

ORDER BELOW EXH. 21 IN R.C.S. No. 44/2018

1. The present application is filed on behalf of plaintiff under O. VI Rule 17 of the C. P. C. 1908 for amendment to pleading.

2. the defendants No. 1 to 5 filed say at Exh. 23 and resisted the application.

3. Ld. Advocate for the plaintiff has submitted that the plaintiff has not mentioned the four boundaries of the suit property in pleading. The defendants have raised objection on the point of boundaries. Therefore the plaintiff seeks to amend the plaint to include the same. The plaintiff no. 1 died on 24.8.2018. She had executed a will dated 10.1.2018 and desired to give her share in the suit property to plaintiff No. 2 Kavita. Hence the plaintiff seeks to amend the plaint in that regard.

4. Ld. Advocate for the defendants submitted that the proposed amendment to pleading is not permissible as it would change the nature of the suit. He further denied that the plaintiff No. 1 executed a will in favour of plaintiff No. 2. The plaintiff no. 2 has got executed false will deed in her favour. He further argued that the transfer is not tenable in the eye of law as per section 53-A of the Transfer of Property Act 1882. Hence the defendants have prayed for rejection of the application.

5. Read the application and say. Perused the record. Heard both the parties.

6. The present suit is for partition and separate possession of the suit property. The plaintiff wanted to insert para No. 1/A, 1/B, 1/C and 5/A and prayer clause of the present application in plaint.

7. O.VI Rule 17 provides for **Amendments of Pleadings**

The court may at any stage of the proceeding allow either party to alter or amend his pleadings in such manner on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

provided that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial.

The plaintiff seeks to amend the plaint in two way firstly by elaborating description of suit property and amendment with regard to will executed by deceased plaintiff No. 1.

8. It is to be noted that the trial has not commenced in the present matter. From the written statement at exh. 19 it is seen that the defendants have stated that the plaintiffs have given incomplete description of suit property. Therefore the proposed amendment in respect of same would be helpful to elucidate the matter.

9. The Ld. Advocate for plaintiff filed on record the will belatedly. Ld. Advocate for the defendants have resisted the application on the point of a will executed in favour of the plaintiff as the transfer is not tenable as per section 53-A of the Transfer of Property Act. Section 53-A of Transfer of Property Act provides as under:-

53-A. Part performance.--- Whether any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute

the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof

Taking into consideration the factual aspect; section 53-A of the Transfer of Property Act has no application in the present application.

10. On the contrary the proposed amendment would not change the nature of suit. The amendment is necessary to decide real controversy between the parties. Hence to avoid multiplicity of proceeding and for just and proper adjudication of matter on merit, it is necessary to allow the application. No prejudice would cause the rights of defendants. The inconvenience cause to the defendants can

be compensated by imposing cost on plaintiff. Hence I proceed to pass following order.

Order

1. The application is allowed subject to costs of Rs.200/- to be paid to defendants equally.
2. The plaintiff to carry out proposed amendment within 14 days from the date of order.

Date : 23-07-2019

( P. R. Kulkarni )  
2<sup>nd</sup> Jt. Civil Judge, J.D., Ausa.