(2016) 09 DEL CK 0138

DELHI HIGH COURT

Case No: RSA No. 106 of 2012.

Satish - Appellant @HASH Smt. Om Bati — APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 26, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Specific Relief Act, 1963 - Section 34, Section 37, Section 38

Citation: (2016) 9 ADDelhi 128 : (2017) AIR(Delhi) 15

Hon'ble Judges: Valmiki J. Mehta, J.

Bench: Single Bench

Advocate: Mr. Pankaj Kumar, Advocate, for the Appellant; Mr. K.B.B. Singh and Mr. Robin, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Mr. Valmiki J. Mehta, J.(Oral) - This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant impugning the concurrent Judgments of the courts below; of the Trial Court dated 31.7.2010 and the First Appellate Court dated 4.4.2012; by which the courts below have decreed the suit for declaration and mandatory injunction filed by the respondent/plaintiff with respect to the suit property being the property constructed on 42 sq. yds of land on property/plot bearing No. 31, part of khasra No. 47/3 and 4/1, Village Palam, Delhi now known as House No. RZF-528, Raj Nagar, Part-II, Gali Subhash Park, Palam Colony, New Delhi. As per the judgments and decrees of the courts below respondent/plaintiff has been declared to be the owner of the suit property by virtue of the Sale Deed dated 20.9.2005 Ex.PW1/2 executed by Sh. Khushi Ram (father of respondent/plaintiff) in favour of the respondent/plaintiff. The appellant/defendant was held to be a licensee in the suit property and since the respondent/plaintiff was held to be the owner, reliefs of

declaration and mandatory injunction were granted in favour of the respondent/plaintiff and against the appellant/defendant. The defences of the appellant/defendant that he was an adopted son of Sh. Khushi Ram and that the suit property was an ancestral property in which the respondent/plaintiff had a share have been rejected by the courts below.

2. The issues between the parties were of ownership of Sh. Khushi Ram and consequently of respondent/plaintiff on the one hand and of whether the appellant/defendant is the adopted son of Sh. Khushi Ram and the suit property is an ancestral property in which the appellant/defendant had a share whereby Sh. Khushi Ram could not have sold the suit property to the respondent/plaintiff under the Sale Deed dated 20.9.2005/Ex.PW1/2.

3. The trial court on 13.12.2006 framed the following issues:-

"1. Whether the plaintiff is entitled for the relief of declaration, as prayed for? OPP

2. Whether the plaintiff is entitled for the relief of mandatory injunction, as prayed for? OPP

3. Whether the plaintiff is entitled for the relief of permanent injunction, as prayed for? OPP

4. Whether the suit has not been properly valued for the purpose of Court fee as well as jurisdiction? OPD

5. Relief."

4. On issue nos. 1 to 3 the trial court held that respondent/plaintiff has proved the sale deed, inasmuch as, Sh. Khushi Ram as PW2 admitted to execution of the sale deed. So far as adoption is concerned, the courts below have held the same against the appellant/defendant on the ground that adoptive parents, namely, Sh. Khushi Ram and his wife Smt. Chalti Devi had denied their signatures on the Adoption Deed dated 9.4.1985/Ex.DW1/1. Another reason for holding the adoption to be bad was that the appellant/defendant was found to be 17 years of age when the adoption deed was made whereas under the Section 10 of the Hindu Adoptions and Maintenance Act, 1956 no adoption can take place of a person who is more than 15 years of age. The courts below have also held that no evidence was led by the appellant/defendant that the suit property was purchased by Sh. Khushi Ram from the funds of the ancestral property at Motia Khan, Delhi. Courts below have also held that the property No. 10955, Gali Peepalwali, Idgha Road, near Motia Khan, Delhi was in fact not even owned by Sh. Khushi Ram or his paternal ancestor Sh. Khem Chand because this property was only on license basis from MCD. The courts below have also further held that there is no connection found between Motia Khan property and the suit property situated in Palam as it has not been proved that the suit property has been purchased from the funds of sale of property of Motia Khan by Sh. Khushi Ram.

5. Learned counsel for the appellant/defendant has argued the following aspects before this Court.

(i) The courts below have erred in disbelieving the factum of adoption of the appellant/defendant by Sh. Khushi Ram and Smt. Chalti Devi by committing complete illegality and perversity, inasmuch as, mere denial of thumb impressions/signatures of Sh. Khushi Ram and Smt. Chalti Devi on the Adoption Deed dated 9.4.1985 would not make any difference because in the documents which have been proved by the appellant/defendant, being water bills, marriage card, ration card, driving licence etc, exhibited as Ex.DW1/2 to DW1/13, the appellant/defendant has been duly shown to be the son of Sh. Khushi Ram. Great emphasis is placed specially upon the ration card Ex.DW1/3 and which is a ration card of the family of Sh. Khushi Ram and which shows that the appellant/defendant Sh. Satish Kumar is shown as a family member and son of Sh. Khushi Ram. Emphasis is also placed by the counsel for the appellant/defendant upon the Motor Licence dated 7.6.1994, Ex.DW1/5 which showed the appellant/defendant to be the son of Sh. Khushi Ram. Accordingly, it was argued that in the light of this unimpeachable evidence of acting upon over various years of the adoption, mere denial by Sh. Khushi Ram and Smt. Chalti Devi cannot take away the factum of adoption. Also, it is argued that the courts below have completely misread and misinterpreted the Adoption Deed dated 9.4.1985 Ex.DW1/1 resulting in perversity and illegality because the adoption deed does not talk about adoption of the appellant/defendant as on 9.4.1985 when the adoption deed was executed because the second page of the adoption deed clearly recites that the adoption ceremonies including dattak homam was performed around 15 years prior to the execution of the Adoption Deed on 9.4.1985 and that since the adoption Sh. Khushi Ram and Smt. Chalti Devi were treating appellant/defendant as their own son and who was eighteen months old when the dattak homam ceremony had taken place.

(ii) Respondent/plaintiff has failed to prove the site plan Ex.PW1/1 because the total constructed property was of 92 sq. yds and in the site plan Ex.PW1/1 proved by the respondent/plaintiff the portion of 50 sq. yds belonging to appellant/defendant is shown as 42 sq. yds portion sold by the sale deed of Sh. Khushi Ram in favour of the respondent/plaintiff i.e, it is argued that the site plan wrongly shows in red colour, out of the total property of 92 sq. yds the portion of 50 sq. yards instead of showing 42 sq. yds, and thus the site plan Ex.PW1/1 is liable to be rejected. It is also argued that the correct site plan thereafter filed and exhibited again as Ex.PW1/1 in terms of the Order of the trial court dated 16.9.2009 has been wrongly relied upon by the courts below because in the same Order dated 16.9.2009 after taking the amended site plan on record pursuant to an amended application of the respondent/plaintiff it was observed that the evidence cannot be taken of the site plan then filed on 16.9.2009 because evidence of the respondent/plaintiff was closed and it was the evidence of the appellant/defendant which was going on. A related issue with respect to improper identification of the suit property is argued that in the sale deed

executed by Sh. Khushi Ram in favour of the respondent/plaintiff the boundaries described of the suit property are incorrectly mentioned.

(iii) The courts below have committed illegality and perversity on the one hand holding issue No. 4 in favour of the appellant/defendant by holding that the suit is not properly valued for the purpose of court fee and jurisdiction, yet have passed a decree of mandatory injunction in spite of holding that the suit for mandatory injunction was a suit for possession and it was not properly valued and proper court fee was not paid.

6. So far as the first argument urged on behalf of the appellant/defendant is concerned, I agree with the argument urged because it is found that the best proof of adoption having taken place is whether that the adoption is acted upon. Adoption is found to have been acted upon in my opinion in view of the marriage card of the appellant/defendant, Ex.DW1/12 showing appellant/defendant as the son of Sh. Khushi Ram, and the ration card and other documents being water bills etc proved as Ex.DW1/2 to Ex.DW1/13 which show that the appellant/defendant has been shown to be the son of Sh. Khushi Ram. The appellant/defendant is shown in these documents as the son of Sh. Khushi Ram when there were no disputes between the parties. Also, counsel for the appellant/defendant is correct in arguing that the courts below have completely misread the adoption deed because adoption is not taking place of a person who is more than 15 years of age when the Adoption Deed dated 9.4.1985 is executed because the adoption deed talks not only of adoption of the appellant/defendant having taken place in the past when the appellant/defendant was 18 months old when the dattak homam ceremony was performed but also that the appellant/defendant thereafter was living as a family member of Sh. Khushi Ram. Once that is so, the age of the appellant/defendant when he was adopted would be 18 months as stated in the adoption deed because on the date of execution of the Adoption Deed on 9.4.1985, appellant/defendant was 17 years of age. Clearly, therefore, adoption deed was only a record of the past event of the appellant/defendant being adopted at around the age of 18 months by Sh. Khushi Ram and Smt. Chalti Devi and as so stated in the adoption deed. Accordingly, in my opinion, it has to be held that the appellant/defendant was duly adopted by Sh. Khushi Ram and Smt. Chalti Devi as their son and the courts below have committed complete illegality and perversity in this regard by holding otherwise.

7. In my opinion, however holding the appellant/defendant to be an adopted son of Sh. Khushi Ram will not change the conclusion whereby the appellant/defendant has been held not entitled to the suit property because the appellant/defendant has failed to lead any evidence, except self serving oral statements in his deposition and in the deposition of his witnesses DW2 and DW3 that the suit property was an ancestral property. Before the suit property is proved on preponderance of probabilities to be an ancestral property/HUF property, evidence was required to be

led by the appellant/defendant to show that the funds from where the suit property was purchased were on account of sale of the ancestral property at Motia Khan, Delhi. In this regard, there has been no evidence led to indicate the connection of sale of Motia Khan property with the purchase of the suit property whether by the same period or the amounts received on sale of Motia Khan property and which amount is sufficient and used for purchasing the suit property i.e there is no evidence as to when the Motia Khan property was sold, for how much the same was sold, whether that consideration flowed with respect to the purchase of the suit property etc etc. I may note that in the sale deed Ex.PW1/2 executed by Sh. Khushi Ram in favour of the respondent/plaintiff, it is nowhere mentioned that the same is an ancestral property or that the suit property has any link or connection with any funds received from the Motia Khan property. Therefore, in my opinion, appellant/defendant has miserably failed to prove that the suit property was purchased from the funds of Motia Khan property. 8(i) Also merely because the suit property is purchased from the funds of the ancestral property at Motia Khan will not make the suit property as an HUF property in view of the ratio of the judgments of the Supreme Court in the cases of **Commissioner of Wealth Tax, Kanpur and others v. Chander Sen and Others, (1986) 3 SCC 567** and **Yudhishter v. Ashok Kumar, (1987) 1 SCC 204** which hold that after passing of the Hindu Succession Act, 1956, even if a person inherits a property from his paternal ancestor, inheritance of the ancestral property will be taken only as self acquired property, and not HUF property of the person who inherits the same. Therefore, before it can be held that the sale of Motia Khan property resulted in funds which can be taken as HUF in the hands of Sh. Khushi Ram, it had to be shown that the Motia Khan property was sold prior to coming into force the Hindu Succession Act. No evidence has been led by the appellant/defendant that the Motia Khan property was inherited by Sh. Khushi Ram from his father Sh. Khem Chand prior to coming into force the Hindu Succession Act. Once the Motia Khan property of Sh. Khem Chand is inherited by Sh. Khushi Ram after 1956, inheritance by Sh. Khushi Ram of Motia Khan property from Sh. Khem Chand will be as a self acquired property of Sh. Khushi Ram. I have had an occasion to consider this aspect in detail in the judgment in the case of **Sunny (Minor) and anr. v. Raj Singh and ors., 225(2015) DLT 211**. The relevant paras of the judgment in the case of Sunny (Minor) & Anr. (supra) are paras 6 to 9 and 14 and which paras read as under:-

"6. At the outset, it is necessary to refer to the ratio of the judgment of the Supreme Court in the case of **Yudhishter v. Ashok Kumar, (1987) 1 SCC 204** and in para 10 of the said judgment the Supreme Court has made the necessary observations with respect to when HUF properties can be said to exist before passing of the Hindu Succession Act, 1956 or after passing of the Act in 1956. This para reads as under:-

"10. This question has been considered by this Court in **Commissioner of Wealth Tax, Kanpur and ors. v. Chander Sen and ors. [1986] 161 ITR 370 (SC)** where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son

is born, he gets a share in father''s property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne''s on Hindu Law 12th Edition pages 918-919. Shri Banerji relied on the said observations of Mayne on ''Hindu Law'', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne''s Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house."

(emphasis is mine)

7(i). As per the ratio of the Supreme Court in the case of Yudhishter (supra) after passing of the Hindu Succession Act, 1956 the position which traditionally existed with respect to an automatic right of a person in properties inherited by his paternal predecessors-in-interest from the latter''s paternal ancestors upto three degrees above, has come to an end. Under the traditional Hindu Law whenever a male ancestor inherited any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him had a right in that property equal to that of the person who inherited the same. Putting it in other words when a person "A" inherited property from his father or grandfather or great grandfather then the property in his hand was not to be treated as a self-acquired property but was to be treated as an HUF property in which his son, grandson and great grandson had a right equal to "A". After passing of the Hindu Succession Act, 1956, this position has undergone a change and if a person after 1956 inherits a property from his paternal ancestors, the said property is not an HUF property in his hands and the property is to be taken as a self-acquired property of

the person who inherits the same. There are two exceptions to a property inherited by such a person being and remaining self-acquired in his hands, and which will be either an HUF and its properties was existing even prior to the passing of the Hindu Succession Act, 1956 and which Hindu Undivided Family continued even after passing of the Hindu Succession Act, 1956, and in which case since HUF existed and continued before and after 1956, the property inherited by a member of an HUF even after 1956 would be HUF property in his hands to which his paternal successors-in-interest upto the three degrees would have a right. The second exception to the property in the hands of a person being not self-acquired property but an HUF property is if after 1956 a person who owns a self-acquired property throws the self-acquired property into a common hotchpotch whereby such property or properties thrown into a common hotchpotch become Joint Hindu Family properties/HUF properties. In order to claim the properties in this second exception position as being HUF/Joint Hindu Family properties/properties, a plaintiff has to establish to the satisfaction of the court that when (i.e date and year) was a particular property or properties thrown in common hotchpotch and hence HUF/Joint Hindu Family created.

(ii) This position of law along with facts as to how the properties are HUF properties was required to be stated as a positive statement in the plaint of the present case, but it is seen that except uttering a mantra of the properties inherited by defendant No. 1 being "ancestral" properties and thus the existence of HUF, there is no statement or a single averment in the plaint as to when was this HUF which is stated to own the HUF properties came into existence or was created i.e. whether it existed even before 1956 or it was created for the first time after 1956 by throwing the property/properties into a common hotchpotch. This aspect and related aspects in detail I am discussing hereinafter.

8(i). A reference to the plaint shows that firstly it is stated that Sh. Tek Chand who is the father of the defendant No. 1 (and grandfather of Sh. Harvinder Sejwal and defendants No. 2 to 4) inherited various ancestral properties which became the basis of the Joint Hindu Family properties of the parties as stated in para 15 of the plaint. In law there is a difference between the ancestral property/properties and the Hindu Undivided Family property/properties for the pre 1956 and post 1956 position as stated above because inheritance of ancestral properties prior to 1956 made such properties HUF properties in the hands of the person who inherits them, but if ancestral properties are inherited by a person after 1956, such inheritance in the latter case is as self-acquired properties unless of course it is shown in the latter case that HUF existed prior to 1956 and continued thereafter. It is nowhere pleaded in the plaint that when did Sh. Tek Chand father of Sh. Gugan Singh expire because it is only if Sh. Tek Chand father of Sh. Gugan Singh/defendant No. 1 had expired before 1956 only then the property which was inherited by Sh. Gugan Singh from his father Sh. Tek Chand would bear the character of HUF property in the hands of Sh. Gugan Singh so that his paternal successors-in-interest became co-parceners in an

HUF. Even in the evidence led on behalf of the plaintiffs, and which is a single affidavit by way of evidence filed by the mother of the plaintiffs Smt. Poonam as PW1, no date is given of the death of Sh. Tek Chand the great grandfather of the plaintiffs. In the plaint even the date of the death of the grandfather of the plaintiffs Sh. Gugan Singh is missing. As already stated above, the dates/years of the death of Sh. Tek Chand and Sh. Gugan Singh were very material and crucial to determine the automatic creation of HUF because it is only if Sh. Tek Chand died before 1956 and Sh. Gugan Singh inherited the properties from Sh. Tek Chand before 1956 that the properties in the hands of Sh. Gugan Singh would have the stamp of HUF properties. Therefore, in the absence of any pleading or evidence as to the date of the death of Sh. Tek Chand and consequently inheriting of the properties of Sh. Tek Chand by Sh. Gugan Singh, it cannot be held that Sh. Gugan Singh inherited the properties of Sh. Tek Chand prior to 1956.

(ii) In fact, on a query put to the counsels for the parties, counsels for parties state before this Court that Sh. Gugan Singh expired in the year 2008 whereas Sh. Tek Chand died in 1982. Therefore, if Sh. Tek Chand died in 1982, inheriting of properties by Sh. Gugan Singh from Sh. Tek Chand would be self-acquired in the hands of Sh. Gugan Singh in view of the ratio of the Supreme Court in the case of Yudhister (supra) inasmuch as there is no case of the plaintiffs of HUF existing before 1956 or having been created after 1956 by throwing of property/properties into common hotchpotch either by Sh. Tek Chand or by Sh. Gugan Singh/defendant No. 1. There is not even a whisper in the pleadings of the plaintiffs, as also in the affidavit by way of evidence filed in support of their case of PW1 Smt. Poonam, as to the specific date/period/month/year of creation of an HUF by Sh. Tek Chand or Sh. Gugan Singh after 1956 throwing properties into common hotchpotch.

(iii) The position of HUF otherwise existing could only be if it was proved on record that in the lifetime of Sh. Tek Chand a Hindu Undivided Family before 1956 existed and this HUF owned properties include the property bearing No. 93, Village Adhichini, Hauz Khas. However, a reference to the affidavit by way of evidence filed by PW1 does not show any averments made as to any HUF existing of Sh. Tek Chand, whether the same be pre 1956 or after 1956. Only a self-serving statement has been made of properties of Sh. Gugan Singh being "ancestral" in his hands, having been inherited by him from Sh. Tek Chand, and which statement, as stated above, does not in law mean that the ancestral property is an HUF property.

9. Onus of important issues such as issue nos. 1 and 2 cannot be discharged by oral self-serving averments in deposition, once the case of the plaintiffs is denied by the defendants, and who have also filed affidavit of DW1 Sh.Ram Kumar/defendant No. 2 in the amended memo of parties for denying the case of the plaintiffs. An HUF, as already stated above, could only have been created by showing creation of HUF after 1956 by throwing property/properties in common hotchpotch or existing prior to 1956, and once there is no pleading or evidence on these aspects, it cannot be

held that any HUF existed or was created either by Sh. Tek Chand or Sh. Gugan Singh. In my opinion, therefore, plaintiffs have miserably failed to discharge the onus of proof which was upon them that there existed an HUF and its properties, and the plaintiffs much less have proved on record that all/any properties as mentioned in para 15 of the plaint are/were HUF properties.

xxxxx xxxxx

14. Plaintiffs thus have failed to prove that there existed an HUF before 1956 on account of Sh. Tek Chand having inherited properties before 1956 and that the plaintiffs have further failed to prove that HUF was created after 1956 on account of throwing of property/properties into common hotchpotch either by Sh. Tek Chand or by Sh. Gugan Singh/defendant No. 1. Accordingly, it is held that there is no HUF and there are no properties of HUF in which late Sh. Harvinder Sejwal had a share. The entire discussion given above for existence/creation of HUF and plaintiffs failing to discharge the onus of proof upon them will similarly apply qua the alleged family settlement pleaded by the plaintiffs because once again no credible evidence has been led except self serving statements and which cannot be taken as discharge of the onus. In his cross-examination on 01.04.2013, the defendant No. 3 as DW1 has denied the suggestion that there was any family settlement. It is therefore held that plaintiffs have failed to prove issue nos.1 and 2."

(ii) In view of the above, it cannot be held that the suit property merely because it was purchased from the funds of the sale of the ancestral property would be an HUF property in the hands of Sh. Khushi Ram for the appellant/defendant to claim rights in the same inasmuch as inheritance of ancestral property by Sh. Khushi Ram from his father Sh. Khem Chand will not make the Motia Khan property or the suit property as an HUF property because ancestral property if is inherited after 1956 the inheritance will be as a self acquired property and not as an HUF property.

9. In view of the above, the appellant/defendant cannot have any right/title to the suit property for the following reasons:-

(i) No evidence is led of the Motia Khan property as a source for providing of funds for purchase of the suit property so that the suit property is to be taken as an ancestral property in the hands of Sh. Khushi Ram.

(ii) Even if the suit property is purchased by Sh. Khushi Ram from the funds of the sale of the ancestral property at Motia Khan, yet, Motia Khan property as also the suit property would be the self acquired properties of Sh. Khushi Ram because no evidence is led of Sh. Khushi Ram inheriting the Motia Khan property prior to coming into force the Hindu Succession Act.

10. The next argument urged is that the site plan Ex.PW1/1 as originally filed and proved on 30.7.2007 has to be rejected because it wrongly shows the red area portion which is not the suit property of 42 sq. yds but is actually the 50 sq. yds

portion out of the 92 sq. yds portion i.e instead of the site plan showing the 42 sq. yds portion in red and which was the subject matter of the sale deed Ex. PW1/2 the site plan wrongly shows the 50 sq. yds portion. Also it is further argued that the amended site plan subsequently filed in terms of the Order dated 16.9.2009 and also taken as Ex.PW1/1 has to be rejected as per the contents of the Order of the trial court dated 16.9.2009 which while taking the new site plan as Ex.PW1/1 observes that this site plan cannot be taken on record as evidence of respondent/plaintiff has already concluded and that evidence of appellant/defendant was being led. These arguments which are only technical, and therefore, the same are rejected for the reasons given hereinafter.

11. No doubt, in the original site plan Ex.PW1/1 which was proved and exhibited in the deposition of the respondent/plaintiff dated 30.7.2007 wrongly shows the red coloured portion as the suit property of 42 sq. yds because actually the non-coloured portion of Ex.PW1/1 is the disputed 42 sq. yds, and that admittedly the coloured portion is 50 sq. yds forming part of total area of 92 sq. yds. However, the issue with respect to any site plan is in my opinion only for the proper identification of the suit property, and therefore, I would treat the site plan Ex.PW1/1 as being proved with respect to the suit property which should be taken as the non-coloured portion because admittedly the non-coloured portion of Ex.PW1/1 is the suit property. Colouring is only for identification of a suit property and this stands done because the admitted case is that in the site plan Ex.PW1/1 the coloured portion is not the portion which was the disputed property and which was sold under the sale deed Ex.PW1/2 and what was sold under the sale deed Ex.PW1/2 by Sh. Khushi Ram to respondent/plaintiff was the non-coloured portion. Hence, there would be no confusion as to identification of the suit property and it is clarified that the suit property which is the subject matter of the present suit would be the non-coloured portion in the site plan Ex.PW1/1 and the coloured portion in red will not be taken as the suit property. For the selfsame reason the argument of the appellant/defendant that the sale deed wrongly gives the boundaries is to be rejected because identification of what is the suit property of 42 sq. yds is not disputed and conclusion is drawn by applying Section 95 of the Indian Evidence Act, 1872 which reads as under:-

"95. Evidence as to document unmeaning in reference to existing facts.- When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense"

12. So far as the argument with respect to the issue No. 4 being decided in favour of the appellant/defendant is concerned, it is seen that actually the courts below have fallen into an error that the suit ought to have been a suit for possession inasmuch as against a licensee who refused to vacate a property, the suit can be a suit for mandatory injunction and in effect being a suit for possession. This has been so directly held by the Supreme Court in the judgment in the case of **Sant Lal Jain v.**

Avtar Singh (1985) 2 SCC 332 and the relevant paras of which are paras 6 to 8 and which read as under:-

"6. Now the parties are bound by the following factual findings recorded by the learned Additional District Judge in the first appeal namely: (1) that the appellant who had become the sole proprietor of M/s. Jain Motors in 1967 through at the time of the lease of the property by the original owner Lt. Col. Sadan Singh to M/s. Jain Motors in 1963 he was only one of its partners, was the lessee of the property; (2) that the respondent had become a licensee of the suit shed under the appellant when the appellant was in possession of the whole of the demised premises including the suit shed as tenant under the original owner; (3) that the licence in favour of the respondent has been revoked before the institution of the present suit and (4) that subsequent to the decision in the first appeal on December 7, 1978, the respondent had purchased the entire property from the original owner by a sale-deed dated August 27, 1979. In these circumstances, there is no merger of the lease of the whole property by its original owner in favour of the appellant by reason of the sale of the entire property by the original owner in favour of the respondent or of the licence given by the appellant to the respondent which had been revoked prior to the date of the suit. The lease in favour of the appellant continues, and it is not disputed that under the Act of 1949 referred to above, even the tenant of a vacant land in Patiala town cannot be evicted therefrom except in accordance with the provisions of that Act. In **K.K. Verma v. Union of India** Chagla C.J. presiding over a Division Bench has observed that in India a landlord can only eject his erstwhile tenant by recourse to law and by obtaining a decree for ejectment. In **Milkha Singh v. Diana** it has been observed that the principle once a licensee always a licensee would apply to all kinds of licences and that it cannot be said that the moment the licence it terminated, the licensee''s possession becomes that of a trespasser. In that case, one of us (Murtaza Fazal Ali, J. as he then was) speaking for the Division Bench has observed:
"After the termination of licence, the licensee is under clear obligation to surrender his possession to the owner and if he fails to do so, we do not see any reason why the licensee cannot be compelled to discharge this obligation by way of a mandatory injunction under Section 55 of the Specific Relief Act. We might further mention that even under English law a suit for injunction to evict a licensee has always been held to be maintainable.

...where a licenser approaches the court for an injunction within a reasonable time after the licence is terminated, he is entitled to the injunction. On the other hand, if the licensor causes huge delay the court may refuse the discretion to grant an injunction on the ground that the licensor had not been diligent and is that case the licensor will have to bring a suit for possession which will be governed by Section 7(v) of the Court Fees Act."

7. In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the form of a suit for mandatory injunction.

8. The respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him, during the subsistence of the licence or in the suit for recovery of possession of the property instituted after the revocation of the licence to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to property subsequently through some other person. He need not do so if he has acquired title to the property from the licensor or from some one else lawfully claiming under him, in which case there would be clear merger. The respondent has not surrendered possession of property to the appellant even after the termination of the licence and the institution of the suit. The appellant is, therefore, entitled to recover possession of the property. We accordingly allow the appeal with costs throughout and direct the respondent to deliver possession of the property to the appellant forthwith failing which it will be open to the appellant to execute the decree and obtain possession."

(emphasis is mine)

13. I have given the above additional reasoning for granting the relief of mandatory injunction to the respondent/plaintiff because this Court can do so in exercise of powers under Order 41, Rule 24 CPC and in fact the Supreme Court in the judgment in the case of **Lisamma Antony and another v. Karthiyayani and Another (2015) 11 SCC 782** has recently held that appellate court should not remand the matter to the trial court for fresh decision unless remand is necessary for additional evidence or the trial court had only decided the preliminary issues and not all the issues. It is also noted that as per the suit plaint the appellant/defendant is a gratuitous licensee in the suit premises as he was the son of the real sister of respondent/plaintiff and hence so allowed to reside in the suit property.

14. Accordingly, decision on issue No. 4 against the respondent/plaintiff would make no difference with respect to grant of the relief of mandatory injunction in favour of respondent/plaintiff. I note that the respondent/plaintiff had in any case, after the judgment was passed by the trial court, deposited additional court fee by taking the market value of the suit property of 42 sq. yds in terms of the Sale Deed Ex.PW1/2

dated 20.9.2005, and which also in my opinion cannot be in any manner quarrelled upon by the appellant/defendant inasmuch as, market value for taking value of the suit property on the date of the suit is the consideration written in the Sale Deed dated 20.9.2005 and which is more or less around the same period of filing of the suit on 10.3.2006. It is also noted that it is not as if values of immovable property have fluctuated hugely and widely from September, 2005 to March, 2006 when the suit was filed i.e just after around 5 ½ months after execution of the Sale Deed dated 20.9.2005. Therefore, in any case no benefit can be derived by the appellant/defendant with respect to allegedly the suit being not properly valued for the purpose of court fee and jurisdiction.

15. In view of the above, no substantial question of arises. This regular second appeal is therefore dismissed, leaving the parties to bear their own costs.