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HIGH COURT OF DELHI : NEW DELHI

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FAO (OS) No.239/2007

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Reserved on : 25th September, 2008

Decided on: 28th November, 2008

SAROJ SALKAN

...Appellant

Through : Ms. Malavika Rajkotia , Adv.

Versus

CAPT. SANJEEV SINGH & OTHERS

....Respondents

Through : Mr. G.V.Rao, Adv. with
Mr. S.K.Nanda, Adv.

Coram:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

Yes

MANMOHAN SINGH, J.

1. This appeal has been filed against the order dated 8th May, 2007, passed by the learned Single Judge of this court in suit no. 683/2007 filed by the appellant for partition, rendition of accounts and permanent injunction. By the impugned order the appellant was directed to pay ad valorem court fee within four weeks.

2. While passing the impugned order, the learned Single Judge has observed that the appellant being out of possession of

the suit property would be liable to pay ad valorem court fee in respect of the share claimed and supported her view relying upon AIR 1991 Delhi 48. The appellants in the plaint seeking partition of the properties asserted that she was deriving benefits and rent from the property at Anand Niketan. However the admitted position is the appellant is not in physical possession of the suit properties. The appellant has affixed fixed court fee on the plaint only on the basis of a claim of co-ownership and constructive possession. She was directed to pay ad valorem court fee on her share of the suit properties.

3. The appellant had valued the suit for the purposes of jurisdiction for relief of partition at about Rs. 20 crores in para 48 of the plaint which is reproduced hereinbelow:-

“48. That the value of the suit for purpose of jurisdiction for the relief of partition is above 20 crores. The plaintiff is in possession of an undivided share in their suit properties and has been receiving cash compensation as her share. She is in constructive possession of the properties. The value of the plaintiff's share cannot be computed in terms of money since the share is to be ascertained as to whether it will be as co-parcener to the extent of $\frac{1}{4}$ in General Budh Singh HUF or whether it will be $\frac{1}{3}^{\text{rd}}$ in the half share of General Budh Singh. Thus a fixed fee under Schedule-II Article 7 (ii) of Rs. 20/- is being affixed. The plaintiff undertakes to pay the Court fee as and when her share is computed.”

4. The appellant claimed that property is in her constructive possession, she is a co-owner and thus affixed a fixed court fee of

Rs.20/-. In support of submissions, the learned counsel has relied upon para 23 and 25 of the plaint which reads as under:-

“23. The plaintiff and defendant no. 6 were treated as co-owners. They spent holidays at their parental home. Their nephews and nieces treated them as co-owners. They would regularly be given cash incomes as their share from the farm.....

A major portion of income, according to her would be ploughed back into the farm for new tube wells, generators, threshing machines or tractor. However, despite the above reasons, in all fairness to her she openly acknowledged the rights of the plaintiff and her sister.

25. That the property at Anand Niketan had been rented out and rent was realized by all parties to the suit. The plaintiff and defendant no. 6 used to be given a cash compensation for their share in the Delhi house as well. Again, they never questioned the amount nor did they ask to see the lease deed to check the actual rental value”.

5. The appellant states that she is the daughter of Late Major Gen. Budh Singh who died intestate in 1988. The Late Gen. Budh Singh had an HUF consisting of his son Anup Singh and himself as coparceners. Upon the General's death and since he did not partition the assets of the HUF and since he died intestate in his lifetime the half share of Late Major Gen. Budh Singh devolved upon his sons and two daughters. Upon the death of Sh. Anup Singh his half share in the HUF devolved upon his wife and his children, the respondents no. 1 to 5 as his legal heirs. The appellant claims $1/3^{\text{rd}}$ share in the half share of Late Gen. Budh Singh in his HUF (i.e. $1/6^{\text{th}}$ share in the property).

6. It is further stated that she is a co-owner of the HUF assets for which she was receiving rent in the life-time of Sh. Anup Singh and after his death in 1989 the wife of Sh. Anup Singh (Sneh Lata). It is only after the death of Sneh Lata in June, 2004 that the heirs of the said wife defaulted in paying the rents that were due to the appellant herein. The parties did have talks for settlement in February, 2005. The respondent acknowledged the share of appellant herein and tried to effect the settlement by way of partition. The said share of the suit property has been acknowledged in e-mail dated 06.02.2005. The plaintiff thus claims to be in constructive possession of the suit properties as the respondents have acknowledged title of the appellant and her sister and have acknowledged that their mother too had acknowledged such title.

7. In reply to the show-cause notice, the respondent nos. 1 to 5 have stated that the property no. C-38, Anand Niketan was transferred in the name of Kr. Anup Singh in 1970 within his own life time. The appellant and the respondent no. 6 were aware of the same. The perpetual sub-lease deed was executed in his name on 3.4.1970 between Delhi Administration and Kr. Anup Singh. It was further alleged that the premises in Anand Niketan was rented out but it is denied that appellant and respondent no. 6 were ever given any cash or other compensation from the

rental proceeds of the house. The said respondent nos. 1 to 5 also denied constructive possession of the property by appellant and respondent nos. 6.

8. The learned counsel for the appellant has strongly relied upon the recent judgment reported in ***Jagannath Amin v. Seetharama,(2007) 1 SCC 694*** in which the Apex Court made the following observations :

“9.....The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been ‘excluded’ from joint possession to which they are entitled in law. The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession.”

9. In ***Prakash Wati vs. Dayawanti and Ors. (AIR 1991 Delhi 48)***, it has been laid down that keeping in view the peculiar facts of the case that where the plaintiff claims to be in joint possession of the property of which partition is sought, the plaintiff is to pay only fixed court fee as per Article 17 (vi) in

Schedule II. It is settled law that the question of court fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. It was held that the general principle of law is that in the case of co-owners the possession of one is in law the possession of all unless ouster or exclusion is proved.

10. As regards the case of Prakash Wati (supra) is concerned, it is not applicable in the facts of present case as no rent was ever paid by the defendant.

11. The Apex Court in the case of ***Neelavathi v. N. Natarajan, (1980) 2 SCC 247***, made the following observations in para 6 which is reproduced as under :-

“6.....It is settled law that the question of court fee must be considered in the light of the allegation made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. All the material allegations contained in the plaint should be construed and taken as a whole vide S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Ram Ar. Rm. Ramanathan Chettiar (1958) S.C.R. 1021 at pp. 1031 32.....The plea in para 12 which was relied on by the High Court states that the Defendants 1 to 6 failed to give the plaintiffs their share of the income and the plaintiffs could not remain in joint possession. The plea that they were not given their due share would not amount to dispossession. Reading the plaint at its worst against the plaintiffs, all that could be discerned is that as the plaintiffs were not given their share of the income, they could not remain in joint possession. The statement that they are not being paid their income, would not

amount to having been excluded from possession. The averment in the plaint cannot be understood as stating that the plaintiffs were not in possession.....”

12. In view of the averment in the plaint that property at Anand Niketan has been rented out and rent was realized by all parties to the suit and the plaintiff and defendant no.6 used to be given a cash compensation for their share in the said house, the plaintiff has claimed constructive possession.

13. It is settled law that in a suit for partition, the court fees to be paid if joint possession is pleaded by the plaintiff on the basis that he is the co-owner of the property sought to be partitioned, fixed court fees would be payable under Article 17(vi) of Schedule II of the Court Fees Act presuming the joint possession of the plaintiff even if the plaintiff is not in actual possession. It is because of the reason that in the case of co-owners, the possession of one is in law possession of all, unless from the averments in the plaint read as a whole, a clear case of ouster is made and in that situation the plaintiff is liable to pay ad-valorem court fees on the market value of this share as provided under Section 7(iv)(b) of the Court Fees Act notwithstanding the fact that it is also pleaded that the plaintiff was in constructive possession.

14. In view of the averment made in the plaint as well as e-mail dated 06.02.2005, prima facie, the plaintiff who claims to

be in joint possession of the property of which partition is sought, we find that the appellant has been excluded from joint possession to which she is entitled in law and has to pay only fixed court as per Article 17 (vi) in Schedule II.

15. We have also noticed that when the impugned order was passed, no written statement was filed on record. At this stage, even otherwise, we have to see the statements made in the plaint. Therefore, at this stage order of payment of court fee is unsustainable. However, we may clarify that at the time of framing of issues specific issue in this behalf can be framed and decided in accordance with law.

16. Appeal is allowed. Impugned order is hereby set aside.

No costs.

MANMOHAN SINGH, J.

A.K. SIKRI, J.

November 28 , 2008
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