

(2007) 08 DEL CK 0217

In the Delhi High Court

Case No : IA No. 9106 of 2007 and is No. 9107 of 2007 in CS (OS) No. 721 of 2005

Mr. Manu Khanna through Mother Dr. Poonam Khanna

APPELLANT

Vs

Dr. V.P. Sharma

RESPONDENT

Date of Decision : 14-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 14

Citation : (2007) 08 DEL CK 0217

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Party-in-Person, for the Appellant; Dinesh Garg and Rachna Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.

IA No. 9107/2007

Allowed subject to just exceptions.

IA No. 9106/2007 (Under Order 6 Rule 17 CPC)

1. The plaintiff, a mentally challenged person, has filed the present suit through his mother, Dr. Poonam Khanna against his father, Dr. V.P. Sharma for declaration, partition and mandatory injunction.

2. The claims set out in the plaint are that the mother of the plaintiff purchased the basement and terrace rights of the ground floor of property No. C- 18, Shivalik, New Delhi vide sale deed dated 10.10.1994. The defendant purchased the ground floor of the same property and it is alleged that the corpus for the same came from the mother of the plaintiff as also the grandfather of the plaintiff (father of the defendant). The sale deed in favor of the defendant is also of the same date. The plaintiff claims to be residing in the ground floor of the

property along with his mother. In terms of an Exchange-cum-Partition Deed dated 2.3.2001, the terrace and above rights of the ground floor were exchanged whereby the same went to the defendant while the basement and ground floor went to the mother of the plaintiff. It is further stated that there is a subsequent deed dated 2.4.2003 whereby 45% share went to the defendant while 55% went to the mother of the plaintiff for distribution of sale proceeds on sale of the property.

3. The plaintiff has alleged that since the funds for the purchase of the property came from the grandfather of the plaintiff (alleged to be admitted by the defendant in suit No. 493/2001 filed in the civil court), the plaintiff is entitled to a share in the same. Hence, the suit for partition.

4. The prayer clause in the suit seeks a decree of permanent injunction restraining the defendant from selling the terrace and above rights of the property in pursuance to the Exchange-cum-Partition Deed dated 2.3.2001 and also seek a declaration that the plaintiff has an undivided share in the said terrace and above rights in pursuance to the Exchange-cum-Partition Deed.

5. The plaintiff prayed for interim relief and an ex parte order was passed in favor of the plaintiff in is No. 4129/2005 restraining the defendant from raising any construction or selling the terrace floor or parting with or creating any third party interest therein. The application was finally decided in terms of the order dated 3.1.2007, when issues were framed in the suit.

6. Insofar as the interim application is concerned, the order notes that the plaintiff appears through his mother to resile from the deeds dated 2.3.2001 and 2.4.2003. The defense is predicated on the deed dated 2.4.2003 and an issue had been framed in that behalf. It was noticed that while the plaintiff and his mother are safely residing in the ground floor of the property, the defendant is without any shelter. It is in view thereof that the defendant was permitted to construct the first floor with the condition that he shall not plead any special equity in his favor should the suit succeed. The defendant was further restrained from transferring, alienating or parting with possession of the first floor without taking the leave and liberty of the Court.

7. The plaintiff aggrieved by the said order filed an appeal before the Division Bench. The appeal was decided in terms of the order dated 7.5.2007 and it was noted that the admitted position was that the suit was fixed for hearing with directions to record evidence. The Division Bench found that the construction would change the nature and character of the suit property in view of the fact that the said rights were originally purchased by the mother of the plaintiff along with the basement and thereafter the exchange had taken place. It was directed that the evidence should be recorded on a day-to-day basis and the arguments in the suit expedited. Status quo regarding construction was directed to be maintained by the parties and the other interim injunction orders were affirmed.

8. Now coming to the framing of issues, the order dated 3.1.2007 records that

the plaintiff insists that an issue be framed to the effect whether the agreement of Exchange-cum-Partition Deed dated 8.3.2001 is invalid. The Court did not frame any issue for the reason that the defense was not predicated on the said document though reference had been made in the written statement to the same. The defense in the written statement was predicated on the Deed of Settlement dated 2.4.2003.

9. A perusal of the Deed of Settlement (Exhibit P-4) shows that different FIRs were lodged due to the matrimonial discord between the mother of the plaintiff and the defendant, which were sought to be resolved by the Deed of Settlement which has been duly registered on 2.4.2003. In terms of the settlement, all disputes were amicably resolved and the custody of the plaintiff was to continue with his mother. In fact, even the visiting rights to the child have been excluded. A suitable buyer was required to be procured for sale of the property and the proceed thereto had to be divided in the ratio of 45% to the defendant and 55% to the plaintiff. The parties also prayed for divorce by mutual consent and to withdraw proceedings against each other. All claims of the parents of the plaintiff and the plaintiff are stated to have been settled in terms thereof.

10. The plaintiff filed the list of witnesses and affidavit of evidence was directed to be filed within six (6) weeks as per order dated 30.3.2007 of the Joint Registrar. The plaintiff moved two applications, viz., (i) under Order 7 Rule 14 CPC; and (ii) seeking clubbing of suits, being the other suit filed for possession. Both these applications were dismissed on 31.5.2007. It is thereafter that the present application has been filed seeking to amend the plaint.

11. It is stated in the present application that inadvertently and unintentionally by mistake the relief has been sought in respect of roof and above the ground floor whereas it is the ground floor of the suit property in which the plaintiff intends to pray for the reliefs. Thus, an amendment was sought in the prayer clause.

12. Learned Counsels for the parties were heard on the claims made in the application and in my considered view, such an application cannot be allowed.

13. A bare perusal of the averments made in the plaint show that the amendment being sought in the application is not as innocuous as is sought to be made out by the plaintiff. The discussion aforesaid makes it clear that the reference is to the Exchange-cum-Partition Deed dated 2.3.2001 in terms whereof the basement and ground floor fell to the share of the mother of the plaintiff while the terrace and above fell to the share of the defendant. No doubt the defendant was the original purchaser of the ground floor but the same was exchanged with the mother of the plaintiff in pursuance to the Exchange-cum-Partition deed dated 2.3.2001. It is the case of the plaintiff that the corpus for purchase inter alias came from his grandfather and thus he is entitled to the portion which fell to the share of his father. There is repeated reference to this Exchange-cum-Partition Deed dated 2.3.2001 which clearly show that as per the

plaintiff he recognised the same and in pursuance thereto, the rights conferred on the defendant in respect of the terrace and above of the ground floor.

14. The nature and character of the suit is now sought to be changed by seeking relief against the ground floor of the property which was never the case made out in the plaint. The plaintiff cannot be permitted to approbate and reprobate. In fact, the plaintiff is doing this through his guardian, his mother, who is appearing in person and is seeking to backtrack out of the different settlements. The effect of the same would be examined in the trial of the suit.

15. An amendment of the relief clause as prayed for by the plaintiff would, in fact, result in contrary pleas between what is averred in the plaint and what is the relief claimed. The issues have been framed the reliefs were claimed on the basis of the Exchange-cum-Partition deed dated 2.3.2001. In fact, the defense of the defendant is based on the Deed of Settlement dated 2.4.2003 whereby the property had to be sold.

16. It is trite to say that the approach of the Court has to be liberal while considering an amendment application. However, amendments have to be allowed as may be necessary for determining the real question of controversy between the parties. It is a rule of justice, equity and good conscience and the powers have to be exercised in the larger interest of doing full and complete justice to the parties before the Court. The exceptions to this is that the party applying was acting malafide. This legal position clearly emerges from the judgment of the Supreme Court in Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others, . However, simultaneously in Union of India (UOI) Vs. Pramod Gupta (D) by L.Rs. and Others, , it has been held that delay and laches on the party of the parties in the proceedings would also be a relevant factor for allowing and disallowing an application for amendment of the pleadings.

17. It is not permissible for the plaintiff to change complete scope and nature of the suit which is what the plaintiff seeks to do. The plaintiff while relying on the Exchange-cum-Partition Deed dated 2.3.2001 through out the plaint now seeks to give a go by to the same and change the relief from one claimed on the basis of the said document to a different relief in respect of the ground floor and basement of the property which is no more with the defendant, as per the said deed.

18. The endeavor of the plaintiff or rather the mother of the plaintiff also appears to be not to see an end to the suit and to somehow evade the directions of the Division Bench of a day-to-day trial of the matter. This clearly falls within the parameters of a party acting malafide. The plaintiff and his mother occupy the ground floor with no portion with the defendant.

19. In view of the aforesaid, I do not find any merit in the application and the same is dismissed.