

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

+ **RFA(OS) 27/2013 and CM Nos.2932-33/2013**

SUSHANT

..... Appellant

Through : Mr. Sunil Dutt Dixit, Advocate.

versus

SUNDER SHYAM SINGH

..... Respondent

Through : Respondent is ex-parte.

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Date of Decision : November 07, 2013

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE PRATIBHA RANI

J U D G M E N T

: REVA KHETRAPAL, J.

1. By way of this appeal, the Appellant seeks to impugn the order dated December 13, 2012 passed by the learned Single Judge dismissing the suit of the Appellant for partition and rendition of accounts.

2. The aforesaid suit was filed by the Appellant Master Sushant (minor) through his natural guardian and mother against his father Shri Sunder Shyam Singh (the Respondent herein). The Appellant/Plaintiff has averred in the plaint that the Respondent/Defendant received, by devolution various movable and immovable properties enumerated in the plaint from his father late Shri Joginder Singh (grandfather of the Appellant/Plaintiff) who died on 14.11.1999 and, therefore, he (the Appellant) became a co-

parcener and entitled to the share from the properties which had been inherited by his father (the Respondent No.1) from his grandfather late Shir Joginder Singh. On the aforesaid facts, the learned Single Judge vide the impugned order rejected the plaint under Order VII Rule 11 of the Code of Civil Procedure on the ground that the plaint did not disclose a cause of action. In paragraph 4 of the order, it was held as under:-

*“4. In the present case, since the only averments which are mentioned in the plaint are with respect to inheritance of the properties by the defendant i.e the father of the plaintiff from the grandfather of the plaintiff as ancestral properties, it cannot be said that the plaintiff can have any rights to the properties inherited by the defendant from his own father inasmuch as inheritance of properties by the defendant from his ancestors will only make the properties in the hands of the defendant as self-acquired properties and not HUF properties in view of the ratio of the judgments of the Supreme Court in the cases of **Commissioner of Wealth Tax Etc. (supra)** and **Yudhishter (supra)**. ”*

3. The sole ground on which the aforesaid findings have been assailed is that the Appellant/Plaintiff in paragraphs 11 and 12 of the plaint has described the properties as “co-parcenary”. For the sake of ready reference, the aforesaid paragraphs of the plaint are reproduced hereinbelow:-

“11. That the grandfather of the unfortunately died on 14.11.1999 and thus, the above said properties, specifically detailed in the Annexure-A, annexed with the plaint, devolves upon the defendant and the plaintiff equally in the ratio of 50:50, being co-

parcanary properties, in the hands of Late Shri Joginder Singh, grandfather of the plaintiff.

12. That late Shri Joginder Singh had also left behind three daughters, but since the properties were co-parcenery and plaintiff being one of the co-parceners, hence the daughters have no right in the said property and as such, are not being made a party to the suit.”

4. The legal position with regard to intestate succession under Hindu Law is well established. Prior to the coming into force of the Hindu Succession Act, 1956, the moment a son was born he acquired a share in the father's property and became part of the co-parcenary. The property of the father became part of the Joint Hindu Family of his son and grandson and other members, who formed the Joint Hindu Family. This position was radically altered by the coming into force of the Hindu Succession Act, 1956. Section 8 of the said Act lays down the general rules of succession in the case of a male Hindu dying intestate and reads as under:-

“8. General rules of succession in the case of males.
– The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter –
(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
(d) lastly, if there is no agnate, then upon the cognates of the deceased.”

5. Sub-Section (a) of Section 8 provides that the property of a male Hindu dying intestate shall devolve firstly upon the heirs, being the relatives specified in class I of the Schedule. Class I of the Schedule reads as under:-

“HEIRS IN CLASS I

Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son.; [son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son.]”

6. It may be noted that the heirs mentioned in class I of the Schedule includes sons, daughters, etc. as also son of a pre-deceased son or daughter, but does not include the grandson, i.e., the son of a living son. Thus, the Act did away with the concept of ancestral properties as existed prior thereto. Reference in this regard may usefully be made to the oft-quoted decision of the Supreme Court in ***Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others*, (1986) 3 SCC 567** which was subsequently followed in ***Yudhishter v. Ashok Kumar*, (1987) 1 SCC 204**. In the former case, the Supreme Court after noting the divergent views recorded by different High Courts in the country enunciated the law as follows:-

“21. 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.

22. 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 Section 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by the Andhra Pradesh High Court that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under section 8 of the Hindu Succession would be HUF in his hand vis-a-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-a-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 Section 8 of the Act included widow, mother, daughter of predeceased son etc.

23. Before we conclude we may state that we have noted the observations of Mulla's “Commentary on Hindu law”, 15th Edn. dealing with section 6 of the Hindu Succession Act at pages 924-26 as well as Mayne's on “Hindu Law”, 12th Edition pages 918-919.

24. The express words of Section 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."

7. In its subsequent decision rendered in ***Yudhishter v. Ashok Kumar (supra)***, relying upon the law enunciated in ***CWT v. Chander Sen and Others (supra)***, the Supreme Court made the following observations:-

"10. This question has been considered by this Court in CWT v. Chander Sen, (1986) 3 SCC 567 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 separated 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. At pages 577 to 578 of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and. the commentary made by Mulla, 15th edn. pages 924-926 as well as Mayne's Hindu Law, 12th edn. pages 918-19. Shri

Banerji relied on the said observations of Mayne on 'Hindu Law', 12th edn. at pages 918-19. 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 unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. 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-a- 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 appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house."

8. Thus, as per the ratio of the aforesaid decisions rendered by the Supreme Court, the properties inherited by the grandfather of the Appellant/Plaintiff on the demise of his own father, were held by him as his personal properties and in which his son, i.e., the father of the Appellant/Plaintiff did not acquire any share. The question of the Appellant/Plaintiff inheriting any share from his grandfather, therefore, does not arise. The claim of the Appellant of the properties being ancestral properties in the hands of his grandfather is based only on the fact of the same being ancestral properties in the hands of his great grandfather and it is in this context that the Appellant has claimed them to be co-parcenary properties, though no foundation whatsoever has been laid in the plaint of any HUF being in existence

at any point of time. This Court has in a number of decisions, relying upon the judgments of the Supreme Court (*supra*), has elaborated on this aspect of the matter and held that the Plaintiff in order to make out a case for a share in the property otherwise than under the Hindu Succession Act must plead that there existed a HUF since prior to the coming into force of the Succession Act and such HUF continues to exist. The Appellant-Plaintiff in the instant case has failed to make out any such case. [(See: ***Rahul Behl & Ors. v. Smt. Ichayan Behl & Anr.***, **DRJ 1991 (21)**; ***Pratap v. Shiv Shanker***, **2009 (113) DRJ 811** and ***Neelam & Anr. v. Sada Ram & Ors.***, **(2013) 197 DLT (CN) 52.**]

9. Then again, it hardly needs reiteration that Hindu Undivided Family as a concept and co-parcenary are not one and the same under the Hindu law. This aspect has been lucidly dealt with by the Supreme Court in the case of ***Sathyaprema Manjunatha Gowda (Smt.) v. Controller of Estate Duty, Karnataka***, **(1997) 10 SCC 684**, wherein it is held as follows:-

“The Hindu Joint family is purely a creature of law and cannot be created by act of parties save insofar that by adoption or marriage a stranger may be affiliated as a member thereof. An undivided family which is the normal condition of Hindu society is ordinarily joint not only in estate but in food and worship; therefore, not only the concerns of the joint family, but whatever relates to their commonality and their religious duties and observances are regulated by the members or by the manager to whom they have, expressly or by implication, delegated the task of regulation. The joint family status being the result of birth, possession of joint properties is only an adjunct

of the joint family and is not necessary for its constitution. Nor is it necessary that all the members possess rights or status even though the property of the family is called joint family property. On the other hand, coparcenary is a narrower body than a joint family and consists of only those persons who have taken, by birth, an interest in the property of the holder for the time being and who can enforce a partition whenever they like. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees.”

10. In view of the aforesaid well established legal position, we are of the opinion that the trial court did not err in arriving at the conclusion that upon the demise of his father (grandfather of the Appellant), the suit property devolved on the Respondent in his individual capacity and thus has to be treated as self-acquired property in his hands. Therefore, the claim of the Appellant for partition of the suit property on the ground that the same was ancestral was rightly turned down.

11. We do not find any merit in the present appeal, which is accordingly dismissed. CM Nos.2932/2013 and 2933/2013 also stand disposed of.

**REVA KHETRAPAL
JUDGE**

**PRATIBHA RANI
JUDGE**

November 07, 2013/km