

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

% *Date of Judgment: 29.03.2011*

+ **RSA No. 219/2004**

NARAIN DASS Appellant
Through: Mr.Shailender DAhiya, Advocate.

Versus

PRITHVI RAJ Respondent.
Through: Mr. P. Chakroborty, 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)

This appeal has impugned the judgment and decree dated 06.09.2004 which had reversed the findings of the trial Judge dated 08.10.2002. Vide judgment and decree dated 08.10.2002, the suit filed by the plaintiff i.e. Narain Dass against his brother Prithvi Raj seeking possession of the suit property (i.e. the property on the first floor of quarter No. D-68/B, Madipur, old Slum Quarters, Paschimpuri, New Delhi) was decreed in his favour. The relief of permanent injunction had been denied. The impugned judgment dated 06.09.2004 had reversed this finding. The suit of the plaintiff stood dismissed.

The case of the plaintiff as is evident in the pleadings is that he was allotted the first floor of residential quarter No. D-68/B,

Madipur, Old Slum Quarters, Paschimpuri, New Delhi vide allotment letter dated 25.05.1983. Possession of the same was delivered to him at the spot on 26.05.1983. The defendant was his brother. He was married in June, 1985. At that time, he was residing on the ground floor along with his father. Since accommodation of the ground floor was not sufficient, at the request of father of the plaintiff, the plaintiff allowed the defendant permissive use of two rooms along with a kitchen (shown in red colour in the site plan) to the defendant. The plaintiff thereafter requested the defendant to vacate the suit property but the defendant threatened him with dire consequences. Notice dated 25.11.1996 was issued to the defendant terminating his license. In spite of requests, the defendant did not vacate the suit property. Suit was accordingly filed.

In the written statement, the defence of the defendant was that there was a joint family of their father Ganpat Rai who was the father of both the plaintiff and the defendant. The property was in the name of Ganpat Rai. There was no specific denial to the averment made by the plaintiff that this allotment of the first floor of the suit property had been effected in the name of the plaintiff.

The trial Judge had framed the following two issues:-

1. *Whether the plaintiff is entitled to relief of injunction? OPP.*
2. *Relief.*

Oral and documentary evidence was led. The plaintiff had proved on record Ex. PW-1/A which was the permission granted to him to change the quarter; in terms of Ex. PW-1/A, the earlier allotment which had been effected in the name of the plaintiff i.e. quarter No. D-76/B had been changed and in lieu thereof, he had been allotted the present suit premises i.e. D-68/B. This is evident

from Ex. PW-1/A. The contention of the defendant in his written statement was that the parties had by a family settled agreed that the defendant and his father would continue to reside in the first floor. No date of the said family settlement had been given; no evidence had also been led by the defendant on this score. The trial Judge had decreed the suit of the plaintiff.

In appeal, this judgment was reversed; the suit stood dismissed. The impugned judgment had noted that the mere admission of the defendant in his written statement admitting the allotment of the quarter in favour of the plaintiff would not by itself prove the ownership of the plaintiff; plaintiff had not produced documentary evidence; further a suit for mandatory injunction in the present form was not maintainable; in such a suit possession could not be ordered. This was the reason for dismissal of the suit.

This is a second appeal. It had been admitted and on 02.03.2007, the following substantial questions of law have been formulated:-

1. *Whether the present suit is maintainable and whether the appellant can be asked to pay court fee at this stage?*
2. *Whether the suit is barred by time?*
3. *Whether the suit filed by the appellant is bad for non-joinder of parties or this point cannot be raised before this Court after the application in this regard was dismissed by the trial court?*
4. *Whether the documents on record prove ownership of the appellant in respect of the premises in dispute?*

On behalf of the appellant, it has been urged that the impugned judgment is a perversity. A suit for mandatory injunction in the present form was maintainable; relief of possession could have been sought. For this proposition, reliance has been placed upon a judgment reported in AIR 1985 SC 857 Sant Lal Jain Vs. Avtar Singh as also another judgment reported in AIR 1958 Calcutta 179

Prabirendra Nath Nanday and Another Vs. Narendra Nath Nanday.

It is further submitted that there was no documentary evidence with the plaintiff to prove his claim qua the suit property.

Arguments have been countered.

Record has been perused. Ex. PW-1/A is the allotment letter whereby the plaintiff had been allotted the present suit property in lieu of earlier allotment of quarter No. D-76/B. This document is admitted by the defendant in his written statement; in terms thereof the plaintiff had been allotted this quarter. Specific contention of the plaintiff was that the defendant was a licensee in the suit property; his license stood terminated vide notice dated 25.11.1986. The said notice has been proved as Ex. PW-1/D. The defence of the defendant was that by oral agreement, he and his father were allowed to occupy the suit property was never substantiated because no defence was led on this score.

The impugned judgment dismissing the suit of the plaintiff for the reasons that a suit for mandatory injunction in the present form was not maintainable was an illegality. In *Sant Lal Jain* (supra) where a suit had been filed for mandatory injunction against the respondent who was a licensee and possession had been claimed, the Apex Court had held that although the suit was couched as a suit for mandatory injunction, it was in effect one for possession; the appellant could not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction. Relief of possession had been granted in his favour. This was reiterated in the judgment of *Prabirendra Nath Nanday* (supra).

The finding in the impugned judgment holding that the

plaintiff had not proved title to the suit property is also perverse. Ex. PW-1/A clearly shows that the slum quarter had in fact been allotted to the plaintiff. The admission of the defendant in the written statement is also relevant. These were the factors which had weighed in the mind of the trial court to decree the suit of the plaintiff. The impugned judgment reversing this finding is a perversity and is liable to be set aside.

Legal notice Ex. PW-1/D dated 25.11.1986 terminated the license of the defendant. Suit was filed on 12.02.1997. It was within time. The question of payment of court fee did not arise as the suit in the present form was maintainable. The plaintiff was entitled to the decree.

On the question of non-joinder, it was never a defence raised in the written statement or in the first appellate court. It cannot be raised for the first time before the second appellate court.

All these substantial questions of law are answered accordingly. Appeal is allowed. Suit of the plaintiff stood decreed.

INDERMEET KAUR, J.

MARCH 29, 2011

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