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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) No.1365/2016, CM No.47629/2016 (for stay), CM No.47630/2016 (for exemption), CM No.12788/2017 (for early hearing), CM No.12789/2017 (for exemption) and CM No.32304/2017 (of the respondent for directions).

KAMLESH KUMARI & ANR Petitioners
Through: Mr. Ravi Gupta, Sr. Adv. with Mr. Sachin Jain and Ms. Mallika Bhatia, Advs.

versus

ROHTAS GOYAL Respondent
Through: Mr. Dinesh Kumar Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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21.09.2017

1. This petition under Article 227 of the Constitution of India impugns the order (dated 5th November, 2016 in CS No.316/16 of the Court of Additional District Judge (North-East)-01, Karkardooma Courts, Delhi) of dismissal of the application of the petitioners / plaintiffs in the suit under Order VI Rule 17 of the Code of Civil Procedure, 1908 (CPC) for amendment of the replication.

2. The counsel for the respondent / defendant appeared on advance notice and the matter was adjourned from time to time. Vide order dated 30th March, 2017, further proceedings in the suit were stayed on the application of the petitioners / plaintiffs and the said order has continued.

3. Vide order dated 25th August, 2017 the hearing of this petition was adjourned to 20th February, 2018. The respondent / defendant filed an application for vacation of the stay contending that the suit, from which this

petition arises, is consolidated with a suit for recovery of possession filed by the respondent / defendant against the petitioners / plaintiffs and the interim order was thus affecting the respondent / defendant.

4. The aforesaid application came up before this Court on 5th September, 2017 and was directed to be listed today for appearance of the counsel for the petitioners / plaintiffs. The senior counsel for the petitioners / plaintiffs appears and the counsels have been heard.

5. The learned Additional District Judge has dismissed the application for amendment of the replication, though filed before commencement of trial, in terms of dicta of this Court in *Mohd. Saleem Vs. Naseer Ahmed* AIR 2007 Del 48, for the reason that the averments sought to be taken by way of amendment were not relevant for adjudication of the matter in controversy.

6. The two petitioners / plaintiffs claim to be the wife and son respectively of one late Shri Shyam Sunder Goyal and the respondent / defendant is the brother of the said Shyam Sunder Goyal. It is the case of the petitioners / plaintiffs in the suits that the respondent / defendant had orally agreed to sell immovable property bearing No. C-9/261, Yamuna Vihar, Delhi – 110 053 of which the petitioners / plaintiffs are in possession, to Shyam Sunder Goyal and received Rs.22,00,000/- from Shyam Sunder Goyal towards purchase consideration.

7. The respondent / defendant denies the Agreement to Sell and claims the sum of Rs.22,00,000/- to have been received on some other account. The respondent / defendant in the written statement has also taken a stand that Shyam Sunder Goyal had abandoned the petitioners / plaintiffs and since

1985, was claiming one Sandhya Goyal to be his wife.

8. Both counsels admit that there are several other proceedings between the parties *inter se* as well as with the members of the family of which the parties are a part.

9. The petitioners / plaintiffs by way of amendment wanted to take the pleas (i) of the said other litigations; (ii) of collusion of the respondent / defendant with Sandhya Goyal and other family members; (iii) of the respondent / defendant in earlier proceedings having denied Sandhya Goyal to be the wife of Shyam Sunder Goyal; and, (iv) the said Sandhya Goyal also having denied being the wife of Shyam Sunder Goyal.

10. The aforesaid pleas have in the impugned order, been held to be not relevant for adjudicating the claim of the petitioners / plaintiffs for specific performance.

11. A perusal of the issues framed in the suit on 16th July, 2014 shows the same to be as under:-

- “1. *Whether there exists oral agreement to sell between the predecessor-in-interest of the plaintiff and the defendant, if so, its effect? OPP*
2. *Whether the plaintiff is entitled for a decree of specific performance? OPP*
3. *Whether the plaintiff is entitled for a decree of recovery of damages in the alternative to the tune of Rs.22,00,000/- against the defendant? OPP*
4. *Whether the defendant is entitled for a decree of recovery and possession of the premises bearing no.C-9/261, Yamuna Vihar, Delhi- 110053? OPD*
5. *Whether the defendant is entitled for a decree of recovery of Rs.2,20,000/- for use and occupation*

charges? OPD

6. *Whether the defendant is entitled for a decree of recovery of pendente lite and future use and occupation charges, if so, at what rate and for what period? OPD*

7. *Relief.”*

12. The only issue on which perhaps the question of the status of the petitioners / plaintiffs as heirs of Shyam Sunder Goyal can arise, is issue no.1 aforesaid.

13. I have enquired from the counsel for the respondent / defendant, whether the respondent / defendant in the said suit or in the suit with which the said suit has been consolidated, would take a stand to the prejudice of the petitioners / plaintiffs being not the heirs of Shyam Sunder Goyal.

14. The counsel for the respondent / defendant states that the respondent / defendant, without prejudice to his rights and contentions in other proceedings, in the suit from which this petition arises and in the suit consolidated therewith, will not take the plea of the petitioners / plaintiffs being not the heirs of Shyam Sunder Goyal and the said suit be decided on the premise of the petitioners / plaintiffs being the heirs of Shyam Sunder Goyal.

15. That takes care of the anxiety of the petitioners / plaintiffs with which amendment was sought.

16. Binding the respondent / defendant to the aforesaid statement, the petition is disposed of.

17. The date of 20th February, 2018 stands cancelled.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 21, 2017/‘pp’..CM(M) No.1365/2016

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