

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

% *Judgment pronounced on: January 02, 2014*

+ **CM(M) No.392/2013 & CM No.5937/2013**

SALMA WASIL Petitioner

Through Mr.M.Salim, Adv.

versus

NAZAR SHAMSIE & ANR Respondents

Through Mr.Bharat Bhushan Jain, Adv.
for R-2.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By the impugned order dated 29th January, 2013, the application filed by the petitioner (defendant in the suit) under Order VI Rule 17 read with Section 151 CPC seeking amendment of the written statement was dismissed.

2. The petitioner sought the amendments in paras 4, 5, 7, 8, 8A, 8B, 15(ii) and 16 of the written statement. The reasons for rejecting the said application were given by the learned trial court in paras 3 to 5 of the impugned order. The same are read as under :

“3. In the earlier written statement, the defendant No.2 has clearly and specifically pleaded that the gift in favour of the plaintiff and the defendant No.1 by the defendant No.2 did not materialize as she (defendant No.1) did not accept the oral gift of half share of the suit property in her favour. She also admitted that the defendant No.2 could not deliver the physical possession of the whole of the property to the plaintiff and the defendant No.1. She also admitted that the

plaintiff and the defendant No.1 had been residing in the portions of suit property as licensee of the defendant No.2. She also admitted that the defendant No.2 was sole owner of the property.

4. Despite those clear and unambiguous admissions in the earlier written statement, now the defendant No.1 wants to retract from those admissions and the defendant No.1 now wants to take a stand that the gift is not denied but the intention of the gift was not complied with since mother of parties was also in possession of the suit property. She also wants to plead that only symbolic possession of the suit property was transferred by the defendant No.2 in pursuance of the oral gift. She also wants to plead that the plaintiff and the defendant No.1 are residing in the suit property with their respective families. She now wants to plead the plaintiff and defendant No.1 became joint owner of the suit property after the defendant No.2 gifted the suit property under oral gift to them. She also wants to now plead that after the death of mother, the plaintiff and the defendant No.1 remained in joint possession of the suit property.

5. A perusal of the application would show that vide the present application for amendment, the defendant No.1 is seeking to retract crucial and important admissions made in the suit. For that reason alone, the application cannot be allowed.”

3. The facts of the matter are that the respondent No.2 herein purchased the suit property from his father Sh.S.M. Shamsie vide registered sale deed in June 1992 and from then onwards the answering respondent No.2 is owner in possession of the suit property till now.

4. In or about 1992 the respondent No.1 herein requested the respondent No.2 to gift the suit property to him and the respondent No.2 said that he will consider the request, however, that talks never materialized as the possession of the property remains with the respondent No.1 all the time.

5. The sister of the respondent No.2 never wanted to accept the gift of the suit property at all and after that respondent No.2 changed his mind and kept the property with himself only.

6. The mother and sister of respondent No.2 was living with the respondent No.2 in the suit property and respondent No.2 stayed in the suit property whenever he was in Delhi and the possession of whole property remains with the respondent No.2 and at no point of time it has been delivered to the petitioner and respondent No.1.

7. The respondent No.2 has allowed the plaintiff/respondent No.1 herein to stay in the suit property as licensee alongwith the family, however in return of the favours done by the respondent No.2, the plaintiff/respondent No.1 is trying to grab the suit property by making false and fictitious stories of oral gift of the suit property.

8. Due to ill-will and with intention to grab the suit property, the respondent No.1 filed suit for partition in or about 1995, inter-alia, claiming himself the owner of ½ share of suit property on the basis of oral gift. It is pertinent to mention here that the respondent No.2 has not been made a party to the suit, due to malafide intention.

9. The petitioner appears in the suit for partition and filed a written statement inter-alia admitting the true and correct facts that the talks of gift has never been materialized and the possession of the suit property remains with respondent No.2 and the petitioner also admitted that she never accepted the oral gift in regard to the suit property and also admitted that the petitioner and respondent No.1 are living in the suit property as licensee.

10. On the basis of the written statement of the petitioner herein, the learned trial court impleaded the respondent No.2 as a party to the suit, as the admissions of the petitioner clearly states that the respondent No.1 never became the owner of the suit property by way of oral gift by respondent No.2 and respondent No.2 is owner in possession of the suit property.

11. The issues have been framed in the suit for partition and suit is pending for cross-examination of the witnesses of the plaintiff i.e. respondent No.1 herein.

12. It is the case of the respondent No.2 that the petitioner colluded with the plaintiff/respondent No.1 and with malafide intentions started fight with the respondent No.2 and also threatened him that he will be thrown out from the suit property.

13. At this stage the petitioner moves the application under Order 6 Rule 17 for amendment of her statement and by the way of amendment she wants to withdraw all the admissions made by her regarding the possession of the suit property and regarding the non completion of the gift by the respondent No.2 in favour of petitioner and respondent No.1.

14. It is respectfully submitted that the proviso of Order 6 Rule 17 clearly states that no amendment in the pleadings shall be allowed after the trial has commenced and in the present case trial has been already commenced and the suit is pending for evidence for the ready reference of this court the proviso of Order 6 Rule 17 of CPC has been reproduced herein below :

“Order 6 Rule 17....

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

15. The Double Bench of this court in ***Kali Charan vs. Ishwar Das***, 2002 (61) DRJ 401 (DB) in para 5 held that in the case when the defendant wanted to change the plea of admission then he cannot be permitted to do so.

16. It is held by the Supreme Court in ***A.K. Gupta & Sons vs. Damodar Valley Corporation***, 1966 (1) SCR 796 that in the case of application for amendment a party is not allowed to set up a new case or a new cause of action by amendment.

17. The Supreme Court in ***S. Malla Reddy vs. Future Builders Coop. Housing Society***, (2013) 9 SCC 349 (Civil Appeals No.3914/2013 with Nos.3916-17 of 2013, decided on 18th April, 2013 had held that attempt to resile from admission made in original written statement must be deprecated.

18. The Supreme Court in ***Mashyak Grihnirman Sahakari Sanstha Maryadit vs. Usman Habib Dhuka***, (2013) 9 SCC 485 (Civil Appeal No.3917/2013 decided on 18th April, 2013 held that the amendment sought for in plaint, if a belated one and also an afterthought then it is not liable to be allowed.

In the present matter, it is clear that the prayer made in the application is an afterthought.

19. The allegation of the petitioner herein that the respondent No.2 was contesting the suit of plaintiff/respondent No.1 has no substance as apparently on the face of the fact that from the very beginning M. Ahmed Advocate & Company contesting the suit on behalf of respondent No.1 and even this writ petition has been filed by the same advocate.

20. Even otherwise, it is evident from record that the matter has already been commenced. The petitioner has failed to show any due diligence to seek the prayer in the present case, therefore, the amendment sought by the petitioner are contrary to proviso of Order 6 Rule 17 CPC which cannot be allowed in these circumstances also.

21. In view of the said facts and circumstances of the case, it appears to this Court that the application filed by the petitioner was totally false and frivolous and has been rightly rejected by the learned trial court. It has been filed in order to drag the trial and to harass the respondent No.2 herein.

22. The petition is accordingly dismissed with cost of Rs.10000/- which shall be deposited by the petitioner with the Prime Minister Relief Fund within four weeks from today.

(MANMOHAN SINGH)
JUDGE

JANUARY 02, 2014