

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **I.A. No.19022/2012 (by plaintiff u/Order I Rule 10 r/w Order VI Rule 17 CPC) I.As. No. 7474/2012, 9669/2012 and 9896/2012 in CS(OS) 1116/2012**

Date of Decision: 15th October, 2012

IN THE MATTER OF

BHARAT BHUSHAN MAGGON

..... Plaintiff

Through Mr.K.N.Popli, Advocate

versus

JOGINDER LAL AND OTHERS

..... Defendants

Through Mr.Rikky Gupta, Advocate for D-1 & 2

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

HIMA KOHLI, J. (Oral)

1. I.A. No.19022/2012 has been filed by the plaintiff under Order I Rule 10 read with Order VI R 7 CPC praying *inter alia* for impleadment of Smt.Rupa Maggon(wife of defendant No.2 and sister-in-law of the plaintiff) as a necessary and proper party in the present proceedings and for seeking permission to amend the entire plaint as has been detailed in paras 14 to 22 of the application.

2. The ground furnished for seeking to amend the entire plaint as sought to be explained in para 3 of the application is that the defendant No.1, who is the father of the plaintiff had suffered a cardiac problem on 11.9.2012 and he had to be hospitalized for a surgical

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procedure. At that time, the relatives of the parties used to visit the hospital and the plaintiff had also gone there to see his father. On 12.9.2012, the plaintiff had met his maternal uncle at the hospital, who had asked him to visit him at his house and on visiting his uncle, the plaintiff came to know of some facts which were not to his knowledge earlier and thus arose the need to file the present application for carrying out extensive amendments to the plaint.

3. The aforesaid application is strongly opposed by learned counsel for the defendants No.1 & 2, who are the contesting defendants. Mr.Gupta, Advocate, who appears on advance copy, submits that the application is liable to be dismissed on the ground that if the sole source of information on which the present application is based, is the maternal uncle of the plaintiff, then he was always available to him for purposes of gathering necessary information before instituting the present suit and having failed to approach his uncle earlier, the plaintiff cannot be permitted to plead complete ignorance of the facts that are sought to be incorporated in the plaint by way of amendment.

4. Learned counsel for the defendants further submits that without admitting any of the contents of the present application, even as per the averments made in the proposed paras 12 to 14 of the plaint as set out in para 7 of the present application, the suit is patently barred by limitation and on this ground alone, is liable to be dismissed. He elaborates that as per the story set up by the plaintiff in the proposed

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paras, he had lost his mother in the year 1994 whereafter, his father, defendant No.1 had re-married in March 1999, when the plaintiff was 36 years of age and had two sons. Anguished with the aforesaid re-marriage of the defendant No.1, the plaintiff claimed to have demanded his share in the suit premises due to which his relationship with his father had become bitter. The plaintiff was therefore constrained to leave the joint family house, i.e., the suit property in March 1999 itself. It is thus submitted that even as per the plaintiff, the cause of action for instituting the present suit had arisen in March 1999 when he had demanded his share in the suit property from his father as he had been excluded from the joint family house.

5. Learned counsel for the defendants states that under Article 110 of the Schedule to the Limitation Act, 1963, the plaintiff could have enforced his right to claim a share in the suit property within a period of twelve years from the date when the exclusion became known to him and in the present case, the period of twelve years ought to be reckoned from March 1999, i.e., the date when the plaintiff has himself stated that he had demanded his share in the suit property from the defendant No.1 and was constrained to leave the joint family house. The aforesaid period of twelve years if reckoned from March 1999, would have expired in March 2011 whereas the present suit was instituted on 23.4.2012.

6. Mr. Popli, learned counsel appearing for the plaintiff concedes that the averments made in the proposed paras 12 to 14 of the present application, whereunder extensive amendments to the plaint have been sought, mentions March 1999 as the date when the plaintiff demanded his share in the suit property from the defendant No.1 and was thereafter constrained to leave the joint family house. It has also not been denied that the plaintiff had access to his maternal uncle all through this period and he could have very well consulted him before instituting the suit.

7. Another very material factor that is relevant for consideration is the order dated 28.8.2012 whereunder, an objection had been taken as to the maintainability of the suit instituted by the plaintiff. On the aforesaid date, learned counsel for the defendants No.1 & 2 had submitted that the suit as instituted was liable to be dismissed for the reason that as per the plaintiff's own version, late Smt. Krishnawanti (grandmother of the plaintiff) had acquired the suit property from her own funds and that she had expired *intestate*. It was thus contended by the learned counsel for the defendants No.1 & 2 that upon the death of Smt. Krishnawanti, the suit property had devolved in equal shares on her husband (father of defendant No.1.), defendant No.1 (father of the plaintiff), and the sisters of defendant No.1 and in view of the fact that the deceased father and sisters of the defendant No.1 had relinquished their respective shares in favour of the defendant No.1, he had become the absolute owner of the suit property in his personal capacity. In view of

the aforesaid position, learned counsel for the defendants No.1 and 2 had urged that the plaintiff not being a class-I heir under Section 8 of the Hindu Succession Act, was not entitled to institute the present suit during the lifetime of his father, as the suit property could not be treated as an ancestral property in his hands.

8. When called upon to address arguments on the maintainability of the present suit in the light of the aforesaid objection taken on behalf of the defendants No.1 and 2, learned counsel for the plaintiff had sought an adjournment on the ground that he required some time to prepare the brief. Instead of arguing the case on the maintainability of the suit, the present application has been filed by the plaintiff for seeking extensive amendments to the plaint.

9. The present application can only be treated as a blatant and unwarranted attempt on the part of the plaintiff to set up an entirely new case so as to overcome the objection taken by the other side as to the maintainability of the present suit, which goes to the root of the case.

However generous the courts may be in permitting a plaintiff to amend the plaint and that too at the initial stage of the proceedings, a party cannot be permitted to misuse the said provision to completely back track from the initial story set up in the plaint to set up an entirely different and diametrically new case, without furnishing any legitimate or plausible cause for doing so. In this regard, reference may be made to a judgment in the case of Devajeetu Builder and Developers Vs. Narayana Swamy and

Sons & Ors reported as **(2009) 10 SCC 84**, wherein the Supreme Court had observed that while deciding applications for amendments the courts must not refuse bonafide, legitimate, honest and necessary amendments and at the same time, they should never permit malafide, worthless and/or dishonest amendments. In the present case, the amendments proposed to the plaint, as sought by the plaintiff, cannot be described as either bonafide or honest. Rather, they are found to be motivated and a sheer after thought and can only be treated as a gross attempt on the part of the plaintiff to wriggle out of the admissions that were made by him in the original plaint, to urge an entirely new case, which is impermissible.

10. Furthermore, even if the averments made in the paras proposed to be incorporated in the plaint and mentioned in paras 14 to 22 of the present application are accepted, then it is relevant to note that the plaintiff has himself stated therein that he had demanded his share in the suit property from the defendant No.1 sometime in March 1999, when his father had re-married one Smt. Poonam and he was then compelled to leave the joint family house along with his family members. It has therefore to be held that in the light of the said averment, the present case would be squarely hit by Article 110 of the Schedule to the Limitation Act, 1936 whereunder, a person excluded from a joint family property can seek to enforce a right to claim a share therein within a period of twelve years from the date when the exclusion becomes known to him. As the

plaintiff himself admits that his exclusion became known to him in March 1999, he was entitled institute a suit for seeking the relief of partition within a period of twelve years therefrom, i.e., till March 2011 whereas, the present suit was instituted by the plaintiff only in April 2012 and is thus patently barred by limitation.

11. In view of the aforesaid position, the Court is constrained to dismiss the present application as being devoid of merits.

12. Coming to the suit as instituted by the plaintiff, learned counsel for the plaintiff concedes that there is no quarrel with the legal position that under Section 8 of the Hindu Succession Act, 1956, a property that devolves on a Hindu, cannot be treated as an HUF property in his hands, vis-à-vis his own sons. The Hindu Succession Act lays down rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II, as stipulated in the aforesaid provision. Sub-section (a) of Section 8 of the Act provides that the property of a male dying intestate shall devolve firstly upon the heirs, being the relatives specified in Class I of the Schedule. The list of heirs mentioned in Class I of the Schedule shows that it includes sons, daughters etc. as also son of the pre-deceased son, but does not specifically include the grandson, being the son of a living son. Under the Hindu Law, as soon as a son is born, he gets a share in his father's property and becomes a part of the coparcenery. Such a right accrues in favour of the son by virtue of his

birth and not on the date of demise of the father or inheritance from the father. However, under Section 8 of the Act, the property that devolves on a Hindu would not be HUF property in his hand, vis-a-vis his own sons.

13. The aforesaid conclusion was drawn by the Supreme Court in the case of Commissioner of Wealth-tax, Kanpur etc. vs. Chander Sen etc. reported as **AIR 1986 SC 1753**, wherein after taking note of the divergent views expressed on the said issue by the Allahabad High Court, Full Bench of Madras High Court, Madhya Pradesh and Andhra Pradesh High Courts on the one side, and the Gujarat High Court on the other, it was observed as below:-

"19. It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus. 20. In view of the Preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by S. 8 he takes it as karta of his own undivided family. **It would be difficult to hold today the property which devolved on a Hindu under S. 8 of the Hindu Succession Act would be HUF property in his hand vis-à-vis his own son;** that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under S.8 of the Act

included widow, mother, daughter of predeceased son etc.

21. xxxxxxxx

22. The express words of S.8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The Preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law. **With that background the express language which excludes son's son but included son of a predeceased son cannot be ignored.** (emphasis added)

14. The aforesaid judgment was relied upon by the Supreme Court in a subsequent case entitled Yudhishter vs. Ashok Kumar reported as **AIR 1987 SC 558**, wherein it was held as below:

"10. This question has been considered by this Court in Commr. Of Wealth Tax. Kanpur v. Chander Sen (1986) 3 SCC 567; (AIR 1986 SC 1753), where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore, whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. **This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property**

in the situation contemplated by Section 8, he does not take it as Karta of his own undivided family but takes it in his individual capacity. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. **In that view of the matter, it would be difficult to hold that property which devolved on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-à-vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property.** If that is so, then the appellant authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house." (emphasis added)

15. Following the aforesaid judicial pronouncements, a Single Judge of this Court in the case of Rahul Behl and others vs. Smt. Ichayan Behl and another reported as **DRJ 1991 (21) 205**, upheld an application filed by the defendants therein under Order VII Rule 11 CPC in a suit for declaration instituted by the plaintiffs against their grandmother and their father and held that the father of the plaintiffs had acquired a share in the suit premises in his individual capacity as a heir of his deceased father and not as coparcenary property. By applying the provisions of Section 8 of the Act, it was held that defendant No.2 therein (father of the plaintiffs) had inherited the property to the exclusion of his sons because it had

devolved on him in his individual capacity and had become his self-acquired property, and therefore would not become a part of the coparcenary property.

16. The aforesaid principle was also reiterated by this Court in the case of Pratap vs. Shiv Shankar reported as **164 (2009)DLT 479**, wherein it was held that under Section 8 of the Act, the property that devolves on a Hindu would not be HUF property in his hands, vis-a-vis his own sons and that the rules of succession as laid down in Section 8 of the Act envisage that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II, in the manner stipulated in Section 8 of the Act.

17. Thus in view of the fact that the plaintiff herein has instituted the present suit for partition against his father (defendant No.1) and his brother and sisters during the lifetime of the defendant No.1, who had inherited the suit property from his mother, Smt. Krishnawanti (grandmother of the plaintiff) and subsequently, when the father and the sisters of the defendant No. 1 had relinquished their respective shares in the suit property in favour of the defendant No.1, he has become the sole and exclusive owner thereof by inheritance and relinquishment. In such circumstances, the suit property cannot acquire the colour of a coparcenary property for the plaintiff to lay a claim thereon during the lifetime of his father.

18. In view of the aforesaid legal position, it has to be held that

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the present suit as instituted by the plaintiff is barred by law and is liable to be dismissed. Ordered accordingly. As a result, the interim order dated 24.4.2012 stands vacated and all the pending applications are disposed of, while leaving the parties to bear their own costs.



(HIMA KOHLI)
JUDGE

OCTOBER 15, 2012
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