

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

RSA No.2255 of 2011(O&M)

Date of decision:28.8.2018

Sarwan Kumar and anotherAppellants

VERSUS

Smt. Chhoti and othersRespondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Ranjit Saini, Advocate for the appellants.

Mr. Navmohit Singh, Advocate for respondents.

REKHA MITTAL, J.

Challenge in the present appeal has been directed against concurrent findings recorded by the Courts below whereby suit filed by the appellants/plaintiffs in respect of house No.217 old and new No.1214, Ward No.18, New Char Chaman, Karnal for declaration, mandatory and permanent injunction was dismissed by the trial Court vide judgment and decree dated 28.07.2009 and appeal preferred by unsuccessful plaintiffs/appellants did not find favour with the Additional District Judge, Karnal.

The plaintiffs/appellants claimed themselves to be co-owners of the suit property on the premise that mother of the plaintiffs purchased suit property with her resources in the year 1983 vide registered sale deed No.5309/1 dated 14.03.1983. The suit property was purchased in the name of Sarwan Kumar – plaintiff No.1 and Nanu Ram (since deceased), brother of plaintiffs because plaintiff No.2 was a government employee. The

mother of the plaintiffs had told to plaintiff No.1 and Nanu Ram that after her death, portion of the suit property in her possession to the extent of $1/3^{\text{rd}}$ share will be inherited by plaintiff No.2 as owner in possession. As such, after death of their mother, plaintiff No.2 became owner of the suit property to the extent of $1/3^{\text{rd}}$ share.

Nanu Ram committed suicide by hanging on 03.10.2004. He was issueless. After his death, plaintiffs became owners in possession of the suit property in equal shares. On 13.10.2004, defendants gathered for Rasam Pagri of deceased Nanu Ram and threatened the plaintiffs that they will forcibly occupy the suit property. On 17.10.2004, Chhoti- defendant No.1 along with other defendants and some anti-social elements tried to take possession of baithak of suit property forcibly. Defendants No.1 to 3 claimed $1/3^{\text{rd}}$ share in the suit property whereas Nanu Ram took divorce from defendant No.1 vide judgment and decree dated 23.08.1988 passed by the Additional District Judge, Karnal. After divorce, defendant No.1 remarried and two sons of Nanu Ram had also expired. On 26.10.2004, defendants forcibly took possession of front room and room on the upper storey in absence of the plaintiffs. They also took certain articles belonging to the plaintiffs.

Defendants/respondents filed the written statement raising preliminary objections inter alia that suit is not maintainable; plaintiffs have no locus standi and cause of action to file the suit and the suit is not properly valued for the purpose of Court fee and jurisdiction. They have denied the material averments of the plaint with the plea that Nanu Ram, father of defendants No.2 and 3 purchased half share in the suit property with his own money. Plaintiff No.2 and mother of the plaintiffs have no

concern with the suit property. Since purchase of suit property, father of defendants No.2 and 3 was in possession of some portion of suit property and after his death, defendants No.1 to 3 are in possession of that portion of the suit property.

The plaintiffs filed replication and reiterated their stand taken in the plaint.

The controversy between the parties led to framing of following issues by the learned trial Court:-

1. Whether the plaintiffs are owners in possession of the house in question qua 1/2 share? OPP
2. If issue No.1 is proved, whether the plaintiffs are entitled to the relief of injunction as prayed for on the grounds mentioned in the plaint? OPP
3. Whether the plaintiffs have no locus standi to file the present suit? OPD
4. Whether the present suit is not maintainable? OPD
5. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction? OPD
6. Relief.

The parties were permitted to adduce evidence in support of their respective contentions. Having heard counsel for the parties in the light of materials on record, the learned trial Court decided issue No.1 and 2 against the appellants/plaintiffs whereas issues No.3 to 5 were decided against the defendants and eventually suit filed by the plaintiffs/appellants was ordered to be dismissed with costs. As has been noticed hereinbefore, appellants remained unsuccessful before the first Appellate Court.

The sole submission made by counsel for the appellants is that though the Court in appeal has held that date of birth certificates Mark N and O cannot be connected with defendants No.2 and 3 but still the Court proceeded to dismiss the appeal filed by the appellants. It is vehemently argued that in the document Mark – N, Krishan Kumar is stated to be born on 04.01.1986 but as per the averments raised by Nanu Ram in the petition filed under Section 9 of the Hindu Marriage Act, 1956 for restitution of conjugal rights in August 1984, it has been clearly averred that Chhoti left the matrimonial home on 25.04.1984, therefore, there is no possibility of Krishan Kumar having born out of alliance with Nanu Ram. In addition, it is argued that in the certificate Mark – N name of mother of the child is recorded as Karamwati but it is not the plea of the defendants/respondents that Smt. Chhoti was also known as Karam Wati. Counsel would argue that Chhoti left her matrimonial home in the year 1984 and she performed marriage with a person at Ganaur and defendants No.2 and 3 were born out of that wedlock of Chhoti. They cannot claim inheritance to Sh. Nanu Ram who died in the year 2004.

Counsel representing the respondents/defendants has supported concurrent findings of fact with the submission that the same are based upon detailed and correct appreciation of materials on record and issues No.1 and 2 have been decided on the basis of balance of probabilities. It is argued that the appellants have not disputed that there were two sons born out of the wedlock of Nanu Ram and Smt. Chhoti but the appellants have failed to adduce satisfactory much less cogent or clinching evidence to substantiate their plea that those two sons of Nanu have actually passed away or Chhoti performed second marriage with a

resident of Ganaur and defendants No.2 and 3 were born out of her second wedlock with that person. It is further argued that the plaintiffs have to stand on their own legs and they cannot derive strength from weakness of defence. The last submission made by counsel is that even if the two documents marked N and O cannot be connected with regard to defendants No.2 and 3 being sons of Nanu Ram but as the plaintiffs have failed to prove the averments raised in para 5 of the plaint, they cannot be heard to say that findings recorded by the Courts below suffer from an error much less perversity warranting intervention in Regular Second Appeal.

I have heard counsel for the parties, perused the paper-book and records.

Counsel for the appellants has not assailed factual findings that house in question was purchased by appellant No.1 and Nanu Ram vide sale deed dated 14.03.1983. Counsel would fairly concede that there is no material on record to substantiate plea of the appellants that house was purchased with the funds/resources provided by Smt. Punni Devi, mother of the appellants and Nanu Ram. As such, findings of the Courts that the house in question was co-owned by Sarwan Kumar and Nanu Ram to the extent of half share each are liable to be affirmed and ordered accordingly.

Indisputably, Nanu Ram filed petition under Section 9 of the Hindu Marriage Act, 1956 for restitution of conjugal rights wherein it was averred that Nanu and Smt. Chhoti cohabited with each other at Karnal and two sons were born out of their wedlock. The petition was filed in August 1984 that culminated in ex parte judgment and decree dated 17.10.1984. Subsequently, Nanu filed petition under Section 13 of the Hindu Marriage

Act, 1956 on the premise that decree for restitution of conjugal rights remained un-executed for more than a year and he is entitled to a decree of divorce on that ground. The said petition was again decided ex parte vide judgment dated 23.08.1988 passed in a petition filed in 1987. In the petition filed in 1987, Nanu again raised the plea that two male children were born out of his wedlock with Smt.Chhoti.

Plaintiffs/appellants have claimed inheritance to the share of Nanu in the suit house primarily on the ground that Smt. Chhoti is not entitled to succeed to Sh. Nanu as there was a decree of divorce passed in the year 1988 and two male children born out of the wedlock of Chhoti and Nanu had passed away long back. It is also averred that Chhoti revealed to family of the plaintiffs that she is well-settled with her second husband at Ganaur. The defendants filed the written statement but there is no specific denial with regard to the averments that defendant No.1 revealed to the plaintiffs with regard to death of two sons of Nanu and she being re-settled with her second husband.

Order 8 Rule 5 of the Code of Civil Procedure, 1908 (in short 'the Code') contains that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except as against a person under disability. However, proviso appended to Rule 5 envisages that the Court may in its discretion require any fact so admitted to be proved otherwise other than by such admission. In the case at hand, after the written statement was filed by the defendants wherein they did not specifically denied the aforesaid facts, the trial Court framed the issues and called upon the parties to adduce evidence. By necessary implication, the

trial Court invoked proviso to Rule 5 and called upon the appellants to prove the facts qua death of sons of Nanu and Chhoti and defendant No.1 being well-settled at Ganaur with her second husband.

The allegations raised in para 5 of the plaint are based upon purported revelations by Smt. Chhoti either with regard to death of two children of Nanu or she being well-settled with the second husband. The appellants have not given a specific date, month or year when any such information was given by Chhoti. There is nothing on record suggestive of the fact that the appellants made any inquiries in order to know when sons of Nanu passed away or the person with whom Chhoti performed second marriage. Counsel for the appellants has fairly conceded that there is no material on record to substantiate plea of the appellants that two sons born out of wedlock of Chhoti and Nanu passed away or Chhoti had performed second marriage or defendants No.2 and 3 are born out of wedlock of Chhoti with her second husband.

Chhoti appeared in the witness box to counter case of the appellants and substantiate her defence plea. She was subject to lengthy cross examination but counsel for the appellants has failed to point out any materials elicited in her cross examination to prove that either Chhoti ever made any such revelations or two sons of Nanu had already passed away. On the contrary, Chhoti in her cross examination had stated that she has been residing at Ganaur in the house of Lillu arrayed as defendant No.4 and Lillu is her brother as well as Nandoi (husband of Nanad). She had further stated that name of her Nanad is Veero and husband's name of Veero is Lila Ram. There is no challenge to this part of testimony of Chhoti even by way of suggestion. The appellants have not examined

Veero, their sister to prove that either Veero is not married with Lillu or Chhoti is not residing in the house of Lillu. In this view of the matter, I find it difficult to accept contention of the appellants that Courts below have committed an error much less findings recorded suffer from perversity merely because the two documents marked N and O cannot connect defendants No.2 and 3 being sons of Nanu.

The appellants/plaintiffs also prayed for relief of mandatory and permanent injunction with the averments that on 26.10.2004, the defendants have taken forcible possession of front room and room on the upper storey after breaking the locks and removing the kundis of the doors of the house of the plaintiffs. Counsel has failed to point out any materials on record to substantiate their plea in respect of alleged incident dated 26.10.2004. No sooner the appellants failed to prove their case that the defendants have taken forcible possession of a part of the suit house, the necessary and inevitable inference is that defendants No.2 and 3 being successors in interest of Nanu Ram are occupying a part of the suit house and they being co-owners in the suit house has the right of possession in the joint property. In view of discussion made hereinbefore, contentions raised by counsel for the appellants are not meritorious and accordingly rejected.

For the foregoing reasons, the appeal fails and is accordingly dismissed leaving the parties to bear their own costs.

AUGUST 28, 2018
‘D. Gulati’

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no