

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

% *Judgment Reserved on: January 24, 2014*
Judgment Pronounced on: February 24, 2014

+ **RFA (OS) 23/2013**

AMIT JOHRI Petitioner
Represented by: Mr.Rajiv K.Garg, Advocate with
Mr.Ashish Garg, Advocate

versus

DEEPAK JOHRI & ORS. Respondents
Represented by: Mr.S.Shantanu, Advocate for R-1,
R-7, R-8 and R-9
Mr.Sanjeev Sindhvani,
Sr.Advocate instructed by
Ms.Shalini Kapoor, Ms.Promil
Seth and Ms.Kriti Arora,
Advocates for R-11 and R-12

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE JAYANT NATH

PRADEEP NANDRAJOG, J.

1. The appellant Amit Johri son of respondent No.1 K.K.Johri is the plaintiff of CS(OS) No.818/2011. He sought declaration, partition, and possession of 1/6th share in property No.1112, Chhata Madan, Gopal Maliwara, Delhi-110006. Alternatively he prayed for a decree in sum of ₹50,00,000/- (Rupees Fifty Lacs only).

2. To understand his claim we reproduce averments made by him in para 2 to 9 of the plaint. They read as under:-

“2. For the convenience of the Hon’ble Court and to appreciate the controversy between the parties, the plaintiff herein set out the family chart:

LAXMI NARAIN

.....

<i>K.K.JOHRI</i> (son) <i>DEEPAK JOHRI</i> (Def.No.1)	<i>P.P.JOHRI</i> (son) WIFE & 4 DAUGHTERS (DECEASED- NO HEIRS)	<i>BALDEV PD.JOHRI</i> (son) 2 DAUGHTERS & ONE SON (DEF. No.7 to 9)
<i>AMIT JOHRI</i> (PLAINTIFF)		

3. From the above pedigree, it is clear that plaintiff herein is the great grandson of the Late Shri LAXMI NARAIN JOHRI, the grandson of K.K.JOHRI and the son of the defendant no.1 (Mr.Deepak Johri) and defendant no.10 (Ms.Kumkum Johri) having born out of the wedlock of Defendant no.1 and defendant no.10. Late Shri Laxmi Narain Johri owned a house bearing, House No.1112, CHHATA MADAN GOPAL, MALIWARA, CHANDANI CHOWK which upon his demised was inherited by his three sons namely, Shri K.K.Johri and Baldev Parsad Johri in equal shares.

4. Shri K.K.Johri had two sons namely, Deepak Johri (Defendant No.1) and Late Shri Rupak Johri. Shri Rupak Johri died intestate and issueless. Shri Deepak Johri got married to Ms.Kumkum Johri (defendant no.10) on 4.12.1980. Out of their wedlock, the plaintiff herein namely, Amit Johri was born on 02-11-1981. On account of temperamental differences disputes arose between Shri Deepak Johri, Defendant no.1 and Ms.Kumkum Johri, Defendant no.10 which resulted in decree of divorce between the two. The said decree of divorce became final having confirmed by the Hon’ble Apex Court vide its order dated 27-09-2010.

5. Being the son of SHRI K.K.JOHRI, the defendant no.1 inherited undivided $\frac{1}{3}^{\text{rd}}$ share defendants Nos.2 to 6, inherited undivided $\frac{1}{3}^{\text{rd}}$ share being heirs of Shri P.P.Johri and Defendant no.7 to 9 inherited remaining $\frac{1}{3}^{\text{rd}}$ share in the

aforesaid property, namely, being 1112, CHATTA MADAN, GOPAL MALIWARA DELHI-110006 in equal share.

6. *That the defendant no.10 is the mother of the plaintiff and the ex-wife of defendant no.1 who by way of a mutual consent decree for divorce dated 27.09.2010 has dissolved all relationship with the defendant no.1 as aforesaid.*

7. *The marriage between the parents of the plaintiff was solemnized on 4.12.1980 at New Delhi as per the Hindu Rights. Soon after the marriage the defendant no.10 accompanied defendant no.1 to their matrimonial residence being 1112, CHATTA MADAN, GOPAL MALIWARA DELHI-110006, where they along with other family members were residing. On 02.11.1981 the defendant no.10 was blessed with a male child (plaintiff) out of the aforesaid wedlock.*

8. *That the plaintiff states that he being the son of defendant no.1 got by birth the right in the aforesaid ancestral property. It is undisputed that the aforesaid house belonged to the great grandfather of the plaintiff and was inherited by him from his father thus upon his birth he was entitled to half the share in the 1/3rd share of Defendant no.1.*

9. *That the plaintiff submits that he has unbridled right to inherit half of the 1/3rd share in the aforesaid property which defendant No.1 has ultimately inherited from Late Shri Laxmi Narain Johri, like the other defendants. However, the defendant no.1 kept assuring the plaintiff that he shall provide the plaintiff his part of the share as and when the same aforesaid property is divided among all the heirs but the same was proved to be false, assurance."*

3. He pleaded thereafter that treating as if K.K.Johri, P.P.Johri and Baldev Prasad Johri were the owners of the property, their children in turn treating themselves to be the owners have sold the property at Gopal Maliwara to defendants No.11 and 12. In a nut shell his case was that since his father Deepak Johri inherited a share in the property from his

father K.K.Johri who in turn inherited the same from Laxmi Narain Johri, in the hands of his father, the property had an ancestral character and thus he had a share therein by birth.

4. In preliminary objection No.1 taken by defendants No.11 and 12, it was pleaded as under:-

“1. The suit for declaration, partition, possession and permanent injunction or in the alternative for recovery as framed is not maintainable in view of the fact that the plaintiff has no legal right in the suit property during the lifetime of his father, as such he is not entitled to challenge the sale executed by Defendants Nos.1 to 9 in favour of Defendants Nos.11 and 12. The property subject matter of sale was no HUF property in the hands of Defendant No.1 who on the death of his father inherited the same in his individual capacity and not as Karta of HUF vis-à-vis his son. Even if it be assumed though not conceded that the property in suit was inherited by Shri Deepak Johri as a karta of HUF and not in his individual capacity, in that event also the plaintiff has no right to challenge the sale and Shri Deepak Johri could sell the same for legal necessity and benefit of the estate. The property in suit was very old and in a dilapidated condition and there were several tenants in the ground floor of the suit property, who were paying nominal rents. The suit property could not be developed since there were large number of owners and therefore the owners decided to sell the suit property. The present suit as such is liable to be rejected under Order 7 Rule 11 CPC.”

5. In preliminary objection No.1 in the replication filed by the plaintiff to the written statement filed by defendants No.11 and 12 and reply to preliminary objection No.1 taken by defendants No.11 and 12 in the written statement, Amit Johri pleaded as under:-

“1. Before replying to the contents of the written statement it is relevant to point out that in the written statement it has been categorically admitted that the suit property i.e. house bearing no.1112, Chatta Madan Gopal, Maliwara, Chandani Chowk, Delhi – 110006 was owned by Sh.Laxmi Narain Johri. He had

three sons namely K.K.Johri, P.P.Johri and Sh.Baldev Prasad Johri. After his death the aforesaid house was inherited by the aforesaid three sons of Sh.K.K.Johri having 1/3rd undivided share in the said house. It is also admitted that defendant no.1 Deepak Johri is son of Sh.K.K.Johri. However, mischievously answering defendants allege that on the death of Sh.K.K.Johri on 29.10.1985 his 1/3rd share has been inherited only by Shri Deepak Johri when on the death of Sh.K.K.Johri he had two heirs i.e. Shri Deepak Johri and the plaintiff i.e. Amit Johir who was born on 2.11.1981 i.e. prior to his death and thus each of them had inherited 1/6th undivided share in the aforesaid property. Thus the plaintiff has vested right, title, interest in the aforesaid house to the extent of 1/6th share from the date of his death.

REPLY TO PRELIMINARY OBJECTIONS

1. The contents of para 1 of the preliminary objections as stated are denied being false, frivolous and misconceived. It is specifically denied that the plaintiff had no right in the aforesaid property during the life time of his father as alleged or at all. Mr.Amit Johri has vested right, title, interest in the aforesaid house to the extent of 1/6th share from the date of his death. It is denied that the subject property is not an HUF property. From the date of the death of Sh.K.K.Johri, the plaintiff got the right in the property. Sh.K.K.Johri, inherited the same from his father Sh.Laxmi Narain Johri. It is denied that the plaintiff has no right to challenge the sale made by Deepak Johri and other defendants. Admittedly on the date of the sale the plaintiff was major and had right therein to the extent of 1/6th share. The condition and position of the building does not give any right to sell the property without the consent, knowledge or information of the plaintiff who had vested right in the property. If the property could not be developed that does mean that after conspiracy and without the knowledge, consent of the plaintiff the said property could be sold the third party in a clandestine manner depriving the legitimate right of the plaintiff. Admittedly the answering defendants who are the developers and has purchased the subject property for developing the said building and not for the small amount of rent which is being paid by the tenants. It is denied that the present suit is liable to

be dismissed under Order 7 Rule 11 of the CPC as alleged or at all.”

6. It is not in dispute that Laxmi Narain Johri died on August 22, 1972 and his wife Jal Devi died on July 19, 1976 i.e. much after the promulgation of the Hindu Succession Act, 1956.

7. IA No.18548/2011 under Order VII Rule 11 of the Code of Civil Procedure was filed by defendants No.11 and 12 praying that the plaint be rejected since it did not disclose a cause of action; and for which decisions reported as AIR 1986 SC 1753 Commission of Wealth-tax, Kanpur etc. vs.Chander Sen etc., AIR 1987 SC 558 Yudhishter vs.Ashok Kumar, DRJ 1991 (21) 205 Rahul Behl & Ors.vs.Smt.Ichayan Behl & Anr., 1993 Suppl.(1) SCC 580 Commissioner of Income-tax vs.Plkaruppan Chettiar, 2008 (3) SCC 87 Bhanwar Singh vs.Pooran & Ors., and 164 (2009) DLT 479 Pratap vs.Shiv Shanker were relied upon to urge that after 1956, upon the death of a male Hindu his legal heirs acquire his estate as per Section 8 of the said Act and thus the property owned by Laxmi Narain Johri, who died on August 22, 1972, devolved on his legal heirs as per Section 8 and could not be treated as HUF property.

8. Agreeing with the contentions urged by defendants No.11 and 12, referring to the decisions cited by defendants No.11 and 12, in paragraph 13 and 14 of the impugned decision dated November 26, 2012, the learned Single Judge has held as under:-

13. The aforesaid conclusion was arrived at by the Supreme Court in the case of Commissioner of Wealth-tax, Kanpur (supra), wherein notice was taken of the divergent views that were expressed by the Allahabad High Court, Full Bench of Madras High Court, Madhya Pradesh High Court, Andhra

Pradesh High Court and Gujarat High Court and it was held 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. 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 S.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 S.8. Furthermore as noted by the Andhra Pradesh High Court, the Act makes it clear by S.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 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. xxx xxx xxx

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. Subsequently, in the case of Yudhishter (supra), the Supreme Court had followed the judgment in the case of Commissioner of Wealth-tax, Kanpur (supra) and observed 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 a Karta of his own undivided family but takes it in his individual capacity.** At pages 577 to 578 (of SCC): (at p.1760 of AIR) 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 on Hindu Law 12th edition pages 918-

*919. Shri Banerji relied on the said observations of Mayne on Hindu Law 12th Edn. at pages 918-919. 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. 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-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 appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house.**" (emphasis added)*

9. The net result is that the plaint has been rejected.

10. Learned counsel for Amit Johri, though made an attempt to argue that on death of Laxmi Narain Johri, the suit property being inherited by his three sons K.K.Johri, P.P.Johri and Baldev Prasad Johri would vest an ancestral character in the property qua Amit Johri with reference to his father Deepak Johri inheriting K.K.Johri's share when K.K.Johri died on October 29, 1985, but in the teeth of the crystal clear enunciation of law not only by various Benches of this Court but even the Supreme Court, learned counsel, short of making a concession that the impugned decision took the right view in view of the pleadings in the plaint; the written statement filed by defendants No.11 and 12 and the replication filed thereto, left the argument hanging in the air.

11. On the pleadings of the parties we agree with the view taken by the learned Single Judge that since in the plaint it was averred that the suit property belonged to Laxmi Narain Johri who died intestate on August 22, 1972, he being a Hindu, his estate was inherited by his three sons and his wife being his class-I heirs under Section 8 of the Hindu Succession Act, 1956. On the death of Laxmi Narain Johri's wife Jal Devi her share devolved upon her three sons and thus the three sons born to Laxmi Narain and Jal Devi became 1/3rd owner each of the suit property. Upon K.K.Johri's death his sons inherited the property as Class-I heirs under Section 8 of the Hindu Succession Act, 1956. The second son of K.K.Johri Rupak Johri left behind no Class-I heirs and thus his brother Deepak Johri inherited Rupak Johri's share. The share of the property in the hands of Deepak Johri has to be treated as his personal self acquired property and not imparted with the colour of joint family property.

12. But, learned counsel for the appellant put a second string to his bow to shoot another arrow. Contrary to his pleadings in the plaint, Amit Johri through his counsel projected the argument that as a matter of fact the property had been purchased by one Chuttan Lal on October 26, 1846, and on his death the same devolved on his son Munshi Durga Prasad who was survived by two sons Brij Bihari and Chatter Bihari. Brij Bihari died issue less, on a date not known. Thus, Chatter Bihari acquired full interest in the property and on his death on May 29, 1943, his son Laxmi Narain inherited the property, meaning thereby ancestral character was imparted to the property when Laxmi Narain Johri inherited the same through his father because Laxmi Narain Johri acquired the property from his grandfather : '*Pitahmaha*'. Counsel urged

that this fact is not disputed because in the sale deed executed in favour of defendants No.11 and 12 the title has been traced to the suit property to Chuttan Lal.

13. It may be true that property under Hindu Law can be classified under two heads:- (i) coparcenary property; and (ii) separate property. Coparcenary property is again divisible into (i) ancestral property and (ii) joint family property which is not ancestral. This latter kind of property consists of property acquired with the aid of ancestral property and property acquired by the individual coparcener without such aid but treated by them as property of the whole family.

14. It may also be true that the three notions: (i) joint property, (ii) joint family property, and (iii) joint ancestral family property are not the same. In all the three things there is no doubt a common subject, property, but this is qualified in three different ways. The joint property of the English law is property held by two or more person jointly, its characteristic is survivorship. Analogies drawn from it to joint family property are false or likely to be false for various reasons. The essential qualification of the second class mentioned above is not joints merely, but a good deal more. Two complete strangers may be joint tenants according to English law; but in no conceivable circumstances except by adoption could they constitute a joint Hindu family, or in that capacity, hold property. In the third case, property is qualified in a two-fold manner, that it must be a joint family property and it must also be ancestral. It is obvious that there must have been a nucleus of joint family property before an ancestral joint family property can come into existence, because the word ancestral connotes descent and hence pre-existence. But because it is true that there can be no joint ancestral

family property without pre-existing nucleus of joint family property, it is not correct to say that these cannot be joint family property without a pre-existing nucleus, for, that would be identifying joint family property with ancestral joint family property. Where there is ancestral joint family property, every members of the family acquires in it a right by birth which cannot be defeated by individual alienation or disposition of any kind except under certain peculiar circumstances. This is equally true of joint family property. Where a sufficient nucleus in the possession of the members joint family has come to them from a paternal ancestor, the presumption is that the whole property is ancestral and any members alleging that it is not, will have to prove his self-acquisition. Where property is admitted or proved to have been joint family property, it is subject to exactly the same legal incidents as the ancestral joint family property, but differed radically in original and essential characteristics from the joint family is the tie of sapindaship without which it is impossible to have a joint Hindu family, which such a relationship is unnecessary in the case of a joint tenancy in English laws.

15. It may further be true that coparcenary property means and includes: (1) ancestral property, (2) acquisitions made by the coparceners with the help of ancestral property, (3) joint acquisition of the coparceners even without such help provided there was no proof of intention on their part that the property should not be treated as joint family property, and (4) separate property of the coparceners thrown inot the common stock.

16. But, there has to be a properly constituted pleading before principles of law can be attracted. It is trite that depending upon a fact

stated a principle of law would be attracted. Issues of law and fact have to be settled with reference to the pleadings of the parties.

17. In the decision reported as AIR 1998 SC 628 Heeralal Vs. Kalyan Mal & Ors. it was held that with respect to the character and ownership of a property an admission made in the pleading conferred a valuable right on the opposite party and that said admission could not be permitted to be withdrawn. The logical extension of the same principle would be that a case pleaded by the party would require to be established as pleaded and not with respect to something else.

18. It assumes importance to note that neither before the learned Single Judge nor in appeal the appellant made any attempt to amend the plaint.

19. Now, if Chuttan Lal was the owner of the property and it devolved upon his son Munshi Durga Das, in the absence of any pleadings that Chuttan Lal had constituted an HUF with his son, even under the Hindu Law in existence prior to 1956 Durga Prasad would have inherited the property in his own right as the successor in interest of his father. Inheritance would be by succession and not survivorship. It may be true that upon his death when his sons Brij Bihar and Chattar Bihari acquired interest therein by succession, it may be possible to argue that qua their children the property had an ancestral character. But the fact that Brij Bihari died issueless and his brother Chattar Bihari acquired even his half share may give birth to an argument that half share in the property acquired by Chattar Bihari was through his brother and thus said half share would not have an ancestral character. In what manner said half share would require to be treated vis-à-vis Laxmi Narain would also be an issue which would arise if the appellant had traced lineage and thereafter title to Chuttan Lal.

20. What we intend to highlight is that we do not know as to what would be the case of the defendants if appellant in his pleading had traced title of the suit property to Chuttan Lal.

21. The appellant instituted the suit pleading that Laxmi Narain was the owner of the property. The appellant admits that Laxmi Narain died on August 22, 1972 and his wife Jal Devi died on July 19, 1976 i.e. after the promulgation of the Hindu Succession Act, 1956. The appellant pleaded ancestral character of his father's share in the property on the plea that his father acquired interest from his i.e. appellant's grandfather who in turn acquired interest under Laxmi Narain.

22. Thus, on the pleadings as laid the appeal has to be dismissed.

23. We dismiss the appeal leaving the parties to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(JAYANT NATH)
JUDGE

FEBRUARY 24, 2014

Mamta/Skb