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DELHI HIGH COURT

*V.B.Gupta J.*

**Davender Lal Mehta v. Sh. Dharmender Mehta & Anr.**

RFA App. No.789/2006 & CM No.17561/2008

(Judgment reserved on: 30th April, 2009, Judgment delivered on:14th May, 2009)

**Suit for injunction - Respondent is in possession as per appellant's own case - Proper remedy for appellant was to file suit for possession with injunction - Suit simpliciter for injunction, is not maintainable - Specific Relief Act S. 41 , Evidence Act S. 58. [Para 22]**

Mr. G.L. Rawal, Sr. Adv. with Mr. Ankur Sethi,  
for the parties.

Adv., Mr. H.S. Arora, Adv.

**V.B.Gupta, J.**

The appellant has filed this appeal against decree and judgment dated 25th September, 2006, passed by Sh. M.K. Gupta, Additional District Judge, Delhi, who vide impugned judgment, dismissed the suit of the appellant.

2. The brief facts of this case are that appellant is the father of respondent No.1 and husband of respondent No.2. He filed the present suit for permanent injunction on 24th September, 1999, on the allegations that, he is owner in possession of property No. D-135, Anand Vihar, New Delhi and this property has been acquired by him from his previous owner. Respondent No.2 has been cruel towards him. Sometimes on account of torture committed upon him, he goes and sleeps in the house of his other son, Sh. Bhupinder Mehta at A-144, Anand Vihar, New Delhi, though appellant permanently resides in the property in question and all his goods and belongings are lying there.

3. It has been further alleged that respondent No.1 is not permitting the appellant to enter the house, though the appellant is owner in possession of the property. Respondent No.1 is living in this property illegally and without any authority of law and appellant is thus entitled to damages for use and occupation of the property by respondent No.1.

4. Appellant thus sought a decree for permanent injunction in his favour, and against respondent No.1, restraining him from entering upon, living or otherwise keeping any of his goods in property in question. It was also prayed that respondents be restrained from causing any interference in the peaceful enjoyment of the property by the appellant and his family members and respondents be restrained from causing any hindrance/interference in

the egress and ingress of appellant and his other son and his family, from entering upon the said property and from removing or bringing in any goods and belongings of the appellant and his other son.

5. In the written statement filed by the respondents, it was stated that property in question was purchased from the sale of golden jewellery belonging to respondent No.2 and out of her savings. The appellant under the garb of the present suit is claiming the recoveries of the goods which are not permissible under the law. As a matter of fact, the appellant is residing with his elder son, Bhupender at A-144, Anand Vihar, Delhi, while respondent No.2 is residing with respondent No.1 in the property in question. It has been denied by the respondents that appellant is in possession of the suit property. Respondent No.1 is living in the suit property in order to look after his aged and willing mother namely respondent No.2. The appellant has no right over the suit property as the same belongs to respondent No.2.

6. The trial court framed following issues;

*"1. Whether the suit is not maintainable as mentioned in Preliminary Objection No.1 of the written statement?(OPD)*

*2. Whether the suit is not property valued for the purpose of court fees and jurisdiction? OPD*

*3. Whether the suit is barred U/s 41(h) of Specific Relief Act? OPD*

*4. Whether the property in question was purchased from the sale proceedings of bulk of Golden Ornaments belonging to defendant no.2? If so to what effect? (OPD)*

*5. Whether Plaintiff is entitled to decree of permanent injunction as prayed?*

*6. Relief."*

7. After framing of issues, appellant led evidence. Thereafter, an application under Order 23 Rule 3 CPC dated 27th October, 2005 for compromise was filed and matter between appellant and respondent No.2 was compromised.

8. Trial court thereafter, held that though the case has reached at the stage of recording of the evidence of respondent but it heard the counsel for the parties at length on the point of maintainability of the suit, considering the prayers made by the appellant in the suit.

9. As regard the first prayer of the appellant, it held that the present suit is only for permanent injunction on which court fee has been paid accordingly. Appellant and the contesting respondent, are the father and son and considering the status of the parties, title is not going to be decided in the present suit. It further held, that the appellant under the guise of injunction is seeking possession from respondent No.1 and thus the same relief cannot be granted to the appellant and proper remedy for appellant is to file a suit for possession against respondent.

10. The court further held that as another equally efficacious remedy available to the appellant is to file a suit for possession, the suit for permanent injunction is not maintainable and consequently, it dismissed the suit of the appellant.

11. It has been contended by learned counsel for the appellant that no doubt under Order 14 Code of Civil Procedure, it is open for the Court to frame preliminary issue but only those issues which pertains to question of law. The trial court thus mislead itself while dismissing the present suit on the premise of impugned order, without appreciating that there was no preliminary issue between the parties.

12. Learned counsel further contended that the suit cannot be decided suo moto at the instance of the court, much less when the issues relate to mixed question of law and fact.

13. Another contention is that the trial court failed to appreciate the pleadings set out in the plaint and the stand taken and that too specifically set out in details that appellant has been and continued to be in actual and physical possession of the subject property and so highlighted from the record of the Local Commissioner and otherwise, there was no occasion for appellant to file suit for possession.

14. Learned counsel for the appellant also contended that appellant has already moved an application for amendment and appellant wants to amend his pleadings and convert his present suit, to a suit for recovery of the possession.

15. On the other hand, it has been argued by learned counsel for respondent that no ambiguity or infirmity can be found with the judgment of the trial court, since appellant, admittedly, filed a suit for permanent injunction against respondent No.1, though as per averments made in the plaint, respondent No.1 is in possession of the suit property. When respondent No.1 is in possession of the suit property, the suit for permanent injunction simpliciter is not maintainable.

16. As far as amendment of the plaint is concerned, it is contended by learned counsel for the respondent that when appellant had got equally efficacious remedy available under the law, he cannot be permitted to amend his suit for permanent injunction to a suit for recovery of possession and moreover, proviso to Order 6 Rule 17 CPC as amended in 2002, prohibits allowing of amendment of pleadings, after commencement of the trial.

17. As regards framing of a preliminary issue is concerned, it is admitted by the appellant that the defendant no.1 is in occupation of the suit premises and when a fact is admitted by a party to the suit, the same need not be proved or evidence be adduced for the same fact, as per Section 58 of the Indian Evidence Act, 1872. This section reads as under:

*“Section 58 - Facts admitted need not be proved:-*

*No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:*

*Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admission."*

18. Even if some evidence has been adduced, still the court can decide the issue as preliminary issue, as to maintainability of suit. See Madras High Court in S.G. Badrinath v. V. Jagannathan and another, AIR 2004 Mad 161, where it was held that;

*"Issue at jurisdiction of a Court could not be said to be purely an issue of law, some cases issue involved mixed questions of fact and law. Merely because some evidence was required to be taken an issue could not be refused to be tried as preliminary issue such as an issue regarding jurisdiction or maintainability of suit or Court-fee. However, Courts could try issue as preliminary issue only if the facts are independent and self-contained and do not have any bearing on the facts which may arise for consideration of the suit."*

19. Thus, the trial court was justified in deciding as to whether a suit for injunction or possession is maintainable or not.

20. Now the question arises as to whether in a suit for injunction, possession can be claimed or not. Supreme Court in Anathula Sudhakar v. P.Buchi Reddy (dead) by LR's and others, AIR 2008 SC 2033 held;

*"To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:*

*(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.*

*(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.*

*(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar v. Alagammal (AIR 2005 SC 4004)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.*

*(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."*

21. Section 41 of Specific Relief Act, 1963, lays down the condition when an injunction can be refused. The relevant provision of this Section for the purpose of the present case is S.41 (h) which reads as under;

*"S. 41. Injunction when refused.- An injunction cannot be granted-*

*(a) to (g) xxx xxx xxx xxx xxx*

*(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;*

*(i) & (j) xxx xxx xxx xxx xxx"*

22. Admittedly, respondent No.1 is in possession as per appellant's own case. Therefore, proper remedy for appellant was to file suit for possession with injunction. The present suit simpliciter for injunction, is not maintainable and as such, I do not find any infirmity in the impugned judgment of the trial court and the present appeal is not maintainable and is liable to be dismissed.

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23. By way of present application, the appellant seeks to amend his plaint. He wants to convert the present suit of injunction into a suit for recovery of possession, with consequential relief of injunction.

24. The present suit was filed on 23rd September, 1999. During pendency of the suit, appellant filed an application under Order 39 Rules 1 & 2 CPC. On 19th July, 2002, while disposing of the application, it was observed by B.N. Chaturvedi, J. that;

*"Since the defendant No.1 has, admittedly, been in occupation of the suit premises, even if he is an unauthorized occupant, the plaintiff cannot seek to recover possession from him simply by seeking a permanent restraint order against him from entering upon the suit property or living therein or keeping any of his goods there. The proper remedy would be to bring a suit for recovery of possession from him."*

25. In spite of this finding given by this Court, the appellant continued with his suit for

permanent injunction. Trial court ultimately dismissed the suit of the appellant on 25th September, 2006. Thereafter appellant filed the present appeal and now in the year 2008 only, during the pendency of the present appeal, appellant filed the present application.

26. As per averments made in the suit for injunction, cause of action arose on or about 30th August, 1999. The present application for amendment has been filed after more than nine years, after filing of the suit for injunction. In spite of order dated 19th July, 2002, passed by this Court making observation “that the proper remedy would be to bring the suit for recovery of possession”, the appellant, even thereafter did not amend his plaint.

27. Under these circumstances, I hold that present application for amendment of the plaint is hopelessly time barred and there is considerable delay and latches in filing of this application. Accordingly, application for amendment is also not maintainable.

28. In view of the above discussion, I hold that the present appeal as well as application for amendment are not maintainable and the same are hereby dismissed with costs of Rs.20,000/-.

29. Costs be paid by the appellant to respondent No.1, within one month from today, failing which the trial court shall recover the same, in accordance with law.

30. Trial court record be sent back.