

HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 59 of 2012

1. Sohanlal Shrivastava, S/o – Late Damodar Prasad Shrivastava (Retired Railway Servant), Aged about – 74 Years, R/o -Madhya Nagari Chowk, Masanganj, Tahsil & District – Bilaspur (C.G.)
2. Deepak Kumar, S/o - Sohanlal, Aged about – 35 Years, R/o Madhya Nagari Chowk, Masanganj, Bilaspur, Tahsil & District – Bilaspur (C.G.)

---- Appellants

Versus

Kanhiyalal Shrivastava, S/o – Damodar Prasad Shrivastava, Aged about – 70 Years, (Retired Sahkari Bank Employee), R/o- Madhya Nagari Chowk, Masanganj, Bilaspur, Tahsil & District – Bilaspur (C.G.)

---- Respondent

For Appellants : Shri Upendra Bharat, Advocate.

For Respondent : Shri Ram Kumar Tiwari, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma

Order On Board

01/07/2019

1. This miscellaneous appeal is filed under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 against the judgment/decreed dated 29th February, 2012 passed by 3rd Additional District Judge, Bilaspur, District – Bilaspur (C.G.) in Civil Appeal No. 44-A/2011, wherein the said Court remanded the case to the trial Court (Court of 8th Civil Judge Class-II, Bilaspur) who passed judgment/decreed dated 18th July, 2007, whereby the trial Court decreed the suit filed by the appellant/plaintiff for eviction of the respondent from house situated at Madhya Nagari Chowk, Masanganj, Bilaspur (C.G.) against the respondent/defendant.
2. The appellant/plaintiff filed a suit for possession of house in question claiming his exclusive title on the basis of registered will executed by his father- Damodar Prasad Shrivastava on 12th

October, 1989. It is alleged that the respondent was residing in the suit premises as licensee and as per notice issued by the appellant dated 8th June, 1998, the license was terminated, but the respondent did not vacate the house that is why the suit was filed on 11th September, 1998. As the respondent/defendant was son of late Damodar Prasad Shrivastava, he was residing in the premise without paying any rent and it is not a case of tenant and landlord, but it is a simple case of license. The appellant estimated rental value to the tune of Rs. 300/- per month and paid Court Fee accordingly. The trial Court misdirected that question of title is not raised in the present case and Court fees paid by the appellant is not proper and came to the wrong conclusion that is why appeal is preferred.

3. Learned counsel for the appellants submits as under:-

- (i) The respondent was licensee in the premise in question because he is son of Damodar Prasad Shrivastava. Damodar Prasad Shrivastava executed a will in favour of appellant who became sole owner of the property and he issued a notice to respondent for termination of license and giving vacant possession which falls within purview of Section 7(iv)(d) of the Court Fees Act enabling the appellant to put his own valuation and it is not necessary for him to pay Court Fees on the market value of the suit property. It is a case of allowing the premise to son by his father, therefore, it is a case of simple license without any condition.

- (ii) The suit was filed showing title of the appellant and on that basis, eviction is sought from licensee. The title is also decided by the trial Court, therefore, finding of first Appellate Court is not proper.
 - (iii) The issue of Court Fees is primarily the question between the appellant and the State. The respondent has no right to move to the superior court against the order for adjudicating payment of Court Fees because the same is a matter between the appellant/plaintiff and the State, therefore, the finding arrived at by the trial Court is liable to be set aside.
- 4.** On the other hand, learned counsel for the respondent submits as under:-
- (i) In the notice (Ex.P-3), the monthly rent is mentioned as Rs. 500/- per month while in the plaint, it is mentioned as Rs. 300/- per month. Amount of rent is not fixed in the present case, therefore, valuation is not proper. The question of title is not considered by the trial Court.
 - (ii) The finding arrived at by the trial court is based on proper marshaling of evidence and the same is not liable to be interfered with while invoking jurisdiction of appeal.
- 5.** The first question for consideration before this Court is whether the issue of title is not considered by the trial Court as concluded by the first appellate Court. From evidence of both sides, it is clear that the appellant pleaded regarding the will executed in his favour by Damodar Prasad Shrivastava. The will is registered one and it is executed on 12.10.1989. From the record, it is clear

that Damodar Prasad Shrivastava was the sole owner of the property in question. Though it is pleaded on behalf of the respondent/defendant that house was built from assistance of other brothers of Damodar Prasad Shrivastava, but the same is not substantiated by the evidence before the trial Court. The attesting witnesses of the will namely Maniram Yadav (PW-3) & Videsh Miri (PW-4) have deposed before the trial Court that the will was executed in favour of the appellant by Damodar Prasad Shrivastava and they attested the will which is registered one.

6. Looking to the entire evidence, the trial Court recorded finding that the will is executed by Damodar Prasad Shrivastava in favour of the appellant and Damodar Prasad Shrivastava was the sole owner of the property and after passing of Damodar Prasad Shrivastava, the appellant is sole owner of the property, therefore, it cannot be said that the trial Court has not considered the issue of title. The finding arrived at by the first appellate Court is not proper in this regard, therefore, argument advanced on behalf of the appellant has force that the trial Court has considered the issue of title.
7. Other question for consideration before this Court is whether the trial court has properly considered the issue of court fee. The question of court fee is primarily question between the appellant/ plaintiff and the State. It is not for contesting party to use this issue with a weapon of defence.
8. As per evidence adduced by both sides and as per finding recorded by the trial Court, the respondent was residing in the

house because he was son of Damodar Prasad Shrivastava, therefore, license was granted to him out of kindness and as such condition was attached to the license and same was license without condition. In such nature of cases, the appellant/ plaintiff was given an option of putting any valuation and Court fees has to be paid on such valuation. It is not a case whether respondent is trespasser in the house in question, therefore, Section 7(iv)(d) of the Court Fees Act, 1870 is applied. Argument advanced on behalf of the appellant has force that it is not a case of trespassing the property, therefore, *ad valorem* Court fees is not necessary as per law laid down in the matter of **B. Sri Nivas Kumar Vs. B. Krishnamurty & Another**, reported in **2010 (2) C.G.L.J. 273**, **Ravipal Vs. Smt. Mumtaz Begum & Others**, reported in **2010 (3) C.G.L.J. 102**, **Saraswati Bichpuria (Smt.) Vs. Smt. Archana Bichpuria**, reported in **2008 (I) MPWN 12 & Corporation of the City of Bangalore Vs. M. Papaiah & Another**, reported in **AIR (1989) SC 1809**. In view of the above argument advance on behalf of respondent is not sustainable.

9. Accordingly, this miscellaneous appeal is allowed and the first appellate Court is directed to decide all the issues on merit after hearing both sides within six months after receipt of copy of this order.

Sd/-
(Ram Prasanna Sharma)
Judge