

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

Reserved on : 28.11.2013
Pronounced on: 04.03.2014

+ RFA (OS) 14/2008, C.M. APPL. 1201/2013

JEEVAN DASS Appellant
Through: Sh. H.S. Phoolka, Sr. Advocate with Sh.
Jasmeet Singh and Sh. Gursimranjit Singh,
Advocates.

Versus

ANIL SHARMA Respondents
Through: Sh. Sudhanshu Batra, Sr. Advocate with
Sh. Suresh Singh, Advocate.

+ RFA (OS) 20/2008

ANIL SHARMA AND ORS. Appellants
Through: Sh. Sudhanshu Batra, Sr. Advocate with
Sh. Suresh Singh, Advocate.

Versus

JEEVAN DASS Respondent
Through: Sh. H.S. Phoolka, Sr. Advocate with Sh.
Jasmeet Singh and Sh. Gursimranjit Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The present common judgment will dispose off two appeals –
RFA (OS) 14/2008 (filed by the plaintiff Jeevan Das) and RFA (OS)

20/2008 (filed by Anil Sharma, defendant). Both the appeals are directed against the different findings of the learned Single Judge in the impugned judgement and decree of 20.12.2007 in CS(OS) 2350/1997. In the suit, Jeevan Das sought partition of residential premises located at Hanuman Mandir (hereafter referred to as “the suit premises”) and a decree or direction that he was entitled to a share equal to that of the defendant Anil Sharma in respect of the business carried on by him and by his father in a *takhat* in the temple premises.

2. The suit before the learned Single Judge was preferred by Jeevan Das, the son of Janki Das. The plaintiff (hereafter referred to as such) had another brother, Hari Shankar, whose son Anil Sharma was arraigned as the first defendant (hereafter called “the first defendant”). It was claimed that through Janki Das, (the plaintiff’s father and grandfather of first defendant), the said parties inherited the right in respect of the family residence, as also the business and the shop where from, during his life time, Janki Das was carrying on some business. The plaintiff contended that he and his brother, Hari Shankar used to carry on business from a shop for a period of six months each on rotational basis, and after Hari Shankar's death, Anil Sharma in 1992 ousted him from the shop. The plaintiff claimed that he was entitled to sit in the shop or “*takhat*” and carry on business for six months each year. The plaintiff also urged that the first defendant made unauthorized constructions in the residence and had forcibly dispossessed him from a room in his occupation on the ground floor; he also alleged that the first defendant used to lock a toilet and the

bathroom on the ground floor notwithstanding that he had an exclusive toilet and bathroom in his possession. On the strength of these averments, partition of the residential premises was sought; further a decree for accounts from 1933 in respect of the business carried on in the shop, as well as partition of the shop/*takhat* or use of it in the temple complex was sought.

3. The defendants denied the suit claim and argued that the temple existed from time immemorial. The land adjoining it was donated to the temple by Maharaja Jai Singh. It was also contended that six *pujaris* (priests) were managing the affairs of the temple and were given puja *sewa* rights. In terms of an understanding amongst them, out of 12 months each year, Mahant Sadhu Ram and Bholey Prasad were given two months to exclusively appropriate the puja *sewa* rights. Panna Lal and Nathu jointly got three months. Ram Chander and Radha Krishan got two and a half months each. It was stated that during the respective puja *sewa* period, offerings at the temple were appropriated by the six *pujaris*. It was argued that Radha Krishan was survived by three sons, namely, Janki Das, Shiv Lal and Laxman Singh. These three decided that the 2 ½ months puja *sewa* rights of Radha Krishan would be shared by them by each of them enjoying exclusive 15 days each year and one month every third year to appropriate the puja *sewa* rights i.e. for 2 years Janki Das got 15 days each year and the third year he got one month, and so on. Janki Das' two sons shared his right to perform *sewa* puja 15 days each year for two years and one month in the third year by assigning 15 days every alternative year to each other and 15 days each in the third year. The

defendants alleged that on 16.3.1931, the Governor General of India executed a temporary lease in favour of the *pujaris* of the temple demising 1.091 acres land for a period of 25 years, whilst referring to the lands adjoining the temple. It was alleged that the New Delhi Municipal Committee (NDMC) took over possession of the lands adjoining the temple, in 1967-68. It was urged that after the shop inherited from Janki Das was demolished by NDMC, a *takhat* put up by ancestors of one Dharam Chand on the temple land with the permission of the *pujaris* for use by Dharam Chand, was allowed for use to late Hari Shankar on week days except Tuesdays. Hari Shankar sold flowers from the *takhat* belonging to Dharam Chand. On Hari Shankar's death, with the permission of Dharam Chand, the defendants used the *takhat* to sell flowers except on Tuesdays when Dharam Chand used the *takhat* for his business.

4. With respect to the residential structures, the defendants urged that the original *pujaris* and their successors made constructions in accordance with their need, without any title to the land. Janki Das used to occupy a residential hall measuring 20ft. x 40ft. with an adjoining store room measuring 6ft. x 11ft. A bathroom below the stair case leading to the first floor existed; the defendants admitted that it was constructed by Janki Das. It was contended that upon the demise of Hari Shankar, since the plaintiff was creating problems and wanted a formal partition, a settlement was arrived at in which he (the plaintiff) was given the big hall on the ground floor and the old construction on the first floor above the hall. The defendants claim that they occupied the small store room on the ground floor and one

room on the first floor. As that accommodation was inadequate, the defendants constructed a second floor above the said room.

5. The parties went to trial on several issues; these included as to the maintainability of the suit in respect of the residential property, and the relative rights as well as the plaintiff's entitlement to carry on business on the *takhat* and the corresponding liability of the defendants, if any, to render accounts of past profits and proceeds. The plaintiff relied on the oral testimony of 8 witnesses.

6. The learned Single Judge, on an appreciation of the evidence and materials led before him, held that the parties were unable to prove that either of them had any valid title or interest in respect of the property. It was held that the evidence led showed that the right to use the property was that of the temple, which in turn was managed by the trustees and that the parties had not shown that either of them had any permission or sanction to carry out any construction. The impugned judgment, however, recorded that since the temple authorities did not appear to have ever objected to such constructions, they had acquiesced to it. The Single Judge thereafter held that the property had to be partitioned, reasoning as follows:

“51.....the constructed portions in possession of the defendants are disproportionate to their share. As is noted from the evidence, both toilets are being sought to be appropriated by the defendants and plaintiff is being relegated to use the municipal toilet constructed by NDMC as a public convenience for the devotees who visit the Temple. It is difficult to believe that the plaintiff would have agreed to such an unfair partition as is alleged by the defendants.

52. *Partition of an immovable property causes severance of a joint status. Meaning thereby unity of title and possession is brought to an end with each party having exclusive right of ownership and possession of his/her respective share. Clear and cogent evidence has to be brought on record to establish partition i.e. severance.*

53. *I accordingly hold that the family arrangement proved on record by the defendants at best evidences an agreement between the parties of an inchoate nature to use and occupy the different portions of the residential complex. I hold that constructions effected by Hari Shankar on the first floor and thereafter by defendant No.1 on the floor above were to meet the growing needs of the family. The constructions were not pursuant to any partition. Since the constructions were on the roof of the existing ground floor constructed by Janki Dass, the same would be liable to be partitioned, along with the partition of the constructions effected by Janki Dass, with plaintiff having half share therein and the defendants having the remaining half share.*

54. *Issue pertaining to the shifting of the water tank is a non-issue for the reason the water tanks serves as an amenity for the entire building.*

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7. It is argued on behalf of the appellant in RFA(OS) 20/2008, the first defendant in the suit, that partition of the residential property was not warranted. It was argued in this regard that since the plaintiff did not possess title to the property, but was a mere permissive user, a direction by the learned Single Judge that the suit premises had to be partitioned was not justified. It was argued, in this connection, by Shri Sudhanshu Batra, learned Senior Counsel that the Single Judge fell

into error in directing partition of property that was inherently impartible. Elaborating on the argument, counsel submitted that once the Court held that the title vested in a third party, there was no question of the plaintiff seeking a decree for partition. It was also highlighted that in the event the Court holds that the property cannot be divided by metes and bounds, the logical corollary would be that there would be *inter se* bidding, and in the event of the transfer not taking place, it would have to be sold to a third party, in accordance with law. When the parties do not possess title to the property, there can be no question of sale of the suit property or any right in respect to it at all.

8. Counsel for the plaintiff, Shri H.S. Phoolka argued that the learned Single Judge's direction to partition the residential property was justified. He highlighted that the finding regarding the possession of a disproportionate share of the suit property with the defendants, was based on a proper appreciation of the evidence on record. It was emphasized that the defendant not only was in possession of a lion's share of the residential property over which both the parties to the suit had equal shares, but also had exclusive possession of the toilet and other common facilities. The counsel relied on the findings in this respect, and submitted that there is no bar in law to the partitioning of property over which parties have only an entitlement to use or possess.

9. The crucial evidence in this case relating to the partition of residential property is that of DW-1; he deposed that the plaintiff had been residing in the premises since 1971. The said defendant got

married much later, in 1985 and started using a first floor room. Later he expanded that premises. He unequivocally stated that though the plaintiff was residing in the same premises and though there were two toilets, the plaintiff had to use the municipal toilets. Now, it is a matter of record that the parties have been using the premises jointly; none of them own it. The property belongs to the temple management; if at all, the temple management through the Trust, has property rights over it. Since neither party has any clear entitlement, but are in the premises at the sufferance of the Temple Trust, or in permissive possession, neither can assert exclusive control over the portions in their control. At best the existing arrangement is *ad-hoc*. This Court does not find any infirmity with the impugned judgment especially since the common facilities and toilets are in the exclusive enjoyment of the defendant. Since both parties had been enjoying the premises on account of their admitted family status i.e. as descendants of Janki Das, the entitlement to one half share each (of the use of the premises) decreed by the Single Judge is unexceptionable and, therefore, hereby affirmed.

10. The plaintiff, Jeevan Das argues in RFA(OS) 14/2008 that the findings of the learned Single Judge in regard to the partition and sharing of rights in respect of the shop are contrary to the evidence. Learned counsel relies upon the oral testimony of PW-2 Bhagwati Devi, sister of PW-1; her husband PW-3 and the testimony of PW-4, Mahant Prem Das, one of the priests of the temple; PW-5 and PW-6, i.e. PW-1's brother-in-law and PW-7, another brother-in-law. It is

contended that all these witnesses consistently deposed that upon the death of Janki Das, father of the plaintiff, the shop was managed by him with the help of his servant. It was submitted that clear evidence of PW-3 was that the defendant refused to hand-over possession of the shop after the death of Hari Shankar and that he used to just help his father in his shop and the temple. PW-4 likewise deposed that both the brothers Hari Shankar and Jeevan Das, after Janki Das's death, under the supervision of their mother Prashanti have been running the shop in the temple. Learned counsel also submitted that a reading of the evidence pointed to the two parties transacting jointly till about 1993 after which the defendant refused access to the plaintiff in the business. In the light of this evidence, and the admission made in the written statement, especially in para 7, argued the plaintiff, the finding that he was not entitled to partition or a share in the business carried on at the *takhat* or counter at the temple cannot be sustained. Learned counsel also relied upon Ex.PW-8/1, a letter addressed by the NDMC to all legal heirs of Janki Das in respect of the old shop. It was submitted that this established that the plaintiff had rights equal to that of the defendant in respect of the business carried on at the *takhat*. Learned counsel also relied upon the testimony of PW-1 that the business at the shop used to be carried on under the provision of his mother by the plaintiff and that this was with the approval of the original *pujaris* of the temple. Learned counsel submitted that in these circumstances, the question as to the location of the counter or *takhat* was irrelevant, it being an interest which had been asserted by the plaintiff and acknowledged by the defendant for a considerable period,

and a partition decree was called for on account of defendant's wrongful action in preventing the plaintiff's rights to participate in such commercial activity and earn his livelihood.

11. Learned counsel for the defendant argued that the impugned judgment does not call for interference in respect of the decision not to partition the business and the right to use the *takhat* or shop. It was submitted that the findings as to who owned the shop or had property rights over it are conclusive. The plaintiff could not establish that the business had been commenced or continued with the approval of the trustees. It was further argued that on an overall consideration of the materials, Dharam Chand, who had primary right to use the *takhat* had permitted Hari Shankar to use it. There was no evidence that either Dharam Chand or Hari Shankar had permitted the plaintiff to use the *takhat* over which they had rights to transact business from. In these circumstances, the question of partition did not arise. The right to transact from the *takhat* or use it for some part of the week, being a purely personal one as between the defendant and the primary user or licensee of the *takhat* (unless the plaintiff led evidence that such business or activity was one over which the joint family could exercise rights) was impartible.

12. As is evident from the above discussion, the question involved in RFA(OS)14/2008 is as to whether the plaintiff could claim a right or a decree for partition in respect of the *takhat*. In the suit the plaintiff led claim in para 17 of the suit which reads as follows:

“17. That the shop below the temple is in the possession of the Defendant No.1 from which he is earning about Rs.1,00,000/- per month and the defendants are liable to render the accounts since the year 1993. Shri Hari Shanker, brother of the Plaintiff and father of the Defendant No.1 died in 1988. The Plaintiff is also entitled to the profits of the shop and is also entitled to sit in the shop for six months in a year.

18. That besides the residential accommodation and the shop the brass utensils of the temple and other goods relating to the temple are still lying jointly and the Defendant No.1 keeps on fighting with the plaintiff on the trivial issues which also need to be partitioned.”

13. The corresponding relief is claimed in para 31(b), in which the primary decree of partition of shop/counter at Shri Hanuman Mandir, for a declaration of the shares was sought. Consequently, direction to render accounts of the business since 1993 was also sought. The defendant denied the allegations in the suit in the following terms:

“17. The contents of paragraph-17, as stated, are wrong and denied. It is stated that there is no shop as alleged by the plaintiff in the paragraph under reply. As stated above, the father of defendant No.1 used to put the flower baskets in a portion of the alleged counter and was doing his personal and individual business of selling the flowers for puja and after his death, defendant No.2 is running the said business which is her only livelihood. Defendant No.2 is running the said business with the help of servants. This business is very small as only flowers are being sold for puja and that is also excluding Tuesday which is the main day for puja of Shree Hanumanji. There is hardly any substantial income from the said business. The alleged income of Rs.1,00,000/- per month is imaginary. Whatever income is derived by defendant No.2 from the said business, is used for her personal needs. Defendant No.1 does not take any share

from the said income. It is denied that the plaintiff is entitled to the profit from the said business and/or entitled to sit on the said place for six months in a year. The plaintiff has never been associated in the said business and there was no arrangement with the plaintiff to sit on the said place in the alternative turn as alleged by the plaintiff.

18. The contents of paragraph-18, as stated, are wrong and denied. The alleged brass utensils are meant for use in the Puja Sewa rights of the Temple at the turn of the family. The said utensils were stored in the store room attached to the big inner hall in occupation of the plaintiff. The plaintiff has thrown out the said utensils from the store room and the same are now lying outside the outer room. The utensils cannot be partitioned as the same are used for the puja at the turn of the family.”

14. The defendant, DW-1 (respondent in RFA(OS) 14/2008) deposed in the examination-in-chief that the shop used to be run by his father till it was demolished by the NDMC in 1968 and that after its demolition, his father (Hari Shankar) started a new shop in the counter in the verandah of the temple where he used to sell flowers and cold drinks. He also deposed that the forefathers of Dharam Chand, who used to sell *prasad* and sweets in the temple had been permitted to put a wooden *takhat* on the verandah near the entrance by leave and license of the pujaris. As Hari Shankar's shop was dislocated, he requested Dharam Chand's father or ancestors to allow him to put his flower basket on a part of the *takhat* on all days except Tuesday. One of the *pujaris* of the temple also deposed along the same lines. In cross-examination, he clearly stated that Hari Shankar had started the shop and that earlier in 1964, he alone used to sit in the *khokha*/shop which was demolished in 1967. He further deposed that Hari Shankar

started selling the flowers sometime in 1971 and also offered puja articles. DW-3 was repeatedly cross-examined on this; however, the deposition that the shop and the business were solely managed by him remained unshaken.

15. From an analysis of the evidence on the record, what is apparent is that one Dharam Chand was granted leave to sell flowers and puja related articles in the temple quite long ago. Concurrently, Hari Shankar used to carry on business just outside the temple and within the larger precincts. DW-3 talks of this business being carried-on as long as in 1964. The evidence also suggests – this part being undisputed by the plaintiff – that the shop was demolished in 1967. Later, Hari Shankar approached Dharam Chand, who granted him permission to use part of the space (occupied by him or the *takhat*) to conduct his (Hari Shankar's) business. DW-3, who appears to be an unrelated witness withstood the cross-examination by the plaintiff and consistently deposed that Hari Shankar alone carried-on his business.

16. The plaintiff has placed reliance on Ex.PW-8/1. In this Court's opinion, that document does not advance his case even one whit; it is merely a notice by the NDMC after demolition of the shop, in the course of property tax assessment proceedings, calling upon the heirs of Janki Das. That the plaintiff was included as heir of Janki Das cannot in any manner be determinative as to whether he was in fact entitled to claim a share in the deceased Hari Shankar's business activity. The defendant's assertion that the commercial activity carried-on, i.e. sale of flowers and cold drinks on its other side was his

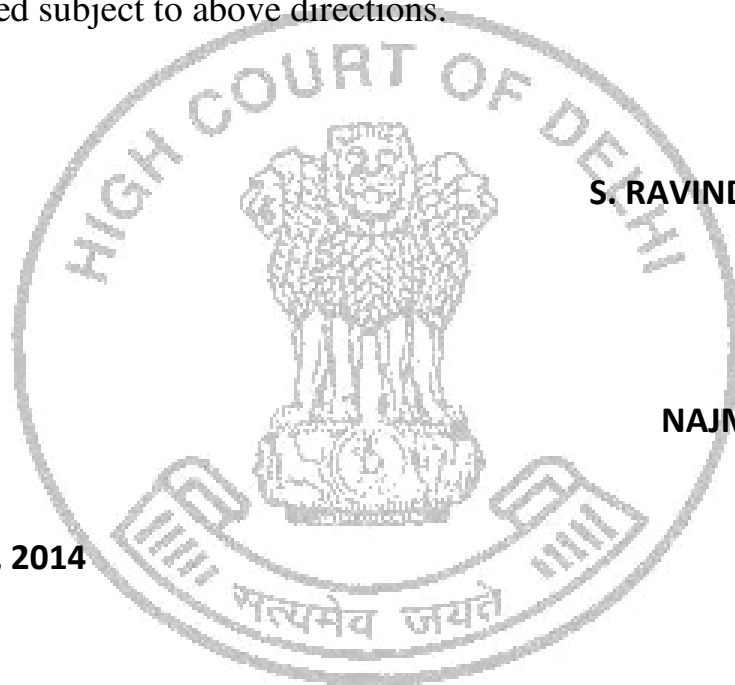
personal business and not HUF venture, has not been displaced by acceptable evidence. The deposition of some of the plaintiff's witnesses – in the absence of any other objective material, does not establish a right to claim a share which can be granted only if there is acceptable proof of existence of an HUF business.

17. It has been held by the Court that the mere fact that the parties are joint or that there is no partition of the properties and assets does not raise a presumption that the income in the hand of the one or the other individual members is part of the hotch pot thereby constituting partible property (refer to *Rukhma Bai v. Laxmi Narayan* AIR 1960 SC 335). Similarly, the mere fact that the parties to these proceedings lived together and the plaintiff could establish his rights to claim a share in the residential premises does not establish his right to claim a corresponding share in the business on the *takhat* by Hari Shankar unless it was proved by him likewise that the commercial or business activity was HUF business. For these reasons, this Court is of the opinion that the findings of the learned Single Judge in refusing to direct a partition of the business cannot be faulted.

18. In view of the above discussion, the judgment and decree of the learned Single Judge do not suffer from any infirmity. The directions contained in the impugned judgment that partition of the residential premises be carried-on through *inter se* bidding between the parties are hereby affirmed. It is clarified that consequential steps towards sale of the property under the Partition Act cannot be undertaken having regard to the fact that the neither of the parties has title to the

suit property. In such situation, the endeavour in the final decree proceedings would be to somehow arrive at an acceptable and just solution where the premises can be equitably shared by the parties to the suit.

19. The parties are directed to be present before the learned Single Judge for further directions towards completion of final decree proceedings. The appeals - RFA(OS) 14/2008 and RFA (OS) 20/2008 are dismissed subject to above directions.



**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

MARCH 04, 2014