

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

+ CM (M) 191/2011

Date of Decision: 05.10.2012

RAVINDER VASHISHT

..... Petitioner

Through: Mr. O.N.Sharma, Mr.Sanjay
Kumar, Advs.

Versus

NANHI DEVI & ORS.

..... Respondent

Through: Mr.Siddharth Aggarwal, Adv.
for R10.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J. (Oral)

1. This petition under Article 227 of the Constitution seeks assailing the order dated 7.10.2010 of Addl. District Judge whereby the application under Order 6 Rule 17 read with Section 151 CPC filed by the petitioner, who was the plaintiff in the suit bearing No. 721/08, was dismissed.

2. The petitioner has filed a suit for partition against the respondents. The instant application was filed seeking amendment in the plaint. The petitioner wanted to delete the properties bearing No. 147-B, Hari Nagar, Ashram and 88, Gali No. 37-A, Zakir Hussain Colony, Sakir Marg, Okhla, New Delhi from the properties to be

partitioned. With regard to these properties, there was neither any objection by the respondents, nor by the court and consequently, the amendment with regard to deletion of these two properties from the ambit of the partition, was allowed.

3. The amendment was also sought for seeking relief of declaration and partition in respect of two shops bearing No. 111 and 113. The amendment in this regard was sought on the premise that during the pendency of the suit, defendant No. 5, in his statement under Order 10 Rule 2 CPC, had stated that shop No. 113 was sold by his father to the defendant No. 10 by way of sale deed dated 20.10.2001, and also shop No. 111 was sold by him by virtue of an agreement to sell dated 28.03.2002, and that, sale of both these shops by his father to defendant No. 10 was illegal and defendant No. 10 had no right, title or interest in those shops. Based on these averments, a prayer clause was also sought to be added to seek relief of declaration for quashing of sale of the aforesaid two shops by his father in favour of the defendant No. 10. In addition, it was also averred that shop No. 115 also could not be added at the time of the filing of the suit and this shop being in possession of defendant No. 4, was also required to be partitioned.

4. The application was contested by the respondents. Vide the impugned order, the learned ADJ dismissed the application. The same is under challenge in the instant petition.

5. I have heard learned counsel for the petitioner and the respondent No. 1 & 10 and perused the records.

6. It is submitted by the learned counsel for the petitioner that earlier, he had filed an application under Order 1 Rule 10 for impleading Rakesh Goel as defendant No. 10 and the said application was allowed vide order dated 18.5.2006, and consequently, he was permitted to file the amended plaint with the necessary amendments. He submitted that the amended plaint that was filed in pursuance of the said order dated 18.5.2006 did not make mention of the reliefs regarding shop No. 111 and 113 inadvertently, and thus, the instant application was filed seeking amendment to that effect. The submission of the learned counsel for the petitioner is apparently misconceived. In the application under Order 1 Rule 10, Rakesh Goel was permitted to be added as defendant No. 10 in the array of the defendants in the suit. The amended plaint was filed on 02.06.2006. In para 4 of the said plaint, it was specifically averred by the petitioner/plaintiff that the defendants No. 4 & 5 have illegally and unauthorizedly, without the consent of the plaintiff, sold shops No. 111 and 113 to defendant No. 10. This would evidently show that the petitioner/plaintiff had the knowledge of the fact of those shops having been sold to defendant No. 10, even at the time of filing of the amended plaint on 2.6.2006. Not only this, the defendant No. 10 Rakesh Goel (respondent No. 10 herein) also filed his written statement on 27.07.2006, and in para 3 therein, he specifically averred

shop No. 113 having been sold to him by Than Chand and power of attorney in respect of the shop No. 113 given to Madan Mohan for execution of necessary documents of sale. The said shop No. 113 was sold by attorney Madan Mohan on 28.3.2001 in favour of Deepali Taneja, who, in turn, sold the said shop to defendant No. 10 Rakesh Goel vide sale deed dated 28.10.2001. The particulars of the sale of both these shops were mentioned in the written statement filed by defendant No. 10 Rakesh Goel. Further, in para 4 of the amended plaint, it was also averred by the petitioner that under the will executed by Than Chand, shop No. 111 was bequeathed to Raja Ram and Ram Niwas i.e. defendants No. 4 & 5, who have sold the said shop to defendant No. 10 Rakesh Goel. Not only this, the petitioner through his counsel has also sent a legal notice dated 20.3.2006 to defendant No. 10 Rakesh Goel mentioning therein about the sale of shop No. 111 to Mr. Goel on 20.08.2005. According to the petitioner's own showing, he had come to know about the sale from the statement of defendant No. 5 recorded on 22.8.2005 under Order 10 CPC. In his statement, defendant No. 5 had stated about shop No. 113 having been sold in 1998-1999 and shop No. 111 on 30.3.2002. Thus, the fact of these shops having been sold by their father, was in the knowledge of the petitioner as back as on 28.8.2005 and which stood confirmed by him in his amended plaint as also from the averments of the written statement filed by the defendant No. 10 on 27th July, 2006.

7. The relief that was sought regarding declaration was governed by law of limitation provided under Article 58 of the Limitation Act, which is undisputedly three years. Though the aforesaid shops had been sold by his father long back, but, taking as it is undisputed on record, the petitioner acquired the knowledge of the same at least on 22.08.2005, from the statement of the defendant No. 5. The instant application was filed on 9.2.2010, which is apparently much after the period of limitation of three years. By lapse of limitation, a valuable right has accrued to the defendant No. 10. The law as regard to the amendment is well-settled by various decisions of the Supreme Court. Reference can be made to the case **Radhika Devi Vs. Bajrangi Singh and Others, AIR 1996 SC 2358**, wherein it was held that “there is no doubt that the amendment of the plaint is normally granted, and only in exceptional cases where the accrued rights are taken away by amendment of the pleading, the Court refuses the amendment”. In this case, the reliance was placed by the Apex Court on its decision in **Laxmidas Dahyabhai Kabarwala Vs. Nanabhai Chunilal Kabarwala, (1964) 2 SCR 567**, wherein it was held as under:

“It is, no doubt, true that, save in exceptional cases, leave to amend under Order 6 Rule 17 of the Code will ordinarily be refused when the effect of the amendment would be to take away from a party a legal right which had accrued to him by lapse of time”.

8. Similar view was expressed in **K.Raheja Constructions Ltd. & Anr. Vs. Alliance Ministries & Ors., 59 (1995) DLT 3 (SC)**.

9. In the instant case, the issues have already been framed way-back on 27.10.2004 and the affidavit of evidence has also been filed way-back on 17.2.2007, and the case is at the stage of trial. In the case of **Ajendraprasadji N. Pande & Anr. Vs. Swami Keshavprakeshdasji N. & Ors., AIR 2007 SC 806**, the Apex Court reiterated its decision rendered in **Vidyabai & Ors. Vs. Padmalatha & Anr., AIR 2009 SC 1433**, wherein it was held that proviso appended to Order 6 Rule 17 CPC restricts the power of the Court by putting an embargo on the exercise of jurisdiction in allowing amendment after the commencement of the trial, unless the Court comes to the conclusion that in spite of due diligence the parties could not have raised the matter after the commencement of the trial. In both these cases the facts sought to be raised by way of amendments by the appellants were well within their knowledge on their court cases and that manifested the absence of due diligence on the part of the appellants, disentitling them to the relief of amendment.

10. In view of my above discussion, I do not see any infirmity or illegality in the impugned order, warranting any interference by this court. The petition has no merit and is hereby dismissed.

M.L. MEHTA, J.

OCTOBER 05, 2012

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