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HIGH COURT OF DELHI AT NEW DELHI

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RSA No.28/2007

Decided on : 9th January, 2015

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SHYAM LAL MITTAL

..... Appellant

Through: Mr.Ashok Sapra, Adv.

versus

SARLA MITTAL & ORS

..... Respondent

Through: Applicant in person in CM
No.17823/2014.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

C.M. No.17823/2014 (u/O 1 Rule 10 CPC)

1. This is an application filed by the brother of the respondent No.1/plaintiff (since deceased) for being impleaded as a party to the present appeal.
2. It has been contended by the learned counsel for the applicant that he is the brother of respondent No.1/plaintiff and as the respondent No.1/plaintiff Smt.Sarla Mittal has died and there is a will purported to have been made by her in respect of the

property in question in his favour, therefore, he may be brought on record by allowing the present application for impleadment.

3. I have considered the submission and have also gone through the record.
4. The applicant cannot be permitted to be impleaded as a party in the present regular second appeal. This is on account of the fact that the appellant has filed the present regular second appeal against the concurrent finding of the courts below. The respondent No.1/plaintiff in the suit No.103/1997 is the dominus litis of her case and she chooses to file the suit against the present appellant and the statutory body i.e.DDA. Merely because the respondent No.1/plaintiff, during the pendency of the suit has died, does not give rise to ipso facto an order of impleadment unless and until the right to sue survives and the application is filed within stipulated period. Further, the Will has not been probated when her husband, who is the appellant, is alive. I find no justification for impleading the brother of the respondent No.1/plaintiff as a party in the matter for two reasons. Firstly, the appellant was the husband of respondent No.1/plaintiff and thus has a better right to succeed to the

interest of the respondent No.1/plaintiff and secondly, the application itself is filed beyond 90 days.

5. The applicant is free to take such recourse as may be available to him in accordance with law in case he has any cause of action accruing to him. Accordingly, the application is dismissed.

R.S.A. No.28/2007

1. This is a regular second appeal filed by the appellant against the judgment of the first appellate court dated 11.09.2006 upholding the judgment and decree passed by the trial court vide order dated 30.08.2005.
2. The appeal has been pending for the last six year in this court and stands admitted without formulation of any substantial question of law. No appeal can be admitted under Section 100 CPC without there being formulation of a substantial question of law which may be done by the appellant concerned or alternatively in case he fails to do so, by the court. It seems that this fact has been ignored inadvertently resulting in colossal wastage of judicial time.
3. I have heard the learned counsel for the appellant and I have also gone through the record.

4. Briefly stated, the facts of the case are that the respondent filed a civil suit on 08.05.1991 bearing Suit No.103/1997 for declaration, permanent and mandatory injunction against the present appellant/defendant No.4 Mr.Shyam Lal Mittal, her husband. DDA was also made a party to the suit. The case set up by the respondent No.1/plaintiff in the suit was that she is the owner of the property in question.
5. The aforesaid suit was decreed in favour of the respondent No.1/plaintiff on 30.08.2005.
6. The appellant/defendant No.4 feeling aggrieved filed a first appeal which came to be decided by the learned ADJ vide order dated 11.09.2006.
7. It may be pertinent to mention that despite service, the present appellant/defendant No.4 was proceeded *ex parte* on 22.04.1993 by the trial court. However, on account of the inadvertence, the trial court on a subsequent date vide order dated 25.02.1994 had permitted the appellant/defendant No.4 to file his written statement. The said written statement was filed on record on 25.03.1994. However, the learned counsel for the respondent No.1/plaintiff filed an application under Section 151 CPC on

09.05.1994 for taking the written statement of the appellant/defendant No.4 off the record and during the pendency of the said application, the appellant/defendant No.4 filed an application under Order 9 Rule 7 CPC on 01.09.1995 for setting aside the ex parte proceedings dated 22.04.1993. The court later on allowed the application on 01.11.1999 and the written statement of the appellant filed under mistaken court order was ordered not to be read in the proceedings. Against this order, the appellant did not file any appeal or revision. The court framed issues on 10.02.2000 and the trial started.

8. The appellant failed to cross-examine the witnesses of the respondent No.1/plaintiff and his right to cross-examination was closed vide order dated 23.05.2001. The appellant challenged the order before the High Court by filing a revision petition. The High Court vide interim order dated 02.08.2001 allowed the cross-examination of the witnesses of the respondent No.1/plaintiff, but subjected him to certain conditions. These conditions were not complied with by the appellant and finally the revision petition was dismissed on 11.02.2002. Whereafter also, the appellant or his counsel rarely appeared before the trial

court which after recording the evidence of respondent No.1 and DDA, closed the evidence of the appellant on 13.12.2003. The trial court thereafter decreed the suit vide impugned order dated 30.08.2005 in favour of the respondent No.1/plaintiff and against the appellant.

9. The question which is sought to be raised now is that since there was a written statement on record filed by the appellant, therefore, the appellant's plea in the written statement ought to have been considered before the appeal was heard by the learned ADJ.

10. It may be pertinent to mention here that even if this document of the appellant is accepted, even then, it does not take the case of the appellant any further. This is on account of the fact that a fact must not only be pleaded but the party, but the party concerned must also adduce evidence in support of his plea after framing of issues. In the instant case, there is absolutely no pleading on behalf of the appellant or the evidence produced by the appellant. Therefore, the judgments of the both the trial court and the first appellate court are totally against the present appellant on account of these defects in his case. The plea of

the appellant that since by mistake the written statement was filed by him, therefore, the plea in the written statement ought to have been taken on record, is not a question of law much less a substantial question of law. These are all questions of fact which have stood concluded right up to the High Court.

11. For the reasons mentioned above, I feel that the present appeal does not involve any substantial question of law nor has the appellant been able to make out one so that the matter could be considered.

12. Since the present appeal does not involve any substantial question of law, accordingly, the same is dismissed.

V.K. SHALI, J.

JANUARY 09, 2015
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