

(1973) 09 P&H CK 0013

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 998 of 1972 and Civil Miscellaneous No. 3234 of 1973

Jaswant Rai

APPELLANT

Vs

Dhanwanti Devi and Another

RESPONDENT

Date of Decision : 10-09-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : AIR 1974 P&H 197

Hon'ble Judges : A.D. Khosla, J

Bench : Single Bench

Judgement

1. This petition for revision of the order dated the 17th of June, 1972, passed by Shri Aftab Singh, Additional District Judge, Ludhiana, has arisen in these circumstances. The petitioner before me is one of the two defendants in the case, both of whom are the sons of the plaintiff-respondent whose suit is for a declaration to the effect that she is the owner in possession of a third share in house No. B-IV-843 situated in Wait Ganj, Ludhiana and that she is in exclusive possession of portion of that house consisting of two rooms and a kitchen and shown red in the plan accompanying the plaint. She has also prayed for the issuance of a permanent injunction restraining both the defendants from interfering with her exclusive possession till partition of the house and restraining defendant No. 1 from dispossessing her in execution of a decree obtained by him against defendant No. 2. The suit is based on the allegation that the house in dispute was allotted to the parties in lieu of property left by Ganesh Dass, the husband of the plaintiff, and of the property inherited by her from her parents, in West Pakistan. According to the averments in the plaint, the defendants acknowledged the plaintiff to be a joint owner of the house in dispute in an agreement executed by the parties on the 4th of September, 1961. The plaintiff claims to have been in continuous possession of the portion shown red in the plan above-mentioned since the year 1955 and to have, therefore, acquired ownership thereof by adverse possession also.

It is common ground between the parties that in a suit filed against defendant No. 2 by defendant No.1 the latter obtained a decree for possession of a portion of the house. The plaintiff has pleaded that that decree had been obtained by misrepresentation, that the plaintiff was no party thereto and that it could not be executed as against her.

Defendant No. 1 resisted the suit with the averments that the plaintiff was not in possession of any portion of the house in her own right, that she was residing with defendant No. 2 against whom the decree above-mentioned had been obtained and that she did not have any share in the house. According to defendant No. 1, the plaintiff had colluded with defendant No. 2 and that was why she had brought the suit.

The plaintiff made an application u/s 151 and Rules 1 and 2 of Order XXXIX of the CPC for the issuance of a temporary injunction restraining defendant No. 1 from dispossessing the plaintiff in execution of the decree above-mentioned. He application was initially granted by the trial Court but the temporary injunction was later on vacated for the reasons that the plaintiff had been shown to have stated in an earlier suit brought by defendant No. 2 against defendant No. 1 that she had no share in the house in dispute which was jointly owned by the two defendants and that the present litigation was the result of collusion between the plaintiff and defendant No. 2. The plaintiff filed an appeal which was accepted by the learned Additional District Judge who issued the temporary injunction prayed for through the impugned order holding that-

(a) the plaintiff had a prima facie case by reason of the acknowledgment made by the defendants in the agreement dated the 4th of September, 1961, to the effect that the house in dispute was jointly owned by all the parties and such prima facie case was not displaced by the admission of the plaintiff in the previous suit between the two defendants because she was no party to that suit and had the right to be afforded an opportunity to explain that admission.

(b) the mere production of a certified copy of the statement of the plaintiff containing the admission did not prove the admission.

(c) the plaintiff had been in possession of the property for more than 12 years and had, therefore also, a prima facie case, and

(d) the balance of convenience was in favour of the plaintiff who was a 60 years old woman and who had been residing in the house since 1955.

2. In my opinion, the learned Additional District Judge has erred in accepting the plaintiff's appeal. It is no doubt true that the statement contained in the certified copy above-mentioned has not been formally proved but it is nobody's case that the plaintiff did not make it. For the purpose of deciding the application for the grant of a temporary injunction the Court has merely to see the existence of a prima facie case and the stands taken by the contending parties are not to be proved in such a manner that a final decision can be given in regard to them.

The certified copy should have been taken at its face value for the purpose of deciding the application and so taken it makes out an admission on the part of the plaintiff which demolishes her case. It is to be noted that the acknowledgment contained in the agreement dated the 4th of September, 1961, was made long before the admission in question. The suit in which the admission was made, was filed by defendant No. 1 against defendant No. 2 sometime in or after December, 1966, and although the plaintiff was not a party to that suit, her statement was recorded as a witness for defendant No. 2 in support of his objection that that suit was not properly constituted because plaintiff was a necessary party thereto but had not been so impleaded. The plaintiff stated at that time that the house in dispute was owned only by the two defendants, that she was residing with defendant No. 2 with whom she was taking her meals and that she herself had no share in the house. The result was that the Court gave a finding that she was not a necessary party to the suit before it. The suit was decreed on the 10th of June, 1969, and an appeal against it was dismissed on the 10th of May, 1971. A second appeal filed by defendant No. 2 in this Court also failed and it was thereafter that the present suit was brought by the plaintiff. It is quite clear that the plaintiff took a categorical stand that she had no right in the house and thus allowed the earlier litigation to take a particular course. Her present change of front cannot, in my opinion, be countenanced by the Court for determining whether she has a prima facie case. Her admission must be taken as it stands till it is shown to be erroneous or otherwise to have been made under circumstances which entitle her to claim that it could not be acted upon. In the face of that admission she cannot take advantage of the acknowledgment contained in the agreement dated the 4th September, 1961 and of the fact that she has been living in the house for more than 12 years.

The balance of convenience is also not on her side. It was due to the admission made by her that she was not made a party to the previous litigation between the two defendants. Now that defendant No. 2 with whom she is obviously siding has been non-suited, the somersault that she has taken would appear to be the result of collusion between the two of them. Having allowed a decree to be passed against defendant No. 2 alone by reason of her averment that she had no share in the house, she cannot be heard to assert the contrary and impede the execution of that decree. In this view of the matter the reasons given by the learned Additional District Judge for reversing the order of the trial Court do not appear to me to be sound.

3. For the reasons stated I accept the petition, set aside the order of the learned Additional District Judge and restore that of the trial Court, leaving the parties to bear their own costs. I may state, however, that nothing contained herein shall preclude the Lower Courts from arriving at conclusions justified by evidence recorded at the trial, even though such conclusions run contrary to what I have said above.

4. Revision allowed.