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

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Date of Decision: 12.01.2021

% **FAO(OS) 167/2019**

RAVI MALHOTRA

..... Appellant

Through: Mr. Sandeep Sharma, Advocate.

versus

PREM MALHOTRA & ANR

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The present appeal is directed against the order dated 11.09.2018 passed by the learned Single Judge rejecting the appellant/ defendant's application being I.A. No. 23748/2014 under Order VII Rule 11 CPC. The appellant has also assailed the order dated 05.10.2018 passed in Review Petition No. 383/2018, whereby the review sought by him against the order dated 11.09.2018 was also rejected.

2. The respondents/plaintiffs instituted a suit against the appellant/defendant to seek a decree for partition and permanent injunction in respect of property No. 17, Road No. 8, Punjabi Bagh, New Delhi on the premise that the plaintiffs and the defendant are co-owners of the said

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property.

3. After the demise of their father, Late Shri Jaidev Malhotra, the plaintiffs are residing in USA and therefore, the suit has been instituted through their General Attorney. It has been averred in the plaint that the plaintiffs are in joint possession of the suit property which has, accordingly, been valued for purposes of court fee and jurisdiction. The appellant/defendant has filed his written statement, claiming therein that the plaintiffs, not being in possession of the suit property, were required to pay *ad valorem* Court fees on the value of their share in the same.

4. Vide the impugned order, the learned Single Judge has rejected the application by observing that the question as to whether proper Court fees has been paid or not had already been framed as an issue vide order dated 23.09.2014, which issue would be decided at the stage of final hearing of the suit. The review application filed by the appellant was disposed of by recording the undertakings of the plaintiffs that in case the Court were to hold that further Court fees was payable, they would make the requisite payment within the time granted by the Court at that stage.

5. Learned counsel for the appellant submits that the learned Single Judge has failed to appreciate that the respondents/plaintiffs have not visited India in the last 15 years and therefore, could not be treated as being in possession of the suit property. Consequently, the respondents were bound to pay the *ad valorem* Court fees on their claim for partition, which aspect has been not properly appreciated by the learned Single Judge.

6. Having heard the learned counsel for the appellant and perused the

record, we do not find any merit in the present appeal. The appellant does not dispute the fact that the plaintiffs continue to be co-owners of the suit property, which fact has been specifically averred in the plaint. In our view, that statement, in itself, is sufficient to show their possession, since ownership is a bundle of rights – including the right to possession and there is nothing to show that the plaintiff has been ever divested of possession.

7. Even otherwise, from a perusal of the plaint it is evident that it is not the case of the plaintiffs that they were ever dispossessed or forcibly ousted from the suit property. On the contrary, the plaintiffs have specifically averred in the plaint that they continue to be in joint possession of the suit property.

8. It is settled legal position that an application under Order VII Rule 11, CPC is to be determined primarily by looking at the averments in the plaint and the documents filed by the plaintiff along with the plaint. The version of the defendant cannot be gone into to decide such an application. Therefore, the plea of the defendant/ appellant that the plaintiffs are not in possession or that he is in exclusive possession of the suit property was rightly not considered by the learned Single Judge while deciding the said application.

9. We may also observe that deficiency in court fees, if any, is not fatal to maintainability of the suit. Even if, eventually the court fees is found to be deficient and the Court comes to the conclusion that more amount is payable by the plaintiff towards court fees, the plaintiff is entitled to be granted a reasonable opportunity to make up the said deficiency before the decree is drawn.

10. In the present case, in view of the specific undertaking given by the plaintiffs as recorded in the order dated 05.10.2018 during the hearing of the review petition, we find no merit in the present appeal, which is accordingly dismissed.

VIPIN SANGHI, J

REKHA PALLI, J

JANUARY 12, 2021

N.Khanna

