

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

+ **RSA No. 90/2010 & CM Nos. 8406-07/2010**

Date of Decision: May 06, 2010

PRABHU DAYAL Appellant
Through: Mr.Bhupesh Saini, Advocate.

Versus

SH. SHAMBHU DAYAL (DECEASED) Respondents
Through: None.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

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| (1) | Whether reporters of local paper 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 |

J U D G M E N T

ARUNA SURESH, J. (Oral)

RSA No.90/2010

Impugned in this appeal is the judgment and decree of the First Appellate Court dated 18th February 2010, whereby suit for mandatory injunction filed by the predecessor-in-interest of the respondents was decreed and the appellant was directed to hand over the vacant possession

of the suit property bearing No.16/1555-E, Bapa Nagar, Arya Samaj Road, Karol Bagh, New Delhi, as shown in red colour in the site plan Ex.PW-1/2 to the respondents within three months.

2. Parties to the suit i.e. Shambhu Dayal and appellant Prabhu Dayal are real brothers. Shambhu Dayal, predecessor-in-interest of the respondents claimed that he was owner of property bearing No.16/1555-E, Bapa Nagar, a three storeyed building. He had permitted his brother/appellant herein (defendant in the suit) to use and occupy the said property except one shop on the ground floor which is in possession of the respondents, purely on license basis with an understanding that as and when he needed the property, appellant would vacate the same. However, when Shambhu Dayal asked the appellant to hand over vacant possession of the property, he refused. He failed to vacate and hand over possession of the suit property despite service of legal notice dated 13th September 1998. Therefore, he filed a suit for mandatory injunction seeking direction against the appellant to vacate the portion of the suit property in his possession and hand over vacant and peaceful possession of the same to the respondent.

3. Appellant in his written statement denied that property was exclusively owned by Shambhu Dayal and alleged that property was owned by father of the parties along with another property bearing No.16/1700-E,

Bapa Nagar, Karol Bagh, New Delhi, which is in possession of the respondents. Appellant claimed his possession in the suit property in his own right.

4. Trial Court dismissed the suit of the respondents on 17th August, 2002. Respondents filed a Regular Civil Appeal No.205/02 before the First Appellate Court against the judgment and decree of the Trial Court. Appellate Court vide its impugned judgment and decree was pleased to set aside the judgment and decree of the Trial Court, allowed the appeal and granted a decree for mandatory injunction in favour of the respondents, directing the appellant to vacate the suit property and hand over possession of the same within three months.

5. Mr. Bhupesh Saini, counsel appearing on behalf of the appellant has argued that substantial questions of law are required to be formulated in this appeal, as the Appellate Court granted mandatory injunction in favour of the respondents without recovery of court fees, because in the garb of mandatory injunction, respondent had sought possession of the suit property. He further argued that only Attorney of the respondents was examined and Shambhu Dayal never stepped in the witness box to depose in his favour and therefore, Appellate Court committed an error in accepting testimony of the Attorney. He submitted

that Appellate Court has committed illegality in declaring respondents as owners of the property without any sufficient proof of ownership.

6. Trial Court, while dismissing suit of the respondents was weighed by the fact that predecessor-in-interest of respondents himself did not step in the witness box to prove that he was the owner of the property, instead his son Narender Kumar, Special Power of Attorney Holder had appeared as PW1. While relying upon '*Bhaguji Bayaji Pokale Vs. Kantilal Baban Gunjaws*', 1998 (3) CCC 377 (Rajasthan), Trial Court observed, that since plaintiff had not appeared in the witness box in person, his Attorney Holder was not entitled to appear as a witness on behalf of the plaintiff by virtue of provisions of Order 3 Rule 2 CPC; hence his testimony was of no assistance to the plaintiff and therefore, he failed to prove that he was the owner of the property in suit. Trial Court also observed that the documents placed on record by the plaintiff in the form of house tax receipts, payment receipts, lease hold charges receipts, water bills etc. did not, in any manner, establish the title of the plaintiff qua the suit property.

7. First Appellate Court while disagreeing with the findings of the Trial Court made it clear that non-examination of the respondent in no manner affected his case as none of the documents proved on record could have been better proved by the respondent in his testimony. Court also

observed that no such evidence required from the mouth of the respondent was missing and that appellant had proved his case. In the absence of any evidence to the contrary on part of the appellant to demolish the case of the respondent, Appellate Court considered the documentary evidence available on record and proved in evidence by the respondent to come to the conclusion that qua the appellant, respondent was the owner of the suit property. Appellate Court also observed that none of the judgments relied upon by the Trial Court to conclude that non-appearance of the respondent in the witness box had damaged his case, were applicable to the facts and circumstances of the case in hand.

8. Perusal of the impugned judgment clearly indicate that the Appellate Court based his findings on appreciation of oral as well as documentary evidence only. Under these circumstances, no substantial question of law arises in this case. It is an established principle of law that in second appeal, this Court has no power to reassess the entire oral as well as documentary evidence to appreciate the judgment of the First Appellate Court or of the Trial Court, specially when it is not the case of the appellant that the Court gave perverse findings. Decision in this case is purely based on evidence adduced on record. True that, respondents could not produce any title documents to show that property in suit was owned by them, but the fact remains that appellant also failed to substantiate his stand that the

suit property was purchased by his father and that he was in possession of the property in his own right. It Shambhu Dayal who had been paying house tax, lease hold charges, water and electricity bills etc. of the property in question.

9. Admittedly, appellant did not file a single document to indicate that he was not in permissible user of the property in suit and that he and his family members were living there in their own right.

10. In view of my aforesaid discussion, no substantial question of law is involved in this appeal. It being without any merit is hereby dismissed.

CM Nos. 8406/2010 (for stay) & 8407/2010 (for exemption)

11. Since the appeal has been dismissed, both these applications have become infructuous and the same are accordingly dismissed.

**(ARUNA SURESH)
JUDGE**

**MAY 06, 2010
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