

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS (OS) 876/2008**

Reserved On : 02.09.2009

Pronounced on : 09.10.2009

Lt. Col R.R. Chandra (Retd.)

..... Plaintiff

Through : Mr. D.L. Frey with Ms. Retika Frey, Advocates

Versus

Mr. Sandeep Chandra

..... Defendant

Through : Mr. L.C. Goel, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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1. The plaintiff seeks a decree for possession and consequent permanent and mandatory injunction against his son, the defendant, who occupies a portion of the suit property, being S-207, Greater Kailash- II, New Delhi.

2. The suit averments are that the plaintiff, a retired army officer, is the sole and absolute owner of the entire suit property, which he purchased with his funds and income. His wife is a medical doctor; she, like him is a senior citizen. Both are maintaining themselves with pension and rental income, received by letting out the second floor of the suit property. The defendant is their elder son. The plaintiff claims that the defendant was

given the best education, having graduated in commerce honours from the Bhagat Singh College; he is also a diploma holder in personnel and marketing management, from Delhi University. He is also a management graduate (MBA) from the Faculty of Management Studies, Delhi University. It is contended that the entire expenses for the defendant's education were borne by the plaintiff; the latter's younger son, Anuj Chandra is a medical doctor, settled in the United States of America (USA).

3. The plaintiff says that the defendant got married in 1985, to one Ms. Shoma; a son, Vijay Vikram was born to the couple in 1988. Their marriage was however, dissolved in 1995; the defendant's son was in the care and custody of his mother. It is alleged that as per the decree, the defendant had to pay Rs. 2,000/- per month for his son's support. The plaintiff claims that the defendant could not comply with this direction, as a result of which the plaintiff used to discharge the liability. It is further stated that the plaintiff later married one Ms. Pratibha Prahalad, but due to some dispute with her, the defendant has been residing in the suit property.

4. The plaintiff says that the defendant had acquired a residential property, i.e. 27, Siddharth Enclave, which was mainly funded by him (the plaintiff). He had let it out, and used to get rents; the property was, however, sold by the defendant in 2004; he retained the entire sale proceeds. It is alleged that despite giving the best education to the defendant, the latter does not show any regard or respect to his elderly father, and behaves arrogantly. It is alleged that the defendant routinely does not allow the plaintiff's guests to visit him. The defendant, says the plaintiff, threatens to implicate him (the plaintiff), his wife (i.e. his mother) and the younger brother, in criminal cases. The plaintiff says that the

defendant's behaviour is cruel, harsh and inhuman; often due to his shouting, he (the plaintiff) gets severe palpitations and his blood pressure rises. His doctors have advised him to avoid stress, yet, the defendant inconsiderately persists in his ill-treatment.

5. The defendant occupies one room, mentioned in a plan, annexed to the plaint-marked in red. The plaintiff says that despite being asked to leave the premises, (after failed attempts to end the matter amicably through meetings) through legal notice, the defendant continues to occupy the premises. In these circumstances, the plaintiff seeks a decree for possession, and also permanent injunction restraining the defendant from disturbing his possession (i.e. the plaintiff's possession) of the premises.

6. The defendant, has resisted the claim in the suit, and also set up a counter claim. He says that his (defendant's) great grandfather was a big landlord and Zamindar, who, at the time of his death in 1949-50, passed on his considerable estate to his son, i.e. the plaintiff's father, late Ramachandra, who died in 1983-84. It is claimed that with the money, the said Ramachandra purchased huge property, No. 6A, Nemi Road, Dalanwala, Dehradun, UP. It is alleged that the plaintiff persuaded Ramachandra to sell that property to purchase and construct the suit property, which was agreed and done. It is contended that the suit property was thus purchased out of money received by the plaintiff, which is from the Hindu Undivided Family funds. It is submitted therefore, that the defendant has 1/3rd share in the suit property, as a coparcener, other shares being that of the plaintiff, and his younger son. The defendant alleges that he has a share in the property, which has the character of joint undivided family property, and that the plaintiff has deliberately concealed the true nature

of construction. According to him, the dispute between the parties arose when he (the defendant) sought for partition, but the plaintiff did not agree to it.

7. The defendant, in his written statement denies that the suit property was acquired by the plaintiff with his funds; it is alleged that apart from the rental out of the second floor, the plaintiff also receives substantial amounts for letting out the first and third floor. The defendant states that his educational expenses were borne by his grandfather, and not by the plaintiff. He does not deny his first marriage, but denies that any monetary liability towards the expenses for his son (the defendant's son) was ever discharged by the plaintiff. It is also not denied that the defendant married Ms. Pratibha Prahalad. However, it is alleged that the plaintiff's differences with her were due to the plaintiff's adamant behaviour, refusing to partition the property. The defendant alleges that the Siddhartha Enclave property was purchased from his hard earned income.

8. The defendant denies that he is not helping in looking after his mother or that he does not permit the plaintiff's guests to visit him. He alleges that the plaintiff causes nuisance whenever anyone visits him (the defendant); it is alleged that the plaintiff threatens to implicate the first defendant in false criminal cases. The defendant says that he is in occupation of the entire ground floor, except two bedrooms, which are used by his parents. He says that his furniture and belongings are lying in all other parts of the ground floor. He says that though he was unwilling to use the rear entrance, suggested by the plaintiff, he did show reluctance, but denies flying into a rage or hurling abuses, since as a son, he could not dream of doing so. He denies any discussion with the plaintiff.

9. In his counter claim, the defendant reiterates the allegations levelled in the written statement, and contends that he is entitled to a share in the suit property, as a coparcener, and that the property was purchased out of joint family funds. It is alleged that the plaintiff is also entitled to a share, but cannot claim a decree for partition, as is done in the suit. He also says that the suit property is liable to be partitioned by metes and bounds. In addition, he seeks a decree for account against the plaintiff, in respect of the rents received by him, for letting out different portions of the suit property; he also seeks a permanent injunction, against the plaintiff restraining from selling, letting out and parting with possession, the suit property.

10. On 18.02.2009, the court framed five issues. The first issue framed was as follows:

“1. Whether the property No. S-207 Greater Kailash II, New Delhi was a HUF property as alleged by the defendant?”

The court also directed that since the defendant had alleged that the suit property belonged to a HUF, despite its standing in the plaintiff's name, and he (the defendant) claimed his right to remain in it on the basis of its being a HUF property, he (the defendant) had to lead evidence first to prove his allegation.

11. In his replication, the plaintiff denies the allegation levelled by the defendant that the suit property is a joint family property and as such he (the defendant) is entitled to a 1/3rd share in the same. While reiterating that the suit property is a self-acquired property, it is stated that the same was purchased from DLF United Limited through a registered sale deed dated 28.12.1973 and thereafter construction was carried out from the loan obtained by the plaintiff for this purpose from HDFC Bank. It was further stated that the defendant's great grand father was not a big land-lord or Zamindar, rather he owned a small kirana

business, which he left behind in Pakistan. The great grand father passed away in Pakistan pre-1947. The defendant's grand father, i.e. the plaintiff's father, worked as a government servant in Burma and retired pre-maturely as an Executive Engineer, the last pension drawn by him was Rs. 597.87/- p.m. The grand-father later passed away in the plaintiff's government allotted house. It is stated that the Dehradun property was a self-acquired property of the plaintiff's father, which was gifted by him to his wife, who later sold it in the year, 1975 for a consideration of Rs. 90,000/-. The plaintiff's mother, later bequeathed her estate of about Rs. 1.7 Lacs to the defendant and his younger brother (i.e. plaintiff's younger son, Anuj) and his mother. The parties to the suit are not members and of a Hindu Undivided Family and have never been assessed as such, hence they are not governed by the Mitakshara Law principles. It was also stated that even Anuj does not hold any interest in the suit property, which belongs to the plaintiff alone. It was also denied that the plaintiff is holding any Benami property.

12. On 09.01.09 the defendant was set down *ex-parte* and later on in consideration of an application filed by the defendant and after imposing costs, the order was set aside on 18.02.09. In the mean time the plaintiff filed his *ex-parte* evidence by way of affidavit. The suit averments were reiterated therein and to substantiate his claim that the suit property is held in his individual name a certified copy of the registered sale deed dated 28.12.1973 is filed and marked as Ex. PW-1/1; the plaintiff has also filed the certificate issued by HDFC bank confirming repayment of the said loan as Ex. PW-1/2. It is stated that the property stands mutated in his name and is assessed as such for tax purposes; a copy of the Wealth Tax assessment order dated 30.07.1984 is placed on record as Ex. PW-1/3. The defendant too filed his affidavit in evidence, where he reiterated the allegations made in his written

statement and the counter claim but no document was pointed out therein to substantiate his claims.

13. In I.A. no. 3681/2009, moved by the defendant for summoning eight witnesses, which was dismissed by order dated 17.03.2009 he was permitted to examine only himself to prove the preliminary issue. It was observed that:

“Defendant has not appeared despite the fact that defendant was specifically told to appear today for consideration of the list of witnesses filed by the defendant. I have perused the list of witnesses. Against the column ‘the facts sought to be proved by the witness’, the sole answer as mentioned by the defendant is to ‘give evidence on facts in issue’. The fact in issue in this case the onus of which on the defendant is ‘whether the property in question was HUF property as claimed by the defendant’. The defendant in the list of witnesses has not mentioned what document are to be proved by which witness in respect of proving the property to be HUF property neither any document has been filed. I, therefore, consider that the witnesses mentioned in part-D of the list of witnesses filed by the defendant are unnecessary and frivolous witnesses who have mentioned by the defendant only to prolong the trial. None of the witnesses stated in part-D can throw light on this nature of the property without any document. One of the witnesses Ms. Kunti Chandra wife of plaintiff and mother of defendant is suffering from Alzheimer disease. She has also been cited as a witness. The other witnesses mostly are those who cannot connected given evidence without documents. The defendant is free to examine only himself to prove the issue. The matter is already listed for evidence which be recorded subject to payment of cost already ordered by this court.”

14. The defendant filed I.A. no. 4231/2009 seeking recall/review of order dated 17.03.2009, which was dismissed as withdrawn on 28.05.2009, while observing that the proposed witnesses, cannot, in absence of any documents, testify as to the status of the suit property. On 09.04.2009 the defendant (DW-1) was examined, when he tendered his affidavit in evidence towards his examination-in-chief and cross-examined and further cross-examination was scheduled on 13.05.2009 and 14.05.2009. On 13.05.2009, his counsel sought an adjournment on the ground of the defendant being unwell; a medical certificate was filed, which was allowed and the matter was adjourned for 21.05.2009 and 22.05.2009.

Again an adjournment was sought and allowed on the same ground when the matter was taken up on 21.05.2009, this time an OPD card of DW-1 was submitted. The matter was then listed for 22.05.2009. The plaintiff filed an affidavit stating that the defendant was bluffing the court and avoiding cross-examination in order to delay the proceeding in the matter. The Ld. Joint Registrar observed that- *"It seems that DW-1 is avoiding his cross-examination, and delaying the matter"*. On 26.05.2009 notice was issued to Dr. Deepak Choudhary, who issued the medical certificate to the defendant, whose statement was recorded on 28.05.2009, he could not state with certainty whether the person who he examined was the defendant. The defendant finally appeared before the court on 03.07.2009, when his cross-examination was concluded.

15. Defendant filed I.A. no. 8331/2009, virtually seeking to revisit order dated 28.05.2009, as no new submissions were made by the defendant as to why deposition of such witnesses is necessary. While dismissing the I.A. on 14.07.2009, the Court observed that:

"The Court is of the opinion that this is an attempt to merely prolong the case and somehow get around the orders of the Court, (which has made it clear that preliminary issue will be decided first before the proceedings can go ahead)

In the circumstances, I.A. No. 8331/2009 is dismissed; the applicant shall bear costs quantified at Rs. 30,000/- to be paid to the plaintiff before the next date of hearing"

16. The Court has carefully considered the pleadings of the parties, documents placed on record of the suit by the plaintiff and the deposition made by the defendant in his cross-examination, and the parties' submissions. Ex. PW-1/1 is a certified copy of the registered sale deed dated 28.12.1973 executed by DLF United Ltd. in favour the plaintiff for a sum of

Rs. 5,700/-. Ex. PW-1/2 is the certificate issued by the HDFC bank to the plaintiff, stating that he repaid the amount obtained by him as housing loan in terms of the loan certificate dated 13.10.1982 after mortgaging the suit property plot as security (for the said loan). Ex. PW-1/3 is the copy of the Wealth Tax assessment order for the suit property, issued in the name of the plaintiff alone.

17. As it noticed earlier, the onus of proving the preliminary issue was on the defendant. The defendant has not placed any document, whatsoever, on the file of this suit that remotely suggests that the suit property was held by the plaintiff for or on behalf of the members of the HUF. In his cross-examination, on being suggested that he has not produced any documents in support of the allegations the suit property is a joint family property, the defendant made a bald assertion that- *"They (the documents) are lying with the plaintiff."* On being further suggested that he has not declared the suit property as HUF in any of his income tax returns, his response was that-

"Till now my returns were being handelled (sic handled) by the plaintiff and this can be verified from the handwriting of the plaintiff written on the income tax returns..... Regarding the HUF property, I have to consult my income tax consultant, since this HUF property came into being when I was a minor."

On being questioned about his not filing the valuation report of the suit property, the defendant stated that-

"The valuation report of the HUF property of S-207, Greater Kailash, Part-II, New Delhi was supposed to be filed by the plaintiff on behalf of the HUF."

18. The court is mindful of the defendant's previous conduct in defaulting appearance and resorting to delay tactics, due to which on two occasions the Court has imposed costs.

19. The evidence placed on the record about the plaintiff's ownership of the suit property, by way of the sale deed, as well as the certificate showing that he discharged the

loan secured by him previously for acquiring the asset, clearly establishes his ownership. The defendant's evidence is entirely oral, and at best speculative and conjectural. At each step, he suggests that the plaintiff is in possession of the documents, and that even his (the defendant's) wealth tax returns were with the plaintiff. Other than his oral testimony, he did not lead any documentary evidence to establish the claim that the suit property was acquired out of joint family funds. He is the counter-claimant, asserting such state of affairs.

20. In *Srinivas v. Narayan*, AIR 1954 SC 379, the Supreme Court held that:

i) Proof of existence of joint family does not lead to a presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish that fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question have been acquired, the burden shifts to the party alleging self-acquisition to establish that property was acquired without the aid of joint family funds.

(ii) The mere proof of existence of joint family nucleus out of which acquisitions should have been made is not sufficient. The important thing to consider is whether the income which the nucleus yields is sufficient to lead to an inference that acquisitions were made with that income. A building in the occupation of the members of a family yielding no income could not be a nucleus out of which acquisitions could be made even though it might be of considerable value.

21. The above decision was applied in *M. Girimallappa v. R. Yellappagouda* AIR 1959 SC 906. In *Rukhmabai v. Laxminarayan* AIR 1960 SC 335, the Supreme Court held that:

"...there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member

of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.”

22. The *ratio* of the above pronouncements is that that there exists a presumption in Hindu Law that a family is joint. However, there is no presumption that property owned by any member or members of the joint family is Hindu undivided family property. The member asserting so (that the property is Joint family property) has to prove by cogent and convincing evidence that he, or other member acquired the asset by investing joint family funds or nucleus. In such event, the onus shifts on those who say that the property is not joint family property, to say so. These issues are not questions of law, but questions of fact to be decided on appreciation of evidence led by the disputing parties.

23. In this case, as observed by this court earlier, the defendant has not led any credible evidence to establish that the suit property was acquired out of, or with the aid of joint family funds; he relies entirely on the assertion that the documentary and other evidence is with the plaintiff. He also does not seek recourse to the remedies available in law, to adduce any objective material, apart from his oral testimony. On the other hand, the plaintiff has shown that the property stands in his name; he was serving in the army, and had secured a loan, which was later liquidated, evidenced by a certificate. Such evidence clearly points to the property being self acquired property of the plaintiff.

24. In view of the above, the court is of opinion that the plaintiff has been able to establish his case, and the defendant cannot succeed, in the suit, as well as the counter claim. A decree for possession as sought, shall be drawn; permanent and mandatory

injunction shall also issue, as claimed by the plaintiff, in the suit. The defendant's counter claim is also dismissed, for the above reasons.

25. The suit is decreed, and counter claim dismissed, in the above terms, with costs against the defendants. Counsel's fee is quantified at Rs. 30,000/- to be paid within four weeks.

October 09, 2009

(S.RAVINDRA BHAT)
JUDGE