

RAJASTHAN HIGH COURT

Prem Kanwar

Vs.

Chand Singh

C. F. A. No. 643 of 2003

(A.C. Goyal, J.)

09.11.2004

JUDGEMENT

A. C. Goyal, J.

1. This is the first appeal by the defendant against the judgment and decree dated 3-11-2003 whereby plaintiff's suit for possession and permanent injunction was decreed by Learned District Judge (Fast Track) No. 4, *Jaipur City, Jaipur*.
2. The plaintiff-respondent filed a suit for possession, permanent injunction and damages on 13-9-1990 with the averments that both the plaintiff and the defendant (brother and sister) are residing in house No. 2305 at *Jaipur*. The plaintiff and the defendant are respectively in possession of the portions shown with yellow color and brown color in the map annexed to the plaint (Exhibit-1), that the disputed room of 15' x 10' in south east corner is in the ownership of the plaintiff. The plaintiff allowed the defendant to use this room as and when required. Thereafter the defendant demolished some portion of eastern wall of this room. Hence, the plaintiff filed a suit for permanent injunction with an application for temporary injunction in June, 1990 and in reply to that application the defendant claimed herself to be the owner of this room along with some other portion belonging to the plaintiff. Since the defendant declined to vacate the disputed room hence, the present suit.
3. The defendant vide written statement denied the allegations made in the plaint. She pleaded that the room in question along with adjoining open room with roof of the ground floor marked with yellow color in the map belongs to the defendant and she is in possession as owner.
4. Issues were framed. Evidence was recorded. Learned Additional District Judge (Fast Track) No. 4, *Jaipur City, Jaipur* vide judgment dated 3-11-2003 decided all the

issues except issue No.5 for damages claimed by the plaintiff in the plaintiff's favor and thus decreed the suit for possession and permanent injunction.

5. I have heard learned counsel for the parties. These facts are not in dispute that the appellant defendant is the daughter of step mother of the plaintiff Chand Singh; that the defendant after her mother's death was brought up since her childhood by Smt. Laxmi Bai-kept of late Sh. Umrao Singh father of the plaintiff as well as the defendant. It is also not in dispute that Smt. Laxmi Bai executed a Will which is Ex. 3 along with a map Ex. 4 in favor of the defendant.

6. The first point for consideration in this appeal is whether the issue of ownership was rightly decided by the trial Court in plaintiff's favor? The learned trial Judge held that in view of the oral testimony of the plaintiff and his three witnesses P. W. 2 Labh Chand, P. W. 3 Ambalal and P. W. 4 Babu Lal Soni and on the basis of Ex.2 Patta, the plaintiff is found to be the owner of the disputed room. Learned counsel for the appellant defendant contended that the plaintiff has based his title only on Ex. 2 Patta, while plaintiff himself admitted in cross-examination that he has no other document of title except Ex. 2 and there is no mention of the disputed property in this patta Ex. 2, hence the very basis of determining the title in plaintiff's favor goes away. Learned counsel for the plaintiff respondent contended that the trial Court considered the entire evidence in a proper manner and there is no reason to interfere with such concurrent finding and the defendant completely failed to prove her title over the disputed room.

7. I have considered the rival submissions. With regard to title of the defendant the trial Court rightly observed that she claims herself to be the owner of the disputed property on the basis of Ex. A-1 which was executed by late Sh. Umrao Singh on 19-11-1951 in favor of Smt. Laxmi Bai, Ex. A-2 and Ex.3 registered Will executed by Smt. Laxmi Bai in favour of the defendant, but the disputed property is not included in the writings of these documents. According to the statement of the defendant Smt. Prem Kanwar she claimed herself to be the owner firstly on account of being daughter of late Sh. Umrao Singh and secondly on the basis of Ex. A-2 and registered Will Ex. 3, but in cross-examination she admitted that the disputed room is not constructed over the property given to her under Ex.3 Will. But title of the plaintiff was to be proved by the plaintiff Chand Singh. He stated that the disputed property along with other portions of this house was given to him by his father vide patta Ex. 2 which bears the signatures of his father as well as his elder brother Sh. Ram Singh. But in cross-examination he made a clear admission that the disputed property is not mentioned in Patta Ex. 2 and he has got no other document of title in his favor except Ex. 2.

Therefore, the decision of the trial Court that the plaintiff is found to be the owner of the disputed property on the basis of Patta Ex. 2 is contrary to the statement of the plaintiff himself. The statements of P. W. 2 Labh Chand, P. W. 3 Ambalal and P. W. 4 BabuLalSoni are not relevant at all to determine the question of title over the disputed property, rather they speak about the possession of the disputed property. Therefore, the decision of the trial Court on the issue of title in plaintiff's favor cannot be upheld at all.

8. The next point for consideration is as to whether the finding of the trial Court that it was the plaintiff who gave possession of the disputed property to the defendant is correct ? Learned counsel for the appellant contended that it is not pleaded in the plaint that as to when the possession was given to the defendant and the plaintiff's witnesses did not support his statement that the possession was given to the defendant by the plaintiff in the year 1964. Learned counsel for the respondent contended that there is no ground to interfere with the finding of the trial Court which is based on appreciation of entire evidence on record.

9. In para 5 of the plaint it is pleaded that this room is on third floor of the house and the plaintiff permitted the defendant to use this room as and when it is required. The defendant vide written statement denied this fact and came out with the case that she is in possession of the said room as owner and she never sought any permission from the plaintiff and earlier Smt. LaxmiBai was in possession of the disputed portion along with other portions of this house which are now in her possession. It is significant to say that it is not made clear in the plaint that as to when the plaintiff granted this permission and gave possession of the disputed room to the defendant. As per the statement of P. W. 1 Chand Singh he gave the possession of this room in the year 1964 after the marriage of the defendant and this permission was for residence and storing the goods. In cross-examination he denied the suggestion that this room was earlier in possession of LaxmiBai and at the time when possession was given to the defendant two persons namely Labh Chand and BabuLalSoni were present. According to the statement of P. W. 2 Labh Chand he is friend of the plaintiff and this room was given by the plaintiff to the defendant for storing the goods. In cross-examination he pleaded ignorance about the fact that upto what period the plaintiff remained in possession of the disputed room. It was also admitted by him that the possession to the defendant was not given in his presence. He also pleaded ignorance since when the defendant is in possession and thereafter he stated that possession was given to the defendant after her marriage which took place in the year 1964- 1965. A careful perusal of his

statement goes to show that this room was given to the defendant only for storing the goods while according to the statement of the plaintiff himself this room was given for residence as well as for storing the goods and further regarding the period of possession of the plaintiff as well as the possession of the defendant since when he first pleaded complete ignorance and subsequently stated that possession was given about in the year 1964-1965. It is significant to observe that the statement of P. W. 2 was recorded on 8-8-2001 i.e. about 37 years of 1964 when the possession was given to her according to the statement of the plaintiff. Hence, statement of P. W. 2 cannot be relied upon. According to the statement of P. W. 3 Ambalal he is also friend of the plaintiff. According to his statement, the disputed room is still in possession of the plaintiff. In cross-examination, he stated that this room was not in existence in the year 1958 and thereafter he stated that when he came to this house for the first time in the year 1958 he found the plaintiff in possession of the disputed room. He reiterated in cross-examination that the disputed room is still in possession of the plaintiff since 1958. Thus, the statement of this witness with regard to possession of the defendant over the disputed room is in complete contradiction to the statement of the plaintiff himself. As per the statement of P. W. 4 BabuLalSoni he knows the plaintiff since childhood and the plaintiff was in possession of the disputed portion of the house but for last 15 to 20 years the defendant and her husband are in possession of the same. His statement was recorded on 20-9-2001. Thus, according to his statement the defendant is in possession since 1986-1987 while according to the statement of the plaintiff the defendant is in possession since 1964. According to the statement of the defendant herself she is in possession of the disputed property along with other portions of this house as daughter of late Sh. Umrao Singh as well as by registered Will executed by Smt. LaxmiBai in her favor. She denied that possession of the disputed room was given to her at any time by the plaintiff. D. W. 2 Sh. Shyam Singh is the husband of the defendant. He supported her statement with regard to possession. D. W. 3 Onkar Singh and D. W. 4 Hanuman Mal also supported the oral testimony of the defendant. It was for the plaintiff to prove his case that he allowed the defendant to remain in possession of the disputed room. In other words the defendant's possession was permissive was to be proved by the plaintiff.

But on a careful consideration of the entire evidence of the plaintiff as discussed hereinabove, the plaintiff utterly failed to prove that he gave possession of the disputed room to the defendant.

10. Learned counsel for the appellant contended that since the plaintiff failed to prove

his title, he is not entitled to delivery of possession. He placed reliance upon *Kanti v. U. I. T. Bikaner*,¹ wherein this Court held that the defendant who is in peaceful possession of the disputed land is entitled to retain possession and only true owner can file a suit for recovery of possession. In *Kalulal v. ShriMannalal*² it was held that where the plaintiff claimed possession on the basis of his title and not on alternative basis of possession and if the question of title is decided against the plaintiff, he is not entitled to possession. In the instant case, the plaintiff-respondent utterly failed to prove his title over the disputed property and further failed to prove that he gave possession of this property to the defendant. In view of the entire discussion made hereinabove, the impugned judgment and decree of the trial Court cannot be upheld at all.

11. Consequently, this appeal is allowed. The impugned judgment and decree dated 3-11-2003 stand set aside and the suit of the plaintiff stands dismissed. No order as to costs.

Appeal allowed.

Cases Referred.

1. 1998 (1) R. L. W. (Raj) 536 (AIR 1998 Raj 108)
2. AIR 1976 Raj 108