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

\+ **FAO(OS) 230/2017**

Date of decision: 15th November, 2018

BHUPINDER SINGH & ANR ..... Appellants

Through: Mr. Sunil Dalal& Mr. Chandan Rai Chawla, Advs.

versus

ATTAR SINGH & ANR ..... Respondents

Through: Mr. Madan Lal Sharma, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

This order disposes of the intra-court appeal filed by Bhupinder Singh and Randhir Singh.

2. The appellants, Bhupinder Singh and Randhir Singh, and the respondents, Attar Singh and Col. (Retd.) Yoginder Singh, are brothers.

3. The respondents have filed CS(OS) No. 1088/11 for partition of three immovable properties, bearing Nos. F-169 Village Katwaria Sarai, New Delhi, F-100 Village Katwaria Sarai, New Delhi and F-157,Village Katwaria Sarai, New Delhi.

4. Impugned order dated 10.07.2017 passed by the learned single Judge dismisses I.A. No. 12324/2016 filed by the appellants for amendment of the written statement to incorporate the plea that the parties had executed partition deed dated 20.06.1993 on the ground that trial had commenced as affidavit by way of plaintiff's evidence had been filed and plaintiff's witness had appeared for recording of deposition. Further, the appellants were negligent in not relying upon the purported partition deed dated 20.06.1993 earlier, as atleast a photocopy of the partition deed was available with them in July, 2015.

5. The impugned order also dismisses the Chamber Appeal OA No. 127/2016 filed by the respondents challenging the order of the Joint Registrar dated 11.05.2016 whereby the appellants were permitted to place on record a copy of the partition deed dated 20.06.1993 and sale deed dated 11.11.2005.

6. Having heard the learned counsel for the parties, we are inclined to permit the appellants i.e. Bhupinder Singh and Randhir Singh, to amend their written statement to specifically rely upon the purported partition deed dated 20.06.1993.

7. In the written statement, the appellants have pleaded and rely on alleged oral family settlement and understanding whereby their late father had given-up and relinquished his share in the suit property in favour of the parties.

8. As per the case set-up by the appellants, they were unable to trace out and locate the partition deed dated 20.06.1993.The document relied upon is an old one and the explanation that it could not be located is plausible and not make believe. There was no cause or reason for the appellants to

withhold the document and not rely on the document in the written statement. Thus, the assertion is that the purported document dated 20.06.1993 was untraceable. Assertion regarding a family settlement is not new and does not project a different case but supports the stand already taken.

9. The Joint Registrar vide order dated 11.05.2016 had allowed the appellants to place on record the partition deed dated 20.06.1993 and the sale deed dated 11.11.2005. In Chamber Appeal filed by the respondents challenging the said order stands rejected by another order of the same date, namely 10.07.2017.

10. Thus, there is an element of contradiction between the order disallowing the amendment application and the order dismissing the Chamber Appeal for production of partition deed dated 20.06.1993 and sale deed dated 11.11.2005. The impugned order rejecting the amendment application therefore would result in confusion and unnecessary legal controversy. Even otherwise the appellants could have confronted the document to the respondents during their cross-examination.

11. Primary reason given by the learned single Judge to reject the application for amendment is the proviso to Order VI Rule 17 of the Code, which states that '*no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial*.' Secondly, the impugned order highlights contradiction in the application for production of additional documents and the averments in the amended application. In the former application the reason stated was inadvertence, whereas in the application for amendment

the reason stated was that despite due diligence the appellants had not been able to earlier locate the partition deed. On the first aspect, we would record that the proviso permits amendment where the court is satisfied that despite due diligence the party could not have raised the matter. Therefore, the issue was of due diligence on part of the appellants. On the said aspect, we have already observed that the document was an old one and therefore, the submission that the document could not be traced merits acceptance. The plea and explanation regarding due diligence should not be rejected. Pertinently, the appellants have taken the defence of oral partition that was accepted and implemented by the parties. The contradiction alleged shows lack of proper pleadings rather than malafides and false statement. "Inadvertence" is rather a loose and ambiguous word. The object, intent and purpose behind the two applications and even the reasons given would indicate a connect, rather than a contradiction. Given the factual background, we would grant this latitude to the appellants.

12. At this stage, learned counsel for the respondents states that the appellants should be burdened with costs as application for amendment was filed after the trial had commenced. The appellants would file amended written statement, the respondents would also file replication to the amended written statement and this will put back the trial and decision of the suit by some months. Present appeal has remained pending since August, 2017. Consequently, there has been delay in trial.

13. In the given circumstances, we would accept the prayer made by the respondents and direct that the appellants shall pay costs of Rs. 25,000/- to the respondents for the delay caused.

14. Respondents have also submitted that since appellants have accepted the position that the parties were joint owners of the three properties but are claiming that there was an oral partition, onus of proving the defence should be on the appellants. With regard to the prayer of shifting of the onus, it will be open to the respondents to move an application before the learned single Judge to consider and examine the contention. The appellants would be at liberty to contest the application on all aspects including maintainability.

15. Costs as aforesaid would be paid within a period of three weeks from today. Amended written statement shall be filed within the said period. Replication to the amended written statement shall be filed within three weeks after service of the amended written statement.

16. Recording the aforesaid, the appeal is disposed of.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 15, 2018
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