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IN THE HIGH COURT OF DELHI AT NEW DELHI

CM (M) 995/2009 & CM APPL Nos. 13244/09, 6106/2010

ANSHUMALEE SOOD Petitioner
Through Mr. Ashish Mohan, Advocate with
Petitioner in person.

versus

SUDARSHANA KUMARI BLAGAN & ANR Respondents
Through Mr. S.S. Dhingra, Advocate for R-1.
Mr. K.S. Patharia, Advocate for R-2.

CORAM: JUSTICE S.MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the order? No
2. To be referred to the Reporter or not? Yes
3. Whether the order should be reported in Digest? Yes

ORDER
21.04.2010

1. The Petitioner is the son and sole legal representative ('LR') of late Smt. Devi Kumari Sood, Defendant No. 3 in Suit No. 791 of 2007 (renumbered), which is a partition suit filed by her sister Smt. Sudarshana Kumari Blagan the Respondent No. 1 Plaintiff way back in 1984. The Petitioner challenges an order dated 15th July 2009 passed by the Commercial Civil Judge ('CCJ'), Delhi whereby an application filed by the Plaintiff under Order XXII Rule 4 CPC seeking to implead the Petitioner as LR was allowed and the Petitioner's application under Order 1 Rule 10 CPC seeking to implead himself as a party Defendant in his own right was dismissed.

2. Respondent No. 1 filed the aforementioned suit for partition of the immovable property at I-13, Jangpura Extension, New Delhi ('suit property') which belonged to late Shri Mela Ram Sood, the husband of

Defendant No. 1 Smt. Tulsan Devi, and the father of the Plaintiff, and Defendant Nos. 2 and 3 Shri Din Dayal Sood and Smt. Devi Kumari Sood respectively. Shri Mela Ram Sood died intestate on 5th September 1975. The claim of the parties in the suit was that the suit property was his self-acquired property. The case of the Plaintiff was that after being deserted by her husband she was residing in the suit property along with her mother; that Defendant Nos. 2 and 3 had relinquished their respective shares in the suit property in their favour and were therefore not co-owners. Separate written statements were filed by Defendant Nos. 1, 2 and 3 in the suit. Defendant No.1, who died on 9th August 1984 soon after filing her written statement on 9th July 1984 denied that Defendant No.2 had relinquished his share in the suit property. According to Defendant No.1 the Plaintiff and Defendant No.3 had executed relinquishment deeds giving up their rights to the suit property. There was an oral family settlement under which each of them was paid Rs.40,000. Defendant No.1 claimed to be the exclusive owner of the suit property and further that only she and her son had any right to it. On his part defendant No.2 filed a written statement on 11th December 1989 supporting his mother's stand and further pleading that she had by a Will dated 25th January 1984 bequeathed the entire suit property to him. He denied that the Plaintiff had been deserted by her husband and asserted that they were having cordial relations. The Petitioner's mother Smt. Devi Kumari Sood stated in her written statement filed on 15th April 1984 (purportedly amended on 20th December 2001) stated that "the father of the Plaintiff and replying Defendant had the property bearing No. I-13, Jangpura Extension, New Delhi which was acquired and built by the parents of the Plaintiff and of the Defendant Nos. 2 and 3." She further admitted to both the Plaintiff and

herself having executed relinquishment deeds but maintained that the one executed by her was not a valid document as it was not registered. She admitted that there had been an oral family settlement and to having received Rs.40,000. What is important to note that nowhere was it pleaded by any of the parties to the suit that the property was an ancestral one.

3. During the pendency of the suit Smt. Tulsan Devi died on 7th August 1984. Defendant No. 3 Smt. Devi Kumari Sood also expired on 5th October 2007 leaving behind the Petitioner as her sole LR entitled to succeed to her estate. Accordingly, an application was filed by the Plaintiff under Order XXII Rule 4 CPC to substitute Defendant No. 3 by the Petitioner. On his part, the Petitioner independently filed an application under Order 1 Rule 10 CPC seeking impleadment as a Defendant in his own right. In this application he, for the first time, set up a plea that the property was ancestral and that after the amendment to the Hindu Succession Act 1956 ('Act') by the Hindu Succession (Amendment) Act, 2005 which came into effect on 9th October 2005, the suit was barred under Section 23 of the Act. In his application the Petitioner contended:

“A. That Shri Mela Ram Sood, the maternal Grand-father of the applicant, migrated from Pakistan after partition. In lieu of the properties left by him in Lahore, Pakistan and by virtue of his being a refugee, a property admeasuring about 200 square yards bearing No. I-13, Jangpura Extension, New Delhi – 110 014, a refugee colony, was allotted to late Shri Mela Ram Sood by the Land & Development Office, Government of India on long term lease basis, hereinafter referred as the suit property.

B. That Shri Mela Ram Sood died intestate on 5th

September 1975 leaving behind his wife, two daughters namely Smt. Devi Kumari Sood (Defendant No.3, mother of the applicant). Smt. Sudershana Kumari Blagan (plaintiff) and one son Shri Din Dayal Sood (Defendant No.2). Since the property was ancestral, upon the demise of Shri Mela Ram Sood, the legal heirs mentioned herein became entitled to inherit 1/4th share each of the suit property.”

4. It was then contended by the Petitioner that the partition of the undivided suit property “having acquired the rights in the property on the promulgation of the Hindu Succession (Amendment) Act 2005, being the sole heir of late Smt. Devi Kumari Sood, applicant is the only interested and necessary party.” His case was that by virtue of Section 6 of the Act as amended in 2005, his mother “has been recognized as a coparcener” and that he had “acquired a right in the property through his mother, as the property is ancestral.” He contended that “being the son of a coparcener of the Hindu Undivided Family” he was “entitled to partition and grant of his share in the property held by the coparceners together.” He staked a claim to the 1/3rd share of the suit property to which his mother was entitled.

5. By the impugned order, the learned CCJ held that:

- (i) There was no presumption that a property standing in the name of a member of a joint Hindu family was the joint family property. Reliance was placed on the decision in *Ms. Rukhmabai v. Lala Laxminarayan AIR 1960 335*.
- (ii) The mere fact of Shri Mela Ram being a refugee and the suit property having been allotted by the Government of India in lieu of

his property left behind by him in Pakistan at the time of partition would not make the suit property ancestral. The applicant had failed to make sufficient averments in support of such claim.

(iii) Even as of the date of filing the partition suit by impleading the other legal heirs there was a severance of status of the parties and therefore there was a partition even prior to 20th December 2004. In terms of the proviso to Section 6(1) as amended that partition could not be reopened.

(iv) Section 6 (3) referred to only a male Hindu and therefore did not cover Defendant No.3 or her interest in the suit property.

(v) Even if it were presumed that the suit property was joint family property, by virtue of the proviso to the unamended Section 6 of the Act, the share of Mela Ram Sood would devolve upon the female heirs i.e. the Plaintiff and Defendant No.3, and the petitioner as son of a female heir, not by survivorship but by succession.

(vi) In terms of the amendment to Section 6 (1) of the Act in 2005, it is only the daughter of a coparcener who has been bestowed with the character of a coparcener in her independent right not her lineal descendant as has been urged by the petitioner.

(vii) The petitioner has no independent right in the suit property except as LR of Defendant No. 3.

6. Learned counsel for the Petitioner submits that the question whether the property was an ancestral or joint family property or whether the plea of the Petitioner for partition on the basis of independent right to share of such property were all matters of evidence and cannot be gone into at the stage of

an application under Order 1 Rule 10 CPC. It is argued that the words ‘coparcener’ and ‘coparcenary property’ are not defined under the Act and therefore, whether the suit property was a joint family property or a coparcenary property cannot be a matter of evidence.

7. This Court finds that except the petitioner, none of the parties claims the suit property to be joint family property or ancestral or coparcenary property. Even the Petitioner’s case is that the property was allotted to be Petitioner’s maternal grandfather by the Government, after partition, in lieu of the properties that he held in Pakistan. The suit property cannot therefore be held to be ancestral property by any stretch of imagination.

8. The terms ‘joint family property’, ‘ancestral’ and ‘coparcenary’ property are not defined in the Act but have been the subject matter of decisions over the years. Over a hundred years ago in *Karsandas Dharamsey v. Gangabai* (1908) 10 Bom LR 184 Beaman, J. explained:

“(T)here must have been a nucleus of joint family property before ancestral joint-family property can come into existence. Because the word ancestral connotes descent and therefore of course pre-existence. But because it is true that there can be no joint ancestral family property without a previous nucleus of joint family property, it is not true that there cannot be joint family property without a pre-existing nucleus. For that would be identifying joint family, with ancestral joint family property. The distinctions arising under the case law between the two classes of property thus designated are well enough known, though it would be hard to find any strictly logical justification for them. Where there is ancestral joint family property, every member of the family acquires by birth an interest in it, which cannot be defeated by individual alienation or disposition of any kind. And

this, in my opinion, with respect to any judicial decisions to the contrary is equally true of joint family property... **whereas in the case of joint ancestral property, members of the family acquire a right to their shares by birth *ex necessitate et vi termini*, in the case of merely joint-family property, the Courts have shown a very strong tendency to refuse to draw even a presumption in favour of this peculiar incident... where property is admitted or proved to have been joint family property, it is subject to exactly the same legal incidents in every respect, as property which is admitted or proved to be ancestral joint family property.** Further that this class of property in India differs radically in origin and essential characteristics from the joint property of the English law.” (emphasis supplied)

9. Further, it was held that

“the person alleging that it was joint family property must (in the present state of the law) show that the family was joint in food, worship, and estate, in other words that the members had shown their intention to constitute a joint family, and to hold all their property as joint family property.”

10. In *Gowli Buddanna v. Commissioner of Income-tax, Mysore, Bangalore AIR 1966 SC 1523* the Supreme Court explained:

“A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons and great-grandsons of the holder of the joint property for the time being. Therefore there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners.”

11. Reference was made to the judgment of the Judicial Committee in *Ceylon Attorney-General of Ceylon v. A. R. Arunachalam Chettiar I.L.R. (1957) A.C. 540* where it was observed:

"The family, a body fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word "owner" in this connexion. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as "joint property" of the undivided family."

12. In *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh and Ors. AIR 1985 SC 716* it was held:

"As observed in Mayne on Hindu Law and Usage (1953 Edn.) the joint and undivided family is the normal condition of a Hindu society. An undivided Hindu family is ordinarily joint not only in estate but in food and worship **but it is not necessary that a joint family should own joint family property. There can be a joint family without a joint family property.** At para 264 of the above treatise it is observed thus:

264. It is evident that there can be no limit to the number of persons of whom a Hindu joint family consists, or to the remoteness of their descent from the common ancestor, and consequently to the distance of their relationship from each other. But the Hindu coparcenary is a much narrower body.... For, coparcenary in the Mitakshara Law is not identical with coparcenary as understood in English law: when a member of a joint family dies, 'his right accrues to the other members by survivorship, but if a coparcener dies his or her right does not accrue to the other coparceners, but goes to his or her own heirs". **When we speak of a Hindu joint family as constituting a coparcenary we refer not to the entire number of persons who can trace descent from a common ancestor, and amongst whom no partition has ever taken place; we include only those person who, by**

virtue of relationship, have the right to enjoy and hold the joint property, to restrain the acts of each other in respect of it, to burden it with their debts, and at their pleasure to enforce its partition. Outside this body, there is a fringe of persons possessing only inferior rights such as that of maintenance, which however tend to diminish as the result of reforms in Hindu law by legislation.” (emphasis supplied)

13. The position in law from the above decisions is that there is a distinction between a joint Hindu family and joint family property. The existence of the former does not automatically mean that the latter exists. For there to be a coparcenary property it must be established that persons linked by a common descent have a right to the joint property of the coparcenary by birth. In other words, only those persons who acquire by birth an interest in the joint or coparcenary property are stated to be coparceners entitled to enforce such rights. Mayne explains that it is not all persons who trace themselves to a common ancestor who are coparceners but “only those person who, by virtue of relationship, have the right to enjoy and hold the joint property, provided the property has not been partitioned.” The burden to show that the property was a joint family property was on the person laying such claim.

14. The above position was given statutory form in Section 6 of the Act prior to its amendment in 2005 when it read as under:

“6. Devolution of interest in coparcenary property - When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparceners property, his interest in the property shall devolve by survivorship upon the surviving members of the coparceners and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparceners property shall devolve by testamentary

or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1 - For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2 - Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparceners before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.”

15. Thus even under the unamended Section 6 where prior to a partition a male died leaving behind a surviving female relative specified in Class I of the Schedule or a male relative specified in Class I who claims under such female relative, the interest of the deceased in the coparcenary property was to devolve not by survivorship but by succession. There was a deeming fiction of a partition on the date of death of such coparcener. If such male relative had separated himself before his death from his coparceners then no such claim by his female relative or a male claiming under her would lie. This principle of the devolution only by succession of the share of a male coparcener who dies before a formal partition has taken place has been retained in the amended Section 6 which reads as under:

“6. Devolution of interest in coparcenary property -

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall, -

(a) by birth become a coparcener in her own right the same manner as the son;

(b) have the same rights in the coparceners property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparceners property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a

reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparceners ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparceners property shall be deemed to have been divided as if a partition had taken place and, --

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.-- For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognize any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect--

- (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or
- (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.--For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

- (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation- For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court.”

16. The change brought about by the 2005 amendment to the Act is to recognize the daughter as a coparcener on par with a son. However, this was not meant to accord the status of a coparcener to the lineal descendants of the daughter. Section 6 (3) of the Act retains that portion of the unamended law as to what should happen to the share of the male coparcener, who dies after the coming into force of the Act (as amended), in the coparcenary property. That share will devolve on her heirs by succession and not by survivorship. The learned CCJ is right in concluding that Section 6 (3) as worded and when read with Section 3 (2) of the act applies only to a male Hindu and therefore the rights of Defendant No.3 in the suit property cannot be determined with reference to that provision. Therefore, there is no question of her son being permitted to claim any such right on that basis after her death. He would succeed to her estate only by succession and not by survivorship.

17. Of course in the instant case such question does not arise for consideration for the simple reason that during her lifetime and after the coming into force of the 2005 amendment the petitioner's mother never took a stand that the suit property was ancestral or coparcenary property; she never laid a claim to her right as a coparcener and to a share in the suit property on the basis that it was coparcenary property. The suit was filed in 1984. The petitioner's mother filed her written statement in 1984 itself (with an amendment purportedly in 2001). She never took a stand that the property was an ancestral, joint family or coparcenary property. On the other hand, the parties throughout have proceeded on the footing that it was the self-acquired property of Shri Mela Ram Sood. Even if she could not have possibly claimed to be a coparcener till the amendment to Section 6 in 2005 was enacted (which she did not, even thereafter), the nature of the property remained the same. The actual proof of such claim, if made responsibly and is shown to be prima facie tenable, may have to await evidence at the trial. However, in the instant case the petitioner has made a sweeping claim that the suit property is ancestral in an application under Order I Rule 10 twenty-five years after the filing of the suit, without anything to show for it even prima facie. In the circumstances, there is no question of the petitioner being permitted to claim any such right on that basis. He can claim a right to whatever comprises the estate of his mother only by succession. If the plaintiff succeeds in proving that prior to her death the petitioner's mother already relinquished her rights in the suit property in favour of the plaintiff and her mother then that would effectively mean that the petitioner can have no claim in the suit property. Whether in fact a partition already took place of the suit property prior to 20th December 2004, whether the petitioner's

mother did receive Rs.40,000 in the oral family agreement and whether any relinquishment deed was executed would be issues which would be decided on the basis of the evidence led at the trial. In any event there is no question of the petitioner being impleaded in the suit in his own right vis-à-vis the suit property.

18. Consequently, this Court finds no error in the impugned order passed by the learned CCJ dismissing the Petitioner's application under Order 1 Rule 10 CPC even while allowing the Plaintiff's application under Order XXII Rule 4 CPC and bringing the petitioner on record as the sole LR of Defendant No.3.

19. The petition and the pending application are dismissed.

S. MURALIDHAR, J.

APRIL 21, 2010
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