

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

+ **FAO(OS) No.634/2009**

Reserved on 7th January, 2010.

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Date of decision:15th January,2010

MRS. ADARSH KAUR GILL

....Appellant

Through: Mr. C.A. Sundaram, Sr. Advocate with
Ms. Divya Kesar, Mr. Zaffar Inayat,
Mr. Manmohit Puri, Mr. Gaurav Dudeja,
Ms. Aradhana Kaura, Mr. Anandh Kannan &
Mr. Abhishek Gupta, Advocates

Versus

SMT. SURJIT KAUR GILL & ORS.

... Respondents

Through: Mr. M.L. Bhargava, Advocate.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. This appeal has been preferred by the defendant in the suit from which it arises and against the order dated 3rd November, 2009 of the Learned Single Judge dismissing the application of the appellant defendant for amendment of the written statement. The Learned Single Judge has dismissed the application on the grounds that the suit had been pending since 1993; written statement was filed on 8th November, 1995; the application

for amendment was filed on 8th July, 2008 i.e. after 13 years of the filing of the application; that appellant defendant by the amendments sought wants to put some more arguments in each paragraph, based on the facts earlier stated by the defendant; that by the amendments the appellant defendant wants to make the written statement a lengthy and prolix document. It was further held that by addition of para 5 A in the written statement the appellant defendant now wants to assert a claim that he has been in adverse possession of the property for a period in excess of 12 years before the commencement of the suit and as such the title if any of the respondent plaintiff stood extinguished by limitation. The Learned Single Judge held that the appellant defendant had already pleaded limitation as a ground for non-maintainability of the suit and adverse possession being one of the facets of limitation is included in the said plea. It was thus held that since the plea of adverse possession is already covered, no amendment is necessary.

2. The senior counsel for the appellant defendant contends that the reason of delay for dismissal of the application for amendment is erroneous. It is urged that the appellant defendant had also filed an application under Order 7 Rule 11 of the CPC for rejection of the plaint and which application had been dismissed by the Learned Single Judge; an appeal being FAO (OS) No.290/2008 was preferred by the appellant defendant there against and which appeal was decided vide order dated 27th January, 2009 only and whereby the application under Order 7 Rule 11 was allowed in part. It is urged that the trial had not commenced and for this reason there was no delay.

3. The senior counsel for the appellant defendant further contends that the amendment of the written statement is to be allowed more liberally than an amendment to the plaint. Reliance is placed on **Baldev Singh Vs. Manohar Singh** AIR 2006 SC

2832, *Usha Balashaheb Swami Vs. Kiran Appaso Swami* AIR 2007 SC 1663 and on *Sushil Kumar Jain Vs. Manoj Kumar* JT 2009 (8) SC 392.

4. The senior counsel for the appellant defendant also contends that though the Learned Single Judge has in para 9 of the order impugned in the appeal held the plea of adverse possession to be covered in the plea of limitation already taken but in subsequent para 11 of the order it has been held that the appellant defendant cannot take new pleas by way of amendment. It is urged that there is thus an inconsistency in the order.

5. The counsel for the respondent caveator, per contra has contended that the application for amendment which has been dismissed had been filed before the order dated 27th January, 2009 (supra) of the Division Bench in appeal aforesaid preferred by the defendant and the appellant defendant cannot explain away the delay for the reason of the said order. It is also contended that the application for amendment was not in the requisite form and the various amendments sought to be carried out were not set out therein. It is next urged that the appellant defendant by way of amendment is seeking to withdraw the admissions made. He relies upon *Kedar Nath Vs. Ram Prakash* 76 (1998) DLT 755 (FB), *Gurdial Singh Vs. Raj Kumar Aneja* (2002) 2 SCC 445, *Ajendraprasadji N. Pandey Vs. Swami Keshavprakeshdasji N.* (2006) 12 SCC 1, *Brij Lal Sharma Vs. Kanhaiya Lal* 2008 VIII AD (Delhi) 321, *Heeralal Vs. Kalyan Mal* (1998) 1 SCC 278, *M/s Modi Spinning & Weaving Mills Co. Ltd. Vs. M/s Ladha Ram & Co.* AIR 1977 SC 680 & *Banta Singh Ganga Singh Vs. Smt. Harbhajan Kaur* AIR 1974 Punjab & Haryana 247 (F.B).

6. We have perused the amendments sought to be carried out. The appellant defendant is seeking to virtually rewrite the written statement by substituting the contents

of a large number of paragraphs of the written statement. The same is clearly impermissible in law.

7. The suit has been filed for the relief of partition of property No.3 South End Road, New Delhi and of the movable assets belonging to one Smt. Abnash Kaur and for rendition of accounts. The suit also claims the relief of declaration that no lease of the property had been executed by the said Smt. Abnash Kaur in favour of the appellant defendant and further declaration that the appellant defendant is not a subrogee of the mortgage deed executed by Smt. Abnash Kaur with respect to the property. A declaration was also sought to the effect that the appellant defendant has disentitled himself from getting any share in the estate of Smt. Abnash Kaur.

8. The Division Bench of this court in the order dated 27th January, 2009 (supra) has held the reliefs of rendition of accounts, qua declaration with respect to the lease deed in favour of the appellant defendant, declaration qua subrogation of mortgage to be barred by time; it was however held that the claim of the respondent plaintiff for partition could not be said to be barred by time without trial; it was held that the period of three years under Article 113 of the Limitation Act for suing for partition would commence from the date when the appellant defendant claimed exclusive possession of the property in a manner adversarial to the plaintiff's right and as would amount to ouster; the claim for partition of movable assets was also held to be time barred. Thus the suit survived only qua the relief of partition of immovable property and other relief consequential thereto.

9. The respondent plaintiff has instituted the suit *inter alia* on the ground that Smt. Abnash Kaur was the owner of the property; that she had vide her Will dated 6th February, 1983 bequeathed her assets to the plaintiff and five defendants equally. The

appellant defendant in the written statement as originally filed did not dispute the Will of Smt. Abnash Kaur; he however contended that Smt. Abnash Kaur had given the property on rent to him at a rent of Rs.500/- later increased to Rs.1,500/- per month; that the persons to whom Smt. Abnash Kaur had mortgaged the property had filed the suit for foreclosure of the mortgage and the money for redemption of the mortgage was paid by the appellant defendant after the death of Smt. Abnash Kaur and the appellant defendant thus stood subrogated in place of the original mortgagee with the consent of all the legal heirs of Smt. Abnash Kaur including the plaintiff; that the plaintiff was never in constructive possession of the property and the appellant defendant was in possession of the entire property as co-owner, as a subrogee mortgagee and as a tenant (refer para 6 of the written statement as originally filed). The appellant defendant in the written statement also controverted the averments in the plaint that the lease between Smt. Abnash Kaur and the appellant defendant was a fake document. It is further averred in para 43 of the said written statement that the appellant defendant being the lessee of the property with a right to sublet the property to whomsoever she pleased was not accountable to the plaintiff in any manner whatsoever. The appellant defendant in para 54 of the written statement also denied and controverted a family settlement as averred in the plaint. In para 69 of the written statement however it was stated that Smt. Abnash Kaur had left no other immovable property except the house at 3 South End Road, New Delhi. In para 70 of the plaint, it was averred that the suit was false and frivolous and barred by time. In the preliminary objections it was stated that the appellant defendant by redeeming the mortgage and thereby becoming the subrogee-mortgagee in possession

of the property was entitled to keep absolute possession of the property since the only remedy that the plaintiff had for redemption of the mortgage was barred by limitation.

10. It would thus be seen that in the written statement as originally filed the appellant defendant did not dispute the Will of Smt. Abnash Kaur whereunder the respondent plaintiff also had a share in the property; he however claimed superior rights as a subrogee mortgagee in possession of the property and as a tenant with right of subletting in the property; he claimed possession of the property as a co-owner, as a subrogee-mortgagee in possession and as a tenant.

11. The appellant defendant now in para 5 A of the proposed amended written statement wants to plead that he has been in adverse possession of the property for a period in excess of 12 years before the commencement of the suit and as such the title if any of the respondent plaintiff has been extinguished by virtue of Limitation Act and the appellant defendant is the absolute owner of the property.

12. It was put to the senior counsel for the appellant defendant that the plea now sought to be taken of ownership by way of adverse possession was mutually destructive to the plea earlier taken in the written statement of possession as a co-owner, a subrogee-mortgagee and as a lessee. The senior counsel for the appellant defendant however contends that inconsistent pleas are permitted to be taken in the written statement and relies on the judgments noted above. Though inconsistent pleas are permitted to be taken by way of amendment in the written statement but the Supreme Court has at the same time in *Vimal Chand Ghevarchand Jain Vs. Ramakant Eknath Jajoo* MANU/SC/0441/2009, *Biswanath Agarwalla Vs. Sabitri Bera* MANU/SC/1452/2009 & in *Gautam Sarup Vs. Leela Jetly* MANU/SC/7401/2008

distinguished inconsistent pleas from mutually destructive pleas. Thus though a defendant is entitled to take an alternative and inconsistent plea, such alternative pleas cannot be mutually destructive of each other; pleadings of the parties are required to be read as a whole; defendants although are entitled to raise alternative and inconsistent pleas but should not be permitted to raise pleas which are mutually destructive of each other.

13. The plea of ownership by way of adverse possession now sought to be taken is found to be mutually destructive to the plea of possession as co-owner, as a subrogee-mortgagee in possession and as a tenant. The Supreme Court in *L.M. Aswathama Vs. P. Prakash* MANU/SC/1222/2009 has also held that pleas based on title and adverse possession are mutually destructive; adverse possession does not begin to operate until title is renounced; unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period of prescription will not commence.

14. We, therefore, find the appellant defendant, by way of amendment to be totally changing the stand/defence in the written statement as originally filed and which is impermissible in law. The counsel for the respondent/plaintiff is correct in contending that the appellant defendant by substituting the pleadings in as many as 15 paragraphs in the written statement is attempting to withdraw the admissions made in the written statement as originally filed of the possession of the appellant defendant as a co-owner, as a sub tenant and as a mortgagee in possession.

15. As far as the contention of the senior counsel for the appellant defendant of inconsistency in the findings in paras 9 & 11 in the impugned order is concerned, we find

that the plea in the written statement as originally filed of limitation is of the claim for partition being barred by time. Reference in this regard can be made to the observations of the Division Bench in the order dated 27th January, 2009 (supra) in the earlier appeal arising from the suit. The Division Bench has correctly held that it is to be adjudicated whether the cause of action for the relief of partition had accrued to the respondents plaintiffs more than three years prior to the institution of the suit i.e. whether there was ouster of the respondent plaintiff by the appellant defendant from the property more than three years prior to the institution of the suit. The Learned Single Judge by holding in para 9 of the order that the plea of ouster has already been taken in the written statement as originally filed has merely given vent to the same view. On the contrary, para 11 of the order has to be read as holding that the appellant defendant cannot set up a new plea of adverse possession.

We, therefore, find no merits in the appeal. The same is dismissed with conditional costs of Rs.15,000/- to the respondent plaintiff.

CHIEF JUSTICE

**RAJIV SAHAI ENDLAW
(JUDGE)**

**January 15th, 2010
PP**