

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

+ **RFA (OS) No.99/2009**

% **Judgment reserved on: 25.02.2010**
Judgment delivered on: 09.04.2010

MR. SANDEEP CHANDRA Appellant
Through: Mr. Arun Bhardwaj, Sr. Advocate
with Mr. S.K. Sahijpal and
Mr. Rakesh Kumar Singh, Advs.

Versus

LT. COL. R.R. CHANDRA (RETD.) & ANR. Respondents
Through: Mr. D.L. Frey, Adv. with Ms. Retika
Frey, Adv.

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

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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 |

MANMOHAN SINGH, J.

1. The present Regular First Appeal from the Original Side under Section 96 of the Code of Civil Procedure, 1908, has been filed by Mr. Sandeep Chandra, the Appellant, against the Judgment and Decree dated 9th October, 2009, passed by the learned Single Judge in CS (OS) 876 of 2008, whereby the learned Single Judge passed the decree for possession, permanent and mandatory injunction in favour of Respondent No. 1 father of the Appellant and also dismissed the

counter-claim filed by the Appellant. The submissions made by both the parties in the suit for the purpose of determining the present appeal are that the Respondent no.1 Col. R.R. Chandra (Retd.) who was the plaintiff before the learned Trial Court filed a suit for possession and permanent injunction against his son (Appellant herein) who occupies a portion of the suit property, being S-207, Greater Kailash-II, New Delhi-110048. The Respondent No.1 is a retired army officer and is the sole and absolute owner of the entire suit property which was purchased from his own funds and income. His wife is a medical practitioner. Both, Respondent No. 1 and his wife are senior citizens and are maintaining themselves with pension and rental income received by letting out the second floor of the suit property. The Appellant is their elder son.

2. As per Respondent No.1, the Appellant was given very good education. The younger son Dr. Anuj Chandra, Respondent No.2 herein is a medical practitioner settled in the United States of America. According to Respondent No. 1, the Appellant got married in 1985 to a Ms. Shoma. A son, namely, Vijay Vikram was born to the couple in the year 1988. The marriage was however, dissolved in 1995. The son is in custody of his mother. It is also stated in the plaint that the Appellant acquired a residential property i.e. 27, Siddharth Enclave which was mainly funded by the Respondent No.1 which was let out by the Appellant. However, the same was sold by the Appellant in the year 2004 and he retained the entire sale proceeds.

3. There are various other allegations made by the Respondent No.1 against the Appellant, inter alia, that the Appellant does not show any regard or respect to his elderly father and behaves arrogantly. He goes as far as to not allowing the Respondent's guests to visit him and also threatens to implicate him, his wife as well as his younger brother in criminal cases. The Appellant occupies one room, mentioned in the plan annexed to the plaint. Under these circumstances, the Respondent had no option but to seek a decree for possession and permanent injunction restraining the Appellant from disturbing his possession.

4. The Appellant contested the claim of the Respondent No.1 by filing the written statement and also set up a counter claim. His case before the Trial Court was that his great grand father was a big landlord or Zamindar who passed on a considerable estate to the Respondent's father, late Ramachandra, who died in 1983-84 and who had purchased a huge property No. 6A, Nemi Road, Dalanwala, Dehradun, UP. By selling the said property of his father, the Respondent No.1 purchased the suit property which has been bought from the Hindu Undivided Family Funds and since the Appellant has 1/3rd share in the HUF and consequently in the suit property, as coparcener, therefore, the relief sought by the Appellant in the counter claim was for partition and rendition of accounts. It is alleged in the Written Statement and Counter Claim by the Appellant that the Respondent No.1 has concealed the above mentioned facts from this Court regarding acquisition of the property with family funds.

5. It is also alleged that the Appellant's education expenses were borne by his grand father and not by Respondent No.1. It is averred that the Respondent No.1 has differences with the Appellant's wife due to his adamant behavior and his relations with her were spoiled as the Respondent No.1 is refusing the partition of the property. As far as the Siddharth Enclave property is concerned, it is alleged by the Appellant that the same was purchased from his hard earned income. In the Written Statement it is also alleged by him that he is in occupation of the entire ground floor of the suit property except two bed rooms which are used by his parents.

6. In the counter claim, the Appellant has claimed that he is entitled to his share in the suit property as coparcener as the property was purchased out of joint family funds and the Appellant is also entitled to a share. A prayer was made in the counter claim for partition of the suit property by metes and bounds and decree for accounts was also sought by the Appellant and for injunction against the plaintiff restraining him from selling, letting out and parting with possession of the suit property.

7. The learned counsel for the Appellant has challenged the judgment and decree dated 09.10.2009 mainly on the following points :

- a. That the learned Single Judge in the judgment has not considered the counter-claim filed by the Appellant wherein the Appellant sought a decree for partition of the property in question. The learned Single Judge has ignored

the fact that the Appellant is using the accommodation in question since 1983-84 and is holding the said property on behalf of all the coparceners and the suit property had been purchased and got constructed by the Respondent no.1 out of the money obtained by him from the Appellant's grandfather for the benefit of all the coparceners in the family.

- b. That the learned Trial Court has not allowed the Appellant to produce witnesses as per the list of documents filed by him particularly in view of the defence of the Appellant as regards the property being HUF as the same was purchased from the sale proceeds of a large estate owned by the grandfather of the Appellant. The Appellant by producing the said witnesses sought to prove the nature of the property and also various other defences taken in the written submissions. However, the Appellant was not allowed to produce the said witnesses and the said procedure adopted by the learned Trial Court is in complete violation of Order XVI of Code of Civil Procedure read with various provisions of the Evidence Act, 1872.
- c. It is argued that the learned Single Judge erroneously rejected the application being I.A. No. 8331/2009 and Review Application being I.A. No. 9948/2009 without considering the earlier observations made vide order dated 06.04.2009 wherein the Appellant was given an

opportunity to examine the other witnesses after examining himself. There was no delay on the part of the Appellant as observed by the learned Single Judge. The Appellant was only trying to summon the witnesses to support his oral testimony as per law.

8. Before dealing with the submissions made by the Appellant before us, it is necessary to refer the proceedings recorded by the learned Trial Court from time to time in order to understand the argument of the Appellant. The details of the same are given as under:-

- i) The suit (CS(OS)876/2008) along-with interim application was listed for the first time listed on 9th May, 2008 when the ex-parte ad interim order was issued against the Appellant in the application under Order XXXIX Rules 1 & 2 of Code of Civil Procedure.
- ii) Vide order dated 9th January, 2009 the Appellant was proceeded ex-parte as no one appeared on his behalf when the matter was called. The Respondent No.1 was granted permission to lead ex-parte evidence by way of affidavit before the Joint Registrar. The interim application was allowed and order dated 9th May, 2008 was made absolute.
- iii) Thereafter the Appellant filed the application to set aside the ex parte proceedings under Order IX Rule 7 of Code of Civil Procedure being I.A. No. 1065/2009 which was allowed by the

court vide order dated 18th February, 2009 subject to the cost of Rs. 10,000/-. In the main suit, the following issues were framed:

- “1. Whether the property No. S-207, Greater Kailash-II, New Delhi was a HUF property as alleged by the defendant ? – OPD*
- 2. In case issue No. 1 is held in favour of the defendant, what would be the share of the defendant and whether the defendant was entitled to separate possession of his share in the property and if so, and whether the property was liable to be portioned ? – OPD*
- 3. Whether the plaintiff is entitled to a decree of possession in respect of that part of the property which is in occupation of defendant, son of the plaintiff ? – OPP*
- 4. Whether the suit has not been properly valued for the purpose of court fee ? – OPD*
- 5. Relief.”*

- iv) It was also recorded in the said order that the Appellant would lead evidence first to prove that the suit property was an HUF property. Four weeks time was given to the Appellant to produce evidence by way of affidavit of all his witnesses. The matter was placed before the Joint Registrar on 19th March, 2008.
- v) In the meanwhile there was talk of settlement, therefore, the matter was listed before the Court on 6th March, 2009 by which order the Court observed that there seemed to be no possibility of settlement and the parties were given time to file the list of witnesses and the matter was kept before the Court on 17th March, 2009 for examining the list of witnesses filed by the parties.
- vi) On 17th March, 2009, the Court examined the list of witnesses produced by the Appellant and held that the defendant has filed

the list of witnesses in part –D and has filed documents which are unnecessary and produced frivolous witnesses in order to prolong the trial and the Appellant was granted liberty to examine himself to prove the issue No. 1.

- vii) When the matter was listed before the Joint Registrar on 19th March, 2009, it was noticed that the affidavit filed by the Appellant as evidence was not attested by the Oath Commissioner. It was also indicated to the Joint Registrar that the Appellant moved an application being I.A. 3682/09 for modification of the order dated 18th February, 2009 for waiving the cost of Rs. 10,000/-.
- viii) Second application was filed by the Appellant being I.A. No. 3681/2009 under Order XVI Rules 1 & 2 of Code of Civil Procedure for seeking permission to summon other witnesses. Both the applications were listed before the Court on 30th March, 2009. On 30th March, 2009, the first application being I.A. No. 3682/2009, filed by the Appellant for reduction of cost was dismissed. The second application being I.A. No. 3681/2009 seeking review of order dated 17.03.2009 was put before the same Bench on 06.04.2009 which had earlier passed the order dated 17.03.2009 allowing the Appellant to examine himself only.
- ix) The Appellant filed another application being I.A. No. 4231/2009 for review of order dated 17th March, 2009 which was listed

before the Court on 6th April, 2009 wherein the Court passed the following order:-

"The defendant has moved this application without examining himself. The onus of proving the basic issue in this case "whether the property of which she claims partition was an HUF or not" is on the defendant. Defendant had to examine himself as his own witness first and then only he can claim examination if necessary of the other witnesses.

Let the defendant first examine himself on the date already fixed, i.e., 9th April, 2009 and then revert to this Court after his cross-examination is over.

The Joint Registrar after examination of the defendant shall get this matter listed before this Court immediately."

- x) On 9th April, 2009, DW-1 was examined and cross-examined partly and the matter was adjourned to 13th May, 2009 and 14th May, 2009. When the matter was listed before the Joint Registrar on 13th May, 2009, a medical certificate was produced on behalf of the Appellant and a request for adjournment was made. The matter, despite opposition, was adjourned to 21st May, 2009 and 22nd May, 2009. On 21st May, 2009, again, OPD card of DW-1 was produced before the Joint Registrar. The said request was opposed by the Respondent No.1 on the ground that the DW-1 is hale and hearty and the matter was adjourned for next day. On 22nd May, 2009, as DW-1 did not appear, an order was passed by the Joint Registrar to the effect that the DW-1 is avoiding his

cross examination and delaying the matter and the matter was listed before the Court for appropriate order on 26th May, 2009.

- xi) On 26th May, 2009, the court issued notice to the Doctor who issued the OCD card to DW-1. On 28th May, 2009, the statement of Dr. Deepak Choudhary, who had issued the OPD card, was recorded by the Court. On that the defendant withdrew his application being I.A. No. 4231/2009 for review of order dated 17th March, 2009 and the matter was adjourned to 3rd July, 2009 for remaining cross examination of DW-1.
- xii) On 3rd July, 2009, DW-1 was cross examined and discharged and the matter was listed before the Court for further directions on 14th July, 2009. On 8th July, 2009 again, the defendant filed the application being I.A. No. 8331 of 2009 under Order XVI Rules 1 & 2 of the Code of Civil Procedure. The said application was also listed before the Court on 14th July, 2009 which was dismissed by the Court with cost of Rs. 30,000/-.
- xiii) In the said order, the Trial Court observed that the earlier application filed by the defendant was declined by the Court vide order dated 17th March, 2009 and the second application was also dismissed being infructuous by the subsequent order dated 30th March, 2009. It was also observed that the I.A. No. 8331/2009 virtually sought the Court to revisit the same issue. Therefore, the application was dismissed.

- xiv) On 20th July, 2009, it was recorded by the learned Single Judge that the cost was not paid by the Appellant and the matter was finally listed for 28th August, 2009 for hearing of the main matter.
 - xv) In between one more application being I.A. No. 9948/2009 was filed by the Appellant under Order XLVII Rule 1 CPC seeking review of order in I.A. No. 8331/2009, again praying for summoning the witnesses listed in part-D of list of witnesses. On the said date, it was also informed by the Respondent No.1 to the Court that the Advocate of the Appellant has addressed a letter to the Federal Bureau of Investigation (FBI) Headquarters in Washington, U.S.A. and to the Chief Immigration Officer, East Block-VIII, R.K. Puram, New Delhi giving indication that Mr Anuj Chandra, the elder brother of defendant is being summoned as prime witness in the High Court and his address was verified from the said department to serve notice on him.
 - xvi) Learned Single Court clarified the position that the Court had never required the presence of any witness named in part-D, in the list of witnesses, filed by the defendant. On 2nd September, 2009, the learned counsel for the Appellant confirmed before the Court that he had issued the said notices at the instructions of his client. After hearing the parties, the judgment was reserved and by judgment and decree passed on 9th October, 2009, the suit filed by the Respondent No.1 was decreed.
9. Now coming to the merit of the present Appeal, it is a matter of record that order dated 17th March, 2009 was not challenged by the

appellant in an appeal. It further appears from the said order that in a way the right to produce the other witnesses by the Appellant, mentioned in part-D in the list of witnesses, was closed, and even review filed against the order was withdrawn on 28.05.2009 by the appellant. After withdrawal of the review, I.A. No. 4231/2009 *ipso facto* became infructuous and no further orders were required to be passed. Thus, the submission of learned senior counsel has no merit in this regard.

10. After withdrawal of the review petition, the Appellant filed one more application being I.A. No. 8331/2009 for the same relief which was also dismissed vide order dated 14th July, 2009 with cost of Rs. 30,000/-. The said order was not challenged by the Appellant in appeal at that time. On the other hand, the Appellant filed one more application being I.A. No. 9948/2009 for review of the order dated 14.07.2009 passed in I.A. No. 8331/2009 praying for summoning the said witness listed in part-D of list of witnesses.

11. The main defence of the Appellant before the learned trial court was that the suit property was a HUF property. The burden of issue No.1 was upon the Appellant. The decision as regards the rest of the issues was obviously dependent upon the result of Issue No.1 and nature of the evidence to be adduced by the Appellant. Therefore, in the order dated 6.4.2009, the learned Single Judge had observed that the Appellant should first examine himself and only then can he can claim examination, if necessary, of the other witnesses. The court, no doubt, left open an option at that time. It might have been done by

the court in order to examine the evidence adduced by the Appellant so that, if necessary, more witnesses are allowed to be examined however, the Appellant himself lost that opportunity when he withdrew his review petition on 28.05.2009. Thus, the Appellant is not correct while making his submission before us that the procedure adopted by the trial court is contrary to the provisions of Code of Civil Procedure and Evidence Act.

12. The appellant has not produced any cogent evidence to establish that there existed any coparcenary in which Appellant and Respondents are coparceners or that the Suit property was purchased out of joint family funds despite the fact that the Appellant was given opportunities by the Trial Court to place on record proof thereof, he failed to establish the same. In fact, he has not filed even single document. In his cross-examination, he merely gave an oral testimony mainly stating that the documentary evidence is with the respondent no.1 but he however, did not move any application for discovery of documents from the respondent no. 1 in this regard. During cross-examination he was questioned upon why he had not declared the Suit property as HUF in any of his income tax returns and his reply was that

“till now my returns were being handled (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.”

13. Admittedly, the appellant had given the names of the other witnesses as Part -D of the list of witnesses. As per Delhi High Court

(Original Side) Rules, 1967, Part-D witnesses are required to give oral evidence but no documents are required to be proved. In the present case admittedly the Appellant did not place documents either along with written-statement or by way of evidence. Thus, the question of proving the documents does not arise.

14. On the other hand, the respondent no.1 was able to prove his ownership of the Suit property by way of sale deed and by production of certificate proving that he cleared the loan secured by him for acquiring the asset. The documents placed on record of the Trial Court by respondent no.1 who has proved Ex. PW-1/1 which is a certified copy of the registered sale deed dated 28.12.1973 executed by DLF United Ltd. in favour of 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.

15. As per settled law that there is no presumption of a property being a joint family property on account of existence of a Joint Hindu Family. The one who asserts that it is so has to prove that the property is a joint family property.

16. We find no evidence in this regard except the oral statement made by the Appellant in his pleadings that the suit property had been purchased and got constructed by the respondent no. 1 out

of the money received by him from the appellants' grandfather. We also feel that after withdrawal of the review petition on 28.05.2009, the learned trial court has rightly dismissed the subsequent applications/review petition seeking the same relief.

17. In ***Srinivas Vs. 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.

18. The above decision was applied in **M. Girmallappa Vs. R. Yellappagouda** AIR 1959 SC 906. In **Rukmabai Vs. 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.”

19. When the appeal was listed before the court at the initial stage, the learned counsel for the Appellant sought an adjournment to place on record the affidavits of witnesses who were intended to be produced by the Appellant before the learned Trial Court. The Appellant thereafter filed two affidavits of Sh. Alakhendra Raj Rajesh and Sh. Ishwar (two witnesses). The Appellant also filed his own affidavits along with copy of the manuscript of a conversation.

20. These affidavits have been filed without moving the requisite application for production of additional evidence. They were not found in the Trial Court record, therefore, in the absence of the application for additional evidence, can not be considered. Even otherwise these affidavits contain no credible evidence suggesting that the suit property is a HUF and is a joint property.

21. The last submission of the learned counsel for the Appellant is that the counter-claim filed by the Appellant along with the written statement was not considered by the learned Single Judge. We find no merit in the submission as the result of the counter-claim depended upon the outcome of the issue No.1. Had the issue No.1 been decided in favour of the Appellant, the counter claim under those circumstances ought to have been considered by the learned Single Judge. Due to the Appellant's failure to prove Issue No.1, the counter claim filed by the Appellant has become infructuous under the operation of law.

22. We do not find any infirmity in the judgment and decree passed by the learned Single Judge. The present Appeal is, therefore, dismissed as being without any merit with costs.

MANMOHAN SINGH, J.

VIKRAMAJIT SEN, J.

April 09, 2010
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