Mrs. Anita Kumari Gupta Vs Late Mr. Ved Bhushan (Deceased Thr. L.Rs.) and Others

Court: Delhi High Court

Date of Decision: May 6, 2014

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 6 Rule 17, Order 7 Rule 11, 2(2)

Citation: (2014) 143 DRJ 576

Hon'ble Judges: G. Rohini, C.J; Rajiv Sahai Endlaw, J

Bench: Division Bench

Advocate: S.D. Singh and Mr. R.K. Vats, Advocate for the Appellant; Sanjiv Kakra, Mr. Atul Kumar and Mr. Sanjeev Mahajan, Advocates for R-1, 2, 5 and 6, Advocate for the Respondent

Final Decision: Allowed

Judgement

1. The appeal impugns the order dated 9th July, 2013, of the learned Single Judge in CS(OS) No. 1093/2011 filed by the appellant/plaintiff,

allowing the application of the respondents/defendants under Order VII Rule 11 of the CPC (CPC), 1908 and rejecting the plaint as not disclosing

any cause of action.

2. The appeal was admitted for hearing and the parties directed to maintain status quo with regard to the title and possession of ""the suit property"".

Attempts to have the dispute settled amicably did not fructify. We have heard the counsels for the parties.

3. We have at the outset enquired from the counsel for the appellant/plaintiff, as to how the present appeal with the nomenclature of "FAO" i.e.

First Appeal against Order is maintainable. Attention of the counsel is invited to the definition of a "decree" u/s 2(2) of the CPC and which is

deemed to include rejection of the plaint. It has thus been enquired, whether not the remedy of the appellant/plaintiff is by way of a Regular First

Appeal i.e. RFA against such a decree.

4. The counsel for the appellant/plaintiff has invited our attention to the order dated 6th August, 2013 when, while admitting the appeal, the

appellant/plaintiff was directed to deposit appropriate court fees in accordance with law. He states that such court fees has since been deposited

and in fact the appeal should thus be treated as RFA rather than FAO.

5. The counsel for the respondents/defendants has fairly stated that in view of the court fees having been paid, the nomenclature makes no

difference.

6. The suit, plaint wherein has been rejected as not disclosing a cause of action, was filed by the appellant/plaintiff seeking partition of property No.

24, Pusa Road, New Delhi, claiming 1/6th share therein and for ancillary reliefs, averring:

(i) that the father of the appellant/plaintiff and the respondents/defendants No. 1 to 4 and the grandfather of the respondents/defendants No. 5 & 6

was the owner of the said property and he died on 18th December, 1965;

(ii) that after the death of father, the property was transferred in the name of the mother who also died intestate on 28th March, 1991;

(iii) that the appellant/plaintiff thus had a 1/6th share in the property;

(iv) that the appellant/plaintiff though settled abroad, on her visits to India always used to reside in the said property but which is now being denied

to the appellant/plaintiff.

7. The respondents/defendants No. 1 to 3 & 5 contested the suit by filing written statement dated 25th May, 2011, on the grounds:

(a) that it was the mother of the parties and not the father who was the owner of the said property;

(b) that the mother had left behind her last Will and Testament dated 8th December, 1988 bequeathing the said property to the

respondents/defendants No. 1 to 3 and the predecessor-in-interest of the respondents/defendants No. 5 & 6 only;

(c) that the respondents/defendants No. 1 to 3, 5 & 6 had got the suit property mutated in their names in the records of the Municipal Corporation

of Delhi (MCD) vide letter of mutation dated 20th November, 1991;

(d) that this mutation was in the knowledge of the appellant/plaintiff;

(e) that the respondents/defendants No. 1 to 3, and predecessor-in-interest of respondents/defendants No. 5 & 6 also applied to the Delhi

Development Authority (DDA), being the lessor of the land underneath the property, for mutation in their names on the basis of the Will aforesaid;

(f) that DDA required recording of the statements of all the legal heirs including the appellant/plaintiff;

(g) that the appellant/plaintiff appeared before the Assistant Collector, DDA and made a statement admitting the ownership of the mother as well

as the genuineness and authenticity of the Will and respondents/defendants No. 1 to 3, and predecessor-in-interest of respondents/defendants No.

5 & 6 having become the owners of the property thereunder;

(h) that on the basis of the aforesaid statements and the Will, the DDA mutated the property in the names of the respondents/defendants No. 1 to

3, and predecessor-in-interest of respondents/defendants No. 5 & 6 on 1st March, 1996;

(i) that the property, to the knowledge of the appellant/plaintiff, had since then been standing in the ownership of the said respondents/defendants

for 15 years prior to the institution of the suit, without any objection whatsoever of the appellant/plaintiff;

(j) that the appellant/plaintiff had turned dishonest after 20 years of the death of the mother.

8. The appellant/plaintiff, within days of filing of the written statement aforesaid, filed I.A. No. 8823/2011 for amendment of the plaint, inter alia

pleading, (a) that she is the youngest sibling; (b) that soon after marriage, she had settled abroad, though had retained physical possession of one

room on the ground floor and one room on the first floor of the property, where her belongings remained; (c) that the appellant/plaintiff was always

under the impression that the property was owned by her father and was inherited by the mother from the father and had only then learnt that it,

from the beginning, was in the name of the mother; (d) that after the demise of the mother, there were extensive discussions about sharing of the

property; (e) that she totally trusted the respondents/defendants and had also lent a sum of Rs. 25 lakhs to them in the year 1994 (i.e. after the

demise of the mother); (f) that the respondents/defendants had taken her signatures on blank papers on the pretext of the same being required for

common activities and it appears that the said papers had been misused by placing the same on the file of the DDA; and, (g) that she had become

aware of the alleged Will of the mother for the first time then only and to incorporate the said facts in the plaint.

9. The respondents/defendants, besides contesting the said application for amendment, also filed I.A. No. 14420/2011 under Order VII Rule 11

CPC for rejection of the plaint, on the ground that the appellant/plaintiff had not appropriately valued the same and not paid the appropriate court

fees thereon and on the ground that the appellant/plaintiff having given her no objection before the DDA to the mutation of the lease of the land

underneath the property in the names of the respondents/defendants No. 1 to 3, 5 & 6 on the basis of the Will of the mother, the suit on the

premise that the mother had died intestate, was false.

10. The learned Single Judge, in the impugned order dated 9th July, 2013, first dealt with the application of the respondents/defendants under

Order VII Rule 11 CPC and observing that:

There is no need for DDA to resort any fabrication. The files appear to have been continuously numbered. There does not appear to be any sign of

a tempering. Significantly, there is no averment in the plaint that the plaintiff was asked to sign blank papers. This stand is plainly an afterthought.

On the other hand the plaintiff has no satisfactory explanation as to what she was doing all these years after the death of her mother, and after the

mutation was carried out in favour of the respondents/defendants No. 1 to 4 admittedly to her knowledge. The suit is barred by laches. Further,

the Court is satisfied that the plaintiff has not come with clean hand and has suppressed material facts of her having agreed to the mutation of the

suit property in favour of the defendants No. 1 to 4.

allowed the application holding that the plaint did not disclose any cause of action. The learned Single Judge consequently dismissed the application

for amendment of the plaint.

11. We are not only unable to agree with the reasoning given by the learned Single Judge for allowing the application of the

respondents/defendants under Order VII Rule 11 CPC and in the facts aforesaid, do not find any ground for rejection of the plaint to have been

made out but are also of the view that the order is erroneous also for dealing first with the application under Order VII Rule 11 CPC, when an

application filed earlier in point of time for amendment of the plaint was pending consideration. We are of the opinion that once an application for

amendment of the plaint has been filed, even if after the filing of an application under Order VII Rule 11 CPC, ordinarily the application for

amendment of the plaint is to be considered first and it is only thereafter, if the amendment were to be refused, that the application for rejection of

the plaint as originally filed, is to be considered; needless to state that if the amendment is allowed, it has to be seen, whether the ground on which

rejection is sought survives. It was so held by this Court as far back as in Wasudhir Foundation Vs. C. Lal and Sons, by aptly observing that

Courts allow amendments, not really as a matter of power but in performance of loftier duty to deliver substantial justice and the ouster of Order

VI Rule 17 CPC will throttle the very life line of Order VII Rule 11 and instead of promoting, would defeat the ends of justice. Alas, neither

counsel cited the law before the learned Single Judge or before us.

12. Faced therewith, the counsel for the respondents/defendants contends that we may dispose of this appeal by setting aside the order allowing

the application of the respondents/defendants under Order VII Rule 11 CPC and remand the matter to the learned Single Judge for considering the

application for amendment of the plaint in accordance with the principles applicable thereto.

13. Though the modus suggested by the counsel for the respondents/defendants is a possible one but having heard the counsels at length including

on the aspect of amendment, we are of the view that rather than perpetuating duplicity by allowing the time of the learned Single Judge also to be

spent on the application for amendment, we only should deal therewith, dismissal thereof also being in any case part of the order impugned in this

appeal.

14. The amendment sought was at a pre-trial stage. It cannot also be doubted that the amendment sought is necessary for adjudication of the

matter in controversy. The counsel for the respondents/defendants however contends that the principles of amendment of the plaint are different

from the principles of amendment of the written statement (with which legal principle, there can be no dispute); that the amendment is in withdrawal

of the admission and changes the very nature and character of the suit and ought not to be allowed. Reliance in this regard is placed on:

(I) Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., ;

(II) Kali Charan Vs. Ishwar Dass, ;

(III) Vivek Narayan Pal Vs. Sumitra Pal, ;

(IV) Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others, ;

(V) Joginder Singh Vs. Gurdeep Singh and Others, ;

(VI) Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, ;

(VII) Rameshkumar Agarwal Vs. Rajmala Exports Pvt. Ltd. and Others, ;

(VIII) B.K.N. Narayana Pillai Vs. P. Pillai and Another, ;

(IX) Municipal Corporation for Greater Bombay Vs. Lala Pancham of Bombay and Others, ;

(X) Shri Rajan Suri and Another Vs. The State and Another, ;

(XI) Judgment dated 1st November, 2013 in FAO(OS) No. 271/2013 titled Nripendra Kumar Aggarwal Vs. Surender Lal Aggarwal; and,

(XII) Valluri Jaganmohini Seetharama Lakshmi and another Vs. Kopparthi Ramachandra Rao and others, .

15. We are unable to agree. In the plaint as filed, there is no admission of the Will of the mother. Rather, it is expressly stated that the mother died

intestate. Similarly, there is no admission in the plaint, of the property having been mutated in the names of the respondents/defendants or with the

consent of the appellant/plaintiff. The question thus, of withdrawal of any admission does not arise. The only question for consideration is, whether

in the face of the appellant/plaintiff, while seeking the amendment, not disputing her signatures on the papers in the record of the DDA, it can be

stated that the appellant/plaintiff has to suffer for not disclosing in the plaint as originally filed, the factum of having signed papers in blank and giving

the same to the respondents/defendants.

16. We are of the view that no case for denying the amendment on the said ground is made out. The appellant/plaintiff is not stating that such blank

signed papers were handed over in respect of anything to be done qua the property with which the suit is concerned. The plea sought to be taken

is, of the signatures on the blank papers having been taken on the pretext of any common activities of the parties. Such a plea is not of a kind which

is not to be put to trial. It is a different matter that ultimately the appellant/plaintiff may fail in proving the same. However, the appellant/plaintiff

when confronted with such a defence is entitled to take the plea to meet such defence and which plea can be adjudicated only after trial and cannot

be rejected at the stage of Order VI Rule 17 CPC only.

17. As far as the contention, of the amendment changing the nature and character of the suit is concerned, we may notice that the suit as originally

filed was for partition of the property, on the ground of the mother of the parties having died intestate. The appellant/plaintiff in such a suit, when

met with the defence of a Will of the common predecessor, is entitled to either in the replication or by way of amendment of the plaint, plead facts

constituting a challenge to the Will. Therefrom, it cannot be said that the nature and character of the suit has changed.

18. Though the counsel for the respondents/defendants has handed over the judgments aforesaid but during the hearing has referred only to Lala

Pancham and Usha Balashaheb Swami supra. Lala Pancham is cited to contend that where there is not the slightest basis in the plaint as originally

stood to make out a case of fraud, amendment to make out such a case has to be disallowed. It is argued that the plea of the appellant/plaintiff by

way of amendment of her having signed papers in blank and the same having been used for mutation, is a plea of fraud and since there was no

basis therefor in the suit as originally filed, the said amendment cannot be allowed. However, reliance placed on the said judgment de hors the facts

thereof, is misconceived. The Supreme Court in that case was concerned with, a suit by tenants for injunction against demolition by the landlord for

the reason of the tenancy premises having been declared as dangerous. The suit was dismissed as untenable, since the demolition was at the

instance of the Municipality. At the appellate stage, the plaint was sought to be amended to plead that the demolition order of the Municipality was

fraudulently induced by the landlord. It was such an amendment which was disallowed holding that in the suit as originally filed, there was no

challenge to the order of the Municipality. The situation here is entirely different. Similarly, Usha Balashaheb Swami supra is relied only to contend

that the general principles of amendment of the written statement are different from that applicable to amendment of the plaint. However, the same

does not amount to laying down that the amendment of plaint can never be allowed.

19. We are therefore of the view that the learned Single Judge, has erred in dismissing the application for amendment of the plaint without testing

the same on the anvil of the legal principles applicable thereto.

20. Though in view of the aforesaid, the ground of rejection of the plaint disappears but we may otherwise also observe that the learned Single

Judge, in exercising power under Order VII Rule 11 CPC also, has gone contrary to the settled principle of law that at the stage of Order VII Rule

11 CPC, the plaint and only the plaint and the documents filed therewith are to be seen and not the defence thereto. Reference if any required can

be made to the dicta of the Division Bench of this Court in Texem Engineering Vs. Texcomash Export, . The learned Single Judge has however

held the plaint to be not disclosing any cause of action on the basis of the defence of the respondents/defendants.

21. Not only so, there is no presumption lest rebuttable presumption as drawn by the learned Single Judge that there is no need for DDA to resort

to any fabrication. Further, rejection of the plaint is on factual findings of the mutation in the records of the DDA being genuine and honest inspite of

challenge thereto and which factual finding could not have been arrived at without trial. Rather, the procedure for mutation adopted by the DDA in

the present case is found to be strange in the experience of at least one of us (Rajiv Sahai Endlaw, J.) which is that the DDA, for such mutation,

insists upon the affidavits, undertakings and indemnities of all the natural heirs and does not record statements of the natural heirs on its file as is

stated to have been done in the present case. It is thus to be determined at trial, whether the statement attributed to the appellant/plaintiff and

recorded admittedly not in the hand of the appellant/plaintiff but in the hand of some official of the DDA, is of the appellant/plaintiff or not, though

bearing the signature of the appellant/plaintiff. Significantly, the said statement is not on oath as indeed the said official of the DDA was not entitled

and empowered to administer. The possibility of a blank piece of paper bearing the signature of the appellant/plaintiff being used for the purpose of

recording such a statement of the appellant/plaintiff, instead of accepted procedure of requiring the appellant/plaintiff to furnish affidavit and

indemnity bond, cannot be ruled out.

22. The counsel for the respondents/defendants has also contended that the impugned order was made after examining the file of the DDA

summoned at the instance of the appellant/plaintiff herself.

23. The same would however not make any difference. Undoubtedly, the counsel for the appellant/plaintiff when faced with the argument of the

counsel for the respondents/defendants of appellant/plaintiff having participated in mutation, while denying submitted that record of DDA can be

requisitioned. However the same, cannot stop the appellant/plaintiff from controverting the said record or explaining the same.

24. Though the counsels have not argued but we may notice that the learned Single Judge has besides the aforesaid reason, also given the reason

of there being no satisfactory explanation for the delay in filing the suit and of laches, for rejecting the plaint. The same is however without any

discussion on, which Article of the Schedule to the Limitation Act, 1963 applies. Substantive rights in properties cannot be defeated by laches. A

suit by a co-owner for partition can be defeated on the ground of limitation, only by pleading ouster and the other co-owner having become

exclusive owner of the property by adverse possession and which is not the plea of the respondents/defendants.

25. We may further notice that though the respondents/defendants have also raised the ground of the suit being not appropriately valued for the

purposes of court fees and jurisdiction and appropriate court fees having not been paid, for rejection of the plaint but neither was the same pressed

before the learned Single Judge and has not been given as a ground for rejection of the plaint nor has the counsel for the respondents/defendants

argued so before us. We may however refer to the judgment dated 2nd February, 2012 of the Division Bench of this Court in FAO(OS) No.

183/2006 titled Sonu Jain Vs. Rohit Garg as per which also and in view of the averments in the plaint, the same does not constitute a ground for

rejection of the plaint.

26. We accordingly allow the appeal, set aside the order dated 9th July, 2013 of the learned Single Judge rejecting the plaint as well as the order

declining the amendment sought by the appellant/plaintiff and remand the suit for decision in accordance with law. Accordingly, the application for

amendment of plaint is allowed and the application for rejection of the plaint is dismissed.

27. The parties to appear before the learned Single Judge on 7th July, 2014.

28. The suit file if requisitioned in this appeal, be put up before the learned Single Judge on the same date.