

(2007) 03 RAJ CK 0056
In the Rajasthan High Court
Case No : Civil First Appeal No. 42 of 2006

Neeraj Lunawat and Another	Vs	APPELLANT
Gyanchand Chawrdia and Others		RESPONDENT

Date of Decision : 15-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(12)

Citation : (2007) 03 RAJ CK 0056

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : R.K. Agrawal, for the Appellant; L.L. Gupta, for the Respondent

Judgement

Dr. Vineet Kothari, J.—Heard on the application No.845 dated 05.01.2007 filed by the respondent-plaintiff No. 1 claiming mesne profit and decreetal amount which is opposed by the defendant-appellants.

2. Mr.L.L.Gupta, learned counsel appearing for the plaintiff-respondent submits that in view of the decree in his favour of declaration of sale-deed in favour of defendant No.2 Pankaj Lunawat dated 30.09.2000 as void and declaration of his entitlement to the half share of the flat No.204 in Swapna Gokul Apartment, C-69-A, Sundar Marg, Tilak Nagar, Jaipur, he is entitled to mesne profits of Rs.5,000/- per month from defendant No.2 as directed by trial court.

3. Opposing this submission, Mr.R.K.Agrawal, learned counsel appearing for the appellant-defendants submitted that in fact the whole of the flat was purchased by two brothers in pursuance of oral agreement between defendant No.3 and defendant No. 1 & 2 in 1994 under which payments were made to the defendant No.3 Devendra Harneja by cheques on various dates between 1994 to 1997 and registered sale-deed in favour of defendant No. 1 Neeraj Lunawat was executed by defendant No.3 on 10.07.1998 which is not the subject matter of any challenge. However since the registered sale-deed for the remaining half share was not executed in favour of defendant No.2 Pankaj Lunawat by defendant No.3

Devendra Harneja, he had to file the suit for specific performance and during the pendency of that suit, such sale-deed for remaining half portion was also executed by defendant No.3 Devendra Harneja in favour of defendant No.2 Pankaj Lunawat on 30.09.2000 and in view of this, decree for only cost of Rs.5000/-was passed by the trial court. He submits that sale-deed in favour of plaintiff-respondent Gyanchand Chowrdia was executed on 27.03.1999 in pursuance of an oral agreement claimed to have been executed somewhere in 1998 between him and the defendant No.3 and there was no evidence before the trial court that money in pursuance of said agreement was paid by cheques. He relies upon the judgment in the case of Thammana Nukiah Shetti Vs. Velapa Appalaraju and ors. (AIR 1975 A.R 208) wherein the Division Bench of Andhra Pradesh High Court relying on the decision of Hon"ble Supreme Court in the case of Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, held as under:

"Going by the principle, a purchaser of an undivided share will not be entitled to possession until he is allotted a specified share in the property. Mesne profits can be claimed by him only from the date when he is deprived of his lawful possession. Section 2(12) of CPC defines "mesne profits" of property as profits which the person in wrongful possession of such property actually received or might have received with ordinary diligence from it. A person is said to be in wrongful possession when he enjoys such possession despite, another person is entitled to it under law. A purchaser is entitled to lawful possession only when allotment of a specified portion is made to him. In this case, the finding is that there was a division in status, but there was no division by metes and bounds. A mere division in status does not bring about the consequence of the different sharers being entitled to specified portions of the property. The only legal consequence of a division in status of a joint Hindu family is that the erstwhile coparceners become "tenants in common" without any member becoming entitled to a specific portion or item of the properties that belonged to the joint family. In the absence of a specified allotment, no member is entitled to claim possession of any specific item of the property or any specified portion of the property of the joint family. He will have to file a suit to enforce that right, a purchaser from such a member cannot have a higher right than the member of such a family."

4. He also relies on the judgment of this court in Mohanlal Vs. Mishrimal & ors. (1970 WLN 575).

5. Having considered the rival submissions and law applicable, this court is of the view that in view of the nature of dispute and undivided half portion of common flat No.204 having been agreed to be, sold to two brothers and one sale-deed being not in dispute or challenged, and the challenge being limited to the extent of other sale-deed in favour of defendant No.2 alone by the plaintiff, this does not appear to be a case prima facie of the nature that the defendant No.2 can be said to be in wrongful and unlawful possession of the half portion of the said

property nor plaintiff Gyanchand Chowrdia can be said to have any specified portion of the said suit property.

6. Therefore, in view of law laid down by this court as well as Division Bench of Andhra Pradesh High Court relying on the Hon''ble Supreme Court's decision, this court is not inclined to direct the payment of mesne profits by the defendant-appellant to the plaintiff-respondent in pursuance of the impugned decree. The execution of the decree has already been stayed by this court on 17.01.2006. The said stay order shall remain in force during the pendency of this appeal subject to the condition that the appellant-defendant No.2 Pankaj Lunawat shall furnish a solvent security in this court giving an undertaking therein that in case this appeal fails, he would pay the entire arrears of mesne profits as directed by the trial court subject to the decision of this appeal. The appellant-defendant No.2 shall also not alienate his rights in the said property in favour of any other third party during the pendency of this appeal.

7. The application is accordingly disposed of. Application disposed of as above.