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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : October 15, 2018

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Judgment pronounced on: November 01, 2018

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FAO(OS) 114/2016 AND CM APPL. 13061/2016

AJAY SHARMA & ANR Appellants

Through Mr. Rajat Aneja and
Ms. Chandrika Gupta, Advs.

versus

MANU MARKANDE Respondent

Through Mr. Nitesh Kumar Singh and
Ms. Savita, Advs. for R-2 & R-5.

FAO(OS) 190/2016

MANU MARKANDE AND ANR Appellants

Through Mr. Nitesh Kumar Singh and
Ms. Savita, Advs.

versus

STATE & ORS Respondents

Through Mr. Rajat Aneja and
Ms. Chandrika Gupta, Advs. for
R-3 & R-4.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. These two appeals impugn the order dated 14.01.2016 passed by the learned Single Judge, partly allowing an application (IA No.21049/2014) seeking amendments in the

reply/objections (written statement) filed Ajay Sharma, (appellant in FAO(OS) No.114/2016, hereafter “Ajay” and Vijay Kumar Sharma (third respondent, hereafter “Vijay”) in Test. Cas.51/2010).

2. The relevant facts are that one Pyare Lal Sharma and his wife Shanta Sharma (both since deceased) had two sons and three daughters namely, Vijay, Ajay, Ms. Surakasha Markande (since deceased hereafter “Suraksha”); Ms. Sudesh Khanna (“Sudesh” hereafter); and, Ms. Vinay Sharma (“Vinay” hereafter). Surakasha predeceased her parents and died on 16.03.1999. Pyare Lal Sharma died on 20.08.2000 and Shanta Sharma died on 10.12.2000. Suraksha was married and had two children namely, (Manu Markande and Manishree Markande- (hereafter “Manu” and “Manishree”). They are appellants in FAO(OS) 190/2016.

3. What emerges from the chequered history of the case is that in 2007, the surviving sons and daughters of Pyare Lal Sharma (viz. Vijay, Ajay, Sudesh and, Vinay) filed a petition under Section 372 of the Indian Succession Act (Succession Cas. No. 183/2007 i.e. Sudesh Khanna & Ors. vs. State & Ors.) seeking a succession certificate in respect of debts and security etc. of Pyare Lal Sharma and Shanta Sharma.

4. In the petition, (before the Administrative Civil Judge, Delhi) Manu and Manishree were arrayed as the second and third respondents. During the pendency of the petition, sometime in July, 2010, Manu and Manishree filed Test. Cas. No.51/2010

before this court under Section 270, 278 and 300 of the Indian Succession Act for grant of Letters of Administration in respect of the estate of the deceased Pyare Lal Sharma and Shanta Sharma. In that petition, Sudesh, Vijay, Ajay and Vinay were arrayed as second to fifth respondents. Later, on a transfer petition (being TR.P.(C) 32/2010) filed by Manu, on an order dated 12.04.2012, the Succession Case No. 183/2007 titled Ms.Sudesh Khanna and Ors. vs. State & Anr. pending before the Administrative Civil Judge was transferred to this court and tagged along with Test. Cas. No.51/2010. Succession Cas. No. 183/2007 on transfer was registered as Test. Cas.46/2012.

5. Pleadings in both the cases were complete, when Ajay and Vijay filed I.A. no.21049/2015 under Order 6 Rule 17 CPC seeking amendment of the common reply/objections dated 03.10.2012, in short, 'the said application'. Adverting to the record of the proceedings and the conduct of their counsel in prosecuting the case on their behalf and the fact that at the relevant time they were residents of West Indies and Canada respectively and there was communication gap between them and their counsel, they sought amendments to their reply/objections (written statement), which are well enumerated in para 2 of the impugned order. Suffice to say, by the amendment sought, Ajay and Vijay sought to incorporate the plea of execution and existence of a family agreement dated 11.10.1993, in short, 'the subject family agreement' by Surakshsa and elaborate the due

execution of the Will dated 16.08.2000, in short, 'the subject Will'. Besides such pleas, Ajay and Vijay also sought to incorporate the plea that Test. Cas. no. 51/2010 was barred by limitation alleging that the immovable property bearing no. C-113, Naraina Vihar, Delhi stood mutated in their favour in the year 2001 itself and in view of the fact that the subject Will was dated 16.08.2000, the petition seeking Letters of Administration in the year 2010, was time barred.

6. The amendment sought was opposed by Manu and Manishree on the premise that both the documents viz. the subject family agreement and the subject Will were forged and fabricated and that the said pleas were not only inconsistent, but had the effect of wriggling out of the admissions made and an application under Order XII Rule 6 was already filed.

7. By the impugned order, the learned Single Judge declining the amendments as regards the questions of limitation, granted the said application to incorporate the pleas of the execution of the subject family agreement by Suraksha and the subject Will by Pyare Lal Sharma. On account of the amendments partly allowed and partly declined, both the parties have preferred their respective appeals in hand.

8. It is submitted on behalf of Manu and Manishree that the impugned order is unsustainable in law. It is argued that the amendments permitted not only had the effect of resiling from the admissions made, but also had the effect of permitting

inconsistent pleas founded on forged and fabricated documents and the said application was not *bonafide*. Placing reliance upon *Reevajeetu Builders and Developers vs. Narayanaswamy and sons and others*, (2009) 10 SCC 84, it was strenuously contended that ignoring the dishonest and *mala fide* conduct, the application was granted on the substantial aspects in a casual manner.

9. It was also contended that by granting the said application, the learned Single Judge has allowed Ajay and Vijay to set up a new case and rendered the application under Order XII Rule 6 filed by Manu and Manishree infructuous and that was contrary to the law laid down in *Gautam Sarup vs. Leela Jetly and others*, (2008) 7 SCC 85. Placing reliance upon *S. Malla Reddy vs. Future Builders Cooperative Housing Society and others*, (2013) 9 SCC 349, it was argued that the said application was malicious in the given facts and circumstances inasmuch as the plea of negligence of counsel was not sustainable, especially, when a plea of the similar nature was rejected earlier by the court.

10. Learned counsel for Ajay and Vijay however contended that the amendments were necessary to decide the real dispute amongst the parties and that for the laxity or the negligence attributable to an advocate, a litigant should not suffer. It was also contended that the request for amendment of plaint and the written statement stand on different footing inasmuch as in the written statement even alternate inconsistent pleas can be taken. In support of such submissions, reliance was placed on *Rajesh*

Kumar Aggarwal & Ors. vs. K.K. Modi & Ors., 2006(3) SCALE 312 and *Usha Balasaheb Swami vs. Kiran Appaso Swami*, AIR 2007 SC 1663.

11. The records of Succession Cas.183/2007 (since transferred to this court & numbered Test. Cas.46/2012 Ms. Sudesh Khanna and Ors. vs. State & Anr.) and Test. Cas. 51/2010 Manu Markande & Ors. vs. State & ors. were called for and perused.

12. The single judge culled out the amendments sought in the said application, which is too exhaustive, in para 2, as follows :

"(i) The mother of the petitioners Smt. Suraksha Markande had in her life time executed a family agreement dated 11.10.1993 whereby the mother Smt. Suraksha Markande had waived of her rights in the property bearing no. C-113, Naraina Vihar, New Delhi. It is contended that on account of the negligence of the earlier counsel this most important plea was not taken earlier. This plea which is now sought to be raised is supported by filing the original agreement dated 11.10.1993 executed by Smt. Suraksha Markande.

(ii) Late Sh. Pyare Lal Sharma the grandfather died leaving behind his Will dated 16.8.2000 as per which the petitioners received a sum of Rs.1 lakh each and gave up of their rights in the properties of their grandparents. Accordingly, the written statement is sought to be amended with other related facts that on account of the Will dated 16.8.2000 of late Sh. Pyare Lal Sharma, petitioners have no rights to the properties of the grandparents.

(iii) The petition for letters of administration is pleaded to be barred by limitation as the period of limitation is 3 years with respect to the probate case and thus this letters of administration case which has been filed in the year 2010 is time barred as the Will of late Sh. Pyare Lal Sharma is dated 16.8.2000.

(iv) The petition is also barred by limitation because the respondent nos. 3 and 4 had got mutated the suit property in

their names in the year 2001 and the claim of the petitioners to the suit property is hence time barred."

13. The amendments at serial nos. (i) and (ii) in the preceding para, it requires no elaboration, relate to material factual aspects and are concerning the valuable rights of the parties in the estate left behind by Pyare Lal Sharma and Shanta Sharma, especially, the immovable property bearing no. C-113, Naraina Vihar, Delhi. It is a matter of record that in Succession Cas. no. 183/2007 Ajay and Vijay along with their two sisters Sudesh and Vinay sought issuance of a succession certificate for distribution of only the movable assets comprising of the savings and fixed deposit amounts lying with various banks and shares etc. Furthermore, it is also a matter of record that in the reply, Manu and Manishree stated that no Will was left behind by Pyare Lal Sharma and in rejoinder, signed only Ms. Sudesh Khanna, it was not disputed. In this background, it appears, Manu and Manishree filed Test. Cas.51/2010 seeking Letters of Administration in respect of the estate left behind by Pyare Lal Sharma and Shanta Sharma. Whether the purported admission in the rejoinder in Succession Cas. no. 183/2007 (Test. Cas. 46/2012) in the hand of Sudesh had the effect of binding Ajay and Vijay on the material aspects of the existence of the subject Will, (on which basis the immovable property bearing no. C-113, Naraina Vihar, Delhi, is said to have been mutated in favour of Ajay and Vijay way back in the year 2001), would be a matter of consideration by the court. So would be case with regard to the factual aspects of due execution and

existence of the subject family agreement and the subject Will. Facts cannot be erased or obliterated. It is a different matter that a party in its pleadings admits or denies the existence of a fact. It is only when a dispute is raised as to the existence of a fact, that the court would proceed to adjudicate thereupon.

14. In the above background, when the court adverts to the case in hand, it would be relevant to note that in the reply/objection dated 03.10.2012 filed by Ajay and Vijay in Test. Cas.51/2010, which they sought to amend, there was no any admission of non-existence of the subject Will or the subject family agreement. To the contrary, they have averred for the due execution of the subject Will by Pyare Lal Sharma. Here, it is also relevant to note that in such reply/objections (written statement), they have also specifically averred that both Manu and Manishree have even received the amounts as per the wish of the testator under the subject Will to show that the subject Will was even acted upon to the knowledge of Manu and Manishree. In this background, the purported admission made in the rejoinder in Succession Cas. 183/2007 (Test. Cas.46/2012), which is signed only by Sudesh *prima facie*, cannot be said to be an un-equivocal admission of non-existence of the subject Will by Ajay and Vijay.

15. In the reply/objections dated 03.10.2012, Ajay and Vijay on their part also seek to explain that the Succession Cas. 183/2007 was filed to seek succession certificate only in respect

of movable assets of Pyare Lal Sharma and Shanta Sharma. Whether such plea is sustainable or not and/or would invite penal action(s) against them or Ms. Sudesh Khanna, of course, cannot be gone into at the stage of consideration of the said application seeking amendment of the pleadings. All amendments of the pleadings, it is settled law, are to be allowed as long as these are necessary for the determination of the real controversy in relation to the subject matter of an action. Though, it is equally true that an amendment cannot be allowed, when it has the effect of withdrawing an admission made by a party in the original proceedings, it is a matter of record that in the original reply/objections, which was sought to be amended, Ajay and Vijay did not make any admission, which the amendments allowed have the effect of being taken away. Then, whether any of the documents viz. the subject family agreement and/or the subject Will are forged and fabricated is a matter that can be adjudicated only on trial.

16. In the given facts and circumstances of the case therefore, the reliance placed on *Reevajeetu's* case (supra) by Manu and Manishree is misplaced. The Supreme Court in that decision in fact reiterated that the basic test governing the grant or refusal of amendment is whether such amendment is necessary for determination of real question in controversy or for proper and effective adjudication of the case. In doing so, supreme court has also said that the principles enumerated in the judgment supra

were only illustrative and not exhaustive. It is thus clear from the said judgment also that each case has to be decided on its own merits. *Gautam Sarup's* case is equally of no avail to Manu and Manishree because in Ajay and Vijay's original pleadings, which were sought to be amended, there is even no implied admission that Pyare Lal Sharma did not leave behind any Will. No question of any inconsistency in the pleas is therefore attracted. At the same time, it is equally well settled that even inconsistent pleas can be raised in the written statement. *S. Malla Reddy's* case (supra) is also distinguishable on facts inasmuch as in that case the plaintiff had sought to amend the plaint after 13 years having exhausted a full run of appeals up to the Supreme Court and had lost on two earlier applications under Order 6 Rule 16 and under Order 8 Rule 9 for the similar relief more-so when the hearing of the suit had already commenced. Here, however, the issues are not yet framed. In view of the foregoing, the FAO(OS) 190/2016 must fail.

17. This court further does not find any merit in FAO(OS) 114/2016 filed by Ajay and Vijay as regards the declining of the amendments on the questions of limitation. Suffice to say, learned counsel for Ajay and Vijay did not even advert to any provision of law on the premise whereof Ajay and Vijay have sought to raise the questions of limitation. Said appeal is wholly meritless and must fail with costs.

18. In view of the foregoing, FAO(OS) 190/2016 is dismissed without any order as to costs. FAO(OS) 114/2016 is however dismissed with costs of `50,000/- to be deposited with Delhi High Court Legal Services Committee within four weeks.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

NOVEMBER 01, 2018

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