

RSA-4450-2013

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IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

RSA-4450-2013

Date of decision : 17.02.2016

Vijay Kumar

... Appellant

Versus

Sanjeev Kumar

... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. R. S.Bajaj, Advocate
for the appellant.

Mr. Animesh Sharma, Advocate
for the respondent.

REKHA MITTAL. J.

The present appeal has been directed against concurrent findings recorded by the Courts below whereby the suit filed by the appellant / plaintiff was dismissed by the trial Court and the findings recorded by the trial Court have been affirmed in appeal.

The appellant filed a suit for injunction restraining the respondent / defendant from taking forcible possession, interfering into peaceful possession, making an encroachment in respect of two rooms at the first floor and store room, Varandah and terrace on the second floor measuring 2 marlas, 114 square feet (30' X 16'), portion of the property bearing No.77-78/1, situated at Mohalla No.11, Jalandhar Cantt. The claim of the appellant is that he is owner of the suit house by way of purchase from Smt. Shanti Devi widow of late Sh.Nand Lal vide sale deed

dated 11.08.1999. The respondent is his nephew and he was given one room, kitchen, toilet and bath as a licensee at ₹ 2000/- per month w.e.f. 01.01.2004 and he tried to encroach upon the remaining portion of the suit house which is under lock and key of the appellant.

The respondent filed the written statement, contested claim of the appellant with the plea that the appellant has gained unlawful possession over the suit house by way of deceitful means after filing the suit and he has no locus standi to seek injunctive relief against him as he is one of the co-owners of the suit house on the basis of Will dated 03.03.2001 executed by Smt. Shanti Devi in her sound disposing mind. He has further denied that he was given one room, kitchen, toilet and bath on licence at ₹ 2000/- per month. The suit house never remained under lock and key of the appellant and the whole house is in possession of the answering respondent. He never tried to take forcible possession of the suit property as the same is in his possession.

The appellant preferred replication, reiterated his stand taken in the plaint and controverted the allegations raised in the written statement.

The trial Court framed the following issues for determination:

- (i) *Whether the plaintiff is owners in possession of the suit property?OPP*
- (ii) *Whether the plaintiff is entitled to permanent injunction as prayed for?OPP*
- (iii) *Whether the defendant has become owner on the*

basis of Wil dated 3.3.2001?OPD

(iv) Whether the suit is not maintainable?OPD

(v) Whether no cause of action accrued to the plaintiff to file the present suit?OPD

(vi) Relief.

Issues No.1 & 3 were struck off on 09.01.2013, therefore, issues No.2,4 & 5 were left for determination in the present proceedings. The learned trial Court, in view of pleadings of the parties, evidence adduced and rival submissions made by respective counsel, rejected claim of the appellant in regard to his possession of first and second floor of the house in question with the finding that the house is in exclusive possession of the respondent / defendant. The Court has held that the appellant has not placed on record any document regarding his possession which could suggest that he is in exclusive possession of the suit house.

The appellate Court has upheld the findings of the learned trial Court with the observations that it is proved by the plaintiff and his witness Deepak Sharma that he (appellant) has been residing in house No.35/7, Mohalla No.5, Jalandhar Cantt and not in the property in dispute. No document of possession is on record by the plaintiff to discharge the onus laid upon him. PW2 Deepak Sharma admitted possession of defendant Sanjeev Kumar over the suit property. In absence of proof of any document of licence and payment of licence fee by the respondent/defendant, the possession of plaintiff cannot be substantiated by the Court. Even a licensee is entitled to reasonable notice of revocation

even where the licence is a revocable one, in the opinion of this Court. Even the efficacious remedy is also available in a separate suit of title, where the Court would also determine validity of the title deeds and entitlement of the parties thereto which would also be inclusive of the point of possession. The findings recorded by the trial Court are in consonance with the settled principles of law and they cannot be said to be unreasonable or perverse.

The substantial question of law which arises for adjudication is *“whether the Courts below have taken into consideration an admission made by the respondent, if not so, whether it renders findings of the Courts to be perverse.”*

Counsel for the appellant has submitted that the Courts below have altogether ignored a vital admission made by the respondent in the written statement and in his statement on oath regarding possession of the appellant when otherwise he has failed to adduce any evidence to prove that the appellant has taken over possession of the first and second floor of the property in question by way of deceitful means during pendency of the suit. It is further argued that in view of admission by the respondent, the onus stands shifted upon the respondent to prove that the appellant gained possession of the said portion by any deceitful means, as alleged.

Counsel for the respondent has supported the judgments passed by the Courts below with the submissions that as the appellant is admittedly maintaining his residence in House No.35/7, Mohalla No.5,

Jalandhar Cantt, the consistent findings recorded by the Courts cannot be faulted with. The appellant has failed to produce any document to prove his possession qua first and second floor of the suit property bearing No.77-78/1 and PW2 Deepak Sharma's admission negates his plea as he deposed, *'it is correct that Sanjeev Kumar along with his family is residing in the suit property. Volunteered, he is residing there as a licensee.'*

I have heard counsel for the parties and perused the records.

The appellant filed the suit for injunction on 17.05.2007 in respect of first and second floor of the suit property as there is no dispute between the parties that ground floor is in possession of the respondent. The ownership of the suit house is also disputed and the parties are litigating in regard thereto in a separate suit and it is for this reason that issues No.1 & 3 were struck off in the present proceedings.

The only dispute in the present lis is in regard to possession of first and second floor of property bearing No.77-78/1, Mohalla No.11, Jalandhar Cantt.

The Courts below, for undisclosed reasons, have not taken note of one of the significant averments in the written statement both in the preliminary objection as well as on merits. A relevant extract therefrom reads thus:-

“PRELIMINARY OBJECTIONS

2. *That plaintiff has gained unlawful possession over 1st floor of property No.77-78/1, situated in the area of*

Mohalla No.11, Jalandhar Cantt, after filing of the present suit by deceitful means and for that reason, he has no locus standi to seek an injunctive relief against the defendant, who is one of the co-owners of the suit property on the basis of Will dated 03.03.2001, executed by Smt. Shanti Devi in her sound disposing mind.

ON MERITS

2. The whole house was in possession of the answering defendant. Plaintiff, after the filing of the present suit, with force got possession of the first floor of the house in dispute. Answering defendant reserves his right to file suit for possession against the plaintiff.”

Sanjeev Kumar respondent appeared in the witness box and tendered into evidence his affidavit Ex.DW1/A. In para 1 of the affidavit, he has reiterated his stand extracted hereinabove. In his cross-examination, he has stated that '*plaintiff has taken forcible possession of the first and second floor of the suit property*'. However, he has denied the suggestion '*it is wrong to suggest that the plaintiff is in rightful possession of the first and second floor of the suit property.*'

The respondent, in the written statement, admitted possession of first floor with the appellant though with a plea of forcible / illegal possession. In his statement on oath, he has admitted possession of the first and second floor of the suit property with the appellant with the same plea that he had taken forcible possession. No date or month has been mentioned in the written statement filed on 25.07.2007 when the appellant gained forcible possession of the first floor of the suit property. The

statement of the respondent in his examination-in-chief as well as cross-examination is equally silent as to the date and month when the appellant gained forcible possession of the first and second floor. As soon as the respondent has admitted that the appellant is in possession of first and second floor of the house in question, it was incumbent upon him to discharge the onus as to when and how the appellant got possession of the first and second floor particularly in the circumstances that he is admittedly residing on the ground floor of the said property.

The plea of the respondent that he was in possession of the entire suit property at the time of institution of the suit gets falsified and belied from documentary evidence i.e. certified copy of the plaint of suit titled Sanjeev Kumar and others Vs. Vijay Kumar and others ExDW2/2 marked as such in the statement of Anita Malhotra DW2, one of the plaintiffs in the said suit pertaining to the same house in regard whereof Sanjiv Kumar and others (plaintiffs) have claimed to be co-owners of the house shown in red and green colour in the site plan and joint possession of the portion shown in green colour. In the plaint Ex.DW2/2, in para 6, the averments raised by Sanjeev Kumar and others read as follow:-

“That plaintiffs were in exclusive possession of the house, fully detailed in the cause title of plaint. Defendant No.1, by dint of force, succeeded in dispossessing the plaintiffs out of the portion shown in red colour in the plan on 13.11.2006.”

To be fair to the appellant, it is submitted that in the plan

appended with the said suit, the portion shown in red colour is the first and second floor of the suit property, annexed with the present appeal, marked as Ex.P1 in the suit preferred by Sanjeev Kumar and others.

Counsel for the respondent, on the contrary, is not in a position to counter the submissions made by counsel for the appellant as well as site plan Ex.P1. Counsel has further failed to explain that if the appellant was in possession of portion shown in red colour in the site plan how plea of the respondent that he was in possession of the entire house at the time of institution of the present suit in May 2007 can be accepted. It is universally accepted that man may tell lie but not the circumstances. The story propounded by the respondent in regard to the appellant having taken over possession of first and second floor of the suit house after institution of the suit gets falsified and belied from a clear admission of the respondent in the plaint of suit instituted by Sanjeev Kumar and others in which Anita Malhotra DW2 is one of the plaintiffs. It further appears to the Court that as the appellant was already in possession of first and second floor of the suit house, the respondent tried to explain his possession of the first floor by raising a plea of forcible possession and for that reason did not mention the date and month of said forcible possession. Had the appellant taken forcible possession of the first and second floor of the property in question after institution of the suit, there was no reason for the respondent not to create commotion in the pending proceedings or / and by reporting the matter to the police or initiating

criminal proceedings against the appellant. There is no material on record suggestive of the fact that the respondent ever raised any voice against the alleged illegal action of the appellant in taking forcible possession of first and second floor of the suit property. Keeping in view the materials on record, it can be safely held that the Courts below committed a gross error by failing to take note of the admissions made by the respondent in the written statement, in his statement on oath as well as in the plaint of the suit instituted by the respondent and others.

There cannot be any better evidence than an admission made by a contesting party and thus, non production of any document by the appellant to prove his possession of the portion in question cannot be commented adversely particularly in the circumstances that the appellant has categorically pleaded that the first and second floor is under his lock and key. The question of production of documents to prove possession would have arisen had the appellant pleaded that he has been making actual use of the first and second floor because in that eventuality, the Court would expect from him to produce documents in respect of electricity consumption charges and water charges etc. That being so, the findings recorded by the Courts below that the appellant has failed to prove his case for want of production of documentary evidence are the result of non application of mind and mis construction of pleadings.

Taking into consideration cumulative effect of the aforesaid discussion, it can be safely held that the findings recorded by the Courts

below holding that the respondent is in possession of first and second floor of the suit property are perverse and liable to be set aside. As a result, the aforesaid question is answered in favour of the appellant and against the respondent.

For the foregoing reasons, the appeal is allowed, the judgments and decrees passed by the Courts below are set aside. As a result, suit filed by the appellant is decreed restraining the respondent from interfering in peaceful possession or making any encroachment in respect of two rooms at the first floor and store room, verandah and terrace at the second floor of the property bearing No.77-78/1 situated at Mohalla No.11, Jalandhar Cantt. except in due course of law, with costs throughout.

(REKHA MITTAL)
JUDGE

February 17, 2016.

Davinder Kumar