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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 22nd November, 2019
+ **CM(M) 1489/2019**
PUSHPA SHARMA & ORS Petitioners
Through: Mr. Rikky Gupta and Mr. J. P. Gupta,
Advocates. (M:9811062591)
versus
GOPAL DAS & ORS Respondents
Through: None.
CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(oral)

CM APPL. 45390/2019 (exemption)

1. Allowed, subject to all just exceptions. Application is disposed of.

CM(M) 1489/2019 & CM APPL. 45391/2019

2. The grievance of the Petitioners/Plaintiffs (*hereinafter, "Plaintiffs"*) is that the suit only prays for declaration and possession is not being sought as the case of the Plaintiffs is that they are in possession of the suit property. Thus, according to the ld. counsel for the Plaintiffs, following the judgment of this Court in *Mohalla Samiti Indara Kuan v. Sunil Mohan & Ors., 242 (2017) DLT 403*, if the Plaintiff is in possession and is merely seeking declaration, only fixed court fee is to be paid and not *ad valorem* court fee.

3. A perusal of the impugned order shows that ld. Trial Court has observed as under:

...
5. *After considering the submissions made by the Ld. Advocates for the parties, on 04.01.2019 and perusing the record of the Court file, I find that the first application is liable to be dismissed because in the first application, the applicant has not disclosed the details of the documents, by virtue of which, it had obtained*

ownership/possessive rights qua the suit property in the year 1978; because along with the first application, the applicant has not filed any document, reflecting that the applicant has ownership rights in respect of the suit property; because along with the first application, the applicant has not filed any document reflecting that the applicant is in settled possession of the suit property since the year 1978 and because along with the first application, the applicant has not filed any document reflecting that Sh. Brij Mohan Mahajan, is the President of the applicant.

6. Further, I find that the second application is liable to be allowed because of two reasons. Firstly, the second application is liable to be allowed because in accordance with the law laid down in Jagdish Singh v Jaswinder Singh & Ors., 2014 SCC OnLine Del 7520 and the amended Section 7(iv)(c) of the Court-fees Act, 1870, referred therein, the plaintiffs are required to value the reliefs of declaration and injunctions, sought by way of this suit, as per the value of the suit property. Secondly, the second application is liable to be allowed because the Khasra Girdawari and other revenue records, filed by the plaintiffs cannot establish that the plaintiffs are the owners of the suit property and because in order to establish their ownership qua suit property, the plaintiffs will have to prove on record the Will dated 20.07.1977, allegedly executed by Late Smt. Channo Devi (grandmother of the defendant no.2) in favour of their predecessors in interest, Late Sh. Suraj Pal Sharma and Late Sh. Jai Bhagwan.

7, In view of the aforesaid, one opportunity is granted to the plaintiffs (a) to correct the valuation of the reliefs, sought by way of this suit, in accordance with the law laid down in Jagdish Singh (supra) and (b) to file a copy of the Will, allegedly executed by Late Smt. Channo Devi (grandmother of the defendant no.2), in favour of Late Sh. Suraj Pal Sharma and Late Sh. Jai Bhagwan. In case, the plaintiffs fail to avail this opportunity, the plaint of this suit will be rejected under Order VII Rule 11(a) &(b) of CPC, 1908.

4. A perusal of the above paragraphs shows that at the preliminary stage itself, the Id. Trial Court has started examining the evidence as to whether the Plaintiffs are, in fact, in possession or not. Such an approach would be contrary to law, inasmuch as the factum of possession having been claimed by the Plaintiffs, the question as to whether the Plaintiffs are in possession or not cannot be gone into at this stage for the purposes of determining the court fee payable.

5. The judgment in *Mohalla Samiti (supra)* cited by the Id. counsel is clear and observes as under:

“10. Hence, where a person who has not executed a sale deed and is in possession of the property seeks declaration, he has to merely pay a fixed Court fee under Article 17(iii) of the Second Schedule of the Act. The position would be different in case the person seeking a declaration/relief is not in possession of the property. Then he has to pay an ad valorem Court fee as per under Section 7 (iv)(c) of the Court Fees Act.”

6. Thus, so long as the Plaintiffs are claiming to be in possession and only seeking declaration, fixed court fee would have to be paid. The question as to whether the Plaintiffs are in possession or not is left open. An issue would be framed as to whether the suit has been valued properly and whether proper court fee has been paid. The Petitioner undertakes that if this issue is decided against the Plaintiffs, the proper court fee shall be deposited by the Plaintiffs as may be directed by the trial court. Accepting the undertaking given, the petition and all pending applications are disposed of in the following terms:

a) In view of the judgment cited by the Id. counsel for the Plaintiff, the Plaintiff need not deposit court fee at this stage.

- b) The ld. Trial Court may frame an issue as to whether the suit is properly valued and whether or not proper court fee has been paid.
- c) As part of this issue, the question of possession shall also be finally adjudicated by the ld. Trial Court.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 22, 2019

dj

