
(2010) 12 DEL CK 0199
In the Delhi High Court
Case No : CS (OS) No. 565 of 2008

Smt. Kailash Sharma

APPELLANT

Vs

Sh. Jagdish Lal Sharma and Others

RESPONDENT

Date of Decision : 01-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 151

Citation : (2010) 12 DEL CK 0199

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Pramod Ahuja, for the Appellant; B.R. Saini, for D-1, for the Respondent

Judgement

V.K. Jain, J.

IA 10668/2010 (O.6 R.17 CPC)

1. This is an application for amendment of plaint. This suit has been filed for partition of the properties which were owned by late Pt. Bhola Nath Sharma, father of the parties to the suit. The Plaintiff has sought partition of two properties bearing No. F-105-110, Lajpat Nagar II, New Delhi. In para 3 of the plaint, it is alleged that Plaintiff is not aware of the existence of any other movable and immovable assets left by late Pt. Bhola Nath Sharma.

Now, the Plaintiff wants to amend the plaint so as to plead that late Pt. Bhola Nath Sharma was also owner of property bearing No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024 and, therefore, he is also entitled to a share in that property.

2. It is alleged in para 13 of the application that inadvertently in the prayer clause, the Plaintiff has not specifically mentioned his rights in property No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024. He is also seeking to challenge the Will alleged to have been executed by late Pt. Bhola Nath Sharma on 8.8.1979 in respect of property No. 31, Pushpa Market, Central

Market, Lajpat Nagar, New Delhi-110024.

3. Admittedly, the Plaintiff had earlier filed a suit for injunction in respect of property No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024. Admittedly, in the aforesaid suit, the Defendants had set up the Will dated 8.8.1979 alleged to have been executed by late Pt. Bhola Nath Sharma, father of the parties, in respect of the aforesaid property. Thereafter, the suit for injunction was withdrawn on 31.01.2008. The present suit has been filed on 25.03.2008.

4. The proposed amendment has been opposed by the Defendants primarily on the ground that since the trial has already begun, in view of the bar contained in the proviso to Order VI Rule 17 of CPC, the proposed amendment cannot be allowed.

5. The proviso to Order VI Rule 17 of CPC provides that no application for amendment shall be allowed after the trial has commenced unless the Court comes to conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. Issues in this case were framed on 6.1.2009. Three affidavits by way of evidence have been filed by Defendants No. 2 & 3 whereas one affidavit by way of evidence has been filed by Defendant No. 1. Defendant No. 1 is already under cross-examination. Thus, it cannot be disputed that the trial has already begun.

6. In *Vidyabai and Others Vs. Padmalatha and Another*, , referring to the proviso added to Order VI Rule 17 of CPC by way CPC (Amendment) Act, 2002, Supreme Court observed that the proviso is couched in a mandatory form and held that the jurisdiction of the Court to allow an application for amendment is taken away unless the conditions precedent therefore are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. The Court clearly held that no application for amendment shall be allowed unless the Court is satisfied that in spite of due diligence the matter could not be raised before the commencement of trial. The Court was of the view that the proviso puts an embargo on the exercise of jurisdiction by the Court and unless the jurisdiction fact as envisaged in the proviso is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.

7. It is settled proposition of law that an amendment should generally be allowed, unless it is shown that permitting the amendment would be unjust and would result in prejudice to the opposite party which cannot be compensated by cost or would deprive him of a right which has accrued to him with the lapse of time. Errors or mistakes, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or Written Statement. If there is no undue delay, no inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and the application for amendment is not mala fide or will not prejudice the opposite party, the amendment should

ordinarily be allowed.

8. In *Rajkumar Gurawara (Dead) thr. L.Rs. Vs. S.K. Sarwagi and Co. Pvt. Ltd. and Another*, , Supreme Court, referring to the aforesaid proviso to Rule 17 of Order VI, *inter alia*, observed as under:

The said rule with proviso again substituted by Act 22 of 2002 with effect from 01.07.2002 makes it clear that after the commencement of the trial, no application for amendment shall be allowed. However, if the parties to the proceedings able to satisfy the court that in spite of due diligence could not raise the issue before the commencement of trial and the court satisfies their explanation, amendment can be allowed even after commencement of the trial. To put it clear, Order VI Rule 17 CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso.

9. Before the proviso came to be added to Order VI Rule 17 of CPC, it was not uncommon for the unscrupulous litigants, who, for one reason or the other, were not interest in expeditious disposal of the case, to prolong the trial by seeking unnecessary and sometimes mala fide and frivolous amendments, in order to delay the progress of the trial. This mischief was sought to be remedied by the legislature by putting an embargo on the power of the Court to allow amendments, once the trial has begun. That precisely was the objective behind adding the aforesaid proviso to the statute book. The legislative intent, therefore, needs to be given a meaningful effect and, therefore, unless the amendment sought by a party squarely falls in the four corners of the legal provision, the Courts need to discourage such amendments. The legislative intent cannot be frustrated by the Courts by giving so liberal an interpretation as to allow the amendment even where they find that the amendment now sought by the party could, on exercise of due diligence, have been conveniently sought before the trial began.

10. The only explanation given by the Plaintiff for not including property No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024, amongst the properties owned by late Pt. Bhola Nath Sharma is that inadvertently prayer with respect to this property could not be made in the plaint. As noted earlier, in para 3 of the plaint, the Plaintiff specifically alleged that she was not aware of the existence of any of the other movable and immovable asset left behind by late

Pt. Bhola Nath Sharma. She further alleged that after due enquiries, she had able to verify and ascertain that property No. F-105-110, Lajpat Nagar II, New Delhi, was the self-acquired property of late Pt. Bhola Nath Sharma. Since the suit filed by Plaintiff for grant of injunction pertained to property No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024, he cannot claim that he was not aware that the aforesaid property was owned by late Pt. Bhola Nath Sharma. The Will dated 8.8.1979 with respect to property No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024 had been set up by the Defendants before the civil suit filed by him for grant of injunction was withdrawn by the Plaintiff on 31.01.2008. This also shows that the Plaintiff was aware of the ownership of the aforesaid property when this suit was filed on 25.03.2008. Not only the Plaintiff was aware of the existence and ownership of the aforesaid property, she was also aware that the Defendants were claiming ownership with respect to that property by virtue of the Will dated 8.8.1979 alleged to have been executed by late Shri Bhola Nath Sharma in their favour.

11. In these circumstances, it is difficult to come to the conclusion that the Plaintiff inadvertently could not include property No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024 in the prayer clause. She was very much aware, on account of the Will set up by the Defendants in the previous suit that this property was owned by late Pt. Bhola Nath Sharma and the Defendants were claiming to be the owners of that property to her exclusion. Despite that she chose not to seek partition with respect to that property and went to the extent of claiming that she was not aware of the existence of any other movable and immovable assets left by late Pt. Bhola Nath Sharma except property No. F-105-110, Lajpat Nagar II, New Delhi.

12. In these circumstances, there is no escape from the conclusion had the Plaintiff exercised due diligence, she would have been able to claim partition in respect of property No. 31, Pushpa Market, Central Market, Lajpat Nagar, New Delhi-110024, while filing this suit.

The proposed amendment is clearly hit by the proviso to Order VI Rule 17 of CPC.

The application is dismissed.

IA 12756/2010 (O.1 R.10 CPC)

1. Vide this application, the Plaintiff was seeking to implead the sons of Defendant No. 1 as Defendants No. 4 & 5 in this suit. The learned Counsel for the Plaintiff does not press this application.

2. Dismissed as not pressed.

IA 9747/2010 (O.26 R.4 CPC)

1. This is an application for examination of the Plaintiff on commission. The Plaintiff is stated to be sick and not in a position to attend the Court in person. The Plaintiff is no other than the sister of the Defendants.

2. There is no opposition to the request. The application is, therefore, allowed and it is directed that at an appropriate stage, the Plaintiff will be examined on commission. The request for appointment of Local Commissioner can be made at the stage when the Plaintiff is sought to be examined.

3. This application stands disposed of accordingly.

IA 11206/2010 (Under Section 151 CPC for directing the Defendant No. 2 to file the Will dated 8.8.1979)

Vide this application, the Plaintiff has sought production of the Will dated 8.8.1979 alleged to have been executed by late Pt. Bhola Nath Sharma in favour of the Defendants. Since the application of the Plaintiff for amendment of the plaint had been dismissed and the scope of the present suit is confined to F-105-110, Lajpat Nagar II, New Delhi, the prayer made in this application cannot be granted.

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List the matter before the Joint Registrar for further cross-examination of the witnesses on 21st January, 2011.