

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

% *Date of Judgment: 20.01.2011*

+ **RSA No.246/2004**

RAVINDER TYAGI .....Appellant  
Through: Mr. S.K. Tyagi, Advocate.

Versus

ANAND SWAROOP TYAGI & ORS .....Respondent  
Through: Mr.Vikram Nandrajog, Adv.

**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 been directed against the judgment and decree dated 18.09.2004 which had reversed the findings of the trial Judge dated 25.03.1992. In the judgment and decree dated 25.03.1992, the suit filed by the plaintiff Anand Swaroop Tyagi seeking mandatory injunction to the effect that the defendants (who are brothers of the plaintiff) be directed to remove their belongings and leave the premises in dispute (bearing No. S-433, Greater Kailash-I, New Delhi) had been dismissed. Vide the impugned judgment, the suit of the plaintiff stood decreed.

The plaintiff had filed a suit for mandatory injunction. He had claimed himself to be the sole and exclusive owner of the aforementioned suit property. He had a registered sale deed dated 25.08.1964 in his favour. He had constructed the said residential premises from his own earning. Defendants No. 1 to 3 who are the

real brothers of the plaintiff had been given permission to occupy one room on the first floor of the premises as licensee. The plaintiff had control over the remaining portion of the premises. Even after marriage, defendants No. 2 & 3 i.e Ravinder Tyagi and Vijender Tyagi were continuing to occupy the suit property. All the three defendant brothers had a common mess. The defendants being licensees were directed to vacate the suit property in terms of the legal notice dated 04.07.1984 and thereafter a subsequent notice dated 03.08.84. They, however, failed to adhere to the said request. Suit was accordingly filed.

In the written statement, the defendants have disputed the claim of the plaintiff. It was stated that the suit in the present form is not maintainable; the premises in dispute have been constructed by their late father Shri Shivcharan Tyagi from his funds; being the eldest son, the property was purchased in his name; it is benami.

On the pleadings of the parties, following nine issues were framed:-

- 1      *Whether the suit is maintainable as framed? OPP.*
- 2      *Whether the suit is bad for non-joinder of necessary party? OPD*
- 3      *Whether the plaintiff is owner of the suit premises? OPP.*
- 4      *Whether the father of parties is the owner of the suit premises? OPD*
- 5      *Whether the defendants are licensees of the plaintiff? If so, whether the licence has been validly terminated by the plaintiff? OPP*

- 6      *Whether the defendant No. 3 is tenant in a room on the first floor? OPD*
- 7      *Whether the suit is correctly valued for the purposes of court fee and jurisdiction? If not so its effect? OPP*
- 8      *Whether the suit for mandatory injunction is maintainable? OPP*
- 9      *Relief.*

On the basis of oral and documentary evidence led before the court, all the issues were decided in favour of the plaintiff. It was held that the suit was maintainable in the present form. It was admitted that the plaintiff is the registered owner of the suit property. However, the relief was not granted to the plaintiff on the ground that the defendants being the brothers of the plaintiff were living in the suit property since 1966; over the years they had got married and had their own families; it would be unfair to evict them at this stage and disturb their married life. It was largely on this premise that the relief was not granted to the plaintiff. The trial court had also recorded that there is a huge delay on the part of the plaintiff in seeking this relief of mandatory injunction. Suit was accordingly dismissed.

In appeal, the judgment of the trial Judge was reversed. Suit of the plaintiff was decreed.

This is a second appeal. It is yet at the admission stage. On behalf of the appellant it has been urged that a substantial question of law has arisen in as much as the suit in the present form is not maintainable; the relief that the plaintiff is seeking is a relief of possession; it has been couched as a suit for mandatory injunction; it could not have been maintainable in the present form.

This has raised a substantial question of law. Learned counsel for the appellant has placed reliance upon the judgment reported in 1998 IV AD (Delhi) 917 titled Ashok Chaudhary Vs. Dr. (Mrs.) Inderjit Sandhu & another; AIR 1963 PATNA 308 titled Jagdish Chandra Ghose and Others Vs. Basant Kumar Bose & another as also a third judgment of the Bench of Calcutta High Court reported in AIR 1961 Calcutta 229 titled Sisir Kumar Dutta & others Vs. Susil Kumar Dutta to support his submission.

Arguments have been countered.

Issue No. 1 has been specifically framed about the maintainability of the suit. Arguments had been addressed before the two courts below and both the courts had returned a positive finding that suit in the present form is maintainable. The body of the plaint has been perused. It has been titled as a suit for mandatory injunction. The plaintiff has claimed himself to be the absolute owner of the suit property. The defendants who were brothers were permitted to occupy the suit property; they were using the said property since 1966; the status of the defendants is always that of a licensee; vide notices dated 04.07.1984 and a subsequent notice dated 03.08.1984, the license of the defendants was validly terminated. The prayer was that a decree of mandatory injunction be passed directing the defendants to remove their belongings and to leave the premises in dispute.

There is no bar for maintainability of such a suit. Section 9 of the Code of Civil Procedure permits the Civil Court to try all such suits except those suits of which cognizance is either expressly or impliedly barred. The judgments relied upon by the counsel for the

appellant do not come to his aid; they all relate to the valuation of the suit for the purpose of Court fee and the amount to be affixed on such a plaint. Court fee is not in issue before this Court. In this context, in the judgment of Ashok Chaudhary (Supra), it was held that the relief of recovery of possession was not the consequential relief to the relief of mandatory injunction and the court fees had to be affixed under Section 7 (v)(e) of the Court Fees Act, 1870. The prayer clause as aforementioned in the instant case has primarily sought the defendants to remove their belongings from the suit premises and to leave the said premises. Mandatory injunction was the principal relief. The judgments aforementioned would not apply in this case.

Admittedly the plaintiff is the registered legal owner of the suit property. The title of the plaintiff/respondent is not in dispute. The respondent has categorically stated that the disputed premises has since been left by the appellants voluntarily; in fact the respondent did not have to resort to execution proceedings. He had filed written reply to the said effect. Appellants namely Ravinder Tyagi and Vijender Tyagi are present in Court today. On a specific query put to them, Ravinder Tyagi has stated that he has shifted with his family to his house at Rohini; Vijender Tyagi has stated that he has shifted with his family to his house at Vasundra Enclave. The third brother Mr. Virender Tyagi is missing. Admittedly the suit property is not in occupation of any of the appellants. It is pointed out by the learned counsel for the appellants that the present exercise has even of course become an academic exercise as the suit property admittedly stands vacated.

That apart this court while dealing with a second appeal will admit second appeal for hearing only if a substantial question of law arises and on no other count. Substantial questions of law have been mentioned in the body of the appeal at page 4; they read as under:-

*A Whether a suit for mandatory injunction is maintainable for recovery of possession of the suit property?*

*B Whether in a suit for possession amount of court fees liable to be paid is according to the value of the premises or not?*

*C Whether the relief of recovery of possession of suit premises is a surplusage in a suit for mandatory injunction or it is a substantive relief?*

*D Whether the person (s) who are not the party in the suit and are living in the suit premises in their own rights can be directed to leave the suit premises?.*

No such substantial question of law has arisen either from the pleadings or in terms of the oral arguments addressed before this Court.

This appeal is dismissed in limine.

**CM No. 12260/2007 (under Order 5 Rule 20 CPC)**

This application has become infructuous in terms of order dated 17.01.2008.

**CM No.15967/2004 (for stay)**

In view of the order passed in main appeal, this application has also become infructuous.

**INDERMEET KAUR, J.**

JANUARY 20, 2011  
A