

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

% Order delivered on: July 21, 2014

+ **CS (OS) No.280/2011**

DEV CHANDER SOOD & ORS. Plaintiffs
Through Mr.Naresh Thanai, Adv.

versus

H.L. SUD & ORS. Defendants
Through Mr.Shariq, Adv. for Mr. N. Raja
Singh, Advocate

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. The plaintiffs have filed a suit for partition against the five defendants. The parties are related to each other. None of the defendants filed the written statement. The defendants' right to file the written statement was closed by order dated 30th January, 2013.

2. An application for recalling of the said order was filed which was withdrawn. Subsequently, the plaintiff has filed affidavit by way of evidence and examined himself.

3. On 28th February, 2014, the court has passed the following order:

"1. The matter has been directed to be listed before the court by the learned Joint Registrar.

2. A perusal of the order dated 25.2.2014 and the statement of PW-1, Dev Chand Sood, recorded on the said date shows that though Dev Chand Sood has been examined as PW-1; however, the witness was not made available for the purpose of cross-examination to the defendants. Even if the written statement has not been filed by the defendants, still they have a right to cross-examine the witness examined on behalf of the plaintiffs. I, therefore, feel that PW-1 should be recalled for the purpose of cross-examination by the defendants.

3. It is further stated by the learned counsel for the defendants has stated that *de hors* the non-filing of the written statement, the defendants can still be permitted to adduce evidence in order to challenge the case which has been set up by the plaintiffs that the suit for partition is not maintainable only respect of the two properties but also with regard to the other properties, details of which are stated to have been given by them in the plaint itself.

4. The learned counsel for the plaintiffs seeks time to address the court with regard to production of evidence by the defendants.

5. List before the Joint Registrar for the purpose of cross-examination on 21st April, 2014.

6. List before court on 21st July, 2014.”

4. In view of the order passed as referred above, the submission of the defendants is that the defendants be granted liberty to cross-examine the plaintiff and lead evidence in order to rebut the case of the plaintiff.

5. Mr. Naresh Thanai on the other hand has referred the provision of Order 8 Rule 5 CPC which provides that defendant must specifically deny averments and facts set out in the plaint. In case of no specific denial or evasive denial, it amounts to admission. Sub rule

further provides that in case no written statement has been filed by defendant, the court may pronounce judgment.

6. It is argued by him that no evidence which is beyond the pleadings is admissible or can be looked into. Defendants have not filed the written statement and there is no pleading on their behalf. Thus, defendants cannot be permitted to lead any evidence in the cross examination of the plaintiffs. Evidence can be allowed on behalf of the defendants limited to examination-in-chief and the witnesses cannot be permitted to be cross-examined beyond the pleading of the plaintiffs. The defendants have the right to cross-examine only to demolish the version of the plaintiff who cannot set up any other evidence either in cross-examination or by way of leading evidence.

7. Mr. Thanai has referred the following judgments in support of his arguments:

- a. In ***Siai Sinha vs. Shivadhari Sinha and Ors.*** AIR 1972 Pat 81, it was observed as under:

The suit, however, was not taken up for hearing ex parte against the petitioner nor was it ordered to be so taken up. The position of law in such a case is that a defendant, even without filing a written statement, can take part in the hearing of the suit. He may cross-examine the plaintiff's witnesses to demolish their version in examination-in-chief. Without written statement, however, he cannot be permitted to cross-examine the witnesses on questions of fact which he himself has not pleaded nor can he be allowed to adduce evidence on Questions of fact which have not been pleaded by him by filing any written statement.

- b. In ***Bhagat Singh and Ors. vs. Jaswant Singh***, AIR 1966 SC 1861, it was held that where a claim has never been made in the defence presented, no amount of evidence can be looked into upon a plea which was never put forward.
 - c. In ***Kishori Lal vs. Mst. Chaltibai***, AIR 1959 SC 504, the written statement had been filed by the defendant. After evidence was led, defendant sought to set up a case on the basis of evidence on record which however had not been pleaded in the written statement. It was held that the defendant could not be allowed to set up a case different to his case in the written statement.
 - d. In ***Trojan & Co. Ltd. vs. Rm. N.N. Nagappa Chettiar***, AIR 1953 SC 235, it was held that it is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case. It was further held that the plaintiff was wrongly granted a decree.
8. It is argued by Mr. Thanai that in view of settled law, the evidence which is sought to be produced by the defendants cannot be allowed in absence of the written statement. As there are no pleadings on behalf of defendant, evidence cannot be led by defendants. Any evidence if led, would be beyond pleadings. As far as the cross-examination of plaintiffs witnesses is concerned, the

defendants can cross-examine the witnesses of the plaintiff only to the extent to demolish the version of the plaintiff not otherwise as per the version of the defendants who failed to plead the same in their written statement.

9. Before considering the argument of Mr. Thanai, one is to consider the nature of dispute between the parties. It is a suit for partition. The defendant No.1 is the father of plaintiff No.1. In a suit for partition, every defendant is the plaintiff and similar is the position vica-versa. No doubt in the present case, right to file the written statement of behalf of defendants has been closed. Even defendants' application for recalling of the said order was withdrawn but the fact of the matter is that the written statement on behalf of defendants was prepared for filing. Copy of the same was also served to the learned counsel for the plaintiffs who has admitted the said fact before Court. The defendants' counsel is not sure as to whether the said written statement was filed in the registry or not. It is not available on record. One written statement on behalf of defendant No.1 to the amended suit for partition is available which was filed on 29th April, 2013. The amendment application was allowed by order dated 11th December, 2012. It is evident from the record that on 18th October, 2011, the statement was made by the defendants' counsel that he would file the vakalatnama and written statement during the course of the day. Two weeks time was also granted to the other defendants i.e. 3 to 5 to file the written statement and reply. The matter was adjourned to 24th February, 2012. However, in the

meantime before the next date, the plaintiff filed an application for amendment of the plaint under Order 6 Rule 17 CPC being I.A. No. 2065/2012 which was allowed by order dated 11th December, 2012. Prior to allowing the application, it was recorded in the order dated 24th February, 2012 by the Joint Registrar that as per defendant No.1, the written statement was filed but the same is not on record.

10. When the amendment was allowed by order dated 11th December, 2012, the defendants were granted four weeks time to file the written statement and the matter was referred to the Joint Registrar for 30th January, 2013 when the right to file the written statement to amended plaint was closed.

11. The fact remains that the subsequent written statement filed on behalf of defendant No. 1 on 29th April, 2013 is available, no specific orders have been passed to remove the written statement from the record. It was merely mentioned in order dated 1st May, 2013 that the right to file the written statement is closed on 30th January, 2013 and application for recalling of order was withdrawn. The matter under these circumstances was proceeded further for recording of evidence of the plaintiff.

12. Learned counsel appearing on behalf of defendant No.1 on merits states that the plaintiffs have not included properties in the suit which are joint family properties. He referred to the agreement dated 25th October, 2006 and 12th December, 2007. The plaintiffs have also not disclosed that the suit property has already been gifted by defendant No.1 to defendant No. 2, 4 and 5 by gift deed dated 20th

March, 2009 registered on 21st March, 2009 vide registration No. 3136 i.e. 1/3rd share to defendant No.2. The defendant No.1 is head of the family and in order to avoid any conflict of interest between the children, he has executed a Will on 20th March, 2009 which was registered with the sub-registrar office in respect of all the movable and immovable properties where fair distribution is being described. The plaintiffs have concealed the fact of two gift deeds i.e. one gift deed dated 13th April, 2009 registered on 15th April, 2009 whereby 1/3rd of the suit property was granted in favour of defendant No.5 and another gift deed dated 24th April, 2009 registered on 27th April, 2009 whereby defendant No.1 gifted 1/3rd share in the suit property to defendant No.4. The plaintiffs have merely filed family settlement agreement dated 25th October, 2006 by re-writing it and have concealed the facts in the re-written wording that 1/3rd portions of two Bantana, Dhakoli plots would be shared equally by three children of defendant No.1 – father of plaintiff No.1

13. The right to file the written statement in the present case is already closed. At this stage, this Court cannot discuss the merit of the case of defendant No.1 who is the father of plaintiff No.1. However, this Court is of the view that in order to demolish the case of the plaintiffs, the defendants are entitled to cross-examine the witnesses of the plaintiffs as they have already joined the proceedings and are appearing in the matter and they cannot be asked to restrict their cross-examination only to the extent of

statement made in the plaint and no question beyond the pleading of the plaintiff be asked.

14. (i) In the case of **Shri Labh Chand Jain Vs. Shri Sujan Chand Jain and Ors.**, in CS(OS) 2214/1988 (Decided On: 02.07.2010), in Para 5, it was observed as under:

“5. A person who does not file written statement to a suit is not ousted from the suit. A person may not file written statement in the suit for several reasons like, he may think that the suit was inherently not maintainable and he would convince the Court about non- maintainability of the suit; he may think that the claim of the plaintiff was justified and he need not contest the claim; he may think that the claim of the plaintiff, even if decreed, was not going to affect him, so why should he unnecessarily file written statement; he may think that since other defendants were contesting the suit that was sufficient to protect his interest and he need not separately file a written statement and engage a counsel. These are some of the few possibilities where written statement may not be filed by a person. However, a person who does not file written statement can still participate in the proceedings and lead evidence either supporting the claim saying that he agrees with the plaint or he may argue before the Court that the claim was inherently not maintainable and he can demonstrate this without filing written statement. The Court cannot deny a person the right to participate in the proceedings if a person does not file written statement or has remained ex parte upto some stage. However, such a person who has been proceeded ex parte cannot be relegated back to the initial stage and he will have to join the proceedings from the stage he started appearing in the Court. In the case in hand, defendant No. 3 joined the proceedings when evidence of defendants was going on and wanted that her evidence be also recorded. Under these circumstances, since she was allowed to participate in the proceedings, she had a right to

lead evidence in support of plaintiff case. However, since she had not filed written statement, it can be presumed that she was supporting the plaintiff case. However, she cannot be permitted to lead evidence on the pleadings of other defendants by saying that she had adopted the written statement of other defendants. She cannot be given liberty to lead evidence on those pleadings in written statement of other defendants on which other defendants had opportunity to lead evidence. In absence of her written statement she can lead evidence in support of plaintiff only to the extent of pleadings of the plaintiff. She cannot introduce new documents by attaching the documents along with affidavit of evidence, since the stage of filing documents was over long back.”

(ii) In ***Gobind Gorhi and Ors. Vs. Baldeo Ram and Ors.***, AIR 1930 Pat 293, in Para 9, it was observed as under:

“9. He argues that if it be held that the failure to file a written statement is not to be taken as an admission of every allegation of fact in the plaint, a defendant who has not filed a written statement might find himself at the trial of the case in a more favourable position than a defendant who had followed the ordinary procedure. But the purpose of the rule is clearly that a defendant when he does intake a written defence shall be compelled to make his defence specific. The rule does not apply to a case where the defendant has not put in a written statement, as was pointed out by Sir Lancelot Sanderson in *Ross v. Scriven* [1916] 43 Cal. 1001. It, therefore, cannot be held that these defendants are debarred from giving evidence which traverses the allegations made in the plaint, and their evidence must be considered on its merits. There is some discrepancy in the accounts which are given by Hazari Mandal and his son of the time at which payment was made; but Haza-zari Mandal is old and blind and apparently failing in memory, while his son Gobind was too young at the time to have any definite personal knowledge of the transaction. The confusion appears to be explained

by the evidence of Baldeo Ram himself, who says that Hazari Mandal paid up the debt of Rs. 300 on the original mortgage bond, and that after that he executed another bond for Rs. 1,200, the mortgage bond of 14th March 1917 which Baldeo Ram produced (Ex. A). Baldeo Ram explains that it was in respect of another bond that Hazari Mandal gave him the land and not settlement of this debt.”

15. The cases referred by the learned counsel for the plaintiff are not applicable in the fact of the present case and particularly in view of the nature of the dispute i.e. in a suit for partition wherein the Court has to judge the matter from different angles. In the cases referred, none of the case is of partition. Thus, these are distinguishable under these peculiar circumstances.
16. In view of the above and peculiar facts of the present case, the defendants are allowed to cross-examine the witnesses of plaintiff No.1 in order to demolish the case of the plaintiff. They can confront the registered documents i.e. gift deeds executed by defendant No.1 and also to lead evidence with regard that the view of the plaintiff was not tenable in law by confrontation of registered document.
17. No further order at this stage be passed.
18. List this matter before Joint Registrar on 22nd September, 2014 for further proceedings.

(MANMOHAN SINGH)
JUDGE

JULY 21, 2014