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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision : 20.10.2011

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FAO (OS) No.719 of 2010

SARABJIT PRAKASH & ANR.

...APPELLANTS

Through: Mr. Manu Nayar, Advocate.

Versus

UDYAJIT PRAKASH & ORS.

...RESPONDENTS

Through: Mr. Kishan Rawat, Mr. Mohit Mudgal
& Mr. Rajan Narain, Advocates for
Respondent No.1.

Respondents 2 to 5 proceeded *ex parte*
today.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | NO |
| 2. | To be referred to Reporter or not? | NO |
| 3. | Whether the judgment should be
reported in the Digest? | NO |

SANJAY KISHAN KAUL, J. (Oral)

CM No.23291/2010 (for condonation of 25 days delay in filing) &

CM No.23293/2010 (for condonation of 9 days delay in refiling)

1. Despite last opportunity granted no reply has been filed by respondent
No.1. Respondents 2 to 5 are already served but have chosen not to
appear.

2. In view of the averments made in the applications sufficient cause has been shown for condonation of delay and the applications are accordingly allowed subject to payment of costs of ₹5,000.00 to respondent No.1.

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3. Respondents 2 to 5 have chosen not to appear despite service and are, thus, proceeded *ex parte*.
4. Admit.
5. Learned counsel for respondent No.1 accepts notice.
6. At request of learned counsels for the parties, the appeal is taken up for final disposal.
7. The parties are brothers and sisters. The appellants and respondent No.1 are the brothers while respondents 2 to 5 are the sisters. The controversy primarily relates to property bearing No.33, Sunder Nagar, New Delhi of which the recorded owner was late Shrimati Raj Mohini who passed away on 20.4.1988. The appellants filed a suit for partition, rendition of accounts and damages in the year 2000 qua the suit property. The appellants pleaded that the deceased at the time of death was possessed of both movable and immovable properties which included the suit property. It was alleged that the property was a joint family property and the appellants as class-I legal heirs were entitled to share in the property.

8. The plaint goes on to state that the appellants had been demanding partition since soon after the death of their deceased mother but respondent No.1 sought to propound a Will of the deceased dated 18.7.1987 and filed Probate Case No.383/1988 in terms whereof respondent No.1 claimed to be the sole beneficiary of the immovable property. This probate petition was not decided till 23.9.2000 when the prayer made by respondent No.1 for grant of the probate of the Will was rejected and the probate petition was dismissed on merits. We are informed that an appeal has been filed against that order but no stay has been granted. The property consists of the ground and the first floors. The first floor has been rented out while respondent No.1 is residing in the ground floor. In paragraph 7 of the plaint there is an averment that the rent is being received by respondent No.1 alone to the exclusion of the appellants. In paragraph 8 of the plaint also there is an averment that respondent No.1 is in physical possession of the suit property and thus has deprived the appellants of the enjoyment of the suit property. In paragraph 9 of the plaint it is stated that the appellants are the co-owners and are in legal and joint possession of the suit property. Paragraph 11 of the plaint is the suit valuation paragraph where the relief of partition has been valued at ₹1,50,00,000.00 on which fixed court fee has been paid. The appellants have undertaken to pay additional court fee on the relief of

rendition of accounts and damages, found due and payable, after final adjudication of the present suit.

9. The suit has been contested by respondents 1 to 4 by filing their written statements, which are almost identical. In a nutshell, the plea is that the suit property is not a joint family property but was exclusively owned by late Shrimati Raj Mohini who by leaving behind the Will dated 18.7.1987 bequeathed the suit property in favour of respondent No.1 alone. It is not disputed that all the parties are class-I legal heirs of the deceased but the claim of the appellants is sought to be ousted on the plea of the Will propounded by respondent No.1.
10. It appears that on the basis of the aforesaid pleadings, the learned single Judge vide order dated 28.11.2008 while referring to paragraphs 7 & 8 of the plaint containing an averment that respondent No.1 was in physical and actual possession observed that the appellants were admittedly ousted from the possession and would have to pay ad valorem court fee especially as they had prayed for possession also. The matter was thereafter listed on 29.1.2009 when more time was sought to pay the court fee and the final opportunity was granted on 17.2.2009, the matter being adjourned to 13.4.2009. Admittedly, no ad valorem court fee was paid but IA No.5066/2009 was filed seeking recall of the orders dated 29.1.2009 and 17.2.2009 predicated on the plea that as per the legal advice obtained, they are

not liable to pay ad valorem court fee and deemed to be in constructive possession of their undivided share in the property. This plea was sought to be supported by the fact that the first floor of the property was with the tenant and the factum of respondent No.1 receiving the rent alone did not disentitle them to claim possession as well as rent in respect of the first floor. The factum of the probate petition being dismissed was also relied upon.

11. The appellants relied upon the observations of the Supreme Court in Neelavathi & Ors. Vs. N. Natarajan & Ors. AIR 1980 SC 691, which have been reproduced in the impugned order and are relevant in the present appeal and, thus, reproduced as under:

“The general principle of law is that the case of coowners, the possession of one is in law possession in all, unless ouster 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 plaintiff could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from joint possession, it is necessary that on a reading of the plaint that they had been excluded from joint possession to which they are entitled to in law. The averments in the plaint that the plaintiff could not remain in joint possession as he was not given any income from the joint family property would not amount to his exclusion from possession. We are unable to read into the plaint a clear and specific admissions that the plaintiff had been excluded from possession.”

12. The aforesaid view is followed in Jagannath Amin Vs. Seetharama (Dead) By Lrs. & Ors. (2007) 1 SCC 694.

13. In terms of the impugned order dated 14.9.2010 this application has been rejected giving four (4) weeks' time to the appellants to pay court fees failing which the plaint would be liable to be rejected under Order 7 Rule 11 of the Code of Civil Procedure, 1908.
14. The impugned order is also predicated on the factum of the first floor of the said property being on rent and the rent being received by respondent No.1 alone and the ground floor of the property being enjoyed exclusively by respondent No.1.
15. Learned counsel for the appellants, once again, before us has adopted the same argument as urged before the learned single Judge that the possession of respondent No.1 of the ground floor must be held to be a constructive possession on behalf of all and the mere receipt of rent by respondent No.1 alone would not, in any manner, affect such constructive possession. Learned counsel further states that in paragraphs 7 & 8 of the plaint relied upon in the impugned order ought not to be read in isolation but have to be read with paragraph 9 of the plaint where there is a categorical averment that the appellants are co-owners and in legal and joint possession of the suit property.
16. Learned counsel for respondent No.1, on the other hand, has adopted the reasoning of the impugned order to contend that once the appellants are ousted they must pay the ad valorem court fee. He further submits that the appellants were given opportunities to pay the deficient court fee but failed to avail of the same. In fact, the

appellants at that stage sought time to pay the court fee twice but failed to deposit the court fee.

17. We have to examine the controversy in question. In so far as the plea of the appellants earlier seeking time to pay the court fee is concerned, the same cannot, in our considered view, prejudice the appellants from raising the plea in law which is permissible. We would, thus, have to examine on merits whether the appellants are required to pay ad valorem court fee or not.
18. The legal position is not in doubt and if one may say so there is really an agreement on the general principle that in case of ownership the possession of one is possession of all unless ouster/exclusion is proved. It is not necessary that a co-owner should be in actual and physical possession of the whole or part of the property or that he should be getting a share of income from the property so long as his right to share and the nature of the property is not disputed.
19. In this behalf the plaint has to be read as a whole. If the present plaint is seen, a conjoint reading of paragraphs 7 to 10 shows that what is pleaded by the appellants is that there is a tenant on the first floor while respondent No.1 resides on the ground floor of the property and the property is jointly owned and there is constructive possession of the appellants.
20. We may note that the factum of the appellants being class-I legal heirs and entitlement to property has not even been questioned but

respondent No.1 seeks to exclude the appellants solely on the basis of the Will propounded of their late mother who was the owner. The probate proceedings dragged on for almost twelve (12) years before the probate petition was dismissed on 23.9.2000. The appeal is pending without any stay. Thus, as on date there is no valid Will propounded by respondent No.1.

21. We are, thus, of the considered view that the plaint be read as a whole which clearly shows that the appellants claim constructive possession being the legal heirs of late Shrimati Raj Mohini. In fact, in paragraph 5 of the plaint the plea raised is of Shrimati Raj Mohini passing away intestate and the factum of respondent No.1 seeking to propound a forged and fabricated Will the probate of which was dismissed.
22. We do not think that the judgement of the learned single Judge of this Court in Prakash Wati Vs. Dayawati & Ors. 42 (1990) DLT 421 relied upon by learned counsel for respondent No.1 will come to his aid when such constructive possession is pleaded arising from the demise of the owner of the property when all parties are class-I legal heirs. The fact that the appellants have not been given their due share in the property or in the rent will not make any difference.
23. The appeal is accordingly allowed and the impugned order dated 14.9.2000 is set aside with a direction that the suit will proceed to trial on merits.

24. In the given facts of the case, the parties are left to bear their own costs.

CM No.23290/2010 (Stay)

25. In view of the disposal of the appeal, no directions are called for on this application and the same stands disposed of.

SANJAY KISHAN KAUL, J.

OCTOBER 20, 2011
b'nesh

RAJIV SHAKDHER, J.