

REPORTABLE
*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) NO. 119 OF 2007

% Date of Decision : 27th August, 2008.

PADMAVATI MAHAJAN Plaintiff.
Through Mr. Rakesh Tiku with Mr.Prakash
Gautam, Advocates.

VERSUS

YOGENDER MAHAJAN & ANR. Defendants.
Through Mr. S.C.Singhal, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J:

1. The plaintiff, Ms. Padmavati Mahajan, is the mother of Mr.Yogender Mahajan, defendant no.1 and mother-in-law of Ms.Sushma Mahajan, defendant no.2. She seeks decree of permanent injunction against the defendants from parting with possession or creating third party rights in respect of the property no.D-95, Anand Niketan, New Delhi (hereinafter referred to as the 'Property', for short). She also seeks mandatory injunction against the defendants to forthwith remove themselves and their belongings from the Property.

2. It is an admitted case of both the parties that by a perpetual Sub-Lease Deed dated 29th May, 1968, marked Exh.PW 1/1 the plaintiff was granted leasehold rights in the said Property. The said Sub-lease Deed is a registered document. It is also an admitted case of the parties that vide Conveyance Deed dated 12th November, 2001, marked PW1/2, the Property was converted into freehold in the name of the plaintiff as the owner.

3. Mr. Prabhudayal Mahajan, husband of the plaintiff and father of defendant no.1 expired in 1983 and the defendant no.1 is one of their five children.

4. The plaintiff claims that she wants to sell the Property and has entered into an Agreement to Sell with a third party. She has also made allegations about ill-treatment at the hands of defendant nos. 1 and 2.

5. The defendants in their common written statement have claimed that the Property was purchased out of funds provided by a Partnership Firm, M/s. Bhagmal Satyapal (hereinafter referred to as the Partnership Firm, for short) of which the defendant no.1 and his father, Mr. Pradbhudayal Mahajan were partners along with some other parties who held 56% shares. It is also stated that the building on the said Property was constructed out of the funds provided from accounts of the said Partnership Firm. The defendant no.1 also claims that he is entitled to and is owner of 72.1% share in the property on the basis that the funds were provided by the

Partnership Firm in which he held 29% share, while his father had 15% share. It is accordingly stated that the defendant no.1 is the owner of 66.5% of the Property in his own right as he had invested funds and he further acquired 5.6% share on the death of his father to make up for 72.1% share claimed by him. The defendant no.1 also claims that he is a tenant on the upper floor of the property, paying rent @ Rs.2000/- p.m.

6. On the basis of the pleadings of the parties, the following issues were framed on 15th May, 2007 :-

“(1) Whether the property No.D-95, Anand Niketan, New Delhi was acquired out of the funds of the firm M/s.Bhagmal Satyapal? If so, its effect? OPD.

(2) Whether the defendants have any right, title or interest in the aforesaid immovable property? OPD.

(3) Whether defendant No.1 is tenant in respect of the first floor of the suit property? OPD.

(4) Relief.”

ISSUE NOS. 1 AND 2

7. Issue nos. 1 and 2 for the sake of convenience are being dealt with together. The Sub-lease Deed dated 29th May, 1968 and the Conveyance Deed dated 12th November, 2001 in favour of the plaintiff in respect of the Property being Exh,PW-1/1 and Exh. PW-

1/2 are admitted documents. In view of the Transfer of Property Act, 1882 the plaintiff and not the defendant no.1 is the owner of the Property.

8. Defendant no.1, however, claims that funds for purchase of leasehold rights and for construction of the building were provided by the Partnership Firm in which the defendant no.1 had 29% share at the relevant time i.e. when Sub-lease Deed was executed and the construction was made in early 1970. In other words, it is claimed that he is a *benami* owner of the Property as funds and consideration for purchase of the plot and for construction of the building were paid by the Partnership Firm in which he held 29% share.

9. The present Suit was filed on 17th January, 2007 after the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as the Act, for short) had come into force. I may note here the definition of the expression "*Benami* Transaction" in Section 2(a) of the Act, which reads as under:-

Section 2(a) : "*Benami* transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;"

10. For plea of *benami* to succeed the person taking the said plea has to prove the factum of the money being given for the purpose of carrying out the transaction by a person other than the

purported owner of the property and secondly, the intention of the parties has to be such that the owner was only a façade for the real owner. Thus, the question arises whether funds for purchase of the Property and construction in 1968-70 had been paid by the defendant no.1 and whether the transaction in question was *benami*.

11. The other question which arises for consideration is whether sub section 3 to Section 4 of the Act will apply and therefore the bar and prohibition in Section 4 would not apply. The plea of *benami* is not available to the defendant no.1 in view of the Act, unless conditions of subsection 3 to section 4 are satisfied. Relevant provisions of the Act read as under:-

Sections 3 and 4

“3. Prohibition of *benami* transactions.- (1) No person shall enter into any *benami* transaction.

(2) Nothing in sub-section (1) shall apply to -

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a -

(i) depository as a registered owner under sub-section (1) of section 10 of the Depositories Act, 1996;

(ii) participant as an agent of a depository.

Explanation : The expressions “depository” and “Participants” shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996.

(3) Whoever enters into any *benami* transaction shall be punishable with imprisonment for a term which may extend to

three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.”

4. **Prohibition of the right to recover property held *benami*.** - (1) No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
- (2) No defence based on any right in respect of any property held *benami*, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.
- (3) Nothing in this section shall apply,-
- (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or
- (b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”

12. The relationship between the plaintiff and the defendant no.1 is not denied and it cannot be also denied that their relationship is fiduciary. In the case of ***R.Rajagopal Reddy versus Padmini Chandrasekharan*** reported in (1995) 2 SCC 630 and ***Nand Kishore Mehra versus Sushila Mehra*** reported in (1995) 4 SCC 572 the Supreme Court laid out certain basic guidelines with respect to the admissibility of the plea of *Benami* being raised in case of a

suit, claim or action. The said guidelines have been propounded later in the case of ***Rebti Devi v. Ram Dutt***, reported in (1997) 11 SCC 714 and the relevant portion thereof reads as under:-

“(7) *Seventhly*, if in a suit, claim or action, a plea or defence based on benami is raised even after 19-5-1988 and the purchase is in the name of a wife or unmarried daughter, such a plea of benami is permissible and *R. Rajagopal Reddy case* will not come in the way merely because the plea is raised after 19-5-1988. Such a plea if raised, will however have to be decided taking into account the statutory presumption laid down in Section 3(2). This is because the Act says that if the purchase is in the name of the wife or unmarried daughter, the prohibition in Section 3(1) will not apply. Section 3(2) is enacted as an exception to the provisions in the Act and does not depend for its interpretation on the question as to what extent Sections 4(1) and 4(2) are retrospective.

(8) *Eighthly*, if the case falls within the exception in Section 4(3)(a) i.e. where the person in whose name the property is held is a coparcener in a Hindu Undivided Family and the property is held for the benefit of the coparceners in the family, or where as stated in Section 4(3)(b) the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity, then in both situations if such a plea or defence is raised in a suit filed after 19-5-1988, the same can be decided by the Court notwithstanding Section 4(1) or 4(2) and notwithstanding what is decided in *R. Rajagopal Reddy case*.”

13. The intention of the parties to enter into a *benami* transaction is to be established, for upon a gift, a mother becomes

the owner of that money/property in her own right. A gift made by a father, husband, son or a daughter for purchase of property will not make the father, husband, son or daughter a *benami* owner. After a gift is made and accepted, money or gift made is the property of the recipient. Donor ceases to have any claim or right on the money or the property gifted. Source of money or the fact that funds emanated from person A and property was purchased by person B is not by itself sufficient to establish benami ownership. Intention of the parties is a relevant consideration. Presumption as raised in Section 3(2) (a) of the Act in case of wife or daughter is to the contrary, but the said section will not apply as the transaction is before the enactment of the Act and the relationship between the parties is that of mother and son. Presumptions under sections 81 and 82 of the Indian Trusts Act, 1882 are no longer applicable as the said sections stand deleted.

14. Mere payment of consideration by a third person will not make the transaction in all cases *benami*. Reference may be made to ***Chittaluri Sitamma and Another versus Saphar Sitapatirao*** reported in AIR 1938 Madras 8, wherein it has been held as under:

“...the mere suspicion that the purchases might not have wholly been made with the Lady’s money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to Jagannadha Rao whether in Smaller measure or larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by

the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction though it is an important character....”

15. On the question of benami ownership, it will be appropriate to refer to the decision of the Supreme Court in the case of ***Binapani Paul versus Pratima Ghosh and others*** reported in (2007) 6 SCC 100. In the said case there was a dispute with respect of the ownership of a property bought in the name of the wife, while the money was paid by the husband. Dispute arose between children of the said lady after the death of the lady. The son had opposed mutation in daughters' names on the ground that their father was the benami owner. The trial court rejected the said contention, but the High Court upheld the objection of the son. However the Supreme Court in appeal held the view of the trial court as the correct one. It was observed that the deceased lady had been treated as the owner of the property during the lifetime of her husband and that she had even paid a part of the consideration for the said property. Supreme Court also noted that there could be various reasons for a person to buy a property in the name of someone else and in all cases such transactions would not be in the nature of a Benami transaction. The Court further noticed that for a particular transaction to be called benami, credence has to be given to the surrounding circumstances and the intention of the parties at the time of the transaction. The Supreme Court in the case of

Thakur Bhim Singh versus Thakur Kan Singh reported in (1980)

3 SCC 72 dealt with this question of the intention behind a transaction and held that the intention could be gauged on the basis of:

- a) surrounding circumstances,
- (b) relationship of the parties,
- (c) motives governing their action in bringing about the transaction, and
- (d) their subsequent conduct.

16. In the case of ***Jaydayal Poddar versus Bibi Hazra***, reported in (1974) 1 SCC 3 the Supreme Court held as under:

“ Though the question, whether a particular sale is *benami* or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a *benami* colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged *benamidar*; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.”

17. Burden to prove and establish *benami* owner's rights protected by Section 4 (3), is on the person who makes the said assertion. The onus, therefore, is on the defendant no.1 who asserts ownership rights to prove *benami* ownership by leading reliable

evidence. This could have been shown by establishing (i) transfer of purchase money or payment of purchase consideration had taken from the account of the defendant no.1, and; (ii) the said transaction was made with the intention to treat the property purchased as a *benami* property of the defendant No. 1 with reference to conduct of parties, surrounding circumstances and motive for their action.

18. On the question of payment of consideration, the defendant no.1 has examined himself as DW-1 and Mr.Sher Singh Jain as DW-2. Evidence by way of affidavit of one Mr.Shiv Nath Sharma was filed by the defendant no.1 but he was not produced for cross examination and therefore his evidence cannot be relied upon by the defendant no.1. It is an admitted case of the parties that the defendant no.1 was born on 23rd November, 1944 and in 1968, he was about 24 years old. It is an admitted case of the parties that the father of the defendant no.1-late Mr.Pradbudayal Mahajan was originally a partner in the Partnership Firm and the defendant no.1 joined the Partnership Firm in 1964. It is the case of the defendant no1 that he joined the business in 1964. (I may note here that, in his affidavit Mr. Shiv Nath Sharma, has stated that the defendant no.1 had joined the partnership firm in 1966). Majority shares in the said Partnership Firm to the extent of 56% were held by outsiders who were also providing finance and raw material for carrying on

business of the firm. In his affidavit in chief, the defendant no.1 has stated as under :-

“ ...The property in question was acquired and built out of the funds provided by M/s.Bhagmal Satyapal, Katra Choban at Chandni Chowk, Delhi of whom the Deponent was the partner...”

19. No document has been placed on record by the defendant no.1 to establish flow of funds from the Partnership Firm and how and in what manner the payments made were treated in the books of the firm. The firm which had even outsiders as partners is not claimed to be the *benami* owner. The claim is made by Defendant No. 1.

20. Defendant no.1 in his cross-examination has admitted that the Partnership Firm used to file Income Tax Returns but the Property was never shown as an asset of the said Firm. He has also admitted that there is no document in existence from which it can be said that the Property was purchased in the name of the Partnership Firm. The defendant no.1 in his cross examination has stated as under :-

“..... I do not have any documents in my possession to show that the funds for purchase of the plot came from the said firm. I had earlier maintained bahi khatas (account books) which showed the payment of such amount from the firm but the said accounts being old are not available now. The money flowed from the firm to the plaintiff who in turn paid for the plot. Vol: The plaintiff was not a partner of the firm. It was given as loan from the firm to the plaintiff.

The construction of the plot was made in 1970. The construction was completed in 8 to 9 months. The construction consisted of four bed rooms with drawing and dining on the ground floor and with a room constructed on the first floor to the extent of 27.5 per cent of the coverage of the ground floor. An amount of Rs. one lakh was spent on construction. Amount on construction was spent by the plaintiff through the funds advanced from the firm. This money was also reflected in the account books which are not available now. The income tax returns of the firm also reflected the same. The amount was shown as a loan to the plaintiff. The amount outstanding against the plaintiff was adjusted in the accounts of the firm by debiting the personal accounts of the partners being myself and my father.

Question : If the amount of dues from the firm to the plaintiff were adjusted on transfer of credit from your account and your father's account to the partnership firm, is the amount now outstanding to you from the plaintiff?

Answer : it is correct that in the accounts amount would be due from my mother to myself on the aforesaid account. There are no outstandings now being shown as it has become nil. The amount was written off.

In the income tax record, the payments both for the plot and construction was shown as emanating from the firm. In the income tax returns, the property has not been mentioned and only outstandings from the plaintiff to the firm were mentioned.

In the returns the property was never shown as a property of the firm. In 1970s the plaintiff, being my mother, my father and I shifted to the house in question from Chandni Chowk. I shifted to the house in the capacity of the son of my parents. Vol : I was also a partner of the firm."

(Emphasis supplied)

21. In the aforesaid statement of the defendant no.1 has stated that the amount paid was treated as a loan by the Partnership Firm to the plaintiff. The said statement was made not once but twice in the aforesaid cross examination and has been underlined. It is also stated by the defendant no.1 that subsequently the amount was written off, though at that time the outstanding amount was adjusted by debiting personal accounts of the partners i.e. the defendant no.1 and his father. If it is a case of loan, claim for *benami* ownership, will certainly fail. If it is the case where the loan was written off subsequent to the purchase of property, the claim for *benami* ownership will again fail, unless it is proved that when loan was given it was with the intention to write it off and defendant-1 was the benami owner. If it is a case where capital accounts of the partners were adjusted, claim for *benami* ownership will depend upon the percentage of adjustment made in the capital accounts of the two partners coupled with the intention of the parties i.e. the plaintiff, the defendant no.1 as well as the father of the defendant no.1 to treat and regard the said Property as a *benami* Property owned by the defendant no.1 and his father {refer ***Binapani Paul versus Pratima Ghosh*** (Supra)}. This intention should have existed at the time when the Property was purchased and not at a subsequent point of time when the adjustment was made, for if the Property at the time of purchase was treated and regarded as

the Property of the plaintiff, it would not become *benami* property on a later date upon adjustment of the loan given by the Partnership Firm to the plaintiff being adjusted in the books of the Partnership Firm from the capital accounts of the defendant no.1 and his father. A gift once made by an individual cannot be unilaterally undone and will not become *benami* as alleged by a subsequent action by which Capital Accounts were adjusted.

22. The defendant no.1, on whom the onus lies, has not produced any document or material to support his contention with regard to the payment of consideration as well as establish intention of the parties to record and treat the Property as a *benami* property. Except for oral statement of the defendant no.1, there is no document, evidence or proof. I may note here that DW-2, Mr.Sher Singh Jain in his affidavit has stated to the best of his knowledge that late Mr.Prabhudayal Mahajan was a partner of the said Partnership Firm along with the defendant no.1 and the entire money was spent, to his knowledge, out of the Partnership Firm. Evidence of Mr. Sher Singh, DW-2 is rather vague. Though in his cross examination he has stated that his deposition is based on best of his knowledge, he has admitted that he did not see any papers of the Partnership Firm and had no knowledge derived from any documents.

23. It is not the case of the defendant no.1 that the Property was declared and shown as *benami* property in the income tax

returns of defendant No. 1 as was required in Section 281-A of the Income Tax Act, 1961 prior to its repeal subsequent to the *Benami Transactions Prohibition Act, 1988*. It is also not understandable why the defendant no.1 did not retain and keep the said accounts if he was claiming *benami* ownership of the Property. I may note here that the Property is located in a posh colony in South Delhi and the said area has seen astronomical increase in the land prices from late 1970s. The plea of the defendant no.1, therefore, that he is unable to produce any document due to delay and time gap has to be considered with doubt and circumspection. Normal, prudence predicates that a person would have retained necessary papers of payment or adjustment from the Capital Account knowing well that he has four brothers and sisters. I also find that the Property was converted into freehold in 2001 and there is no allegation that the defendant no.1 had made any payment at that time. No right was claimed by the defendant No. 1 at that time.

24. The plaintiff who is now in her 90s has in her affidavit by way of evidence stated that the Property was purchased out of her personal savings, deposits and money given by her husband. In her cross examination she has pointed out that she owned a property in Amritsar which was also sold. In her cross examination, even at the age of 90 years she has withstood and stuck to her original claim that the Property was not *benami* and

was purchased out of her own funds and money given by her late husband. I may note here that she has referred to some letters, Exh.DW 1/1 to DW 1/5. Perusal of those letters show that the plaintiff regarded herself to be the owner of the Property and had asked the defendant no.1 to even find a tenant. In case defendant no.1 was *benami* owner of the Property, the said correspondence in which the defendant no.1 was not treated as owner of the Property and the plaintiff was regarded as the owner of the Property would not have been written. In view of the above discussion, it is held as under:-

- (i) Defendant no.1 has not been able to establish that funds for purchase and construction of the Property were paid by him.
- (ii) Defendant no.1 has not been able to show that intention of the parties was to treat the Property as *benami* in the name of the plaintiff with the defendant no.1 and late Mr.Prabhudayal Mahajan as the owners.
- (iii) Defendant no.1 has not been able to discharge onus and establish his case under Section 4(3) of the Act.

25. In view of the above discussion, it is accordingly held that the plaintiff is the owner of the Property and the defendant no.1 is not a *benami* owner of the same.

ISSUE NO. 3

26. The defendant no.1 claims that he is a tenant of first floor

of the Property on a monthly rent of Rs.2000/- p.m. There is a contradiction, as the defendant no.1 also claims that he is a *benami* owner of the Property having a share of 72.6%. Normally, one person cannot be an owner and a tenant of same property. Moreover, the claim for tenancy is rather vague. There is no written agreement. In the cross examination it is stated by the defendant no.1 that he became a tenant in the year 1992-93 @ Rs.2000/- p.m. In the written submission, the defendant no.1 has stated that in the year 1993-94, while the plaintiff was out of Delhi, she had desired that the first floor of the Property should be rented out and at that time the defendant no.1 started paying Rs.2000/- pm. to the plaintiff in cash. It is therefore difficult to accept the said story of the defendant no.1. Tenancy rights have never been shown in house tax returns or income tax returns of the defendant no.1 or the plaintiff. The defendant no.1 also admits that he was filing property tax returns in the name of the plaintiff but no such claim was made. Defendant no.1 in his cross examination has admitted creation of tenancy is not reflected in government records. Learned counsel for the defendants during the course of arguments had referred to handwritten letters including post cards written in and around 1992 and 1994. These letters refer to the intention and desire of the plaintiff to rent out the first floor to a suitable tenant but do not indicate whatsoever that the property was rented out to the defendant no.1. This

becomes clear from the language of the letters which are written in Hindi.

Letter dated 14.9.92 (Exhb.DW-1/4)
written to defendant no.2-Sushma Mahajan.

“....dukan ka season shuru ho gaya hoga. Upar ka kiraye par de dein. Jo jo kuch zaruri hai kara lein. Kiraya achha aa jayega. Upar verandah me kuch parah rahen hein to uppar ja sakte hein. Wahan baher hi hain. Barna sara uttar lein. Kafi jagah hein kiraya aa jaye to marammat kara sakte hein. Aage apki icha hein maine kya karna hain....”

Letter dated 4.5.94 (ExhbDW-1/1) written to defendant no.1.

“... aasha hain makaan kirayen par char gaya hoga.”

Letter dated 7.11.92 (Exhb.DW-1/3) written to defendant no.2

“..... kya uppar aa gaye hain ya nahin. Kiraya diya hain ya nahin. Ab to aap free mehsus karte honge.”

Letter dated 18.5.1993 (Exhibit No.DW 1/5)
written to Sudesh Mahajan.

“..... makaan ka kya banaa, patra ka jawab shigra dein...”

27. The aforesaid letters and portions which have quoted above show that the plaintiff was actively involved in the management and concerned about the property. This was in spite of her advancing age and the fact that the plaintiff was not in Delhi at the time when these letters were written. These letters do not

establish and prove that the defendant no.1 was a tenant in the property.

28. The claim of the defendant no.1 is that he is a tenant of first floor of the Property is therefore rejected.

29. I may however note, two objections which were raised in the written statement but with regard to which no issues were framed. The first contention in the written statement is with regard to maintainability of the Suit for mandatory injunction and the second contention is with regard to the court fees. I have quoted in detail the cross examination of the defendant no.1. In his cross examination he has admitted that he had shifted to the Property in question in his capacity as a son of his parents and then had voluntarily stated that he was also a partner in the Partnership Firm. His claim as a *benami* owner has been rejected. Occupation of the defendant no.1 therefore was a permissive occupation or maximum as that of a gratuitous licensee. The defendant no.1 does not have any right in law to reside in the Property contrary to the wishes and desire of the plaintiff. The Suit for mandatory injunction is therefore maintainable in view of the decision of the Supreme Court in **Joseph Serverence versus Benny Mathew** reported in (2005) 7SCC 667 and decision in **Delhi Gate. Services Pvt. Ltd versus Caltex (India) Ltd.** reported in AIR 1962 P&H 370.

30. The second contention of the defendant no.1 on valuation and payment of Court fee is also liable to be rejected. A suit for permanent and mandatory injunction can be valued by the plaintiff in his/her discretion subject to the discretion not being whimsical. Suit is not required to be valued at the market value of the Property. Reference in this regard can be made to the decision of this Court in

the case of ***Oriental Trading Corporation versus Punjab Spin Trading Company*** reported in 1976 RLR 650 wherein it was observed as under:-

“(2) The law on the subject is well settled. Under Section 7(iv)(d) of the Court Fees Act in a suit to obtain injunction, discretion is given to the plaintiff to value the relief and pay the court fees accordingly and a local amendment made in the law has provided that the court fees paid in such a suit shall be not less than Rs. 13. On the other hand, in suits for possession of land and houses, the court fee is to be paid on the market value as provided in sub-clause (c) of clause (v) of Section 7 of the Court Fees Act. In *Sathapana Chettiar v. Ramanathan*, AIR 1958 SC 245, the Supreme Court laid down that the question of court fees must be considered in the light of the allegations made in the plaint and this decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. A Full Bench of the Circuit Bench of the Punjab High Court at Delhi in *Jai Krishna Dass v. Babu Ram*, 1967 PLR 52, observed that it was settled law that for deciding the question relating to the amount of court fee payable on a plaint, not only have the averments in the plaint alone to be taken into account but the said allegations are to be assumed to be correct and the decision can neither depend on the maintainability of the suit as framed nor upon the assumption that the court must somehow spell out of the plaint such a claim which is ultimately capable of being decreed and the Court has to take the plaint as it is without omitting anything material and without reading in it by implication what is not stated therein.

(3) I also wish to add that in a Pull Bench decision of the court. *Sarup Singh v. Daryodhan* 2nd (1972) I Delhi 759=1971. RLR 89, it has been held that where a party was

content to seek a decree for injunction to vacate rather than delivery of possession in a suit properly framed for the purpose, he had to face its logical consequences and he could have the decree executed only in the manner provided by Rule 32 of Order 21 and the issue of a warrant for delivery of possession in execution of a decree for injunction was not justified either by Rule 35 of Order 21 or clause (c) of Section 51 of the Code of Civil Procedure as it was impossible to convert a suit and a decree for injunction into a suit and a decree for recovery of possession. It is further observed in the said decision that an injunction for dispossession of the judgment-debtor without a direction for delivery of possession of the property to the decree-holder adjudged in the decree to be entitled to recover possession did not confer jurisdiction on the court to dispossess a person and leave the property in vacuum. Hence the decree for injunction can be executed only in the manner prescribed by the law.

(4) In another Full Bench decision of this Court in Jugal Kishore v. Des Raj Seth, 1968 DLT 571, the court observed that the plaint had to be read and construed as a whole and it was the substance which was to be the guiding factor and the court had to look and see in each particular case as to what was the real nature of the relief claimed and it was for that purpose that the allegations contained in the plaint as a whole had to be examined, merely because the expression 'mandatory injunction' was used in the prayer contemplating a decree for possession and if reading the plaint as a whole, it became clear that the plaintiff was seeking possession of the property, then it would be open to the court to hold the suit to be one for possession.

(5) In the instant case. reading the plaint as a whole, I am of the view that the plaintiff has filed the suit only for grant of mandatory injunction directing the licensee to vacate the premises as occurred in Pooran Chand v.

Malik Mukhbain Singh. 1963, PLR 490. Herein, the plaintiff is itself a tenant in respect of a large godown and has shared 3/4th of the same, which the defendants deny, while the plaintiff claims that it has retained the remaining 1/4th portion exclusively with it. The plaintiff has alleged that it has revoked the license and as such the defendants are bound to restore its possession to the plaintiff. I am, therefore, of the view that the suit of the plaintiff is not for recovery of possession, but for grant of mandatory injunction to vacate premises. In such a suit, the plaintiff cannot get a warrant for delivery of possession, as has been held by this court in Sarup Singh's case. If the plaintiff is content to have the mandatory injunction, as prayed for by it, it is) certainly open to it to pay court fees on a suit as framed for the said purpose."

31. I may note here that the plaintiff admittedly was in possession of the Property and it is an admitted case that the plaintiff and the defendant no.1 were jointly using the Property. Therefore it cannot be said that the plaintiff must pay court fee on the market value of the entire property or is required to pray for consequential relief of possession. Relief for mandatory injunction has been valued by the plaintiff at Rs.20,00,000/- and the relief of permanent injunction has been valued by the plaintiff at Rs.200/- and appropriate court fees has been affixed. In view of the above, these two objections raised by defendant no.1 in the written statement are also rejected.

RELIEF

32. In view of the above discussion, the Suit of the plaintiff is

decreed. Plaintiff is held entitled to decree of permanent injunction restraining the defendant nos.1 and 2, their agents, representatives, etc. from in any manner parting with possession or creating third party rights in respect of the Suit property or from in any manner creating interference or obstruction to the rights of the plaintiff, her successors, transferees, etc. Decree of mandatory injunction is also passed in favour of the plaintiff directing the defendants and their agents to remove themselves from the Property.

33. The plaintiff will be entitled to costs.

(SANJIV KHANNA)

JUDGE

AUGUST 27 , 2008.
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