would be removed by defendants at their own cost. Fact whether defendants have raised construction exceeding their shares cannot be adjudicated properly and effectively unless revenue expert is appointed as Local Commissioner in the present case. It is held that appointment of revenue expert as Local Commissioner in the present case is essential for the purpose of elucidating matter in dispute inter se parties and in order to impart substantial justice inter se parties. It is held that appointment of Local Commissioner is essential in the present case in the ends of justice.

11. Submission of learned Advocate appearing on behalf of petitioners that

learned Trial Court has created evidence in favour of the plaintiff which is not permissible under Order 26, Rule 9 CPC and on this ground petition be accepted is also rejected being devoid of any force for reasons hereinafter mentioned. It is held that appointment of Local Commissioner is discretion of the Court. It is well settled law that where local inspection under Order 26, Rule 9 CPC is requisite and proper for elucidating matter in dispute in civil suit then Court can appoint Local Commissioner. In the present case fact whether defendants have raised construction over joint immovable land exceeding their shares or not cannot be decided by way of oral evidence and appointment of revenue expert as Local Commissioner is essential in the present case in order to elucidate matter in dispute properly and effectively. It is held that defendants would get opportunity to file objections over Local Commissioner report and defendants would get opportunity to rebut Local Commissioner report in accordance with law. It is held that no miscarriage of justice will be caused to petitioners by way of appointment of revenue expert as Local Commissioner in the present case.

12. Submission of learned Advocate appearing on behalf of petitioners that plaintiff intends to fill-up lacuna in the present case and on this ground petition be accepted is also rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that in joint property no co-owner can be allowed to raise any fresh construction exceeding his share without consent of other co-owners. In the present case Hon"ble High Court of Himachal Pradesh in CMPMO No. 4075 of 2013 title Naresh Kumar and another v. Tej Ram decided on 03.09.2013 has specifically directed in positive manner that defendants would demolish the construction if raised exceeding to the share of defendants in suit property. Admittedly the suit property is valuable suit land situated adjoining to National Highway. See AIR 1989 Kerala 78 title John v. Kamarunnissa. Also see AIR 1989 Orissa 21 title Sanku Ranga Rao v. Devi Prasad Sahu and another.

13. Submission of learned Advocate appearing on behalf of petitioners that non-petitioner cannot take benefit of his own wrong because non-petitioner has already raised construction more than his share over suit land in front portion of suit land and on this ground petition be accepted is also rejected being devoid of any force for reasons hereinafter mentioned. Fact whether plaintiff himself has raised construction exceeding his share over suit land cannot be decided in present CMPMO No.30 of 2016 because the same is complicated issue of fact. There is no evidence on record in order to prove that defendants have filed counter claim in civil suit. It is well settled law that unless counter claim is not filed by defendants in civil suit no effective relief can be granted to defendants relating to counter claim. It was held by Hon"ble Apex Court of India in case reported in 2000 (6) SCC 506 title Rajinder and Company v. Union of India & others that High Court should not interfere in the discretion of learned Trial Court appointing Local Commissioner.

14. Court has also carefully perused the copy of jamabandi for the year 2009-2010 placed on record prepared under H. P. Land Revenue Act. Jamabandi

for the year 2009-2010 has been prepared by public official in discharge of official duties and is relevant fact under Section 35 of Indian Evidence Act 1872. As per jamabandi for the year 2009-2010 Balbir Singh s/o Sh. Devi Singh is owner of 5/30 shares, Bhoop Singh, Tej Ram, Munshi Ram, Krishna Devi, Parwati Devi and Mathura Devi are owners of 6/30 shares, Gurdas and Prem Dass are owners of 6/30 shares, Saran Dass is owner of 6/30 shares, Bhola and Ram Dass are owners of 1/30 share and Baishakhu s/o Sh. Thallu is owner of 6/30 shares in the suit land situated in Khasra No.1130. Total area of suit land is 01-10-01 out of which area measuring 00-15-01 is Dhani Abbai and over area measuring 00-15-00 house is constructed. It is proved on record that Munshi Ram was one of co-owners of suit land and he died and thereafter Naresh Kumar and Deepa Devi have inherited the share of Munshi Ram in suit land. As per jamabandi for the year 2009-2010 suit land is joint inter se parties and has not been partitioned in accordance with law. Rights and liabilities of joint owner in joint suit property are defined in ruling reported in AIR 1961 Punjab 528 title Sant Ram Nagina Ram v. Daya Ram Nagina Ram operative part is quoted in to: (1) A co-owner has an interest in the whole property and also in every parcel of it. (2) Possession in joint property by one co-owner is in the eye of law possession of all. (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 co-owner. (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. (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 is by way of partition. (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. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order).

15. In view of findings on point No.1 above present petition filed under Article 227 of Constitution of India is dismissed. Order of learned Trial Court appointing Local Commissioner is affirmed. No order as to costs. Parties are directed to appear before learned Trial Court on 11.07.2016. File of learned Trial Court along with certified copy of order be sent back forthwith. Observations made herein above will not effect merits of civil suit in any manner. CMPMO No.30/2016 is disposed of. Pending application(s) if any also disposed of.