

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

Pronounced on: 22.04.2010

+ **CS(OS) 1950/2006 and I.A. Nos. 2328/2008, 2329/2008,
13787/2008 and 734/2009**

SH. BALBIR SINGH UPPAL AND ANR. Plaintiffs

Through : Mr. H.L. Dasi, Advocate.

versus

SH. GURMEET SINGH UPPAL AND ORS. D+ Defendants

Through : Mr. Harish Malhotra, Sr. Advocate with
Mr. Charan Singh Verma, Advocate.

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT**

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.

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This judgment will dispose of the defendants' application (I.A. No. 13787/2008) for rejection of the suit on the ground that the plaint does not disclose a triable cause of action and, therefore, cannot be entertained.
2. The facts briefly, according to the suit averments are stated as follows – concededly late Hakim Dewan Singh Uppal (hereafter referred to as “Hakim Dewan”) was the grandfather of the plaintiffs and Defendant Nos. 1 to 3. The plaintiffs and Defendant Nos. 1-3 (hereafter referred to as “the sons”) are the sons of the fourth defendant (hereafter referred to as “Arjan Singh”, i.e. son of late Hakim Dewan). The late Hakim Dewan was initially a government teacher in the erstwhile non-partitioned Lahore who retired from government service in 1934, and was a

3. pensioner. It is stated that he had good knowledge about herbs and indigenous treatment and used to give medical advice in the Pakistani territories of pre-partitioned Punjab. The suit states that he was earning good amounts from this alternative profession and was immensely popular, credited with discovering effective remedies for sexual vitality. In the wake of Partition, he migrated to India and settled in Delhi. It is submitted that after that event he gave about Rs.10,000/- or Rs. 15,000/- to Arjan Singh for starting the same business and under his guidance. The latter (Arjan Singh) thereafter used to give medical consultation and herbs under the style M/s. Sewak Pharmacy.

4. The sons allege that Arjan Singh was acting as *karta* of the Hindu Undivided Family (HUF) during Hakim Dewan's lifetime, being the latter's elder son. It is also alleged that Hakim Dewan never engaged himself in any independent business or service. The suit claims that Hakim Dewan, after migration, lodged a claim against loss of family ancestral property, which was allowed to the tune of Rs. 6,400/- in terms of order dated 10.07.1951 as regards joint ancestral property and another of his claims was allowed for Rs. 10,240/- by an order dated 08.11.1951. Hakim Dewan died in 1955 before the release of claim amounts; he was survived by Arjan Singh and another son, Amar Singh. They applied for claiming their rights in respect of such alleged ancestral property of Hakim Dewan. It is contended that they were held entitled for compensation. The suit contends that the property, being 8756-8758, Gali Rahat Ganj, Roshnara Road was an Evacuee property and had belonged to migrants who had fled to Pakistan. On 11.07.1984, a Conveyance Deed was executed in favor of Arjan Singh and registered on 18.10.1984 in respect of that property. This was after the compensation amount granted to late Hakim Dewan was adjusted to the extent of Rs. 2,426/- and the balance of Rs. 5,155/- was paid to Arjan Singh. The suit contends that Arjan Singh started his business with the help of financial assistance given by his father from out of the compensation amounts so derived.

5. The sons contend that the second defendant, Surjeet Singh started separate business of automobile workshop for which financial investment was from family funds. Similarly, the first plaintiff joined family business with Arjan Singh in 1969. Documentary materials such as public advertisement in different newspapers are relied upon. It is submitted that the second plaintiff joined business in 1984 whereas the first defendant never took-up the ancestral family business but started a separate business of automobile spare parts with the initial amount from the joint family funds. The plaintiff mentions about a partnership deed dated 01.04.1985, i.e. "M/s Hakim

Dewan and Sons” in which the first two defendants had 15% share each and Arjan Singh had 40% share. Defendant Nos. 1 and 2, though being not part of the business, were given shares. It is submitted that the business was always carried on jointly as part of the HUF business and Arjan Singh bought a plot, A-2, Sarai Pipal Thala, Adarsh Nagar, Delhi in 1964 out of the proceeds of that fund. The suit states that Smt. Gurcharan Kaur, wife of Arjan Singh died on 27.12.2002 after which event, allegedly by forging signatures of other family members, the said property was sold. The plaintiffs also contend that the entire family lived jointly (except Defendant No. 3) continuously in the Roshnara Road house; further that the first plaintiff and second defendant got married in 1978 and 1971 as a result of which the family extended and a plot measuring 250 sq. yards was purchased at Saraswati Vihar, which was paid for by Arjan Singh for which receipt was executed in his favor (i.e. Arjan Singh) and the first plaintiff. The suit mentions about certain other properties which are described in Annexure-1 to the plaint, and also that the Saraswati Vihar plot was built upon later in 1983 and 1984 when Defendant Nos. 1 and 2 along with Defendant No.4 shifted to these premises. The suit describes various portions of the said property occupied by different members of the family. It is alleged that the first plaintiff requested for partition of the property in June 2004 and subsequently repeated the demand. The suit mentions about a police complaint having been falsely alleged by Arjan Singh resulting in a civil suit by the plaintiffs which is pending before the Civil Court and in which an interim order, protecting them from dispossession, subsists. It is also stated that during pendency of these proceedings, Arjan Singh filed a suit for possession against the first plaintiff regarding portion of Saraswati Vihar property occupied by him. It is contended that at that stage, the plaintiffs became aware that the property was purchased by Arjan Singh in his name and not in the capacity of *karta* of HUF. The plaintiffs allege that all the properties mentioned in Annexure-1, including the Saraswati Vihar property have been acquired out of the joint family funds and irrespective of who was in possession, inure to the benefit of all members of the family. It is also alleged that the amounts and other immovables mentioned in Annexure-2 are similarly kept in separate accounts but are manipulated by Arjan Singh and that they belong to the joint family. Alleging all these, the plaintiffs seek partition. Annexure-1 to the suit, lists out 10 properties; they are all in the name of one or the other defendant but it is generally alleged that the funds towards consideration were from out of the HUF assets.

6. In the common written statement, the defendants, including Arjan Singh deny that the properties mentioned in the suit were purchased from the joint family funds and or that there was any joint family business, as alleged. The existence of a partnership as on 01.04.1985 is denied specifically. The plea of estoppel as regards the ownership of property– A-2, Sarai Pipal Thala, Adarsh Nagar is challenged on the ground that in two pending proceedings, i.e. criminal complaint, in suit no. 138/6/05 and suit 154/6/05, the present plaintiffs had taken contradictory stands to the effect that Arjan Singh was paid Rs. 10,000/- or 15,000/- by late Hakim Dewan and started the business of M/s. Sewak Pharmacy. It is alleged that subsequently the written statement was sought to be amended to allege that it was an extension and continuation of the family business established by late Hakim Dewan in Pakistan. The amendments were, however, not permitted and the application was withdrawn. It is submitted that the same averments are sought to be re-introduced by way of the present suit.

7. The defendants allege that the circumstances whereby ownership of the Saraswati Vihar property was acquired by Arjan Singh in 1982, i.e. in his personal capacity were known to all and further that the said property as well as properties being 8756-8758, Roshnara Road were purchased by Arjan Singh in his name and registered through conveyance on 11.07.1984. The Conveyance Deeds dated 29.10.1983 and 11.07.1984 have been produced. The defendants dispute existence of any HUF, as is alleged. Arjan Singh completely denies the existence of any HUF upon which the suit for partition is based and contends that the properties were acquired by each member of the family out of their respective earnings. Reference is made to an agreement dated 21.04.2003 evidencing the payment of Rs.12 lakhs to the plaintiffs as well as what is termed as an illegal agreement dated 09.06.1998 in which it was stated that the plaintiffs are tenants of the properties at Sarai Pipal Thala, Adarsh Nagar, Delhi.

8. It is argued by the applicant defendants that the suit is liable to be rejected as not revealing any cause of action. They contend that the claim for partition has to necessarily fail because the suit stems on a misrepresentation that Arjan Singh started business as member of late Hakim Dewan's joint family. It is submitted that averments in the suit disclose that Arjan Singh's business, M/s. Sewak Pharmacy was based on an application of acquired skill and concededly was the a proprietorship incapable of being joint family enterprise. It is submitted that such medical practice is based on statutory recognition and also special training and knowledge and, therefore, impartable. Reliance is placed upon Section 3 of Hindu Gains of

Learning Act, 1930 to say that earnings of Arjan Singh and any property acquired out of them can never be considered as joint family assets since they are barred from being considered as undivided properties. It is also urged that none of the documents ever reveal the existence of a HUF either of late Hakim Dewan or of Arjan Singh so as to clothe the plaintiffs with the right to claim partition. On the other hand, it is urged that Arjan Singh always declared his income not in his individual capacity and also that, the late Hakim Dewan, plaintiffs' grandfather had solely declared that the properties *in lieu* of which compensation and claims urged were self-acquired. It is stated that the entire documentary evidence placed on the record read together with the pleadings does not remotely suggest that the business in Sewak Pharmacy or any other commercial activity or Arjan Singh, were being conducted as a joint family activity and thus any question of assets by the defendants are necessarily their personal properties which cannot be subjected to partition.

9. The plaintiff, in reply urges that a similar application had been filed in one pending case before the Addl. District Judge rejected on 07.02.2007. That order remains unchallenged. Mention is also made of some other orders in this regard. The plaintiffs also rely upon an order of this Court dated 14.11.2008 recording that according to the admitted case, late Hakim Dewan had died on 11.05.1955 before the new Hindu Succession Act was brought in force and that succession had been according to the personal Hindu Law and thereafter properties were joint family properties. It is submitted that on the same day, the statement of parties under Order 10 Rule 2, CPC, were recorded and that on a consideration of the same as well as pleadings in this case, it is not appropriate for the Court, having regard to the circumstances of the case to conclude that the suit is bereft of any cause of action.

10. The plaintiffs urge and contend that the law pertaining to Order 7 Rule 11 CPC is clear in that the Court cannot delve into merits of the allegations of the suit but has to take them on their face value. Only if taken in totality, the case made-out is untenable would the Court be justified in rejecting the plaint as either barred or not disclosing any cause of action. The plaintiff submits that in this case, a detailed list containing no less than 368 documents have been filed with the suit which alleges at no more than one place, categorically, that the parties were engaged in joint family business. The suit also relies upon a partnership deed of 1985, the truth or falsity of which cannot be delved into at this stage. Taken together, the suit not only discloses a triable cause of

action but entitles the plaintiff to trial in accordance with law and a judgment by the Court on merits.

11. From the above discussion, certain undisputed facts can be gleamed from the suit averments:

- (a) Late Hakim Dewan was a government servant in erstwhile Pakistan, who retired in 1934 and became a pensioner.
- (b) He started engaging himself in giving medical advice, based on indigenous medicine or herbs and is credited with having discovered new therapies.
- (c) After partition, late Hakim Dewan, with his sons migrated to Delhi in 1947.
- (d) Arjan Singh, son of late Hakim Dewan, and the plaintiff's father is alleged to have received Rs. 10,000/- or Rs. 15,000/- from out of the "ancestral" or "joint" family assets with which he started M/s. Sewak Pharmacy in which he engaged in medical practice.
- (e) Late Hakim Dewan had applied for compensation as a displaced person which was eventually granted. From out of those funds, one of the suit properties was purchased.
- (f) Arjan Singh acquired the Saraswati Vihar premises in 1982.
- (g) A registered Conveyance in respect of the Sarai Pipal Thala property and Roshnara Road property was executed in favor of Arjan Singh in 1984 and in respect of Saraswati Vihar in 1993.
- (h) Arjan Singh and Defendant Nos. 1 and 2 are alleged to have entered into a partnership in 1985.

12. From the above analysis, it is evident that to sustain the allegation of existence a joint family, the plaintiffs rely upon late Hakim Dewan's medical practice said to have commenced by him after 1934 when he retired from government service. It is said that from out of those earnings as well as from the joint family assets (presumably derived from such earnings), Arjan Singh commenced M/s. Sewak Pharmacy. The earnings and proceedings from the business in M/s. Sewak Pharmacy constituted the basis for acquiring various properties, allegedly in the names of other members of the family, such as Defendant Nos. 1, 2, 3 etc.

13. The plaintiffs have, along with the list of documents filed with the suit produced a certified copy of the claim in Form-A, for amounts made in the relevant laws dated 10.07.1951 by the late Hakim Dewan, in which he had demanded Rs. 11,600/- as compensation in respect of

the property left behind in erstwhile Pakistan and for which amounts were claimed. In column 6, it was stated as follows:

“XXXXXX XXXXXX XXXXXX

6. *How did applicant acquire property*
(inheritance applicant, purchase, gift, etc.).

his Self purchased by interest in property

XXXXXX XXXXXX XXXXXX”

14. In column 7, the form required the deponent to state the mode of acquisition of the property. Late Hakim Dewan stated that the plot measuring 800 sq. yards was purchased in 1925 by him from one Sh. Habibullah and that the house was purchased for Rs. 150/-. The claim was supported by the verification by late Hakim Dewan. Similarly, another claim dated 08.11.1951 for Rs. 25,000/- was also made describing various properties which, like in the other claim, declared that the said premises were acquired by late Hakim Dewan. The plaintiffs further rely upon subsequent affidavits and verifications made in the forms submitted by Arjan Singh and Amar Singh where it was declared that the properties were joint/HUF. A certified copy of one such document has been produced. Relevant portion of the said declaration seeking substitution has to be read. It is extracted below:

“XXXXXX XXXXXX XXXXXX

(2)	<i>Was the applicant a member of Joint Hindu Family in Pakistan</i>	<i>Yes</i>
(3)	<i>Was his claim filed on behalf of the Joint Family as constituted in Pakistan? If not, state whether claim in respect of the joint properties has been separately filed and state Index No. of such claim State names and addresses of principal members of Joint Family.</i>	<i>The claim was filed by Shri Dewan Singh and after his death the claim was substituted in two names myself and brother Shri Arjan Singh</i>

XXXXXX XXXXXX XXXXXX”

15. The documents also reveal that late Hakim Dewan had availed of a loan of Rs. 750/- from out of the estimated compensation and had applied for, the said document is produced at page 314 of the list of documents. All these taken together, in the opinion of the Court, lead to the

conclusion that the compensation received by the late Hakim Dewan was in respect of his self-acquired properties and not in relation to ancestral properties, or joint family funds. The basis of the suit is that the compensation received which formed the nucleus for acquiring the properties in India was out of the joint family funds is not only groundless but in fact falsified.

16. As far as the main contention with regard to joint family having been constituted by the fourth defendant, and that such joint family acquired properties from out of the business, M/s. Sewak Pharmacy is concerned, the defendants rely upon Section 3 of the Hindu Gains of Learning Act, 1930, which reads as follows:

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3. Gains of learning not to be held not to be separate property of acquirer merely for certain reasons.— *Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reasons of—*

(a) *his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof, or*

(b) *himself or his family, having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.*

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XXXXXX”

17. Now it is not denied anywhere that the business started by Arjan Singh was not a commercial venture per se but a calling or profession, i.e. medical advice in respect of herbal remedies. The plaintiffs allege that such knowledge or expertise so acquired by Arjan Singh is not on account of his association with his father. The object of the said Act was to ensure that earning from acquired skills such as medical or legal practice, accountancy or in other avocations where individual effort and skill is necessary, should never be deemed as part of contribution by member of a joint family property so as to bring it within the HUF hotchpotch. This was to incentivize proficiency in such vocations and encourage people into acquiring greater skills and higher learning as in the absence of such safeguard, the danger of earnings acquired by the members of such joint families becoming available for division are very real. In such eventuality, the members of the joint family, who earn and toil hard were left with a miniscule portion of their earning gained entirely by individual skill and effort as the latter’s share, the lion’s share of which would have fallen to the other members of the family, who would possibly never work at

all. In the present case, the suit expressly states that the funds for acquiring various properties in the name of Arjan Singh were out of his earnings as a medical professional, from out of M/s. Sewak Pharmacy. That clearly falls within the mischief of Section 3 of the Hindu Gains of Learning Act. Therefore, the claim for partition of such properties is expressly barred. So far as the claim for partition *vis-à-vis* other properties is concerned, no material has been shown on the record, save and except averments and orders made in pending cases filed by various parties, to the effect that Defendant Nos. 1 to 3 or any other party are holding various assets for and on behalf of the HUF. While there is a presumption about the existence of HUF, it is settled that such presumption does not extend to the properties acquired and standing in the name of one or the other members of the joint family. 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.”

The above judgment was followed 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.

18. In the present case, while there can be presumption about the existence of joint family of Arjan Singh, in view of his being father of the plaintiffs and Defendant Nos. 1 to 3, there is no presumption that the assets and properties acquired by Defendant Nos. 1 to 3 belonged to the joint family. On the other hand, all communications are to the contrary.

19. In addition to the above, the Court notices that on 14.11.2008, statement of the Plaintiff No. 1— who has verified the pleadings as well as the fourth defendant were recorded. To a specific question about whether late Hakim Dewan carried on the business with sons as HUF, the first plaintiff admitted that he had no knowledge as he was only five years old at that time. He, on the other hand, mentioned that Arjan Singh had been giving professional advise as a Hakim before partition of the country and had been doing so after he shifted to India. It was further deposed in this background that the properties mentioned in the Schedule were to be considered as HUF properties as the family had worked together. The statement of Arjan Singh reveals that he founded M/s. Sewak Pharmacy in 1948 and that the same was not in existence in Pakistan. He applied for license to practice Ayurveda under the style, M/s. Sewak Pharmacy in 1949 in his individual name. He also deposed that his younger brother was not a Hakim and had expired in 1988.

20. On a consideration of the totality of pleadings and documents and material circumstances, the inescapable conclusion which the Court has to draw is that the basis for the suit, i.e. existence of HUF owned properties in Pakistan, headed by late Hakim Dewan and subsequently of HUF properties being owned by a HUF headed by Arjan Singh is contradicted by documentary evidence. On the other hand, all indications are that the properties purchased by Arjan Singh or acquired by him were through his individual effort and skill, and are covered by the Hindu Gains of Learning Act. Similarly, the properties acquired by late Hakim Dewan fall within the mischief of the said Act as it came into force in 1930. His two sons inherited it as his heirs. The plaintiffs, therefore, cannot claim partition sought in the suit. The suit does mention existence of partnership deed and produces a copy of that deed. However, the claim encompasses one for dissolution or for rendition of accounts of the said partnership. In these circumstances, the suit is not maintainable as it does not disclose cause of action and is also barred by provisions of Hindu Gains of Learning Act.

21. For the above reasons, IA 13787/2008, filed by the first defendant, is allowed; the suit is therefore, not maintainable. The plaint is accordingly rejected. All the pending applications are also dismissed accordingly. In the circumstances, there is no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

April 22, 2010