



\$~OS-10

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

% ***Date of decision:*** 15.01.2019

+ CS(OS) 587/2017

SMT. POONAM BHANOT Plaintiff
Through Mr.K.K Rohatgi, Adv.

versus

VIRENDER SHARMA & ORS Defendants
Through Mr.Prabhjit Jauhar,
Ms.Rosemary Raju, Ms.Upasana
Goel and Ms.Aishwarya, Advs.
for D-1
Ms.Bhavna Arora, Adv. for D-2
to 4

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

IA No.8668/2018

1. This application is filed by defendant No.1 under Order 7 Rule 11B & D of CPC 1908 for rejection of the plaint. Present suit is filed by the plaintiff for partition of the suit properties being Flat No.203, K 1 Building, 412-Gurgaon Mehrauli Road-Sector 14, Gurgaon Haryana; A-12, Jhilmil Industrial Area, G.T. Road Shahadra, Delhi and plot No. 18, Block No.D-14A, Model Town, Delhi-110009.
2. By the present application it has been pleaded that in the Memo of Parties, the plaintiff and defendants No.2 to 5 have admitted that they are not in possession of the suit properties and that they are also not



residing at the said properties. As the valuation of the property is said to be Rs.7,90,50,000/- appropriate court fee is required to be paid. It is pleaded that despite this plaintiffs have filed the court fee of Rs.20/-.

3. I have heard learned counsel for the parties. Learned counsel for the applicant/defendant No.1 has also pointed out that a perusal of the written statement of the other defendants and the relinquishment deed dated 17.3.2008 executed by the plaintiff and other defendants regarding Jhilmil Industrial area property would show that the plaintiff and defendants No.2 to 5 have been completely ousted from the suit properties. He further submits that there is no challenge to the registered relinquishment deed so executed in favour of defenadntNo.1/applicant. He relies upon the judgment of this court in ***Suresh Kapoor v. Shashi Krishan Lal Khanna, 216 (2015) DLT 273.***

4. The settled legal position is that under Order 7 Rule 11 CPC only the averments in the plaint are to be taken and not the defence of the defendant.

5. Reference in this context may be had to the judgment in the case of ***Mayar (H.K.) Ltd & Ors v. Owners & Parties, Vessel M.V. Fortune Express & Ors, AIR 2006 SC 1828;*** wherein the Supreme Court held as follows:

“11. It is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII, Rule 11 of the Code. Essentially, whether the plaint discloses a cause of



action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint.”

6. Similar are the observations of the Hon’ble Supreme Court in the case of *Vigneswara Coop. Housing Society Ltd. vs. K. Balachandramouli & Ors*, (2005) 13 SCC 506.

7. It is a general principle of law that in case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. Reference in this context may be had to the judgement of the Supreme Court in the case of *Neelavathi & Ors. v. N.Natarajan & Ors.*, AIR 1980 SC 691 wherein it was held as follows:-

“8. Section 37 of the Tamil Nadu Court Fees and Suit 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.

37(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 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.”



8. Similarly, the Division Bench of this court in *Saroj Salkan v. Sanjeev Singh & Ors.*, 155 (2008) DLT 300 (DB) held as follows:

“13. It is settled law that in a suit for partition, the court fees to be paid if joint possession is pleaded by the plaintiff on the basis that he is the co-owner of the property sought to be partitioned, fixed court fees would be payable under Article 17(vi) of Schedule II of the Court Fees Act presuming the joint possession of the plaintiff even if the plaintiff is not in actual possession. It is because of the reason that in the case of co-owners, the possession of one is in law possession of all, unless from the averments in the plaint read as a whole, a clear case of ouster is made and in that situation the plaintiff is liable to pay ad-valorem court fees on the market value of this share as provided under Section 7(iv)(b) of the Court Fees Act notwithstanding the fact that it is also pleaded that the plaintiff was in constructive possession.”

9. Learned counsel for the applicant also relies upon judgment of this court in *Suresh Kapoor vs. Shashi Krishan Lal Khanna*, (supra) which was a case where the court had culled out the legal proposition as follows:-

“11. Relying on *Sathappa Chettiar and Neelavathi*, a learned Single Judge of this Court in *Sushma Tehlan Dalal v. Shivraj Singh Tehlan*, 2011 (123) DRJ 91, culled out the following proposition of law:-

“11. The following legal proposition of law emerges from the above-referred decisions:

(i) In order to ascertain whether the suit has been property valued for the purpose of Court fee or not, only the averments made in the plaint have to be seen, without reference to the plea taken by the Defendants;

(ii) If the plaintiff claims to be in joint possession of the suit property, he has to pay a fixed Court fee in terms of Article 17(vi) of Court-fees Act.

(iii) If the averments made in the plaint show that the



plaintiff has been completely ousted from possession and is not in possession of any part of the suit property, he is required to claim possession and also pay ad valorem Court fee on the market value of his share in the suit property.”

10. Hence, where averments in the plaint show that plaintiff has been completely ousted from possession it is then that the issue of payment of ad valorem court fee would arise. As noted above, the plaint does not make any such averment as has been argued.

11. A perusal of the plaint shows that the plaintiff has made a categorical averment that she is in constructive possession of the suit property and hence on a reading of the plaint it cannot be said that the plaint discloses that the plaintiff has been ousted out from the suit property. The plea that *ad valorem* court fees was payable is misplaced.

12. Another, plea raised by the applicant is regarding the Jhilmil Industrial Area property. It is stated that the plaintiff and other defendants have executed registered relinquishment deed for the said property and the same has not been challenged. Hence, as far as the said property is concerned, the plaint, it is pleaded, does not describe a cause of action. Even if I were to accept this plea it is settled law that there can be no partial rejection of the plaint.

13. In this context reference may be had to judgment of the Supreme Court in *Sopan Sukdeo Sable and Ors. v. Assistant Charity Commissioner and Ors., AIR 2004 SC 1801*.

“18. As noted supra, the Order VII Rule 11 does not justify rejection of any particular portion of the plaint. Order VI Rule 16 of the Code is relevant in this regard. It deals with 'striking out pleadings'. It has three clauses permitting the Court at any stage of the proceedings to strike out or amend



any matter in any pleading i.e. (a) which may be unnecessary, Scandalous, frivolous or vexatious, or, (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or, (c) which is otherwise an abuse of the process of the Court.”

14. Relying on the above judgment this Court in the case of *Dr. D.K.Modi vs. Y.K.Modi & Ors.* vide judgment dated **24.09.2013** in *CS(OS) No. 991/2009* held that there cannot be a partial rejection of the plaint.

15. Clearly, there is no merit in the plea of the applicant. The present application is hence demised.

IA No.12666/2017

16. This application is filed under Order 39 Rule 1 and 2 CPC. Learned counsel for defendant No.1 states that as far as properties at Model Town and Gurugram are concerned he will maintain status quo regarding the same without prejudice to his rights and contentions. Regarding the property at Jhilmil Industrial Area he states that there is a relinquishment deed executed by the other party. This aspect is not denied by the plaintiff though the contention is that this relinquishment deed is void ab initio.

17. Taking the above submission of the defendant No.1 regarding the property at Model Town and Gurugram on record and binding the defendant No.1 to the same, the present application is disposed of.

CS(OS)587/2017

18. List on 15.4.2019 for framing of issues.

JAYANT NATH, J.

JANUARY 15, 2019/n