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

+ **MAT.APP.(F.C.) 337/2019 & C.M.Applns.54941-43/2019**

PANKAJ VERMA

..... Appellant

Through: **Mr. Rajesh Rai, Advocate**

versus

PREET VERMA

..... Respondent

Through: **None**

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

23.12.2019

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1. The appellant is aggrieved by an order dated 30.09.2019, passed by the learned Family Court, East District, Karkardooma Courts, Delhi dismissing an application filed by him under Order VI Rule 17 of the CPC praying inter alia for amendment of the plaint.

2. The reasons for rejecting the amendment application filed by the appellant is that the evidence by way of affidavit was tendered by him on 22.03.2019 and the case was adjourned for his cross-examination. Only thereafter, did the appellant file the captioned application, on 08.04.2019.

Noting that the trial in the case has already commenced before the application was filed and further, taking into consideration that the suit instituted by the appellant had remained pending for over eight years, the learned Family Court has declined to entertain the amendment application filed by him in view of the proviso to Order VI Rule 17 of the CPC.

3. We may note that in the suit instituted by the appellant/plaintiff against his wife, he had prayed for a decree of declaration declaring that the defendant is a *benami* owner and trustee of the residential premises bearing No. A-3, East Baldev Park, Delhi-110051 and further, for a decree of permanent injunction restraining the defendant and her representatives, assigns, etc. from transferring, alienating, mortgaging or creating any third party interest in the subject premises.

4. As per the order-sheets placed on record, after the pleadings were completed in the suit, issues were framed by the Family Court on 05.03.2019 and on the same day, the parties were directed to file their list of witnesses and the appellant was directed to file the evidence by way of affidavit with a copy to the other side. The matter was adjourned to 22.03.2019, for recording the appellant's evidence. On 22.03.2019, the appellant tendered his evidence by way of affidavit and at the request of the learned counsel for the respondent, his cross-examination was deferred on the ground that a copy of the said affidavit has been furnished to the learned counsel on the very same day. As a result, the suit was adjourned to 20.04.2019 for the cross-examination of the appellant as PW-1.

5. On 08.04.2019, the appellant moved an amendment application praying *inter alia* that he be permitted to amend the prayer clause of the suit by substituting prayer (a) which was originally for a decree of declaration declaring that the respondent/defendant is the *benami* owner and the trustee of the suit premises and substitute the same by praying for a decree of declaration declaring him to be the *de jure* owner of the suit premises.

6. It is the contention of the learned counsel for the appellant that the

amendment application was necessitated in view of the additional issue that was framed by the Family Court on 19.11.2019, at the request of the respondent. He clarifies that aggrieved by the order dated 28.01.2019, passed by the Family Court by which an application moved by the respondent under Order 7 Rule 11 of the CPC for seeking rejection of the plaint, she had filed MAT.APP.(F.C.) 108/2019, which was disposed of by a co-ordinate Bench of this court on the date of admission itself vide order dated 10.04.2019. Learned counsel submits that at the time of disposing of the said appeal, the appellant was not present nor was he represented through a counsel.

7. The order dated 10.04.2019, passed by the Division Bench is as follows: -

“Challenge in this appeal is to the order dated 28.01.2019 passed by the Family Court by which an application under Order VII Rule 11 CPC filed by the defendant/appellant herein was dismissed. Mr. Sharma, learned counsel for the appellant submits that the view taken by the Family Court is erroneous on the face of the record. He submits that not only the suit is barred by limitation, the prayers so made on the face of it cannot be granted to the respondent.

However, after some hearing in the matter, learned counsel for the appellant submits that he would request the Family Court to frame a preliminary issue with regard to the maintainability of the suit.

We have heard the learned counsel for the appellant. We are of the view that the stand taken by the counsel for the appellant is just and fair.

It would be open for the appellant, if so advised, to request the Family Court to frame a preliminary issue with regard to the maintainability of the suit. We have no hesitation in saying that after hearing the respondent, the request of the appellant would be considered by the Family Court.

With these observations, the appeal stands disposed of.

CM.APPL 16880/2019 also stands disposed of.

8. After the aforesaid order was passed, the respondent/defendant approached the Family Court on 19.11.2019, praying *inter alia* that a preliminary issue be framed regarding the maintainability of the suit instituted by the appellant, as per the liberty granted by the High Court. Though the said prayer was opposed by the learned counsel for the appellant, the Family Court framed an additional issue regarding the maintainability of the suit instituted by the appellant. The submission made by the learned counsel for the appellant is that the preliminary issue subsequently framed by the Family Court on 19.11.2019, is the reason for the appellant to file the amendment application.

9. We are not persuaded by the submission made by the learned counsel for the appellant. The preliminary issue framed by the Family Court on 19.11.2019 at the instance of the respondent is only in relation to the maintainability of the suit, which would mean that the suit is liable to be rejected within the scope of the provisions of Order VII Rule 11 of the CPC, but not beyond that. However, the prayer made by the appellant in the amendment application is on an entirely different track. Under the garb of moving the amendment application, the appellant seeks to substitute the

relief prayed for earlier which was for a declaration against the respondent/defendant declaring her as a *benami* owner of the suit property and a trustee thereof and now, the appellant seeks a declaration to the effect that he is the *de jure* owner of the suit property.

10. We are inclined to concur with the view expressed by the learned Family Court that such an amendment application at a belated stage, when the matter is at the stage of recording evidence, cannot be allowed. The proviso engrafted to Order VI Rule 17 of the CPC, as amended w.e.f.01.07.2002, mandates 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 the trial. In the instant case, the trial has already commenced in the suit. Even otherwise, we are of the opinion that this is hardly a case where the appellant can seek amendment of the prayer clause by claiming that he could not have sought the said relief despite due diligence exercised by him.

11. Accordingly, the impugned order is upheld and the present appeal is dismissed in *limine* alongwith the pending applications.

HIMA KOHLI, J

ASHA MENON, J

DECEMBER 23, 2019/s