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

% ***Date of Decision: 23.07.2025***

\+ C.R.P. 135/2022 & CM APPL. 38588/2022

HEMLATA & ORS. .....Petitioners

Through: Mr. T.C. Yogi, Advocate.

versus

SHYNI V & ORS. .....Respondents

Through: Mr. Zain Haider, Mr. Atul Kumar Srivastav and Mr. Kaoliangpou Kamei, Advocates for R-1 and 2.
Mr. Dalip Singh, Mr Sanjeev Kr. And Mr. Sushil Kumar, Advocates for R-3 to 10.

CORAM:
HON'BLE MS. JUSTICE TARA VITASTA GANJU

TARA VITASTA GANJU, J.: (Oral)

1. The present Petition has been filed under Section 115 of the Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"] seeking to challenge the order dated 23.02.2019 passed by the learned ADJ-02/SE, Saket, New Delhi [hereinafter referred to as "Impugned Order"]. By the Impugned Order, the Application under Order VII Rule 11, CPC filed by the Petitioners/Defendants has been dismissed with a finding that since it is a suit for partition, the possession of one co-owner is considered the possession of all co-owners and the *ad valorem* Court fee is not required to be paid.

2. It is the grievance of the Petitioners/Defendants that the Impugned Order suffers from an infirmity since the Respondents/Plaintiffs are not in

possession. Learned Counsel for the Petitioners/Defendants seeks to rely upon his Written Submissions and the Replication filed in this regard.

3. It is settled law that while examining an Application under Order VII Rule 11, CPC all that the Court is required to do is to examine the plaint along with the documents filed with the plaint. The suit as filed by the Respondents/Plaintiffs is a suit for partition.

4. It is the case of the Respondents/Plaintiffs that the Plaintiffs and Defendants are siblings, being sons, daughters and wives of late Shri Bijender Pal. It is further the case of the Respondents/Plaintiffs that both the Plaintiffs and Defendants have a right in the suit property.

5. As stated above, the only ground that has been taken in the Application under Order VII Rule 11, CPC by the Petitioners/Defendants is that since ouster is pleaded *ad valorem* Court fee is required to be paid. However, as stated above, learned Counsel for the Petitioners/Defendants wishes to rely upon the Written Submissions in this behalf which the Court cannot examine in proceedings under Order VII rule 11, CPC.

6. On the aspect of *ad valorem* Court fee, it is the case of the Respondents/Plaintiffs that Court fee had been correctly calculated and paid. Thus, it is contended that the Impugned Order does not suffer from any infirmity.

7. It is no longer *res integra* that in the case of co-owners of an immovable property, if the right to a share and the nature of the property being a joint property is not disputed, the law presumes that the co-owners

are in joint possession. The possession of one is in law the possession of all, unless ouster or exclusion is proved.

7.1 The Supreme Court in the ***Neelavathi & Ors. v. N. Natrajan & Ors.***[1] has held that it is the general principle of law that in the case of co-owners of an immovable property, the possession of one is synonymous with the possession of all, unless ouster or exclusion is proved. To be in joint possession of the immovable property, in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. So, as long as the right to a share and the nature of the property as joint is not disputed, the law presumes that the co-owner is in joint possession unless the co-owner is excluded from such possession. The relevant extract of the ***Neelavathi*** case is set out below:

> *"8...*
>
> ***<u>It will be seen that the court fee is payable under Section 37(1) if the plaintiff is "excluded" from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession.</u>*** *Under the proviso to Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided "joint family property" though not in the strict sense of the term.* ***<u>The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless</u>***

[1] AIR 1980 SC 691

he is excluded from such possession…"

[Emphasis supplied]

8. Learned Counsel for the Petitioners/Defendants has repeatedly stated that he is challenging the rights of the Respondents/Plaintiffs, however, is unable to show to the Court a clear and specific averment of ouster. In the absence of the same, the challenge *qua* payment of *ad valorem* Court fee would fail.

9. This Court has while relying on the ***Neelavathi*** case has in the case of ***Sakshi Dhall v. Smt. Indira Dhall & Ors. bearing C.R.P. No. 93 of 2025*** held that before a Plaintiff could be called upon to pay Court fee on the ground of exclusion there should be a clear and specific averment to that effect in the plaint.

9.1 In addition, reliance was also placed on a judgment of a Coordinate Bench in the case of ***Tara Chand Gaur v. Satish Chand Sharma & Anr.***[2] where it was held that determination of exclusive possession or ouster is a question of fact and must be established from the evidence. The relevant extract of the judgement of this Court in the ***Sakshi Dhall*** case is set out below:

> "14. The Supreme Court in the **Neelavathi** case has also held that before a plaintiff could be called upon to pay court fee under Section 37(1) of the Court Fees Act, 1870 [hereinafter referred to as "Court Fees Act"] on the ground that the plaintiff has been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that the plaintiff has been "excluded" from joint possession to which the plaintiff is entitled in law. As long as a party has a share in the property, the law presumes his possession. The relevant extract is set out below:

[2] 2018 SCC OnLine Del 12923

"8...

<u>Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been "excluded" from joint possession to which they are entitled in law.</u> *The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession."*

[Emphasis Supplied]

"14.1 A Coordinate Bench of this Court in the ***Tara Chand Gaur*** case has held that a co-owner seeking partition of an immovable property is liable to pay only fixed court-fee under Schedule II, Article 17(vi) of the Court Fees Act, **<u>as such co-owner is presumed to be in constructive possession unless ouster is specifically pleaded and proved by the other co-owners. Determination of exclusive possession or ouster is a question of fact and must be established through evidence</u>**. The relevant extract of ***Tara Chand Gaur*** case is reproduced below:

"6. So far as the third aspect of the court-fee having not been paid is concerned because the appellant/plaintiff has only affixed a court fee of Rs. 20/-, once again, the trial court has erred in holding that since the appellant/plaintiff had valued the suit at Rs. 1 crore, and he was not in possession of the suit property, therefore, the appellant/plaintiff was liable to pay court-fee on his 1/3rd share. ***<u>In law, when a partition is sought by a co-owner, court-fee which is payable is a fixed court-fee in terms of Schedule II, Article 17(vi), of the Court-fees Act, 1870 inasmuch as every co-owner is either in actual physical possession of whole or part of the property or in law has to be taken in deemed possession or constructive possession of the co-owned property. If a defendant is a co-owner who is in actual physical possession of the complete property, even then, the possession of one or more such co-owners who are defendants in possession, the possession is for and on behalf of all co-owners including the plaintiff(s), and whether there exists exclusive possession of the respondents/defendants and the same acts as an ouster of the plaintiff(s) is a question of fact, and only when this question of fact is proved by the respondents/defendants by leading evidence, it can be held that the appellant/plaintiff was not in possession, physical or constructive, of the suit property, so that court fee is payable for the 1/3rd share as claimed by the</u>***

__appellant/plaintiff.__ In fact, this issue of court-fee is very much inter-linked with the issue of limitation because the appellant/plaintiff is not in possession, and both are factual issues which will have to be proved by the respondents/defendants that the appellant/plaintiff was not in physical possession of the suit property and ouster has been proved against the appellant/plaintiff by respondents/defendants after leading evidence."

[Emphasis Supplied]"

10. A perusal of the plaint reflects that the Respondents/Plaintiffs have stated that the Respondents/Plaintiffs are the co-owners and the suit property is derived by them from their predecessor in interest. The relevant part of the plaint is set out below:

"1. That the Plaintiff No.1 (Smt. Shyni V.) is the wife of Late Sh. Vijender Pal @ Bijender Kumar (hereinafter shall be referred as the Deceased) and resides on rent at H.No.239-A, Pocket-12, Jasola Vihar, New Delhi-110025. That the Plaintiff No.2 (Sh. Avinash Chaudhary) is the son of Late Sh. Vijender Pal, residing at H.No.239-A, Pocket-12, Jasola Vihar, New Delhi-110025 along with his mother (Plaintiff No.1). (True copies of the Driving License of the Deceased, Pan Card of the Deceased, Death Certificate of the Deceased, Death Certificate of the father of the Deceased and the Passport of the Plaintiff No.1 have been produced along with the list of documents).

xxx xxx xxx

5. __That the Plaintiffs and the Deceased lived together at their rented residence at the above-mentioned address in Jasola Vihar, New Delhi.__

xxx xxx xxx

__FACTS THAT LEADS TO THE FILING OF THIS SUIT:__

24. That the Plaint-Schedule properties were owned and possessed by the Deceased. __Thereafter the demise of the Deceased, by fiction of law, the Plaintiffs herein have become the co-owners and possessed the Suit-Properties and the said properties are deemed to be in joint-possession of the Plaintiff No.1 & No.2 and the Defendants No.1, No.2 & No.3__.

xxx xxx xxx

26. That for the above reasons it would be to the Plaintiff's benefit to have *their share separated by partition.*

27. That the Plaintiffs claim partition of the said properties and separate possession of their share.

xxx xxx xxx

VALUATION

36. That the suit is valued for the purpose of court fees and the jurisdiction in the following manner:

** For a decree for Partition to the effect the Plaintiffs are entitled to, the suit is valued for the purpose of court fees and jurisdiction over Rs.1 Crore and court fees of Rs.500 each are paid. The Plaintiffs also undertake to pay any further court fees which may be required to be paid on actual partition of the property at the appropriate time."*

23. That the Plaintiffs have preferred to file this present suit since ***they have become the joint-owners of the Suit-Properties which were inherited by the deceased who was the husband of the Plaintiff No.1 and the father of the Plaintiff No.2, shown in the Plaint-Schedule below and are at present in the possession of both the Plaintiffs and the Defendants.*** *Though at present the Defendants No.1, No.2 & No.3 are the ones who are staying in one of the Suit-Properties, namely H.No.14-B, Khizrabad, New Delhi-110025 and the other Suit-Property namely, H.No.2-A, Khizrabad, New Delhi-110025 is leased out on rent.*

24. That the Plaint-Schedule properties were owned and possessed by the Deceased. ***Thereafter the demise of the Deceased, by fiction of law, the Plaintiffs herein have become the co-owners and possessed the Suit-Properties and the said properties are deemed to be in joint-possession of the Plaintiff No.1 & No.2 and the Defendants No.1, No.2 & No.3."***

11. Since the Respondents/Plaintiffs have averred that they are co-owners of the suit property, the suit property would be joint property and ouster or exclusion has not been specifically pleaded and thus, at the preliminary stage at which the proceedings are before the learned Trial Court, the law would presume them to be in joint possession of the property.

12. Since Respondents/Plaintiffs would be considered to be in possession

of the suit property, Respondent No.1/Plaintiff would only be liable to pay fixed court fee as per the Article 17(vi), Schedule II of the Court Fees Act, 1870 and not *ad valorem* Court fees on the market value of the suit property.

13. In any event, the plaint contains an averment that in the event, the Court finds the Court fee to be deficient, the Plaintiffs have undertaken to make good such deficiency in the Court fee and given the law as settled in this behalf, the plaint could not be rejected on this basis.

13.1 Thus, the contention of the Petitioner that *ad valorem* court fee on the market value of the suit property has to be paid in view of the plea of ouster is without any merit.

14. In view of the aforegoing discussions, this Court finds no infirmity in the Impugned Order which would merit interference by this Court in revisionary jurisdiction of this Court.

15. The Petition is accordingly dismissed. Pending Application stands closed.

15.1 It is however made clear that the order passed today will not preclude the Petitioners/Defendants from raising all contentions before the learned Trial Court. The rights and contentions of the parties are left open in this behalf.

16. The parties shall act based on a digitally signed copy of the order.

TARA VITASTA GANJU, J

JULY 23, 2025/pa