

Nisheet Bhalla and ors. Vs. Malind Raj Bhalla and ors.

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Court : Delhi

Decided On : May-26-2006

Reported in : AIR2007Delhi60

Judge : A.K. Sikri, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 11 - Order 39, Rules 1 and 2; Code of Civil Procedure (CPC) (Amendment) Act, 2002 - Sections 26; Tamil Nadu Court-Fee and Suits Valuation Act, 1870 - Sections 37, 37(1) and 37(2); [Hindu Succession Act, 1956](#) - Sections 6

Appeal No. : I.A. No. 4643 of 2004 in C.S. (OS) No. 1327 of 2003

Appellant : Nisheet Bhalla and ors.

Respondent : Malind Raj Bhalla and ors.

Advocate for Def. : Shiv Charan Garg, Adv.

Advocate for Pet/Ap. : D.R. Bhatia, Adv

Judgement :

ORDER

A.K. Sikri, J.

1. In this suit filed by the plaintiffs, relief of partition and permanent injunction is claimed. Plaintiff Nos. 1 & 2 are sons of late Cdr. Manu Raj Bhalla and plaintiff No. 3 is his widow. Defendant Nos. 1 & 2 are the brothers of Cdr. Manu Raj Bhalla and defendant No. 3 is his sister. Thus, father of plaintiff Nos. 1 & 2 (husband of plaintiff No. 3) and the defendants were/are brothers and sister. They are all children of Shri Bal Raj Bhalla. Shri Bal Raj Bhalla was allotted a plot of land bearing No. 48, Block-G measuring 233.33 sq. yards in Naraina Industrial Residential Scheme, New Delhi (hereinafter referred to as 'the suit property') on perpetual lease. He constructed a 2A 1/2 storeyed building on the said plot of land. During his lifetime, he executed a will dated 26-5-1990 whereby he bequeathed the suit property in favor of his wife Smt. Swadesh Kumari Bhalla. Shri Bal Raj Bhalla died on 6-6-1990 and on his death the suit property devolved upon Smt. Swadesh Kumari Bhalla and DDA mutated the property in her name. While Smt. Swadesh Kumari Bhalla was still alive, her eldest son namely Cdr. Manu Raj Bhalla died on 2-1-1993 leaving behind the plaintiffs as his only legal heirs. Within few months, Smt. Swadesh Kumari Bhalla also died on 23-5-1993. She died intestate and accordingly the suit property is inherited by the plaintiffs (claiming through Cdr. Manu Raj Bhalla) and defendants in four equal shares. Thus, plaintiff Nos. 1 to 3 have 1/4th undivided share in the suit property.

2. After the death of Smt. Swadesh Kumari Bhalla, DDA has mutated this property in the name of plaintiffs and defendants vide letter dated 16-12-1994. The plaintiffs accordingly claimed that they are owners of 1/4th undivided share in the property and on that basis decree of partition is prayed for demarcation of respective shares by metes and bounds. In the alternative, it is prayed that in case the property cannot be partitioned by metes and bounds, then the same be sold and plaintiffs be given their 1/4th share. Decree for permanent injunction is also sought against the defendants seeking restraint against them from parting with possession or creating any encumbrance or otherwise disposing the suit property. In the written statement filed on behalf of defendant No. 1 aforesaid facts pleaded in the plaint are not disputed. However, the maintainability of the suit is challenged on the ground that after the death of Cdr. Manu Raj Bhalla, his wife 'plaintiff No. 3, has married Shri Anil Rajput and plaintiff Nos. 1 and 2 have also been adopted by Shri Anil Rajput. therefore, plaintiffs have ceased to have any interest in the

property. It is also stated that all pleas made in the plaint are to the effect that parties are in joint possession of the property, whereas the fact is that plaintiffs are not in possession of any portion of the suit property and the entire property is in possession of defendant Nos. 1 and 2. On this basis it is also pleaded that plaintiffs have not paid requisite court-fee.

3. Written statement on behalf of defendant Nos. 2 and 3 is also on the same lines. In this backdrop, defendant Nos. 2 and 3 have also filed application under Order VII, Rule 11 of CPC for dismissal of the suit/ rejection of the plaint. Though this application is filed on behalf of defendant Nos. 2 and 3, after the arguments were heard in this application, defendant No. 3 (sister) has filed is No. 5481/2006 wherein she has prayed for transposing herself as the plaintiff and is now supporting the claim of the plaintiffs for partition and claiming therein her 1/4th share. By necessary implication defendant No. 3 is now not pressing the application under Order VII, Rule 11, CPC.

4. To recapitulate, in this application under Order VII, Rule 11, CPC, dismissal of the suit is sought on the following grounds:

(a) Since plaintiff No. 3 has re-married Shri Anil Rajput and plaintiff Nos. 1 and 2 have also been adopted by him as his children, plaintiffs cannot claim any interest in the suit property. It is also stated that this material fact has been suppressed in the plaint;

(b) plaintiffs have obviously mentioned that they are in joint possession of the property in question in the plaint, whereas in is No. 6801/2003, which is application under Order 39, Rules 1 and 2, there is a specific admission that the suit property is in occupation of the defendants and they are enjoying the income being received from the suit property;

(c) plaintiffs have not paid requisite court-fee as required inasmuch as the suit property is valued for the purpose of jurisdiction at Rs. 1,00,00,130/-, but court-fee of only Rs. 33 is paid. On this suit for partition when the plaintiffs are not in possession of the suit property, the court-fee is to be paid as per the market value;

(d) plaintiffs have not sought consequential relief of possession and, therefore, suit is not maintainable on this ground. It is also stated that site plan of the property is not filed and even the affidavit of facts, as required under Section 26 of the Code of Civil Procedure (Amendment) Act, 2002 is not filed and, therefore, plaint is to be rejected on this ground alone.

5. I do not agree with the submission of the learned Counsel for the defendants that after the death of her husband, by remarrying Shri Anil Rajput, plaintiff No. 2 shall lose her right or interest in the suit property. Likewise, plaintiff Nos. 1 and 2, children of late Cdr. Manu Raj Bhalla would continue to have their interest in the property which cannot be forfeited on the alleged adoption by Mr. Anil Rajput. It may be mentioned that in the reply to this application, though marriage of plaintiff No. 3 with Mr. Anil Rajput is admitted, it is specifically denied that plaintiff Nos. 1 and 2 have been adopted by Mr. Anil Rajput or have started using the name of Mr. Anil Rajput as their father. Thus, even if it is presumed for the sake of argument that plaintiff No. 3 has no right in the property, share which belongs to Cdr. Manu Raj Bhalla would devolve upon plaintiff Nos. 1 and 2 and, therefore, suit cannot be dismissed on this ground.

6. Other arguments of learned Counsel for the defendants are interconnected. According to the defendants, plaintiffs are not in possession and, therefore, when the suit is valued for the purpose of jurisdiction at Rs. 1,00,00,130/-, ad valorem court-fee on that valuation is to be paid and plaintiffs are required to even ask for consequential relief of possession. Learned Counsel for the plaintiffs, on the other hand, submitted that since the property in question is joint property, it would be a deemed possession as co-owners. In support of this plea, learned Counsel for the plaintiff referred to the judgment of the Supreme Court in *Neelavathi v. N. Natarajan* : [1980]2SCR307 . He also mentioned that this judgment is followed by this Court in *Master Kunal v. Harsh Dev Shinghari* : AIR2003 Delhi441 . Learned Counsel for the defendants, on the other hand, referred to another judgment of this Court in *Smt. Prakash Wati v. Smt. Dayawanti* : AIR1991 Delhi48 and Supreme Court judgment in *Kamleshwar Kishore Singh v. Paras Nath Singh* : AIR 2002 SC233 .

7. The two judgments of this Court mentioned above refer to the Supreme Court judgment in *Neelavathi* : [1980]2SCR307 (supra). thereforee, let me first discuss the judgment of the Supreme Court in *Neelavathi* (supra). That was also a suit for partition. Five sisters as plaintiffs had filed the suit against two brothers and an unmarried sister. The averment was made in the plaint to the effect that plaintiffs were in joint possession of the properties along with the defendants. Claim was that each of the plaintiffs, as co-owner, was in joint possession of the suit property and the suit was filed to convert the joint possession into separate possession so far as the shares of the plaintiffs were concerned. The plaintiffs had valued their share of the property and fixed court-fee of Rs. 200/- under Section 37(2) of the Tamil Nadu Court-Fee and Suits Valuation Act was filed. In the written statement filed on behalf of the two brothers it was contended that suit was not maintainable as plaintiffs were not in joint possession but out of possession and they were required to pay ad valorem court-fee at the market rate. The Subordinate Judge, who tried the suit, did not frame any preliminary issue regarding the court-fee and granted preliminary decree for partition and possession in favor of the plaintiffs. On the payment of court-fee the subordinate Judge held that ad valorem court-fee was payable and granted time to the plaintiffs for payment of the court-fee. As the court-fee was not paid within the time granted, suit was ultimately dismissed. Plaintiffs filed two appeals against the dismissal of the suit which were also dismissed. Aggrieved by the order of dismissal, plaintiffs filed the appeals in the Supreme Court. Allowing the appeals, the Apex Court held that the question of Court-fee must be considered in the light of the allegations made in the plaint and decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. The Court noted that the plaintiffs claim that each of them as co-owner was in joint possession of the suit property. Referring to the averments made in various paragraphs of the plaint, the Court concluded that throughout the plaint the plaintiffs had asserted that they are in joint possession of the suit property and while deferring with the High Court, observed as under (Para 6):

Throughout the plaint, the plaintiffs have asserted that they are in joint possession. We are unable to agree with the High Court that recitals in all the paragraphs is merely a formal statement repeating the statutory language. The plea in paragraph

12 which was relied on by the High Court states that the defendants 1 to 6 failed to give the plaintiffs their share of the income and the plaintiffs could not remain in joint possession. The plea that they were not given their due share would not amount to dispossession. Reading the plaint at its worst against the plaintiffs, all that could be discerned is that as the plaintiffs were not given their share of the income, they could not remain in joint possession. The statement that they are not being paid their income would not amount to having been excluded from possession. The averment in the plaint cannot be understood as stating that the plaintiffs were not in possession.

8. After quoting the provisions of Section 37 of the Tamil Nadu Court-Fee and Suit Valuation Act, the Court held:

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. 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. The general principle of law is that in the case of co-owners, the possession of one is 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 he is excluded from such possession. 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 to in law. The averments

in the plaint that the plaintiff could not remain in joint possession as he was not given any income from the joint family property would not amount to his exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiff had been excluded from possession.

9. Following principles can be culled out from the aforesaid judgment : (a) in order to decide the question of Court-fee, averments made in the plaint are to be seen and decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits; (b) 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; and (c) 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. It is also not necessary that he should be getting a share or some income from the property so long as his right to a share and his nature of the property as joint is not disputed, the law presumes that he is in joint possession unless he is excluded from such possession.

10. Relying upon this judgment, this Court in *Master Kunal* : AIR2003 Delhi441 (supra) held that proper Court-fee had been paid. That was also a suit for partition and rendition of accounts and plaintiff has pleaded joint ownership and joint possession.

11. On the other hand in *Smt. Prakash Wati's case* : AIR1991 Delhi48 (supra), this Court considered the effect of the aforesaid Supreme Court judgment and came to the conclusion that since in the said case from the consideration of the pleadings in the plaint it was clear that plaintiff was never in physical possession of any portion of the property, ad valorem Court-fee was to be paid. It would be apposite to reproduce para 4 of the said judgment, which makes the following reading:

Counsel for the plaintiff has made reference to *Jagdish Pershad v. Jyoti Preshad* 1975 Rajdhani LR 203, wherein it has been laid down that keeping in view the peculiar facts of the case that where the plaintiff claims to be in joint possession of the property of which partition is sought, the plaintiff is to pay fixed Court-fee as per Article 17(vi) in Schedule II. There is no dispute about this proposition of law. Counsel for the plaintiff has then placed reliance on *Neelavathi v. N. Natarajan* :

[1980]2SCR307 , wherein the Supreme Court has laid down that it is settled law that the question of Court-fee must be considered in the light of the allegation made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. It was held that the general principle of law is that in the case of co-owners the possession of one is in law the possession of all unless ouster or exclusion is proved. I think these observations of the Supreme Court go against the case of the plaintiff because in the present case reading of the whole of the plaint makes it clear that the plaintiff is alleging ouster from possession and thus, the plaintiff has to pay ad valorem Court-fee on the value of her share.

12. From a reading of all these three judgments, it is clear that normally if joint possession is pleaded by the plaintiff on the basis that he is the co-owner of the property, the Court-fee to be paid would be fixed Court-fee presuming the joint possession and even if the person is not in actual possession. However, if from the reading of the pleadings it becomes clear that the plaintiff was excluded from such possession, then he is liable to pay the ad valorem court-fee on the market value of his share. That is held by the Supreme Court also where it is stated '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.

13. Applying the above principles to the present case, no doubt in the plaint the plaintiffs have alleged that they are co-owners and in joint possession of the suit property along with the defendants. However, this possession is stated more in law and at the same time admitting that declaration are enjoying the actual possession and Realizing the rent, as is clear from para 7 of the plaint which reads as under:

That though the plaintiffs are co-owners and in joint possession of the aforesaid property along with the defendants, the defendants have been enjoying the rights in the said property and the defendants have not paid any amount realized by them from the tenants and/or for their occupation of the premises, to the plaintiffs till date, though the plaintiffs and the defendants became co-owners of the property since May, 1993, i.e. after the death of late Smt. Swadesh Kumari Bhalla.

As the plaintiffs admit that they are not in possession of the suit property, clever nature of pleading in the plaint which is of ambiguous nature would not save the day for them.

14. The averment by the plaintiffs in is No. 6801/2003, which is an application under Order XXXIX, Rules 1 and 2, clinches the issue. In paras 3 and 5 of this application, the plaintiffs made the following averments:

3. That the said property is in the use and occupation of the defendants and they are enjoying the income being received from the said property.

5. The Defendants are, now, taking advantage of their use and occupation of the said property, in a wrong and illegal manner, attempting to dispose of or otherwise create third party interest and/or otherwise part with possession of the property or any part thereof to some third parties.

15. In no uncertain and unambiguous terms the plaintiffs admit their ouster or exclusion from the suit property. The fact situation is thereforee more akin to the case of Smt. Prakash Wati : AIR1991 Delhi48 (supra). Plaintiffs shall, thereforee, have to make up the deficiency in the court fee. Since they are not in possession, it would be necessary for them to seek the consequential relief of possession also. The plaintiff is to be rejected at this stage and one chance for this purpose is required to be given to the plaintiffs. Plaintiffs are accordingly given eight weeks time to make out the deficiency in the court fee. They may also file proper application for amendment of the plant seeking the relief of possession.

16. Before parting, I may add that on the basis of admitted position as recorded in para 2 above, preliminary decree for partition could be passed. However, this course is not adopted at this stage inasmuch as the plaintiffs have to overcome the technicalities of the matter by paying the court fee and suitably amending the plaint. At the same time, I got the feeling that defendant Nos. 1 & 2, who are in occupation of the entire property, are unnecessarily delaying the matter with the sole intention to deprive the plaintiffs and defendant No. 3 of their rightful share in the property. thereforee, though the court fee is payable by the plaintiffs in the first instance, the Court may, at the time of passing the decree, burden defendant Nos.

1 & 2 with this Court fee by imposing costs.

17. This application stands disposed of in the aforesaid terms.

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