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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(OS) 499/2009, Counter Claim No.81/2009 & Counter Claim No.40/2010.

SHYAMA PAHWA Plaintiff

Through: Mr. Shailender Dahiya, Advocate

versus

NARENDER PRATAP BHALLA & ORS. Defendants

Through: Mr. Sajan Narain, Adv. for D1&D2

Mr. Deepak, Proxy counsel for D3

Ms. Suruchi Suri, Adv. for LR's of D4

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

27.11.2017

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1. IA No.17283/2013 (of the defendants no.1&2 under Order VII Rule 11 and also invoking several other provisions of the CPC but all for rejection/dismissal of the plaint/suit) and IA No.2432/2015 (of the plaintiff under Order VI Rule 17 of the CPC) are for consideration.

2. Before proceeding further, I may record that on 17th August, 2017, these applications were adjourned to 9th September, 2017. However, 9th September, 2017 was declared a holiday and all cases listed on the said date were ordered to be taken up on 24th November, 2017 which was a Saturday and as such the case is taken up today.

3. The law being, that even if the plaintiff has applied for amendment of the plaint, after the defendant has applied for rejection of the plaint, to get over the grounds taken by the defendant for rejection of the plaint, the application for amendment of the plaint is to be considered first (See *Anita Kumari Gupta Vs. Ved Bhushan* 2014 SCC OnLine Del 2895, *Gaganmal*

Ramchand Vs. The Hongkong & Shanghai Banking Corporation MANU/MH/0013/1950 and ***Gurumayum Prahlad Sharma Vs. Hidangmayum Gokulananda Sharma*** MANU/GH/0111/1962, the counsels were asked to address first on the application of the plaintiff for amendment of the plaint.

4. The counsel for the plaintiff has argued, (i) that the plaintiff filed the present suit *inter alia* for declaration of the documents allegedly executed by the plaintiff on 10th October, 2008 and 13th October, 2008, the Relinquishment Deed dated 12th January, 1995 allegedly executed by Smt. Basant Bhalla in favour of the defendant no.2, the Will dated 21st June, 1965 allegedly executed by Shri H.D. Bhalla in favour of the defendants no.1&2 and the Composition Deed dated 12th October, 1964 allegedly executed by Smt. Basant Bhalla and Shri H.D. Bhalla and the judgment and decree dated 17th July, 1975 in Civil Suit No.397/1974 titled ***Narindra Pratap Bhalla Vs. Harcharan Das Bhalla***, as sham, fabricated, null and void and unenforceable against the plaintiff and her legal heirs and that the alleged documents do not create any right, title or interest in favour of the defendants no.1 to 3 and their legal heirs in respect of the suit property; (ii) that inadvertently prayer for cancellation of the Relinquishment Deed dated 10th October, 2008 and the affidavits dated 13th October, 2008 was not made; and, (iii) that the plaintiff thus wants to amend the plaint to also claim the relief of cancellation of the said documents;

5. Being of the opinion that the plaintiff having sought the relief of declaration, the relief now sought to be claimed by way of amendment of cancellation of the said documents, is merely a surplusage, I have

straightway enquired from the counsel for the defendants no.1&2 as to why the amendment should not be allowed.

6. The counsel for the defendants no.1&2 draws attention to ***Liliben Vs. Ramilaben*** 2011 SCC OnLine Guj 2847 and ***Harsharan Singh Vs. Surinder Kaur Narula*** 2015 SCC OnLine Del 8984 but both of which are not found to be apposite.

7. The counsel for the defendants no.1&2 then states that he wants to cite other judgments and which are immediately not available with him.

8. The matter, if passed over is unlikely to reach again; being of a *prima facie* view that the amendment had to be allowed, instead of adjourning the hearing, the file is ordered to be kept in Chamber for orders on the application for amendment of the plaint to be passed and liberty is given to the counsels to, in the course of the day, hand over copies of the judgments on which they sought to rely.

9. Though the counsel for the defendants no.1&2 handed over copies of judgment, but order remained to be passed and the file went on the back-burner.

10. On going through the file, it is found:-

- (a) that this suit came up first before this Court on 17th March, 2009 and finding that the suit had been filed on behalf of the plaintiff by her son, averring in the plaint that the plaintiff was an insane lady and that the plaint was accompanied with an application under Order XXXII Rule 15 of the Code of Civil Procedure, 1908 (CPC) and further finding the averments in the

plaint of the plaintiff being of unsound mind to be doubtful and the plaintiff to have not been declared as a person of unsound mind, the personal presence of the plaintiff before the Court on 19th March, 2009 was directed;

- (b) on 19th March, 2009, the plaintiff appeared in person and disclosed her name, her education and her age correctly; she also disclosed that she was living with her son; she also disclosed that she sometimes forgets things; she disclosed that she herself disclosed the facts of this case to her son as well as to her advocate; some more questions were asked by this Court from the plaintiff to determine the mental status of the plaintiff and the statement of the plaintiff was recorded;
- (c) a perusal of the order dated 19th March, 2009 in the suit indicates that this Court on so examining the plaintiff was not satisfied that the plaintiff is a person of unsound mind, for the provisions of Order XXXII Rule 15 of the CPC to be applicable or for the suit on the basis of cause of action personal to the plaintiff to be filed by her son as her next friend; a perusal of the order dated 19th March, 2009 also indicates that the Court thus asked the counsel for the plaintiff, whether he would want to pursue the suit in its present form but the counsel for the plaintiff insisted on pursuing the suit in the form in which it was filed; recording so, this Court adjourned the matter to 11th August, 2009;
- (d) immediately on change of Roster, IA No.5699/2009 was filed

by the plaintiff to seek early hearing and which came up before this Court on 29th April, 2009;

- (e) the order dated 29th April, 2009 indicates that this Court, without realising that the suit was filed under Order XXXII Rule 15 of the CPC and that as per the earlier orders this Court was not satisfied of the maintainability of the suit, issued summons of the suit;
- (f) the suit is since languishing, with issues even having not been framed yet;
- (g) the defendants no.1&2 even filed written statement and counter claim running into as many as 200 pages and violative of all laws relating to pleadings;
- (h) the counter claim made is *inter alia* for dismissal of the suit and for which there is no need;
- (i) the defendants no.1&2 have applied for rejection of the plaint *inter alia* on the ground of the suit having not been admitted for hearing; and,
- (j) the plaintiff to have died and has been substituted by her son who had earlier instituted the suit as the next friend of the plaintiff.

11. Though it is doubtful that inspite of the Court having ordered summons of the suit to be issued, it is open to the defendants to contend that there is no admission of the suit or that the issuance of summons of the suit is without application of mind, but else the law is clear: when a suit is filed

as the next friend of a person who, owing to state of mind, is unable to act on his own, an inquiry is necessarily required to be conducted and the suit cannot be proceeded with further. I have recently on 11th August, 2017, had occasion to reiterate the same including by reference to my earlier judgment in *Mithilesh Chauhan Vs. Rajesh Kumar Pandey* 2009 SCC OnLine Delhi 3481 and to *Jairamgurnami Vs. Shantagurnani* (1979) 15 DLT 8, *Jai Prakash Goel Vs. State* 2004 (77) DRJ 187 and *Radhika Kapoor Vs. State* 2016 (159) DRJ 437, in the order in CM(M) 864/2017 titled *G.S. Bawa Vs. Surinder Kaur*.

12. This is thus not a case where amendment of the plaint is sought to get over the lacuna or the ground on which the defendants have sought rejection of the plaint. The counsel for the defendants no.1&2, though ought to have pointed out the said aspect during the hearing, did not.

13. In the present case, though an enquiry under Order XXXII Rule 15 of the CPC was conducted by the Court and the Court was not satisfied of the maintainability of the suit but subsequently, summons of the suit were ordered to be issued without expressing opinion contrary to that expressed earlier.

14. It is thus felt that the application of the plaintiff for amendment of the plaint ought not to be decided first or till the suit is held to have been appropriately instituted.

15. Ordinarily, the Court would have at this stage ordered such an inquiry into the state of mind of the plaintiff, to be conducted. However, the plaintiff is no more. The question arises, as to how the said enquiry is to be conducted now.

16. It is deemed appropriate to grant an opportunity to the counsels to address on the said aspect.

17. Before parting, I however implore upon the counsels, particularly the counsel for the defendants no.1&2 who appear to be the only contesting defendants, to in future, strictly follow the law of pleadings and to not make pleadings, including in applications, as made till now. The counsels are also requested to come fully prepared and to be precise in their submissions.

12. List on 21st February, 2018.

RAJIV SAHAI ENDLAW, J

NOVEMBER 27, 2017

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(Corrected & released on 30th January, 2018)