

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.140 of 2019(O&M)

Date of Decision:22.05.2019

Rekha Jain

.....APPELLANT

Vs.

Kamal Joshi and another

.....RESPONDENTS

CORAM: HON'BLE MR. JUSTICE DR. RAVI RANJAN

Present: Mr.Sanjay Mittal, Advocate for the appellant.

DR. RAVI RANJAN, J.(Oral Judgment)

Heard learned counsel for the appellant.

This appeal is directed against the Judgment and Decree dated 20.11.2018 passed in CA/37/2017 by the Ld. Addl. District Judge, Rewari, by virtue of which the Judgment and Decree of the Trial Court dated 14.12.2016 passed by Ld. Civil Judge, (Sr. Divn.), Rewari in *Civil Suit No.148-RBT of 2011/2016* has been set aside and a decree for permanent injunction has been passed in favour of the plaintiff directing defendant No.2-Rekha Jain (appellant herein) to hand over the vacant possession of the disputed property by removing the material and tin shade etc. at her own expense. She was required to hand over possession of the same to plaintiff within a period of two months from the date of passing of the Judgment. It is informed that the decree has already been executed and the plaintiff had already been put in possession through the process of Court.

Facts of the case in brief stands enumerated as under:-

The plaintiff-respondent No.1-Kamal Joshi filed a suit for mandatory injunction for getting back the vacant possession of the house in

dispute. Case of the plaintiff is that late Sh. Chunni Lal was the owner in possession of the house no.5353 which he acquired through a registered sale deed No.79 dated 22.04.1963 and remained in possession thereof till his death on 29.11.2008. The aforesaid Chunni Lal, in his lifetime, executed a registered Will No.540, dated 11.03.2004 in favour of his real sister's son, i.e., plaintiff-respondent No.1, namely, Kamal Joshi and after the demise of Sh. Chunni Lal on 29.11.2008, he became the owner in possession of the aforementioned house. A probate certificate regarding the same had also been issued in favour of the plaintiff by the Court of Ld. Addl. District Judge, Rewari on 24.08.2010. Further case of the plaintiff is that the aforesaid Chunni Lal, during his lifetime, gave southern portion of the house measuring 18'3"X19'9" including a tin shed to his neighbour Narender son of Raghuwar Dayal, who has been impleaded as defendant No.1, on the basis of oral licence with the promise that he would vacate the part of the house No.5353 whenever it was desired by the owner-Sh.Chunni Lal. Further case of the plaintiff is that Chunni Lal, in his lifetime itself, requested the defendant to comply with his promise and vacate the licenced part of the aforementioned house but he ignored the same and, after the death of Chunni Lal, the plaintiff requested the defendant on several times to vacate and hand over the possession of the property in dispute but the defendant kept on deferring the matter on one or the other pretext.

Legal notice was also served upon the defendant but the defendant gave a false reply denying the contents of the same. When the defendant did not pay any heed to the requests of the plaintiff, then the suit was filed.

Upon notice, defendant No.1 appeared and filed written statement along with counter claim. However, at the stage of evidence of the defendants, defendant No.1 was proceeded against *ex-parte* and his counter claim was also

dismissed in default vide order dated 03.09.2014. Defendant No.2 filed an application under Order I Rule 10 of Code of Civil Procedure, during the pendency of the suit which was allowed and she became a party to the suit and filed her written statement raising several objections. It has stated in the written statement that Chunni Lal and Rameshwar Dass mutually partitioned the property in dispute and Sh. Chunni Lal became owner in possession of property in the southern side of the property and he entered into agreement with defendant No.1 on 26.11.2002 for selling the said property for a total sale consideration of Rs.1,25,000/-. It is claimed by defendant No.2 that Chunni Lal had received the aforesaid amount from defendant No.1 and deposited Rs.1,00,000/- in FDR No.14646 and 14647 dated 26.11.2012 in the post office, Rewari. He had also received Rs.20,000/- on 14.09.2002 as earnest money. He executed another agreement to sell on 28.11.2002 and handed over the possession of the property in dispute to defendant No.1 agreeing to execute sale deed in his favour whenever it was required by defendant No.1.

However, Chunni Lal became ill and, after the execution of the agreement to sell, died issueless. Therefore, the sale deed could not be executed and registered in favour of defendant No.1. Thereafter, defendant No.1 sold that property to defendant No.2-Rekha Jain, vide a registered sale deed No.4692 dated 07.10.2013. Thus, it is claimed that defendant No.2 has entered into the shoes of defendant No.1. Defendant No.2 also filed her counter claim.

In the aforesaid background of the matter, the following issues were framed by the Ld. Trial Court vide order dated 22.07.2015.

“1.Whether the plaintiff become owner in possession of property in dispute by way of registered WILL no.540 dated 11.03.2014 executed by Sh. Chunni Lal in his favour? OPP

2.Whether the licence for use of southern part of property in dispute given to defendant no.1 was revoked in life time of Sh. Chunni

Lal and after that defendant no.1 is residing and occupying the said portion unauthorizedly? OPP

3. Whether the plaintiff is entitled for the relief of mandatory injunction to get back the vacant possession of property in dispute? OPP

4. Whether the deceased Chunni Lal entered into an agreement to sell with defendant no.1 Sh. Narender Kumar on 26.11.2002 to sale the property in dispute? OPD

5. Whether the deceased Chunni Lal received complete consideration of sale from defendant no.1? OPD

6. Whether the defendant no.1 has always remained ready and willing to perform his part of contract? OPD

7. Whether the defendant/counter claimant is entitled for relief of possession by way of specific performance? OPD

8. Whether the counter-claim is not maintainable and time barred? OPD

9. Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD

10. Whether the plaintiff is estopped by his own act and conduct? OPD.

11. Whether the defendant no.2 is a bonafide purchaser of property in dispute vide agreement dated 28.11.2002 and registered sale deed no.4692 dated 7.10.2013? OPD.

12. Relief.”

The Trial Court recorded finding in favour of the defendant holding that, in view of the Will having not been proved in accordance with law, i.e., as per the requirement of Section 68 of the Evidence Act, as none of the attesting witness has been examined by the plaintiff, on that score itself, no legal right could be said to have accrued upon him and, accordingly, the suit was dismissed. The Judgment and Decree was put to appeal.

The First Appellate Court set aside the Judgment and Decree of the Trial Court and reversed the finding observing though it is true that the plaintiff failed to examine the attesting witness of alleged registered Will executed by Chunni Lal and it is also correct that original Will was not produced in the

Court but the Will was probated and a probate certificate has already been granted by a competent court and that original probate certificate has been brought on record as Ex.P1.

After noticing the above and placing reliance upon a Division Bench decision of Madras High Court rendered in **Alagammai and others Vs. Rakkammal, AIR 1992 Madras, 136**, it has been held that once the Probate Court finds the Will to be genuine and duly executed, the Judgment would not only bind the parties but the whole world which is an acceptable proposition. The Hon'ble Supreme Court in one of its decision rendered in **Chiranjilal Sharilal Goenka (deceased) through LRs. Vs. Jasjit Singh and others, 1993 (1) LJR, 556**, has held that Probate granted by Court is conclusive of validity of Will until it is revoked as per Section 273 of the Indian Succession Act, 1925, thus, the Lower Appellate Court has held that the absence of the original Will or non-examination of attesting witness would not be fatal in such a situation.

Learned counsel appearing for the appellant has vehemently argued before this Court that he is in possession and his possession should be protected. However, the question is, even if it is assumed that an agreement to sell was executed by Sh. Chunni Lal in favour of defendant No.1 and again another agreement was also executed and he was put in possession, he was merely entitled to protect it by filing a suit for specific performance of the contract. It cannot be assumed that the title was already transferred in his favour by late Chunni Lal so that he could also transfer it in somebody else's name, i.e., defendant No.2. So far as possession is concerned, defendant No.1 was required to prove it or say something in pleading and prove it in answer to the plaintiff's allegations made in plaint. But after filing written statement, he escaped from the scene and never appeared before the Trial Court.

In the result, not only his counter claim was dismissed in default but the suit also proceeded ex-parte against him. By filing an application under Order 1 Rule 10 of the Code of Civil Procedure, defendant No.2 had tried to fill up the lacuna but unless the right and possession of defendant No.1 is proved and further it is proved that he was competent to execute a sale deed and put defendant No.2 in possession of the suit land, everything would be a futile exercise.

Thus, in my opinion, the First Appellate Court has rightly held that, since the Will was already probated, legal right to possess the property being a title holder can not be questioned by the defendants. So far as the possession of defendant No.1 is concerned, he had neither filed a suit for specific performance of contract nor had he pursued his counter claim in the present case on the basis of alleged agreement to sell. Thus, on that count his claim and legal right to possession does not stand established. Accordingly, transfer of possession by him in favour of defendant No.2, cannot be believed and allowed.

As such, since there is no other manner to explain the possession of defendant No.1 other than the case of the plaintiff that he was merely a licensee of late Chunni Lal and the title having been transferred in the name of the plaintiff by execution of a registered Will, he has got every right to ask him to vacate the premises.

In the result this appeal, being devoid of any merit and also since no substantial question of law emerges, is dismissed.

(DR. RAVI RANJAN)
JUDGE

22.05.2019
Anjal

Whether speaking/reasoned?
Whether reportable?

Yes/No
Yes/No