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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 26th February, 2020

+ **CM(M) 255/2020**

ACHALA MOHAN

..... Petitioner

Through: Mr. Prashant Mendiratta, Mr. B. Venkatraman, Ms. Jahnvi Singh and Mr. Prashant Bhardwaj, Advocates. (M:9811182500)

versus

JAYASHREE SINGH

..... Respondent

Through: Mr. D.P. Singh, Ms. Sonam Gupta and Mr. AASTIK Dingra, Advocates. (M:9873498887)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

CAV 173/2020

1. Caveat is discharged as the Caveator has entered appearance.

CM APPL. 7695/2020 (for exemption)

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

CM(M) 255/2020 & CM APPL. 7694/2020

3. Ld. Counsel for the Caveator/Respondent appears and submits that he does not have a copy of the petition. A perusal of the record shows that the advance copy is claimed to have been sent but only the courier receipt is filed without the tracking report.

4. Advance copies of petitions, pursuant to recently issued Practice directions are being served. However, when the matter is listed, the only proof of service is the courier receipt and the tracking report is not placed

along with the receipt. The Registry is directed to ensure that when advance copies are sent either to the Caveator or to the Respondents, by courier, along with the courier receipt, the tracking report showing the delivery to the Respondents/ Caveator ought to be also attached in future. Copy of this order be circulated to the filing counter by the Id. Registrar General.

5. The present petition has been filed challenging the impugned order dated 9th January, 2020 by which a review application seeking review of order dated 30th September 2019, was dismissed by the Trial Court.

6. A suit was filed by one Smt. Jayashree Singh – Respondent herein/Plaintiff (*hereinafter ‘Plaintiff’*) for mandatory injunction and for recovery of *mesne profits* and damages in respect of property bearing no. 141, Golf Links, New Delhi-110003 (*hereinafter ‘suit property’*). The suit was filed by the Plaintiff on the basis of the plea that Mrs. Achala Mohan - Petitioner herein/Defendant (*hereinafter ‘Defendant’*) was in unlawful occupation of the said property. The background relating to the manner in which the Defendant came into possession of the suit property is not relevant for the present petition. The reliefs sought in the suit are as under:

“In light of the foregoing facts and circumstances, the Plaintiff most humbly, and: respectfully prays that this Hon'ble Court may kindly be pleased to:

a) Pass a decree of mandatory injunction against the Defendant herein thereby directing the Defendant to handover the vacant and peaceful possession of the Suit Property to the Plaintiff herein, alongwith all the personal belongings of the Plaintiff lying at the Suit Property, in their proper and fit condition, whether in use by the Defendant or not; and,

b) Pass a decree in favour of the Plaintiff and against the Defendant directing the Defendant to pay mesne

profits/damages for a period commencing from August 2018, i.e., date of illegal occupation of the Defendant herein till the date of handing over of the vacant and peaceful possession of the Suit Property to the Plaintiff, calculated at the rate of Rs. 8,50,000/- (Rupees Eight Lakh Fifty Thousand Only) per month, i.e. the prevailing market rate; and,

c) Award costs of the suit in favour of the Plaintiff and against the Defendant; and/or,

d) Pass any or such other/further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstance of the case and in the interest of justice.”

7. In the written statement, the Defendant took three broad defences:

- i) that the Defendant was in settled possession of the suit property under an oral agreement;
- ii) that the Defendant has become owner of the property due to adverse possession as the husband of the Defendant had been given possession by the Plaintiff and her father;
- iii) that the suit is not maintainable as it is in effect a suit for possession which has been couched as a suit for mandatory injunction.

8. On 30th September 2019, in view of the pleadings and the respective stands of the parties, the following issues were framed:

1. Whether late husband of the defendant continued to occupy suit property as per oral agreement with plaintiff. OPD

2. Whether as per oral understanding between plaintiff and late husband of defendant, the taxes and other levies in respect of suit property were paid by the plaintiff as she was yet to transfer her proprietary interest to late Sh. R.K. Dhawan (late husband of defendant)? OPD.

3. Whether the plaintiff is entitled for Decree of mandatory injunction as prayed for in para a of the prayer clause? OPP.

4. Whether the plaintiff is entitled for recovery of mesne profits/or damages, as prayed for in prayer clause (b)? if yes at what rate and for what period.? OPP

5. Relief”

9. The Trial Court, after framing issues also observed that since the Defendant’s case is that she is in settled possession due to lapse of considerable time and is also relying on an oral agreement, the Defendant ought to lead evidence first. The observation of the Court is as under:

“List of witness be filed within a week by defendant specifying the purposes thereof. Copy of affidavit of witnesses of defendant be supplied in advance to facilitate cross-examination of the witnesses.

Since the defendant is defending the suit contending her possession having settled by lapse of considerable period of time and is contending the oral agreement having entered into between plaintiff and husband of defendant, it would be appropriate to list the matter for evidence of defendant first.”

10. The Defendant, thereafter moved an application seeking review/recall of the said order dated 30th September, 2019. In the said application, the stand of the Defendant is that the property belonged to the Defendant’s husband and this was due to the long possession which was vested in them by the Plaintiff and her father. Secondly, on the aspect of settled possession, no issue has been framed by the Court. Thirdly, the court fee had not been paid and accordingly this would be liable to be treated as a preliminary

issue.

11. Further, it is also contended that the order to the extent, it directs the Defendant to lead evidence first, is erroneous. This application has been decided by the impugned order dated 9th January, 2020 by which the Trial Court has rejected the application. The contention of Id. counsel for the Defendant is that the Trial Court failed to appreciate that in the written statement, the ownership of the Plaintiff has been denied by the Defendant. Thus, the Plaintiff ought to lead evidence first. It is submitted further by Id. counsel that the preliminary objection in respect of court fee has also not been framed in the matter. Reliance is placed on the following two judgments of this Court:

- ***Sabha Sultana & Ors. v. Ahmad Aziz & Anr., [CS(OS) 2958/2011, decided on 31st August, 2017]***
- ***Om Prakash v. Amit Choudhary & Ors., [CM(M) 282/2019, decided on 25th July, 2019]***

12. On the other hand, Id. counsel appearing for the Caveator/Plaintiff submits that the entire defence of the Defendant is based upon the fact that the Plaintiff's ownership is not disputed but what is disputed is that the Defendant has acquired ownership due to settled possession and adverse possession. Thus, the Trial Court has rightly directed the Defendant to commence evidence first. He further submits that the issue of court fee was heard by the Court at the time of admission of the suit and the Court did not deem it appropriate to frame any issue in respect of the court fee/maintainability of the suit. Reliance is placed on the following judgements:

- *Vikram Kaushik & Anr. v. Vivek Kaushik*, [CS(OS) 1848/2009, decided on 13th December, 2011]
- *Jagran & Ors. v. Basanti Bai & Ors.*, 2001(1) MPHT 430
- *Purastam & Ors. v. Chatru*, 1992(1) OLR 72
- *Keshavlal Durlabhasinbhai's Firm & Anr. v. Shri Jalaram Pulse Mills*, AIR 1995 Guj 166
- *Chandralatha v. Annamallai Finance Ltd.* [CRP No. 1092/1993, decided on 20th February, 1996]
- *Krishnakumar v. V. Seethalakshmi* [CRP No. 28/2013, decided on 7th January, 2013]
- *Jagdish Prasad Aggarwal & Ors. v. Shashi Jain* [CM(M) 26/2014, decided on 30th April, 2014]
- *Vaishakhi Ram & Ors. v. Sanjeev Kumar Bhatiani*, (2008) 14 SCC 356
- *Joginder Singh Sodhi v. Amar Kaur*, (2005) 1 SCC 31
- *RVE Venketachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr.*, (2003) 8 SCC 752
- *Ravinder Kaur Grewal & Ors. v. Manjit Kaur & Ors.*, (2019) 8 SCC 729

13. The Court has heard ld. counsel for the parties and has perused the pleadings and the impugned order. The Plaintiff firstly, pleads categorically that she is the owner of the property in question. The Defendant on the other hand claims that she is married to one Mr. R.K. Dhawan, who was put in settled possession by the Plaintiff/her father and hence the Defendant's husband had become the owner by way of adverse possession/settled

possession. The Defendant also takes the stand in the written statement that though the Defendant's husband had become the owner, the taxes and all other charges in respect of the property were being paid by the Plaintiff in view of the oral agreement between the parties.

14. The judgments of ***Jagdish Prasad Aggarwal (supra)***, ***Vaishakhi Ram and Others (supra)***, ***Joginder Singh Sodhi (supra)*** and ***RVE Venketachala Gounder (supra)*** all lay down the fundamental principles of onus of proof. In ***Jagdish Prasad Aggarwal (supra)*** where adverse possession was claimed, the onus of proof had to be discharged by the Defendant. On this proposition there cannot be any doubt whatsoever. In ***Ravinder Kaur Grewal and Others v. Manjit Kaur and Ors. (supra)*** the Supreme Court has, recently reiterated the principles of adverse possession and that the same can be not only used as a shield but also as a sword. The relevant observations of the Supreme Court are as under:

“59. We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the Plaintiff as well as a shield by the Defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained Under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be

remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the Plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the Plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a Plaintiff by adverse possession. Similarly, under other Articles also in case of infringement of any of his rights, a Plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.”

15. In ***Vikram Kaushik v. Vivek Kaushik (supra)*** a ld. Single Judge of this Court, after perusing the issues, discussed the question of who should lead evidence first. The Court in the said case held that when the Defendant pleaded oral partition as its defense, the Defendant ought to be directed to lead evidence first. Since the main defense of the Defendant, if proved, would have dis-entitled the Plaintiffs to any relief, the Court directed the Defendant to commence evidence in the said case. Similar was the view taken by various other High Courts in the judgments cited by the Respondents including the Madhya Pradesh High Court in ***Jagran and Ors. v. Basanti Bai and Ors. (supra)***, wherein the Court observed as under:

“8. ...Applying the aforesaid enunciation of law to the obtaining factual matrix it becomes graphically clear that Issue No. 2 (b) is answered in favour of the defendants then the plaintiff's suit is bound to fail, and therefore, the learned Trial Judge has rightly directed the contesting defendants to lead the evidence first.”

16. In ***Purastam @ Purosottam Gaigouria and Ors. v. Chatru @ Chatrubhuja Gaigouria (supra)***, the Orissa High Court also observed as

under:

“6. In this case, the plaintiff sought partition alleging that the property was joint family property and had not been decided by metes and bounds. The defendant-petitioners placed a previous partition since 1960-61 to defeat the plaintiff's suit. In view of the plea of the defendants that there was a previous partition, the learned Subordinate Judge called upon the defendants to begin. The plaintiff's plea that the property was joint family property having been admitted by the defendants and the latter having pleaded previous partition, the defendants are to lose if neither party adduced evidence, the burden being on the defendants to prove previous partition. Only when the defendants lead some evidence in proof of previous partition, the plaintiff would be obliged to lead evidence in rebuttal. Rightly, therefore, the learned Subordinate Judge called upon the defendants to begin. We, therefore, see no merit in this revision which is accordingly dismissed. There would be no order as to costs.”

17. In ***Keshavlal Durlabhasinbhai's Firm and Another v. Shri Jalaram Pulse Mills (supra)***, the Gujarat High Court observed as under:

“7. In view of the fact that the plaintiff's claim is substantially admitted and the plaintiff-firm is also prima facie shown to be a registered firm, the trial court has rightly directed the defendant to lead the evidence first. The trial Court is entitled even to record the statements of the parties before framing issues under Order XIV, Rule 1 read with Order X, Rule 2. ...

8. These provisions enable the trial Court to narrow down the controversy and focus the attention of the parties to the barest minimum. In large number of cases, the matters would be expeditiously disposed of. This is a very salutary provision for expeditious disposal of suits and it should ordinarily be resorted to and followed, by all trial courts.

9. In the present case, though this procedure is not followed and though the stage of framing of issues has passed, the trial court has on correct appreciation the rival contentions of the parties come to a proper conclusion that the defendant should lead the evidence first. This order is perfectly legal and proper and no interference is called for on any of the grounds canvassed by the learned advocate for the petitioner. Though the defendant has chosen to deny the claim of the plaintiff in totality, that is a denial without any substance in view of the other admitted facts of receipt of goods, part payments, issuance of cheques and a claim of having made further payments and, therefore, onus lies on the defendant. The denial of registration of partnership is also prima facie frivolous. The plaintiff has given the registration number of the partnership firm of the plaintiff.”

18. In **Krishnakumar v. V. Seethalakshmi** (*supra*), the Madras High Court observed as under:

“7. In this case too, the burden of proof lies on the party, who asserts a particular fact. The particular fact, which is asserted is, whether the property belonged to Narayana Asari absolutely. That fact has been asserted by the plaintiffs and also admitted by the defendants. Therefore, there is no burden of proof on the plaintiffs to prove that fact. Insofar as the onus of proof is concerned, it is held in that judgment, referred to above, that onus of proof by a party would cease, the moment, the opposite party admits the transaction. In this case, the onus of proof is on the defendants to prove the execution of the Will, that has been denied by the plaintiffs. Once defendants are able to prove the Will to the satisfaction of the court, the suit filed by the plaintiffs will be dismissed and there is no necessity to go into the further aspects of the matter, by letting evidence by the plaintiffs. Considering all these aspects, the Court below initially directed the defendants to lead evidence first and that was properly appreciated, while considering the Review Application.

Further, I do not find any infirmity in the order passed by the Court below in the Review Application and there is no error apparent on the face of record to interfere with the same. In the result, the Civil Revision Petition fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

19. Thus, the consistent view has been that if the Defendant sets up a case, the proving of which, would completely decide the issues which have been raised in the suit itself, then the Defendant under Order XVIII Rule 1 CPC can be directed to lead evidence first.

20. In the present case, the crux of the dispute is therefore whether the Defendant has become owner due to settled possession/adverse possession. The admission as to title is integral to the defence of adverse possession inasmuch as the Defendant is claiming adverse possession after having admitted the title of the Plaintiff. Without admitting the title or ownership of the Plaintiff, the defence of adverse possession would not arise. Under such circumstances, the Trial Court is right in holding that the main defence being that of an oral agreement and that of adverse possession/settled possession, the Defendant ought to commence evidence first. It is the settled position in law that a bare denial does not constitute a denial. A denial has to be meaningful. The suit and the written statement when read as a whole clearly show that it is the Defendant's case that they have acquired title not from a third party but from the Plaintiff herself. Under these circumstances Order XVIII Rule 1 CPC in effect, requires the Court to consider as to whether there is an admission or not. Considering the stand of the Defendant in the written statement, without saying anything further so as to not affect the final adjudication of the suit, it suffices to state that the Trial Court's order

directing the Defendant to commence the evidence first is completely correct and in accordance with law.

21. The judgment in *Sabiha Sultana (supra)* relied upon by the Defendant primarily sets out the entire law on this subject, which is quite well settled now. Even in the said case, the Court relies upon the judgment in *Dattatray Namdeo Patil v. Ram Namdeo Patil and Ors., 2010 (4) AIR Bom 345* where the Bombay High Court holds that the Defendant can be compelled to lead evidence first, if the facts and pleadings require such an order to be passed. Even if the admission is not categorical, it is definitely readable in the present case from the written statement.

22. The order dated 30th September, 2019 therefore does not require to be interfered with on this aspect.

23. However, on the second aspect of court fee, there is clearly a lapse in the order that there is no issue of deficiency in court fee which has been framed. Accordingly, one more issue be framed as issue no.1(a) to read as under:

1(A). Whether the suit is maintainable without payment of full ad-valorem court fee? OPD

24. It is accordingly directed that with the addition of this one issue, the impugned order shall stand modified.

25. The Id. counsel for the Defendant submits that unless and until the Defendant voluntarily opts for leading evidence first, the Court would not have the power to direct so. This would not be in accordance with law inasmuch as the Court has the power to curtail the trial of any suit at the time of framing of issues. The manner in which the issues have been framed in the present case shows that insofar as the issue no.1 and issue no.2, the

onus has been cast clearly on the Defendant. If the Defendant is able to prove or not prove these issues, the decision in the suit would get quite expedited.

26. Under these circumstances, it is not necessary that in every suit, unless and until, the Defendant opts, the Court cannot direct the Defendant to lead evidence first. The question as to whether who should lead evidence first, would have to be decided by the Court after ascertaining the respective stands of the parties and after seeing as to what are the actual issues which arise for adjudication in the suit itself.

27. The Id. counsel for the Defendant submits that the review has been dismissed without adverting to the merits of the matter. While the Trial Court may have held that the review is not maintainable, the Trial Court has considered the issues on merits as is evident from a reading of paragraph 10 of the impugned order.

28. The Defendant shall first lead the evidence before the Trial Court. Considering the age of both the parties, both parties agree for expeditious adjudication of the suit. Accordingly, it is directed that the affidavit by way of evidence on behalf of the Defendant, be filed within four weeks. The trial of the suit shall commence on the date fixed i.e. 23rd April, 2020. The Trial Court shall endeavour to conclude the trial within a period of six months and pronounce the judgment on or before 31st December, 2020.

29. With these observations, the petition and all pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 26, 2020

Rahul/A.S.