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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 815/2017 & CM No.27387/2017 (for stay).
MOHINDER KUMAR MEHRA Petitioner
Through: Ms. Shobha and Ms. Joyshree, Adv.
versus

ROOP RANI MEHRA & ORS Respondents
Through: Mr. Rana S. Biswas, Adv. for R-5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **02.08.2017**

CM No.27388/2017 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

CM(M) 815/2017 & CM No.27387/2017 (for stay).

3. This petition under Article 227 of the Constitution of India impugns the order (dated 24th October, 2016 in CS No.10843/16 of the Court of Additional District Judge (South-East), Saket Courts, New Delhi) dismissing the application of the petitioner / plaintiff under Order VI Rule 17 of the Code of Civil Procedure, 1908 (CPC).

4. The counsel for the respondent / defendant appears on seeing the matter in the cause list.

5. The counsel for the petitioner / plaintiff has been heard.

6. The suit, from which this petition arises, was instituted by the petitioner / plaintiff for partition of his 1/3rd share of the property as detailed in Appendix-A to the plaint. The petitioner / plaintiff though has filed a copy of the plaint before this Court but without Appendix-A. The counsel for the petitioner / plaintiff states that the same remained to be filed but informs that

Appendix-A mentions only one property i.e. property no.D-4, Lajpat Nagar, Part-II, New Delhi.

7. Issues were framed in the suit and at the stage when the suit was pending for evidence of the petitioner / plaintiff, after the petitioner / plaintiff had availed of three opportunities without leading any evidence and when last opportunity had been given to the petitioner / plaintiff, the petitioner / plaintiff filed the application under Order VI Rule 17 of the CPC against dismissal whereof this petition has been preferred.

8. In the application under Order VI Rule 17 of the CPC it was pleaded (i) that at the time of institution of the suit on 4th November, 2009, “somehow certain relevant facts, which are material for the proper adjudication of the present suit were not incorporated in the body of the plaint”; by way of amendment, and blaming the inadvertence of the earlier counsel in not incorporating the said facts, amendment was sought; (ii) that besides the property of which partition was sought, another property had been acquired out of claims allotted by the Department of Relief and Rehabilitation and which property had been sold by the defendant no.1 in the suit for a sale consideration of Rs.1,00,00,000/-; and, (iii) that since the said property was also acquired from ancestral funds, the petitioner / plaintiff was entitled to 1/3rd share in the said amount of Rs.1,00,00,000/- also.

9. Accordingly, besides amendments to plead the said facts, amendment to the valuation paragraph also was sought, wherein on the claim for recovery of Rs.33,00,000/- being the 1/3rd of the sale proceeds of Rs.1,00,00,000/-, tentative court fees of Rs.2,000/- was sought to be paid.

10. It is not understandable as to how the claim for recovery of Rs.33,00,000/- could be valued at Rs.2,000/- only.

11. The learned Additional District Judge, vide the impugned order, dismissed the said application reasoning (i) that the thrust of the contention of the counsel for the petitioner / plaintiff was the negligence of the earlier counsel; (ii) that a litigant cannot blame all his defaults on the earlier counsel and is required to peruse the pleadings and follow up the proceedings in the Court; there was no basis for the blame being put on the earlier counsel; (iii) that the claim sought to be made by way of amendment was *inter alia* for recovery of Rs.33,00,000/- and which was barred by time; (iv) that neither of the Articles 106 or 110 of the Schedule to the Limitation Act, 1963 on which reliance was placed by the counsel for the petitioner / plaintiff applied to the said claim for recovery of Rs.33,00,000/-; (v) that there were no averments in the application as to when the petitioner / plaintiff came to know the nature and character of the property; (vi) the respondents in their reply had pleaded that the petitioner / plaintiff was a witness to the Sale Deed of the year 2000 of the property, 1/3rd consideration whereof was sought to be claimed and which fact was not in dispute; and, (vii) that in the rejoinder to the reply to the application for amendment it was unambiguously stated that ancestral nature of the 'other' property came to the knowledge of the petitioner / plaintiff in September, 2009 i.e. one month prior in filing of the suit.

12. I have at the outset drawn the attention of the counsel for the petitioner / plaintiff to the proviso to Order VI Rule 17 of the CPC inserted vide amendment of the year 2002 to the CPC.

13. The counsel for the petitioner / plaintiff has argued that the said proviso has to be read as a proviso only and full effect is to be given otherwise to the main provision of Order VI Rule 17 of the CPC and if the main provision is given full effect, the amendment sought being necessary for the purpose of determining the real controversy between the parties ought to have been allowed, whether it be made before the trial has commenced or after the trial has commenced. Reliance in this regard is placed on *Rajesh Kumar Aggarwal Vs. K.K. Modi* (2006) 4 SCC 385, *M.C. Agarwal HUF Vs. Sahara India* (2008) 5 SCC 642, *Fritiz T.M. Clement Vs. Sudhakaran Nadar* (2002) 3 SCC 605, *Mount Mary Enterprises Vs. Jivratna Medi Treat Pvt. Ltd.* (2015) 4 SCC 182 and *Mahila Ramkali Devi Vs. Nandram (Dead) Through Legal Representatives* (2015) 13 SCC 132.

14. I have however enquired from the counsel, whether the proviso to Order VI rule 17 of the CPC inserted by way of amendment of the CPC of the year 2002, has been referred to in any of the said judgments. The counsel is also reminded that the said proviso, as per Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act, 2002 is not applicable to pleadings filed prior to the coming into force of the Amendment Act and it is enquired, whether the suits subject matter of the aforesaid judgments were instituted prior to the coming into force of the Amendment Act or thereafter.

15. Though the counsel for the petitioner / plaintiff, with reference to *Rajesh Kumar Aggarwal* supra, on which the main emphasis was laid, sought to contend that it is of after the Amendment Act but it is noticed that the said judgment arises out of Civil Appeals No.5350-51/2002 wherefrom it can be inferred that the suit subject matter thereof must be of prior to the

Code of Civil Procedure (Amendment) Act, 2002.

16. The counsel for the petitioner / plaintiff fairly states that the proviso has not been considered in any of the aforesaid judgments.

17. However while this order is being dictated, the counsel for the petitioner / plaintiff contends that her argument qua Order VI Rule 17 of the CPC has not been correctly recorded hereinabove. She states that in the face of the language of Order VI Rule 17 of the CPC, she could not have possibly argued so.

18. The counsel having earlier argued so, has been asked to in her hand, give in one paragraph her contentions qua Order VI Rule 17 of the CPC, with the dictation of the remaining order being deferred, to be done in chamber.

19. The counsel for the petitioner / plaintiff however, instead of giving her contention on the interpretation of Order VI Rule 17 of the CPC, has at 1715 hours handed over to the Court Master “written arguments on behalf of the petitioner” running into four sheets and also annexed thereto copy of the judgment in ***Chander Kanta Bansal Vs. Rajinder Singh Anand*** (2008) 5 SCC 117 to which no reference was made during the hearing.

20. In the guise of one paragraph, full written arguments, after full hearing, cannot be given and wherein passages from the aforesaid judgments are reproduced. However the position that none of the judgments cited deal with the proviso to Order VI Rule 17 of the CPC stands.

21. In ***Chander Kanta Bansal*** supra it was held i) that the proviso limits the power to allow amendment after commencement of trial but grants discretion to the Court to allow amendment if it feels that the party could not

have raised the matter before the commencement of trial inspite of due diligence; ii) that though amendments to avoid multiplicity of proceedings should be liberally allowed but care should be taken to see that injustice and prejudice of a irremediable character are not inflicted upon the opposite party under pretence of amendment; iii) whether a party has acted with due diligence or not, would depend upon the facts and circumstances of each case; iv) that though the proviso to some extent limits the scope of amendment to pleadings but still vests enough power in the Courts to deal with unforeseen situations whenever they arise.

22. Once the legislature has brought in an amendment, this Court cannot ignore the same. It is not in dispute that the application for amendment was filed after the trial had commenced and when the petitioner / plaintiff had been granted last opportunity to lead evidence. The only reason stated in the application for amendment being not sought before the commencement of trial was, that the facts sought to be pleaded by way of amendment remained to be incorporated in the plaint as originally filed due to inadvertence of the earlier counsel.

23. The facts which remained to be incorporated were the factum of another property in which the petitioner / plaintiff claims share having been sold and in the sale proceeds whereof the petitioner / plaintiff claim shares. I fail to see as to how the said facts could remain to be incorporated owing to the inadvertence of the advocate. Even if the petitioner / plaintiff had informed the said facts to the advocate, though it is not so pleaded, and the advocate had inadvertently not incorporated them in the plaint, it is the petitioner / plaintiff who under the law is required to sign and verify the

plaint and also support the same with an affidavit. It is not the case that the petitioner / plaintiff is an illiterate person.

24. The petitioner / plaintiff is expected to and must have signed and verified the plaint and affirmed the affidavit in support thereof after reading the plaint and if any fact informed to the advocate and required to be incorporated in the plaint had remained to be incorporated, the petitioner / plaintiff would have come to know of the same at that time.

25. Supreme Court in *Salil Dutta Vs. T.M. & M.C. Private Ltd.* (1993) 2 SCC 185 held that an advocate is the agent of the party and his acts and statements are the acts and statements of the principal i.e. the party who engaged him and that there is no such absolute rule that a party can disown its advocate at any time and seek relief. It was further held that no such absolute immunity can be recognized and that such an absolute rule would make the working of the system extremely difficult.

26. Of late, this has become the trend, especially in the supervisory jurisdiction, of each successive lawyer appearing for the party blaming the earlier lawyer for the defaults / defects remaining in the conduct of the suit and seeking to rectify the same and thereby making litigations remain pending in the Courts endlessly. Supreme Court on its administrative side is taking steps to ensure time bound disposal of suits and which is impossible if such pleas continue to be entertained.

27. No error can thus be found in the reasoning given in the impugned order, of the petitioner / plaintiff not satisfying the requirement of the proviso to Order VI Rule 17 of the CPC.

28. The learned Additional District Judge in the impugned order has also

accepted the contention of the counsel for the respondents / defendants of the relief sought to be added by way of amendment being barred by time and Articles 106 and 110 of the Schedule to the Limitation Act being not applicable. The counsel for the petitioner / plaintiff has been unable to show any precedent that a claim for a definite share in the sale proceeds of, a property would be governed by Articles 106 and Article 110 supra. However the same being in the nature of entering into the merits of the amendment, I refrain from dealing with the said aspect, though the view taken by the learned Additional District Judge appears to be reasonable and plausible.

29. It has also been informed during the hearing that since then, the recording of evidence in the suit has been concluded and the suit is ripe for final hearing.

30. I therefore agree that the amendment claimed cannot be granted in view of the proviso to Order VI Rule 17 of the CPC.

31. There is no merit in the petition.

Dismissed.

Dasti under signature of Court Master.

RAJIV SAHAI ENDLAW, J

AUGUST 02, 2017

‘pp/gsr’..