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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(OS) 303/2008
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Order delivered on: 18.11.2011

SMT. HARDEEP KAUR & ORS. Plaintiff

Through: Ms.Sonali Malhotra, Advocate

versus

SHRI SADHU SINGH & ORS Defendant

Through: Mr.B. Vijay Kumar for Mr.G.K. Kaushi,
Advocate for the defendant

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

G.S.SISTANI, J. (ORAL)

I.A. No.13771/2009

1. Counsel for the defendant/ applicant submits that necessity for filing present application for amendment has arisen, as at the time of preparing the affidavits by way of evidence certain discrepancies were noticed in the written statement, which had occurred due to inadvertence and typographical errors. It is submitted that the amendments sought, are necessary without which the matter cannot be adjudicated and the defendants would not be able to secure proper justice in the matter. It is further contended that the amendments are necessary for the purpose of determining real question in controversy between the parties. It is further contended that most of the amendments are formal in nature.
2. Counsel for the non-applicant has strongly opposed this application. It is contended that the application is an abuse of the process of the court and the same has been filed with *mala fide* and mischievous motives and the

same merits dismissal. Ms.Sonali Malhotra, counsel for the non-applicant submits that the sole purpose of filing this application is to delay the matter. It is submitted that pleadings in this case are complete and admission/ denial is complete and issues have been framed. This court has also issued certain directions to the effect that evidence will be led by the defendants at the first instance and time was granted for this purpose to the defendant on 07.07.2011. It is submitted that once a direction is issued for filing affidavits by way of evidence, the trial commences, at that stage, and therefore, no application under the provisions of Order 6 Rule 17 CPC can be filed, unless the application could not be filed despite due diligence. In support of his submission, counsel for the plaintiff has placed reliance on **Mohd. Saleem & Ors. Vs. Naseer Ahmed** reported at AIR 2007 DELHI 48. Counsel for the non-applicant further submits that the past conduct of the defendant would show that the sole aim and purpose of the defendants is to delay the matter as much as possible.

3. I have heard counsel for the parties and considered their rival submissions. The plaintiff no.1 is the widow and plaintiffs no.2, 3 and 4 are the children of the deceased brother of defendants no.1 to 3. The plaintiff has filed present suit for partition, rendition of accounts and permanent injunction. Issues in this matter were framed on 04.02.2009. While framing of issues, this court had observed that since the onus of the main issues is on the defendants, they would lead their evidence first and six weeks time was granted to file their affidavits by way of evidence and the matter was adjourned to 18.04.2009. The defendants did not file their affidavits by way of evidence within the time allowed and the present application for amendment of the written statement was filed on 15.09.2009. Although reply to this application was filed on 16.01.2010 no rejoinder was filed for three dates of hearing and thereafter the matter

was placed before court. As none appeared on behalf of the applicant on 07.07.2011 the application for amendment was dismissed and thereafter restored on 12.09.2011.

4. It has been repeatedly noticed that parties interested in delaying the trial of a case take refuge under Order 6 Rule 17 CPC and move frivolous applications for amendment and successfully delay the trial by filing revisions and appeals. It is to block this loophole that Order 6 Rule 17 has been amended and a new proviso has been added to the Rule that no application for amendment of the pleading 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 applied for amendment before commencement of trial. Having regard to the amendment in the Code of Civil Procedure, ordinarily no application for amendment of the pleadings should be allowed unless the court comes to the conclusion and records a finding that in spite of due diligence an applicant could not have sought amendment before the commencement of trial.
5. Learned counsel for the non-applicant submits that in this case at the stage when issues were framed and a direction was issued for filing affidavit by way of evidence, the trial would have commenced. The submission of the counsel for the defendant / non-applicant is supported by a case of this court in the case of **Mohd. Saleem (Supra)**. It would be useful to reproduce para 7 of the case, which reads as under:

“7. In my considered view, the stage of the trial only begins after the framing of issues when the directions are passed and a date fixed for filing of affidavits of evidence. In fact, a learned single Judge of this Court in Mrs.Suneel Sodhi v. Mr.M.L. Sodhi, AIR 2004 Delhi 99 while considering this plea has taken the dates of trial fixed as the commencement of the trial.”
6. Having examined the order dated 07.07.2011, it leaves no room for doubt that in this case the trial has commenced. The only question which arises

for consideration at this stage is as to whether in spite of due diligence the present application could have been filed by the applicant or not.

7. The question would thus arise for consideration is whether the defendant in this case has acted with due diligence and could not move the present application prior to the commencement of trial.
8. In the paragraphs foregoing this court has noticed that affidavits by way of evidence were not filed by the defendants within the time allowed and thereafter the present application for amendment was filed while non-applicant filed its reply at the first opportunity available, but rejoinder thereto could not be placed on record for three dates of hearing and thereafter the defendant did not appear in court which resulted in dismissal of the present application which was restored on 12.09.2011.
9. Such is the casual approach of the applicant that there is not a single averment in the application, that in spite of due diligence the application could not be filed prior to the commencement of trial. The only ground taken in the present application is that when the counsel was preparing the evidence, he observed certain typographical errors.
10. The order-sheets show that the defendant has successfully delayed the trial in this case from 04.02.2009 onwards till date. This is an ideal example of a matter which the legislature would have kept in mind while carrying out the amendment in the Code of Civil Procedure. In my view, the present application is not maintainable and in fact it is a gross abuse of the process of court and the same is accordingly dismissed with costs of Rs.5,000/-.

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11. It may be noticed that since 04.02.2009 defendants have successfully delayed the hearing of the matter and the affidavits by way of evidence have not been filed. In the absence of any prayer oral or written, seeking extension of time to file affidavits by way of evidence, the right of the

defendants to file evidence stands closed.

12. List the matter before the Joint Registrar on 02.02.2012, for further proceedings.

G.S.SISTANI,J

NOVEMBER 18, 2011

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