

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

% *Date of Judgment : 18.08.2010*

+ **R.S.A.No.11/2010 & C.M.Appl.990/2010**

AISHA BEGUM AND OTHERS Appellants
Through: Mr.S.D.Ansari, Advocate.

Versus

MOHD.IBRAHIM (DECEASED THR.L.Rs) Respondent
Through: Mr.Vijay Tandon, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the 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

INDERMEET KAUR, J.(Oral)

1. This second appeal has impugned the judgment dated 9.12.2009 vide which the judgment and decree of the trial court dated 1.5.2002 had been upheld. Vide the judgment and decree dated 1.5.2002, the suit of the plaintiff seeking a decree of mandatory injunction as also mesne profits had been decreed in his favour.

2. The appellant before this court was the defendant before the trial court. The plaintiff Mohd.Ibrahim was the elder brother of deceased Mohd.Ismail; the defendants are the legal representatives of Mohd.Ismail. The suit property is property no. 1148, Matia Mahal Chowk, Near Churiwala, Jama Masjid, Delhi-6.

Plaintiff was stated to be the owner of the suit property. He had permitted the legal representatives of his deceased brother Mohd.Ismail i.e. his widow, three daughters and one son who were minors at the time of death of their father to stay in his house i.e. in the disputed property. Mohd.Ismail had died in 1983. Thereafter the son and the widow of his deceased brother started harassing the plaintiff. On 15.3.2002 by a notice the plaintiff revoked the license of the defendants. In spite of service of notice, the defendants did not vacate the suit property. Suit was accordingly filed.

3. In the written statement it had been contended that in the year 1978 the plaintiff had made an oral Hiba of the disputed property in favour of his younger brother i.e. Mohd.Ismail by a family settlement and the defendants are in occupation since then. The defendants have also become owners by way of adverse possession.

4. Trial judge had framed seven issues; all the issues were decided in favour of the plaintiff. After examination of three witnesses on behalf of the plaintiff and one witness on behalf of the defendant the suit was decreed in favour of the plaintiff. The defendants were ordered to vacate the suit property; the defendants had also been directed to pay mesne profits at the rate of Rs.2000/- per month. It was held that there was no Hiba executed by the plaintiff.

5. The first appellate court vide its judgement dated 9.12.2009 endorsed the findings of the trial judge.

6. Before this court the questions of law have been formulated on page 10 of memo of appeal. They are eight in number.

Arguments have been addressed at length by learned counsel for the appellant. It is submitted that the questions of law which has arisen are that the suit for mandatory injunction as filed by the plaintiff was not maintainable; it was actually a suit for possession on which the requisite fee had not been paid; the suit not being maintainable in the said form, the courts below have erred in deciding this issue in favour of the plaintiff. For this proposition reliance has been placed upon a judgment of Full Bench of this court reported in DLT 1968 371 Jugal Kishore vs. Des Raj Seth. A second substantial question of law has also arisen on the oral settlement which had been averred by the defendants and which has not been decided by the courts below. Thirdly, the provisions of Order 20 Rule 12 of the Code of Civil Procedure (hereinafter referred to as 'the Code') have not been adhered to. Without holding any enquiry under the aforesaid provision of law, the courts below have decreed the suit of the plaintiff for mesne profits.

7. Arguments have been countered by the learned counsel for the respondent. It is stated that the judgment of the two fact finding courts below does not call for any interference.

8. The powers of this court to interfere in findings of the fact has been circumscribed by the provisions of Section 100 of the Code. In 2009 RLT 27(NSC) 34 Koppi Setty V Ratnam vs. Pamarti Venka the Supreme Court has reiterated that the law relating to second appeal had been amended in the year 1976 primarily with a view to curtail second appeals; the laudable object being not to increase arrears in the High Courts and only substantial question of law could be entertained and heard by the second appellate

court. The relevant extract from the aforementioned judgment is reproduced herein and reads as under:

.... Provision was amended because of report of Law Commission in 1973. Report said that any rational system of law should have only hearings on questions of facts, one by trial Court and the other by 1st appellate Court as a search for absolute truth must be put under some reasonable restraint to reconcile it with the doctrine of finality. Finality is absolutely necessary to give certainty to law to avoid delay, all would agree that at a certain stage questions of facts decided by 2 Courts should be allowed to rest without further appeal.
..... ... Legislative intent was clear as it never wanted 2nd appeal to become "third trial on facts" or "one more dice in the gamble."

9. Arguments propounded before this court by the learned counsel for the appellant have raised no substantial question of law. The question about the maintainability of the suit had been decided by trial judge while disposing of issue no.1. The first appellate court had endorsed this finding and had inter alia held as follows:

"9. In case titled Joseph Severance vs. Beny Mathew 2005(7) SCC 667. Hon'ble Supreme Court while upholding the maintainability of the suit for mandatory injunction for evicting a licensee observed:

10. In case titled Sant Lal Jain vs. Avtar Singh AIR 1985 Supreme Court (857). :- Hon'ble Supreme Court relied case titled Milka Singh vs. Diana AIR 1964 J&K (DB) 99 wherein the principle of once a license always a licensee was laid and it was also held that the moment a license is terminated, possession of the licensee does not become that of a trespasser. In this judgment Hon'ble Court observed:

"Where a licensor approaches the Court for an injunction within a reasonable time after the license is terminated, he is entitled to the injunction. On the other hand, if the licensor huge delay, the Court may refuse the discretion to grant an injunction on the ground that licensor had not been diligent and in that case the licensor will have to bring a suit for possession which will be governed by Section 7 (v) of the Court Fee Act."

Relying and quoting this above observation. Hon'ble Supreme Court in Sant Lal Jain's Case further observed.

"In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will dis entitle him to the discretionary relief. Even if there was some delay, we think that in case of this time attempt should be made to avoid multiplicity of suit and licensor should not driven to file another round of suit with all the attendant delay, trouble and expense."

11. Plain reading of the above case laws shows that if suit for evicting a licensee is filed shortly after revocation of license then it can be filed in the form of mandatory injunction. In the case in hand as well, the license was revoked vide legal notice dated 15.3.2002 and suit was filed on 2.5.2002 and the same is as such maintainable and also does not suffer from any flow in valuation of it."

10. There is no fault in this finding of the first appellate court. The legal proposition as also the averments as contained in the plaint had been adverted to. It is entire body of the plaint which has to be taken into account to determine the nature of the suit. In this view of the matter the judgment relied upon by the learned counsel for the appellant on this score would not be applicable.

11. The defence raised by the defendants was that pursuant to family settlement an oral Hiba had been executed by the plaintiff in their favour. This has also been detailed and discussed by both the courts below. In the impugned judgment this has been discussed in para 12 to para 17. The provisions of Section 116 of the Evidence Act had also been resorted to. The findings by the trial court that no Hiba had been established by the defendant which was the plea set up by him had been endorsed by the first appellate court. The documentary evidence adduced by the defendant had been appreciated and rejected. The plea of adverse possession as set up by the defendants had also been rejected. These were findings of fact which cannot be re-agitated before this court. This court is not a third fact finding court.

12. The last argument submitted by learned counsel for the appellant that the provisions of Order 20 Rule 12 of the Code have not been adhered to also has no merit. The case of the plaintiff was that the defendants were living in the suit property with his permission; they were the widow and children of his deceased younger brother; they were not being charged any license fee.

There is no dispute to the legal proposition that judicial notice can be taken of facts including the rate of rentals which are prevailing in a particular place as also the escalations which have taken place over the years. In AIR 2008 Delhi 110 M.R.Sahni vs. Doris Randhawa a Bench of this court had opined that while determining mesne profits there is always some element of guess work involved. Mesne profits awarded at the rate of Rs.2000/- per month for the suit property i.e. a property situated in the heart of Delhi i.e. property no.1148, Matia Mahal Chowk, Near Churiwala, Jama Masjid, Delhi-6 which as per defence in the written statement has three floors with constructed rooms on each floor; the rate was awarded after considering the locality and area in which the property is situated; the said finding cannot be termed to be an illegality. In AIR 1963 SC 1405 Fateh Chand vs. Balkishan Das the Supreme Court had held that ascertainment of mesne profits can be made on the basis of the value of the user to the person in lawful possession.

13. No question of law much less any substantial question of law has arisen. Appeal as also the pending application is dismissed in limine.

INDERMEET KAUR, J.

AUGUST 18, 2010.

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