

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) No. 828/2018**

Judgment reserved on : 13.03.2019

Date of decision : 01.07.2020

CHETAN DAYAL

..... Petitioner

Through: Mr. Jai Sahai Endlaw, Ms.
Deepika Mishra, Mr. Shivansh
Soni, Advocates

versus

ARUNA MALHOTRA & ORS

..... Respondents

Through: Ms. Namita Roy, Mr. Abhijit
Acharya, Advocates for R-1.
Mr. Mohit Kumar, Adv. for R-2
Ms. Prabhsaha Karu, Ms. Shruti
Gola, Advs. for R-3.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The petitioner vide the present petition under Article 227 of the Constitution of India seeks the setting aside of the order dated 31.5.2018 of the learned Additional District Judge-05, Patiala House Courts, New Delhi whereby inter alia an application under Order 6 Rule 17 CPC filed by the respondent No.2 herein through his LRs for the amendment in the written statement was allowed.

2. Submissions have been made on behalf of the petitioner and the respondents.

3. The petitioner in the instant case is the plaintiff of CS No. 56158/16 seeking partition and separate possession of his 1/4th share in property bearing No.E-7/6, Vasant Vihar, New Delhi and has also sought *mesne* profits and rendition of accounts. The claim of the plaintiff i.e., the petitioner herein is that the suit property was owned by late Sh. Dayal Chand Kaith vide a perpetual lease Deed dated 6.4.1971 and late Sh. Dayal Chand Kaith vide a gift deed dated 3.6.1974 transferred his half undivided share in the suit property to the defendant No.1, i.e., the respondent No.1 herein, and made his last and final Will dated 4.2.1997 by virtue of which he bequeathed his half undivided share to the defendant No.2, i.e., the respondent No.2 herein, and the remaining half undivided share to the plaintiff. The petitioner further submitted that Sh.Dayal Chand Kaith died on 3.12.1997 and on his death, the plaintiff to the suit, i.e., the petitioner herein and the defendant no.2, i.e., the respondent No.2 herein now represented through his legal representatives, became the owners of 1/4th undivided share in the suit property bearing No. E-7/6, Vasant

Vihar, New Delhi, with the defendant No.1 i.e., the respondent No.1 herein being the owner of 1/2 share of the suit property and thus the plaintiff, i.e., the petitioner herein, came into constructive possession of the suit property and became entitled to rent from the tenant and to possession thereof upon vacation by the tenant.

4. According to the plaintiff, i.e., the petitioner herein, on 28.1.1999, the defendant No.1, i.e., the respondent No.1 as the attorney of defendant No.2, i.e., the respondent No.2 herein, filed a suit for declaration that the Will dated 4.2.1997 was not genuine and on 25.2.1999, the plaintiff, i.e., the petitioner herein filed a suit for declaration and consequential relief before the learned Civil Judge (Junior Division), Chandigarh, for declaration to the effect that the Will dated 4.2.1997 is the last Will of Late Sh. Dayal Chand Kaith. It is further submitted that the learned Civil Judge (Junior Division) Chandigarh vide judgment dated 30.7.2004 partly allowed the suit of the plaintiff to the effect that the Will dated 4.2.1997 is the last and final Will of the deceased Dayal Chand Kaith which judgment has become final and thus the plaintiff, i.e., the petitioner herein, filed the suit praying that a decree be passed in his favour and against the

defendants no.1 and 2, i.e., the respondents No.1 and 2 herein for partition and separate possession of the plaintiff's 1/4th share of the suit property as well as for *mesne* profits and rendition of accounts etc.

5. The defendants No.1 and 2, i.e., the respondents No.1 and 2 herein, vide their joint written statement contested the suit of the plaintiff, i.e., the petitioner herein, and categorically denied the execution of the Will dated 4.2.1997 by late Sh. Dayal Chand Kaith and according to them late Sh. Dayal Chand Kaith during his lifetime had executed two Wills one dated 21.12.1995 and another dated 9.8.1996.

6. The legal representatives of the defendant now arrayed as the respondents No.2(i), (ii) and (iii) to the present petition, sought amendment of the written statement on the ground that the plaintiff therein, i.e., the petitioner herein, had made a statement before the Local Police at Chandigarh by lodging the FIR No. 13 with PS 03, Chandigarh dated 24.1.2011 whereby the plaintiff, i.e., the petitioner herein had made a statement that the immovable property situated at Plot No. 213 Sector 9C, Chandigarh *is an ancestral property* and whereas the claim of the plaintiff, i.e., the petitioner herein, in the suit

out of which the present petition arises accepted had propounded the last alleged Will dated 4.2.1997 of late Sh. Dayal Chand Kaith to contend that the property at Chandigarh was owned by late Sh. Dayal Chand Kaith at the time of his death and the same was bequeathed by way of the said alleged Will to the petitioner herein. It is submitted by the legal representatives of respondent No.2 arrayed as LR 2(i), (ii) and (iii) to the present petition that by making these admissions the plaintiff, i.e., the petitioner herein had himself disowned his very document dated 4.2.1997 before the local police at Chandigarh, which is the basis of the present suit and it was averred that after lodging the FIR, the plaintiff, i.e., the petitioner herein got a collusive Suit no. 439/2011 filed before the Court of the Civil Judge (Junior Division) Chandigarh, seeking partition *inter alia* amongst other reliefs on the ground that late Sh. Dayal Chand Kaith was incompetent to execute the Will dated 4.2.1997 as the property of Chandigarh was an ancestral property. The legal heirs of the defendant No.2 herein thus contended that they be thus allowed to amend the written statement by raising preliminary objections and submissions and the legal representatives of the respondent No.2 herein had thus sought addition

of additional preliminary objections as mentioned in paragraphs 8 and 9 of the application under Order VI Rule 17 of the CPC and also the amendment of paragraph 8 on merits.

7. The plaintiff, i.e., the petitioner herein vehemently opposed the prayer before the learned Trial Court. The learned Trial Court has however observed to the effect:

"16. I have gone through the file. The present suit was filed in the year 2006. The defendant no.2 filed the written statement on 14.2.2007. The subsequent developments have taken place after the filing of the suit when the plaintiff lodged the FIR in the year 2011 and also filed the alleged collusive suit.

17. A perusal of the provision of Order VI Rule 17 CPC makes it manifest that the Court is conferred with the power to allow alterations and amendments of the pleadings if the Court is of the view that such amendments may be necessary for determining the real question in controversy between the parties at any stage of the proceedings. Proviso to Order VI Rule 17 CPC stipulates that no application for amendment shall be allowed after trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, party could not have raised the matter before the commencement of trial.

18. It is settled law that the Court should be liberal in granting prayer for amendment of pleadings, unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer made in the amendment application is mala fide. One of the basis for rejecting an

amendment of the pleadings is that the amendment shall result in changing the subject matter of the suit by substituting one cause of action for another and the other is that the relief sought by way of amendment is time barred.

19. The object of the aforesaid provision is that the Courts should try the merits of the case that come before them and should allow all amendments that may be necessary for determining the controversy between the parties provided, it does not cause any injustice or prejudice to the other side. It is also settled law that while considering whether an application for amendment should be allowed or disallowed, the Court should not go into the correctness or the falsity of the case in the amendment, nor should it record a finding on the merits of the amendment sought to be incorporated by way of amendment.

20. It is equally well settled principle that the prayer for amendment of the plaint and prayer for amendment of the written statement stand on different footing and different yardsticks are applicable. As against the general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim, in the case of written statement the said principle is not applicable and addition of new grounds of defence or substituting or altering a defence by taking inconsistency pleas in the written statement is permissible. It is settled law that the Courts while deciding prayers for amendment should not adopt a hyper technical approach and amendments should be allowed in the pleadings to avoid uncalled for multiplicity of litigation.

21. Now keeping in mind the aforesaid principles, the plea of the counsel for the plaintiff that the stand of the defendants to the effect that subsequent

events after the filing of written statement have no bearing on the case and also not necessary for proper adjudication of the suit is without any merit. It is not for the courts to examine the defence of the defendants or the stand of either of the parties on merits at the stage of dealing with an application for permission to amend the written statement.

22. Suffice it is to state that the (sic) evidence is yet to commence. LRs of defendant no.2 seek to place on record subsequent events that have occurred after filing the written statement which will not prejudice the plaintiff in any manner. The amendments are in the nature of an update of the pending litigation between, the parties and no more. The amendments are relevant and necessary for the purpose of determining the real questions in controversy between the parties. By way of present amendment, defendant is not seeking to withdraw any admission. Subsequent to the filing of the written statement, plaintiff prima facie himself has taken contradictory pleas. There appears no legal impediment in allowing the present application filed by the defendant. Accordingly, the application is allowed.",

and thus, permitted the prayer made by the defendant No.2, i.e., the respondent No.2 herein, through his legal representatives to amend the written statement.

8. It is contended on behalf of the petitioner that the said amendments permitted are in gross violation of the law and that the learned Trial Court had erroneously observed that the suit is at the

stage of evidence and that the amendment in the written statement of the respondent No.2 would not cause prejudice to the rights of the plaintiff, i.e., the petitioner herein and rather the petitioner submits that the suit of the plaintiff was filed in the year 2006 and the issues have been framed in the matter and that the trial is yet to commence. The petitioner further submits that the reliance placed by the respondents on the FIR lodged in Chandigarh and the suit filed by the son of the petitioner, herein, and the relative of late Sh. Dayal Chand Kaith at Chandigarh is not in relation to the suit property situated at Delhi. Inter alia the petitioner has submitted that the respondent No.3 seeks to reagitate the issue with regard to the validity of Will dated 4.2.1997 and that the respondent was estopped from agitating the claim because of a judgment dated 30.7.2004 of the competent Court at Chandigarh and as the respondents or the parties to the said suit had not challenged the said judgment, it has attained finality.

9. Inter alia, the petitioner submitted that the respondents in this case had filed an application before this Court seeking framing of an additional issue in relation to the validity of the Will dated 4.2.1997 which was declined vide order dated 14.8.2012 observing to the effect

that there was no ground for framing the issue with respect to the jurisdiction of the Court to adjudicate upon the genuineness and validity of the Will dated 4.2.1997.

10. The petitioner has further submitted that the respondents have filed a probate case in respect of another Will dated 21.12.1995 which they alleged was the last and final Will of late Sh. Dayal Chand Kaith and that this probate petition was dismissed by this Court on 14.12.2009 and no appeal was filed and that there is no interim order of stay in favour of the respondents.

11. Inter alia, the petitioner submits that the application filed by the respondents is frivolous and vexatious and in order to harass the petitioner and to defeat the agitation of the suit of partition. Inter alia the petitioner submits that the respondents were aware of the rights of the petitioner in the suit property and had only sought to delay the matter by introducing frivolous amendments which have no bearing with regard to the will dated 4.2.1997 and that the learned Trial Court had erroneously observed that the original Will dated 4.2.1997 has not been filed by the petitioner and it was further submitted on behalf of the petitioner that the learned Trial Court at Chandigarh had issued a

declaration that the Will dated 4.2.1997 was the last and final Will of late Sh. Dayal Chand Kaith.

12. Inter alia, it has been submitted that the Ld.Trial Court has erroneously relied on the order dated 23.12.2009 of the Division Bench of this Court in FAO(OS) No. 453/2009, which was an appeal filed on behalf of the respondents against the dismissal of their application under Order VII Rule 11 of the CPC which appeal was subsequently dismissed by the Hon'ble Division Bench and whilst dismissing the appeal, the Hon'ble Division Bench had observed to the effect that the judgment dated 30.7.2004 passed by the learned Civil Judge, Chandigarh, would be *non est* and of no legal efficacy or any bearing on any subsequent litigation. The petitioner however submits that the said observations of the Hon'ble Division Bench of this Court are in the nature of *obiter* and have to be read in the light of the fact that the petitioner had filed a declaratory suit in respect of the Will dated 4.2.1997 at Chandigarh and had not sought probate of the Will dated 4.2.1997. Inter alia, the petitioner submits that despite the observation of the Division Bench of this Court referred to herein above, this Court has declined the framing of an additional issue

regarding the validity of the said Will dated 4.2.1997 vide a subsequent order dated 14.8.2012.

13. On behalf of the legal heirs of the respondent No.2, the petition has been vehemently opposed submitting inter alia to the effect that the petitioner cannot resile from his admissions and that the amendment sought by the legal representatives of the respondent No.2 were absolutely necessary for the proper adjudication of the *lis* between the parties and that the amendments that have been allowed by the learned Trial Court arose from subsequent events in as much as the plaintiff, i.e., the petitioner herein had taken stands totally contrary to the present suit and that in the Court at Chandigarh and before the local police at Chandigarh, the plaintiff, i.e., the petitioner herein has himself disclaimed and disputed his own document i.e., the alleged Will dated 4.2.1997, allegedly executed by late Sh. Dayal Chand Kaith which is the very basis of his alleged claim over the suit property in the suit in question. Inter alia, the legal representatives of defendant No.2, i.e., the respondent No.2 herein, submit that the FIR No. 13/2011 was lodged at the Police Station-03 at Chandigarh where the

present petitioner categorically stated that the property at Chandigarh is an ancestral property, whereas in CS(OS) 2318/2006, the petitioner had contended that the property had been bequeathed to him through the Will dated 4.2.1997. It is further submitted on behalf of the legal representatives of the respondent No.2 that as per the statement of the petitioner in the FIR No. 13/2011 PS 03 at Chandigarh, late Sh. Dayal Chand Kaith was not competent to execute the Will qua the ancestral property.

14. Inter alia, the legal representatives of the respondent no.2 submitted that the petitioner had further confirmed his stand taken by him in the FIR vide the proceedings filed by his wife Mrs. Madhu Dayal vide No. 439/16.02.2011 before the learned Civil Judge titled Master Jyotiraditya Dayal (Minor) son of Sh.Chetan Dayal through his natural guardian and mother Mrs. Madhu Dayal seeking a declaration and partition inter alia on the basis that the suit property situated at Chandigarh is an ancestral property and thus has taken a contradictory stand qua the alleged Will dated 4.2.1997 on which the partition suit in question in Delhi is based with the sole intention to usurp the Chandigarh property. Inter alia, it is further submitted on behalf of the

legal representatives of the respondent No.2 that the memo of parties in the Chandigarh Original Suit No. 429/16.02.2011 included Sh.Rup Dayal as defendant No.1, i.e., the father of the present petitioner and executor of the alleged Will dated 4.2.1997 on which Chetan Dayal, ie., the petitioner relies in the present partition suit in Delhi is not a party to the present partition suit, and that Sh.Dhruv Dayal as the defendant No.2 i.e Chetan Dayal's younger brother was not made a party to the suit before the learned Trial Court at Chandigarh arrayed as defendant No.2 to the suit in question now represented by his legal representatives, Mrs. Aruna Malhotra as defendant No.5 arrayed as defendant No.1 to the proceedings to the suit in question and Chetan Dayal as proforma defendant No.3 arrayed as the petitioner in the suit in question as well as other family members of the family tree. Inter alia it is submitted by the legal representatives of the respondent No.2 that Mrs.Aruna Malhotra and Basant Dayal were not served with the summons of that suit instituted at Chandigarh and are not aware of its present status.

15. Inter alia, the legal representatives of the respondent No.2 placed reliance on the contents of the plaint of the suit titled **Master**

Jyotiraditya Dayal V. Rup Dayal & Ors. filed by Mrs. Madhu Dayal,

i.e., the wife of the petitioner, stating to the effect:

“6. That after the death of Sh DC Kaith, the house has got transferred by the defendants in collusion with each other in the records of the Estate Office in the name of the Defendant No.1 vide letter dated 28.05.1998 Annexure P-6. The transfer was got effected on the basis of a Will dated 04.02.1997 alleged to be executed by Late SH DC Kaith. The copy of the Will is Annexure P-7,

*9..... But the intentions of the Defendant No.1 and 2 were malafide from the very beginning that is why at the first instance **Defendant No. 1 got transferred 100% share in the house in his name on the basis of a Will alleged to be executed on 04.02.1997 by late Sh DC Kaith. Sh. DC Kaith was not competent to execute the said Will and to bequest the house in favour of any person because the house is ancestral as explained above. (Emphasis Supplied)**”*

16. The legal representatives of the respondent No.2 further submit that they filed an application seeking dismissal of the said suit being IA No. 7403/2012 in CS(OS) 2318/2006 which now bears No.56158/16 before the learned Trial Court in as much as the cause of action shown by the plaintiff, i.e., the petitioner herein, disappears by way of a subsequent event and that the suit has become infructuous

which IA No. 7403/2012 was withdrawn by the legal representatives of the respondent No.2 with liberty to seek amendments in the written statement which liberty was granted vide order dated 14.08.2012 of this Court and thereafter the application under Order VI Rule 17 CPC was filed.

17. The legal representatives of the respondent No.2 further submitted that the petitioner has not denied lodging of the FIR No.13/2011 and the suit filed at Chandigarh in the name of his minor son bearing O.S.No.439/16.02.2011 and has also concealed the plaint in the said suit before the Chandigarh Court.

18. Inter alia the respondent No.2 submitted that the petitioner approached the DDA i.e., the defendant No.3 to the proceedings before the learned Trial Court i.e. the respondent no.3 herein, seeking the mutation relying on the order of the learned Civil Judge at Chandigarh dated 30.7.2004 and rival claims of the parties, the DDA vide order dated 5.4.2005 instructed both the petitioner herein, Chetan Dayal and the respondent No.2 (Basant Dayal) now represented by his legal heirs to obtain a probate in order to seek mutation and vide order dated 01.06.2006 in Writ Petition (Civil) No.9829/2006 challenging

the order of the DDA dated 5.4.2005, the learned Single Judge of this Court directed the petitioner herein to obtain a probate of the Will dated 4.2.1997 and the order dated 3.11.2006 of the DDA has not been challenged nor has the petitioner not taken any steps to comply with the order of the DDA and has rather filed the suit in question for partition in the year 2006 and that the petitioner has concealed the fate of the proceedings in the Writ Petition (C) No.9829/2006 titled ***Chetan Dayal V. DDA*** in the present petition and that the petitioner has also concealed the order dated 3.11.2006 passed by the DDA in pursuance of the final order dated 1.6.2006 passed in W.P.(C) No.9829/2006 as well as the order dated 18.2.1999 in Writ Petition(C) No.1001/1999 and the order dated 18.8.1999 in LPA No. 130/1999 of the Hon'ble Division Bench of this Court and that further the legal representatives of the respondent No.2 have taken steps for seeking Letters of Administration and thus filed a Testamentary Case No. 5/2009 which was decided vide order dated 4.12.2009 as being time barred and thus an appeal was filed vide FAO(OS) No. 181 and 182/2010 by Sh. Basant Dayal, now represented by his legal representatives, which appeal is still pending before the Hon'ble

Division Bench of this Court. Inter alia, the legal representatives of the respondent No.2 submit that the impugned order dated 31.5.2018 allowing the amendments does not suffer from any infirmity as the recording of evidence in the suit in question is yet to commence and no prejudice has been caused to the petitioner by allowing the application in as much as the Court ought to be liberal while permitting the amendments in the written statement in the circumstances and that the petitioner's petition is a gross abuse of the process of law and is a dilatory tactic.

19. Inter alia, reliance has been placed on behalf of the legal representatives of the respondent No.2 on a catena of verdicts i.e.

- a) Usha Balasaheb Swami & Ors. V Kiran Appaso Swami & Ors.; (2007) 5 SCC602;*
- b) Ajendraprasadji N.Pandey & Anr. V Swami Keshavprakeshdasji N. & Ors; (2006) 12 SCC 1;*
- c) Andhra Bank V. ABN Amro Bank & Ors.; (2007) 6 SCC 167*
- d) Rajesh Kumar Aggarwal & Ors V.K.K.Modi & Ors.; (2006) 4 SCC 385;*
- e) Gautam Sarup V. Leela Jetly & Ors;; (2008) 7 SCC85 and;*
- f) Rajkumar Gurawara v. S. K. Sarwagi& Co. Pvt. Ltd.& Anr.; (2008) 14 SCC 364*

in support of their contention that the amendment sought by the legal representatives of the respondent No.2 and permitted vide order dated 31.5.2018 has essentially to be allowed and that the impugned order is liable to be set aside.

20. On a consideration of the submissions that have been made on behalf of either side, it is apparent that the amendments sought by the legal representatives of the respondent No.2 are due to the subsequent events that had taken place after institution of the suit that has been lodged by the petitioner herein, in as much as the suit was filed in the year 2006 and the written statement was filed in the year 2007 and the FIR in question was lodged by the petitioner herein bearing No.13 at Police Station 03 at Chandigarh which is dated 24.1.2011 wherein the petitioner herein had made a statement that the immovable property situated at Sector 9C Chandigarh, the property in question in the suit CS(OS) No. 56158/2016 which the petitioner had claimed to have been bequeathed to the extent of 1/4th share in property E-7/6, Vasant Vihar, Delhi apart from the relief of *mesne* profits and rendition of accounts and seeking partition and separate possession in view of the

Will dated 4.2.1997 inter alia executed by late Sh. Dayal Chand Kaith, in his favour, whereas the petitioner herein in the FIR No. 13/2011 had submitted that the immovable property situated at 213, Sector 9C, Chandigarh, was an ancestral property and that the petitioner herein had disowned the document dated 4.2.1997 before the local police at Chandigarh and had also submitted that late Sh. Dayal Chand Kaith was incompetent to execute the Will dated 4.2.1997 as the property at Chandigarh was an ancestral property, it is apparent that the petitioner herein seeks to take different stands in different proceedings qua the Will dated 4.2.1997 stated to have been executed by late Sh. Dayal Chand Kaith on the basis of which he had filed the suit CS(OS)56158/2016 bearing initial No. 2318/2006. In the circumstances, it is apparent that in as much as the trial having not started at the time when the amendment was allowed and the recording of evidence having not commenced till the date of the impugned order, there is apparently no infirmity in the impugned order.

21. The petition is thus declined.

ANU MALHOTRA, J.

JULY 1, 2020/SV

