

REPORTABLE

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

+ FAO(OS) NO. 432 OF 2006

% Date of Decision : January 18, 2008.

CHET RAM GUPTA THRU LR'S Appellant.

Through Mr. S.C. Anand & Mr. S.K. Chaturvedi,
Advocates.

VERSUS

MOTIAN DEVI LAMBA & ORS. Respondents.

Through Ms. Nandani Sahni & Mr. Ujjwal Kumar,
Advocates.

CORAM:

HON'BLE DR. JUSTICE MUKUNDKAM SHARMA, CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J:

1. The appellant herein is plaintiff in suit being CS (OS) No.

2818/1989. The appellant has filed the said suit for specific performance against Ms. Motian Devi Lamba, Dr. G.S. Gupta, Mr. S.P. Gupta and Mr. Ravi Prakash Gupta hereinafter referred to as Respondent Nos. 1, 2, 3 and 4 in respect of the property bearing No. E-578, Greater Kailash, Part-II, New Delhi. The appellant-plaintiff is in possession of the property and claims that the respondent No. 3 on behalf of respondent No. 1 had executed an agreement to sell dated 16th September, 1986, which stands modified, amended and confirmed as per letter dated 1st October, 1986 written by the respondent No. 1 herself. It is also claimed that the respondent No. 1 had executed a power of attorney in favour of the appellant and the said power of attorney was duly certified and attested by the Indian High Commission in London.

2. The respondent Nos. 1, 2 and 4 have disputed genuineness of the agreement to sell dated 16th September, 1986 as well as letter dated 1st October, 1986. However, the respondent No. 3 admits his signature on the agreement to sell dated 16th September 1986. With regard to power of attorney, the stand taken by the respondents is

that the same was executed to enable the appellant to obtain requisite permission from Government authorities. It is claimed that authority letter dated 1st October, 1996 is forged and fabricated.

3. It is stated by the respondents that the respondent No. 1 had executed an un-registered relinquishment deed in favour of the defendant No. 2 on 1st October, 1986 and subsequently had executed gift deeds in favour of respondent Nos. 2 and No. 4 on 6th April, 1987. The said gift deeds were duly certified and authenticated by the Indian High Commission, London and were registered in India on 5th August, 1988

4. We need not examine merits of the respective cases of the parties, except to the extent of taking a prima facie view to decide the limited controversy involved in the present appeal, which is directed against order dated 10th May, 2006 dismissing IA No. 3403/1995 under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short) for amendment of the plaint. By the said amendment application the

appellant wanted to amend the prayer clause and add para 18A to the plaint that not with-standing purported execution of the relinquishment deed and gift deeds, the appellant is entitled to decree of specific performance and respondent Nos. 1, 2 and 4 should jointly execute the sale deed in favour of the appellant. Learned Single Judge dismissed the said application, inter-alia, holding that. execution of the above documents i.e. relinquishment and gift deeds, was mentioned by the respondent No. 2 in his written statement filed on 26th May, 1990 and, therefore, the application for amendment is barred by limitation as the same was filed only on 18th April, 1993, more than three years after the written statement was filed.

5. At this stage we may deal with one of the contentions of the respondents that the impugned order is not a judgment under Section 10 of the Delhi High Court Act. We do not find any merit in the said contention. Learned Single Judge has held that the the relief sought by the Appellant viz.; that the gift deeds and the relinquishment deed shall not be binding on the Appellant, are prayers which are ex-facie

barred by limitation and thus, affects vital and important right of the appellant in the Suit. The impugned order cannot be regarded as a mere inconsequential interlocutory order. The observations and the findings given in the order on the question of limitation have adverse and material affect on the claims made and the reliefs prayed for in the original suit itself. The Supreme Court in the case of **Liverpool & London S.P & I Association versus M.V Sea Success I** reported in (2004) 9 SCC 512, while discussing the definition of the term “judgment”, quoted with approval the following portion from the case of **Shah Babulal Khimji versus Jayaben D Kania** reported in (1981) 4 SCC 8

“80 “We think that “judgment” in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.”

81 . An analysis of the observations of the Chief Justice would reveal that the following tests were laid down by him in order to decide

whether or not an order passed by the trial Judge would be a judgment:

(1) a decision which affects the merits of the question between the parties;
(2) by determining some right or liability;
(3) the order determining the right or liability may be final, preliminary or interlocutory, but the determination must be final or one which decides even a part of the controversy finally leaving other matters to be decided later.”

6. The Supreme Court also held that the Letters Patent confers a right of appeal on a litigant against any judgment passed under any Act, unless the same is expressly excluded. In view of the decision of the Supreme Court in ***Khimji case (Supra)*** and looking into the nature of the impugned order, this contention is rejected.

7. Whether or not agreement to sell dated 16th September, 1986 is genuine and valid, a decree for specific performance should be passed and whether or not respondent No. 1 had signed and executed letter dated 1st October, 1986 and the effect and purpose of power of attorney dated 1st October, 1986 in favour of the plaintiff-appellant, etc.; are matters to be considered and decided by the Court on merits after recording evidence of the parties. However,

two facts may be noticed here viz.; that the respondent No. 3 has not denied his signatures on the agreement to sell dated 16th September, 1986 and respondent Nos. 4 and 3 are both residing at the same address viz. 58A, Kamla Nagar, Delhi.

8. By the amendment application IA No. 3403/1995, the appellant had referred to cause of action relied upon by him in the plaint and the facts stated therein. The appellant by the aforesaid amendment application had submitted that the aforesaid gift deeds/relinquishment deed do not stand in the way of the claim and prayer for specific performance made in the suit and the appellant is entitled to decree for specific performance in spite of the said documents. Accordingly, the appellant wants to add paragraph 18A and amend prayer clause of the plaint. For the sake of convenience paragraph 18A and the amended prayer clause are quoted below:-

“18-A. That during the pendency of the suit defendant No. 1 and 2 in their written statements have alleged that defendant No. 1 had executed a Relinquishment Deed with respect to the plot in question Relinquishing her share in favour of defendant No. 2 and the

said Relinquishment Deed was attested before the High Commission of India at London (U.K.), on 1.10.1986. She has further alleged that she had thereafter executed a declaration of Gift on 6th April, 1987, in favour of defendant No. 2 and Shri Ravi Prakash Gupta (defendant No. 4) and the Gift Deed was duly registered on 8th September, 1987, in London (U.K.), and was got registered with the Sub-Registrar, New Delhi, on 5.8.1988/9.9.1988. The plaintiff respectfully submits that he had no knowledge of any such documents and he was never informed about the same by defendant No. 1. The plaintiff further submits that defendant No. 1 and no authority to execute either Relinquishment Deed in favour of defendant No. 2 or to execute any Gift Deed in favour of defendants 2 and 4 after entering into Sale Transaction with the Plaintiff. The alleged Relinquishment Deed as well as Gift Deed are not legal and valid. In any case, since the alleged Relinquishment Deed and Gift Deed are purported to have been executed after entering into sale transaction with the Plaintiff with regard to the plot in dispute, the same are not binding on the Plaintiff and the Plaintiff is entitled to get a decree for specific performance of agreement against all the defendants.

It may further be held that the alleged Relinquishment Deed alleged to have been executed by defendant No. 1 in favour of defendant No. 2 and the alleged Gift Deed alleged to have been executed by defendant No. 1 in favour of defendant No. 2 and 4 with

respect to the property in suit are not binding on the Plaintiff and the Plaintiff is entitled to a decree for specific performance of the Agreement to Sell against all the defendants. Defendants No. 2 and 4 may also be directed to join Defendants 1 and 3 in the execution and registration of Sale Deed with respect to the Suit property in favour of the Plaintiff.

After addition of the above mentioned relief, the prayer Clause of the suit will be read as under:-

The Plaintiff, therefore, prays that a decree for specific performance of the Agreement to Sell dated 16.9.1986, modified/amended by a further confirmatory letter and authority dated 1.10.1986, duly executed by the defendant No. 1 and also confirmed expressly or impliedly by the General Power of Attorney executed in favour of the Plaintiff by the defendant No. 1 and registered on 1.10.1986, in the Office of the Indian High Commissioner at London in respect of the aforesaid plot of land bearing No. W-73, measuring 1014 square yards situate in Greater Kailash II, New Delhi, be passed in favour of the Plaintiff and against the defendant No. 1 and/or defendant No. 3 who is duly authorised attorney of defendant No. 1 and directing the defendant No. 1 and or

defendant No. 3 to obtain necessary permission required to be obtained from the various competent authority for the sale of the plot if not obtained so far and after obtaining the same to execute the Sale Deed in respect of the said plot and get the same registered in favour of the Plaintiff on the payment of balance sale consideration of Rs.12.5 lacs. It may further be held that the alleged Relinquishment Deed alleged to have been executed by defendant No. 1 in favour of the defendant No. 2 and the alleged Gift Deed alleged to have been executed by defendant No. 1 in favour of defendant No. 2 and 4 with respect to the property in suit are not binding on the Plaintiff and the Plaintiff is entitled to a decree for specific performance of the Agreement to Sell against all the defendants. Defendants 2 and 4 may also be directed to join defendants 1 and 3 in the execution and registration of Sale Deed with respect to the suit property in favour of the Plaintiff. The cost of the suit be also awarded. Any other relief which this Hon'ble Court deems just and fit may also be awarded to the Plaintiff."

9. The original prayer clause in the plaint reads as under:-

“The plaintiff, therefore, prays that a decree for specific performance of the Agreement to Sell dated 16.9.1986, modified/amended by a further confirmatory letter and authority dated 1.10.1986, duly executed by the defendant No. 1 and also confirmed expressly or impliedly by the General Power of Attorney executed in favour of the plaintiff by the defendant No. 1 and registered on 1.10.1986, in the office of the Indian High Commissioner at London in respect of the aforesaid plot of land bearing No. W-73, measuring 1014 sq. yards situate in Greater Kailash II, New Delhi, be passed in favour of the plaintiff and against the defendant No. 1 and/or defendant No. 3 who is duly authorised Attorney of defendant No. 1 and directing the defendant No. 1 and or defendant No. 3 to obtain necessary permission required to be obtained from the various Competent Authorities for the sale of the plot if not obtained so far and after obtaining the same to execute the Sale Deed in respect of the said plot and get the same registered in favour of the plaintiff on the payment of balance sale consideration of Rs.12.5 lacs. The cost of the suit be also awarded. Any other relief which this Hon'ble Court deems just and fit be also be awarded to the plaintiff.”

10. It is not disputed that the suit for specific performance is based

upon the purported agreement dated 16th September, 1986 that is claimed to be amended, modified and confirmed vide letter dated 1st October, 1986. The respondents rely upon relinquishment deed dated 1st October, 1986 stated to be executed by respondent No. 1 in favour of the respondent No. 2, but the same is not registered. An unregistered instrument cannot transfer title in an immovable property exceeding Rs.100/-. The relinquishment deed and the letter relied upon by the appellant are both allegedly dated 1st October 1986. The respondents, also rely upon the subsequent gift deeds dated 6th April, 1987 executed by respondent No. 1 in favour of respondent Nos. 2 and 4. The gift deeds are certainly later in point of time to the purported agreement dated 16th September, 1986. What is the effect of execution of the subsequent gift deeds and how far the rights of the appellant-plaintiff are affected by the same, is again a matter for the learned Trial Court to decide on merits. We are at this stage required to take only a prima facie view of the contentions raised and to decide the appeal on the question of whether the amendment should be allowed or not.

11. In **Durga Prasad and Another versus Deep Chand and Others**, reported in AIR 1954 SC 75, the Supreme Court examined an almost similar legal issue, where a property made subject matter of a suit for specific performance has been transferred to a third party. It was observed that the practice of the courts in India is not uniform and three distinct lines of thought were prevalent. Reference was made to Section 91 of the Indian Trust Act, 1882, Section 3 of the Specific Relief Act, 1887 and Section 40 of the Transfer of Property Act, 1982, but these provisions it was held do not directly relate to the form of the decree. The first line of thought that the sale deed executed in favour of the subsequent purchaser should be canceled, was rejected, inter alia, holding that it was not a desirable solution. This was so because it may have implications between the original vendor and the subsequent purchaser. The second line of thought that the subsequent purchaser should execute a sale deed in favour of the plaintiff, who has succeeded in the suit for specific performance, was also rejected on the ground that the court will be making a contract which never existed between the

subsequent purchaser and the plaintiff. The last and the third line of thought that the original owner should be directed to execute conveyance in favour of the plaintiff and the subsequent purchaser should join in executing the conveyance deed was accepted. The said judgment of the Supreme Court has been followed in **R.C. Chandiok and Another versus Chuni Lal Sabharwal and Others**, reported in 1970(3) SCC 140 and in **Dwarka Prasad Singh versus Harikant Prasad Singh** reported in (1973) 1 SCC 179.

12. What the appellant seeks to do by the amendment application is to bring the prayer clause in conformity and in accord with the aforesaid decisions of the Supreme Court. If this aspect is kept in mind, the main object of making prayers for amendment becomes apparent. It is to deal with technical objection, which may be raised at a later point of time, even if the appellant succeeds in the suit and a decree of specific performance is granted. Amendments to meet technical objections are normally allowed and courts are liberal because this ensures that substantial justice is done and the parties are not made to suffer for want of proper drafting, even when relevant

facts are already before court in the pleadings and the basic structure of the suit is not altered. Way back in 1960, in **Rukhma Bai versus Lala Laxminarayan**, reported in AIR 1960 SC 335 it was observed that where a suit is filed without seeking an appropriate relief, it is well settled that the suit should not be dismissed automatically but the plaintiff should be permitted to make necessary amendment, if a prayer is made.

13. In another judgment in the case of **Nanduri Yogananda Lakshminarasimhachari versus Sri Agastheswaraswamivaru**, reported in AIR 1960 SC 622, it was observed that where all necessary allegations have been made in the original plaint, requisite pleas have been raised, issues in respect to that controversy are framed and the parties were fully cognizant of the controversy, amendment should be allowed. In the present case, we find that issues were framed on 9th November 1994. Issue No. 6 specifically related to the gift deeds executed by respondent No. 1 in favour of the respondents Nos. 2 and 4 and whether the said respondents are entitled to possession of the suit property. This issue was

subsequently modified vide order dated 14th May, 1996. The said issue was modified vide Order dated 14th May, 1996 as under:-

“Whether any legal and valid Gift Deed has been executed by the defendant no.1 in favour of defendant no.2 and 4 transferring the plot in their favour and if so, whether the Gift Deed is binding on the plaintiff? OPD”

14. Therefore, the parties are cognizant of the fact that the question of the relinquishment deed and effect of the gift deeds has to be examined and gone into in the suit. In fact, the respondents have raised a counter claim and also prayed for decree of possession against the appellant.

15. While deciding the amendment application, question of prejudice caused to the opposite side is also a relevant consideration. An amendment application may be dismissed if a relief sought by way of amendment is barred by limitation. While examining the question of amendment, courts must examine the nature of amendment and a party should not be allowed and permitted to set up a new case or a new cause of action when such

new case or cause of action is otherwise barred by law of limitation. If a prayer for amendment is based on a new case or a new cause of action and is also barred by limitation, then prejudice is caused to the defendant and such prejudice cannot be compensated by payment of costs. However, when an amendment does not constitute a new cause of action or makes a different case but merely amounts to a different or additional approach to the pleaded facts, amendment can be allowed even after the expiry of period of limitation. In **A.K. Gupta and Sons Limited versus Damodar Valley Corporation**, reported in **AIR 1967 SC 96**, the ratio has been explained as under

“7. It is not in dispute that at the date of the application for amendment, a suit for a money claim under the contract was barred. The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new case or cause of action is barred: *Weldon v. Neale*¹. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional

1 19 QBD 394

approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: see *Charan Das v. Amir Khan*¹ and *L.J. Leach & Company Ltd. v. Jardine Skinner and Co.*².

8. The principal reasons that have led to the rule last mentioned are, first, that the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (*Cropper v. Smith*⁴) and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended (*Kisandas Rupchand v. Rachappa Vithoba*⁵ approved in *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*⁶).

9. The expression 'cause of action' in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was said in *Cooke v. Gill*⁷ in a different context, for if it were so, no material fact could ever be amended or

1 LR 47 IA 255

2 (1957) SCR 438

4 (1884) 26 Ch D 700, 710-1

5 (1909) ILR 33 Bom 644, 651

6 (1957) SCR 595, 603

7 (1873) LR 8 CP 107, 116

added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in *Robinson v. Unicos Property Corporation Ltd.*⁸ and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas': *Dornan v. J. W. Ellis & Co. Ltd.*⁹ This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

16. If in substance, the pleadings already exist, law of limitation may not be a hindrance in the way of the plaintiff to make a prayer of amendment as long as there is no fundamental change, which can be categorized as a new cause of action or a new case. In **Pirgonda Hongonda Patil versus Kalgonda Shidgonda Patil**, reported in **AIR 1957 SC 363**, Supreme Court approved of the view that the term "cause of action" and "new case" in this context does not mean every

⁸ (1962) 2 All ER 24

⁹ (1962) 1 All ER 303

fact, which is material to be proved to entitle a plaintiff to succeed but a material fact, which is sought to be amended or added and any amendment that will change the nature of a case or adds a material allegation. It implies a new claim based and constituted on new facts. It is equivalent to new set of ideas, so as to prejudice a right that a party has acquired by lapse of time under law of limitation. However, this does not imply that a party cannot be allowed to amend the shortcomings and errors made in drafting. These are correctable and can be rectified by taking remedial steps. In **Pankaja and Another versus Yellappa (Dead) by LRs and Others**, reported in (2004) 6 SCC 415, the Supreme Court has referred to with approval to the ratio of **Ragu Thilak D. John versus S. Rayappan and Others**, reported in (2001) 2 SCC 472 and has observed as under:-

“18. We think that the course adopted by this Court in Ragu Thilak D. John case applies appropriately to the facts of this case. The courts below have proceeded on an assumption that the amendment sought for by the appellants is ipso facto barred by the law of limitation and amounts to introduction of

different relief than what the plaintiff had asked for in the original plaint. We do not agree with the courts below that the amendment sought for by the plaintiff introduces a different relief so as to bar the grant of prayer for amendment, necessary factual basis has already been laid down in the plaint in regard to the title which, of course, was denied by the respondent in his written statement which will be an issue to be decided in a trial. Therefore, in the facts of this case, it will be incorrect to come to the conclusion that by the amendment the plaintiff will be introducing a different relief.”

17. In view of the above, we do not think the amendment sought, seeks to make out a new case or a new cause of action. The fundamental facts stated by the appellant continue to be the same and in substance the amendment does not introduce any new material facts. The main objective of the amendment is to prevent any technical challenge to a decree if it is passed, subsequently in the suit.

18. In these circumstances, we feel that the present appeal should be allowed and the impugned order dismissing IA No. 3403/1995 should be set aside. The amendment application is accordingly

allowed subject to payment of costs of Rs.20,000/- , which shall be paid by the appellant to the respondents within four weeks from today.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

JANUARY 18, 2008
VKR