

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

**RSA No.3610 of 2011 (O&M)
Date of Order:30th October, 2018**

Parshotam Lal Sharma

..Appellant

Versus

Subhash Chand Sharma

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. C.B.Goel, Advocate,
for the appellant.

Mr. H.R.Bhardwaj, Advocate,
for the respondent.

ANIL KSHETARPAL, J.

Plaintiff-appellant is in the regular second appeal against the judgments passed by the courts below, dismissing his suit for mandatory injunction directing the defendant to deliver the vacant possession of House nos.6034, 6034/1, 6034/2 and 6034/A, Machi Mohalla, Ambala Cantt/Ambala Sadar and for recovery of Rs.36800/- as compensation/damages for use and occupation of the building @ Rs.1500/- per month till the date of delivery of possession and future interest.

Undisputed facts are that Smt. Daya Wanti, mother of both the parties purchased the property on 18.09.1974. Both the brothers, namely the plaintiff and the defendant were living along with the mother. Smt. Daya Wanti executed a registered Will dated 29.03.1993 in favour of the plaintiff-appellant. After the death of Smt. Daya Wanti, plaintiff filed a suit for mandatory injunction directing the defendant to hand over vacant

possession of the portion which was in the possession of the defendant.

Defendant contested the suit and pleaded that mother has never executed any Will in favour of the plaintiff. It may be significant to note here that the defendant had previously filed a suit for exclusive possession by way of partition of the property in dispute. The aforesaid suit was defended by the plaintiff-appellant herein (defendant in the aforesaid suit) on the basis of registered will executed by mother of the parties dated 29.03.1993. The aforesaid suit was dismissed and in appeal the judgment was upheld. The court held that the Will is genuine and proved on file.

Learned trial court as well as learned first appellate court has dismissed the suit on the ground that the licence in favour of the defendant-respondent is not proved, therefore, the suit for injunction is not maintainable.

In the considered view of this court, question of law which requires determination is:-

“Whether a suit for injunction can be filed against a family member who is in joint possession of the property directing him to hand over vacant possession of the portion occupied by him or a suit for possession would be maintainable particularly when that family member against whom decree is sought does not have any right, title or interest?”

Learned first appellate court has relied upon a judgment passed by Bombay High Court in the case of **Conrad Dias of Bombay v. Joseph Dias of Bombay, AIR 1995 (Bombay) 210.** On careful reading of the aforesaid judgment, it is nowhere held that the suit against a family member

for injunction directing him to vacate portion in his possession is not maintainable. Rather in the aforesaid judgment it has been held that such suit for injunction would be maintainable because parties are in joint possession of the property and therefore, suit for possession would not be maintainable. No doubt, it has been held in the aforesaid judgment that the possession of the family member would not be of a licensee but that would not make any difference. It may be noted that in the aforesaid judgment, son had taken a plea that he is tenant or in the alternative he is in adverse possession of the property. The court in the aforesaid judgment dealt with the issue and ultimately held that the suit for injunction would be maintainable. It is not disputed before this court that judgment passed in the previous suit declaring that plaintiff-appellant is exclusive owner of the property on the basis of will dated 29.03.1993 has attained finality even upto the Supreme Court.

In view of the aforesaid, the defendant-respondent has no right, title or interest in the property.

This matter can be examined from another angle. Property belongs to mother. She permitted both the children to reside. They grew up and got married. Their possession is permissive without having any right, title or interest in the property. Now plaintiff-appellant has stepped into the shoes of her mother being owner as per registered Will dated 29.03.1993, therefore, possession of the defendant continues to be permissive. It is not the case of the defendant that he is in exclusive possession of the property. A bare look at the address, it is apparent that both the parties are residing in the same house jointly. Once defendant have no right, title or interest in the property, he cannot continue to reside against the wishes of the owner.

In view of the aforesaid discussion, the question of law framed above is answered in favour of the plaintiff-appellant and against the defendant-respondent. Judgments passed by both the courts below are set aside. Suit filed by the plaintiff qua mandatory injunction is decreed.

However, it may be noticed that, although, the plaintiff has prayed for grant of decree for recovery as damages for use and occupation, however no reliable evidence has been led to prove what were the damages which the plaintiff suffered due to continuous occupation of the portion of the premises by the defendant.

Hence, the appeal is allowed and the judgments passed by both the courts below are set aside.

30th October, 2018
nt

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned	: Yes/No
Whether reportable	: Yes/No