

**(2023) 09 SHI CK 0030**

**In the High Court Of Himachal Pradesh**

**Case No : Regular Second Appeal No. 669, 670 Of 2005**

Sukh Chain Singh (Since Deceased) Through His Lrs And  
Others

**APPELLANT**

**Vs**

Bhagat Ram Kaswal (Since Deceased) Through His Lrs And  
Others

**RESPONDENT**

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**Date of Decision : 12-09-2023**

**Acts Referred:**

**Citation : (2023) 09 SHI CK 0030**

**Hon'ble Judges : Rakesh Kainthla, J**

**Bench : Single Bench**

**Advocate : R.K. Bawa, Ajay K. Sharma, G.D.Verma, Sumit Sharma**

**Final Decision : Allowed**

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## **Judgement**

Rakesh Kainthla, J

1. The present appeals are directed against the judgment and decree dated 19.11.2005, passed by learned Additional District Judge, Shimla, Camp at Rohru, vide which the appeal filed by respondents (plaintiffs before the learned Trial Court) was allowed and the judgment and decree dated 08.11.2004 passed by the learned Civil Judge (Jr. Division), Court No.II, was set aside. (Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated the facts giving rise to the present appeals are that the plaintiffs filed a Civil Suit before the learned Trial Court for seeking a permanent prohibitory injunction restraining the defendant from raising construction on the land comprised in Khasra Nos. 1602 and 1605, situated in Mauza Chirgaon, Tehsil Chirgaon, District Shimla as per the Jamabandi for the year 1996-97 (hereinafter referred to as the suit land). It was pleaded that that plaintiff No.1 is owner of the land bearing Khasra No.1605 and plaintiff No.2 (wife of plaintiff No.1) is owner in possession of Khasra No.1602. Uttam Sain, one of the co-

owners sold 4 biswas of the land to the defendant out of Khasra No.1602 on 21.12.2001. He has a share measuring 0-00-17 hectares. He had already sold 1 biswa of land. Plaintiff No. 1 constructed a house on Khasra No.1605 in the year 1998 and has been residing in the house since then. The defendant started interference with the suit land by digging holes for 4 pillars on 05.05.2003. The plaintiff requested the defendants not to do so but in vain. Hence, the suit was filed to seek the relief mentioned above.

3. The suit was opposed by filing a written statement, taking preliminary objections regarding lack of maintainability and cause of action, improper valuation, and the suit being bad for mis-joinder of parties. The contents of the plaint were denied on merits. It was asserted that Uttam Sain @Uttam Chand was the exclusive owner in possession of the suit land. He sold the same to the defendant by means of a Sale Deed, registered on 21.12.2001. Uttam Chand delivered the possession to the defendant. A boundary in the form of a stone wall separates the suit land and the land possessed by the plaintiffs. The defendant started construction by raising RCC building consisting of 8 rooms with 15 RCC pillars in April 2003. The defendant awarded construction work to Maan Chand for a sum of Rs. 4,00,000/- on 07.04.2003.

The defendant constructed his stone wall by spending Rs.18,000/-.

He purchased various articles for construction of the building.

The material purchased by the defendant is being stolen, as the defendant is unable to complete his construction. The suit land was partitioned in a family partition between co-shares and they are in separate possession of the land allotted to them. The suit has been filed without any basis; hence it was prayed that the suit be dismissed.

4. A replication denying the contents of the written statement and affirming those of the plaint was filed.

5. The learned Trial Court framed the following issues on 28.07.2003:-

1. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction, as prayed? OPP

2. Whether the sale effected by one Uttam Sain @ Uttam Chand in favour of the defendant is illegal, null and void? OPP

3. Whether the suit is not maintainable? OPD

4 Whether the suit of the plaintiffs is bad for the act, conduct, behaviour, omissions and commissions? OPD

5. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction?

6. Whether the plaintiffs have got no cause of action? OPD.

7. Whether the suit is bad for mis-joinder of the plaintiff? OPD.

8. Relief.

6. The parties were called upon to produce their evidence and the plaintiff examined himself (PW-1). The defendant examined Surinder Dutta (DW-1), Rameshwar Dass (DW-2), Ramesh Chand (DW-3), himself (DW-4), Bhagwan Dass (DW-5), Maan Chand (DW-6), Roshan Lal (D-7) and Uttam Sain (DW-8).

7. The learned Trial Court held that the version of the defendant that the suit land was partitioned in a family partition and he is in possession of Khasra No.1602, was highly probable. Uttam Sain, a co-sharer, had sold his share to the defendant and delivered the possession to him. Defendant had no concern with Khasra No.1605. The learned Trial Court answered issue no.1 in affirmative, issues no.2 to 7 in negative and partly decreed the suit for permanent prohibitory injunction restraining the defendant from interfering with Khasra No.1605; however, no relief was granted regarding Khasra No.1602.

8. Being aggrieved and dissatisfied with the judgment and decree passed by the learned Trial Court, two appeals were filed one by the plaintiff and another by the defendant before the learned First Appellate Court. The learned First Appellate Court held that the suit land bearing Khasra No.1602 is jointly owned and possessed by the parties. A co-sharer cannot raise construction without the consent of the other co-sharer. In case, the defendant is permitted to raise construction over the land, the plaintiffs and other co-sharers could not be compensated in terms of money. Uttam Sain had sold his share and no advantage could be derived from the Sale Deed. The share of Uttam Sain was about 17 sq. meters i.e. 1/2 Biswa, whereas he had sold the land to the extent of 150 sq. meters, which was more than his share. The defendant had not produced any evidence to show the source of the money stated to have been spent by him for the purchase of construction material. Plaintiff No.2 did not appear in the witness box; hence, an adverse inference has to be drawn against her. The learned First Appellate Court allowed the appeal filed by the plaintiffs and granted a permanent prohibitory injunction restraining the defendant from interfering in the possession of the plaintiffs over Khasra Nos. 1602 and 1605. The learned First Appellate also dismissed the appeal filed by the defendant.

9. Aggrieved with the judgment and decree passed by the learned First Appellate Court, two separate appeals have been filed. The defendant also filed cross - objections against the judgment and decree passed by the learned First Appellate Court. The appeals were admitted on the following substantial question(s) of law framed on 02.05.2006: -

Whether decree of permanent prohibitory injunction against the appellant could not have been lawfully granted when according to the respondents'-plaintiffs' own admission during the course of trial, the possession is with the appellant-defendant?

10. I have heard Mr. R.K.Bawa, learned Senior Advocate assisted by Mr. Ajay K. Sharma, Advocate for the appellant(s)/defendant(s) in both the appeals and Mr. G.D.Verma, learned Senior Advocate assisted by Mr. Sumit Sharma, Advocate, for the respondents/plaintiffs.

11. Mr. R.K.Bawa, learned Senior Advocate, appearing on behalf of the appellant(s)/defendant(s) submitted that the learned First Appellate Court erred in issuing the injunction. It was duly proved by the evidence on record that Uttam Sain was in separate possession of the land sold by him to the defendant. He had also delivered the possession to the defendant. The defendant has a right to raise construction over the land in his possession. The learned First Appellate Court erred in holding that Uttam Sain had sold the land in excess of his share. He prayed that the present appeal be allowed and the judgment and decree passed by the learned First Appellate Court be set aside.

12. Mr. G.D.Verma, learned Senior Advocate appearing on behalf of plaintiffs/cross-objectors submitted that the learned Trial Court had erred in refusing the injunction regarding Khasra No. 1605, a co-sharer has no right to raise construction over the land jointly owned by him. The learned First Appellate Court had rightly held that in case the defendant is permitted to raise construction, plaintiffs and other co-sharers would be deprived of the use of the land to which they are entitled being the co-sharers. Uttam Sain, had sold the land in excess of his share and in case the defendant is permitted to raise construction, he will cover the land more than his share, which will be prejudicial to the rights of the plaintiff; hence, he prayed that the appeal filed by the defendant be dismissed and the cross-objections filed by the plaintiffs be allowed.

13. I have given considerable thought to the rival submissions at the bar and have gone through the records carefully.

Substantial questions of law:

14. The learned Trial Court held that the plea of the defendant that the suit land was divided in a family arrangement was more probable. Khasra No. 1605 was possessed by Bhagat Ram whereas Khasra No.1602 was possessed by Uttam Sain, who had sold it to the defendant. The learned First Appellate Court also held that the suit land bearing Khasra No.1602 was recorded in possession of Uttam Chand and Smt. Murtu and Khasra No.1605, was recorded in possession of plaintiff Bhagat Ram.

15. The learned Trial Court had rightly pointed out that the plaintiffs admitted a family arrangement in para 6 of the plaint by saying that the Khasra number is jointly owned by the co-sharers but the respective share of each co-sharer has been divided as per the Khangi Hisakashi. Learned Trial Court had also rightly relied upon the copies of the Jamabandi for the 1996-97, (Ext.PC), wherein Uttam Sain and Smt. Murtu were recorded in possession of Khasra No.1602 and a copy of the Jamabandi for the year 1996-97 (Ext. PF), wherein Bhagat Ram is recorded to be in possession. The plaintiff admitted in his cross-examination that

Uttam Sain used to cut grass and cultivate the land before the sale. He volunteered to say that land is jointly owned by the parties. He also stated that he had not objected to the entry of possession in the name of Uttam Sain, because he was employed in Delhi. He admitted that he never remained in possession of the suit land.

16. These admissions clearly corroborate the entries in the revenue record that Uttam Sain was in possession of Khasra No. 1602 as per family arrangement. Uttam Sain (DW-8), stated that he had sold the suit land to the defendant. He was in possession of 1/2 bigha of land, which was being cultivated by him. He had delivered the possession at the time of the sale and plaintiffs never remained in possession. Therefore, it was duly proved that Uttam Sain was in possession of Khasra N. 1602 and he had delivered its possession to the defendant. A constitutional Bench of Punjab & Haryana High Court discussed the rights of the co-sharers in *Ram Chander vs Bhim Singh & Others* 2008 (4) Civil Court Cases 2 and held that a co-sharer has a right to alienate the joint property and the transferee gets all the rights vested in the co-sharer. A co-sharer in possession of a joint holding has a right to transfer the possession and the vendee is entitled to protect the portion, so transferred till the partition of the joint estate. It was observed:-

"19. Another attribute of joint property is that where a co-owner in possession of a specific portion of the joint holding and recorded as such in the revenue record, transfers any right, title or interest, from the portion in his specific possession, his vendee would be entitled to protect the portion so transferred, without, however, asserting exclusive ownership to the portion so transferred and possessed, till such time as the joint estate is not partitioned.

20. In order to place our above conclusion in perspective, we deem it appropriate to reproduce a paragraph from the judgment in *Bhartu v. Ram Swarup's* case (supra) that succinctly explains our opinion, as under: -

"6. Take another example where 'A' and 'B' jointly' own a khewat in equal shares measuring 200 bighas. 'B' is in separate possession of 100 bighas of land comprised of specific khasra numbers and transfers it to 'C'. This is not disputed that in spite of this sale, 'A' continues to be a co-sharer in the land transferred by 'B'. If that is so how can it be disputed that 'C' would necessarily be a co-sharer in the remaining 100 bighas of land in possession of 'A' as otherwise, it would mean that 'A' is exclusively the owner of 100 bighas of land in his possession and also a co-sharer with 'C' in the remaining 100 bighas which obviously is not possible. The matter can further be illustrated by another example. 'A' and 'B' are co-sharers in the joint khewat, say of 100 bighas of land in equal shares. 'B' who is in exclusive possession of land measuring 40 bighas of land comprised of khasra Nos. 1,2,3 and 4 transfers two khasra numbers, that is, 1 and 2, measuring 20 bighas to 'C' specifically stating in the deed that he is in possession of these khasra numbers as a co-sharer and is transferring his interest as such. Can it be said on these facts that 'C' has purchased anything except a co-sharer's

interest in khasra Nos. 1 and 2 in spite of the fact that the sale is of specific numbers and of the specified area. The answer obviously would be in the negative and if so then the sale is obviously of a share by the co-sharer out of the joint land and nothing else."

21. As a result of the above discussion, we express our complete agreement with the opinion, recorded in the Full Bench in Bhartu v. Ram Samp's case (supra) and are sanguine in our understanding of the law so as to hold that the Full Bench judgment in Lachhman Singh's case (supra) does not lay down the correct position in law, as while considering the rights of a vendor/co-sharer, flowing from his status as a co-sharer/joint owner, the Full Bench in Lachhman Singh's case (supra) disregarded the nature of the joint property and the status of joint owners, and placed undue significance upon artificial divisions of land, made by revenue authorities intended to identify land, namely: rectangle numbers, killa/khasra numbers etc.

17. In the present case, Uttam Sain was in possession of Khasra no. 1605 as per the family arrangement and he could have transferred the land in his possession to the defendant. The defendant is entitled to remain in possession till the suit land is partitioned as per the law.

18. Learned First Appellate Court held that Uttam Sain had already sold one (1) biswa of land, whereas, he was owner of Khasra No. 1605 to the extent of half (1/2) biswa. The sale made to the defendant was more than his share. This is not correct. A perusal of copy of the Sale Deed (Ext. PB) shows that Uttam had sold 1/49 shares out of the land jointly owned by him for Rs.72,000/- to the defendant. Thus, the sale was not of any specific portion of the land but of the share of the land owned by Uttam Sain. He also delivered the possession of the land possessed by him to the defendant. Since it was permissible for Uttam Sain to sell his share and deliver the possession of the property in his possession subject to the right of other co-sharers at the time of partition; therefore, it cannot be said that Uttam Sain had sold more than his share.

19. It was submitted that the defendant had taken a plea of family partition and also denied the rights of the plaintiffs; therefore, the plaintiffs are entitled to an injunction. This submission cannot be accepted. The plaintiffs had stated in para 6 of the plaint that the land was divided in family arrangements. He also admitted that Uttam was in possession. Thus, the plea of family partition was already put forth by the plaintiff. It was laid down in Janku v. Nagnoo, 1985 SCC OnLine HP 12= AIR 1986 HP 10, that mere separate- occupation of the property by a co-sharer in a family arrangement does not amount to partition. It was observed:

"14. In the written statement the defendants allege that a private partition took place about 47 years back, that is, in or about 1921. No deed/writing of partition was produced by the defendants and there is also no evidence to prove as to when this private partition took place between them or their ancestors. It is also

not proved as to what property was put in the hotch-pot in the partition and which portions of the property were allotted to each of the co-sharers/co-owners. No report was given to, the revenue authorities with the result that no mutation of partition was sanctioned. There is also no entry in the revenue records to prove that any co-sharer is in possession of a separate parcel of land on account of partition the entries on the contrary show that separate possessions are recorded in the capacity of a co-sharer.

15. In the case of co-sharers, every co-sharer has an interest in the whole property and also in every parcel of it and possession of the joint property by one-sharer is, in the eyes of the law, possession of all even if all but one are actually out of possession. A mere occupation of a larger portion or even of an entire joint property cannot necessarily amount to an ouster as the possession of one co-sharer is deemed to be the possession on behalf of all. If, however, the co-sharers are in possession of separate parcels of land under some arrangement, then such an arrangement cannot be disturbed except by filing proceedings for partition and during these proceedings, the proper mode of partition can be framed and respective possession of the parties/co-sharers can be respected to the extent to which it is possible.”

20. This question was again considered in *Leetho Versus Chamelo and Others* 2001(2) Shim.LC 238 and it was held that mere arrangements regarding the cultivation of the land cannot be termed as a partition. It was observed:

“12. So far second substantial question of law is concerned, the learned Counsel for the plaintiff has taken this Court through the pleadings and evidence on record, oral as well as documentary, but has not been able to show that any part thereof has been misread and misinterpreted by the first appellate Court to come to the conclusion that the land in dispute stood already partitioned. In para 7 of the plaint, there is mention of family settlement without giving further particulars thereof, whereas, the oral evidence pertains to partition, which is not supported by the revenue record produced by the plaintiff. Partition, whether by way of family settlement or family arrangement or by the Revenue Officer by giving effect to the family partition or settlement by metes and bounds should be such which may conclusively establish the respective shares of the parties so as to stop further dispute in between them. Vague assertions in regard to the share of one party and that too which is not proved from the evidence, cannot be said to be sufficient to hold that a partition had taken place. Further, mere arrangement in regard to the cultivation of the land cannot be termed as partition though such arrangement at the time of final partition by the Revenue Officer should be given due consideration in order to maintain possession of the parties intact. Therefore, the first appellate Court has rightly set aside the findings of the trial court to hold that the land in dispute was not partitioned as alleged by the plaintiff. The Substantial Question of Law No. 2 is answered accordingly.”

21. This judgment was followed in *Mangat Ram Versus Gulat Ram* (since deceased) through his LRs *Jagdeep Kumar and others* Latest HLJ 2011(1) (HP)

274 and it was held that mere arrangement between the parties for the cultivation of the land does not amount to a formal partition, especially when the same is not reported to the revenue authorities. It was observed:

"19. Prior to the passing of the order by the competent authority, no partition by metes and bounds ever took place between the parties. The court below rightly came to the conclusion that private partition was actually an arrangement for the purpose of cultivation of land. It was not a final partition of the land by metes and bounds so as to effect severances of joint holdings. Had it been so, parties would have definitely got this fact recorded in the revenue record and resorted to the mandatory provisions of Sections 35 and 135 of the Act. The act is a complete code in itself. It provides a procedure for preparing revenue records. Under Section 35, any person acquiring right in an estate as a landowner is required to report the same to the Patwari of the estate, who in turn, is obliged to enter this fact in the register of mutations maintained by him. Whenever there is partition without the intervention of the Revenue Officer, the Private party is required to apply to the Revenue Officer for an order of confirmation/affirmation of partition. The Act provides that in such like cases Revenue Officer is mandatorily required to inquire the fact as to whether in fact partition was ever effected upon or not. The Revenue Officer is required to comply with the statutory provisions laid down under Chapter 9 of the Act. Admittedly in the instant case, parties have not resorted to such measures. Partitions entered into in the year 1961 and 1972/74 is no partition in the eyes of the law.

20. This Court in *Leetho vs. Chamelo & Ors.* 2001 (2) Shim. L.C. 238, while dealing with the question of jurisdiction of the Civil Court to entertain a suit filed by the plaintiff, assailing the order, of partitioning the land, passed by the competent authority, has specifically held that partition, whether by way of family settlement or family arrangement or by Revenue Officer by giving effect to the family partition or settlement by metes and bounds, should be such which may conclusively establish the respective shares of the parties so as to stop further dispute in between them. Mere arrangement in regard to the cultivation of land cannot be termed as partition though such arrangement at the time of final partition by Revenue Officer should be given due consideration in order to maintain possession of the parties intact."

22. The learned First Appellate Court held that a co-sharer has no right to raise construction over the land jointly owned by him. This proposition of law is not correct. The law relating to the co-sharers was considered by this Court in *Ashok Kapoor v. Murtu Devi*, 2015 SCC OnLine HP 1422= 2016 (1) Shimla Law Cases 207 and it was held that a co-sharer cannot be restrained from raising construction on the joint land on the ground that he has no right to raise construction on the joint land. After an exhaustive review of the case law, it was held as under:-

"46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-

sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

(i) A co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

(ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such an act, which is detrimental to his interest.

(v) Before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury, which materially would affect his position or his enjoyment, or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) The question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and the exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience."

23. This judgment was followed in *Piar Chand and Others Versus Sandhya Devi and Others* 2017 (2) Shim.LC 1040 and it was held after quoting the above para that where the plaintiff had failed to lead evidence to prove that the proposed construction of the defendants will diminish the value or utility of property or the same is detrimental to the interest of other co-owners, including the plaintiff, the suit could not have been decreed.

24. Similar is the judgment in *Ramesh Kumar v. Sheetal*, 2021 SCC OnLine HP 89 = 2021(1) Shim.LC 377 wherein, it was observed:

17. It is quite apparent from the aforesaid exposition of law that a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession. The mere making of construction or improvement in the common property does not amount to ouster rather, if by any act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property. If the acts of the co-owner in possession are detrimental to the

interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such an act, which is detrimental to his interest.

25. A similar view was taken in *Rattan Singh vs. Som Dutt and Others* 2023 (1) Shim. LC 446 wherein it was observed:

"11. From the pleadings and record, two facts become clear, one is that the suit land is technically joint inter se parties and second, the defendants are co-owners in the suit land. It is settled law that a co-sharer cannot seek a restraint order against another co-sharer merely because the land is joint, until and unless the plaintiff succeeds in proving that such construction would amount to his ouster. If the plaint and the petition filed in this court are seen, there are no grounds pleaded qua question of ouster or prejudice, if any, being caused to the plaintiff. The plaintiff admittedly has raised construction on the suit land and has filed the suit, when defendants Started raising construction."

26. Therefore, a co-sharer cannot be restrained from raising construction over the joint land unless it is shown that such an act would constitute prejudice and the mere raising of construction does not amount to any prejudice as laid down by this Court.

27. The plaintiffs asserted in para 5 of the plaint that he had raised construction of a house in Khara No.1605 in the year 1998. It was laid down in *Hussan Lal vs. Krishan Devi* 1996 PLR 528 that where a co-sharer had raised the construction himself, he cannot restrain the other co-owners from raising construction. This position was reiterated in *Lal Chand vs. Jagdish Kumar* 2001 HLJ 777, wherein it was observed:

"13. The other conclusions arrived at by the learned District Judge and already set out here-in-above are prima facie permissible on the basis of the record. It is not in dispute that the petitioner has constructed a six-storeyed building on a portion of the joint land. Prima facie, it is also not in dispute that such a building is on an area of 10 Biswas and different other constructions have also been raised on the joint land including one by a co-sharer over an area in excess of her share. The sales of the plots by co-sharers in the total joint land on which such constructions have been raised are prima facie not disputed. Thus, in view of the aforesaid express and implied admissions, the conclusions under reference as arrived at by the learned District Judge cannot be said to be wholly unwarranted or illegal or perverse."

28. Similar is the judgment in *Kalawati v. Netar Singh*, 2016 SCC OnLine HP 223 = AIR 2016 HP 85, wherein it was held:

"11. It would be evident from the decision, that the mere fact that the parties are co-owners and joint owners etc. is not the sole criterion for granting or refusing the injunction, the conduct of the parties too plays an important role and in such like cases, the plaintiff conduct has to be free from blame so as to enable the court to conclude that the plaintiff has approached the Court with

clean hands. But here is a case where the petitioner though claims herself to be a joint owner with the respondents after having already raised construction over the suit land seeks an injunction against the respondents without even disclosing this fact.

11. The injunction being an equitable relief, the person seeking an injunction must come with clean hands. The well-known mechanism that applies in such a matter is "he who seeks equity must do equity". Since the petitioner has admittedly raised construction of her house(s) on a portion of the suit land, she is estopped and has waived her right to assail and question the construction being raised by the respondents. The fact that the petitioner has not approached the court with clean hands in itself is sufficient ground for not granting the relief of injunction."

29. A similar view was taken in *Raj Kumar v. Rakesh Kumar*, 2022 SCC OnLine HP 2663 = 2022 (2) ShimLC 1083, wherein it was observed:

5(a) It is not in dispute that the plaintiff had already raised construction over the suit land alleged by him to be the joint land of the parties along with other co-sharers. This fact was not disclosed by the plaintiff in the manner it ought to have been stated in the plaint. The plaintiff in a round about manner averred that the defendant was trying to block the air and light of the house of the plaintiff existing over the suit land. Prima facie observation of both the learned courts below that the plaintiff had himself raised construction on the best and most valuable portion of the suit land also assumes significance. It is well settled that when a person seeks equity, he must come with clean hands.

5(b) It is admitted fact that Sh. Kartar Chand brother of the petitioner/plaintiff and one of the co-sharers had also raised construction over the suit land in the year 2010. It is not the case of the petitioner/plaintiff that he had objected to the construction work done by his brother over the suit land or that the plaintiff had instituted any civil suit for restraining his brother from raising construction over the suit land. It is apparent that the petitioner/plaintiff has selectively chosen the respondent/defendant for filing the suit for injunction. At this stage, it will be relevant to notice the following references:-

In (2010) 3 Shimla L.C. 205, titled *Payar Singh Vs. Narayan Dass and others*, the respondents pleaded themselves to be in settled separate possession of joint land in family partition over which they were raising construction. They also took up a stand that the petitioner had also constructed his house over the land in his possession. The Court upheld the contentions of the respondents. The following observations made in the judgment are material:

"12. The respondents in the written statement have specifically pleaded that parties are in separate possession under the family arrangement. The petitioner has also constructed his house on the joint land. It is not the stand of the petitioner that respondents are raising construction in an area which is more than their share. The case of the respondents is that the petitioner has

constructed his house on a better portion of the land. The under-construction house of the respondents is away from National Highway 21 whereas the house of the petitioner abuts N. H.21. The respondents have placed on record on the file of revision photographs construction of an under-construction house of the respondents. The photographs indicate the sufficient gap between the already constructed house of the petitioner and the under-construction house of the respondents over which even a slab has been placed. It is the case of the respondents in the written statement that they are in separate possession of the land in the family arrangement. This fact has not been denied by filing replication. The respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction. The respondents have thus established a prima facie case, the balance of convenience, and irreparable loss in their favour. In these circumstances, no fault can be found with the impugned judgment. In revision, the scope is limited as held in *The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another Vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad*, AIR 1973 SC 76. The suit is for permanent prohibitory and mandatory injunction. The rights of the parties will be decided in the suit. It has not been established that the view taken by the learned District Judge does not emerge from the material on record.”

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In a judgment dated 03.09.2021, delivered in CMPMO No. 555 of 2018, *Ajay Kumar Vs. Ishwar Dutt*, it was held that when a co-sharer himself raises a construction over the joint land when a co-sharer does not object to the raising of construction over the joint land by some other co-owners, then, he cannot seek to restrain one specific co-owner from raising construction over part of the suit land, more so, when the construction being raised by that particular co-owner is over a portion, which, as per the revenue record, is in his possession along with others and when the plaintiff has not been shown in possession of this specific portion of land.

Placing reliance upon various authorities, defendants in CMPMO No. 77 of 2021, titled *Smt. Vyasa Devi Vs. Harish Kumar* were permitted to undertake construction inter-alia on the ground that the plaintiff had also carried out construction on the joint land. Material observations made by the Court on facts are as under:-

“10. The facts involved in the case have been narrated by me hereinabove and the same are not being repeated for the sake of brevity. It is not in dispute that the parties are co-sharers of the suit land but the petitioners herein are recorded to be in possession of the portion of the suit land in issue along with other co-sharers. It is further not in dispute that the respondents herein are not recorded to be in possession of the suit land. It is also not in dispute that the respondents herein have also carried out construction activities by raising constructions over

the joint land, as is evident from the record. In these circumstances, this Court is of the considered view that the petitioners herein, who besides being the co-owners of the suit land are also recorded to be in possession thereof, cannot be estopped from raising construction pending the adjudication of the civil suit. It is settled law that injunction cannot be granted against a co-sharer and further as the respondents herein themselves have constructed their houses over the joint suit land, in these circumstances, they cannot be permitted to restrain other co-sharers, i.e. present petitioners, from doing so. The construction, which is being carried out by the petitioners, however obviously shall be subject to the final adjudication of the suit as also partition proceedings, if any, and if the area upon which construction being carried out by the present petitioners ultimately falls in the share of the plaintiffs in partition proceedings, then, of course, consequences will ensue. However, this does not mean that till the suit land is partitioned, the petitioners herein should be restrained from raising construction over the parcel of the suit land in their possession."

CMPMO No.522/2017, decided on 29.11.2018 titled Chanchal Kumar Vs. Prem Parkash & Anr. was a case where the plaintiff was one of the co-sharers over the suit land. He raised construction and filed suit for a prohibitory injunction to restrain the respondents from raising construction on the vacant portion of land. The Court held that:-

".....Once, the plaintiff himself raised construction over one portion of the land, it is not understood, how he could raise an objection, if any, qua the construction on the other portion of land, by the defendants, who are admittedly co-owners of the suit land to the extent of one-half share. Needless to say, the applicant, while seeking relief of injunction is required to show that he/she has a prima facie case in his/her favour and balance of convenience also lies in his/her favour, but, in the instant case, aforesaid basic ingredients/conditions are totally missing, rather, very conduct of the plaintiff suggests that he wants to take advantage of the situation."

30. This position was reiterated in Jai Singh VS Rajeev Latest HLJ 2023 (HP) (1) 162, wherein it was observed:-

"19. The fact that in the past also different co-owners including the parties to suit have raised construction also weakens the case of plaintiffs. When plaintiffs had no objection when the co-owners had raised construction on different parts of the joint land in the same khata, they must come out with special reasons to raise objections against construction being raised by the defendant. Another fact, which cannot be ignored is that there is another structure on suit land being used as "Panchayat Ghar." At the time of its construction again there was no objection. Admittedly, no other co-owners have raised any objection to the construction being raised by the defendant. The conduct of plaintiffs smacks of some ulterior purpose than the assertion of any legal right.

31. Both the learned Courts below have concurrently found that Uttam Sain was

in possession. The plaintiffs also admitted that he never remained in possession of Khasra No.1602. It was laid down by this Court in Ajay Kumar vs. Ishwar Dutt 2021(3) Shimla Law Cases 1714 that raising construction by a co-sharer in exclusive possession will not constitute prejudice to other co-sharers. It was observed:

"Plaintiff has not even shown as to how in the facts of the case, the raising of construction by the defendants over 6 Biswas of land falling under Khatauni Nos.37-39 which are in their possession, will cause prejudice to him or would be detrimental to his interest."

32. Uttam Sain is not recorded to be in possession of Khasra No.1605, and the defendant has no right over this khasra number. However, the defendant denied the title of the plaintiff over this khasra number. It was held by this Court in Bali Ram vs Mela Ram & another AIR 2002 HP 87, that when the defendant denies the title of the plaintiff it amounts to sufficient interference and the Courts are justified in issuing the injunction. It was observed:-

9. The concurrent findings of fact recorded by both the Courts below to the effect that the defendant is not interfering with the possession of the plaintiff over the suit land are evidently unreasonable and not supported by the material on record. It is unambiguously clear from the pleadings of the defendant read with other evidence on record that he has all the intentions to interfere and is interfering with the possession of the plaintiff over that part of the suit land which is in his possession. It is so because the defendant, in his written statement, has denied the possession of the plaintiff over the suit land as a whole and has claimed that part of land khasra No. 151/1 is used as a path by the villagers and the remaining land is used by him as Bartan. It is, thus, implicit in the defence taken by the defendant that he is claiming a path on a part of the suit land and the remaining portion of it as his Bartan. This challenge to the Claim of the plaintiff constitutes a challenge even to his claim regarding that part of the suit land which, according to both the Courts below, is in possession of the plaintiff. When this pleading of the defendant is read with the statements of the plaintiff (PW-1), Ram Chand (PW-2) and Sunder Ram (PW-3), it is crystal clear that the defendant is interfering with the possession of the plaintiff over the portion of the suit land which is in possession of the plaintiff. Therefore, the findings recorded by the Courts below that the defendant is not interfering with the possession of the plaintiff are contrary to the pleadings and evidence on record and cannot be sustained being unreasonable.

33. Therefore, the learned First Appellate Court had erred in granting an injunction against a co-sharer in exclusive possession of the joint land with the consent of other co-sharers. Hence, this substantial question of law is answered accordingly.

Final order:

34. In view of the above, the present appeals are allowed and judgment and

decree passed by the learned First Appellate Court are ordered to be set aside and that of the learned Trial Court are ordered to be restored. The cross objections are dismissed. The record of the case be remitted back to the learned Courts below. Pending miscellaneous applications, if any, also stand disposed of.