

In the High Court of Punjab and Haryana at Chandigarh

201

CR No. 7315 of 2015

Date of decision: 16.8.2018

Prem Kumar (now deceased) through LRs

.....petitioner

Versus

Ram Singh (now deceased) through LR

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Sandeep Jain, Advocate,
for the petitioner.

Mr. Zorawar Singh Chauhan, Advocate
for the respondent.

RAJ MOHAN SINGH, J (oral)

Petitioner has challenged the order dated 28.5.2015, vide which the execution application filed by the decree-holder was dismissed. Suit of the petitioner-decree holder for possession was decreed by the trial Court vide judgment and decree dated 30.8.1983. The operative part of the relief clause read as under:-

“ In view of my decision on the above issues, the suit of the plaintiff succeeds and the same is decreed under Section 22 of the Hindu Succession Act, 1956

for possession as owner of 3/10th share of the premises in dispute as fully detailed in the head note of the plaint comprised in Khasra No. 452 (3-0) 880/469 (1-0) situated in village Ramgarh Tehsil Phillaur on payment of Rs. 7200/- to defendant Nos. 1 and 2 after removal of malwan, if any. The plaintiff shall pay Rs. 7200/- to defendants No.1 and 2 or deposit the same in the court for payment to them within a period of two months from today failing which this suit shall be deemed to have been dismissed. As held in the case of Valliyail Sreedevi Amma (AIR 1976 Kerla 19) the remedy of a co-sharer to enforce his preferential right under Section 22 (1) of the Hindu Succession Act to acquire the transferred interest is by way of a regular suit and not by way of an application under Section 22 (2) of the said Act and that being so the plaintiff was obliged to pay advelorem court fee on the amount of Rs.7200/- whereas he has paid court fee of Rs. 1.25 paise only. The learned counsel for the plaintiff also conceded that the plaintiff was required to pay court fee on the amount of Rs.7200/- and the plaintiff expressed his willingness to make good the court fee if so required by the Court. The plaintiff is, therefore, directed to

make good the court fee within a period of two months failing which the plaint shall be deemed to have been rejected for want of payment of requisite court fee. No order as to costs in the circumstances of the case. Decree sheet be prepared accordingly. File be consigned to the record room.”

Admittedly, the said decree has attained finality between the parties.

At the time of issuance of notice of motion, following order was passed on 2.11.2015 :-

“Counsel for the petitioner inter alia contends that pursuant to the judgment and decree dated 30.8.1983 (Annexure P-1), only symbolic possession was delivered to the LRs of Prem Kumar. The application filed with regard to the physical possession, has been dismissed by observing that it requires separate proceedings.

Notice of motion for 22.1.2016.

Operation of the impugned order shall remain stayed in the meantime.”

It is not in dispute that an amount of Rs.7,200/-, as directed by the trial Court, has already been paid and symbolic possession of 3/10th share out of 4 kanals comprised in khasra No. 452 (3-0), 880/469 (1-0) has been delivered to the decree

holder. The plaintiff had filed a suit claiming right in the suit property by invoking the provisions under Section 22 of the Hindu Succession Act, 1956. As per the decree of the trial Court, he was held entitled to the possession as owner of 3/10th share of the premises in question subject to payment of Rs.7,200/- to defendants No.1 and 2. In the execution, symbolic possession has already been delivered to the decree holder and the execution petition was decided on 21.2.2012. The instant application was filed for execution of the decree in the month of April 2015.

Learned counsel for the petitioner submits that the *malba* has not been removed by defendants No.1 and 2 and, therefore, the decree passed by the trial Court has not been satisfied fully.

I have considered the controversy between the parties.

Admittedly, the decree for possession of 3/10th share was passed in favour of the decreed holder. Till date parties have not resorted to any partition proceedings. Symbolic possession has already been delivered to the decree holder. Actual possession can only be delivered to the decree holder after partition. Removal or non removal of *malba* is a factual plea. However, learned counsel for the respondents undertakes

to remove the *malba* (if any) forthwith.

For the reasons recorded herein above, this petition is disposed of.

(RAJ MOHAN SINGH)
JUDGE

August 16, 2018

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Whether reasoned/speaking

Yes/No

Whether reportable

Yes/No