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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 13th March, 2020
+ **C.R.P. 49/2020 and CM APPL. 9666/2020, 9667/2020**
RITA GHOSH & ORS Petitioners
Through: Mr. Chandan Kumar, Advocate (M:
9810312011).

versus

RAMA TIWARI Respondent
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition challenges the impugned order dated 5th February, 2020 by which the application moved by the Respondent/Plaintiff (*hereinafter, 'Plaintiff'*) under Order VI Rule 17 CPC has been allowed by the Trial Court.

2. The suit is one for partition filed by Mrs Rama Tiwari i.e., the Plaintiff, against her siblings i.e., the Petitioners/Defendants (*hereinafter, "Defendants"*). The suit prays for partition of the suit property, being one two bedroom flat at E-13B, Second floor, Vijay Nagar, New Delhi and one flat at First Floor, 4-Hind Colony, Gwalior-Murar Road, Gwalior, Madhya Pradesh (*hereinafter, "suit property"*). The prayer in the suit was as under: -

"A. Decree for partition of suit property to the extent of 1/5th share of the plaintiff separating 1/5th independent share of the plaintiff from the suit property.

B. Cost of the suit may also be awarded to the plaintiffs against the defendants.

C. Any other relief, which the Hon'ble Court may deem, fit and proper may also be passed, in favour of the plaintiff and against the defendants."

3. A joint written statement was filed by the Defendants who also moved an application under Order VII Rule 11 CPC. In the said application a challenge was raised to the effect that in the plaint no possession was sought though the Plaintiff has pleaded that she has been ousted from possession. The Defendants also challenged the valuation of the suit.

4. The Plaintiff then moved an application under Order VI Rule 17 CPC seeking to add the relief of possession which was opposed by the Defendants.

5. The Trial Court, however, vide the impugned order, allowed the application under Order VI Rule 17 CPC by holding that there was no change in the nature of the suit and mere addition of the prayer of possession cannot be construed as a withdrawal of any admission. The observations of the Trial Court are as under: -

"The plaintiff has filed suit for partition against the defendants claiming herself to be the owner of the suit property to the extent of 1/5th share. The defendants have basically objected the amendment application on the ground that the same is belated and further, the valuable rights have already been accrued in favour of the defendants. Ld. counsel for defendants has further argued that the plaintiff has been taking different stands in different pleadings. Initially, the plaintiff has herself pleaded that she is in joint possession of the property. She has reiterated the said pleadings in the Replication. However, by way of amendment now, the plaintiff is seeking the separate possession of the suit property.

The plaintiff, by way of present amendment, is

seeking only the amendment in the prayer clause, whereby, she is seeking the possession of her independent 1/5th share in the suit property. The said pleading cannot be taken as withdrawal of the submission that she is not in the joint possession of the suit property. In **P. Lakshmi Reddy V. L. Lakshmi Reddy, AIR 1957 SC 314**, the Hon'ble Supreme Court held that the possession of one co-heir is considered, in law, as possession of all the co-heirs. The relevant portion of the said judgment is reproduced hereunder under:-

8...But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. **The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title.** The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Corea V. Appuhamy*, 1912 AC 230 [C]). It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster."

(Portion bolded in order to highlight)

In the suit for partition, the Court has to firstly adjudicate the rights of the parties in the property and the shareholding in the suit properly and thereafter, the question arises, whether the suit property can be

divided by metes and bounds and for this purpose, the Local Commissioner may also be appointed in terms of Order 26 Rule 13 and 14 CPC. If the Court comes to the conclusion that the property is divisible by metes and bounds, then, the respective parties are put to the possession in their independent share in terms of the judgment & decree, which follows in the said suit. In the present case, there is no dispute that the plaintiff is seeking the partition of the suit property. Mere addition of separate and independent possession does not change the character of the suit and the same will not, in any way, amounts to change of cause of action. The question of actual possession can be decided after looking into the entire pleadings and the evidence led by the parties and on that basis, whether the Court fees is required to be paid or not, which can be adjudicated after leading the evidence by the parties. The suit is at initial stages and still the issues are not framed in the present case. The delay in filing the application for amendment of the suit can be compensated in terms of the money. In my considered view, the amendment sought is necessary in order to decide the real question of controversy between the parties. Accordingly, the application for amendment is allowed subject to cost of Rs.3,000/- to be paid to the defendants.”

6. Ld. counsel for the Defendants submits that the Plaintiff has taken contradictory pleas. While in the plaint the Plaintiff claimed that she was in joint possession of the suit property, in the reply to the Order VII Rule 11 CPC application she claimed that she has been dispossessed. Thus, he submits that the Defendants have been put to enormous prejudice in view of the contradictory pleas taken by the Plaintiff. He further submits that the application under Order VII Rule 11 CPC is yet to be heard and decided by the Trial Court.

7. This Court has perused the impugned order as also the application

under Order VI Rule 17 CPC. There is no doubt that the parties are all siblings. The initial prayer was only for partition but by way of the amendment application, the relief of possession was sought to be added. Only pleadings in the suit have been completed and issues are yet to be framed. In the opinion of this Court, the relief of possession is a natural corollary of partition being directed in a suit and it would be for the Court to decide as to which party is entitled to possession of the whole or a part of the property. The issues are overlapping in nature. The fact that possession is now being prayed for by the Plaintiff would not in any way change the nature of the suit. Moreover, a perusal of the pleas being taken by the Plaintiff shows that the Plaintiff in effect is claiming, that though she has not been in physical possession of the suit property, in view of the joint ownership with her siblings, she is in deemed possession. Thus, there is no contradiction in the pleadings.

8. Under such circumstances, considering the nature of the suit and the stage of the suit, the Trial Court has allowed the application for amendment. This order does not warrant any interference owing to the settled legal position as set out in the Trial Court order itself.

9. However, since the Order VII Rule 11 CPC application is pending for consideration before the Trial Court the same would be adjudicated on its own merits, without being affected by the fact that the relief of possession has now been added to the plaint. In so far as valuation of the suit is concerned, the Court shall consider the pleadings in the plaint as also the reply to the application Order VII Rule 11 CPC and decide the question as to whether further Court fee would be liable to be deposited by the Plaintiff or not, in accordance with law. The observation in the impugned order that the

question of valuation would be looked at, after evidence, is not tenable and is set aside and would not bind the decision in the pending application. Accordingly, the application under Order VII Rule 11 CPC be adjudicated on merits on the basis of the pleadings of the parties.

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

PRATHIBA M. SINGH
JUDGE

MARCH 13, 2020

MR/T

(corrected and released on 18th March, 2020)

