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

+ **CS(OS) NO.2073/2002**

HEMANT KUMAR AND ANR.

..... Plaintiffs

Through: Mr. Madan Lal Sharma, Mr. Vidhi Kumar, Ms. Disha Sharma, Mr. Ashish Bhardweaj and Mr. Varun Nischal, Advs.

Versus

SATYA DEV BHARREL AND ORS.

..... Defendants

Through: Mr. Ghan Shyam Vasisht, Adv. for D-1 to 12.
Mr. S.K. Bhaduri and Ms. Kirti Parmar, Advs. for D-13 to 16.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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12.08.2016

IA No.21896/2012 (of plaintiffs u/O 6 R-17 CPC)

1. The plaintiffs in this suit for partition, upon being told in the order dated 25th September, 2012 that on the pleas contained in the plaint, had no basis for the claim in the suit, have filed this application for amendment of the plaint.

2. The plaintiffs, in the suit as originally filed sought partition of the estate of late Sh. Bhadra Sen amongst the two plaintiffs and the sixteen defendants.

3. In the suit as originally filed, the claim of the plaintiffs was (i) that in the year 1911, the lands of Sh. Hari Singh, father of Sh. Bhadra Sen were

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acquired for development of National Capital Territory of Delhi, New Delhi and in lieu thereof Sh. Bhadra Sen and his brother were allotted agricultural land in District Multan, now in Pakistan; (ii) that after the partition of the year 1947, Sh. Bhadra Sen was allotted agricultural land of 125 bighas in village Alipur, Delhi in lieu of the land left behind in District Multan; (iii) that it is from the nucleolus of the said 125 bighas of agricultural land at village Alipur (which was sold) that the entire estate of Sh. Bhadra Sen of which partition is sought was made and thus the plaintiff No.1 being the grandson of Sh. Bhadra Sen and plaintiff No.2 being the great grandson of Sh. Bhadra Sen have a share therein by birth.

4. It is *inter alia* the case of the contesting defendants No.13 to 16 (a) that the land at District Multan was the self acquired property of Sh. Bhadra Sen; (b) that the father of the plaintiff No.1 and the grandfather of the plaintiff No.2 namely Sh. Satya Dev Bharrel, defendant No.1 in an earlier legal proceeding between Sh. Bhadra Sen and his sons had admitted the entire estate of Sh. Bhadra Sen to be his self acquired estate and the claim now of the two plaintiffs who are claiming through their father defendant No.1 is *mala fide*.

5. Issues were framed in this suit on 25th January, 2010. The plaintiff No.1 has also filed affidavit by way of evidence but the plaintiff No.1 has not tendered the said affidavits into evidence as yet.

6. When the matter came up before this Court on 25th September, 2012, this Court observed that the claim of the plaintiffs on the basis of old Hindu Law i.e. of Mitakshra Family, on the basis of the averments in the plaint, CS(OS) NO.2073/2002

was not made out. However, on the request of the counsel for the plaintiffs, the suit instead of being dismissed, was adjourned.

7. The counsel for the plaintiffs also agrees that the plaint as originally filed is not happily worded. The plaint, as originally filed also does not satisfy the criteria as laid down in para 212 of Mulla Hindu Law, 2012 Edition, photocopy whereof has been handed over by the counsel for the plaintiffs, of a coparcenary having come into existence. Needless to state that without the averments in the plaint constituting a plea of existence of a coparcenary, the question of the plaintiff No.1 and the plaintiff No.2 having any share in the properties or claiming partition thereof would not arise.

8. The question which now arises is whether the plaintiffs should be permitted to so amend the plaint. The Code of Civil Procedure, 1908 (CPC) as amended with effect from 1st July, 2002 bars such amendment. The counsel for the plaintiffs however states that the suit was filed prior thereto.

9. A perusal of the suit file shows that the suit was first filed on 8th May, 2002 but was defective and returned under objection and was thereafter repeatedly filed on 30th May, 2002, 21st August, 2002 and finally on 31st August, 2002 and came up first before this Court on 2nd September, 2002, on which date none appeared for the plaintiffs and was renotified for 25th October, 2002 and thereafter for 11th November, 2002 when also it was adjourned and finally the plaint was registered and the summons of the suit issued only on 11th December, 2002.

10. The plaintiffs in the proposed amended plaint have sought to make the pleas to show the constitution of a coparcenary. However, upon it being

asked from the counsel for the plaintiffs, as to what is the basis of the claim sought to be pleaded by way of amendment, inasmuch as the claim being with respect to immovable properties, has to be backed by documents and cannot be in the air, the counsel for the plaintiffs states that the plaintiffs have none but the plaintiffs would in trial summon the records of the Rehabilitation Department and which ‘may’ prove the case of the plaintiffs.

11. This application for amendment itself has been pending for the last nearly four years. Now under the Right to Information Act, 2005 regime, if there are any documents supporting the case of the plaintiffs as sought to be amended, it was open to the plaintiffs to have obtained copies thereof. The fact that the plaintiffs have not been able to get any copy or to file the same before this Court itself speaks of there being no such documents.

12. The question which further arises is whether in this state of affairs this Court should allow the amendment by giving benefit to the plaintiffs of the first filing of the suit which was defective; else, the suit in proper form and in accordance with law was filed only on 31st August, 2002 i.e. after coming into force of the Amended CPC and whereafter it was listed.

13. I may in this context notice that vide amendment to the CPC with effect from 1st July, 2002, Order IV of the CPC titled “Institution of Suits” was also amended and sub rule (3) of Rule 1 thereof provides that the plaint shall not be deemed to be duly instituted, unless it is in accordance with law.

14. The application for amendment has been filed after nearly ten years of the institution of the suit and now the suit is fourteen years old. Once the Court finds that the plea sought to be taken by way of amendment are only

upon the Court quizzing the parties, as to how the pleadings as exist, constitute a claim or a defence and without any factual basis, the amendment cannot be allowed to permit such a party to through the medium of the Court conduct a fishing and roving enquiry and to the harassment of defendants.

15. It cannot also be lost sight of that there is an interim order in force in the suit restraining the defendants from dealing with the property which according to the defendants belongs exclusive to the defendants and to which the plaintiffs claim a share, claiming the existence of a coparcenary and after the plaintiffs' father and grandfather respectively had expressly in a legal proceeding admitted to the contrary.

16. Such *mala fide* actions cannot be permitted to be perpetuated.

17. I have enquired from the counsel for the plaintiffs, as to how the plaintiffs intend to compensate the defendants for the loss suffered by the defendants, if the suit is ultimately dismissed.

18. The counsel for the plaintiffs has not been able to make any offer.

19. To test the *bona fide* of the plaintiffs, it has been enquired from the plaintiffs, whether the plaintiffs are willing to deposit Rs.10 lakhs in this Court to be forfeited and to be paid to the defendants to partly cover such loss of the defendants, in the event of the plaintiffs ultimately failing in the suit.

20. The counsel for the plaintiffs, after obtaining instructions from the plaintiffs, states that the plaintiffs are not so willing and on the contrary states that the interim orders be vacated.

21. However the same would still attract the principle of *lis pendens* affecting the marketability of the properties.

22. The counsel for the plaintiffs states that the plaintiffs are not willing to agree to have the applicability of the principle of *lis pendens* removed from the suit.

23. In this view of the matter, the application for amendment is found to be *mala fide* and is dismissed.

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24. The counsel for the plaintiffs agrees that on the basis of the plaint as exists, the plaintiffs have no case.

25. The suit also is accordingly dismissed by imposing costs on the plaintiffs of Rs.1 lakh payable to the contesting defendants No.13 to 16 within six weeks of today. Else, the defendants shall be entitled to execute the decree for recovery of costs.

26. At this stage, the counsel for the plaintiffs states that his concession be not recorded.

27. However, it is not disputed that in law, on the plaint as exists, the plaintiffs have no claim of coparcenary on the basis whereof the suit has been filed.

28. The counsel for the plaintiffs, at this stage, also states that there is a copy of a *Sanad* in favour of Sh. Bhadra Sen and his brother on record with respect to the allotment of land at District Multan, Pakistan.

29. Such last ditch efforts to save the suit cannot be permitted.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

AUGUST 12, 2016/bs..
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