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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **C.R.P. 227/2017**

SYED MOHD YAHYA NIZAMI Petitioner

Through: Mr. S.H. Nizami, Adv.

Versus

MOHD USAMA Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **16.10.2017**

CM No.37284/2017 (for exemption)

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

C.R.P. 227/2017 & CM No.37283/2017 (for stay)

3. This Revision Petition under Section 115 of the CPC impugns the [order dated 6th September, 2017 in CS No.7089/2016 of the Court of Additional District Judge (ADJ)01, South District, Saket Courts, New Delhi] allowing the application of the respondent /plaintiff for amendment of the plaint and dismissing the application of the petitioner / defendant under Order VII Rule 11 of the CPC.
4. *De hors* the technicality that whilst against dismissal of an application under Order VII Rule 11 of the CPC, Revision Petition under Section 115 of the CPC lies and against the order allowing the application under Order VI Rule 17 of the CPC, a petition under Article 227 of the Constitution of India would lie, the counsel for the petitioner has been heard and the copies of the trial Court record annexed to the paper book perused.

5. What emerges is, that the respondent / plaintiff instituted a suit against one Ishrat Begum for specific performance of an Agreement for Sale of immovable property by directing her, *inter alia*, to handover symbolic possession of the property agreed to be sold and by passing a decree for possession of the property in his favour. The said Ishrat Begum died during the pendency of the suit and the respondent / plaintiff applied for substitution of her legal heirs. The petitioner / defendant also applied for impleadment in the suit claiming Ishrat Begum to have gifted the property to the petitioner / defendant.

5. On 29th May, 2013, the counsel for the respondent / plaintiff withdrew the suit against the legal representatives of the deceased Ishrat Begum and gave his “No Objection” to impleadment of the petitioner as a defendant in the suit. Accordingly, the petitioner / defendant was impleaded as a defendant in the suit and the suit against the LRs of Ishrat Begum was dismissed as withdrawn.

6. The respondent / plaintiff applied for amendment of the plaint, pleading that the respondent / plaintiff, under the Will of Ishrat Begum, had become the owner of the property and since the petitioner / defendant was in unauthorized occupation of the property, seeking recovery of possession from the petitioner / defendant as an unauthorized illegal occupant.

7. The petitioner / defendant applied under Order VII Rule 11 of the CPC for rejection of the plaint stating that the suit for specific performance after “dismissal as withdrawn” of the suit against the agreement seller, was liable to be dismissed.

8. The learned ADJ, vide the impugned order dated 6th September, 2017, has allowed the application for amendment and reasoning that the petitioner / defendant had himself become party to the suit by filing the application for impleadment under Order I Rule 10 of the CPC and that whether or not the petitioner / defendant is covered by the Proviso to Section 19(b) of the Specific Relief Act, 1963 can only be determined at trial, dismissed the application under Order VII Rule 11 of the CPC.

9. The order, insofar as dismissing the application under Order VII Rule 11 of the CPC, wrongly refers to Section 19(b) of the Specific Relief Act ignoring that pursuant to the amendment which had been allowed, the suit was no longer for specific performance of the Agreement to Sell but was for recovery of possession of the property from the petitioner / defendant on the basis of title. Similarly, the mere fact that the defendant may have himself sought impleadment in the suit, does not preclude the defendant from applying under Order VII Rule 11 of the CPC.

10. The counsel for the petitioner / defendant has contended that by allowing the amendment, the nature and character of the suit has been permitted to be changed, from that of specific performance to that of recovery of possession of immovable property on the basis of title.

11. Though there is merit in the aforesaid plea but in the facts of the present case, where the respondent / plaintiff in the suit as originally filed for specific performance also claimed the relief of possession though in pursuance to specific performance only and further, since according to the respondent / plaintiff, the respondent / plaintiff during the pendency of

the suit has acquired title to the property under the Will of the deceased / defendant and yet further, since the suit is now pending for the last over six years, it is not deemed appropriate to interfere in exercise of powers under Article 227 of the Constitution of India and it is deemed appropriate to allow the lis to continue.

12. The counsel for the petitioner / defendant has contended that since the deceased Ishrat Begum, after the execution of the purported Will in favour of the respondent / plaintiff has gifted the property to the petitioner / defendant, the respondent / plaintiff, even if the Will were to be believed, would not inherit the property and not acquire any title thereto.

13. This is an argument on the merits of the suit as it now stands and it will be open to the petitioner / defendant to take the said defence.

14. The counsel for the petitioner / defendant states that Ishrat Begum was the owner of only undivided share in the property.

15. It will be open to petitioner / plaintiff to take the said plea also in defence to the suit.

16. Only for the aforesaid reasons, though commenting adversely on the impugned order, I refuse to interfere.

Dismissed

No costs.

RAJIV SAHAI ENDLAW, J

OCTOBER 16, 2017

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