

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

+ **CM(M) 81/2012 & CM 1225/2012 (Stay)**

% **Decided on: 22nd January, 2015**

ASIM KHAN

..... Petitioner

Through: Mr. Risha Mittal and Mr. Vatsal
Kumar, Advocates.

versus

ZAHID ALI & ORS

..... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The petitioner impugnes the order dated 30th November, 2011 whereby the application under Order 6 Rule 17 CPC, filed by the petitioner before the learned trial court seeking amendment of the plaint, was dismissed.

2. Notice in this petition has been served on respondent Nos. 1, 2 and 4. Respondent No. 3 had already been proceeded ex-parte before the learned trial Court. Despite service of notice, none has entered appearance on behalf of respondent No. 4. Today, despite three pass overs, none is present on behalf of respondents. Thus, I have proceeded to hear and dispose of the matter.

3. The petitioner/plaintiff filed the suit being CS (OS) No. 578/2010 on 28th July, 2010 which was registered on 18th November, 2010. In the suit,

the petitioner claimed possession, declaration and mandatory injunction against the respondents/defendants. It was stated by the plaintiff that he had purchased property No. 145 part of Khasra No. 127, main market road, Okhla Village, Jamia Nagar, New Delhi admeasuring 52 sq. yards from defendant Nos. 1 and 2 vide documents i.e. General Power of Attorney, agreement to sale and purchase, affidavit and will, all executed on 31st February, 2010. All the documents mentioned the measurement of the property as 52 sq. yards, however, after taking possession of the suit property on 31st March, 2010, plaintiff got measured the area and found the same to be 32 sq. yards only. The same was pointed out to respondent/defendant Nos. 1 and 2.

4. Thus, the petitioner/plaintiff sent a legal notice dated 21st May, 2010 which was replied only by respondent/defendant No. 4. Defendant No. 4 started construction over the remaining part of the property No. 145 part of Khasra No. 127 with the help of defendant No. 5- builder under the protection of defendant No.6, who was the SHO of the area. Thus, the father of the plaintiff lodged a complaint to the Commissioner of Police on 22nd July, 2010, and finally the present suit was filed. In the prayer clause, the following prayers were made:-

“i) to pass a decree of possession of 20 sq. yds or such other portion in respect of property bearing No. 145, part of Khasra No. 127, Main Market Road, Okhla Village, Jamia Nagar, New Delhi (shown in red colour of the site plan and at present in possession of defendant No. 4) in favour of the plaintiff and against the defendants.

ii) to pass a decree of declaration declaring the plaintiff the owner of 20 sq. yds or such other portion in

respect of property bearing No. 145, part of Khasra No. 127, Main Market Road, Okhla Village, Jamia Nagar, New Delhi (shown in red colour of the site plan).

iii) to pass a decree of mandatory injunction directing the defendants No. 4 and 5 to remove the building materials lying at property bearing No. 145, part of Khasra No. 127, Main Market Road, Okhla Vilalge, Jamia Nagar, New Delhi (shown in red colour of the site plan) and hand over the possession of the same to the plaintiff.

iv) Also pass mandatory injunction directing defendant No. 6 to not permit any illegal construction in property bearing No. 145, part of Khasra No. 127, Main Market Road, Okhla Vilalge, Jamia Nagar, New Delhi (shown in red colour of the site plan and at present in possession of defendant No. 4).

v) To award the cost of the proceedings in favour of the plaintiff and against the defendants; and

vi) To pass a mandatory injunction directing defendant No. 6 to not to permit any illegal land unauthorized contraction in the premises.

vii) To grant such other and further reliefs in favour of the plaintiff and against the defendants which this Hon'ble Court deems fit and proper in the facts and circumstances of the case."

5. On 3rd July, 2011, the petitioner/plaintiff filed an application under Order 6 Rule 17 CPC stating that the petitioner inadvertently missed out a prayer by *bona fide* mistake and thus wants to add prayer (ia) in the plaint between prayers (i) and (ii) which reads as under:

“ia) to pass a decree of specific performance against the defendants No. 1 and 2 by directing them to execute the necessary papers with respect to the 20 sq. yds of the property bearing No. 145, part of Khasra No. 127, Main Market Road, Okhla Village, Jamia Nagar, New Delhi shown in red colour of the site plan.”

And in the title of the suit wants to add words “specific performance”, thereby, making the subject of the plaint read as “Suit for specific performance, possession, declaration and mandatory injunction”.

6. Though, issues were framed on 14th March, 2011 after defendant No. 3 had been proceeded ex-parte and on the defendant Nos. 1, 2 and 4 filing their written statements, however, no evidence had been recorded when this application was filed. The learned trial court dismissed the application on the ground that the contentions addressed by the parties were also the subject matter of discussion in order dated 14th March, 2011 when application under Order 26 Rule 9 CPC of defendant No. 4 was disposed of. The plaintiff had purchased 52 sq. yards of land and, as appears, the same was purchased as a built up property on the basis of “as is where is” basis, possession was also received by the plaintiff and later the area was not discovered as narrated in the papers. There was no other area of 20 sq. yards with defendant Nos. 1 and 2 for which the amendment has been sought, though, the defendants have already executed papers for measuring 52 sq. yards, however, the plaintiff proposes direction to defendant Nos. 1 and 2 to execute papers with respect to 20 sq. yards property and that the plaintiff’s request for execution of the sale deed is an afterthought. As there was no error in the main suit for execution of sale

deed, and it was not possible to direct execution of sale deed in respect of 20 yards when the property purchased was 52 sq. yards and there was no cause of action in the plaint or in the notice.

7. A perusal of the unamended plaint would show that in para 16 of the plaint while dealing with valuation, the plaintiff has stated as under:-

“That value of the suit for the purpose of court fee and jurisdiction for the relief of specific performance, possession and declaration is valued as Rs.3,38,462/- and a court fee of Rs.5712/- has been paid on it. The value of the suit for mandatory jurisdiction the property is valued as Rs.130/- and a court fee of Rs.13 is also affixed on the plaint. The plaintiff undertakes to pay court fees if any directed by this Hon’ble Court.”

8. It would be thus seen that the plaintiff was in fact seeking the relief of specific performance and, inadvertently, in the subject of the suit and in the prayer clause the same was missed out. There is no dispute to the trial having not started when the application under Order 6 Rule 17 CPC was filed; the parties to the litigation being same; the cause of action being the same and no new cause of action being introduced in the suit from the pendency thereof. It is in the interest of justice to allow the said amendment.

9. In *Sampat Kumar v. Ayyakannu and Ors.*, (2002) 7 SCC 559 the Supreme Court in a case where the application for amendment was filed after 11 years being a pre-trial amendment, allowed the same on the ground that the basic structure of the suit is not altered by the proposed amendment and what was sought to be changed was the nature of relief sought for by the plaintiff. The plaintiff has not debarred from instituting now suit seeking relief of declaration of title and recovery of possession on the same basic

facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and thus to avoid multiplicity of suit, it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit.

10. In the present case, though cause of action had arisen, however, there is no dispute of the trial having not started; the parties to the litigation being same, the relief sought in the suit was contemplated in view of the averments in para 16 of the plaint and were missed out in the relief due to inadvertence. Consequently, the impugned order is set aside. The application of the petitioner under Order 6 Rule 17 CPC is allowed. The respondents shall be at liberty to file written statement within four weeks. Replication thereto, if any, be filed within four weeks thereafter.

11. The petition is disposed of in the above terms. This, however, is subject to payment of costs of Rs5,000/- to be deposited with the Delhi High Court Legal Services Committee within four weeks from today.

(MUKTA GUPTA)
JUDGE

JANUARY 22, 2015

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