

(2012) 04 DEL CK 0469**Delhi High Court****Case No:** I.A. No. 5509 of 2011 in Counter Claim No. 41 of 2009 in CS (OS) No.576 of 2009

Skyhawk Educational and
Welfare Society (Regd.) and Anr

APPELLANT

Vs

Directorate of Education and Ors

RESPONDENT**Date of Decision:** April 10, 2012**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 6 Rule 17, Order 7 Rule 14(3), Order 8 Rule 1A(3), Order 8 Rule 6A(4)

Citation: (2012) 189 DLT 449**Hon'ble Judges:** Manmohan Singh, J**Bench:** Single Bench**Advocate:** Harish Malhotra with Ms. Nandni Sahni, for the Appellant; Purnima Maheshwari, for defendants No.1, 2 and 4. Mr. Ved Prakash Sharma, with Ms. Amrit Kaur Oberoi, for applicant/D-3. Ms. Sujata Kashyap, for D-5., for the Respondent**Final Decision:** Allowed**Judgement**

Manmohan Singh, J

1. By this order, I shall dispose of the application being I.A. No.5509/2011 filed by the counter-claimant/defendant No.3 under Order VI, Rule 17 and Order 1, Rule 10 read with Section 151CPC. The brief facts are that the plaintiffs have filed the above-mentioned suit for declaration, permanent and mandatory injunction against the present defendant No.3/counter-claimant and others, on the premise that plaintiff No.1 is a Society registered under the Societies Registration Act, 1860 and the said Society by virtue of a resolution dated 20.04.2008 expelled the defendant No.3/counterclaimant from the its membership.

2. Defendant No.3/counter-claimant has filed his written statement as well as the counter-claim thereby controverting the claim made by the plaintiffs. Defendant No.3 has also questioned the true status and position of plaintiff No.1 as a society to

run as an educational institution.

3. The issues were framed on 18.05.2010 in the main suit. The plaintiffs were directed to adduce evidence in the first instance and ten weeks" time was granted to the plaintiffs to produce the evidence by way of affidavit(s). An additional issue was also framed on 22.09.2010 in view of the application filed by defendant No.3, being I.A. No.8077/2010. On the said date, three issues in the counter-claim No.41/2009 were also framed. The plaintiffs filed the list of witnesses and also the evidence of PW.1 along with 10 other affidavits of the witnesses.

4. In the meanwhile, the defendant No.3/counter-claimant has filed the present application for amendment of his counter-claim. It is stated in the application that after the discovery of some documents, the said amendment has been sought, as the applicant did not know about the custody of these documents.

5. It is contended by the defendant No.3/applicant that the applicant was not aware of the custody of three documents which are now sought to be placed on record until February, 2011 which are now documents are given in para-6 of the application which is reproduced here below:

6. That defendant No.3 had discovered documentary evidence i.e. writings dated 21.08.2004, 23.08.2007, proposed settlement dated 01.10.2007 between Shri Balraj Singh Lochhab and Shri Yashpal Rana, Release Deed dated 25.02.2008 by Shri Surender Singh in favour of Shri Balwan Singh, Release Deed dated 26.02.2008 and Receipt dated 26.02.2008 by Shri Anand Singh alias Anand Kumar in favour of Shri Bhom Singh which was in the custody and possession of Shri Anand Singh alias Anand Kumar Dahiya and have been handed over to defendant No.3 only on 5th February 2011 as already explained.

A perusal of these documents coupled with proposed settlement dated 11th December, 2007 (already on the court record) leaves no doubt that the real intention of the parties was to have a partnership amongst themselves and the affairs of the partnership were being shown to be run by the society to obviate the derecognition and de-affiliation of the school by the Directorate of Education, Central Board of Secondary Education.

The defendant No.3 is also filing an application for amendment of his counter-claim.

6. It is further stated that in order to adjudicate the controversy between the parties, the proposed defendants No.6 to 10 are necessary parties to be impleaded and at the same time, paragraphs-7(iv)A to 7(iv)F are necessary to be added in the preliminary objections of the counter-claim after paragraph-7(iv) thereof, the details of which are mentioned in paragraph-8 of the application.

7. Mr. Ved Prakash Sharma, learned counsel appearing on behalf of defendant No.3/counter-claimant states that the said amendments are clarificatory in nature which explain the relationship between the parties which are reflected in the

document dated 11.12.2007 and the same would also go into the route of the controversy between the parties. The defendant No.3 earlier could not take the said proposed pleas for want of sufficient evidence which has been discovered and said documents came to the knowledge of defendant No.3/counterclaimant only on 05.02.2011. In order to avoid the multiplicity of litigations, the notices dated 18.02.2011 u/s 80 CPC were issued to the Government of India, Directorate of Education, CBSE and Registrar of Societies. It is also prayed that proposed defendants No.6 to 10 be impleaded in the suit.

8. The application of defendant No.3/counter-claimant is strongly opposed by the learned counsel for the plaintiffs who has argued that the trial in the matter has already been commenced as the issues in the matter were framed on 18.05.2010. An additional issue in the suit and the issues in the counter claim were framed on 22.09.2010. The plaintiffs have already filed 10 affidavits. Thus, under proviso of Order VI, Rule 17 CPC, the amendment application is not maintainable as no due diligence as provided in the proviso has been shown by the defendant No.3. The said documents were available with defendant No.3/counter-claimant. The learned counsel has referred the following judgments in support of his submissions:-

- (i) Prominent Hotels Ltd. vs. New Delhi Municipal Council, reported in 175 (2010) DLT 66.
- (ii) Gastech Process Engineering (India) Pvt. Ltd. vs. Saipem, reported in 159(2009) DLT 756.
- (iii) [Dr. D.K. Attery Vs. Mr. Kanwal Singh Mehra,](#)
- (iv) Vidyabai and Others vs. Padmalatha and Another, reported in (2009) 2 Supreme Court Cases 409.
- (v) Rohit Singh and Others vs. State of Bihar (now State of Jharkhand) and others, reported in (2006) 12 Supreme Court Cases 734.

9. Mr. Sharma, learned counsel appearing on behalf of the applicant/defendant No.3 has argued that the contentions of the learned counsel for the plaintiffs have no force. He has also argued that the trial has not commenced in the counter-claim which has to be treated as a normal suit under the provisions of Order VIII, Rule 6A(4) CPC which provides that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. He further argued that while framing the additional issue in the counter-claim on 22.09.2010, there were no directions given to the defendant No.3/counter-claimant to file any list of witnesses or evidence by way of affidavit. The learned counsel states that since the list of witnesses and affidavit(s) have not been filed by the defendant No.3, therefore, the trial has not commenced in the counter-claim. In support of his submissions, Mr. Sharma has referred the decision of this Court given in the case of [Rajesh Sharma Vs. Krishan Pal and Another](#), it has been held that the actual commencement takes

place only when either witness appears in Court for giving evidence, or affidavits of witnesses are filed by way of their examination-in-chief.

10. After hearing the rival submissions of the learned counsels for both the parties, it is not in dispute that the additional issue in the above case was framed on 22.09.2010 and the issues in the counterclaim were also framed on the same date. It appears from the record that there was no direction given to the defendant No.3/counterclaimant to file the list of witnesses or evidence by way of affidavit. Under the provisions of Order VIII, Rule 6A (4) CPC, the counterclaim has to be treated as a plaint and governed by the rules applicable to plaints. No doubt, the plaintiffs have filed the evidence of PW-1 and other 10 affidavits. As far as the defendant No.3/counter-claimant is concerned, his counter-claim has to be treated as an independent suit. It is also a matter of fact that the defendant No.3/counter-claimant has not filed the list of witnesses or evidence by way of affidavit. Therefore, it appears to the Court that the proviso as referred to by the learned counsel for the plaintiffs for rejection of the present application has no applicability under the said circumstances. As regards the objections of the plaintiff on merit of the proposed amendments are concerned, the same cannot be considered at the time of deciding the application for amendment.

11. In para-6 of the application, specific statement has been made that this documentary evidence which was in the custody and possession of Sh. Anand Singh alias Anand Kumar Dahiya, the same was handed over to defendant No.3 only on 5.2.2011. In case the statement of defendant No.3 is correct, then, there is no impediment to allow the application even if trial in the matter is commenced.

12. As far as adding of proposed defendant Nos.6 to 10 is concerned, I am of the considered view that it is not necessary to implead these defendants. However, liberty is granted to the defendant No.3 to summon these persons as their witnesses to prove the documents in accordance with law. The prayer of the defendant No.3 in this regard is rejected.

13. It appears prima-facie that the amendments sought by the defendant No.3/counter-claimant are bonafide in nature and the statement made in the proposed parties are based upon evidence received by the defendant No.3 in the matter of February, 2011.

14. In view of the above, the present application filed by the defendant No.3/counter-claimant is partly allowed as prayed for. The amended counter-claim filed along with the application is taken on record.

15. The application is disposed of.

I.A. No.5510/2011 and I.A. No.2499/2011

16. The application, bearing I.A. No.5510/2011, has been filed by defendant No.3, under Order VIII, Rule 1A(3) read with Section 151 CPC with a prayer that he may be

allowed to place on record the original documents as per the list of documents along with the documents annexed to the present application on record, in support of his defence as well as counter-claim.

17. The application, bearing I.A. No.2499/2011, has been filed by the plaintiffs u/s 151 read with Order VII, Rule 14(3) CPC, praying that they may be allowed to place on record Annexure P-1 along with their additional affidavit and original documents and Sh. Balraj Singh Lohchab, plaintiff No.2's evidence be recorded on the basis of the said additional evidence by way of affidavit and documents also.

18. In view of the order passed in I.A. No.5509/2011, both the applications are allowed.

CS (OS) No.576/2009 & Counter Claim No.41/2009

Amended written statement/counter claim is taken on record. Replication/written statement be filed by the plaintiffs within four weeks, replication in counter claim be filed within four weeks thereafter. Additional documents be filed within six weeks. List the matter before Joint Registrar for admission/denial of documents on 03.09.2012.