

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

CR No. 6446 of 2015(O&M)
Date of decision : May 6, 2016

Onkari through her L.Rs. Des Raj Sharma and others

..... Petitioners

Versus

Suresh and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. K. L. Kohli, Advocate
for the petitioners.

Mr. Deepak Sharma, Advocate
for the respondent No.4.

Amit Rawal, J (oral).

The petitioner-plaintiff is aggrieved of the impugned order whereby application filed under Order 7 Rule 11 CPC has been allowed and the petitioner-plaintiff has been called upon to pay the ad valorem court fee.

Mr. K. L. Kohli, learned counsel appearing on behalf of the petitioner submits that the suit is for possession by way of partition by metes and bounds of specific two rooms in the basement and one room with combined toilet and kitchen on the ground floor with half of front and rear verandah of House No. 34, Sector 16-A, Chandigarh, as per building plans sanctioned by the Government and deposited with Defendant No.4, by virtue of Will of the Plaintiff's and Defendants' mother Savitri Devi, registered with the Sub Registrar, UT Chandigarh, approximate No.4341 in the year 2007, at present in

the illegal possession of the Defendants, and one-half share in Booths No.7 and 8 in Sector 9-D, Chandigarh, that devolved on the Plaintiffs and the Defendants, equally, on 10.9.1985 when their father Shri Birbal Sharma son of Devi Dayal expired which is at present illegally locked by the defendants and for declaration that the owner, namely, Birbal Sharma, of the property, namely, Booths No.7 and 8 in Sector 9-D Chandigarh, died intestate, leaving behind his Class 1 heirs, namely, the Plaintiffs and the Defendants and for permanent injunction restraining Defendants No.1 to 3 from getting the said House and the Booths transferred in their names only through Defendant no.4, and also restraining Defendant No.4 from transferring the said House and the said Booths in their names and further restraining Defendants No.1 to 3 from alienating the said House and the Booths with further prayer of by way of sale, gift, lease, mortgage or in any such or other manner whatsoever and from creating any charge over the said House and the Booths with further prayer of restraint by creating any third party right over the said House and the Booths in any manner, whatsoever. It has been categorically pleaded that plaintiffs had been staying with the testator who has executed a Will in their favour but after demise of testator defendants refused/denied their share in the suit property as plaintiff No.1 was staying outside during her Head and Eye operations at Chandigarh and plaintiff No.2's son were living in a rented house in Village Naya Gaon.

He further submits that there is a categoric pleading in para No.3 that the plaintiffs and defendant Nos. 1 to 3 are in legal

possession of the said house and said booths, but after the death of Savitri Devi-defendant Nos. 1 to 3 locked the said two booths in Sector 9, Chandigarh and refused to give ½ share and also refused to give their share in the said House in Sector 16, Chandigarh, therefore the ad valorem court fee for possession and declaration i.e. ₹195 and ₹140/- has been paid.

In support of his contentions, he has relied upon the judgment of Hon'ble Supreme Court in **Neelavathi and others Vs. M. Natarajan and others 1980 SCC(2) 247** and of this Court in **Narula Vs. Juneja and others** in CR No. 6451 of 2013 decided on 14.10.2014 to contend that the Court fee is not liable to be paid if the plaintiffs continue to be in joint possession of the properties.

Respondent No.1 has been served but there is no representation on his behalf.

Mr. Deepak Sharma, learned counsel appearing on behalf of respondent No.4 submits that qua adjudication of the application under Order 7 Rule 11 CPC, averments made in the plaint have to be seen. This Court while issuing notice of motion order on 30.9.2015 made the following observations:-

*“Learned counsel for the petitioners, inter alia, contends that pursuant to execution of the Will by their mother, the petitioners are in possession of the suit property. They have been given a portion of the house in question as per the said Will. Hence, in view of the judgment delivered by this Court in **Sunil Narula Vs. Shelly Juneja and others**, 2015 (3) RCR (Civil) 1027, they are not required to affix the ad valorem Court fee in respect of their share in the suit property of which, they are seeking*

possession.

Notice of motion for 29.01.2016.

In the meantime, operation of the impugned order dated 31.08.2015 (Annexure P-1) shall remain stayed.

Copy of this order be given to learned counsel for the petitioners under the signatures of Court Secretary.”

I have heard learned counsel for the parties, appraised the paper book. For the purpose of adjudication of the application, averments made in the plaint and prayer clause conjunctively have to be read and on perusal it is discernible that the plaintiffs are not residing in the house in question, much less not in possession. For the sake of brevity averments made in paragraph 1 to 5 reads thus:-

1. That the Plaintiffs and the Defendants No. 1 to 3's father Sh. Birbal Sharma purchased Booths No. 7 and 8 in Sector 9-D, Chandigarh, each measuring about 25 Sq. Yards in his own name, and residential plot No. 29, Street-L (Now House No. 34), in Sector 16, measuring about 249.04 Sq. Yards, in the name of his wife Smt. Savitri Devi and constructed a Basement with Ground Floor thereupon. Sh. Birbal Sharma died on 10.09.1985 intestate leaving behind the Class 1 heirs, namely his widow Savitri Devi, and the sons, namely, the Defendants, and the daughters, namely, the Plaintiffs, and Smt. Savitri Devi, died on 18.12.2008, leaving behind a Will Registered with the Sub Registrar, UT Chandigarh, approximate No. 4341 in the year 2007, bequeathing House No. 34, Sector 16-A, Chandigarh to all her sons, namely, the Defendants, and all her daughters, namely the Plaintiffs, specifying therein that

two rooms in the Basement and one room with combined Toilet and a Kitchen on the Ground Floor with half of the front and rear verandah shall be owned and occupied by the Defendants, the other two rooms in the Basement, and the remainder of Ground Floor comprising two rooms, Toilet and a Store shall be owned and possessed by Defendant No.3, First Floor shall be constructed, owned and possessed by Defendant No.1, and the second Floor shall be constructed and possessed by Defendant No.3. Defendant No.1 has constructed the First Floor, and he is in possession thereof. Defendant No.2 is in the occupation of the remainder of Ground Floor comprising two rooms, Toilet and a Store. Defendant No.3 has not constructed the 2nd Floor and he is in illegal occupation of the share of the Plaintiffs in the House, namely, two rooms in the Basement and one room with combined Toilet and a Kitchen on the Ground Floor with half of the front and rear verandah. During the life time of their mother, the Plaintiffs had been staying with her on their visits to Chandigarh; but after her death, the Defendants have refused the Plaintiffs' share in the suit property, and consequently, Plaintiff No.1 stayed outside during her Head and Eye operations at Chandigarh, and Plaintiff No.2's son Akhil Sharma is living in rented house in Village Naya Gaon nearby, and Defendant No.3's daughter Eshna a student of 11th Class in the Senior Model School Sector 16, Chandigarh, has to live in a far off Sector 38-West in House No.5219 owned by a relation, named Satish, which is embarrassing to the Plaintiffs owning a share in the suit property at Chandigarh.

2. That the Plaintiffs and the Defendants No.1 to 3 had two more sisters namely Usha and Surekha, who are

dead.

- 3. That the Plaintiffs and the Defendants No.1 to 3 are the only legal heirs of the said property left behind by their parents, namely Sh. Birbal Sharma, father, and Smt. Savitri Devi, mother. They are entitled to the share in the said House as per the said Will, and 1/6 share each in the said two Booths. The plaintiffs and the Defendants No.1 to 3 are in legal possession of the said House and the said Booths.*
- 4. That after the death of the Plaintiffs' and Defendants No.1 to3's father Sh. Birbal Sharma on 10.09.1985, the suit property was managed by the mother Smt. Savitri Devi; but after her death on 18.12.2008, Defendants No.1-3 have locked the said two Booths in Sector 9-D, Chandigarh and have refused to give ½ share therein to the Plaintiffs, and similarly Defendants No.1-3 have refused to give them their share in the said House in Sector 16, Chandigarh, as per the registered Will of their mother Savitri Devi.*
- 5. That the real intention of Defendants no.1 to 3 is malafide and smacked with greed. Taking undue advantage of residence in Chandigarh, they have locked the Booths in Sector 9-D, Chandigarh and do not allow the Plaintiffs to use the House in Sector 16 for their need according to their legal share therein.”*

There is no dispute with the aforementioned ratio decidendi culled out by the Hon'ble Supreme Court in **Neelavathi's case (supra)** but in view of the categorical averment in the plaint, even plaintiffs are not stated to be in joint possession. The question of ½ share on the basis of Will of Savitri Devi who died intestate would be adjudicated at the time of final hearing for the purpose of examination

of court fee, the averment in the suit are to be seen. From the perusal of the aforementioned averments, it is evident that the plaintiffs are not in possession of the house, booths claiming ½ share. The petitioners-plaintiffs are entitled to pay court fee qua their share only.

I do not find any illegality and perversity in the impugned order and the same cannot be said to have been passed without jurisdiction.

The revision petition is devoid of merits. Accordingly the same is dismissed.

(AMIT RAWAL)
JUDGE

May 6, 2016
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