

**IN THE COURT OF MS. RAVINDER BEDI,
ADDL. DISTRICT JUDGE-02,
SHAHDARA, KARKARDOOMA COURTS, DELHI.**

In the matter of :-

CS No. 252/2019

Intizar Ahmad

.....Plaintiff

VERSUS

Ishtiaq Hussain & Anr.

.....Defendants

17.08.2022

ORDER

1. By this order, I shall decide an application under Section 151 CPC filed by Plaintiff on 28.05.2022 against Defendants seeking interim restraintment from Defendants from selling, transferring or alienating the property no.264, Gali No.13, Jafrabad (in short as 'suit property') till disposal of suit.

2. It is stated by Ld. Counsel Mr. Faiz Ahmad for Plaintiff that Plaintiff and Defendants are brothers and their father Mr. Mukhtiar Hussain had purchased the suit property in the year 1982 from Mr. Abdul Rashid. The property was thereafter built upto three floors by all co-sharers / co-owners. Ld. Counsel submits that Plaintiff and Defendants are brothers. He submits that Plaintiff has filed the present suit for Partition and consequential relief of injunction in respect of the suit property. He submits that Plaintiff has apprehension that Defendants are going to alienate / transfer the suit property to the third person / outsider without consent and knowledge of Plaintiff. It is submitted that the suit

property is let out to various tenants and Defendants are collecting rent to the exclusion of Plaintiff.

3. Ld. Counsel for Plaintiff further submits that after filing of the suit, Defendants stopped extending threats to transfer property and Plaintiff did not press upon his application under Order 39 rules 1&2 CPC and withdrew the same as is evident from the Order dated 04.02.2020. Ld. Counsel submits that recently Plaintiff's Attorney enquired from BSES YPL regarding installation of electricity meter and was shocked to know that one NOC putting purported signatures of Plaintiff was given to BSES office after being forged by Defendants. Counsel submits that plaintiff never gave any such no objection certificate in favour of Defendants or any other person. A complaint has been filed on 30.05.2019 with PS Jafrabad regarding the said forged action; hence the Plaintiff has prayed for interim relief against the Defendants.

4. Ld. Counsel for Defendants has opposed the application by filing a reply thereto. It is contended that Plaintiff cannot seek the interim relief by filing application under Section 151 CPC after his application under Order 39 rules 1&2 CPC was dismissed as withdrawn. He submits that inherent powers under Section 151 CPC cannot be used if there is specific provision for granting such relief under CPC. It is argued that the Plaintiff has no title to the suit property nor is he in possession of the same and only remedy before him is to have filed a Declaratory suit alongwith possession. Reliance is placed upon the judgment of Hon'ble Apex Court in case **Anathula Sudhakar v. P.Buchi Reddy (dead)** by

LRs, (2008) 4 SCC 594. It is argued that Defendants are in exclusive possession of suit property since the year 1982 till date and it is the Defendants who looked after their old parents as well as their brother late Mukhtiar till their death. It is argued that Defendants are still looking after their two sisters. It is argued that Plaintiff abandoned the entire family in the year 1978 itself much before the acquisition of the suit property and was living separately and kept no relationship with rest of the family. In such circumstances, Plaintiff has no right, title or interest in the suit property. The allegations that any NOC was obtained by Defendants with forged signatures of Plaintiff are denied. The purported forged documents are not filed on record alongwith application and hence the plea of Plaintiff seeking relief on the strength of the purported forged document which is not part of record, deserves dismissal.

5. I have heard the respective submissions as addressed by Ld. Counsel for parties and perused the record.

6. Plaintiff has filed a suit for Partition, claiming his share in the suit property. It is not in dispute that on earlier occasion, an application seeking interim relief under Order 39 rules 1&2 CPC was withdrawn by Plaintiff. The present application under Section 151 CPC is premised primarily on the ground that Plaintiff came to know recently that Defendants in connivance with each other have got installed one electricity meter without consent of Plaintiff i.e. co-owner of suit property. It is the admitted case of parties that Plaintiff has never been in possession of suit property and suit property is in exclusive possession of

Defendants since the year 1982. Plaintiff admittedly has not filed anything in the form of electricity bill or municipal records since the property allegedly having purchased by his father. The stand of Defendants is that father of parties had transferred rights and title in the suit property to his brothers in the year 2000 itself. The documents in support of same have been filed by them. It is also not denied that bills of electricity meters and the revenue records including property taxes of suit property are all being paid by the defendants.

7. Another aspect which is to be seen is that prima facie Plaintiff is neither in constructive nor in actual physical possession of the suit property. The entire plaint of the Plaintiff does not aver that Plaintiff is in constructive possession. In the absence of such averment, prima facie constructive possession of the Plaintiff cannot be attributable to him. There is no document even remotely having filed by Plaintiff to show that he was ever in possession of the suit property in any manner. The rejoinder filed to the written statement is only in the form of flat denials and as such, the pleadings would show that Plaintiff is not in actual or constructive possession of the suit property.

8. In order to succeed in an Order XXXIX Rule 1 and 2 application, the plaintiff has to satisfy the trinity test of prima-facie case, balance of convenience and irreparable loss. The Plaintiff claims that he being a co-owner is entitled for his share in the suit property. The plaint contains mere bald averments as to his entitlement of claim of share in the suit property without any supporting document, specifically when there is

not even an averment to this effect in the plaint that plaintiff is in constructive possession of the suit property. Plaintiff has also not shown that after his specific ouster, he did any act which would raise the presumption as to restoration of any such possessory rights.

9. Thus, present is a case where plaintiff admits his ouster and denial of enjoyment of suit property which is claimed by Defendants to be their exclusive property on the strength of sale deed in their favour and their possession since 1982 and exclusive enjoyment of the same. In such circumstances, the question arises that can the plaintiff be allowed to put fetters on the right of defendants in respect of the suit property. *Prima facie*, the matter does not seem to be in favour of Plaintiff.

10. A bare perusal of plaint demonstrates that though plaintiff states to be the co-owner, he has not placed any material evidence to show his constructive possession in the same. Admittedly, plaintiff has never resided in the suit property at any point of time and to plead that he has the share being the co-sharer in the same, would not meet the rigours of Article 17(VI) of Schedule II of The Court Fees Act, 1870. The plaint lacks material averments and seems to escape paying the *ad valorem* court fees under Section 7(iv)(b) of Court Fees Act, 1870.

11. Hon'ble Delhi High Court in **Ramesh Kumar Bhagchandka v. Mahesh Kumar Bhagchandka**, 2014 SCC OnLine Del 1324 held the following :

“22. To put it pithily: where meaningfully read the

averments in the plaint would show that the plaintiff admits ouster by the defendants to keep him away from immovable property and the ouster is permitted on the plaintiff's right, title or interest in the property being denied: title, right or interest has to be established and only thereupon partition claim followed by possession. In the decision reported as 20 Cal. 762 **Mohendra Chandra Ganguli v. Ashutosh Ganguli** it was held that if it was a case of complete ouster, a claim of being a co-sharer in an immovable property and hence partition with recovery of possession as the prayer would warrant ad-valorem court fee to be paid on the plaint.”

12. If assuming at best, the plaintiff has a prima-facie case of being an owner of his share in the suit property, the balance of convenience does not lie in his favour. The interim prayer sought by the plaintiff without filing the alleged forged document submitted by the Defendants with BSES YPL does not warrant any relief in favour of plaintiff.

13. Further, this court observes that plaintiff is required to pay ad-valorem court fee atleast on the valuation put by him on the value of the property for the purpose of court fee and jurisdiction, since plaintiff is not in possession, either physical or constructive of the suit property.

14. Having stated so, the circumstances indicate that balance of convenience is also not in favour of plaintiff. The interim relief prayed by plaintiff in such circumstances deserves dismissal.

The interim relief so prayed therefore stands declined.

It is hereby directed that plaintiff shall pay ad-valorem court fee on his share in the suit property within 15 days from today.

List the matter for compliance as above on **05.01.2022**.

Shortest possible date is given considering the pendency as well as regular cause list. There is pendency of about 2400 cases which includes about 400 more than five year old cases in this court.

Announced in the open court
on 17.08.2022.

(RAVINDER BEDI)
Additional District Judge-02
SHD/KKD/Delhi/17.08.22