

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

+ **CM(M) 356/2013 & CM No.5291/2013**

% **10th October, 2014**

RAMESHWAR PAL Petitioner

Through: Mr. D.S. Dalal with Ms. Sunita,
Advocates along with petitioner in
person.

versus

CHANDER DASS Respondent

Through: Mr. Ashok Sapra, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Article 227 of the Constitution of India is filed by the petitioner who was the defendant in the suit and who is the appellant in the first appeal, against the order of the first appellate court dated 21.3.2013 whereby an application filed under Order VI Rule 17 of Code of Civil Procedure, 1908 (CPC) to amend the written statement has been dismissed. The subject suit was filed by the respondent/plaintiff for possession and damages and which was decreed by the trial court vide a judgment dated

05.09.2012. As per the operative portion of the judgment dated 05.09.2012, suit of the respondent/plaintiff was decreed in his favour and against the petitioner/defendant (appellant in the first appeal) with respect to property no.G-145, Paschim Vihar, (Industrial Worker Cooperative House Building Society Limited), New Delhi-110063.

2. The judgment of the trial court dated 05.09.2012 decreeing the suit is a detailed judgment running into 15 pages and 37 paragraphs and which decides as many as 8 issues which were framed in the suit, including the issue claimed by the petitioner/defendant that the suit property was joint family property because it was purchased from joint Hindu Undivided Family funds. The issue of HUF funds/HUF property which was framed was issue no.1 and was framed on 07.09.1998.

3. The suit of the respondent/plaintiff was decreed by the judgment dated 05.09.2012 after evidence was led by both the parties.

4. The petitioner/defendant filed the first appeal against the judgment and decree of the trial court dated 05.09.2012. It is in this first appeal that the petitioner/defendant sought amendment of his written statement filed in the suit in the trial court, and it is that application which has been dismissed by the first appellate court vide impugned order dated 21.3.2013.

5. By the amendment application, the petitioner/defendant wanted to bring on record three aspects:-

(i) Petitioner/defendant wanted to bring on record the factum with respect to filing of a suit by the sister of the parties Smt. Krishna in the Original Side of this Court, CS(OS) No.218/2013 titled as ***Krishan Vs. Shanti & Ors***, and which was a suit for partition, permanent injunction and declaration. The filing of the suit was pleaded as a subsequent event and the details of the suit was sought to be included by amending the written statement because the said suit included the suit property and in the suit Smt. Krishna pleaded that the property was HUF/joint family property. It may be added here itself that now the present petitioner stands transposed as the plaintiff in the suit pending in the original side of this Court and Smt. Krishna has been made defendant no.5.

(ii) The second ground which is sought to be added by means of amendment in the written statement is that a status quo order dated 15.3.2013 has been passed by this Court in the CS (OS) No. 218/2013 filed by Smt. Krishna whereby both the parties in the present petition i.e the plaintiff and the defendant in the present suit, have been directed to maintain status quo with respect to the possession of the suit property.

(iii) Thirdly, by the amendment the petitioner/defendant wants to add the plea that the subject suit is bad for non-joinder of the necessary parties being the other brothers and sisters, of the parties to the suit.

6. In my opinion, there is no illegality in the impugned order dismissing the application for amendment and the reasons are contained hereinafter.

7. In my opinion, nothing will turn upon the factum with respect to the sister Smt. Krishna filing the suit in the Original Side of this Court being CS(OS) No.218/2013 in which it is alleged that the suit property is an HUF property in as much as the present suit is only a suit between the respondent/plaintiff and the petitioner/defendant whereby possession is asked by the respondent/plaintiff from the appellant/defendant/petitioner and no possession is claimed from Smt. Krishna or any other person. The fact that even the sister Smt. Krishna claims that the suit property is an HUF property, cannot mean that the amendment of the written statement is required to be allowed to bring on record factum of filing of the suit by Smt. Krishna because the issue with respect to the suit property being an HUF property, and allegedly not the personal/acquired property of the plaintiff, was already an issue which was framed in the present suit and which issue has been decided against the appellant/petitioner/defendant after trial.

Therefore, merely because some other sibling pleads the property to be as an HUF property will not mean that that aspect is relevant to be referred to by means of the written statement in the present suit for possession filed against the petitioner/defendant. If some third person claims a right in the suit property, and with respect to which a suit is filed, that suit will be decided in accordance with law, but filing of the suit by another sibling cannot interdict proceedings in the subject suit for possession. Also merely because the present petitioner has now got himself substituted as a plaintiff in that suit, will not make any difference to the status of the subject suit in view of the Explanation I to Section 11 CPC which provides that there can be simultaneous trial in two suits involving common issues. Once there is finality to the present suit proceedings, the decision in the present suit, and which has been decreed in favour of the respondent/plaintiff, and with respect to which a first appeal is filed, will operate as *res judicata* between the parties with respect to the issue as to whether the suit property is an HUF property/joint Hindu family property. For the sake of completion of narration, I must note that as already stated above that Smt. Krishna has to be taken as having withdrawn the partition suit because Smt. Krishna is now defendant no.5 in that suit pending in the Original Side of this Court wherein

the petitioner was transposed as plaintiff, on the request made by the petitioner herein in that suit and hence the prayer made to amend the written statement will not operate for pleading the filing of the other suit by the other sibling.

8. Therefore in my opinion reference in the written statement to the other suit, and in which now the present petitioner is the plaintiff is not required, by amending the written statement, because, the issue raised in that suit of whether the suit property is the individual property of the respondent/plaintiff or an HUF property is already an issue in the present suit proceedings, and this issue has already been decided in favour of the respondent/plaintiff and against the petitioner/defendant, and as stated above, the decision in this present suit will operate as *res judicata* between the parties.

9. The second ground sought to be added of a status quo order being passed in the suit CS(OS) No.218/2013 for partition to maintain the status quo as regards possession is of no consequence as an interim order does not confer any final rights on the parties and nor can that interim order change the decision in another/present suit which would operate as *res judicata* between the parties. The only effect of the interim order in the suit filed by

Smt. Krishna, and which is now being pursued by the petitioner as plaintiff, would be that the respondent/plaintiff may not be able to execute the decree for possession if that interim order for maintaining status quo of possession is not vacated or varied by the Court hearing CS(OS) No.218/2013. Therefore, there is no requirement with respect to adding a plea in the written statement of passing of interim orders because this aspect will not be relevant for determining of issues in the present suit and at best will be an issue only when the decree for possession is sought to be executed by the respondent/plaintiff.

10. The third ground which is sought to be incorporated by the amendment in the written statement that the suit is bad for non-joinder of necessary parties because the other siblings ought to be made parties inasmuch as the suit property was an HUF property, the same is an aspect which cannot be added by allowing an amendment in written statement at the stage of appeal after the issue has already been decided against the petitioner/defendant and in favour of the respondent/plaintiff holding that the suit property is not an HUF property and the property is the individual property of the respondent/plaintiff in whose favour a Conveyance Deed has been executed and registered by the Delhi Development Authority.

11. Finally, I would like to note that the subject suit was filed more than 17 years back. If amendment is allowed, then the suit will be thrown back by 17 years causing grave and irreparable prejudice to the respondent/plaintiff. Also, as already stated above, the subsequent event of the filing of the suit by Smt. Krishna and now which is pursued by the petitioner/defendant, will not change the decision in the present suit because the judgment in the present suit will operate as *res judicata* on the issue between the parties herein as to whether the suit property is an individual property of the respondent/plaintiff or the same is an HUF property.

12. Before concluding this judgment, I would like to mention that at the commencing of hearing I had put it to the counsel for the petitioner that the petitioner has liberty to challenge the impugned order disallowing the amendment of the written statement in an appeal if the appellant does not succeed in the first appeal, by invoking of Section 105 CPC in the second appeal which the petitioner/defendant may file, but the counsel for petitioner insisted that the present petition is being pressed and the same be decided in terms of Article 227 of the Constitution of India.

13. Powers under Article 227 of the Constitution of India are discretionary and extraordinary powers. Powers under Article 227 of the

Constitution of India are meant to be exercised to prevent injustice and not to cause injustice. If the impugned order dismissing the amendment application seeking amendment of the written statement is set aside, not only unnecessary aspects will be brought in, but also serious and grave prejudice will be caused to the respondent/plaintiff by setting the clock back by 17 years and, that too for no purpose.

14. In view of above it is clear that the application of amendment of the written statement which has been dismissed by the impugned order, as also the present petition, are an abuse of the process of law by a defendant who is making all efforts to somehow or the other delay the decision in the suit for possession of the suit property filed by the respondent/plaintiff and who has already succeeded in the suit for possession. Accordingly, the present petition is dismissed with costs of Rs.20,000/- in favour of respondent no.1/plaintiff, and the payment of which costs shall be a condition precedent for the petitioner/defendant to continue with the appeal before the first appellate court.

VALMIKI J. MEHTA, J

OCTOBER 10, 2014

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