

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

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FAO(OS) 640/2009

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Date of decision: 4th February, 2010

VIVEK NARAYAN PAL

..... Appellant

Through: Mr. Manish Vashisht, Advocate

Versus

SUMITRA PAL

..... Respondent

Through: None.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. The defendant in the suit before the learned Single Judge, in this appeal challenges the order dated 6th October, 2009 dismissing his application for amendment of the written statement. The learned Single Judge found the appellant, by way of amendment seeking to withdraw the admissions in the written statement filed earlier and held the same impermissible.

2. The respondent/plaintiff had instituted the suit from which this appeal arises for partition of estate of the parents of the parties, comprising of property No.A-34, Chittranjan Park, New Delhi-110 019 and share holding of a private limited company

and for rendition of accounts of the benefits derived by the appellant/defendant qua the said shares of the company and qua the immovable property. The parties are the only children and legal heirs of their parents. The immovable property as well as the shares aforesaid belonged to the parents who are stated to have died intestate.

3. The appellant/defendant filed a written statement. Qua the claim of the respondent/plaintiff for partition of immovable property, it was inter alia stated:-

- (i) That there was no cause of action and the suit had been filed to deter the appellant “from filing a claim for mesne profits” against the respondent/plaintiff “for occupying more portion in the suit property than her so called share.”
- (ii) That the suit is barred by Section 23 of the Hindu Succession Act.
- (iii) That the suit property is not partible.
- (iv) “..... that after the demise of the parents, the parties mutually agreed to occupy a portion each on the ground floor and the first floor besides the common portion for the common user and enjoyment.....”
- (v) “There is no denying the fact that the shares were allotted in the name of the father”.
- (vi) The appellant/defendant took a plea of adjusting the dividends of the share against the expenses being incurred exclusively by him qua the immovable property.
- (vii) “The parties have been in occupation of their respective shares as shown red & yellow besides common portion shown green in the annexed site

plan”.

(viii) “Pertinent to mention that the parents of the parties never wished to get the property partitioned and always wanted the same to be kept intact even in future and even the defendant has the same wish”.

(ix) It is the plea of the defendant that the licensee had been inducted on the first floor of the immovable property by both the parties under consensus ad-idem and that the license fee is being equally disbursed to the parties.

(x) “It is denied that the defendant avoided the issue of partition The defendant repeatedly informed the plaintiff regarding the wish of the parents of not having partition of the property it is denied that (the defendant) refused to partition the suit property or the shares..... it is denied that the defendant has dishonest intention or that wants to grab the suit property much less to the exclusion of the plaintiff..... the claim of the plaintiff for rendition of accounts from 1995 is ostensibly time barred and cannot be enforced. However, the defendant is always ready to render account for the last three preceding years and the same can be adjusted after the equal apportionment of the expenses incurred by the defendant on the maintenance of the property The defendant has never exclusively received the license fee.....”

A reading of the written statement unequivocally shows that the appellant/defendant admitted the share of the respondent/plaintiff.

4. The learned Single Judge records that the respondent/plaintiff applied under Order 12 Rule 6 of the CPC for decree on admissions as well as for other interim reliefs. The application of the appellant/defendant for amendment of the written statement was filed then, clearly in an attempt to pre-empt the decision on the application of the respondent/plaintiff under Order 12 Rule 6 of the CPC.

5. In the application for amendment of the written statement, the appellant/defendant stated that his mother's sister had telephonically called him on 27th February, 2007 i.e. about 10 months prior to the filing of the application for amendment but after filing of the written statement by him in December, 1996; the said aunt is stated to have informed the appellant/defendant of a family settlement/arrangement between the mother of the parties and the respondent/plaintiff qua sharing of the family properties/assets. The appellant/defendant thus wanted to amend the written statement to plead that in the family settlement between the mother of the parties and the respondent/plaintiff, the respondent/plaintiff had been compensated in the lifetime of the mother, in lieu of the share of the respondent/plaintiff in the estate and that the estate of which partition was sought was to vest exclusively in the appellant/defendant. The appellant/defendant by the said amendment thus sought to deny the share of the respondent/plaintiff in the estate of which partition was sought and which share in the written statement as originally filed had been admitted.

6. The learned Single Judge has dismissed the application for amendment holding the same to be in withdrawal of the admissions and impermissible.

7. The counsel for the appellant/defendant has contended that the appellant/defendant was by way of amendment only seeking to add a new ground of defence which had come to his knowledge after the filing of the written statement. He has also contended that admissions even if any made could be withdrawn or could be explained and his conduct could not be said to be mala fide. Reliance is placed on ***Sushil Kumar Jain Vs. Manoj Kumar*** AIR 2009 SC 2544.

8. A three Judge Bench of the Supreme Court in ***Modi Spinning & Weaving Mills Company Ltd. Vs. Ladha Ram*** AIR 1977 SC 680 has held that an amendment in the pleading which had an effect of displacing the plaintiff from the admissions made by the defendant in the written statement cannot be allowed. It was held that if such amendments are allowed, the plaintiff will be irretrievably prejudiced by being denied opportunity of extracting the admission. In the case of ***Heeralal Vs. Kalyan Mal*** AIR 1998 SC 618 the suit for partition was filed of several properties. The defendants in their written statement took a definite stand with respect to only some of the properties, claiming exclusive title thereto and meaning thereby that the other properties were admitted to be joint. Thereafter amendment was sought claiming some other properties also to be exclusive properties. The Supreme Court held that the order allowing withdrawal of earlier admissions in the original written statement could not be sustained. It was held that the defendants having taken a plea of only some of the properties being their exclusive property were deemed to have admitted the other properties to be joint and could not thereafter amend the written statement to plead, the properties earlier so admitted to be joint to be also their exclusive property.

It was held that on the basis of the said admission a preliminary decree could have been passed and if the amendment is granted, the whole case of the plaintiff qua admitted joint properties would get displaced. It was further held that a right to a decree which had accrued to the plaintiff by such admission could not be irretrievably deprived by allowing the amendment. The attention of the judges was also invited to ***Akshaya Restaurant v. P. Anjanappa*** AIR 1995 SC 1498 to contend that admissions in pleadings could be withdrawn. The Supreme Court (in ***Heera Lal***) held that even if the judgment of the two judge bench of the Supreme Court in ***Akshaya Restaurant*** was to be read as allowing an amendment to withdraw an admission earlier made, the same was contrary to the three judge bench judgment in ***Modi Spinning & Weaving Mills Company Ltd.*** (supra) and to which reference was not made in ***Akshaya Restaurant***. It was thus held that the three judge bench judgment in ***Modi Spinning & Weaving Mills Company Ltd.*** will prevail.

9. We may also notice another judgment of a two judge bench of the Supreme Court in ***Gautam Sarup Vs. Leela Jetly*** (2008) 7 SSC 5. It was held therein that an admission made in a pleading is not to be treated in the same manner as admission in a document. An admission made by a party to the lis is admissible to him *proprio vigore* i.e. by its own force or by its intrinsic meaning . It was further held that a thing admitted in view of Section 58 of the Indian Evidence Act need not be proved. Order 8 Rule 5 of the CPC provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. It is one thing to say that without resiling from an admission, it would be

permissible to explain under what circumstances the same has been made or that it is made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such an admission but it is another thing to say that a person can be permitted to totally resile therefrom. The Supreme Court in this judgment reiterated that notwithstanding a contrary view taken by some of the other two judge bench judgments of the Supreme Court, the three judge bench judgment in ***Modi Spinning & Weaving Mills Company Ltd.*** will prevail and an admission of the nature as to displace the plaintiff's case cannot be allowed. The two judge bench judgments holding to the contrary were held to be per incurium. The Supreme Court summed up the law as, a categorical admission cannot be resiled from but in a given case it may be explained or clarified.

10. We find the admission of the appellant/defendant in the present case of the parties having equal share in the estate of the parents to be a categorical one and from which the appellant/defendant cannot be permitted to resile. By the proposed amendment, he is seeking to totally displace the respondent/plaintiff from the decree on admission. The same is impermissible in law.

11. The said settled position in law cannot be said to have been changed by the two Judge bench judgment in ***Sushil Kumar Jain*** (supra) relied upon by the appellant/defendant. In the facts of that case, the Supreme Court had found no admission having been made in the written statement and the amendment sought was found to be only to elaborate and clarify the earlier inadvertence and confusion in the

written statement. While allowing such an amendment, it was observed that even assuming there was an admission then also such admission could be explained by amendment even by taking inconsistent pleas. However, the said judgment can by no stretch of imagination be said to be holding that admissions, the withdrawal whereof cannot be compensated can be permitted to be withdrawn.

12. We agree with the learned Single Judge that the conduct of the appellant/defendant in the present case is clearly aimed at lengthening the litigation. The appellant/defendant in the earlier written statement clearly admitted the parties to be having equal share in the property. The appellant/defendant realizing that on such admissions a decree for partition was likely to be passed immediately, wanted to amend the written statement to somehow take the matter to trial and thereby to lengthen the litigation and to tire out the respondent/plaintiff and / or to compel her to settle. A litigant cannot be permitted to so abuse the process of the Court. The amendment sought is also found to be mala fide by its very nature even though the court at the stage of dealing with the amendment application is not required to go into the merit of the claims. The parents of the parties had died in 1992 and 1995 respectively and the suit was filed in 2006. The appellant/defendant in the written statement as originally filed made a categorical admission of the parties since the demise of their parents having dealt with the estate properties as equal owners thereof. The appellant/defendant also went to the extent of claiming adjustments of dividends of the company shares forming part of the estates towards the respondent/plaintiff's share of liability for maintenance and payment of taxes of the property. Such

admission of consistent conduct for 11 years prior to the institution of the suit belies the case now sought to be set up by way of amendment.

13. The Division Bench of this Court in *Shri Vasudev Vs. Smt. Rupkumari* MANU/DE/7056/2007 has held that the provision to amend the pleadings cannot be permitted to be used as a lever to frustrate the due process of law nor can the provision for amendment be permitted to be utilized as an instrument for setting at naught the entire progress of the case which had already matured into the passing of a decree. Similarly, the Supreme Court also in *Revajeetu Builders and Developers Vs. Narayanaswamy & Sons* 2009 (10) SCC 84 has held that dishonest amendments should never be permitted.

14. The courts should not allow their process to be abused for such purposes as prolonging the litigation. A plea which is found to be unsustainable cannot be permitted to go to trial just to lengthen the litigation. Unless the courts adopt such procedures, they would not be performing their duty to do justice between the parties.

15. We, therefore, do not find any merit in the appeal; the same is dismissed. However, since the respondent remains unserved, no order as to costs.

CM No.18503/2009 (u/s 151 CPC for stay) & CM No.18504/2009 (for condonation of delay)

With the dismissal of the main appeal, these applications have become infructuous and are disposed of.

CHIEF JUSTICE

**RAJIV SAHAI ENDLAW
(JUDGE)**

February 4th, 2010
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