



**IN THE HIGH COURT OF HIMACHAL PRADESH AT
SHIMLA**

CMPMO No. 78 of 2021

Reserved on: 19.4.2021

Decided on: 24.4.2021

Smt. Besru DeviPetitioner
Versus
Sh. Bhoop Ram and others.Respondents

Coram

Hon'ble Mr. Justice Sandeep Sharma, Judge.

Whether approved for reporting? Yes.

For the petitioner: Mr. G.D.Verma, Senior Advocate
with Mr. B.C.Verma, Advocate.

For the respondents: Mr. Bhupinder Gupta, Senior
Advocate with Mr. Ranvir Chauhan,
Advocate, for respondents No.1 and
2.

Sandeep Sharma, J.

Instant petition filed under Art. 227 of the Constitution of India is directed against the judgment dated 15.3.2021 passed by learned District Judge, Shimla, District Shimla, H.P., in CMA No.29-S/14 of 2020, reversing the order dated 3.9.2020 passed by learned Civil Judge, Court No.7, Shimla, District Shimla, Himachal Pradesh, whereby CMA No. 719 of 2019, having been filed by the applicant-plaintiff (hereinafter 'plaintiff') under Order 39 Rules 1 and 2 CPC, restraining the respondents-defendants (hereinafter,

Whether reporters of the Local papers are allowed to see the judgment? .

'defendants') from causing any damage or interfering, selling, alienating, encumbering and mortgaging any portion of the suit land during the pendency of the main suit was allowed.

2. Precisely, the facts of the case as emerge from the material available on record are that the plaintiff claiming herself to be co-owner alongwith the defendants, filed suit for declaration to the effect that the Relinquishment Deed/Release Deed No. 1604, dated 9.9.2013 registered in the office of Sub Registrar, Shimla in favour of defendants No.1 and 2 is illegal, wrong, void and inoperative against the right, title and interest of the plaintiff as the same has been procured unlawfully without her knowledge and consent. Plaintiff averred in the aforesaid suit that about three years back, defendants No.1 and 2 in collusion with other defendants took her to Tehsil Office on the pretext of getting the said land partitioned. In the Tehsil Office, her thumb impression was taken on different documents, which were neither read over nor explained to her. The plaintiff remained under bona-fide belief that the documents were pertaining to the partition and in due course of time, land would be separated/partitioned. However, after about 2 ½ years, on her inquiry, it was disclosed to her that land stands already

transferred in favour of defendants No.1 and 2. She alleged that she never intended to transfer her share in favour of defendants No.1 and 2 and they, taking undue advantage of her poverty, illiteracy and helplessness, wrongly and fraudulently executed the relinquishment deed in connivance with defendants No. 3 to 8, and as such, same may be declared as null and void. Apart from aforesaid relief, plaintiff also claimed that the defendants be restrained from interfering with her joint ownership and possession over the suit land situate at villages Chamyana and Shahnan.

3. Alongwith the aforesaid suit, plaintiff filed an application under Order 39 Rule 1 and 2 CPC stating therein that during winter vacation in the year 2020, the defendants started raising construction on the valuable portion of the land, for which they dug pits and also raised retaining walls. Plaintiff claimed that in case defendants are permitted to raise construction, she would be deprived of the best portion of the land. Plaintiff averred in the application that the construction is being raised by the defendants on Khasra No.167, measuring 00-36-18 hectares, Khata/Khatauni No.8min/17min, situated at Mohal Shahnan, Tehsil Shimla (Rural), District, Shimla, H.P.

4. Defendants by way of written statement as well as reply to the stay application refuted the case of the plaintiff. Defendants claimed before the court below that the plaintiff voluntarily executed the relinquishment deed by relinquishing her share in the land situated at village Chamyana and Shahnan in favour of defendants No. 1 and 2. Defendants No.1 and 2 while specifically denying the plea of the plaintiff that her thumb impression was required for getting her share separated, submitted before the court below that deed was executed jointly by plaintiff and defendants No. 3 to 8 and the contents of the same were read over and explained to her before she put the thumb impression. Defendants No.1 and 2 specifically denied the allegation of fraud, if any, played by them, while executing the relinquishment deed. Learned trial Court vide order dated 3.9.2020 allowed the application under Order 39 Rule 1 and 2 CPC and directed both the parties to maintain status quo qua the nature, possession and ownership over the suit land on the ground that plaintiff has challenged the relinquishment deed executed in favour of defendants No.1 and 2, therefore, a strong prima-facie case is made out.

5. Being aggrieved and dissatisfied with the aforesaid status quo order passed by learned trial Court, defendants No.1 and 2 filed an appeal under Order 43 Rule 1(r) of CPC in the court of learned District Judge, inter-alia on the ground that the plaintiff has no right, title or interest qua the suit property because she had voluntarily and willingly relinquished her share in the joint land in their favour. Besides above, defendants No.1 and 2 claimed before the court below that since they have no residential house so they started raising the construction, they have already spent huge amount and irreparable loss would be caused to them in case order of status quo granted by the leaned court below is not vacated.

6. Learned Appellate Court on the basis of the material adduced on record allowed the appeal and set aside the order dated 3.9.2020 passed by learned trial Court. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein for restoration of order dated 3.9.2020 passed by learned trial Court after setting aside the judgment dated 15.3.2021 passed by learned District Judge, Shimla, H.P.

7. I have heard the learned counsel for the parties and perused the material available on record.

8. Before grant/refusal of injunction, if any, the court is required to satisfy itself that the party praying for the relief has a prima facie case and balance of convenience is also in its favour. While granting injunction, court is also required to consider whether refusal to grant injunction would cause irreparable loss/injury to such party and irreparable loss/injury, if any, can be compensated in terms of money or not. Similarly, court while deciding balance of convenience is also required to weigh protection of the plaintiff's right against need for protection of defendant's right or infringement of right. Apart from aforesaid well established parameters/ingredients, conduct of the party seeking injunction is also of utmost important, as has been held by Hon'ble Apex Court in case **M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors.**, AIR 1995 2372. If a party seeking injunction fails to make out any of the three ingredients, court should be reluctant to grant injunction. Phrases, "prima facie", "balance of convenience" and "irreparable loss" came to be interpreted by Hon'ble Apex Court in case titled as **Mahadeo Savlaram Shelke v. The Puna Municipal**

Corp., J.T. 1995(2) S.C. 504, wherein Hon'ble Apex Court relying upon its earlier judgment in **Dalpat Kumar v. Prahlad Singh**, (1992) 1 SCC 719, observed that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. Though, existence of prima facie right is a condition for the grant of temporary injunction, but prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Satisfaction that there is a prima facie case is not sufficient to grant injunction, rather court considering prayer for injunction is under obligation to satisfy itself that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction. The

court while granting or refusing injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury, which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued.

9. Now, guided by aforesaid legal parameters required to be kept in mind by the court while considering the prayer for injunction, this Court would make an effort to find out, “whether plaintiff has been able to prove ingredients for grant of temporary injunction or not?”

10. True, it is that as per jamabandi for the year 2008-2009, plaintiff and defendants stand recorded as co-owners in the land at Muhal Shahnan and Muhal Malyana, but it is not in dispute that aforesaid entry in the revenue record subsequently came to be changed on account of execution of relinquishment deed, allegedly executed by plaintiff and defendants No.3 to 8 in favour of defendants No.1 and 2. Vide aforesaid relinquishment Deed No. 1604, dated 9.9.2013

plaintiff alongwith defendants Nos. 3 to 8 allegedly relinquished her share in the property in favour of defendants No.1 and 2. At the time of consideration of application under Order 39 Rule 1 and 2 CPC, factum with regard to relinquishment deed dated 9.9.2013 stood recorded in the revenue record. Pursuant to aforesaid relinquishment Deed dated 9.9.2013 mutation of land stood attested in favour of defendants No.1 and 2 and as such, trial court ought not have put much reliance upon the Jamabandi for the years 2008-09, while inferring/ascertaining prima face case, if any, in favour of the plaintiff.

11. True, it is that the jamabandi carries presumption of truth unless rebutted, but as has been taken note hereinabove, aforesaid jamabandi for the year 2008-2009 had already lost its relevance on account of mutation of land attested in favour of defendants No.1 and 2 pursuant to execution of relinquishment deed dated 9.9.2013. No doubt, very factum with regard to execution of relinquishment deed dated 9.9.2013 is under clout on account of challenge made to the same by the plaintiff, but fact remains that pursuant to aforesaid relinquishment deed, mutation of land in question stood attested in favour of defendants No.1 and 2

and as such, trial Court below erred in concluding that jamabandi for the year, 2008-2009 discloses prima-facie case in favour of the plaintiff. Plaintiff though by way of suit has laid challenge to the relinquishment Deed on the ground of fraud and misrepresentation, but such allegation of fraud and misrepresentation are yet to be proved in accordance with law. Mere filing of suit for declaration that the relinquishment deed is null and void on account of fraud and representation is not sufficient to conclude/infer prima-facie case, rather to infer prima-facie case court below is/was required to see that who is in possession of the suit property against which injunction is being sought.

12. Order 39 CPC regulates grant of temporary injunction and interlocutory orders. Order 39, Rule 1 CPC talks about the cases in which temporary injunction can be granted by the Court. The following are the pre-requisites for the grant of injunction:

- (a) When any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of the decree or
- (b) when there is a threat from the defendant, or he intends, to remove or dispose of his property with a view to defrauding his creditors,

- (c) when there is threat from the defendants to the plaintiff of his dispossession or otherwise to cause injury to him in relation to any property in dispute in the suit.

13. Prima-facie case, balance of convenience and irreparable loss or injury are three main factors to be kept in mind while considering the prayer for grant of injunction. Existence of aforesaid three ingredients is not only mandatory, rather they all should co-exist. Interestingly, in the case at hand, plaintiff besides omitting to furnish specific details of the suit land, has also not made any prayer for injunction in the main suit, rather has simply claimed in the suit the relief of declaration that the relinquishment deed/release deed dated 9.9.2013 be declared illegal, null and inoperative and further the defendants be restrained from interfering with her joint ownership and possession.

14. Order 7 Rule 3 CPC specifically provides that when the subject matter in suit is immovable property, it is necessary to give specific details of the property, so that it becomes easy to identify the same. In case the property is identified by the boundaries or numbers in the record of settlement and survey, it is compulsory to furnish complete

details of the suit property in the plaint. In the case hand, plaintiff has simply given description of the relinquishment deed and there is no mention, if any, of the property and as such, plaint can be said to be hit by Order 7 Rule 3 CPC.

15. Mr. G.D.Verma, learned Senior counsel representing the plaintiff while making this Court to peruse the relinquishment deed vis-à-vis prayer made in the suit, contended that since entire details with regard to description of the property stand recorded in the relinquishment deed, it would be too technical to conclude that plaint of plaintiff is hit by order 7 Rule 3 CPC. Even if aforesaid submission made by learned Senior Counsel is presumed to be correct, relief of interim injunction prayed for in the application under Order 39, rules 1 and 2 CPC, cannot be granted, especially when such relief has been not claimed in the main suit. There is another aspect of the matter that the relinquishment deed, which is now being sought to be declared as null and void was allegedly executed on 9.9.2013 by the plaintiff and defendants No. 3 to 8. For more than 2 ½ years plaintiff took no steps, if any, for getting the aforesaid Relinquishment Deed annulled on account of its being procured by fraud and

misrepresentation and there is no plausible explanation available on record qua the aforesaid delay.

16. Leaving everything aside, the plaintiff at the time of filing the suit at hand in the year, 2016 chose not to file application under Order 39 Rule 1 and 2 CPC, praying therein to restrain the defendants from raising any construction over the suit land, rather such application on her behalf came to be filed when her application under section 65 of the Right to Fair Compensation & Transparency under Land Acquisition, Rehabilitation & Re-Settlement Act, 2013, praying therein to not to release any amount of compensation in favour of defendants No. 1 and 2 came to be rejected by Sub Divisional Collector- cum-Land Acquisition Collector (Rural) Shimla vide order dated 5.5.2018. Though, Mr. G.D.Verma, learned Senior Counsel representing the plaintiff vehemently argued that since plaintiff remained under impression that the papers got signed by defendants No.1 and 2 in collusion with defendants No.3 to 8 were for effecting partition of the land and not for relinquishment deed coupled with the fact that no construction was being raised by defendants on the suit land, plaintiff purposely not filed application under Order 39 Rule 1 and 2 CPC alongwith the

suit filed by her in the year, 2016, but such plea of learned Senior counsel otherwise deserves to be rejected being totally contrary to the record.

17. Careful perusal of petition under Section 65 of the Right to Fair Compensation and Transparency under Land Acquisition, Rehabilitation and Resettlement Act 2013 filed by the plaintiff (Annexure P-11), reveals that factum with regard to execution of relinquishment deed and an intention of the defendants to grab the land of the plaintiff was very much in the knowledge of the plaintiff in the year, 2017, but even then she chose not to file an application under Order 39 Rule 1 and 2 CPC in the suit for declaration filed by her in the year, 2016. It is only after rejection of aforesaid application filed by the plaintiff under Section 65 of Right to Fair Compensation and Transparency under Land Acquisition, Rehabilitation and Resettlement Act 2013, that the plaintiff filed application under Order 39 Rules 1 and 2 CPC. Moreover, the plaintiff in her application has specifically averred that in order to raise construction defendants No.1 and 2 have not only raised retaining wall, but also dug pits and as such, defendants No. 1 and 2 are right in contending that fact of raising construction over the suit land was very

much in the knowledge of the plaintiff prior to filing of the suit.

18. Careful perusal of photographs placed on record itself suggest that the defendants have already raised construction over the suit land by spending huge amount. Mr. G.D.Verma, learned Senior Counsel representing the plaintiff while placing reliance upon the following judgments i.e. **Ballo vs. Paras Ram**, AIR 1972, Himachal Pradesh 33, **Smt. Kartari vs. Kewal Kirshan and others**, AIR 1972 H.P.117, **Smt. Samitra Devi versus Sukhwinder Pal**, AIR 1990 Punjab and Haryana, 23, **Brundaban Misra vs. Ishwar Swain and others**, AIR 1983 Orissa 172, **Ajmer Singh and others versus Atma Singh**, AIR 1985 Punjab and Haryana, 315 and **Girraj Prasad versus Smt. Tribeni Devi**, AIR 2004 Allahabad 348, vehemently argued that if allegations with regard to fraud and undue influence in execution of a particular document are levelled by a rustic villager or illiterate person, burden is upon defendants to prove its validity. However, having carefully perused the aforesaid judgments in its entirety, this Court has no hesitation to conclude that same are not applicable in the present facts and circumstances of the case. No doubt, as per aforesaid

judgments rendered by various constitutional courts, onus is upon the party against whom, allegations of undue influence and fraud are levelled, especially when such allegations are levelled by a rustic villager and an illiterate lady but such onus, if any, upon the defendant is to be discharged during trial by leading cogent and convincing evidence and definitely not at the time of contesting the application for interim injunction filed under Order 39 Rules 1 and 2 CPC. Merely, the fact that plaintiff stood recorded as co-owner in the suit land is not sufficient to deprive or suppress the right of other co-owners to utilize the land by raising construction. Even if the case of the plaintiff, as projected in the main suit and the application under Order 39 Rules 1 and 2 CPC is accepted on its face value, she can be said to be one of the co-owner alongwith other co-owners that too after cancellation of relinquishment deed. But in the case at hand record reveals that even prior to execution of relinquishment deed possession over Khasra No. 174 was with defendants No.1 and 2.

19. Mr. G.D.Verma, learned Senior Counsel representing the plaintiff while placing reliance upon the judgment rendered by Hon'ble Apex Court in **Skyline**

Education Institute (India) Private Limited versus S.L. Vaswani and another (2010) 2 Supreme Court Cases 142,

contended that once the Court of first instance refuses to grant relief of temporary injunction, appellate Court should be loath to interfere. Mr. Verma, further contended that since order granting injunction passed by trial Court was based upon objective consideration of the material placed before it and supported by cogent reasons, learned District Judge ought not have interfered with the same. Though, having read/perused the aforesaid judgment in its entirety, this Court sees no quarrel with the aforesaid proposition of law laid down by Hon'ble Apex Court, but as per aforesaid judgment passed by the court, appellate court should be loath to interfere in order granting injunction passed by trial Court in case same is based upon the objective consideration of the material placed before the Court and same is supported by cogent reasons. However, in the case at hand, careful perusal of order granting injunction passed by trial Court by no stretch of imagination can be said to be based upon objective consideration of the material placed before the Court. Had trial Court made objective consideration of the material made available to it, it would have not placed much

reliance upon the jamabandi for the year, 2008-2009, especially when entry made in the aforesaid jamabandi stood altered in subsequent jamabandi on account of mutation entered in the name of defendant No.2 on the basis of Relinquishment Deed allegedly executed by the plaintiff. Similarly, mere allegation of plaintiff that Relinquishment Deed is obtained by defendants No.1 and 2 by fraud and misrepresentation was not sufficient for the trial court below to pass injunction order, especially when such allegation of plaintiff is yet to be proved in accordance with law. Once factum with regard to possession of defendants Nos. 1 and 2 over the suit land pursuant to execution of relinquishment deed was not in dispute, trial court ought not have been swayed by the entry of joint ownership, if any, made in the Jamabandi for the years 2008-09, especially when such entry subsequently stood altered. Mere allegation of fraud in execution of relinquishment deed cannot be said to be sufficient ground for the court below to grant relief of interim injunction during the pendency of the trial. Once appellate court was convinced that order granting injunction is not based upon objective consideration of the material placed before the trial Court, it rightly interfered in the same.

20. This Court in **Ashok Kapoor versus Murtu Devi 2016(1) Shim.L.C.207**, which has been otherwise taken note by learned District Judge in its impugned judgment, has dealt with the rights and liabilities of the co-owners. As per aforesaid judgments, 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. Most importantly, in the aforesaid judgment, it has been held that mere making construction or improvement of in, the common property does not amount to ouster, rather 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 has right to claim injunction to prevent the diminution of the value and utility of the property. Before injunction is issued, plaintiff is required to establish that he/she 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.

21. In view of aforesaid law taken into consideration, no error, if any, can be found with the finding returned by passed by learned District Judge that appellants/defendants No. 1 and 2 cannot be disentitled from raising construction on the joint land unless and until the other co-owner is being prejudiced by their act. Since relinquishment deed is yet to be cancelled coupled with the fact that possession of defendants No.1 and 2 over Khasra No.167 even before the execution of relinquishment deed stands established, raising of construction over a small piece of land by spending huge amount by defendants No.1 and 2, cannot be said to be detrimental to the interest of the plaintiff.

22. Having perused the material available on record, this Court finds that none of basic ingredients i.e. prima facie case, balance of convenience and irreparable loss/injury, exists in favour of the plaintiff and as such, she is not entitled to discretionary relief. It is equally settled by now that grant of temporary injunction cannot claimed by the party as a matter of right and same cannot be denied by the court arbitrarily, rather discretion in this regard is to be exercised by a Court, on the basis of principles as have been enunciated in the various judgments passed by Hon'ble Apex

Court as well as this Court. Once in the case at hand, it stands prima-facie established that defendants No.1 and 2 is in possession of the land qua which injunction is sought, no interference is called for in the impugned judgment passed by learned District Judge, which otherwise appears to be based upon the proper appreciation of material available on record.

23. Consequently, in view of above, judgment passed by learned District Judge, Shimla is upheld. The petition at hand stands dismissed alongwith all pending applications.

**(Sandeep Sharma)
Judge**

April 24, 2021
(shankar)

High Court