

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

% Date of decision : 16.02.2009

+ FAO (OS) No. 51 of 2009

MAN MOHAN SINGH APPELLANT
Through : Mr. Manish Vashisht and
Mr. Sameer Vashisht,
Advocates.

- V E R S U S -

VEENA SEHDEV RESPONDENT
Through : None.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether the Reporters of local papers
may be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be
reported in the Digest? No

SANJAY KISHAN KAUL, J. (ORAL)

CM Appl. No. 2264/2009

Allowed subject to just exceptions.

+ FAO (OS) No. 51 of 2009

1. The respondent filed a suit for partition being CS (OS)
No.2000/2007. The said suit was contested by the
appellant. On the pleadings of the parties, issues were

framed on 21.11.2008 and in pursuance of directions of the Court, affidavits by way of examination-in-chief of two witnesses were filed by the respondent.

2. It is at this stage that the appellant sought amendment in his written statement and filed an application for the same, which has been dismissed by the impugned order dated 19.01.2009.
3. A perusal of the impugned order shows that the subject matter of partition suit is the immovable property of late Balwant Singh. Late Balwant Singh is survived by five heirs being three sons and two daughters. The respondent acquired the interest of two daughters and two sons and, thus, claimed to be entitled to $\frac{4}{5}$ th share in the property with the appellant left with only $\frac{1}{5}$ th share. The property is a leasehold property and the respondent has registered agreements in her favour.
4. The appellant at earlier stage sought dismissal of the suit denying the ownership of the respondent, but that application already stands dismissed on 21.11.2008.
5. The appellant pleaded that first two sisters had already relinquished their share in the property in favour of the three brothers and were, thus, left with no right or interest in the property and, thus, there could be no question of any agreement to sell or execution of other documents in favour of the respondent. It was, thus, pleaded that the three brothers including the appellant were entitled to $\frac{1}{3}$ rd share each and, thus, the

respondent could at best acquire 2/3rd share in the property. It is, in fact, this defence which has given rise to framing of the issue in respect of share of the parties in suit.

6. In terms of the application seeking amendment of the written statement, the appellant sought to challenge the documents executed by the heirs of his deceased brother *inter se* and the documents executed by one of his sisters in favour of the respondent. This is so as one of the brothers of the appellant passed away leaving a widow, daughter and three sons. The widow, daughter and one son released their share vide a registered Relinquishment Deed in favour of the second son and the second and third sons thereafter executed documents in favour of the respondent. The appellant seeks to plead that the relinquishment of share could not be in favour of the second son alone, but could only be in favour of the second and third sons and the Relinquishment Deeds and consequent documents executed by the second and third sons in favour of the respondent are bad for that reason. A further plea raised is that the relinquishment is, in fact, a conveyance and not validly stamped.
7. Learned Single Judge in a well-reasoned order has discussed all the aforesaid aspects while rejecting the application. It has been rightly noticed that the present case is not one where joint purchasers seek to transfer any *inter se* rights, but a case where the devolution of

interest is by inheritance. The result is the consequence of certain heirs stepping aside and permitting the devolution of interest on the remaining heirs by executing the Relinquishment Deeds in favour of the beneficiary heirs. There is, thus, no element of transfer.

8. The aforesaid aspect has, however, been analysed in the context whether the appellant ought to be permitted to take a plea by way of an amendment when the test is whether such amendments are relevant adjudication of the matter in controversy. Learned Single Judge, in our considered view, has rightly noticed that the appellant has no concern with the Relinquishment Deeds. The third son of the deceased brother has not complained that the Relinquishment Deed should have been executed in his favour. It is for the relevant heirs to execute the Relinquishment Deeds. The second and third sons have both transferred the interest devolved on them in favour of the respondent and the appellant is not an heir to his brother who can raise disputes about the manner of devolution of interest. This is the correct approach.
9. Similarly, the appellant cannot claim to challenge the documents executed by one of his sisters in favour of the respondent as that sister has not come forth to challenge the documents on account of any incapacity. The defence of the appellant is that his sisters had executed documents in his favour leaving no interest to be

transferred in favour of the respondent. This, in turn, has an impact on the share in the property for which issue has already been framed.

10. We are in agreement with the conclusion of learned Single Judge that the application was dilatory and vexatious.
11. Learned counsel for the appellant sought to refer to the judgment of the Supreme Court in Rajesh Kumar Aggarwal & Ors. v. K.K. Modi & Ors., AIR 2006 SC 1647, which showed that the test, which governs such amendment is '*real controversy test*' and the merits of the amendment are not to be gone into. There can be no quibble with this well-established legal position enunciated by the Supreme Court, but if this test is applied in the present case, one finds that the appellant is seeking to raise matters, which are not germane to the real controversy. The controversy is only relating to share in the property on the basis of the claim of the appellant that his sisters had already released their interest in favour of the three brothers giving the appellant 1/3rd share. The appellant is no one to question the transfer of interest by his brothers or their legal heirs or even his sisters in favour of the respondent as he is not a beneficiary to that share except his claim limited to the aforesaid extent. In that behalf, issue has already been framed.

12. Learned counsel also sought to refer to the judgment of the Supreme Court in Baldev Singh & Ors. etc. v. Manohar Singh & Anr. etc., AIR 2008 SC 2832 to submit that the finding in the impugned order that the trial has commenced is not correct as the expression '*commencement of trial*' used in the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908 (hereinafter to be referred to as, 'the Code') must be understood in the limited sense as meaning final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. In the present case, only affidavits of evidence had been filed, which cannot be said to imply that the trial had commenced.
13. In respect of the issue as to what is meant by the expression '*commencement of trial*' finds discussion in two judgments rendered by one of us (Sanjay Kishan Kaul, J.) in Mohd. Saleem & Ors. V. Naseer Ahmed, AIR 2007 Delhi 48 and Link Engineers (P) Ltd. v. Asea Brown Boveri Ltd. & Ors., 140 (2007) DLT 533. The judgment of the Supreme Court in Baldev Singh & Anr.'s case (supra) was analysed in Link Engineers (P) Ltd.'s case (supra) and para 17 of Baldev Singh & Anr.'s case (supra) reads as under :-

"17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the

record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.”

14. The judgment in Rajesh Kumar Aggarwal's case (supra) has also been examined. It would be useful to reproduce the observations from Mohd. Saleem & Ors.' case (supra), which have been relied upon in Link Engineers (P) Ltd.'s case (supra) and read as under :-

“7. In my considered view, the stage of the trial only begins after the framing of issues when the directions are passed and a date fixed for filing of affidavits of evidence. In fact, a learned single Judge of this Court in Mrs. Suneel Sodhi & Ors. Vs. Mr. M.L. Sodhi & Ors. AIR 2004 Delhi 99 while considering this plea has taken the dates of trial fixed as the commencement of the trial.

8. I am fortified in this view by the judgment of learned Single Judge of the Kerala High Court in Neelakandan Nair v. Parameswara Kurup, 2003 (2) KLT 943. It has been held in the said judgment that the expression '*trial*' has been employed in the proviso to Rule 17 of Order 6 of the said Code only in what the Supreme Court described as the narrow sense of examination of witnesses, production of documents in evidence and all stage subsequent to the same. After issues are settled under Order XIV of the said Code, an opportunity is given to the parties to take what is only prescribed as pre-trial steps and then only the suit is listed for trial.

9. In Indian Bank v. Maharashtra State Co-operative Marketing Federation Ltd., (1998) 5 SCC 69, the Supreme Court followed its earlier decision in Harish Chandra Baipai & Anr. v. Triloki Singh & Anr., AIR 1957 SC 444 holding that in a limited sense, '*trial*' means only the final hearing of a petition consisting of examination of witnesses, filing of documents and addressing of arguments.

10. The word 'trial' as described in Black's Law Dictionary (7th Edition) at page 1510 means :-

“Trial : A formal judicial examination of evidence and determination of legal claims in an adversary proceeding.”

11. Similarly according to Ballentine's Law Dictionary (2nd Edition), 'trial' means, “an examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a court hears and determines any issue of fact or law for the purpose of determining the right of the parties, it may be considered a trial”.

12. In Words and Phrases, Volume 7B, Collate – Commodore, it has been stated as under :-

“The beginning of an opening statement, or, if there is no opening statement, the administering of the oath of affirmation to the first witness, or the introduction of any evidence, is the “commencement of trial” within statutory provision allowing a dismissal by plaintiff by written request to the clerk at any time before the actual ‘commencement of trial’.”

15. In view of the aforesaid observations and noticing the observations of the Supreme Court in Baldev Singh & Ors.'s case (supra), the conclusion reached in paras 14 and 15 was as under :-

“14. The conspectus of the aforesaid pronouncements and definitions as to when a commencement of trial takes place leaves no manner of doubt that it refers to a stage after framing of issues and after the hiatus period thereafter where steps have to be taken to start the trial by examination of witnesses whether in the form of filing of affidavit or otherwise.

15. In view of the aforesaid position, it cannot be said that on framing of issues itself the trial has commenced and thus the proviso to Rule 17 of Order VI of the said Code would come into play.”

16. In Link Engineers (P) Ltd.'s case (supra), issues had been framed and affidavits of evidence were directed to be

filed, which were, in fact, so filed, but belatedly. The rival contention was as to whether the last date of filing of affidavits should be taken into account as the date of commencement of trial or whether the date for appearance of the witness fixed before the Joint Registrar should be so considered. In that context, it was concluded as under :-

“17. In my considered view, it is not in doubt that if the affidavits of examination-in-chief were not to be filed but the witnesses were to be examined the date for appearance of the witness itself would be the date for commencement of trial. The only difference in the present case is that in view of the present procedure the evidence is filed by way of affidavit. However, it is also true that the affidavit is taken into account and read in evidence on the appearance of the witness before the Court and accepting that he was tendering the affidavit as his examination-in-chief. The application for amendment has been filed after the last date for filing of affidavit of 23.10.2006 but before the date for appearance of witness on 04.12.2006.

18. It may also be useful to refer to the provisions of Order 16 of the said Code in this behalf. Rule 1 of Order 16 of the said Code deals with the aspect of filing of list of witnesses. These provisions are for seeking aid and assistance of the Court for production of the witnesses. Rule 1A deals with production of witnesses without summons and reads as under:

“1A. Production of witnesses without summons.— Subject to the provisions of sub-rule (3) of rule 1, any party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents.”

19. Thus, it is open to a party to produce a witness in Court to give evidence even if the witness is not listed in the list of witnesses. The legal position on this aspect is clear in view of the judgment in Mange Ram Vs. Brij Mohan & Ors. AIR 1983 SC 925 followed by this Court in Roshan Lal Mittal & Ors. Vs. Hari Singh (since deceased) through his Legal Representatives 131 (2006) DLT 27.

20. No doubt the plaintiff did not formally apply for extension of the date for filing affidavits by way of evidence but the Court is not without power to extend such a date."

17. We are noticing the aforesaid aspects though it has no material bearing on the conclusion arrived at in the present appeal as certain observations have been made in para 13 of the impugned judgment and in view of the submissions of learned counsel for the appellant, we wanted to clarify the position.
18. The first date for the respondent to produce his witness not having arisen, it cannot be said that the trial has commenced.
19. The appeal is accordingly dismissed with the aforesaid observations.

CM Appl. No. 2263/2009

In view of dismissal of the appeal, no further directions are called for in this application.

Application stands disposed of.

SANJAY KISHAN KAUL, J.

FEBRUARY 16, 2009
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SUDERSHAN KUMAR MISRA, J.