IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.7806 of 2015(O&M)
Date of Decision-27.11.2018

Ashok Kinger ... Petitioner

Versus

Pradeep Kinger and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. R.K. Bamal, Advocate
for the petitioner.

Mr. Aman Kashyap, Advocate
for respondent No.1.

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RAJ MOHAN SINGH, J.

[1]. Petitioner has challenged the order dated 20.10.2015 passed by Civil Judge (Junior Division), Chandigarh vide which application under Order 7 Rule 11 read with Section 151 CPC filed by defendant No.1 for rejection of plaint was allowed.

[2]. Plaintiff filed a suit for declaration to the effect that the plaintiff and defendants No.1 to 3 be declared as joint owners in possession of House No.297, Sector-21-A, Chandigarh to the extent of 1/4th share each. Directions were sought against defendant No.4 to transfer the property in favour of the plaintiff and defendants No.1 to 3 in equal share. Suit for partition by way of possession by metes and bounds was claimed and it was also

sought that in case, partition is not possible by metes and bounds, then the property be put to auction between the co-sharers and then in open auction and thereafter, sale proceeds be divided equally amongst the plaintiff and defendants No.1 to 3. Suit for recovery of Rs.2,18,750/- on account of use and occupation charges @ Rs.6250/- per month qua share of the plaintiff w.e.f 08.07.2012 to 07.07.2015 was claimed as defendant No.1 was in possession of entire house in question. Permanent injunction was also sought, restraining defendants No.1 and 2 to alienate the property in question in any manner.

[3]. Plaintiff has also pleaded in the plaint that he does not want to remain in joint possession with defendants No.1 to 3. Pleadings made in para Nos.5 and 6 of the plaint are to the following effect:-

> *"5. That the plaintiff clearly stated that he does not want to remain in joint with defendant No.1 to 3 and he requested them to partition the suit property and to pay him use and occupation charges of the entire house by defendant No.1, qua the share of the plaintiff @ Rs.6250/- per month but no response was received from the defendants. Hence this suit.*
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> *6. That the market rental value of House No.297, Sector 21-A, Chandigarh which is measuring 500 yd. is more than Rs.25,000/- PM and the plaintiff being co-owner of 1/4th share in the said house is entitled to Rs.6250/- per month on account of unauthorized use and occupation charges qua his share w.e.f. 08.07.2012 to 07.07.2015 for last 3*

years as the claim for unauthorized use and occupation w.e.f. 01.01.2008 to 31.07.2012 has become time barred and legally cannot be claimed, therefore, the plaintiff is claiming the use and occupation charges/mesne profits for the last 3 years upto the date of filing of the suit and further damages from the date of filing of suit w.e.f. 08.07.2015 till the property is partition @ Rs.6250/- per month."

[4]. In para No.11 of the plaint, the plaintiff valued the suit property in terms of Court fee in the following manner:-

"11. That the value of the suit for the purpose of declaration is Rs.195/- and a Court fee of Rs.19.50 is affixed on the plaint for the relief of declaration. The value of the suit for the purpose of permanent injunction is assessed Rs.140/- accordingly court fees of Rs.14/- is affixed on the plaint. The value of the suit for the purpose of partition and possession by way of metes and bounds is assessed Rs.200/- and a Court fee of Rs.20/- each is affixed on the plaint. That the value of the suit for the purpose of recovery of damages/mesne profit on account of unauthorized use and occupation of entire house by defendant No.1 is Rs.2,18,750/- and a Court fee of Rs.4491.20 is affixed on the plaint. The plaintiff is claiming further damages @ Rs.6250/- per month from the date of suit till the partition of the suit property, therefore, the plaintiff undertakes to affix the actual Court fees as per the decree which may be passed against defendant No.1 for damages/mesne profits on account of use and occupation charges, which may be passed by this Hon'ble Court."

[5]. In the application under Order 7 Rule 11 CPC, defendant No.1 took up the grounds for rejection of plaint in the following manner:-

"2. That the plaintiff has filed the present suit for declaration, partition, possession, recovery and for permanent injunction with regard to House No.297, Sector-21-A, Chandigarh. However, the plaintiff has not affixed the ad valorem Court fee for seeking relief of partition and possession with the Civil Suit. It may kindly be noted here that the House No.297, Sector 21/A, Chandigarh is a one kanal House and market value of the same is around Rs.6-7 crores. As such the plaintiff is required to affix the ad valorem Court fee for seeking partition and possession of the above said house. Even the collector rate of one kanal plot is Rs.82,368/- per sq. yds approximately and the above house i.e. House No.297 is having size of 500 sq. yds, as such the collector rate for the plot is Rs.4,11,84,000/- and Rs.759/- per sq. ft. is the collector rate for covered area. The House No.297 Sector 21A, Chandigarh is having covered area is Rs.11,38,500/-. Copy of the prevailing collector rate schedule in Chandigarh is attached herewith as Annexure A-1. As already stated above, the plaintiff has not affixed the ad valorem Court fee for seeking partition and possession of above said house, therefore, the Civil Suit is required to be rejected under Order 7 Rule 11 CPC for not affixing the ad valorem Court fee with the plaint. For ready reference, the Order 7 Rule 11 CPC is reproduced herein below:-

> *"Rejection of plaint-The plaint shall be rejected in the following cases:-*
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> *(a) Where it does not disclose a cause of action;*
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> *(b) Where the relief claimed is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*

(c) Where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law;

(e) Where it is not filed in duplicate;

(f) Where the plaintiff fails to comply with the provisions of Rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extent such time would cause grave injustice to the plaintiff."

The plaintiff has shown the valuation of the property in para No.11 of the Civil Suit, wherein he has stated that the value of the suit for the purposes of partition and possession is Rs.200/-, which is highly undervalued and not as per the requirement of law. As such, the plaintiff is required to affix the ad valorem Court fee for seeking partition and possession of the house mentioned above, however, the same has not been affixed with the plaint. Thus, the Civil Suit has to be rejected on this ground alone."

[6]. Trial Court allowed the application and directed the plaintiff to file *ad valorem* Court fee as per market value of the suit property.

[7]. At the time of issuance of notice of motion on 20.11.2015, operation of the impugned order was stayed.

[8]. Learned counsel for the petitioner vehemently submitted that the plaintiff is in joint possession of the property and he is owner of a defined share in the joint property. The suit itself is based on the status of the plaintiff being that of co-sharer. Since the land has not been partitioned, therefore, prayer for declaration and partition along with other prayers have been made.

[9]. In ***Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram, AIR 1961 Punjab 528, Bhartu Vs. Ram Sarup, 1981 PLJ 204 (Full Bench)*** and ***Ram Chander Vs. Bhim Singh and others, 2008(3) RCR (Civil) 685***, the concept of co-sharership was defined in a very exhaustive manner. The right and liabilities of co-sharers are settled by Court *inter se* are to the following effect:-

> *"(i) A co-owner has interest in the whole property and also in every parcel of it.*
>
> *(ii) Possession of joint property by one co-owner, is in the eye of law, possession of all even if all but one are actually out of possession.*
>
> *(iii) A mere occupation of a larger portion or even of entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.*

(iv) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the pre-emption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies that of the other.

(v) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(vi) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar right of other co-owners.

(vii) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition.

(viii) Co-sharer in possession exclusively of some portion of joint holding not more than his share is entitled to continue in possession till joint holding partition and can transfer that portion subject to adjustment at the time of partition.

(ix) Transferee under Section 44 of Transfer of Property Act gets right of transfer to joint possession and to enforce partition irrespective of the fact whether property sold is fractional share or specified portion."

[10]. Learned counsel further relied upon ***Surjit Kaur and others Vs. Smt. Lila Wati and others, 2014(77) RCR (Civil) 905, Surinder Singh Vs. Harvinder Singh and others, 2018(1) Law Herald 47, Rajiv Kumar and others Vs. Rakesh Kumar***

and others, 2015(8) RCR (Civil) 588 and ***Neelavathi and others Vs. N. Natarajan and others, 1980 AIR (SC) 691*** and submitted that in a case of partition amongst the co-sharers, only a fixed Court fee is required to be affixed. In a suit for partition, every plaintiff is defendant and every defendant is plaintiff because every co-sharer is entitled to get his due share in partition. Fixed Court fee is payable in a suit for partition and possession in a joint property even if the plaintiff is not in possession of any part of the suit property. Possession of one of the co-sharers will be deemed to be possession of all co-sharers subject to partition of the joint property by metes and bounds. A co-sharer would be deemed to be in possession of every inch of property till the land is partitioned by lawful means. The expression excluded from possession has to be construed in the light of a specific plea of ouster taken by the co-sharer in exclusive possession. In such eventuality, the possession of a co-sharer must not only be exclusive, but the same has to be hostile to the knowledge of other co-sharers and such co-sharer must exhibit and openly asserts his own title by denying the title of other co-sharers. The plea of ouster has to be in terms of written statement. At the stage of consideration of application under Order 7 Rule 11 CPC, only averments made in the plaint are to be seen. The plea of ouster even taken in the written statement cannot be made subject matter of the application under Order 7 Rule 11 CPC.

[11]. On the other hand, learned counsel for respondent No.1 relied upon ***Sushma Tehlan Dalal Vs. Shivraj Singh Tehlan and others, 2011 (123) DRJ 91 (Delhi)*** and contended that for the purposes of valuation of the suit property, only averments made in the plaint are to be seen without reference to the plea taken by the defendants. If the averments made in the plaint show that the plaintiff has been completely ousted from possession and is not in possession of any part of the suit property, then he is required to claim possession and also pay *ad valorem* Court fee on the market value of his share in the suit property.

[12]. The aforesaid assertion made by learned counsel for respondent No.1 has to be seen in the context of plea of ouster taken by the defendants in the written statement. As per right and liabilities of co-sharers as defined in ***Bhartu's case (supra)*** and again reiterated in ***Ram Chander's case (supra),*** the possession of one of the co-sharers would be deemed to be possession of all other co-sharers unless and until the plea of ouster taken by one of the co-sharers against other co-sharers is established on record and pre-emption of joint possession can only be negated, if the possession of one of the co-sharer is found to be exclusive and hostile to the very knowledge of other co-sharers and co-sharer in possession has openly asserted his own title and denied the title of other co-sharers by way of ground of ouster. For that, the possession of a co-sharer must not only be

exclusive, but also hostile to the knowledge of other co-sharers. The aforesaid requirement would give rise to a triable issue between the parties. Mere occupation of the joint property by one of the co-sharers would be deemed to be possession of all the co-sharers because every co-sharer would be deemed to be in possession of every inch of land till the land is partitioned by metes and bounds.

[13]. Learned counsel for respondent No.1 further relied upon ***CR No.191 of 2014*** titled ***Raj Kumar Vs. Anil Mahajan and others*** decided on 30.07.2014, wherein the plaintiff was not found to be in possession of joint property of the firm and he was seeking possession, therefore, in the facts and circumstances of the case and by relying upon ***Sushma Tehlan Dalal's case (supra)***, it was held that the plaintiff was liable to pay Court fee qua his share. No such proposition is involved in the present case as the plea of ouster has not come forth and the same would give rise to a triable issue at the relevant time.

[14]. In my considered opinion, at this stage, asking the plaintiff to affix Court fee would be in negation of concept of co-sharership.

[15]. For the reasons recorded hereinabove, this revision petition is allowed. Impugned order dated 20.10.2015 passed by Civil Judge (Junior Division), Chandigarh is hereby set aside,

dismissing the application under Order 7 Rule 11 read with Section 151 CPC through out.

[16]. Nothing expressed hereinabove would be construed to be an expression of any opinion on merits of the case.

(RAJ MOHAN SINGH)
JUDGE

27.11.2018
Prince

Whether Reasoned/Speaking Yes/No

Whether Reportable Yes/No