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HIGH COURT OF DELHI AT NEW DELHI

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C.R.P. 147/2015 & CM APPL.21965/2015

Pronounced on: 19th April, 2016

MR. HABIL KHORAKIWALA & ANR.Petitioners

Through: Mr. T.K. Ganju, Senior Advocate with
Mr. Saman Ahsan, Advocate,
Mr. Abhishek Bhardwaj, Adv. &
Mr. Manik Ahluwalia, Adv.

Versus

DR. SARA TAIZOON KHORAKIWALARespondent

Through: Mr. Sumeet Lall Advocate with
Ms. Aditi Kashypal, Adv. &
Mr. Ashmi Mohan, Adv.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This is a revision petition filed by the petitioners/defendants against the order dated 21.09.2015 passed by the learned Additional District Judge, Saket in Civil Suit No.39 of 2015, titled *Dr. Sara Taizoon Khorakiwala vs. Habil Khorakiwala & Anr.* by virtue of which the learned Additional District Judge dismissed the application of Habil Khorakiwala, defendant No.1 under Order VII Rule 11 CPC.
2. In order to appreciate the facts the parties will be referred by their names as were originally before the trial Court. Dr. Sara Taizoon filed a suit for mandatory injunction against Habil Khorakiwala

and Wockhardt Limited, a pharmaceutical company incorporated under Indian Companies Act. The averments made in the plaint were that the property situated on Plot No.190, Sarva Hitkari Co-operative House Building Society (now called Kailash Hills, East of Kailash, New Delhi-110065) was owned by Late Mr. George Mathen, that is, father of Dr. Sara Taizoon, the respondent herein and wife of one Taizoon Farkuddin. Habil Khorakiwala is the son of Late Shri Farkuddin while as Wockhardt Limited is a company of which he is not only the founder but also the Chairman and Director. It was averred that George Mathen had during his lifetime bestowed the suit property to his daughter, Dr. Sara Taizoon. George Mathen died intestate on 20th August, 1987 leaving Dr. Sara Taizoon and her brother as the sole survivor. It is further averred that it was the last wish of the father of Dr. Sara Taizoon that the entire property should be owned by Dr. Sara Taizoon and in deference to his wishes, her brother relinquished his right, title and interest in the suit property in favour of Dr. Sara Taizoon vide Relinquishment Deed dated 12.02.2013. Dr. Sara Taizoon got her name mutated in the records of the DDA and on 28th July, 2014, the property was also converted by her from leasehold to freehold and a Conveyance Deed was executed by the DDA on 28th August, 2014 and thus, she became the owner of the property. Habil Khorakiwala is the brother-in-law of Dr. Sara Taizoon. It is stated that as there was a close family relation between Dr. Sara Taizoon and Habil Khorakiwala, therefore, the

former permitted the latter to gratuitously use the suit property for residential purposes only in the year 1988. It has been alleged that Habil Khorakiwala is presently using the suit property as a guest house of company Wockhardt Limited which is in violation of the permission granted to him for residential use. Dr. Sara Taizoon had stated that she had revoked the permission granted to Habil Khorakiwala in the year 2013 as she had requested him orally to vacate the suit premises by removing himself from the suit property. This was not done by Habil Khorakiwala and it is at that stage that Dr. Sara Taizoon claims that she learnt about the user of the property as a guest house by Wockhardt Company of which Habil Khorakiwala was the Chairman-cum-Managing Director.

3. As the property was not vacated, a legal notice dated 27th October, 2014 came to be issued by Dr. Sara Taizoon requesting Habil Khorakiwala to vacate and handover the suit property within 15 days. A reminder followed on 13th December, 2014 but as Habil Khorakiwala and the Company did not oblige, Dr. Sara Taizoon filed a suit for mandatory injunction against both of them praying therein that they should be directed to remove themselves from the suit property. She also sought *mesne* profits at the rate of Rs.10,96,607/- from 01.11.2014 to 05.02.2015 and thereafter at the rate of Rs.3 lacs per month till the property was actually vacated after holding the inquiry under Order 20 Rule 12 CPC. Interest at the rate of 15% per annum was also claimed.

4. Habil Khorakiwala and Wockhardt Limited filed their written statement on 29th June, 2015 in which preliminary objections with regard to the maintainability of the suit were raised which need not be gone into at this stage. Prior to filing of the written statement an application under Order VII Rule 11 CPC was filed on 15th April, 2015. In this application, the averments were made for rejection of the plaint on the ground that it is essentially a suit for possession which has been devised as a suit for mandatory injunction and therefore, being a suit for possession, the court fees on the market value of the property ought to have been affixed and paid. It was contended as the suit has not been valued correctly therefore, the plaint is liable to be rejected.
5. The learned trial Court heard the arguments and rejected the application of Habil Khorakiwala by holding that as there was an allegation made in the plaint that he was gratuitously permitted to use the property, therefore, essentially he was a licensee and keeping in view the relationship of the parties, the suit for mandatory injunction was maintainable and the suit had been properly valued and court fees paid thereon was sufficient. The learned Judge had also specifically observed that the ratio laid down by the Apex Court in *Sant Lal vs. Avtar Singh*, 1985 (2) SCC 332 clearly laid down that a suit for mandatory injunction was permissible where the licence stood terminated and the title of the plaintiff was not in dispute. This judgment of *Sant Lal*'s case (supra) was relied upon in number of other judgments of the Delhi

High Court in *Gian Chand v. Ram Chander*, (RSA No.69/2014) and *Puneet Chadha v. B.K. Chadha* (CRP No.152/2009 decided on 01.12.2009) holding that such cases were governed rightly under Section 7 sub-rule (iv) of the Court Fees Act and not by Section 7 sub-Clause (v) and therefore, the suit had been properly valued. The learned trial Judge also held that the suit which was filed by Dr. Sara Taizoon was not a suit for possession and, therefore, the judgments especially the judgment passed in *Anathula Sudhaka vs. P. Buchi Reddy & Ors.*; (2008) 4 SCC 594, cited by the learned counsel for Habil Khorakiwala and Wockhardt Limited, was not relevant.

6. Feeling aggrieved by the rejection of the application of defendant No.1, Habil Khorakiwala under Order VII Rule 11 CPC, the present revision petition has been filed.
7. I have heard Mr. T.K. Ganju, the learned senior counsel for the petitioner, Habil Khorakiwala and Shri Sumeet Lall, the learned counsel for Dr. Sara Taizoon, respondent No.1/plaintiff. I have also gone through the record carefully.
8. Mr. Ganju, the learned senior counsel has contended that the suit of Dr. Sara Taizoon was essentially a suit for possession and could not be treated as a suit for mandatory injunction simpliciter. The reason for this is that according to the averments made, Habil Khorakiwala is in occupation of the suit property since 1988 and the occupation of the property for such a long period of time could never be treated to be only as a temporary permission to use the

premises. Mr. Ganju, the learned senior counsel also referred to various other facts, namely, the allegation of Habil Khorakiwala being in unauthorized and illegal possession of the suit property. In the notice dated 27th October, 2014, there was no mention of the word 'licence' rather it was alleged that Habil Khorakiwala is an unauthorized occupant and lastly, the plaintiff Dr. Sara Taizoon had claimed *mesne* profits/damages under Order 20 Rule 12 to the tune of Rs.3 lacs from a cut off date which could be claimed only in the event a person was in unauthorised occupation.

9. It was also contended by Mr. Ganju, that the learned trial Court has wrongly placed the reliance in *Sant Lal's case* to arrive at an erroneous conclusion of dismissing the application under Order VII Rule 11 CPC filed by Habil Khorakiwala. It was stated that in *Sant Lal's case*, the question of valuation of the suit for the purpose of court fee and jurisdiction was not an issue and therefore, the said judgment could not be treated to be as a precedent. It was also stated that so far as the reliance by the learned trial Court in *Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack De Sequeira*, (2012) 5 SCC 370; *Shri Gian Chand Vs. Shri Ram Chander*, 209 (2014) DLT 336; *Puneet Chadha vs. B.K. Chadha*, *CRP No.152/2009*, decided on 01.12.2009 and *Sunil Sharma vs. Smt. Uma Sharma (RSA 166/2004)*, are concerned, that was also unwarranted and illogical. It is contended that these judgments are distinguishable from the facts of the present case and, therefore, no

reliance could be or ought to have been placed by the learned trial Judge on the same.

10. It was contended by Mr. Ganju, the learned senior counsel that it is well settled legal proposition of law that for the purpose of determination of the valuation and jurisdiction of a suit, the averments made in the entire plaint will have to be seen. Seen in this context the plaint in question is essentially a suit for recovery of possession which has been couched in the language of suit for mandatory injunction so far as the prayer is concerned.
11. It has been contended that by doing so, Dr. Sara Taizoon cannot evade the payment of court fees. More particularly when she has alleged in the plaint that Habil Khorakiwala was a trespasser in respect of the suit premises. Reliance in this regard was placed by Mr. Ganju on a judgment of the Supreme Court in *Anathula Sudhakar vs. P. Buchi Reddy & Ors.* (2008) 4 SCC 594 as well as full Bench decision of this Court in *Jugal Kishore vs. Des Raj Sethi*, 4 (1968) DLT 571 in support of this submission.
12. It has been further contended by Mr. Ganju, the learned senior counsel that the impugned judgment is perverse and not sustainable in the eyes of law because if the property would have been valued according to the valuation in a suit seeking a decree of eviction, the value of the suit property would be nearly Rs.5 crores keeping in view circle rates as well as cost of construction and that being the position, the entertainability of the suit by the learned ADJ itself was untenable in law.

13. The learned senior counsel next contended that the reliance which was sought to be placed by the learned ADJ on the judgment of the Apex Court in *Sant Lal vs. Avtar Singh*, 1985 (2) SCC 332 and *Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack De Sequeira*, (2012) 5 SCC 370 in order to hold that the suit was correctly valued for the purpose of court fees was not legally sustainable in the eyes of law. It was contended that the learned ADJ has blindly applied the law laid down in both these judgments so as to entertain a suit for mandatory injunction when it was essentially a suit for possession without realizing that the facts of *Sant Lal's case* as well as *Maria Margarida Sequeira Fernandes's case* were distinguishable.
14. In *Sant Lal's case* the status of the respondent was admittedly of a licensee and, therefore a suit for mandatory injunction was held to be maintainable. Similarly, in *Maria Margarida Sequeira Fernandes's case* also the defendant/respondent was a caretaker in the suit property and was treated to be a licensee and therefore, the suit for mandatory injunction for retrieval of possession was held to be maintainable.
15. I have carefully considered the submissions of the respective sides and gone through the record.
16. It is not in dispute that where there is a close relationship between the plaintiff and the defendant or where admittedly the defendant is a licensee either by written agreement or by other credible evidence brought by the plaintiff, a suit for mandatory injunction would be

maintainable provided there is some proximity of time in bringing the suit after revocation of the license. In this regard, the learned trial Court has referred to the judgments of *Sant Lal vs. Avtar Singh*, 1985 (2) SCC 332; *Maria Margarida Sequeira Fernandes & Ors. vs. Erasmo Jack De Sequeira*, (2012) 5 SCC 370; *Shri Gian Chand Vs. Shri Ram Chander*, (RSA No.69/2014); *Puneet Chadha vs. B.K. Chadha*, CRP No.152/2009, decided on 01.12.2009 and *Sunil Sharma vs. Smt. Uma Sharma* (166/2004) and there may be many more on the subject because this point is no more *res integra*.

17. But the question which arises for consideration is whether on the strength of these judgments alone without co-relating the facts of the present case that whether Habil Khorakiwala is a licensee or shown to be a licensee in respect of the suit premises, a suit for mandatory injunction is maintainable or is it being done to avoid the payment of court fees on the basis of market value of the suit property of which the possession is sought. It may also be pertinent here to mention that the Supreme Court has deprecated the practice of applying the ratio of a judgment by the Courts without co-relating the facts of the case in which any proposition of law has been laid down with the facts of a case in which such a judgment is sought to be relied upon. It has been observed by the Apex Court that judgment cannot be applied like provisions of statute or by mathematical exaction or blindly without bringing about the co-relation of facts. Reliance in this regard can be placed on *Haryana Financial Corporation & Anr. vs. Jagdamba Oil Mills*

& Anr.; AIR 2002 SC 834 which view has been reinforced in subsequent judgments of *Sumtibai & Ors. vs. Paras Finance & Company*, AIR 2007 SC 3166, *Bharat Petroleum Corporation Limited vs. NR Vairamani*, (2004) 8 SCC 579 and *Sushil Suri vs. CBI & Anr.*; AIR 2011 SC 1713.

18. Coming back to the facts of the present case. A perusal of the plaint by Dr. Sara Taizoon shows that though she has devised the suit as a suit for mandatory injunction but essentially it is a suit for possession. The reason for saying so is on account of the following facts:-

(a) Dr. Sara Taizoon has claimed that she has given gratuitous permission to Habil Khorakiwala to occupy the premises from 1988 and in the meantime she has admittedly perfected her title by getting a Conveyance Deed registered from DDA. The suit has been filed in the year 2014 that is after expiry of almost after 26 years. A person who is in settled peaceful possession of the suit property for as long as 26 years could hardly be said to be in gratuitous possession or as a licensee of the suit property. This is more so that till 2014 there has been absolutely no protest shown by Dr. Sara Taizoon to the occupation of the suit premises by Habil Khorakiwala.

(b) Secondly, Dr. Sara Taizoon has claimed mesne profits under Order 20 Rule 12 CPC. The payment of mesne profits invariably would arise only in cases where a suit for possession is filed by a

party. Therefore, Dr. Sara Taizoon seemed to be knowing at the back of her mind that this is essentially a suit for possession.

(c) The view of seeking a retrieval of possession by way of suit for possession gets further fortified by the contemporaneous conduct of Dr. Sara Taizoon. She has not stated in the notice dated 27th October, 2014 that Habil Khorakiwala was her licensee. On the contrary, the allegation are that Habil Khorakiwala is in unauthorized and illegal possession of the property and further she has sought possession of the property.

(d) It is not disputed by Dr. Sara Taizoon that she learnt after giving notice that a company is in possession and running a guest house. Therefore, she has also impleaded Wockhardt Limited, a pharmaceutical company as defendant No.2 in the suit. This company is admittedly not a licensee. Therefore, a suit for possession will only lie.

19. All these facts are reflected in different parts of the plaint which have been reproduced hereinabove and in the light of *Jugal Kishore's* case (*supra*) the entire plaint has to be read as a whole and to see as to what is the nature of the suit which has been filed by the plaintiff Dr. Sara Taizoon. If done so, it leaves no doubt of any manner that the suit of the plaintiff was essentially a suit for possession and it is only with a view to avoid the payment of court fees on *ad valorem* basis which has to be in terms of Section 7 (v) of the Court Fees Act on the market value of the property that the valuation of the suit has been claimed to be only Rs.200/- for the

purpose of mandatory injunction and a nominal court fees has been paid. If this is permitted to be done then not only it would deprive the revenue of its legitimate source of income but would also give impetus to frivolous litigations as the plaint can be filed by a party seeking recovery of possession in fact without payment of court fees.

20. Therefore, I find merit in the contention of Mr. Ganju, the learned senior counsel that the suit of the plaintiff Dr. Sara Taizoon is essentially a suit for possession and the plaintiff was liable to value the suit on the basis of the market value which certainly cannot be less than circle rate prescribed by the DDA and by *ad valorem* court fees in terms of Section 7 (v) of the Court Fees Act, 1870.
21. Having said so, I also feel that the reliance by the trial Court on the judgment of *Sant Lal (supra)* was totally inappropriate and without appreciating distinction between the facts of the two cases. The judgment in the aforesaid case was not in respect of the issue of valuation of the suit for the purposes of court fees and jurisdiction. The question involved was whether the suit for mandatory injunction was maintainable as the plaintiff was out of possession for a long time. The Hon'ble Supreme Court held inter alia that the relief of mandatory injunction sought by the plaintiff was in substance a relief of possession only and it would not be proper at that stage to direct the plaintiff to reagitate the issue by filing a suit for possession. It was a stage where the decision of the High Court in second appeal was being assailed before the Supreme Court.

The feeling of the court was by holding that the suit for mandatory injunction would not be maintainable, the plaintiff would have relegated to file a suit for possession and this would cause serious prejudice to the plaintiff and therefore, upheld the verdict of the High Court. In the present case, the plaintiff, Dr. Sara Taizoon did not even plead the existence of a license or its termination. In fact, the notice that has been filed along with the plaint simply alleges the petitioners to be in illegal possession and claims re-possession of the same.

22. Similarly, reliance by the trial Judge on *Maria Margarida's* case was also misplaced because of the following reasons. Not only the facts are different but also the question of valuation was not involved. The observations in this case in Para 64 and 65, relied upon by the respondent/plaintiff, have to be construed as per the facts of that case. In that case, the defendant was admittedly only a caretaker of the property having no ownership rights and still was resisting the handing over of the possession to the respondent. In fact, without prejudice even if it is assumed that Habil Khorakiwala being a family member of Dr. Sara Taizoon must be presumed to be a licensee of the suit premises and Wockhardt Limited being a public limited company can by no stretch of imagination be said to be related to the respondent/plaintiff. Since Dr. Sara Taizoon has impleaded Wockhardt Limited as defendant No.2, she was bound to file a suit for possession and cannot merely ask for a mandatory injunction.

23. So far as reliance in case of *Gian Chand v. Ram Chander*, (RSA No.69/2014), *Puneet Chadha v. B.K. Chadha* (CRP No.152/2009 decided on 01.12.2009) and *Sunil Sharma vs. Smt. Uma Sharma* (166/2004) are concerned, in all the three cases the question of valuation of the suit for the purpose of court fees was not involved. The question which was involved was only the form of the suit. Further, in the case of *Sunil Sharma*, the suit was filed for recovery of possession whereas in the case of *Puneet Chadha*, the plaintiff was in joint possession and in the case of *Gyan Chand* the suit was filed by father against his son against whom the allegations were that the sons were harassing the father and threatening to part with possession. The father was claiming the property to be the self-acquired property while as the defence was that it is an ancestral property. They had claimed that the father must pay the court fees as per the market value of the property in respect of which issue was framed and onus was put on him. These judgments, therefore, are not the ratio or any authority to decide the present controversy as to whether the plaintiff who is out of possession can file the suit for mandatory injunction which is essentially a relief in the nature of possession and not value the suit on the basis of market value and thereby avoid not only the court fees but also invoke the jurisdiction of the Court which does not have the pecuniary jurisdiction.
24. For the aforementioned reasons, I feel that the order which has been passed by the learned trial Judge in the instant case suffers

from jurisdictional error and is not sustainable in the eyes of law and accordingly the same is set aside.

25. Since the suit of Dr. Sara Taizoon is for mandatory injunction is essentially a suit for possession, therefore, Dr. Sara Taizoon has to value her suit in terms of Section 7 (v) of the Court Fees Act, 1870 appropriately both for the purpose of court fees as well as jurisdiction. Accordingly, before any order for rejection of the plaint under Order VII Rule 11 (b) CPC is passed by the learned trial Court an opportunity deserves to be granted to the plaintiff/respondent Dr. Sara Taizoon to rectify the deficiency with regard to payment of court fees.
26. With these directions the revision petition of the petitioner is allowed. The parties to appear before the learned trial Court on 2nd May, 2016, when the suit is listed for further directions.

V.K. SHALI, J.

APRIL 19, 2016

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