

(2017) 11 DEL CK 0106

In the Delhi High Court

Case No : Civil Suit (OS) No. 365 Of 2017, Miscellaneous Application No. 9071, 9072, 9762, 10846, 10847, 11979, 13418, 13419 Of 2017

D.P. Mahajan And Anr

APPELLANT

Vs

Alok Mahajan And Ors

RESPONDENT

Date of Decision : 29-11-2017

Acts Referred:

Code Of Civil Procedure, 1908 — Order 6 Rule 17, Order 12 Rule 6
Hindu Succession Act, 1956 — Section 6, 6(1)
Evidence Act, 1872 — Section 58

Citation : (2017) 11 DEL CK 0106

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Parag P.Tripathi, Neeraj Chaudhari, Pragyan P.Sharma, Mishiki Bajpai, Anandini Kumari, Rishabh Kaur, Saakshi Agrawal, Rajesh Arya, Priyaka Sharma Goswami, Sanjana Sahni

Judgement

Rajiv Sahai Endlaw, J

1. The two plaintiffs, namely, D.P. Mahajan and his wife Uma Mahajan have instituted this suit for partition of property No. E-185, Greater Kailash,

Part-I, New Delhi and for permanent injunction restraining the defendants from dealing with the property.

2. The suit was entertained and vide ad interim order dated 10th August, 2017, the defendant no.1 and the defendants no.6 to 9 were restrained from

interfering in the peaceful possession and enjoyment of the plaintiffs and the defendants no.2 & 3 on the ground floor and second floor of the property.

3. The pleadings have been completed. The plaintiffs have filed an application under Order XII Rule 6 of the CPC and the defendant no.1 has

thereafter filed an application under Order VI Rule 17 of the CPC for amendment

of his written statement.

4. The senior counsel for the plaintiffs and the counsel for the defendants no.1 & 6 to 9 were heard yesterday; though part of the order was also

dictated but time did not permit the dictation to be completed. The counsel for the defendants no.2 to 5 yesterday stated that she is supporting the

plaintiffs. It was also the contention of the counsel for the defendants no.1 & 6 to 9 yesterday that he was relying on some judgment which remained

to be brought. In the circumstances, the matter was posted for today.

5. The counsel for the defendants no.1 & 6 to 9 has today referred to Vaishali Satish Ganorkar Vs. Satish Kesharao Ganorkar AIR 2012 Bombay

101 (DB).

6. The senior counsel for the plaintiffs has contended that Supreme Court has subsequently in Prakash Vs. Phulavati (2016) 2 SCC 36 pronounced

otherwise and it is also pointed out that the Supreme Court in para 27.3 of the said judgment has noticed a subsequent larger Bench of the High Court

of Bombay, subsequent to Vaishali Satish Ganorkar, in Badrinarayan Shankar Bhandari Vs. Omprakash Shankar Bhandari AIR 2014 Bombay 151 to

have taken a different view from that in Vaishali Satish Ganorkar supra.

7. The senior counsel for the plaintiffs also states that the Larger Bench of the Bombay High Court in Badrinarayan Shankar Bhandari supra held

Vaishali Satish Ganorkar to be per incuriam.

8. The plaintiffs instituted the suit, pleading:

i) that the defendants no.1 & 3 namely Alok Mahajan and Arun Mahajan are the sons of the plaintiffs and the defendant no.2 Alka Roy is the

daughter of the plaintiffs;

ii) that the defendants no.4 & 5 are the daughter and son respectively of the defendant no.2;

iii) that the defendant no.6 is the wife of the defendant no.1 and the defendants no.7 to 9 are the children of the defendant no.1;

iv) that the defendant no.10 is a friend of the defendant no.3, who visits the defendant no.3 from time to time;

v) that the plaintiff no.1 acquired the plot underneath the property aforesaid in the year 1962 and constructed a two storeyed building thereon out of his

own funds and the plaintiffs along with their children defendants no.1 to 3

started residing on the ground floor while the first floor was leased to tenants;

vi) that the plaintiff no.1, on tax planning advice, created a Hindu Undivided Family, namely, D.P.Mahajan and Sons (HUF) and placed the suit

property in the common hotchpotch vide Declaration dated 01.01.1969 and the income received from the suit property in the form of rent was

deposited in a bank account created for the HUF and assessment of income of the said property was also done in the hands of HUF as an assessee;

vii) that in the year 1973 the plaintiff no.1 constructed a barsati above the first floor, again out of his own funds and earnings;

viii) that over a period of time, differences arose between the plaintiffs on the one hand and the defendant no.1 and his wife on the other hand;

ix) that the plaintiff no.1, on 14th September, 2015, acting as the Karta and coparcener in the HUF, circulated a proposed "Memorandum" to

effect partition of the property by metes and bounds in five shares between the family members; as none of the parties objected to the said

"Memorandum" nor suggested any modification thereto, the plaintiff no.1 thereafter executed a Memorandum of Family Settlement (MOFS)

dated 21st September, 2015 to effect partition of the property by metes and bounds between the family members and apportioned 1/5th non-

demarcated share each in the property to the plaintiff no.2; and to the defendants no.1 to 3 and himself;

x) that the defendant no.1 however failed to accede and comply with the terms of the Family Settlement and continued to cause disturbance and

harassment to the plaintiffs; and,

xi) that other efforts were also made to mutually partition the property by metes and bounds but to no avail.

9. The counsel for the defendants no.1 & 6 to 9 on enquiry, states that the defendants no.1 & 6 to 9 have filed separate written statements but with

identical content. Thus, hereinafter, the relevant contents of the written statement of the defendant no.1 shall be read as enunciating the defence of

the defendants no.1 & 6 to 9. The said defendants have pleaded,

i) that admittedly on 14th September, 2015, the plaintiff no.1 handed over to the defendant no.1 a draft MOFS; the contents, terms and conditions

contained in the said draft MOFS were being and continue to be acted upon by

the members/coparceners of D.P.Mahajan and Sons (HUF), not only for many years prior to 14th September, 2015 but also subsequent thereto, and till date;

ii) the plaintiff no.1 claims to have signed the MOFS on 21st September, 2015 thereby effecting a partition/division/distribution of the property; these

acts on the part of the plaintiff no.1 make the present suit, as filed, not maintainable;

iii) that by the present suit, the plaintiff No.1 is seeking to undo the partition/division/distribution effected by him and which is neither tenable nor

permissible; the draft MOFS as well as the plaint clearly acknowledge/admit the entitlement of defendants no.1 & 6 to 9, not only to the first floor of

the property, but also to the common Kitchen, common Drawing Room and common Laundry Area on the Ground Floor as provided therein; a copy of

the draft MOFS handed over by the plaintiff no.1 to the defendant no.1 on 14th September, 2015 was filed along with the written statement; and,

iv) that the defendants no.1 & 6 to 9 had not caused any disturbance or harassment to the plaintiffs.

10. I may record that though the written statements of the defendants no.1 & 6 to 9 are otherwise bulky but the other pleas taken therein are not

material for the purposes of the adjudication of the suit and thus the need to reproduce the contents herein is not felt.

11. Though the written statements of the defendants no.2 & 3 are also on record but since the counsel for the defendants no.2 to 5 states that she is

supporting the plaintiffs, need to elucidate the contents thereof is not felt.

12. Before proceeding further, I may also record that the defendant no.10 is unserved with the summons of the suit as yet and besides the aforesaid

two applications, a large number of other applications are also listed but neither is the presence of the defendant no.10, whom none has claimed has

any share in the property, is necessary nor the need to deal with the other applications may arise with the decision of the two applications

aforementioned.

13. As would be obvious from a perusal of the narrative aforesaid of the written statements of the defendants no.1 & 6 to 9, the defendants no.1 & 6

to 9 have not disputed 1/5th share each of the two plaintiffs and the defendants no.1 to 3 in the property, as pleaded in the plaint. Hence the

application of the plaintiffs for decree on admissions.

14. The defendant No.1, after receiving notice of the application under Order XII Rule 6 of the CPC for decree on admissions, filed the application

under Order VI Rule 17 of the CPC for amendment of written statement. It is pleaded in the application that the defendant no.1, after the filing of the

written statement, has discovered a Declaration dated 9th October, 1975 of the plaintiff no.1 wherein the plaintiff no.1 has declared the HUF to be

comprising of himself and the defendants no.1 & 3 only. The defendant No.1 seeks to take the following pleas in the written statement by way of

amendment thereof:

i) that the plaintiff no.1 in the Declaration dated 9th October, 1975 unequivocally declared that D.P.Mahajan and Sons (HUF) comprises of himself

and the defendants no.1 & 3 only;

ii) that in view of the said Declaration, any/all acts(s), deed(s) and thing(s) sought to be done by the plaintiff No.1 either under the draft MOFS or the

MOFS dated 21st September, 2015 to partition/divide/distribute the property amongst five persons is untenable and the Declaration dated 9th October,

1975 renders the draft MOFS as well as the MOFS dated 21st September, 2015 invalid and non-est;

iii) that the property cannot be partitioned/divided/distributed amongst five persons, either under the MOFS or by way of the present suit as the HUF

consists of three persons only;

iv) that in the course of proceedings in CS(OS) No. 398/2011 before the Saket District Court in which the plaintiffs in collusion with the defendant

no.3 sought eviction of the defendant no.3, his ex-wife and daughters from the suit property, the defendant no.3 has relinquished/abandoned all share

in the property and as a result of which the defendant no.3 now does not have any share in the property, either as a constituent of the HUF or

otherwise;

v) that the defendant no.2, being a married daughter of the plaintiffs, in the event of a partition of the property by the plaintiff No.1 during his lifetime,

is not entitled to a share as a coparcener either under Section 6 of the Hindu Succession Act, 1956 or otherwise specially in view of the Declaration

dated 9th October, 1975;

vi) that in view of the Declaration dated 9th October, 1975, no partition could be done amongst five persons.

15. It is the contention of the senior counsel for the plaintiffs, that the amendment sought is in withdrawal of admissions already made, and cannot be allowed for this reason.

16. The counsel for the defendants no.1 & 6 to 9 contends that there is no admission in the written statements of the said defendants, of the share of the two plaintiffs and the defendants no.1 to 3 being 1/5th each.

17. The senior counsel for the plaintiffs has referred to the draft MOFS referred to in the written statements of the defendants no.1 & 6 to 9 and filed by the defendants no.1 & 6 to 9 before this Court.

18. I have perused the pleadings of the plaintiffs and the defendants no.1 & 6 to 9. The plaintiffs, in para 20 of the plaint, have pleaded as under:-

â??20. Unable to comprehend or control the actions of the Defendants Nos.1 and 6, the Plaintiff No.1, acting as Karta and coparcener in

the HUF, circulated a proposed memorandum to effect partition of the Suit Property by metes and bounds into 1/5th shares between the

family members to all the parties on 14.09.2015. At this juncture, the Plaintiff No.1 felt that a partition by way of metes and bounds could be

a solution to keeping hostile interactions with the Defendants Nos.1 and 6 at a minimum while the parties retained joint ownership in the

Suit Property.â??

19. The defendant no.1, in his written statement, in reply to the said paragraph has pleaded as under:-

â??20. Contents of para 20 of the Plaint are outright denied, in so far as they pertain to any alleged action(s) of Defendants No.1 and 6. A

copy of the draft Memorandum of Family Settlement, as handed over by Plaintiff No.1 to Defendant No.1 on 14.09.2015, has been attached

herewith. The alleged intention/purpose of Plaintiff No.1 behind execution of the said Memorandum of Family Settlement is denied.â??

20. The relevant part of the draft MOFS filed by the defendants no.1 & 6 to 9 is as under:-

â??MEMORANDUM OF FAMILY SETTLEMENT

THIS MEMORANDUM OF FAMILY

SETTLEMENT IS EXECUTED AT NEW DELHI ON THIS THE 21ST DAY OF SEPTEMBER, 2015.

WHEREAS I purchased a plot No. E-185, Greater

Kailash- I, New Delhi 110048, of 206 sq. yds from DLF Ltd. in 1958, the Sale Deed for which, dated 15.02.1962, is duly registered in the

office of the Sub Registrar, Delhi, as document No. 1701, in Additional Book No.1, Volume No. 777, at pages 7-8 on 12.03.1962;

AND WHEREAS I built the superstructure thereon, Ground and First Floor in 1964, all of the above with my own earnings;

AND WHEREAS I put the whole of the above property into the joint family hotchpot, comprising all the members of our family, myself, my

wife-Uma Mahajan, a daughter-Alka, and two Sons - Alok and Arun, on 07.04.1967, vide my Declaration dated 01.01.1969;

AND WHEREAS the Second Floor was built, partly in 1973, and partly in 2002, by me, all with my resources which also became property of

the above joint family;

This house property is the only asset of the joint family;

AND NOW, realizing that it is both prudent and appropriate to do so, I , as Karta and Father of my two co-parcener sons- Mr. Alok

Mahajan, and Mr. Arun Mahajan, effected partition, by metes and bounds, of the house property No. E-185, greater Kailash-I, New Delhi,

on 17.09.2015, due information of my intention to partition was given to all stake holders on 14.09.2015;

AND WHEREAS, on partition, my wife- Mrs. Uma Mahajan, and our daughter- Mrs. Alka Roy (nee Mahajan), are entitled to a share each,

equal to that of our Sons. Thus, in all, the property was divided in five equal shares, as under:-

1. Mrs. Alka Roy (nee Mahajan) was allotted a 1/5th, un-demarcated, share in the property on Ground Floor.

2. Mr. Alok Mahajan was allotted a 1/5th, un-demarcated, share in the property on the First Floor;

3. Mr. Arun Mahajan was allotted a 1/5th, un-demarcated, share on the Second Floor.

4. Mrs. Uma Mahajan was allotted a 1/5th, un-demarcated, share in the property.

5. The balance of 1/5th, un-demarcated, share in property came to my share.â??

21. Though I have summarised hereinabove the pleas of the defendants no.1 & 6 to 9 in their written statements but it is still deemed expedient to

reproduce herein one of the paragraphs of the written statement of the defendant no.1 concerning the aforesaid draft MOFS. Para (1) of the

Preliminary Submissions in the written statement dated 11th September, 2017 is as under:-

PRELIMINARY SUBMISSIONS:-

1. That, admittedly, on 14.09.2015, Plaintiff No.1 handed over to Defendant No.1 a draft Memorandum of Family Settlement (MOFS). The

contents, terms and conditions contained in the said draft MOFS were being, and continue to be, acted upon by the Members/Coparceners

of the HUF (D.P.Mahajan & Sons HUF) not only for many years prior to 14.09.2015, but also subsequent thereto, and till date. Plaintiff

No.1 claims to have, allegedly, signed the said draft MOFS on 21.09.2015, thereby effecting a partition/division/distribution of property No.

E-185, Greater Kailash I, New Delhi 110048. These acts on the part of Plaintiff No.1 make the present Suit, as filed, not maintainable.

Under the garb of the present suit, Plaintiff No.1 is seeking to undo the partition/division/distribution effected by him, which act is neither

tenable, nor permissible. It is submitted that the said MOFS, the said draft thereof, as well as the Plaint, clearly, acknowledges/admits the

entitlement of the Answering Defendant, and his immediate family (Defendants No.6,7, 8 and 9) not only to the First Floor of the Suit

property, but also to the common Kitchen, common Drawing Room, and common Laundry Area on the Ground Floor, with access from

inside, as well as right to use of other common areas, as has been in existence for the last almost 50 years as far as the Answering

Defendant is concerned, and for the last 27 years as far as Defendant No.6 is concerned. Any/all attempt(s) by the Plaintiffs, in connivance

with Defendants 2 to 5 and 10, to undo the state of affairs in existence for the last many years ought not to be allowed by this Honâble

Court. The original of the said MOFS dated 21.09.2015 was given to the Answering Defendant, by Plaintiff No.1, under covering letter

dated 18.07.2017. Copy of the said draft MOFS handed over by Plaintiff No.1 to the Answering Defendant on 14.09.2015, and a copy of

the said original covering letter and the said original MOFS, with an Addendum thereto, as received by the Answering Defendant from

Plaintiff No.1, as recent as 21.07.2017, are annexed hereto. The documents attached by the Plaintiffs to the Plaint, more specifically the

documents at pages 8 to 10 and 14 to 25, being manipulations, and self serving documents, do not reflect the correct, and actual, state of

affairs existing in the Joint Family property. The Answering Defendant reserves his right to avail of any/all legal remedy(ies) against such

manipulations.â??

22. I have already hereinabove recorded that the counsel for defendants no.1 & 6 to 9 states that the written statements of the defendants no.6 to 9

are similar. The said defendants, in the paragraph reproduced above of their written statements, have pleaded the suit to be not maintainable for the

reason of the MOFS, relevant part whereof also is reproduced above and which MOFS has been annexed to their written statement. The said MOFS

records that the property was put into joint family hotchpotch comprising of the two plaintiffs and the defendants No.1 to 3 and each of whom had/has

1/5th share in the property. The said defendants, otherwise in their written statements have not controverted the 1/5th share pleaded by the plaintiffs

of the two of them and the defendants No.1 to 3 in the property in the plaint.

23. The defendants no.1 & 6 to 9, by referring to the MOFS in their written statements and annexing the MOFS with the written statement have made

the same part of their written statements and the defendants having pleaded that the suit is not maintainable in view of the said document, today

cannot renege therefrom and state that they have not admitted to the contents of the document where it is unequivocally mentioned that the two

plaintiffs and the defendants No.1 to 3 have 1/5th share each in the property and today cannot be allowed to amend their written statements in

withdrawal of the said admission and obviously to the prejudice of the plaintiffs and the defendants no.2 to 5.

24. I have recently in Gurcharan Kaur Vs. Ranjeet Singh Sandhu MANU/DE/3598/201 d7iscussed the earlier case law on the aspect of withdrawal

of admission including where such admission is contrary to documents of title to the property discovered subsequently and the need to reiterate the

same here is thus not felt. It has been held in paras 13 to 16 as under:

13. In *Gautam Sarup v. Leela Jetly* (2008) 7 SCC 85, it was held that an admission made in a pleading is not to be treated as an

admission in a document. An admission made by a party to the lis was held to be admissible against him proprio vigore i.e. on its own force.

14. The Division Bench of this Court in *Kali Charan v. Ishwar Dass* 2002 (61) DRJ 401 was concerned with an application for amendment

of written statement in a partition suit. In the written statement filed, the plaintiff was admitted to be having a share in the property.

Subsequently by amendment, the said admission was sought to be withdrawn relying on a Will and/or orders of Courts in earlier

proceedings which were decided against the predecessor in interest of plaintiff and by stating that the previous counsel had in ignorance of

true facts, documents, orders and judgments of Court, made the admission. Holding, that the defendant wanted to change admission already

made of share of plaintiff in the property, to a denial of any share of plaintiff in the property and that the same would change the nature of

defence and totally non-suit the plaintiff, the amendment was denied. It was held that the defendant cannot deprive plaintiff of the valuable

right which had accrued from admission in written statement.

15. It would thus be seen that even where the admission made in the pleading was inconsistent with documents, orders and judgments of

Court in earlier proceedings, it was still not permitted to be withdrawn.

16. Supreme Court, comparatively recently in *Ram Niranjan Kajaria v. Sheo Prakash Kajaria* (2015) 10 SCC 203, reiterated that

amendment, to resile from admission, cannot be permitted and that a party cannot be permitted to wholly withdraw the admission in

pleadings. It was reiterated that admission in pleadings or judicial admissions, admissible under Section 58 of the Indian Evidence Act,

1872, made by the parties, stand on a higher footing than evidentiary admissions and are fully binding on the party that makes them and

constitute a waiver of proof. It was held that admissions in pleadings can be made foundation of rights of parties.??

25. The mainstay of the counsel for the defendants no.1 & 6 to 9 as aforesaid is the dicta of the Division Bench of the Bombay High

Court in *Vaishali Satish Ganorkar supra*, but without checking whether the said

judgment holds the field till now or not and whether it has been overruled or not. It was held in the said judgment that only the daughters born after 9th September, 2005, being the date of amendment of the Hindu Succession Act, 1956, would be coparceners and daughters born before 9th September, 2005, as the defendant No.2 is, would be coparcener only upon devolution of interest in coparcenary property taking place and until a coparcener dies and his succession opens, there is no devolution of interest. However Supreme Court, in Prakash supra has held the rights under the amendment of the Hindu Succession Act to be applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born.

26. Another argument of the counsel for the defendants no.1 & 6 to 9 is that the property had been disposed of or alienated prior to 20th December, 2004 vide the Declaration dated 9th October, 1975, within the meaning of proviso to Section 6(1) of the Hindu Succession Act.

27. However, as aforesaid, the defendants No.1 & 6 to 9 in their written statements filed, admitted the shares of the two plaintiffs and the defendants no.1 to 3 in the property being 1/5th each and cannot be permitted to now contend otherwise.

28. The counsel for the defendants no.1 & 6 to 9 also states that the defendants no.4 & 5 have not filed written statements till now but also fairly admits that nothing turns on the same. Another argument which the counsel wants to be recorded is, that in a partition suit, all the parties enjoy the same status and the counsel for the defendants no.1 & 6 to 9 does not know as to what right the defendants no.4 & 5 and the defendant no.10, who has not even been served, may claim.

29. The counsel for defendants No.4&5 has already stated that they are supporting the plaintiffs. The senior counsel for the plaintiffs earlier in the hearing, when it was pointed out that the defendant no.10 had not been served had stated that the defendant no.10 was added as a pro forma party and no relief has been claimed in the plaint against her and the plaintiffs have no objection to dropping the defendant no.10 from the array of parties in the suit.

30. No merit is thus found in the said contention also.

31. No other argument has been urged.

32. Resultantly, the application of the defendant no.1 for amendment of the written statement is dismissed for the reason of the amendments claimed

being in withdrawal of admissions in the written statement originally filed and the application of the plaintiffs under Order XII Rule 6 of the CPC is

allowed.

33. A preliminary decree for partition of property no. E-185, Greater Kailash, Part-I, New Delhi is passed by declaring the two plaintiffs and the

defendants no.1 to 3 to be having 1/5th undivided share each in the property.

34. The order as to costs, at this stage is deferred till the final decree.

34. Decree sheet be prepared.

35. With the aforesaid, all the other pending applications have become redundant and are disposed of, (save by making the interim order absolute till the decision of the suit).

36. List on 13th February, 2018.

37. The counsels to, on the next date, inform whether the property is divisible by metes and bounds and if so, to put forth a proposal for the same.