

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

% Decided on: 30<sup>th</sup> September, 2019

+ **CS(OS) 553/2018 & IA 14927/2018, IA 238/2019, IA 9706/2019**

MS. HARJEET KAUR LAMBA & ORS. .... Plaintiffs

Represented by: Mr.T.C.Sharma, Advocate.

versus

MR. RAJINDER PAL SINGH LAMBA ..... Defendant

Represented by: Mr.Samit Khosla, Advocate with  
defendant in person.

**CORAM:**  
**HON'BLE MS. JUSTICE MUKTA GUPTA**

**MUKTA GUPTA, J. (ORAL)**

IA 238/2019 (u/O.VII R.11 CPC)

1. By this application defendant seeks rejection of the plaint *inter alia* on the grounds that the Court fee has not been properly paid, the suit is barred by limitation and has been filed *mala fide* as the defendant has been in uninterrupted and exclusive possession of the suit property. However, during the course of arguments, learned counsel for the defendant's only contention is that requisite Court fee has not been paid by the plaintiffs who have ascertained their share in the sum of ₹4,50,00,000/- and thus should have paid ad valorem Court fee of ₹4,41,545/- as they are neither in actual nor constructive possession of the suit property and that the plaintiffs have admitted ouster based on the special power of attorney which has been revoked by them in the year 2018.

2. The present suit has been filed by the plaintiffs seeking decree of partition for the property bearing Municipal No.A-39 Church Road, Bhogal, New Delhi-110014 ad-measuring 167 sq.yd., constructed up to five floors (hereinafter referred to as 'the suit property') besides permanent injunction from selling or transferring the suit property and not to receive the rent from the tenants. Case of the plaintiffs who are the mother, brother and sister of the defendant is that the suit property was owned by late Shri Surjeet Singh Lamba, the husband of plaintiff No.1 and the father of plaintiffs No.2 and 3 and the defendant. The suit property was constructed up to five floors, each floor comprising of two rooms set on each side. Since the plaintiffs were residing in Canada they executed a special power of attorney on 20<sup>th</sup> November, 2007 in favour of the defendant for the purpose of maintaining/looking after the suit property, for collecting the rent from the tenants and to render the accounts thereof being the legal heir of the deceased late Shri Surjeet Singh Lamba. For the last two years, the defendant was neither maintaining the accounts nor rendering the same to the plaintiffs, thus the plaintiffs revoked the special power of attorney on 7<sup>th</sup> June, 2018 and filed the present suit.

3. Learned counsel for the defendant claims ouster of possession by virtue of revocation of special power of attorney as pleaded in para 7 of the plaint wherein it is stated that since the defendant was not rendering the accounts properly, the special power of attorneys were revoked vide legal notice dated 7<sup>th</sup> June, 2018. Learned counsel for the defendant has relied upon the decision of this Court reported as (2014) 146 DRJ 229 Suresh Kapoor vs. Shashi Krishan Lal Khanna & Ors. wherein this Court has held

that the plaintiffs therein having admitted ouster were liable to pay the Court fee as they were never in possession.

4. A three Judge Bench of the Supreme Court in the decision reported as (1980) 2 SCC 247 Neelavathi vs. N. Natarajan, referring to its earlier decision in AIR 1958 SC 245 S. Rm. Ar. S. Sp. Sathappa Chettiar vs. S. Rm. Ar. Rm. Ramanathan Chettiar, reiterated that the question of Court fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by final decision of the suit on merits. It was further laid down that the mere plea by the plaintiff therein that the defendant was not rendering accounts of the income from property will not amount to dispossession or exclusion of possession of the property in respect of which share is being sought by the plaintiff/plaintiffs. Para 6 and 8 of the report read as under:-

*“6. On reading of the plaint as a whole, we are unable to agree with the view taken by the High Court. 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. All the material allegations contained in the plaint should be construed and taken as a whole vide S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Rm. Ramanathan Chettiar [AIR 1958 SC 245: 1958 SCR 1021, 1031-32: 1958 SCJ 407]. The plaint in paragraph 5 states that Muthukumaraswamy Gounder died intestate and undivided and Muthukumaraswamy's father Vanavaraya Gounder was managing all the ancestral joint family property as the head of the Hindu undivided joint family till his death. In paragraph 8 the plaintiffs stated that on the death of Muthukumaraswamy Gounder his 1/3<sup>rd</sup> share in the joint family properties devolved upon his sons and daughters. It*

*further alleged that the plaintiffs were in joint possession of the properties along with Vanavaraya Gounder and his other sons. In paragraph 9, it is stated that each of the plaintiffs is entitled to a share in the suit properties as heirs of the late Muthukumaraswamy Gounder and also as heirs of the late Vanavaraya Gounder. In paragraph 11, it is stated that since the death of Vanavaraya Gounder Defendants 1 to 6 are receiving the income from the properties and are liable to account to the plaintiffs. In paragraph 12, it is stated that since the death of Vanavaraya Gounder Defendants 1 to 6 failed to give the plaintiffs their share of income and the plaintiffs could not remain in joint possession. Therefore the plaintiffs demanded partition and the Defendants 1 to 6 were evading. Again in para 13, it is claimed that each of the plaintiffs as co-owners is in joint possession of the suit properties, and this action is laid to convert the joint possession into separate possession so far as the shares of the plaintiffs are concerned. 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. In fact, the defendants understood the plaint as stating that the plaintiffs are in joint possession of the suit properties. In paragraph 18 of the written statement the defendants pleaded that the plaintiffs have framed the suit*

*as though they are in joint possession and enjoyment of the suit properties. Asserting that the plaintiffs were out of possession, the defendants stated: "While it is so, the allegation that they are in joint possession of the suit properties, is not correct.*

7. ...xxxx xxxxx ...

8. *Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to partition suits. Section 37 provides as follows:*

*"37. (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.*

*(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed."*

*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 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 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 in law. 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.”*

5. This Court in the decision reported as 2004 (78) DRJ 690 Dr. Durga Parmar & Ors. vs. V.K. Verma & Ors. held:-

*“3. In view of the fact that an issue has already been framed on the question of the valuation of the suit and the payment of Court-fee by the plaintiffs, the application of the defendant No. 1 under Order VII Rule 11, CPC for rejection of the plaint appears to be misconceived and premature for the reason that in the facts and circumstances of the case, the controversy in regard to the valuation of the suit is a factual controversy which cannot be adjudicated upon without recording evidence thereon. The plea of the defendant No. 1 that on the face of it the suit is undervalued and proper Court-fee has not been paid inasmuch as the plaintiffs are not in a possession of any part of the suit property cannot be sustained as in the plaint itself the plaintiffs have pleaded that some of the properties left*

*behind by the deceased are with tenants. They have made a claim on the rents which are being collected by defendant No. 1. The law is well-settled that the valuation of a suit for the purposes of Court-fee depends upon the prayers made in the plaint and in partition suits where immovable property sought to be partitioned is with the tenants, the coowners are deemed to be in constructive possession. In such cases, they cannot be, prima facie, held to be out of possession of the property and cannot be made to pay Court-fee on the value of the share being claimed by them. The judgment of the Apex Court in Chief Inspector of Stamps v. Indu Prabha Vachaspati (Smt.) & Ors., (1998) 9 SCC 157, is a direct authority on this question. The judgment of this Court in Smt. Prakash Wati v. Smt. Dayawanti & Anr., AIR 1991 Delhi 48, is not applicable to the facts of the present case inasmuch as in the said case it was shown from the pleadings made by the plaintiff that the defendants had dispossessed the plaintiff from the possession of the suit property and had warned her not to come to the property in suit. It was held that the plaintiff was not in physical possession of any part of the property prior to the filing of the suit and was not being allowed even to visit the property by defendant. In view of such pleadings, it was inferred that the plaintiff was not in possession of any portion of the property in question.”*

*[Emphasis supplied]*

6. From the reading of the plaint it is apparent that late Shri Surjeet Singh Lamba died intestate and thus plaintiffs and defendant inherit 1/4<sup>th</sup> share each of the suit property. Since the plaintiffs have been residing in Canada and the defendant in the suit property, special power of attorneys were executed by the plaintiffs in favour of the defendant which have been filed along with the plaint. In the present case, the plaintiffs have not claimed the relief of possession as they claim to be in constructive

possession of the suit property and because of the said constructive possession had authorized the defendant to collect the rent on their behalf as well.

7. Considering the decision of the Supreme Court, this Court finds no merit in the application and the same is dismissed.

CS(OS) 553/2018

1. On perusal of the pleadings in the suit and on consent of learned counsel for the parties the following issues are framed:-

- (i) *Whether the suit is liable to be dismissed for non-payment of proper Court fee? OPD*
- (ii) *Whether the suit is barred by limitation as per Article 106 and 110 of the Limitation Act? OPD*
- (iii) *Whether the suit is without any cause of action as an oral partition of the properties of Surjeet Singh Lamba, the deceased, has already been effected, and, if so, the effect thereto? OPD*
- (iv) *Whether the plaintiff is entitled to a decree of partition of the suit property? OPP*
- (v) *Whether the plaintiff is entitled to permanent injunction in terms of Prayer (ii) and (iii) of the plaint? OPP*
- (vi) *Relief.*

2. List of witnesses and affidavit by way of evidence of the plaintiffs' witnesses be filed within four weeks.

3. Affidavit by way of evidence and list of the defendant's witnesses be filed within four weeks thereafter.

4. List before the Joint Registrar for fixing the dates of trial on 4<sup>th</sup> November, 2019.

5. List before the Court on 20<sup>th</sup> April, 2020.

IA 9706/2019 (u/O.XI R.12 CPC)

1. By this application, the plaintiffs claiming to be the co-owners of 1/4<sup>th</sup> share each of the suit property claim directions to the defendant to place on record documents in his possession as also the current details of the tenants of the suit property.

2. Considering the nature of the relief sought by the plaintiffs, it is necessary that the original documents as also the names of the tenants and the period from which they are in occupation and the rent received therefrom by the defendant, are directed to be placed on record.

3. Ordered accordingly. Application is disposed of.

IA 14927/2018 (u/O.XXXIX R.1&2 CPC)

1. In view of the fact that late Shri Surjeet Singh Lamba died intestate and admittedly the plaintiffs and the defendant are the four legal heirs of late Shri Surjeet Singh Lamba, interim order of injunction dated 30<sup>th</sup> October, 2018 is made absolute till the pendency of the suit.

2. The application is disposed of.

**(MUKTA GUPTA)**  
**JUDGE**

**SEPTEMBER 30, 2019**  
**dkb**