

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

% **Date of decision: 29th May, 2018**

+ **CM(M) 11/2017 & CM No.239/2017 (for stay)**

ANILA DASGUPTA (DECEASED) THR LRS Petitioner
Through: Mr. S.K. Bhandari, Ms. Vandana and
Mr. Prem Prakash, Advs.

Versus

**MAYA BHATTACHARJEE (DECEASED)
THROUGH LRS Respondent**
Through: Mr. P.K. Maitra, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the order [dated 19th November, 2016 in CS SCJ No.7841/2016 of the Court of Civil Judge-04 (West), Tis Hazari Courts, Delhi] allowing the application of the respondent/plaintiff under Order VI Rule 17 of the Code of Civil Procedure, 1908 (CPC) for amendment of the plaint.

2. The petition came up first before this Court on 4th January, 2017 when notice thereof was ordered to be issued and on the application of the petitioner/defendant, the operation of the order impugned was stayed and owing whereto, the proceedings in the suit from which this petition arises have come to a standstill.

3. The counsel for the respondent/plaintiff has been appearing and the counsels were heard on 15th November, 2017.

4. The respondent/plaintiff, since deceased and represented through legal heirs, in or about the year 1987 instituted the suit from which this petition arises against the petitioner/defendant, also since deceased and represented

through legal heirs, for specific performance of an agreement of sale of immoveable property bearing No.J-1840, Chittranjan Park, Kalkaji, New Delhi and for injunction restraining the petitioner/defendant from alienating, encumbering or parting with possession of the said property.

5. Vide order dated 2nd December, 1987, the following issues were framed in the suit:

- “1. Whether the defendant agreed to sell the property in suit to the plaintiff as alleged?*
- 2. Whether the plaintiff has always been and is still ready to perform her part of the contract?*
- 3. Whether the plaintiff is entitled to damages from the defendant? If so, to what extent?*
- 4. Relief.”*

The order dated 2nd December, 1987 also records that the respondent/plaintiff was not pressing the relief of permanent injunction claimed in the suit.

6. Vide order dated 7th December, 1987 in the suit, reasoning that it was difficult at that stage to believe the existence of any agreement to sell as alleged in the plaint and that it was also difficult to believe that, while there was ample correspondence between the parties, the parties did not formalise a document evidencing the agreement to sell, the application of the respondent/plaintiff under Order XXXIX Rules 1&2 of the CPC for restraining the petitioner/defendant from alienating, encumbering or parting with possession of the property during the pendency of the suit was dismissed.

7. The respondent/plaintiff, in or about March, 1993 applied under Order

VI Rule 17 of the CPC for amendment of the plaint and which application remained pending till 19th November, 2016, when it was allowed vide the impugned order.

8. Though it is unfortunate that the suit, of specific performance of an agreement of sale of immoveable property, has remained pending for 20 years and recording of evidence of the respondent/plaintiff even has not commenced as yet inspite of issues also having been framed 20 years back but this is not the stage to ponder over the reasons for such undue delay. Rather, pronouncement of this order also has been delayed.

9. The counsel for the petitioner/defendant has argued, that the respondent/plaintiff was a tenant under the petitioner/defendant in the property aforesaid and till date continues in possession of the property. It is further stated that though the petitioner/defendant has instituted a petition under Section 14(1)(e) of the Delhi Rent Control Act, 1958 for eviction of the respondent/plaintiff from the premises as a tenant but the said petition for eviction also has been pending for several years and the Additional Rent Controller (ARC) is delaying hearing arguments and pronouncing order on the application for leave to defend filed by the respondent/plaintiff owing to the pendency of the suit for specific performance from which this petition arises.

10. Though again this is not the forum to comment thereon but it is inexplicable, as to why the ARC would not proceed with the petition for eviction and dispose of the application for leave to defend stated to be pending therein.

11. The counsel for the petitioner/defendant has argued that the

respondent/plaintiff in the plaint as originally filed, sued for specific performance of an oral agreement to sell and has in this regard drawn attention to the following paragraphs of the plaint as originally filed:

“2. *That the Defendant agreed to sell the aforesaid plot together with the built up property on 10.05.1985 for a total consideration of Rs.2,05,240/- (Rupees Two Lacs Five Thousand Two Hundred Forty Only), out of which the Plaintiff paid a sum of Rs.50,000/- (Rupees Fifty Thousand) by means of a cheque No.JP.0091840 dated 15.05.1985, the amount agreed to be paid pending sanction/permission of Land and Development Office. This Agreement was subject to sale permission being granted by the Land and Development Officer, Ministry of Works and Housing, New Delhi in obtaining which the Plaintiff assured the Defendant her assistance.*

3. *That it was also agreed that the Plaintiff would pay the Defendant the balance amount of Rs.1,55,240/- (Rupees One Lac Fifty Five Thousand Two Hundred Forty) once sale permission was obtained from Land and Development Office in addition to Rs.50,000/- (Rupees Fifty Thousand) payable before the sale permission is obtained and requisite sale deed is executed and in the following manner:*

- a. *Rs.50,000/- (Rupees Fifty Thousand) in National Saving Certificate of three years.*
- b. *Rs.50,000/- (Rupees Fifty Thousand) by Demand Draft account payee.*
- c. *Rs.30,000/- (Rupees Thirty Thousand) in cash.*
- d. *The balance of Rs.25,240/- (Rupees Twenty Five Thousand Two Hundred Forty Only) in the form of jewellerys.*

The Defendant in addition stipulated the items of jewellery and also gave the measurements to the bangles and necklace to purchase in satisfaction of the entire

consideration. No formal deed in respect of this Agreement was thought necessary in view of the relationship between the parties and because of the fact the Plaintiff along with her husband and family was the tenant in the premises and in occupation and possession of the same. The only qualification/condition being sale permission being obtained from Land & Development Office, New Delhi.”

(emphasis added)

12. It is argued that it is owing to the express case of the respondent/plaintiff in the plaint and at the stage of decision of the application under Order XXXIX Rules 1&2 of the CPC and framing of issues and owing to the denial by the petitioner/defendant of any such Agreement, that the issues as aforesaid were framed and while dismissing the application of the respondent/plaintiff under Order XXXIX Rules 1&2 of the CPC, it was reasoned that it was unbelievable that the parties inspite of being in correspondence with each other would not formalise a document evidencing agreement to sell.

13. It is next contended, that the respondent/plaintiff, by way of amendment which has been allowed, seeks to substitute the case in the plaint as originally filed, of an oral agreement to sell, with a case of an agreement to sell in writing.

14. Attention is invited to the application for amendment, where the respondent/plaintiff has pleaded (i) that subsequent to fixing of the date of trial, the respondent/plaintiff came to know as a matter of fact that the oral agreement to sell was reduced to writing by the deed of Agreement to Sell executed by the petitioner/defendant on 3rd October, 1985; (ii) that it then

came to the knowledge of the respondent/plaintiff, that the petitioner/defendant had also executed a General Power of Attorney (GPA) in favour of the husband of the respondent/plaintiff and in which document also, the petitioner/defendant admitted execution of the Agreement to Sell in favour of the respondent/plaintiff; (iii) that these documents had been received by the respondent/plaintiff through a common friend.

15. The respondent/plaintiff thus wanted to amend the plaint to plead that the oral agreement to sell had been reduced into writing and was for a total sale consideration, instead of Rs.2,05,240/- as mentioned in the plaint as originally filed, of Rs.2,05,240/- and Rs.5,240/-. Para 2 of the plaint as reproduced above, was sought to be substituted to the following paragraph:

“That the defendant agreed to sell the aforesaid plot together with the built-up property on 10.5.1985 which was reduced to writing vide agreement dated 3.10.1985 for the total consideration of Rs.2,05,240/- (Rupees Two lacs Five thousand Two hundred Forty only) by means of cheque No. JP 0091840 dated 15.5.1985 and Rs.5,240/- (Rupees Five thousand Two hundred only) in cash vide receipt dated 11.8.1985 the amount agreed to be paid pending sanction/permission of L&DO. This agreement was subject to the sale permission being granted by the Land and Development Officer, Ministry of works and housing, New Delhi in obtaining which the plaintiff assured the defendant her assistance.”

16. The petitioner/defendant opposed the aforesaid application for amendment *inter alia* contending (a) that by way of amendment, a valuable right which had accrued to the petitioner/defendant was sought to be forfeited; (b) that by way of amendment, the respondent/plaintiff was wanting to deprive the petitioner/defendant of admission already made by the respondent/plaintiff; (c) that the respondent/plaintiff, by way of

amendment, was seeking to introduce absolutely new case inconsistent with the earlier one; (d) that the amendment was barred by limitation; (e) that the respondent/plaintiff had failed to state as to when the deed of the Agreement to Sell and the GPA had come to her knowledge; (f) that the alleged documents bear the signatures of the respondent/plaintiff and the respondent/plaintiff should have been in know of them.

17. The learned Civil Judge, before whom the suit is pending, allowed the amendment, reasoning (I) that the recording of evidence in the suit was yet to begin; (II) that though the respondent/plaintiff was changing her plea in the plaint from that of an oral agreement to sell to that of a written agreement to sell but the relief claimed in the suit remained the same; (III) that though the respondent/plaintiff by way of amendment was taking a stand contrary to the stand in the plaint as originally filed, however since the relief and the cause of action remained the same, hence at that stage, no prejudice could be said to be caused to the petitioner/defendant.

18. The counsel for the respondent/plaintiff has drawn attention to an application under Order XIII Rule 2 of the CPC dated 5th September, 1994 filed by the petitioner/defendant for filing additional documents in the suit.

19. It appears that the respondent/plaintiff along with the application aforesaid for amendment of the plaint, also filed an application for filing the deed of Agreement to Sell and GPA, on the basis whereof, the amendment aforesaid was claimed.

20. The petitioner/defendant in the application aforesaid under Order XIII Rule 2 of the CPC *inter alia* pleaded that the documents sought to be filed by the respondent/plaintiff along with her application for filing additional

documents were “procured back-dated and not genuine, making the defendant who is an old and ailing widow to sign the same when she was in semi-conscious state under threat and coercion. The defendant has brought out these facts in the letters written by her from time to time to her attorney who is handling the present case on her behalf.” The petitioner/defendant vide her application dated 5th September, 1994 aforesaid, under Order XIII Rule 2 of the CPC, wanted to produce the said letters written by the petitioner/defendant to her attorney.

21. The counsel for the respondent/plaintiff has argued that the petitioner/defendant by her pleas aforesaid has admitted the signatures on the deed of the Agreement to Sell and GPA to be hers, with her plea only being that the said signatures had been obtained when the petitioner/defendant was in a semi-conscious state and under threat and coercion. He has thus argued that once the petitioner/defendant had admitted the signatures on the deed of Agreement to Sell and GPA and on the basis whereof, the respondent/plaintiff claimed amendment of the plaint, the amendment has been rightly allowed. Attention has also been invited to the order dated 14th December, 2016 in the suit allowing the application of the respondent/plaintiff for filing the deed of Agreement to Sell and GPA on record.

22. I may however notice that the order dated 14th December, 2016 allows the application aforesaid of the respondent/plaintiff to file additional documents only for the reason of it being consequential to the application for amendment which had been allowed. Thus, if the order allowing the application for amendment were to be set aside in this proceeding, the order

dated 14th December, 2016 would also be of no avail and in any case the documents filed being beyond pleadings, cannot be proved.

23. The counsel for the petitioner/defendant has cited (a) *Heeralal Vs. Kalyan Mal* (1998) 1 SCC 278, (b) *R. Gupta Alias Raj Gupta Vs. Nirmal Nanda* 35 (1988) DLT 206, (c) *S. Malla Reddy Vs. Future Builders Cooperative Housing Society* (2013) 9 SCC 349.

24. The counsel for the respondent/plaintiff has cited (a) *Andhra Bank Vs. ABN Amro Bank N.V.* (2007) 6 SCC 167, (b) *Rajesh Kumar Aggarwal Vs. K.K. Modi* (2006) 5 SCC 385, (c) *Rajesh Sharma Vs. Krishan Pal* 2011 (126) DRJ 34, (d) *Rajkumar Gurawara Vs. S.K. Sarwagi and Company Private Limited* (2008) 14 SCC 364, (e) *A.K. Gupta and Sons Vs. Damodar Valley Corporation* (1966) 1 S.C.R. 796, (f) *Prithi Pal Singh Vs. Amrik Singh* (2013) 9 SCC 576, (g) *Prestige Lights Ltd. Vs. State Bank of India* (2007) 8 SCC 449.

25. I have considered the rival contentions.

26. The respondent / plaintiff, at the time of institution in February, 1987 of the suit from which this petition arises, took a categorical and unequivocal stand that “No formal deed in respect of this Agreement was thought necessary in view of the relationship between the parties and because of the fact that the plaintiff along with her husband and family was the tenant in the premises and in occupation and possession of the same”. The respondent / plaintiff however by way of amendment sought in March, 1993 i.e. after about six years of the institution of the suit, wanted to plead that there was an Agreement to Sell in writing. The same was indeed diametrically opposite and contrary to what was earlier pleaded. This is not a case of the respondent

/ plaintiff suing for specific performance of an agreement to sell without filing the Agreement to Sell along with the suit and subsequently producing the same. Here, I repeat, the respondent / plaintiff took a categorical stand not only of there being no Agreement to Sell in writing but also gave an explanation therefor. The question which arises for consideration is, whether a plaintiff in a suit for specific performance of an agreement of sale of immovable property can substitute by way of amendment one agreement for another. The impugned order though notices that the respondent / plaintiff by way of amendment was taking a contrary stand, still allows the amendment reasoning that the cause of action remains the same and the relief claimed in suit remains the same. The impugned order does not notice that the agreement to sell for specific performance of which suit was filed, was being substituted for another.

27. The reason given in the application for amendment may also be noted. Paras 5 to 8 of the application for amendment in this regard are as under:-

- “5. That the plaintiff’s late husband was dealing with the property and was discussing the matter with the defendant till the time of his death and plaintiff was not fully aware of the nature and contents of the documents with her. She had affixed her signature in some of the documents prepared by her late husband, the significance of which she was not aware and she was not having these documents in her custody.*
- 6. That on the death of the plaintiff’s husband on 9.2.1986 the defendant communicated to the plaintiff that she was no longer prepared to sell the property to the plaintiff and as such the plaintiff was forced to file the present proceedings on the basis of the oral agreement to sell as she*

was not having the written agreement nor she was aware of the existence of such a written agreement to sell.

7. *That subsequent to fixing the date of trial the plaintiff came to know that as a matter of fact the oral agreement to sell was reduced to writing by the deed of Agreement. To Sell executed by the defendant on 03.10.1985.*
8. *That recently it has come to the knowledge of the plaintiff that an agreement to sell was duly executed by the defendant and other documents like the general power of attorney in favour of the plaintiff's late husband, showing that the defendant has executed all necessary documents including the agreement to sell in favour of the plaintiff. These have been received through Mr. Bhaumik who is a common friend."*

28. Significantly, the respondent / plaintiff at the time of institution of the suit did not state that she had affixed her signatures on some documents prepared by her late husband and that the said documents were not found by her. It is also not as if the Agreement to Sell in writing was signed on behalf of the respondent / plaintiff by the husband of the respondent / plaintiff and the suit was also instituted in his lifetime and the respondent / plaintiff impleaded herself in the suit only after the death of her husband and subsequently discovered the Agreement to Sell. The husband of the respondent / plaintiff is stated to have died on 9th February, 1986 i.e. more than one year prior to the institution of the suit. Only a vague averment is made in the application for amendment that the documents have been received "through Mr. Bhaumik who is a common friend", without even disclosing as to how the documents went into the custody of the said Mr.

Bhaumik or as to when the said Mr. Bhaumik delivered the same to the respondent / plaintiff or as to what occasioned the said Mr. Bhaumik to now deliver the same to the respondent / plaintiff.

29. A perusal of the order dated 7th December, 1987 of dismissal of the application of the respondent / plaintiff under Order XXXIX Rules 1&2 of the CPC also shows a categorical stand having been taken by the counsel for the respondent / plaintiff in the hearing thereof that the Agreement to Sell of which specific performance was sought, was oral. Reliance rather was placed on certain letters, extracts whereof are reproduced in the said order, to show the keen desire of the petitioner / defendant to sell the property subject matter of suit to the respondent / plaintiff. The order dated 7th December, 1987, after perusing the said letters, held that it was difficult at that stage to believe the existence of any oral Agreement to Sell, especially in regard to the price and the mode of payment of the same and goes on to further observe that “it is further difficult to believe that when there was correspondence between the plaintiff’s husband on the one hand and the defendant on the other, where was the difficulty in not formalising a document evidencing the agreement to sell. There may have been roving talks but not a concluded agreement to sell”.

30. The possibility of the respondent / plaintiff, when the time of adducing evidence in the suit arrived, realising the difficulty in establishing an agreement to sell, creating the documents, cannot be ruled out.

31. The impugned order also appears to have been influenced by the admission of the petitioner / defendant of the signatures on the Agreement to Sell in writing and GPA being hers. However in my opinion the learned

Civil Judge erred in relying on the admission selectively. The averments of the petitioner / defendant in the application under Order XIII Rule 2 of the CPC did not amount to admission of the existence of the Agreement to Sell, for the learned Civil Judge to hold that notwithstanding the respondent / plaintiff having not earlier pleaded the same, amendment could be permitted. What the petitioner / defendant stated in the application under Order XIII Rule 2 of the CPC was that though there was no Agreement to Sell in writing but the respondent / plaintiff had created Agreement to Sell and GPA by obtaining signatures of the petitioner / defendant while she was in semi-conscious state and by using coercion.

32. In my view, a plaintiff in a suit for specific performance, cannot by way of amendment, substitute one agreement to sell for another.

33. I say that the Agreement to Sell in writing, pleaded by amendment and the agreement to sell for specific performance of which the suit was originally instituted are different, because:-

- (i) While the Agreement to Sell in writing is dated 3rd October, 1985, the agreement to sell for specific performance of which the suit was originally filed was pleaded to be of 10th May, 1985.
- (ii) While the Agreement to Sell in writing is for sale consideration of Rs.2,05,240/- and out of which a sum of Rs.5,240/- had been paid in cash on 11th August, 1985 and a sum of Rs.50,000/- had been paid through Bank Draft dated 21st August, 1985, as earnest money and the balance amount of Rs.1,50,000/- was to be paid at the time of transfer of the property, agreement to sell

for specific performance of which the suit was originally filed was for Rs.2,05,240/- out of which a sum of Rs.50,000/- was paid by means of cheque dated 15th May, 1985 (subsequently substituted with Bank Draft) and the balance amount of Rs.1,55,240/- was agreed to be paid at the time of execution of the Sale Deed.

- (iii) While the Agreement to Sell in writing is for payment of the balance amount of Rs.1,50,000/-, the agreement to sell for specific performance of which the suit was originally instituted was for payment of the balance sale consideration of Rs.1,55,240/- by means of National Saving Certificate for three years of Rs.50,000/-, Rs.50,000/- by Account Payee Demand Draft, Rs.30,000/- in cash and Rs.25,240/- in the form of jewellery.
- (iv) While the Agreement to Sell in writing records that the petitioner / defendant had handed over physical possession of the property to the respondent / plaintiff, under the agreement to sell for specific performance of which this suit was originally filed, possession of the property was not delivered by the petitioner / defendant to the respondent / plaintiff at the time of Agreement to Sell.
- (v) While the oral agreement to sell of 10th May, 1985 for specific performance of which suit was originally filed, qua payment of part of balance sale consideration in jewellery was reiterated by the petitioner / defendant on 29th August, 1985, the

Agreement to Sell in writing contains no mention of the jewellery.

34. In my view, the learned Civil Judge, in the impugned order, erred in holding that no new cause of action was being set up by the respondent / plaintiff and the relief claimed in the suit remained the same. The learned Civil Judge did not notice the aforesaid differences between the agreement to sell for specific performance of which the suit was originally filed and the Agreement to Sell sought to be set up by way of amendment. An Agreement of Sale of immovable property, besides the parties and the property agreed to be sold, has a large number of other ingredients and once the said ingredients change, it can no longer be said to be the same Agreement merely because the parties and the property is the same. Once the agreement to sell for specific performance of which suit was originally filed, was substituted for another Agreement to Sell, the cause of action also changed and cause of action for specific performance of one agreement to sell cannot be cause of action for specific performance of another Agreement to Sell. The respondent / plaintiff by way of amendment sought in the year 1993 was seeking specific performance of an Agreement to Sell entirely different from the Agreement to Sell for specific performance of which the suit was instituted in the year 1987 and the claim for seeking specific performance of the Agreement sought to be set up by way of amendment of the plaint was on the date of applying for amendment barred by time and could not have been permitted.

35. Moreover, the settled principle relating to amendment of plaints is, that admissions made cannot be withdrawn. The respondent / plaintiff in the

plaint as originally filed made an express admission of there being no Agreement to Sell in writing and could not have been permitted to withdraw the said admission by way of amendment.

36. As far as the judgments cited by the counsel for the respondent / plaintiff are concerned -

- (A) ***Andhra Bank*** and ***Rajesh Kumar Aggarwal*** supra are on the aspect of the Court, at the stage of considering the application for amendment, being not entitled to go into the merits of the amendment or the correctness or falsity of the case set up in the amendment. (I have however, in aforesaid reasoning, not gone into merits of amendment).
- (B) ***Rajesh Sharma*** supra is on the aspect of, when the trial commences (However the proviso to Order VI Rule 17 of the CPC was introduced vide amendment in the year 2002 to the CPC and is not applicable to the suit from which this petition arises which was instituted prior thereto in the year 1987).
- (C) ***Rajkumar Gurawara*** supra lays down that pre trial amendments are to be allowed liberally (However it also holds that amendments as may be just and *bona fide* are to be allowed; in the present case, for the reasons aforesaid, the amendment sought by the respondent / plaintiff is not found to be just or *bona fide*).
- (D) ***A.K. Gupta and Sons*** and ***Prithi Pal Singh*** supra lay down that

though amendment to set up a new case or a new cause of action is not to be allowed but where the amendment does not constitute addition of a new cause of action or raising a new case and amounts to nothing more than a different or additional approach to the facts already on record, it does not amount to setting up a new case. (However in the facts aforesaid, the respondent / plaintiff, by way of amendment, is seeking to change the facts by pleading a different agreement to sell of which specific performance is sought by amendment than the agreement to sell for specific performance of which the suit was originally filed).

(E) ***Prestige Lights Ltd.*** supra lays down that the petitioner who is guilty of misleading the Court is to be non-suited; relying thereon, it is contended that the petitioner / defendant herein suppressed its application under Order XIII Rule 2 of the CPC (However, the petitioner / defendant herein cannot be accused of concealment since the same is mentioned in the impugned order which has been produced before this Court).

37. The petition thus succeeds. The impugned order dated 19th November, 2016 allowing the amendment cannot be sustained and is set aside. Resultantly, the application for amendment moved by the respondent / plaintiff is dismissed.

The petition is disposed of.

RAJIV SAHAI ENDLAW, J.

MAY 29, 2018/bs/'pp'..