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

\+ CS(OS) 2173/2015

BAKSHISH SINGH CHANDHOK & ANR

.....Plaintiffs

Through: Mr.Kuljeet Rawal, Mr.Akshit David & Mr.Aditya Josh, Advs.

versus

BHAVJOT SINGH CHANDHOK

.....Defendant

Through: Mr.Manish Kaushik, Mr.Ankit Batra & Mr.Anubhav Gupta, Advs.
Dr.S.S. Hooda & Ms.Rashmi Rawat, Advs. in IA No. 3181/2016.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

O R D E R

% 08.07.2024

I.A. 24111/2015 & 12011/2022

1. The learned counsel for the defendant, without prejudice to the rights and contentions of the defendant, prays for leave to withdraw these applications with liberty to raise all pleas at the trial of the suit.

2. The applications are accordingly dismissed as withdrawn.

3. It is made clear that withdrawal of these applications shall not in any manner prejudice the defense of the defendant in the suit.

CS(OS) 2173/2015

4. In the order dated 08.04.2024, the statement on behalf of the counsel for the defendant was recorded that the plaintiffs have not

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affixed proper court-fee to the plaint inasmuch as the plaintiffs admit having been ousted from the property for several years before the filing of the plaint.

5. To appreciate the above objection, the contents of the plaint with respect to the possession of the property in dispute, that is, C-28, Rajouri Garden, New Delhi-110027, deserves to be noticed.

6. The plaintiffs, in paragraphs 4 and 10 of the plaint, have asserted as under:

> *"4. That at present Defendant is in possession of the suit property. The Defendant has been in possession of the entire suit property ever since the consent terms were filed in the Hon'ble High Court of Bombay. The plaintiffs also used to visit and use the suit property but for the last couple of years the Defendant has taken control over the entire property and is not letting the Plaintiffs enter into the suit property. There is no dispute qua the ownership and the respective share of the plaintiffs and Defendant In the suit property. The Plaintiffs and Defendant are all co-owners of the suit property.*
>
> *xxxxxx*
>
> *10. That the Defendant is not letting the plaintiffs enter into the suit property and has also changed the locks to the entrance to the suit property, to which the plaintiffs always had duplicate keys. As a result whenever the plaintiffs and their family members visit Delhi, they are forced to stay at a hotel other than staying at their own house of which they are the majority co-owners. The conduct of the defendant is causing great Injustice to the plaintiffs and their family members."*
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> (Emphasis supplied)

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7. The learned counsel for the defendant submits that, in the present case, the plaintiffs themselves have asserted that the defendant is not only in exclusive possession of the suit property, but is also not allowing the plaintiffs to enter the same. The possession of the defendant is, therefore, hostile to that of the plaintiffs, as pleaded by the plaintiffs themselves. Placing reliance on the judgment of this Court in ***Anu v. Suresh Verma & Ors.***, 2011:DHC:3444, he submits that in the present case, the plaintiffs shall have to pay *ad valorem* court fees.

8. On the other hand, the learned counsel for the plaintiffs, placing reliance on the judgments of the Supreme Court in ***B.R. Patil v. Tulsa Y. Salwar & Ors,*** 2022 SCC OnLine SC 240 and of this Court in ***Geeta Tandon v. Sunil Gomber & Ors.,*** 2023 SCC OnLine Del 2067; and ***Tara Chand Gaur v. Satish Chand Sharma & Anr.***, 2018 SCC OnLine Del 12923, submits that the possession of the suit property of one co-owner is also the possession of the other. He submits that there cannot be an ouster from possession of a co-owner. He submits that therefore, the plaintiffs have affixed proper court-fee on the Suit.

9. I have considered the submissions made by the learned counsels for the parties.

10. In ***Tara Chand Gaur*** (supra), a learned Single Judge of this Court held that in a Suit for partition, court-fee in terms of Schedule II, Article 17(vi) of the Court Fees Act, 1870 is payable inasmuch as every co-owner is either in actual physical possession of the co-owned property or, in law, has to be taken in deemed possession or constructive possession of the co-owned property. The Court further

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held that where the plaintiff is not in possession, physical or constructive, of the Suit Property, the court fee is payable for the share claimed by the plaintiff. The Court observed as under:

> *"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. 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 courtfee is payable for the 1/3rd share as claimed by the 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*

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been proved against the appellant/plaintiff by respondents/defendants after leading evidence."

11. In ***Geeta Tandon*** (supra), this Court, considering the issue of court fees payable on a suit for partition, has observed as under:

> *"45. It was held by this court in Prakash Wati vs Dayawanti, (1990) 42 DLT 421, that it is a settled principle of law that in the case of co-owners, the possession of one is in law the possession of all unless ouster or exclusion is proved. By relying on the judgement in Jagdish Pershad v. Joti Pershad, 1974 SCC OnLine Del 214, this court in Prakash Wati (Supra) reiterated that, when the plaintiff asserts shared possession of the property for which partition is requested, whether actual or constructive, the plaintiff is only required to pay a fixed court charge in accordance with Article 17(vi) Schedule II of the Court Fees Act, 1870. Thus, ad volarem court fee under Section 7(iv) (b) of the Court Fees Act, 1870 can be applied only when the plaintiff has been ousted from its enjoyment of the suit property and seeks restoration of the joint possession by way of a suit as was held in Asa Ram Vs. Jagan Nath and others, AIR 1934 Lahore 563.*
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> *46. In Jagdish Pershad & ors vs Jyoti Pershad & ors, ILR 1975 Delhi 841, this court held that when a joint owner seeks partition of the property, they merely seek a change in the mode of enjoyment of the said property, where a mere denial of right or title by the other co sharers does not amount to an ouster of the plaintiff.*
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> *47. To appreciate implication of denial of title in a suit property and the necessary ingredients of ouster, a reference may be made to the judgement of the Apex court in Nagabhushanammal (Dead) vs C.Chandikeswaralingam, (2016) SCC 434,*

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which placed reliance on judgement in Vidya Devi vs Prem Prakash, (1995) 4 SCC 496 wherein the meaning and connotation of the term 'ouster' was expounded as follows:

> *"28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus; (ii) long and uninterrupted possession of the person pleading ouster; and (iii) exercise of right of exclusive ownership openly and to the knowledge of the other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."*

48. In the case of Nisheet Bhalla Vs. Malind Raj Bhalla, AIR 1997 Delhi 60, as well Coordinate Bench of this Court had held that in order to decide the question of court fee, averments made in the plaint are to be seen and the decision cannot be influenced by the pleas taken in the written statement or by the final decision of suit on merits. It is only when the ouster or the exclusion from the property is proved that the question of ad valorem Court Fee may arise. So long as there is joint possession in law, it is not necessary that the plaintiff should be in actual possession in whole or part of the property.

49. This court in Krishna Gupta And Anr. vs M/S Rajinder Nath & Co Huf And Ors, 2013 SCC OnLine Del 547 held that while ascertaining if the plaintiff had been ousted from the suit property, the same must be

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indisputably admitted by the plaintiff in their plaint. Specific sentences and paragraphs in the plaint cannot be read in abstract while determining an ouster especially when the plaintiff has categorically stated that they are in joint and constructive possession of the suit property. Thus, once an express plea of constructive possession has been made, the onus to prove ouster for the payment of ad volarem court fee shifts on to the defendants.

50. From a combined reading of the aforesaid judgements, it is clear that a party claiming partition of the property is liable to pay ad volarem court fee only in those circumstances where 'ouster', pleaded as a defence by defendants for the purpose of making out a case of adverse possession, is established."

(Emphasis supplied)

12. In ***Anu*** (supra), this Court had explained the above position in law, by observing as under:

"5. Section 8 of the Suits Valuation Act, 1887 provides that where other than those referred to in the Court-fees Act, 1870 Section 7, paragraph v, vi and ix, and paragraph x, clause (d), Court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. Section 9 of the above-referred Act provides that when the subject-matter of suits of any class, other than suits mentioned in the Court-fees Act, 1870, Section 7, paragraph v and vi, and paragraph x, clause (d) is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may with the previous sanction of the State Government, direct that suits of that class shall, for the purposes of the Court-fees Act, 1870, and of this Act and any other enactment for the time being in force, be

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treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf.

In exercise of powers conferred by Section 9 of Suits Valuation Act, Punjab High Court made rules which are applicable to Delhi.

Suits for partition of property—

Court-fee—(a) as determined by the Court-fees Act, 1870 Value—(b) For the purpose of the Suit Valuation Act, 1887, and the Punjab Court Act, 1918 the value of the whole of the property as determined by Sections 3, 8 and 9 of the Suits Valuation Act, 1887.

It would thus be seen that in view of the rules framed by Punjab High Court under Section 9 of Suits Valuation Act, which admittedly are applicable to Delhi, there can be separate valuations for the purpose of Court fee and jurisdiction. The valuation for the purpose of jurisdiction has to be the value of the whole of the properties subject matter of partition, whereas valuation for the purpose of Court fee would be such as is provided by the Court-fees Act.

Section 7(iv)(b) of Court Fees Act, provides that in a suit to enforce the right to share in any property on the ground that it is a joint family property, the amount of fee payable under Court-fee Act, shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. It further provides that in all such suits the plaintiff shall state the amount at which he values the relief sought by him. Article 17(vi) of Schedule II of Court-fees Act provides for payment of a fixed Court fee in a suit where it is not possible to estimate at a money value the subject matter in dispute, and which is not otherwise provided for by this Act.

6. After examining the decision of Supreme Court in ***S.Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Rm. Ramanathan Chettiar*** *AIR*

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1958 SC 245, ***Neelavathi & Ors. v. N. Natarajan & Ors.*** *AIR 1980 SC 691,* ***Jagannath Amin v. Seetharama (dead) by LRs & Ors.*** *2007(1) SCC 674 and Commercial* ***Aviation and Travel Co. v. Vimla Panna Lal*** *AIR 1988 SC 1636 this Court in CS(OS) No. 2642/2008 and IA No. 10367/2010 decided on 4th March, 2011 summarized the legal position in this regard as under:*

(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."

13. From the above, it is apparent that in a Suit for seeking partition of a co-owned property, the possession of one of the co-owners is deemed to be the possession of the remaining co-owners as well and the court fee payable is in accordance with Schedule II, Article 17(vi) of the Court Fee Act. However, where the defendant proves ouster of the plaintiff from the possession of the property, Court Fee payable is in accordance with Section 7(iv)(b) of the Court Fee Act.

14. In the present case, the averments of the plaint have been reproduced hereinabove. They clearly show that the plaintiffs themselves have asserted and admitted ouster from the possession of the Suit Property. They have claimed that the defendant has not only changed the locks at the entrance of the Suit Property but is also forcing the plaintiffs to stay at a hotel whenever they visit Delhi. The plaintiffs, therefore, on their own assertions, are not in constructive or

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actual possession of the Suit Property. The defendant is not to prove the same any further. As the plaintiffs themselves admit to their ouster from the possession of the Suit Property, the court fee payable shall be *ad valorem* in accordance with Section 7(iv)(b) of the Court Fees Act, 1870 and not Article 17(vi) of the Schedule II of the Act.

15. In ***B.R. Patil*** (supra), the Supreme Court has placed reliance on, *inter ali*a, the earlier judgment in ***P. Lakshmi Reddy v. L. Lakshmi Reddy***, AIR 1957 SC 314, wherein it had been held that the possession of one co-heir is considered as possession of all the co-heirs. However, the said judgment cannot come to the aid of the plaintiffs in the present case. The plaintiffs, as noted hereinabove, have themselves admitted to have been ousted from the possession of the Suit Property by the defendant. Therefore, the plaintiffs shall pay the Court Fees in accordance with Section 7(vi)(b) of the Act.

16. The plaintiffs are therefore, directed to deposit the deficient court fee within a period of two weeks.

17. List on 26th July 2024.

I.A. 11816/2022

18. In view of the orders dated 09.03.2016 and 28.07.2023 of this Court, the present application is disposed of.

I.A. 3181/2016

19. List on 26th July 2024.

NAVIN CHAWLA, J

JULY 8, 2024*/rv/VS*

Click here to check corrigendum, if any

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