

IN THE COURT OF SH. HASAN ANZAR, ADJ-06
WEST DISTRICT, TIS HAZARI COURTS

CS No. 12345/16

Mohd Shamim Malik

.....Plaintiff

Versus

Mohd Shahid & Ors

..... Defendants

Date of Order : 29.07.2019

ORDER

1. Plaintiff has filed suit for possession, permanent injunction and damages against the defendants. It was the case of the plaintiff that father of parties i.e. Sh. Noor Mohammad was running a business in the name and style of **Noor Mohammad Furnishers** as the sole proprietor till the business was converted into the partnership business with defendant no 3 vide partnership deed dated 10.07.1981.

2. It is also averred that plaintiff and defendant No. 3 were having the share of 70% and 30% respectively in the partnership business. Sh Noor Mohammad, father of the parties purchased an industrial plot bearing number 64 Block B, Kirti Nagar, Industrial

Area, admeasuring 111.38 sq mt (hereinafter called as **suit property**) in the name of M/s Noor Mohammad Furnishers vide letter dated 07.07.1981.

3. That on 04.10.1994, partnership firm M/s Noor Mohammad Furnishers was dissolved as Mohd Yasin resigned from partnership firm. Mohd Yasin executed certain documents whereby Sh. Noor Mohammad became exclusive and sole owner of the suit property.

4. It is also averred that an unregistered family settlement took place on 31.10.1992 in between the plaintiff and defendant no. 2 and 3 as regards the distribution of the entire work at Kirti Nagar, property at Baroda and factory at Gali No. B-5, Mustafabad Road and the assets of plaintiff and defendant No.2 and 3 whereby the plainiff and defendant no. 2 and 3 have distributed the properties without the consent and knowledge of Noor Mohammad who was the owner of the property.

5. After the settlement dated 31.10.1992, the partnership firm was dissolved on 04.10.1994 and therefore, the alleged unregistered family settlement dated 31.10.1992 does not have any sanctity in the eyes of law. It was averred that unregistered family settlement dated 31.10.1992 was also not binding on Noor Mohammad. Plaintiff has pointed out certain responsibilities that are to be taken up as per unregistered family settlement dated 31.10.1992 for which parties did

not act. The alleged unregistered family settlement dated 31.10.1992 also took into account of the property of partnership firm i.e suit property i.e B-64, WHS Kirti Nagar, Delhi for which parties have no right to decide about it inter se distribution as it was the property partnership firm. It is also averred that as on date i.e 31.10.1992 the partnership firm was in existence and all the properties belongs to that partnership firm and therefore, the settlement dated 31.10.1992 has no meaning in the eyes of law.

6. It is also the case of the plaintiff that after the dissolution of partnership business Noor Mohammad became the sole proprietor and on 20.04.2009, he entered into the partnership agreement with plaintiff and both were having the share of 66% and 34% respectively.

7. It is also averred that due to the pressure of defendant no. 1 to 3, a fresh partnership deed was executed without dissolving the earlier partnership deed and the plaintiff and Noor Mohammad were compelled to sign the partnership deed dated 15.05.2009 but same was only on papers without cancelling the earlier registered partnership deed dated 20.04.2009.

8. It is also averred that Noor Mohammad had purchased the property at Sunheri Maszid in the name of defendant no. 3 and plaintiff for the welfare of the family however the said property is in the possession of defendant no. 2. It is also averred that Noor

Mohammad had requested the defendant no. 2 and the plaintiff to execute GPA in favour of defendant no. 3 so that business could be run in proper manner.

9. It is also stated that Noor Mohammad purchased the property at Baghirati Vihar, Mustafabad, Delhi-04 from his own fund in the name of defendant no. 1 in the year 1999-2000 and construction was made upto the 4th floor. The property is currently in the possession of defendant no 1.

10. It is also averred that Noor Mohammad has permitted the defendant no. 1 to use and occupy the basement of property bearing no. B-64, WHS Kirti Nagar, Delhi as a licensee and defendant no 1 is a permissive user of the same.

11. It is also averred that first floor of the property bearing no. B-64, WHS Kirti Nagar, Delhi is in the possession of the plaintiff whereas defendant no. 3 is not in possession of any portion of the property. Defendant no 2 was permitted to use the ground floor as permissive owner being the son of Noor Mohammad but defendant no 2 has illegally let out the premises to some other person.

12. It is also averred that Noor Mohammad had purchased the property at Dayalpur Extention having ground floor, first floor and second floor in the name of his wife Rashida. However, Smt Rashida

orally gifted the said property to Noor Mohammad and Noor Mohammad has sold the half portion of the property to one Nazreen Malik and Noor Mohammad had orally gifted half of the portion of the said property to his four daughters namely Zaibun Nisa, Khairun Nisa, Salma and Ruksana with part possession of the property.

13. It is also averred that Noor Mohammad executed the gift deed in favour of plaintiff gifting the entire property bearing no. 1/665 at Kashmere Gate by way of gift deed dated 25.10.2012. A property was also purchased by defendant no.2 on consideration given by Noor Mohammad and another property was purchased at Bhagirathi Vihar, Mustafabad, Delhi-04. Plaintiff also provided description of other properties being purchased by other parties either in their own name or the consideration being paid by Noor Mohammad.

14. It is averred that on 30.12.2013, Noor Mohammed had orally gifted all movable and immovable including suit property to Plaintiff in presence of witnesses and by virtue of the oral gift deed the plaintiff have revoked the license and requested defendant No.1 & 2 to vacate the suit property.

15. Defendant no.1 has filed the Written Statement in which the stand of defendant no.1 can be summarized as under;

a. Father of defendants and plaintiff were engaged in the profession of carpentry. Family business was being done under the

name of Noor Mohd Furnishers. A partnership was entered in between Noor Mohammad and defendant no.3 in the ratio of 70:30 and suit property was purchased in the name of Partner Firm i.e. 'Noor Mohd. Furnishers'.

b. Certain other properties were purchased in the name of plaintiff and other defendants either at Gujarat or Delhi.

c. Partnership firm was dissolved on 31.03.1996 between Noor Mohammad and Defendant No.3 and the said new partnership firm came into existence in between plaintiff, defendant no.2 and 3. It continued to work as proprietorship firm of Noor Mohd. However, firm was being run by Noor Mohammad, plaintiff and defendant No. 2 & 3. It was also averred that new partnership firm came into existence between Plaintiff and Defendant No.3 on 01.04.1992 and same was dissolved on 31.03.1996 and thereafter firm remained as proprietorship firm of Noor Mohd . However, same was being run by Defendant No.2.

d. Mutual Family arrangement was arrived in between father of plaintiff and defendants on 31.10.1992 whereby possession of different portion of suit property was given to plaintiff and other parties.

e. Noor Mohd. rented out to basement to tenants. Defendant

no. 3 started business at Brijpuri. Plaintiff rented his portion at first floor to tenant and in this manner Defendant No.2 was managing the affairs of Noor Furnishers.

f. Defendant No.1 joined the trade and started business with Noor Ahmed in the basement and business of Hayat Furnishers was dissolved due to difference between defendant No.1 and Noor Mohd.

g. Noor Mohammed Furnishers remained joint property of all the family members which could be adjudged from the fact that in the year 2003 plaintiff and all defendants except Defendant No.3 and Noor Mohd. gave undertaking to DDA for getting the suit property mutated in the name of partnership formed in between plaintiff, defendant No.1, 2 and Noor Mohammed. Family settlement dated 31.10.1992 was arrived in between all the parties in respect of other properties either held singly or in their joint names.

h. In the written statement, it was further pleaded that numbers of properties were divided either in the name of the parties singly or jointly by virtue of family settlement dated 31.10.1992 and 16.07.2005.

i. It is further averred that shares of parties have already been determined and parties are enjoying their respective shares to the exclusion of others.

j. It was also pleaded that by virtue of oral gift dated 16.7.2005, defendant No.1 became owner of party bearing number D-126, Gali No.6, Dayalpur, Delhi-41. Mother of parties died on 2.10.2002.

k. That in line with the family settlement, defendant no.1 is enjoying the property in Kirti Nagar.

l. It was further pleaded in the written statement that defendant No. 3 have started claiming in respect of suit property by virtue of the dissolve partnership and new agreement dated 15.05.2009.

m. Plaintiff has compelled defendant no.1 and 2 to sign a new partnership deed dated 15.5.2009 in respect of suit property. It is also averred that as per earlier family arrangement coupled with oral Hiba got 1/4th Share in Kirti Nagar and therefore defendant no.1 is an owner of ground floor portion of suit property.

n. That defendant No.1 has been continuously pursuing Noor Ahmed and other defendants and the plaintiff for the partition of Suit property by virtue of oral gift deed dated 16.7.2005.

o. Defendant No.2 has filed a civil suit No. 35/2013 which is pending in the court of Civil Judge.

p. It is also averred that Noor Mohd was not the owner of suit property as property was allotted to partnership firm of Plaintiff and Defendant No.3 and after its dissolution, Noor Ahmed became its sole owner and thereafter all persons were put into possession in their respective share and therefore Sh. Noor Ahmed cannot transfer share to any person including plaintiff.

16. It is also relevant to note that defendant No. 1 has taken the stand that there was family settlement which was reduced into writing and thereafter the oral gift dated 16.07.2005 was made in respect of the suit property and other properties.

17. Defendant no. 1 has filed an application under Order 6 rule 17 CPC on the ground that need for amendment was necessitated as the Written Statement was drafted contrary to the facts narrated by defendant no. 1 as family settlement dated 21.11.2003 in respect of suit property bearing no. B-64, WHS, Kirti Nagar, Delhi and defendant no 1 was put into the possession of basement of suit property. The factum of settlement dated 21.11.2003 is not mentioned in the Written statement filed by his previous counsel.

18. Defendant no 1 prayed for removal of preliminary submission from A to OO as same is not in the personal knowledge of defendant no. 1 and facts have been stated therein are partly correct

and partly within the knowledge of defendant no. 1 in his Written Statement .

19. In the application for amendment, defendant no. 1 had prayed for addition of new preliminary objection in place of his earlier preliminary objection and also prayed for the deletion of the earlier preliminary submission on the ground that there was a family settlement dated 21.11.2003 and same was ratified by oral hiba dated 16.07.2005. After Oral Hiba dated 16.07.2005, Noor Mohammad does not have any right and interest in respect of the property and therefore, oral hiba dated 30.12.2013 and deed of declaration dated 08.04.2014 as propounded by plaintiff are void ab initio.

20. Sh Noor Mohammad had accepted the Will dated 21.11.2003 by virtue of which defendant no. 1 became joint owner of the suit property in question to the extent of 23%. It is also stated that the property including the suit property is joint and undivided and therefore suit is not maintainable.

21. It is also stated that the suit filed by the plaintiff is bad for misjoinder of parties as other married daughters of Noor Mohammad were not impleaded. It was averred that partnership firm as acquired the property in which Noor Mohd and defendant No.3 were having share of 70% and 30%.

22. Defendant no.1 has pleaded that the dissolution deed dated 04.10.1994 and MOU dated 31.10.1992 became redundant in view of the family settlement dated 21.11.2003.

23. Defendant No.1 has pleaded ignorance to para no 5 -7 of the plaint and reiterated the family settlement dated 21.11.2003 whereby he has undivided 23% share and the earlier dissolution deed dated 04.10.1994 and settlement deed dated 31.10.1992 has become infructuous.

24. Defendant also sought deletion of para no. 8 of the WS and reiterated that the family settlement dated 21.11.2003 supersede of previous arrangement and as per which the property have been divided in the share of 23%, 24%, 23% and 30% in favour of Noor Mohd, Mohd Yakoob, Mohd Shahid and Mohd Yasin.

25. It is also stated that defendant No. 1 had executed the joint indemnity bond accepting the family settlement and the said family settlement has been duly recorded as document no. 5315, additional book no. 3, Vol no 375 on pages 56-57 in the Office of Sub Registrar. It is also stated that after the family settlement dated 21.11.2003, no right whatsoever is left with Late Noor Mohd and as such the entitlement in respect of the property through the partnership deed dated 20.04.2009 or 15.05.2009 is illegal and invalid and therefore the right of defendant no. 1 stands crystalised in terms of family

settlement dated 21.11.2003.

26. Defendant has also sought amendment in para no 9 and 10 by reiterating the family settlement dated 21.11.2003. Defendant has also sought amendment in para no 11 of WS by denying its content. Defendant no 1 took stand that the property bearing no. D-126, Gali no 6, Dayalpur was purchased by him in the name of his mother Smt Rashida Begum due to respect , love and affection. It was also averred that mother of defendant no 1 has made an oral gift to defendant no. 1 and put him into the possession of suit property and therefore defendant no. 1 is the owner of property. Defendant no 1 also took the stand that Noor Mohd does not have any right title or interest in the property at the D-126 and the plaintiff fraudulently got executed the sale deed dated 31.01.2013 in respect of half portion of the property in the name of his wife and remaining half portion was given as gift to married daughter by Noor Mohd by way of Hiba. Defendant questioned the sale deed and oral gift in respect of the property at D-126, Dayalpur. It was also pleaded that married daughters had obtained collusive decree in respect of one room on the first floor of the property.

27. Defendant has deleted para no. 12 and denied the contents of para no. 13 of WS. Para no 16 of WS was also denied. Defendant no.1 denied that he is either harassing the plaintiff or his father and further denied that he has filed a collusive suit with defendant no.2.

28. Para no 17 of WS was also sought to be amended whereby the allegation of the oral gift of all immoveable and moveable property to plaintiff was denied. Defendant no.1 also took the stand that Sh. Noor Mohd was very much ill, who does not possess sound mind till his death on 04.11.2014 and he was residing with plaintiff and plaintiff played a fraud by procuring deed of declaratio dated 08.05.2014. The plaintiff seriously questioned the oral gift as allged to be made by Noor Mohd on 30.12.2013. Defendant no.1 had undertaken that if the application for amendment is allowed, he would withdraw the challenge of the oral gift and he would withdraw the counter claim and it was asserted that vehemence with the WS as filed by previous counsel was not in accordance with the instruction of defendant no 1 and the documents supplied to his counsel and therefore the amendment in Written Statement is necessary for just and fair decision of the case.

29. In the written statement as filed by defendant no.1 apart from making references to the suit property, defendant has also made reference to other properties in which he has either staked claim or attempted to give his version with regard to other properties, admittedly other properties are not the subject matter of the present suit.

30. The amended Written Statement filed alongwith application

for amendment as filed by defendant no.1 took up the plea that in view of the family settlement dated 21.11.2003 which was duly ratified by oral Hiba (Gift) dated 16.7.2005, the alleged oral Hiba dated 30.12.2013 and 8.4.2014 have become null and void. Defendant No.1 also took up the plea plaintiff has accepted Will dated 21.11.2003 and other documents therefore suit filed by plaintiff is not maintainable.

31. It is averred that as per family settlement dated 21.11.2003, defendant is share holder to the extent of 23% and is in exclusive possession of the basement of suit property.

32. It is also averred that serious dispute have arisen in between the sons of Late Noor Mohd in respect of dissolution dated 4.10.94 as well as unregistered family settlement dated 31.10.1992 and Sh. Noor Mohd got a registered family settlement dated 21.11.2003 and in view of the family settlement, the alleged resolution dated 4.10.1994 and 31.10.1992 has become redundant. Defendant No. 1 also took up the plea that he was not party to the settlement dated 31.10.1992. Defendant No.1 also took up the plea that right in respect of the suit property was settled by way of settlement dated 21.11.2003 and defendant no.1 has 23 % share in the suit property and he is in possession of basement of suit property. It was further averred that plaintiff accepted the Will dated 21.11.2003. A plea was taken that after having executed the family arrangement and Will dated 21.11.2003, the alleged partnership dated 20.04.2009 has become

illegal as same does not affect the rights of parties.

33. Defendant No.1 in his amended written statement took a stand that property at Bhagirathi Vihar is in the name of defendant No.1 and he was not a licensee. Defendant no.1 reiterated that by way of settlement dated 21.11.2003, he was having the share of 23 percent in the suit property. It is relevant to note that in paragraph 11 of the amended written statement, defendant has made detailed facts with regard to other properties as being held by plaintiff and defendants either in their own name or the purchase being purchased out of the joint business funds.

34. I have heard Learned Counsel for the parties. I have also perused the written submissions filed by both the parties.

35. Ld Counsel for the defendant no.1 submits that amendment has been necessitated as written statement has been filed beyond the instruction of defendant no.1. The allegations have been levelled against previous counsel for defendant no.1. It was also submitted that amendment does not seek to withdraw any admission made in the written statement. The proposed amendment also explains the admission if any as made by defendant in respect of unregistered family settlement dated 31.10.1992. It was also submitted by Counsel for defendant no.1 that defendant seeks to remove certain paragraphs from his written statement as same is not required in reference to the

averments made in the plaint. It was also argued by Ld Counsel for defendant no.1 that addition of new ground of defence or substituting or altering a defence or taking an inconsistent pleas in the written statement would not be objectionable in comparison to amendment as prayed in the plaint. A liberal approach need to be adopted when amendment is sought in the written statement. It was also argued by Ld Counsel for defendant that in the present case, neither issues have framed nor trial has started and therefore, application for amendment merits favourable consideration.

36. Per contra, it was argued by Ld Counsel for plaintiff that application for amendment merits rejection as by way of amendment, the defendant no. 1 is trying to introduce new case and the nature of amendment sought by defendant No.1 is dishonest as by way of amendment, the defendant is withdrawing the admission made in earlier written statement. Ld Counsel for plaintiff has vehemently argued that by filing the present application for amendment, the applicant/defendant is seeking to abandon the previous written statement which was duly supported with an affidavit. Ld Counsel for plaintiff has referred to the Written statement and the proposed Written statement to show the differences in the Written Statement. It was also argued by Ld Counsel for plaintiff that present application for amendment is in total contrast to the stand taken by defendant no.1 in other proceedings in between the parties. It was also contended by Ld. Counsel for Plaintiff that defendant has tried to

plead a new case and defendant cannot be permitted to take a new stand. .

37. Order VI rule 17 CPC provides that court can permit either parties to amend or alter the amendment in the pleading if it helps in determining the real questions in controversy between the parties. Amendment of a pleading either by plaintiff or defendant prior to the commencement of trial is to be considered in a liberal manner. Amendment of pleading in written statement is to liberally allowed in comparison to the amendment as required in the plaint. Defendant is permitted to raise even inconsistent plea in his written statement. Plaintiff is not permitted to change the nature of case by seeking amendment in a plaint and a defendant is not permitted to withdraw the admission if any made in the written statement. Admissions, if any made in the Written statement could be explained in the subsequent written statement. In this regard, it would be profitable to rely upon ***Usha Balashaheb Swami v. Kiran Appaso Swami (2007)5SCC 602*** wherein it was held as under ;

From a bare perusal of Order 6, Rule 17 of the Code of Civil Procedure, it is clear that the Court is conferred with power, at any stage of the proceedings, to allow alteration and amendments of the pleadings if it is of the view that such amendments may be necessary for determining the real question in controversy between the parties. The Proviso to Order 6, Rule 17 of the Code, however, provides that no Application for amendment shall be allowed after the trial has commenced unless the Court comes to a conclusion that in spite of

due diligence, the party could not have raised the matter before the commencement of trial.

However, Proviso to Order 6, Rule 17 of the Code would not be applicable in the present case, as the trial of the Suit has not yet commenced.

19. It is equally well-settled principle that a prayer for amendment of the Pleint and a prayer for amendment of the written statement stand on different footings. 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 applies to amendments to Pleint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the Pleint may be objectionable.

38. The plea of defendant is that previous written statement as drafted by his counsel was not in accordance with his instruction due to which there is need to seek amendment in the written statement and furthermore, the nature of amendment as sought by him does not withdraw the admission.

39. Therefore, question for consideration is whether by way of amendment, defendant seeks withdrawal of admission if any made by him in the written statement. Secondly, whether defendant has any substantial or valid ground to seek amendment or amendment is

simply based on the narration of facts.

40. In order to decide this question, it is to be noted is that peculiar feature of the present case is reliance on oral gift and settlement by both parties in respect of the suit property and other properties to set up their respective cases. It is only during the trial, the factum of oral gift could be established. It is also a fact that in the present case number of settlements etc was made and new terms have made and what is to be believed is the question that can be answered during the trial.

41. The plaintiff in paragraph No.5 and 6 of his plaint has made reference to settlement dated 31.10.1992. The plaintiff has also pleaded that the settlement dated 31.10.1992 was never acted upon by the parties and same was not binding on Noor Mohammad. The defendant in his written statement has relied upon the settlement dated 31.10.1992. However, in the application for amendment it has been pleaded that there was a settlement dated 21.11.2003 and certain registered documents were also made and followed by the oral gift dated 16.07.2005. The settlement was in the form in the form of declaration and Will given by Shri Noor Mohammad. Defendant has not altogether withdrawn his admission qua the settlement dated 31.10.1992 by explaining the subsequent facts dated 21.11.2003 followed by oral gift dated 16.07.2005. This stand of defendant no. 1 would not amount to withdrawal admission. The Amendment as

sought by defendant explains an event in which Sh. Noor Mohammed which is based on registered documents.

42. It is pertinent to mention that plaintiff has pleaded that the settlement agreement dated 31.10.1992 has never been acted upon it. When the plaintiff himself is not relying on the settlement dated 31.10.1992 and defendant No.1 has explained certain events by referring to the settlement dated 31.10.1992 by making reference to the declaration and will dated 21.11.2003 and oral gift dated 16.7.2005. It cannot be said that any prejudice has been caused to the plaintiff or there is withdrawal of admission.

43. Other ground for opposing the application for amendment is that by way of amendment, defendant no.1 is introducing a new case which has not been pleaded or referred in the previous written statement. It has also been asserted that number of paragraph has been deleted by the defendant by moving the present application for amendment where amendment is sought in the written statement.

44. Its true that in the amendment application, the defendant has sought deletion numbers of paragraph. The perusal of the application for the amendment and the paragraphs that are sought to be deleted in the preliminary submission would clearly reveal that the said paragraphs as referred in the written statement does not have much bearing in reference to the present suit although same might have

bearing in some other litigation in between the parties. The paragraph as sought to be deleted have no reference to the issues pertaining to the suit property. Even the amended written statement does not withdraw admission. It is also relevant to mention that even plaintiff has made reference various properties and have tried to assert the right in respect of the other properties and defendant has also attempted bring a version in reference to the properties as referred in the plaint. Furthermore, if an inconsistent plea is raised by way amendment then same is permissible as inconsistent pleas or different line of defence is permitted to be raised in written statement (**Basawan Jaggi Vs. Dhobhi 1995 Supp (3) SCC 179.**

45. However, dispute in the present case relates to suit property where parties are making their respective claim by relying upon either settlement or oral gift and also on partnership deed.

46. Neither issues have been framed nor trial has started and the amendment would aid in determination of the controversy in between the parties as defendant no.1 has based his one of the defence by way of amendment i.e. Registered Will and other declaration coupled with oral gift and ultimate the effect of will dated 21.11.2003 and declaration has to be considered by the Court, which would aid in determination of disputes between the parties.

47. Only prejudice that has been caused to the plaintiff is that

pendency of application has delayed the proceedings and any prejudice caused to the other party can be suitably remedied, if defendant no.1 is saddled with reasonable costs.

48. Therefore, in view of the above mentioned discussion the application for amendment as filed by defendant no.1 is allowed subject to payment of cost of Rs. 25,000/- payable to plaintiff and amended written statement of Defendant No.1 taken into record subject to the payment of cost as mentioned above.

49. Nothing stated herein shall tantamount to the expression of the opinion of the case.

Announced in the Open Court
on 29.07.2019

(Hasan Anzar)
Additional District Judge-06
West District, THC