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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 17th September, 2019
+ **CM(M) 768/2019 & CM APPL. 23330/2019**
RAJESH AGGARWAL Petitioner
Through: Mr. Vikas Sharma, Advocate (M)

versus

OM PRAKASH & ANR. Respondents
Through: Mr. Narender Vashishta, Advocate (M-9811140704)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed challenging the order dated 16th March, 2019 by which an application for amendment has been allowed, permitting the Plaintiff/Respondent No.1 (*hereinafter, "Plaintiff"*) to incorporate a declaratory prayer and certain other paragraphs, in respect of the Petitioner's/Defendant No.2's (*hereinafter, "Defendant No.2"*) sale deed.
2. The suit dates back to 1991. Plaintiff and Defendant No.1 are brothers. Defendant No.2 is a purchaser of the property from Defendant No.1. At the time of filing of the suit, the alleged sale deed in favour of Defendant No.2, dated 28th November, 1990, had already been executed. The Plaintiff sought reliefs of partition, possession and injunction. The Defendants filed a counter claim. Finally, the following issues were framed by the Court on 24th November, 1995:

"1. Whether the plaintiff proves that his father Kishan

- Chand had executed a legal and valid will on 25.08.1994?*
- 2. Whether the plaintiff proves that by the said Will his father had given the right to purchase the plot from Refugee Cooperative Housing Society Limited in favour of his mother?*
 - 3. Whether the plaintiff proves that defendant no.1 and he himself had paid the instalments of the price of the said plot in equal share?*
 - 4. Whether the plaintiff proves that the building standing on the said plot is built out of the funds contributed equally by himself and defendant No.1*
 - 5. Whether the plaintiff proves that there was a family arrangement between him and defendant No.1 and memorandum dated 15.09.1966 is the memorandum of the said family arrangement?*
 - 6. Whether defendant No. 1 proves that signature of defendant No.1 as well as the mother of defendant No.1 on the document dated 15.09.1966 were obtained by duress and undue influence?*
 - 7. Whether the documents dated 15.09.1966 is admissible in evidence?*
 - 8. Whether the property in dispute was the joint family property of the plaintiff and defendant No.?*
 - 9. Whether defendant No.1 proves that plaintiff is occupying the portion of the property in dispute as his licensee?*
 - 10. Whether the plaintiff in the alternative proves that he has become owner of half of the property in dispute by adverse possession?*
 - 11. Whether defendant No.2 proves that he is a bonafide purchaser for value without notice of the title of the plaintiff?*
 - 12. Whether the counter claim is properly valued for the purposes of Court fee as well as jurisdiction? If no, what order?*

13. Whether the plaintiff has got half share in the property in question?

14. Whether the plaintiff is entitled to get partition and separate possession of his share in the suit property?

15. Whether the plaintiff is entitled to get a decree for perpetual injunction, as sought for?

16. Whether defendant No. 2 is entitled to get a decree of eviction against the plaintiff?

17. Whether defendant No.2 is entitled to claim and get mense profits at the rate of Rs. 10,000/- per month from 20.11.1990?

18. What order and decree?”

3. A perusal of the issues shows that the Plaintiff, as also Defendant No.2 have claimed rights in the property. Issues No.11 and 14 specifically relate to whether the purchase of the property by Defendant No.2 is *bona fide* and whether the Plaintiff is entitled to partition. Evidence already stands recorded between the parties and the matter is ripe for final arguments. During the course of arguments, an application under Order VI Rule 17 CPC was filed by the Plaintiff seeking to add some pleas in respect of the sale deed executed in favour of Defendant No.2 and a prayer for declaration that the said sale deed is null and void. This application for amendment was allowed by the impugned order in the following terms:

“...

*6. On the aspect of condonation of delay the plaintiff is required to show satisfaction of condition precedent as laid down in case titled **Vidyabai and Ors. v. Padamlatha and Anr. 2009 AIR SC 1433** wherein it is held that the proviso to Rule 17 of Order VI is couched in mandatory form. Discretion is vested in the Court to*

allow amendment subject to the conclusion that inspite of due diligence the parties could not have raised the matter before the commencement of the trial. It is laid down in the proviso that no amendment shall be allowed after the trial has commenced u/Order XIV of CPC at the stage of settlement of issues. The trial of the suit commences when material proposition of fact and law and when the admission and denial of respective parties is considered during the hearing. The issues in the present matter were framed on 24.11.1995 and issues in counter claim were framed on 20.03.1998. In the issues raised between the parties the sale deed allegedly in favour of defendant no. 2 is already under consideration under issue no. 11 that "Whether defendant no. 2 proves that he is bonafide purchaser for value without notice of the title of the plaintiff?"

7. Hence it is noted that by raising of such issue which is already on record the purchase by defendant no. 2 vide sale deed dated 28.11.1990 is already under contest between both the parties before the present Court and evidence is led. The same is contested between the parties. Hence the plaintiff has shown due diligence in getting framed such issue and not objecting to the same when the burden of proof of the same is on defendant no. 2. In fact even without amendment of the suit the validity of purchase of defendant no. 2 vide sale deed dated 28.11.1990 has to be adjudicated in reference to the counter claim. Hence the submission of the plaintiff is correct that no new evidence is required to be led by the plaintiff in this respect. The burden of proof is on defendant no. 2 to prove the same which shows that the purchase by defendant no. 2 vide the said sale deed is already under challenge which needs determination for its validity. Facts under issue were same between the parties. The defendant no. 2 subsequent purchaser is

already party in the present suit. The nature of the suit will remain the suit for partition. Hence it is held that plaintiff has shown due diligence in contesting his suit when issue no. 11 was framed in the suit and the first limb of the proviso of Rule 17 of Order VI CPC is satisfied. The issue is already on record at the time of commencement of the suit. The issue no. 14 also laid down such claim of the plaintiff that whether he is entitled to get partition as separate possession of his half share which is also against defendant no. 2 herein. The defendant no. 2 has also claimed eviction of plaintiff and mesne profits against him. Hence validity of said sale deed in favour of defendant no. 2 is under question between the parties since the inception of the suit on the same facts as litigated between the parties, in such circumstances of the case the amendment sought by the plaintiff will not change nature of the suit and will help in completely decide the suit between the parties. No new cause of action is introduced except the alleged threat of selling suit property by defendant no. 2. The limitation period is already available with the plaintiff as the issue is already available on the record which is challenge to the sale deed. The amendment is in nature of seeking declaration of said sale deed as void abinitio and null and void and partition of suit property by metes and bounds in equal share. The amendment prays consequent change in the prayer clause by the plaintiff though the same is already under issue no. 11 and 14., Defendant must show that a right has accrued in his favour which is barred by limitation. When the sale deed is already under challenge in the issues then the bar of limitation is a issue of fact which is kept open to be determined at the stage of final arguments. It is settled law that because there is delay in filing the amendment application it may be allowed if it helps in deciding the

suit completely between the parties. However when the same does not change nature of the suit and completely decide dispute between the parties then the amendment can be allowed between the parties to avoid multiplicity of the suit and for complete decision between the parties. The partition is claimed by the plaintiff both against defendant no. 1 and defendant no. 2. It is mentioned in the plaint that the sale deed dated 28.11.1990 is false to the knowledge of defendant no. 1 and 2. Hence the sale deed is under challenge since very beginning. The same form part of cause of action of the plaintiff and same is not based on new cause of action. Accordingly amendment application of the plaintiff is allowed subject to cost of Rs.25,000/- to be paid to the Id. Counsel for defendant on the next date from moving the amendment application at this belated stage of the proceedings. Amended plaint be filed within 15 days with advance copy to the opposite party and defendants to file amended WS within 30 days thereafter with advance copy to the opposite party.”

4. The sale deed *qua* which the declaratory decree is sought dates back to 28th November, 1990 i.e., 29 years prior to the amendment being sought. At the stage of final arguments the Trial Court ought not to have permitted the amendment in the plaint inasmuch as the same would result in enormous delay in the adjudication of the suit. The suit itself is 25 years old and deserves to be adjudicated at an early date. The question as to what rights, if any, Defendant No.2 has acquired in the suit property would be decided as part of the issues that have already been framed. The Trial Court is expected to adjudicate the issues comprehensively, including determining the rights of the Plaintiff and Defendant No.2. The Plaintiff relies on a family settlement which is already on

record.

5. Allowing of such an amendment to the Plaint at such a belated stage is contrary to the provisions of Order 6 Rule 17. The proviso specifically bars such amendments from being allowed. A 25-year old suit cannot be permitted to be delayed in this manner. There is no justification for the Plaintiff to have not sought the prayer for declaration in respect of the sale deed at the time when the suit was filed and thereafter during the 25 years when the suit has remained pending. The manner in which the final hearing has been sought to be derailed by seeking amendment demonstrates that the intention of the Plaintiff is to merely delay the matter. The Trial Court ought to have appreciated these facts. The impugned order allowing the application under Order VI Rule 17 CPC at the stage of final arguments is completely contrary to law and is set aside. Needless to add, all the issues which have been framed shall be adjudicated by the Trial Court at an early date preferably on or before 30th November, 2019. The parties are permitted to appear before the Trial Court on 30th September, 2019.

6. Petition is allowed in the above terms. All pending applications are disposed of. Copy of this order be communicated by the Registry to the Trial Court seized of the suit.

PRATHIBA M. SINGH, J.

SEPTEMBER 17, 2019

Rahul