

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

% Judgment delivered on: 20.04.2011

+ **RSA No.395/2006**

SHRI TILAK RAJ

.....Appellant

Through: Mr. R.K. Shukla, Advocate.
Versus

SMT. KAUSHALYA & ORS

.....Respondents

Through: Mr. L.K. Singh, 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 appeal has impugned the judgment and decree dated 05.09.2006 which had endorsed the findings of the trial Judge dated 30.09.2004 whereby the suit filed by the plaintiff Tilak Raj seeking possession of the suit property i.e. property bearing No. 1289, Mohalla Ghasian, Pan Mandi, Sadar Bazar, Delhi along with damages had been dismissed.

2 The case of the plaintiff is that at present he is a co-sharer and in exclusive possession of the aforementioned suit property. Jamuna Devi was the co-sharer of this property; in terms of her Will dated 03.08.1992, she had bequeathed her share to the plaintiff. Jamuna Devi was otherwise in exclusive possession of this property. After her death, the aforementioned property came to the share of the plaintiff in terms of her registered Will. In January 1996, since

defendant No. 1 (elder brother of the plaintiff) was having strained relations with his wife and son, the plaintiff permitted his brother to occupy a portion of this property; defendant had agreed to vacate it on demand. In spite of legal notice dated 05.02.1997, defendant No. 1 had failed to vacate the suit property. Present suit was accordingly filed.

3 The defendant contested the suit. It was stated that the plaintiff is only a co-sharer in the suit property having obtained his title from Jamuna Devi, he is not the exclusive owner; the defendant is also a co-sharer in the suit property. Suit is liable to be dismissed as the bequest in terms of the Will dated 03.08.1994 can only be qua the share of the testator Jamuna Devi; she could have bequeathed only her co-share; she could not have bequeathed the entire suit property. Suit is liable to be dismissed.

4 From the pleadings of the parties, the following five issues were framed:-

- 1. Whether the plaintiff is entitled to the decree of possession of the suit premises? OPP*
- 2. Whether the plaintiff is entitled to the decree of Rs.18,000/- for damages? OPP*
- 3. Whether the plaintiff is entitled to the damages/mesne profit, if yes, at what rate and for what period? OPP*
- 4. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD*
- 5. Relief.*

5 Oral and documentary evidence was led. Two witnesses were examined on behalf of the plaintiff and three witnesses were examined on behalf of the defendant. While disposing of issue No.

1, the Will of Jamuna Devi dated 03.08.1992 was examined. The
RSA No.395/2006

Court disbelieved the document; it was held that Jamuna Devi was otherwise signing documents; her thumb impression on the disputed Will raised a doubt on the veracity of the document; further the testator could not bequeath the entire property as she was admittedly only a co-sharer in the suit property. The suit of the plaintiff was dismissed.

6 This was affirmed in the second appeal.

7 This is a second appeal. It had been admitted and on 04.02.2011, the following substantial question of law was formulated:-

“Whether the registered Will of Jamuna Devi Ex. PW-2/A dated 03.08.1992 had been misconstrued? IF so, its effect? ”

8 On behalf of the appellant, it has been urged that the Will stood adequately proved; the Will has been proved as Ex. PW-2/A and the attesting witness to the Will (PW-2) had on oath stated that this Will had been thumb marked by Jamuna Devi in his presence. The valid requirement of a Will stood duly proved. It could not have been disregarded.

9 Arguments have been rebutted. It is pointed out that even assuming that the Will stood adequately proved, the testator Jamuna Devi could have bequeathed only that portion which was owned by her. Admittedly she was a co-sharer and she could not have bequeathed the entire property. The defendant is also a co-sharer.

10 It is not in dispute that the plaintiff and the defendant are real brothers. They are sons of one Chottey Lal. This property had originally been in the name of Chedhi Lal, the great grandfather of

the parties. Chedhi Lal have three issues of whom Jamuna Devi was the daughter in law of his pre-deceased son. Chottey Lal was the father and Chedhi Lal was the grandfather of the plaintiff. Even assuming that Will dated 03.08.1992 had bequeathed a portion of this property (one-share) to the plaintiff, the defendant was also a co-sharer in terms of his right of inheritance claimed from Chottey Lal (who was the son of Chedhi Lal). The property is also admittedly undivided; it has not been partitioned. The case of the defendant all along was that he was living in this suit property since his childhood. Contention of the plaintiff on the other hand was that the defendant was living in suit property No. 1286 and the Electoral Roll Ex. PW-4/1 has evidenced this factum. This document had been examined by the courts below. In fact the entire oral and documentary evidence had been adverted to by both the courts below to return a finding that a co-sharer cannot ask for possession from an other co-sharer. Admittedly, both the parties are co-sharers in the suit property. Suit property has not been partitioned. Without relief of partition, of which particular portion the plaintiff was claiming possession has not been detailed.

11 Being only a co-sharer he not entitled for possession of the entire suit property. The legal notice dated 05.02.1997 has been proved as Ex. PW-1/1; it was stated that the defendant is a licensee and his license had been terminated vide the aforementioned notice. This has been denied in the reply dated 19.02.1997.

12 Be that as it may, it is not in dispute that the defendant is also a co-sharer of the suit property and the plaintiff is not the exclusive owner of the suit property. This fact had been admitted

by the plaintiff in her plaint. In this view of the matter, the property not having partitioned and no specific share having been allotted to the plaintiff, the question of seeking possession of the suit property from the defendant did not arise. Both the courts below had rightly held so.

13 Learned counsel for the appellant has placed reliance upon a judgment of the High Court of Punjab & Haryana reported in AIR 1984 P & H 58 Ajmer Singh Vs. Shamsher Singh & Others to support his submission that the suit by a co-owner seeking possession is maintainable. There is no doubt to this proposition; this was against a trespasser. In the present case, the plaintiff is claiming possession against an other co-sharer; the property is also undivided. Reliance placed upon the judgment reported in AIR 1991 Calcutta 405 Sri Bhadreswar Pandit & Others Vs. Smt. Puspa Rani Pandit is also misplaced. This is clearly not a case of 'no evidence'. Both the courts below had correctly appreciated the evidence and had drawn a conclusion that the suit is liable to be dismissed.

14 Substantial question of law is answered in favour of the respondent and against the appellant. There is no merit in this appeal. Dismissed.

(INDERMEET KAUR)
JUDGE

APRIL 20, 2011
A