

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

+ C.R.P. 212/2013

% **JULY 24, 2014**

TARA DEVI Petitioner

Through: Mr.S.K.Bhalla, Advocate.

VERSUS

PRAHLAD RAI Respondent

Through: Mr.R.P.Prakash, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Section 115 Code of Civil Procedure, 1908 (CPC) impugns the order of the trial court dated 11.9.2013 by which the trial court has disallowed the application for amendment filed by the petitioner/defendant/counter-claimant to the written statement/counter-claim. By the amendment application, the petitioner/defendant/counter-claimant sought to claim the relief of possession of the six wooden boxes/*pattas*, as shown in red colour of the site plan in the shop no.5329, Gali Petiwali, Ghas Mandi, Gandhi Market, Sadar Bazar, Delhi.

2. Certain facts are required to be stated and understood before dealing with this petition, and which are stated hereinafter, but at the outset, at the request of the counsel for the petitioner, this petition under Section 115 CPC is converted into a petition under Article 227 of the Constitution of India, and which I am entitled to do so because heading of the petition is immaterial and substance has to be seen vide judgment of the Supreme Court in the case of *Municipal Corporation of Delhi Vs. R.P.Khaitan & Anr. 79 (1999) DLT 555 (SC)*.

3. Respondent originally was the plaintiff in a suit for injunction as regards the six wooden boxes. The dispute pertains to the six wooden boxes which are lying in the shop no.5329. The respondent/erstwhile plaintiff/defendant in the counter-claim had claimed that he should not be dispossessed from the six wooden boxes which are being used by him and lying in the shop no.5329. In this suit there was an interim order directing the respondent/erstwhile plaintiff/defendant in the counter-claim to pay certain interim charges for use of the wooden boxes. The respondent/erstwhile plaintiff/defendant in the counter-claim, thereafter, withdrew the suit and claimed that since the interim order for direction of payment of charges was made in his suit for injunction, which no longer

continued, he was no longer liable to pay the charges. I may note that the suit was filed in the year 1992 and it was withdrawn by the respondent/erstwhile plaintiff/defendant in the counter-claim, in the year 2005. It is thereafter that the present counter-claimant/erstwhile defendant/now plaintiff moved the subject application for amendment of the counter-claim to seek relief of possession and mesne profits.

4. The case of the petitioner/counter-claimant/now plaintiff is that the respondent herein was not a tenant, but he was given the six wooden boxes on leave and licence basis, and which boxes are placed inside the shop. It is the business of the counter-claimant and before her of her deceased husband to give out wooden boxes for storage to various traders who come to the city of New Delhi on daily basis. These traders use the boxes to keep their purchases and when they go away from the city of New Delhi, they vacate the wooden boxes after paying the daily charges/*bhadas*. In sum and substance these boxes are like ‘vaults’ for storage of items purchased by traders on payment of charges for use of the boxes.

5. A reading of the application for amendment filed by the present petitioner shows that the basis given for seeking amendment is not wholly correct and only partially correct, because, the petitioner for seeking

amendment seems to rely upon the entitlement pursuant to the interim order passed in the suit for injunction of the respondent-erstwhile plaintiff, when really the cause of action and entitlement of the petitioner/counter-claimant/now plaintiff is that since the six wooden boxes were only given on daily storage basis to the respondent herein, and since the respondent is continuing to use the same, the respondent is liable to pay the charges of user of these boxes and also give them back to the petitioner. I am informed with respect to the interim order passed in the suit of the respondent for injunction, only for one year in and around 1993, the respondent has paid charges, but from 1993 till date i.e for over 20 years, the respondent is using the six wooden boxes without paying any charges to the petitioner-widow. Obviously, this is height of dishonesty to say the very least. The petitioner, therefore is, surely, entitled to charges on account of illegal user and non-payment of user charges by the respondent herein of the six wooden boxes kept in the shop owned by the petitioner herein, and for which purpose, the amendment application was filed and which has wrongly been disallowed by the trial court.

6. Surely, for illegal user, a person in illegal possession is liable to pay the necessary charges, whether called damages or mesne profits or any other

nomenclature. The impugned order of the court below dismissing the amendment application for claiming charges is therefore illegal and is hence set aside, subject however, to the observation that the claim of charges will only be for a period of three years prior to the filing of the application for amendment because charges prior to the three years would have become barred by limitation.

7. That takes us to the second aspect as to whether the petitioner/counter-claimant/now plaintiff on account of delay is barred seeking amendment of the counter-claim to claim the relief of possession. Learned counsel for the respondent states that the subject suit was filed in the year 1992, thereafter, the counter-claim was also filed in the year 1992, and therefore the amendment application which is filed on 23.1.2012 is barred by delay and laches. In support of this proposition, reliance is sought to be placed upon a judgment of learned Single Judge of this Court in the case of ***Bal Bhagwan Vs. Balbir Singh & Ors. 189 (2012) DLT 258***. It is also argued that besides the aspect of delay and laches, allowing the amendment will cause to convert the nature of the suit into a suit for possession from a counter-claim of perpetual and mandatory injunction.

8. The arguments urged on behalf of the respondent herein may appear to have some reasoning at the first blush, however, when we examine the arguments in depth, the arguments are totally misconceived. Firstly, the form of relief in the plaint is immaterial and if we see the present counter-claim, the petitioner herein/counter-claimant has already prayed for mandatory injunction. Mandatory injunction is really in form, a claim for possession, and in fact, as against a leave and licensee there need not be a prayer for possession and mandatory injunction is sufficient vide the judgment of the Supreme Court in the case of *Sant Lal Jain Vs. Avtar Singh (1985) 2 SCC 332*. Therefore, the application for amendment is in a way futile, however, I would not like to dismiss the same on a technical ground of limitation or form, inasmuch as, once in fact, the relief in the counter-claim to claim back possession of the six wooden boxes from the present respondent, changing of the existing relief of mandatory injunction to a suit for possession in my opinion should not make any difference because it is really a change only in the heading without changing of the substance of the cause of action which continues to remain the same that the respondent was only given the boxes for being used during the day and for which he was paying daily user charges.

9. So far as the judgment of a learned Single Judge of this Court in the case of *Bal Bhagwan (supra)* is concerned, no doubt it has rightly observed that delay and laches is a ground to dismiss an application for amendment, however, the facts of each case have to be seen in order to determine whether there is any delay and laches. When we look at the averments in the present counter-claim, it is clear that the present petitioner has used specific words in the counter-claim that the respondent had the six wooden boxes only on leave and licence basis. It is specifically stated in the counter-claim that the entitlement of the respondent herein was to use the six wooden boxes only during the day on payment of charges. It was denied that the respondent herein had any tenancy rights in the boxes. It is specifically stated in the counter-claim that the petitioner/counter-claimant is in exclusive possession of the shop in which the six wooden boxes are lying. This averment of exclusive possession was made because the respondent/now defendant was said to be a leave and licensee. Therefore, once the issue is looked at from the point of view of only of a proper heading of the suit being a suit for mandatory injunction or a suit for possession, and only substance is to be seen, the sum and substance of the suit is the illegal user of the six wooden boxes by the respondent herein and the object of the suit is to stop the illegal use by the respondent and to claim

charges for user till the six wooden boxes are continuing to be used by the respondent/plaintiff.

10. Though in my opinion, petitioner is well advised of not asking specifically for the relief of possession and seek only the relief which is claimed as mandatory injunction in view of the judgment of the Supreme Court in the case of *Sant Lal Jain (supra)*, however, this aspect is to be looked into by the petitioner. At this stage, on the request of the counsel for the petitioner, in the amendment application the word 'possession' is deleted and substituted by the word 'mandatory injunction' and which prayer for mandatory injunction already exists in the present suit. As already stated vide judgment of the Supreme Court in the case of *Sant Lal (supra)* that a suit for mandatory injunction lies against a leave and licence and hence the oral prayer of petitioner is accepted and petitioner will make and is entitled to make all requisite and consequential amendments to the counter-claim.

11. No doubt, all types of cases come up before Courts. In some cases there is a reasonable point to be urged, in some others strong issues, however, there are cases in which gross injustice is caused by one party to another. This is one such case where the widow/petitioner is being harassed by the respondent, when the nature of the user of the boxes makes is clear

that there cannot be tenancy rights, and there is only a leave and licence right. Even with respect to the leave and licence right, the respondent is not paying any charges, but is continuing to use the boxes from at least around 1995 without payment of any charges viz for a period of now 20 years.

12. In view of the aforesaid and considering the peculiar facts of this case, the impugned order dated 11.9.2013 dismissing the amendment application filed by the petitioner/counter-claimant is set aside and the application for amendment is allowed with observations that the word 'possession' used in the application for amendment will be treated as the expression 'mandatory injunction' and the mesne profits which would be claimed will now be claimed for three years prior to the filing of the application of amendment. The petitioner can make all necessary amendments to the counter-claim for such purpose.

13. The petition is also allowed with costs of Rs.50,000/- to be paid by the respondent for harassing a widow/petitioner because now as many as 20 years, no charges are being paid for the six wooden boxes and noting that the respondent who had filed the suit for injunction had withdrawn his suit for injunction unconditionally only so as to frustrate the interim order of the court directing payment of the interim charges for user of the six wooden

boxes. Payment of costs by the respondent shall be a conditioned precedent to the respondent pursuing his defence in the counter-claim.

VALMIKI J. MEHTA, J.

JULY 24, 2014
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