

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

**RSA No.4847 of 2014**

**Date of Decision: 11.01.2016**

Ishwar Singh

.....Petitioner

Versus

Dhano Devi and another

... Respondents

**CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH**

Present:Mr. B.R. Vohra, Advocate  
for the appellant.

Mr. Vivek Khatri, Advocate  
for the respondents.

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

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**RAJ MOHAN SINGH, J.**

[1]. Defendant is in second appeal against concurrent judgments and decrees passed by the Courts below.

[2]. Plaintiffs filed suit for possession of double storied house No.588 with specific boundaries as depicted in the plaint over which defendant was in unauthorized and illegal possession. Plaintiffs also claimed recovery of Rs.6,00,000/- as mesne profit @ Rs.10,000/- per month from June 2005 to 15 June, 2010 along with interest @ 18 % per annum from the date of illegal possession till actual payment and further direction of payment of mesne profit from the date of filing of suit till vacation of the house with consequential relief of permanent injunction.

[3]. Plaintiffs claimed that they were residents of village Budha Kehra, Tehsil and District Hisar. Plaintiff No.1 was an old lady and plaintiff No.2 was a minor. They had no immovable and movable property except the present house. They were financially poor. Plaintiff No.1 was dependent upon the maintenance which was to be paid by the defendant as father of plaintiff No.2 had expired. Plaintiff No.1 was taking care of plaintiff No.2 being his grand mother. They were indigent persons and had no source of income except the maintenance. They had no means to pay the court fee on the amount so claimed in the suit. Plaintiff No.1 was the widow of Sita Ram and plaintiff No.2 was the grand son of deceased Sita Ram. Father of plaintiff No.2 namely Kuldeep son of Sita Ram had expired and his widow and three minor children are living with plaintiff No.1 who was taking care of them. Sita Ram died on 12.10.2007. Defendant No.1 is a son of Sita Ram. Plaintiffs further alleged that Sita Ram was owner of the house in question. The house was got by Sita Ram through Civil Court decree suffered by his father in his favour. He was absolute owner in possession of the house. He bequeathed the house in favour of plaintiffs through Will. Defendant had thrown out the plaintiffs including children of deceased Kuldeep, his widow and Sita Ram from the house in question in the month of June 2005

and since then, he is in illegal and unauthorized possession of the house. The house was constructed by Sita Ram about 40 years ago and he executed a registered Will No.59 dated 04.10.2007 in favour of plaintiff in respect of this house. Plaintiffs being lawful heirs were entitled to the estate of deceased Sita Ram. Plaintiffs filed a petition under Section 276 of Indian Succession Act for grant of letter of probate in favour of petitioners, which was accepted by the Court of Additional District Judge, Hisar vide order dated 04.06.2010, wherein it was held that whether the plaintiffs were entitled to possession of the house which was beyond the jurisdiction of the Court granting probate. However, probate regarding Will was duly granted in favour of plaintiffs. Plaintiffs further alleged that the defendant had no right to retain the possession of the house in question because it was self acquired property of Sita Ram and he bequeathed the same in favour of plaintiffs by way of registered Will. Plaintiffs were lawful owners of the house by dint of registered Will and as per letter of probate granted by the Competent Court defendant was in illegal possession of the house in question. With this background, the suit came to be filed with the prayer as mentioned in the preceding para.

[4]. Defendant contested the suit on all counts. Defendant denied the fact that the plaintiffs were thrown out along with

children of deceased Kuldeep, his widow and husband of plaintiff No.1 in June 2005. He contended that Sita Ram never executed any Will in favour of plaintiffs, rather, Will is fraudulent. The house was in the name of defendant. Defendant had already made the payment to Kuldeep during his life time. The suit filed by the plaintiffs is claimed to be to extort money from the defendant. The sanctioning of letter of probate is also claimed to be the result of concealment of facts and against which appeal is statedly pending.

[5]. From the pleadings of the parties following issues were framed by the trial Court:-

*“1. Whether the defendant is in illegal and unauthorized possession of house No.588 and the plaintiff is entitled to recover Rs.6,00,000/- as mesne profit at the rate of Rs.10,000/- per month from June, 2005 to 15.06.2010 along with interest @ 18% per annum from the date of illegal possession till final payment along with mesne profit? OPP*

*2. If issue No.1 is proved whether the plaintiff is entitled to the relief of permanent injunction restraining the defendant from changing the nature, raising any construction or making any addition or alteration in the house in question in any manner? OPP*

*3. Whether the suit is not maintainable in its present form? OPD*

*4. Whether the plaintiff has no locus standi and cause of action to file this suit? OPD*

*5. Whether the Civil Court has no jurisdiction to try and entertain the present suit?OPD*

*6. Whether the plaintiffs have not come to the court with clean hands? OPD*

*7. Relief.”*

[6]. Both the parties led their respective evidence to prove their case. Trial Court decreed the suit vide judgment and decree dated 26.09.2013. Defendant-appellant remained unsuccessful in the appeal before the Lower Appellate Court, who dismissed the appeal vide judgment and decree dated 20.08.2014. However, cross objections filed by the plaintiffs were partly accepted. That is how the present appeal came to be filed.

[7]. Learned counsel for the appellant relied upon following substantial questions of law which are as under:-

*“a) Whether the learned trial Court committed grave error in treating the petition filed by the plaintiffs under Order 33 CPC, as a suit directly, without following the procedure given in Order 33 CPC?*

*b) Whether it is a case of misreading and non-reading of material evidence led by the parties?*

*c) Whether the impugned decrees suffer from*

*perversity and deserve to be set aside?*

*d) Whether the learned courts below have complied with the provisions of Order 20, Rule 12 CPC? If not, its effect?*

[8]. I have heard arguments of both the sides and have also perused the record.

[9]. Probate has been granted by the Competent Court. Sita Ram was owner of house in question by dint of Civil Court decree passed in Civil Suit No.154 of 1983. There is no transfer deed in favour of defendant. No evidence has come to fore in respect of any payment having been made by the defendant to Sita Ram. Mere pendency of a case against grant of probate is of no consequence as no stay has been granted in the said appeal. The letter of probate granted by the Competent Court cannot be kept in abeyance. The entries Ex.D16 to D28 do not confer any title of ownership in favour of the defendant. The genuineness of Will has been successfully proved by the plaintiffs. The possession of the defendant over the suit land can only be in the nature as claimed by the plaintiffs because vide judgment of granting probate Ex.P1, plaintiffs have been duly declared to be owner of the house and they are entitled to get the possession by means of present suit. The claim of mesne profit has also been decided by the trial Court, but inadvertently on the ground that plaintiffs are entitled to nominal

mesne profit for want of evidence. It is a considered position that the house was having its number as 588 whereas its new number is 1394. There is no dispute about the identity of the house between the parties. Even with the aid of documentary evidence viz. Exs. D1 to D33 the ownership of defendant has not been successfully proved. Defendant has not brought on record any document of title whereas plaintiffs have heavily relied upon factum of Will which has been proved before the Court below in probate proceedings. The stand of the defendant was that Sita Ram never executed any Will and the Will which has been alleged by the plaintiffs was fraudulent document which was created by them in collusion with one Jagdish Chander. Once the validity of Will was decided by the Court in probate proceedings and appeal against the said judgment is pending in the High Court, no final adjudication can be foreseen merely on the ground of pendency of suit particularly when no stay has been granted by the High Court. This case was duly decided on the basis of available evidence. Even, the stay of the decree has been declined by the High Court vide order dated 01.08.2013 passed in Civil Revision No.4568 of 2013, therefore, this appeal has to be decided on the basis of available material on record.

[10]. Factum of Will has not been denied by any

unpeachable evidence. The ownership of Sita Ram can be taken to be proved by dint of decree Ex.P3 and Ex.P4 passed in Civil Suit No.154 of 1983. Said suit was related to house No.588. The rights qua the said house were declared in favour of Sita Ram and Jagdish Chander. It was in the light of this document that Sita Ram had executed the Will Ex.P1 in favour of plaintiffs. The Will was brought in the probate proceedings and decision dated 04.06.2010 Ex.P1 came to be passed. Though the defendant brought on record the material to show his possession of the house but there is no document of title which can prove his ownership. The plea of learned counsel is that the share of Jagdish Chander would devolve upon the defendant-appellant under Sections 8 and 9 of Hindu Succession Act as the plaintiffs would fall in entry No.6 whereas defendant would fall in entry No.4. The contention of learned counsel is that as per Section 9 of Hindu Succession Act the person falling under higher entries would be entitled to inherit the property. Before appreciating the aforesaid arguments, it has to be proved whether Jagdish Chander is alleged to have given a share to his brother by Civil Court decree or whether his share has been excluded in the suit land or not? Perusal of plaint and written statement shows that the case set up by the plaintiffs in the suit does not talk about any such property by

Jagdish Chander being part of the suit land. Preliminary objection (para No.10) in the written statement filed by the defendant talks about collusion of the plaintiffs with Jagdish (Uncle of the defendant). The interest of aforesaid Jagdish was shown with the plaintiffs and not with the defendant in any manner. The written statement is conspicuously silent about the inheritance of the defendant in respect of property of Jagdish Chander, qua him allegations were made that he was in collusion with the plaintiffs. No such plea of inheritance was taken in the written statement nor the property of Jagdish Chander has been made the subject matter of suit, therefore, at this stage, particularly in Regular Second Appeal no such consideration can be made on a title. No new plea was ever pleaded in the pleadings nor any such plea was ever raised before the Courts below. The perusal of the plaint as well as the written statement do not attempt such a proposition in any manner. The law point as canvassed by the appellant do not arise inasmuch as that the plaintiffs specifically pleaded in the suit itself in para No.2 that they are indigent persons having no source of income except the maintenance and the house in dispute is the only property available with them.

[11]. No reply was filed by the defendant-appellant. Only a written statement was filed thereby denying the pleading on

merits. No contest was made by them qua the application for which notice was duly given to him. Since the suit has been decided on merits and the Lower Appellate Court has also taken cognizance of matter in appeal, thereby deciding the appeal against the defendant-appellant, therefore, at this stage, no such indulgence can be given on the alleged plea in terms of Order 33 CPC. Question No.(b) has to be answered in negative as the judgments passed by the Courts below are found to be on proper appreciation of evidence on record. No misreading can be presumed. As regards question No.(c), it is found that the judgments and decrees passed by the Courts below are based on proper appreciation of evidence. No misreading and perversity in the impugned judgments can be found and therefore, no such ground is sustainable in law. As regards question No.(d), the trial Court has specifically observed while decreeing the suit that defendant is directed to vacate the house within a period of 2 months from the date of passing of the decree subject to Section 144 of CPC and plaintiffs are also entitled to mesne profit @ Rs.200/- per month from June 2005 to 15.06.2010 along with interest @ 9 % per annum from the the date of illegal possession till its actual payment. The Lower Appellate Court allowed the cross objection particularly to the extent of modifying the decree from Rs.200/- to Rs.500/- per

month from June 2005 to 15.06.2010 along with interest @ 9 % per annum from the illegal possession till actual realisation of the amount. Defendant was directed to pay the mesne profit as mentioned above from the date of filing of the suit till the vacation of the house. In the entire frame of grounds of appeal, the appellant has not mentioned as to in what manner Order 20 Rule 12 CPC has not been complied with. The evidence on record is sufficient to meet the requirement of aforesaid provision. No such inquiry is required to be made in terms of mesne profit when rate of rent fixed by the Courts below is so meager that in all probability rent would come out on higher side in the event of conducting any inquiry. Moreover, it is not mandatory to order inquiry in every case. When a suit is of recovery of possession of immovable property and for rent and for mesne profit, the Court is competent to pass a decree for possession of the property and for rent which has accrued on the property during the period prior to institution of suit or the Court in its own wisdom can direct an inquiry as to such rent and for the mesne profit or directing an inquiry as to such mesne profit. Once the fixation of the amount is on the lowest side, the provision being directory in nature cannot be presumed in facts and circumstances of the case that the provision in terms of Order 20 Rule 12 CPC would vitiate the proceedings on

record.

[12]. In view of this matter, I am of the considered opinion that no indulgence can be given in the present appeal. This appeal being totally bereft of merit is dismissed as such.

11.01.2016  
prince

**(RAJ MOHAN SINGH)**  
**JUDGE**