

\$~6 & 7

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

% *Date of Decision : January 18, 2016*

+ **FAO(OS) 85/2015**

ANIL TYAGI Appellant

Represented by: Mr.Anupam Prakash, Advocate

versus

ARUN SHARMA & ANR Respondents

Represented by: Ms.Sonia A.Menon, Advocate for R-1
and R-2

FAO(OS) 86/2015

ANIL TYAGI Appellant

Represented by: Mr.Anupam Prakash, Advocate

versus

ARUN SHARMA & ANR Respondents

Represented by: Ms.Sonia A.Menon, Advocate for R-1
and R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J (ORAL)

1. Challenge in FAO (OS) 85/2015 is to an order dated January 13, 2015 allowing IA No.14714/2014 filed by the respondents praying to be granted permission to amend the written statement filed by substituting existing para 4 of the preliminary objections to the written statement filed as also existing paragraph 5 of the written statement.

2. Challenge in FAO(OS) 86/2015 is to a subsequent order dated January 20, 2015 taking on record the amended written statement.
3. The grievance in FAO(OS) 86/2015 is that without awaiting the period of limitation within which the appellant could challenge the order dated January 13, 2015, the learned Single Judge could not have taken on record the amended written statement.
4. There was no need to file FAO(OS) 86/2015 for the reason if FAO(OS) 85/2015 were to be allowed, the order dated January 20, 2015 would fall.
5. Relevant facts to be noted would be that the appellant, as plaintiff, claimed title to the suit property under a will dated February 14, 1989 allegedly executed by Late Raj Kumari, the mother of the appellant and respondent No.1. The second respondent is the wife of respondent No.1. Claiming that Raj Kumari died and she had permitted the respondents to stay in the suit premises, during her lifetime, case pleaded by the appellant is that he revoked the permission granted by the mother and hence the possession of the respondent became unauthorised.
6. In the written statement filed the defendants challenged the will dated February 14, 1989 relied upon in the plaint, bringing out that the appellant had not obtained a probate thereof. It was pleaded that the will was forged. In paragraph 4 of the preliminary objections it was pleaded that the funds to purchase the suit property were generated by receipt of sale consideration when Property No.J-36, Rajouri Garden, New Delhi was sold, which property was acquired by the father of the parties partly from his own earnings and partly from the funds of the joint family. In paragraph 5 of the written statement, while responding to paragraph 5 of the plaint this aspect was highlighted with further pleading that the mother of the parties had no source

of income and she was receiving meagre pension after the father of the parties died. It was pleaded that the sale-deed of the suit property was obtained in the name of the mother since she was the eldest in the family.

7. The proposed amendments allowed, simply plea that for the existing facts pleaded, the mother would be required in law to be holding the suit property as a trustee for the benefit of all the legal heirs of Late Sh. Yag Datta, the father of the parties; and that she would hold the property in a fiduciary capacity.

8. The issue as to which kind of orders passed by a Trial Judge, allowing amendment of a plaint (which would also hold good for amendment of a written statement) was considered by the Supreme Court in the decision reported as (1974) 2 SCC 387 Shanti Kumar R. Canji Vs. Home Insurance Co. Of New York. The following observations were made by the Court:-

“We are in agreement with the view expressed by the High Court at Calcutta in the M.B. Sirkar’s case as to when an order on an application for amendment can become a judgment within the meaning of Clause 15 of the Letters Patent. If an amendment merely allows the plaintiff to state a new cause of action or to ask a new relief or to include a new ground of relief all that happens is that it is possible for the plaintiff to raise further contentions in the suit, but it is not decided whether the contentions are right. Such an amendment does nothing more than regulate the procedure applicable to the suit. It does not decide any question which touches the merits of the controversy between the parties. Where, on the other hand, an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a judgment within the meaning of Clause 15 of the Letters Patent. The reason why it becomes a judgment is that it is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It is the final decision as far as the trial court is concerned.

In finding out whether the order is a judgment within the meaning of Clause 15 of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability.”

9. The said judgment was followed with approval by the Supreme Court in the decision reported as 1981 (4) SCC 8 Shah Babulal Khimji Vs. Jayaben D.Kania & Anr. after analyzing the principles on which an order passed by a learned Trial Judge would amount to a judgment, in paragraph 120 of the decision in Shah Babulal Khimji’s case the Supreme Court held as under:-

“120. Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the Trial Judge amounts to a judgment within the meaning of the Letters Patent. We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments:

(1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.

(2) to (15)”

10. That apart, the Supreme Court also approved the principles guiding the approach by an Appellate Court concerning orders passed by Trial Judges as laid down by the Madras High Court in the decision reported as ILR 35 Madras 1 T.V.Tuljaram Row Vs. M.K.R.V.Alagappa Chettiar. In para 119 of the decision in Shah Babulal Khimji’s case it was observed as under:-

“125. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the Trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the Trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) – (3)”

11. The amendment allowed by the learned Single Judge has simply expanded upon the legal position concerning the facts already pleaded. No new ground of defence has been raised. The proposed amendment does not take away any right which could be said to have vested in the plaintiff. The order allowing the amendment does not decide any question which touches the merit of the controversy between the parties.

12. In view of the legal position above, the appeal laying a challenge to the order dated January 13, 2015 would not even lie because it is not a judgment as held in Shah Babulal Khimji's case; and we simply add that what would be a judgment for the purposes of a Letters Patent, would equally apply to Section 10 of the Delhi High Court Act, 1966.

13. Assuming that the appeal would lie, the proposed amendment does not

foul the law pertaining to amendments of pleadings laid down by the Supreme Court in *Shah Babulal Khimji's* case.

14. FAO(OS) No.85/2015 is dismissed for the reasons given above.

15. FAO(OS) No.86/2015 is dismissed as a consequence of FAO(OS) No.85/2015 being dismissed.

16. No costs.

CM No.3059/2015 in FAO (OS) No.85/2015
CM No.3067/2015 in FAO (OS) No.86/2015

Dismissed as infructuous.

PRADEEP NANDRAJOG
(JUDGE)

MUKTA GUPTA
(JUDGE)

JANUARY 18, 2016
Mamta/rb