

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

+ **RSA No. 229/2016**

% **22nd August, 2016**

SH. BAIJ NATH Appellant

Through: Mr. R.L. Kohli, Advocate.

versus

MURTI BHAGWAN JAGANNATHJI MAHARAJ & ANR. Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal is filed under Section 100 of the Code Of Civil Procedure, 1908 (CPC) impugning the concurrent Judgments of the courts below; of the Trial Court dated 8.9.2014 and the First Appellate Court dated 11.5.2016; by which the suit for mandatory injunction etc of the respondent no.1/idol of the temple has been decreed against the appellant/defendant/licensee. The following decree has been passed by the trial court:-

“It is ordered that the suit of the plaintiff is partly decreed. The plaintiffs are held entitled to the decree of mandatory injunction and the defendant is directed to remove himself and his goods from the suit property i.e. tin shed covered with plastic tirpal and the back portion of the garage as shown in red and yellow colour in the site plan annexed with the plaint i.e. Ex.PW1/4. The plaintiffs are held entitled to decree of perpetual injunction and the defendant

and his representatives are hereby restrained from making any addition/alteration in the suit property. The plaintiffs are also held entitled to the mesne profits at the rate of Rs. 1,000/- per month from 21.09.2007 till the defendant hands over the possession of the suit property to the plaintiffs. Plaintiffs are also entitled to the cost of the suit.”

2. A reading of the judgments of the courts below show that the case of the respondent no.1/plaintiff no.1/idol was that the appellant/defendant was appointed as a Chowkidar and was allotted a small tin shed admeasuring 10 X 4 feet to reside in the temple. He was granted a license to stay in this tin shed in terms of the Agreement dated 20.9.1986. As the appellant/defendant failed to perform his duties to the satisfaction of the respondent no.1/plaintiff no.1, therefore the license was terminated by a Legal Notice dated 10.10.2006, and thereafter the subject suit came to be filed.

3. Appellant/defendant claimed that the suit was liable to be dismissed as the respondents/plaintiffs are guilty of concealment of the fact that an earlier suit for declaration was filed which was dismissed in default and the appeal against the same was also dismissed. It is pleaded that the appellant is in possession for the last 40-50 years i.e since 1963 and the respondents/plaintiffs have forged documents with respect to the license of the appellant/defendant in the suit property. The ownership of the respondent no.1/plaintiff no.1 of the suit property was also denied. Suit was prayed to be dismissed.

4. After pleadings were complete trial court framed the following issues:-

- “(1) Whether the plaintiff is entitled to the decree of mandatory injunction, as prayed for? OPP
- (2) Whether the plaintiff is entitled to the recovery of damages, as prayed for? OPP
- (3) Whether the plaintiff is entitled to the decree of permanent injunction, as prayed for? OPP
- (4) Whether the plaintiff is entitled to the decree of mesne profit, if so, at what rate? OPP
- (5) Whether the plaintiff has no locus-standi to file the present suit? OPD
- (6) Whether the suit filed by the plaintiff is bad for non-joinder of necessary parties? OPD
- (7) Whether the plaintiff has not paid the proper Court fees, therefore, the suit filed by him is liable to be rejected under Order 7 Rule 11 CPC? OPD
- (8) Whether the suit filed by the plaintiff does not disclose any cause of action, hence, liable to be rejected under Order 7 rule 11 CPC? OPD.
- (9) Relief.”

5. The main issue relates to the aspect as to whether the respondent no.1/plaintiff no.1 is the owner of the suit property and as to whether the appellant/defendant was a licensee in the same. Another issue to be examined is as to what is the effect of the earlier suit for declaration filed by the respondent no.1/plaintiff no.1 being dismissed in default.

6. At this stage, I would seek to refer to paras 5, 6, 8, 9, 10 and 11 of the judgment of the first appellate court which deal with the issues at hand, and these paras read as under:-

“5. It has been contended that plaintiff has suppressed the material facts from this court regarding decision passed by Hon'ble High Court of Delhi in RSA no. 71/2004 titled as “Mehant Sharda Ram vs. DDA”. Therefore, plaintiff is not the owner of the suit property as admitted by PW-1 Mahant Jai Kishan Sharma in his cross examination. Ld. Trial court has not considered the statement of PW-3 Sh. Om Prakash who has testified the document Ex.PW1/3 was executed wherein, the defendant was termed as tenant. Suit for mandatory injunction is not maintainable as title of the plaintiff over the suit property is under cloud. Reliance is placed upon “Anathula Sudhakar Vs. P. Buchi Reddy IV(2008) SLT 724”. The Ld. Trial Court has wrongly appreciated the decision passed in “Sant Lal Jain Vs. Avtar Singh, AIR 1985 SC 857” as defendant was never the licensee over the suit property. Even for invoking the provision of estoppel u/s 116 of Evidence Act, the plaintiff must prove its title. Reliance placed upon “Kanchan Kapoor vs. Sarwan Kapoor” 216 (2015) DLT 136. The plaintiff has not come to the court with clean hands. Therefore, suit is liable to be dismissed. Reliance is placed upon **“Amar Singh vs. Union of India” IV (2011) SLT 179** and **“Swarn Singh vs. Surinder Kumar” 2012 IAD (Delhi) 266**. the plaintiff failed to prove its title, therefore plaintiff is to be non-suited even if title set up by defendant is found against them. Reliance is placed upon **“Union of India vs. Vasavi Co-operative (2014) 2 SCC 269**. The plaintiff failed to prove relevant documents and onus was on the plaintiff to prove the same, therefore, adverse inference is to be drawn against the plaintiff. Reliance is placed upon **“Bansidhar ganga Pd. Agency vs. Chaman Lal” 1975 RLR 289**.

6. Per contra, counsel for respondent has contended that Ld. Trial Court has rightly passed the impugned judgment as defendant was inducted as licensee over the suit property and after termination of his licence, defendant has become unauthorized occupant. Therefore, Ld. Trial Court has rightly decreed the suit property and issue direction to the defendant to vacate the suit property and also granted mense profit to the plaintiff. There is no suppression of facts as alleged. Plaintiff is the owner of the suit property and Ld. Trial Court has recorded categorical findings in this regard. This appeal is devoid of merits and deserves to be dismissed.

XXXXX

8. It may be noted that the defendant was inducted as licensee over the suit property in terms of document Ex.PW1/3. Even if it is presumed for the sake of arguments that PW-3 Om Prakash has testified that

defendant was in the capacity of tenant over the suit property but such testimony can not re-write categorically terms of Ex. PW 1/ 3 whereby the defendant has been inducted as licensee over the suit property. No evidence led on record by defendant that he was inducted as tenant over the suit property.

9. So far as the contention of the defendant that title of the plaintiff over the suit property is under cloud, therefore, suit for mandatory injunction is not maintainable. I find no substance in the said contention in as much as the defendant was inducted as licensee in terms of Ex.PW1/3 and being licensee, he has no right to challenge the title of the plaintiff as per mandate of section 116 of Indian Evidence Act. The reliance placed upon Kanchan Kapoor is misplaced as in that case the finding recorded by civil court regarding ownership were held to operate as res-judicata in pleadings under DRC Act but in the present case no such findings against plaintiff is on record. The RSA 71/2004 titled Sharda Ram vs. DDA pertains to an appeal whereby suit was dismissed in default and plaintiff is also owner as detailed in para 18 of the impugned judgment.

10. So far as ratio of Vasavi (supra) is concerned in that case plaintiff therein failed to prove his title in suit for declaration. But in the present case, plaintiff has proved that licence of defendant was created in terms of Ex. PW 1/ 3, therefore, facts of this appeal are distinguishable from the facts of that case. In the same manner reliance placed upon Bansidhar (supra) is misplaced as plaintiff proved the licence of defendant on record. The ratio of A. Sudhar Kumar (supra) is also to the effect that, in case, serious disputes are there in respect of title only then suit for injunction is not maintainable. But herein the licence was cancelled, therefore, facts of the case are distinguishable and as such, no applicability to the present case. Therefore, suit for mandatory injunction is maintainable against the defendant as such this contention is hereby rejected.

11. So far as suppression of material facts is concerned, the ld. trial court observed in para 17 of the impugned judgment that the said fact cannot be termed as material. The plaintiff is seeking possession from the defendant in the capacity of the landlord and he has proved the better title then that of the defendant. Non-disclosure of the previous litigation between plaintiff and DDA regarding ownership of suit property has no bearing on the facts of the case as plaintiff inducted the defendant as licensee and sought possession. Therefore, it cannot be termed that plaintiff has suppressed the material fact from this court. The ratio of case law Amar Singh (supra) and Swarn Singh is distinguishable to the facts of the present case. Therefore, this contention is also rejected.

From the abovesaid discussion, I have the opinion that there is no substance in this appeal and being devoid of merits deserves to be dismissed and is hereby dismissed. No order as to cost. Decree sheet be

prepared accordingly. Trial Court Record be sent back alongwith copy of the judgment.

Appeal file be consigned to Record Room.” (underlining added)

As regards the aspect of the appellant/defendant being a licensee, it is seen that the appellant/defendant had executed the document Ex.PW1/3 in which the appellant/defendant has specifically written that he has been inducted as a licensee in the suit property.

7. In my opinion, both the courts below have rightly held that the appellant/defendant was a licensee and that once the appellant/defendant is a licensee in terms of Ex.PW1/3, then by virtue of Section 116 of the Indian Evidence Act, 1872 appellant/defendant was estopped from questioning the title of the respondent no.1/plaintiff no.1/idol. Also, the first appellate court has rightly noted that the earlier suit was dismissed in default, and therefore, if in the earlier suit respondent no.1/plaintiff no.1 failed to prove title would not mean that the present suit has to be dismissed because in the present suit title was proved on account of the fact that the appellant/defendant had executed Ex.PW1/3 admitting that he was a licensee in the suit property. Also, the first appellate court has rightly noted that merely because in the cross-examination of PW-3 it is stated that the appellant/defendant was inducted as a tenant, however, that was only said by virtue of Ex.PW1/3, but the document Ex.PW1/3 talks of the

appellant/defendant being a licensee and not a tenant, and therefore oral testimony cannot change the written terms of the document Ex.PW1/3.

9. Learned counsel for the appellant/defendant argued that the suit for injunction was not maintainable and the respondents/plaintiffs had to file a suit for possession especially qua the illegally encroached portion, however I cannot agree with the arguments urged on behalf of the appellant/defendant because a licensee has only a right to enter into the premises to use the same and the licensee does not have 'possession' of a licensed property vide judgment of the Supreme Court in the case of *Sant Lal Jain Vs. Avtar Singh AIR 1985 SC 857*. So far as the portion said to be in illegal possession of the appellant as shown in yellow colour in the site plan is concerned, in my opinion, a suit for mandatory injunction will suffice inasmuch as a person if because of a license enters into a possession and thereafter illegally expands his possession, his possession of the expanded portion will not mean that any entitlement exists of such a person to occupy the illegal portion in a manner that he cannot be evicted therefrom unless a suit for possession is filed. In my opinion, to permit such tactics and stands would be to give premium to dishonesty and which this Court cannot accept.

10. In view of the above, no substantial question law arises for this second appeal to be entertained under Section 100 CPC. Dismissed.

AUGUST 22, 2016/ib

VALMIKI J. MEHTA, J