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Sh. Sudershan Kumar Seth Vs. Sh. Pawan Kumar Seth and ors.

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Court : Delhi

Decided On : Sep-05-2005

Reported in : 124(2005)DLT305

Judge : Anil Kumar, J.

Acts : Code of Civil Procedure (CPC) - Sections 151 - Order 7, Rule 11

Appeal No. : IA 9776/2000 in CS(OS) 710/2000

Appellant : Sh. Sudershan Kumar Seth

Respondent : Sh. Pawan Kumar Seth and ors.

Advocate for Def. : P.K. Rawal and ; Ajay Bahl, Advs.

Advocate for Pet/Ap. : A.P.S. Ahluwalia, Adv

Disposition : Application allowed

Judgement :

Anil Kumar, J.

1. The defendant No. 1/applicant in a suit for partition filed by his brother against him and his sisters, without filing the written statement, filed the application under 7 Rule 11 read with Section 151 of Code of Civil Procedure for rejection of the plaint.

2. The defendant/applicant has sought rejection of the plaint of the plaintiff on the ground that the plaintiff has paid a fixed court fees of Rs. 20.00 only though the case of the plaintiff is that he is not in possession of the properties to be partitioned and he is claiming possession as a co-owner and thus in view of settled proposition of law, the plaintiff is liable to pay ad-valorum court fees on his alleged 1/6th share in the properties. The plaintiff has valued the suit for the purposes of jurisdictionat Rupees Four crores. It is prayed by the defendant No. 1 that if the plaintiff fails to pay court fees on his 1/6th share the plaint be rejected.

3. The opposition to the application of the defendant by the plaintiff is that the application is malafide and designed to delay the progress of the suit. It was contended by the plaintiff that the settled principle of law is that the plaint is to be read as a whole. In the plaint it is categorically pleaded that the plaintiff is one of the co-owner having 1/6th share in the property left behind by Shri O.P. Seth, father and the possession of defendant No. 1 is not exclusive and is only constructive anoints and since in law possession of one co-owner, is possession of all and thereforee the suit has been properly valued for the purposes of Court fees and Jurisdiction and appropriate fixed court fees has been paid and the plaint is not liable to be rejected. The plaintiff also sought dismissal of the application on the ground that without filing the written statement the defendant could not maintain the application for rejection of the plaint under order 7 rule 11 of the Code of Civil Procedure.

4. The plaintiff has relied on : (2004)1SCC271 , Md. Mohammd Ali (Dead) by LRs v. Jagdish Kalita and Ors.; : [1980]2SCR307 , Neelavathi and Ors. v. N. Natarajan and Ors.; , Sant Ram Nagina Ram v. Daya Ram Nagina Ram and Ors.; : 55(1994)DLT420 , Karam Singh and Ors. v. Nathu Singh; : (1988)IILLJ36SC , Governing Body of Dayanand Anglo Vedic College v. Padmanabha Pathy and Ors. and : AIR 1985 SC577 , Abdulla Bin Ali and Ors. v. Galappa and Ors. to contend that only the allegations made in the plaint are to be considered for determination of the jurisdiction and the jurisdiction does not depend upon the defense taken by the defendants in the written statement and the question of Court fees payable by the plaintiff has to be considered in the light of allegations made in the plaint only. The learned counsel Mr. Ahluwalia relied on the principles

of law that in case of co-owners, possession of one is in law possession of all, unless ouster or exclusion is proved and continue to be in possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. According to him it is not even necessary that a co-sharer should be getting a share or some income from the property as long as his right to a share and the nature of the property is not disputed that he is in joint possession unless he is excluded from such possession.

5. The counsel contended that plaintiff has categorically pleaded in various paragraphs of the plaint that the plaintiff and defendants became co-sharers successor-in-interest being legal heirs of late Sh. O.P. Seth and consequently the possession of defendant No. 1 is not exclusive but joint and constructive and in other words the plaintiff and defendant Nos.2 to 5 are the co-sharers of all the properties mentioned Along with defendant No. 1.

6. For the proposition that if the plaintiff is not in possession of the properties, he is liable to pay ad-valorum court fees on his share under Section 7(iv)(b) of Court Fees Act and not under Article 17(6) of schedule II of the Court fees Act, the counsel for the defendant/applicant has relied on 1977 R L R 54, Jamila Kahtoon v. Saidul Nisa AIR 1999 DELHI 48, Smt. Prakash Wati v. Smt. Dayawanti 80(1999) DLT 357, Ms. Ranjana Arora v. Satish Kumar Arora 2005 R L R 23, Harjit Kaur v. Jagdeep Singh and : 2005(80)DRJ120 , Rajiv Oberoi and Ors v. Santosh Kumar Oberoi and Ors. To contend that he could file the application under order 7 rule 11 of Code of Civil Procedure for rejection of plaint without filing written statment, the applicant has relied on : [2002]SUPP5SCR491 , Saleem Bhai and Ors. v. State of Maharashtra and Ors.

7. I have heard the learned counsels for the parties in detail and have also perused the plaint and the application filed by the defendants for rejection of the plaint. Some of the relevant paragraphs of the plaint to infer whether the plaintiff has averred that he is in possession or not are extracted hereinafter.

5. That late Sh. O.P. Seth, because of his growing age, inducted defendant No. 1 in his business as a partner for which the partnership deed was duly executed on 18.10.93. The said partnership was at will.

7. That in addition to the aforesaid properties, Late Sh. O.P. Seth had a good amount of cash in hand for the purpose of running the business and almost a kilogram of ornaments/jewellery which he had ear-marked for his grandchildren to be gifted to them on the happy occasions of their marriages etc. Late Sh. O.P. Seth died interstate and till the time of his death, he had been residing at 73-D, Kamla Nagar, Delhi. The defendant No. 1 and his family has also been residing along with Late Shri O.P. Seth.

10. That after the death of late Sh. O.P. Seth on 13.05.95, the defendant No. 1 Sh. Pawan Kumar Seth took charge of the entire assets of the business, cash, jewellery etc. The plaintiff expressed full faith and confidence in defendant No. 1 and there was no rhyme or iota of doubt about the honesty of the defendant No. 1. The defendant No. 1 too showed complete respect, love and affection for his elder brother/plaintiff and also expressed to abide by all the settlements of the elder brother/plaintiff as wells for the sisters, who too are elder to him. Certainly there was hardly any chance of suspicion or apprehension of any kind in the minds of the plaintiff and defendants No. 2 to 5 at that time when late Sh. O.P. Seth died for handing over the charge to the defendant No. 1 to look after the business and to take charge of the entire assets of Late Sh. O.P. Seth. Since Late Sh. O.P. Seth died intestate, in law the plaintiff and the defendants became co-sharers, successors in interest being his legal heirs and the inter-meddlers with the estate of the deceased. Each one of them i.e. the plaintiff and the defendants became entitled to 1/6th share in the estate left behind by Late Sh. O.P. Seth i.e. the properties mentioned above as well as the liquidated estates, cash, jewellery etc in the hands of the defendant No. 1 as custodian and agent on behalf of the plaintiff and defendants No. 2 to 5. The possession of the defendant No. 1 is not exclusive but joint and constructive. In other words, the plaintiff and defendants No. to 5 are the co-sharers of all the properties mentioned hereinabove Along with the defendant No. 1 and the defendant No. 1 is under obligation to give respective shares to each of the parties i.e. 1/6th each.

11. That the defendant No. 1 kept running the business of the late father and had assured the plaintiff that he was to keep the entire records with respect to the various dealings, transactions and profit and loss account etc. for all the years.

The plaintiff asked the defendant No. 1 to render the details of all the assets left behind by Late Sh. O.P. Seth and to supply the list thereof. The necessity arose since there was a marriage in the family of the plaintiff in September, 1998. Since the plaintiff had to settle his son, who is also a Chartered Accountant, in November,1997, the plaintiff for the first time asked the defendant No. 1 to give and furnish the details of all the assets, the values thereof so as to have an idea of the exact amount which was due and to which each one of the co-sharers was entitled to. The plaintiff was shocked to learn the behavior of the defendant No. 1. The defendant No. 1 became most evasive with dishonest intentions, denied everything and even refused categorically to render any accounts and even did not allow the plaintiff to have access to the records etc relating to the business and other movable assets as well as immovable properties. The plaintiff became suspicious on account of dishonest intentions and ill-behavior defendant No. 1 who had pointblank refused to pay any heed to the plaintiff and his request. Several meetings were arranged through the common relatives to sort out the differences but nothing constructive could be achieved because there was a total ill motive and malafide intentions on the part of the defendant No. 1. As a result, plaintiff came to believe that the defendant No. 1 had turned dishonest and he had cheated him and other co-sharers with a view to defeat their rights and further to gallop and usurp the entire assets of the late father. As mentioned above, the plaintiff and the defendant No. 2 to 5 are co-sharers of 1/6th share each both in cash, jewellery and immovable properties left behind by late Sh. O.P. Seth, which are at present in the power, custody and possession of defendant No. 1 as custodian and agent on behalf of the plaintiff and defendants No. 2 to 5. The possession of the defendant No. 1 is not exclusive but joint and constructive. In other words, the plaintiff and defendants No. 2 to 5 are the co-sharers of all the properties mentioned hereinabove along with the defendant No. 1 and the defendant No. 1 is under obligation to give the respective shares to each of the parties i.e. 1/6th share.

14. That the plaintiff being one of the co-sharers of the 1/6th share has the legal right to possession, occupy and take custody of any of the assets of Late Sh. O.P. Seth presently in the power and possession and in custody of defendant no1. and to share the same along with defendant No. 1, which the defendant No. 1 has

refused to render to the plaintiff despite several requests, demands and asking of the plaintiffs.

20. That since the defendant No. 1 is in power joint and constructive possession and custody of all the assets both movable and immovable as mentioned above, the relief has been sought only against defendant No. 1 and defendants No. 2 to 5 being legal heirs of Late Sh. O.P. Seth and the co-sharers of 1/6th share each have been imp leaded as the proforma defendants and no relief has been sought against them.

8. It is settled that in order to decide as to what relief has been claimed by the plaintiff, the whole of the plaint has to be read. From the perusal of the plaint if it can be inferred that the plaintiff is in possession of the any of properties to be partitioned, then the court fees shall be payable under Article 17 (6) of schedule II of the Court fees Act i.e. fixed court fees at the time of institution of the suit but if the conclusion is that the plaintiff is not in possession of any part of the properties then the plaintiff has to pay Court fees under section 7(iv)(b) of the Court fees act i.e. on the value of plaintiff's share. 1977 R L R 54, Jamila Kahtoon v. Saidul Nisa AIR 1999 DELHI 48, Smt. Prakash Wati v. Smt. Dayawanti 80(1999) DLT 357, Ms. Ranjana Arora v. Satish Kumar Arora 2005 R L R 23, Harjit Kaur v. Jagdeep Singh and : 2005(80)DRJ120 , Rajiv Oberoi and ors Vs Santosh Kumar Oberoi and ors can be referred to.

9. The plaintiff in the plaint has categorically stated in paragraph 11 that the defendant No. 1 does not allow plaintiff access to the records relating to the business and other movable assets as well as immovable properties. In the same paragraph it has been alleged that he has 1/6th share in cash, jewellery and movable and immovable properties left behind by late Sh. O.P. Seth, which are at present in the power, custody and possession of defendant No. 1 as custodian and agent on behalf of the plaintiff and defendants No. 2 to 5. In paragraph 14 of the plaint the plaintiff contends that he has legal right to possession, occupy and take custody of any of the assets of Late Sh. O.P. Seth presently in the power and possession and in custody of defendant no1. The plaintiff has also sought partition of the properties by meets and bounds and consequently on the reading of entire

plaint, inevitable inference that the plaintiff is not in possession of any movable and immovable properties of Late Sh. O.P. Seth and he is claiming possession being a co-sharer.

10. The judgments relied on by the plaintiff do not support or advance his pleas. The case of MD. Mohammad Ali (Supra) was regarding deemed possession of a co-sharer but in the case of plaintiff, he has categorically admitted that at present he is not in possession of any properties and he has claimed legal possession. The plaintiff himself has pleaded his clear ouster by the defendant No. 1. The counsel for the plaintiff had strongly emphasized on the proposition laid down in Neelavathi and Ors. (Supra)However even in the said judgment it had been held categorically that the plaintiff can be called upon to pay Court fees on the ground that he had been excluded from the possession and it is not necessary that on a reading of the plaint there should be clear and specific averment in the plaint that they had been excluded from joint possession to which they are entitled to. The relevant paragraph is extracted:-'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 presume that he is in joint possession unless he is excluded from such possession.

11. It is equally true that where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners it is not open to anyone to disturb the arrangement without the consent of others except by filing a suit for partition. The judgment of Karam Singh (Supra) also lays down that a co-owner cannot appropriate land to himself against the consent of the co-owner and does not lay down that if the plaintiff who is a co-sharer is not in possession of the properties, still on account of the fact that he is a co-sharer he is not liable to pay Court fees in accordance with Section 7(iv)(b) and is entitled to pay Court fees under Schedule II, Article 17(vi) of Court Fees Act. In Smt. Prakash Wati (Supra) this Court was concerned with the matter of a similar nature where the plaintiff was

not in physical possession of the property and it was held by the Learned Single Judge relying on : AIR1954 All722 , Mir Hassan Khan Vs Ahmad Kahn and ors that where the plaintiff was not in physical possession of any part of the property, it could not be argued that the plaintiff was in joint possession of the property and he is not liable to pay ad valorum Court fees on the value of his share. The learned Single Judge in Smt. Prakash Wati (supra) had noticed the judgment of Supreme Court in Neelavathi (Supra) and on reading of the plaint had come to conclusion that the co-owner seeking partition was not in physical possession of the properties

12. Rather a Single Judge of this Court in Jamila Khatoon v. Saidul Nisa 1977 R L R 54 had held that the expression 'whole of the property' occurring in Rule 8 meant the whole of the property which is the subject matter of the suit for partition and it is not confined to the plaintiff's share of the property. However, in Smt. Prakash Wati (Supra), Smt. Harjit Kaur (Supra), 2005 Rajdhani Law Reporter 23 and in the case of Ms. Ranjana Arora v. Satish Kumar Arora and Ors : 80(1999)DLT537 it was held that the plaintiff who is not in possession of the property is liable to pay ad valorum Court fees on his share.

13. The other plea of the plaintiff that the application for rejection of plaint under Order 7 rule 11 of the Code of Civil Procedure should not be considered as the defendant No. 1 has not filed the written statement and the application has been filed with a view to delay the case, also run contrary to ratio of the judgment of the Supreme Court in Saleem Bhai (supra). The Supreme Court had held that trial Court can exercise the power under order 7 rule 11 of the Code of Civil Procedure at any stage of the suit. The observation of the Supreme Court is extracted:

'The trial Court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit 'before registering the plaint of after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under Rule 11 (a) and (d) of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. thereforee, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC can not but be

procedural irregularity touching the exercise of jurisdiction by the trial court. The trial court's order, thereforee, suffers from non-exercising of jurisdiction vested in the court as wells procedural irregularity.'

14. Considering the facts and in totality of circumstances and for the reasons stated herein above it is held that the plaintiff is liable to pay court fees under Section 7(iv)(b) of the Court Fees Act, on the value of his 1/6th share of Rs. 4 crores, jurisdiction value averred by the plaintiff and not under Article 17(6) of schedule II of the Court Fees Act, (1870). I order accordingly. Since the plaintiff has paid a fixed court fees of Rs. 20 only, Plaintiff to make the deficiency in the Court fees within four weeks failing which the plaint of the plaintiff be rejected under Order 7 Rule 11 of Code of Civil Procedure.

15. Application is allowed with no cost to the defendant No. 1/applicant.

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