

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

+ RSA No. 211/2013 & CM No. 14337/2013 (stay)

% **4th April, 2014**

MINU SHARMA Appellant
Through: Mr.B.S.Shukla and Mr. K.K.Jha,
Adv.

VERSUS

NEELAM VARSHNEY Respondent
Through: Mr. Sunil Kr. Aggarwal, Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This second appeal is filed under Section 100 CPC, 1908 impugning the judgment of the first appellate court dated 27.5.2013 by which the first appellate court dismissed the first appeal filed by the appellant herein and confirmed the decree passed by the trial court dated 15.10.2012. Trial court by its judgment dated 15.10.2012 decreed the suit by allowing the application filed by the respondent-plaintiff under Order 12 Rule 6 CPC. In terms of the decree passed in the suit, the appellant-defendant has been directed to handover vacant and peaceful possession of the suit property

being DDA MIG Flat No. 126, Second Floor, Block B, Pocket-10, Sector-3, Rohini, Delhi, to the respondent-plaintiff.

2. The facts of the case are that the respondent-plaintiff filed the subject suit for possession against the appellant/defendant with respect to the suit property stating that the respondent-plaintiff had purchased the suit property on 26.12.2008 for a sum of Rs.8,50,000/- from her mother Smt. Kamal Sharma. Property was purchased by means of the agreement to sell, power of attorney, Will, affidavit etc and which were duly registered in the office of the sub-Registrar on 27.12.2008. Appellant-defendant was a licensee in the suit property and since the appellant-defendant failed to vacate the suit property the subject suit for possession came to be filed.

3. Appellant-defendant filed her written statement and prayed for dismissal of the suit on various grounds, but the principal ground which was taken was that the suit property was not owned by the mother Smt. Kamal Sharma but the same was an ancestral property because it was purchased out of the sale of the ancestral property which came to the father-in-law –late Ram Prakash Sharma husband of Smt. Kamal Sharma. The ancestral property which was sold was stated to be C-1-A/33-A, Pankha Road, Janak Puri, Delhi-58. It was pleaded by the appellant-defendant that though the

suit property was in the name of the mother of the plaintiff i.e the mother-in-law of the appellant-defendant, actually the property being an ancestral property, the husband of the appellant-defendant also had a share and consequently, the appellant/defendant could not be dispossessed from the suit property. It was also the case of the appellant/defendant that respondent/plaintiff purchased the suit property by playing a fraud on her mother Smt. Kamal Sharma.

4. The first appellate court has dismissed the first appeal by making the following relevant observations:

“7. In this case, Ld. Trial Court has taken into consideration the averments made by the respondent in here plaint and the defence raised by the appellant in her written statement. Ld. Trial Court has discussed para no. 3 of the plaint wherein it is averred by the respondent (plaintiff before the Trial Court) that she is the owner of DDA MIG Flat No. 126 situated at Second Floor of Block-B, Pocket-10, Sector-3 in the layout plan of Rohini Scheme, Rohini, Delhi-110085. In reply, the appellant in the corresponding para stated that the contents of para no.1 of the plaint are not admitted for want of knowledge and it has been admitted by the appellant in para no.3 that the appellant is the permanent resident of the suit property. If the respondent has averred that the respondent is the owner of the suit property and the appellant has denied the the knowledge about the ownership of the suit property, then the court has to find out from the written statement, when it has been admitted by the appellant that the appellant is residing in the suit property as to what is the legal status of the appellant qua the suit property or what right the appellant has in the suit property? The appellant has stated in para no.1 of preliminary objection in the written statement that the plaintiff (respondent herein) and her mother-in-law Smt. Kamal Sharma have fraudulently got executed the alleged documents in respect of the suit

property by playing a fraud upon her. Ld. Trial Court has taken into consideration in its earnest perspective the fact that the respondent has not been able to show the legal right in the suit property and the appellant has no right in the suit property and any fraud, if, has been played between the respondent and the mother of the respondent, then the appellant has no locus standi to cry that a fraud has been played in transfer of the suit property from the mother of the respondent to the respondent.

8. It is held in the matter of Commissioner of Wealth Tax, Kanpur etc. Vs. Chander Sen reported as AIR 1986 SC 1753 and in the matter of Yudhister Vs. Ashok Kumar reported as AIR 1987 SC 558 that even if a male Hindu receives property from his paternal ancestors, unless there exists an HUG, the property which is inherited by a male Hindu from his paternal ancestors, will be individual property/self-acquired property in his hands, of course the inheritance should be after coming into existence of the Hindu Succession Act, 1956.

9. In the matter of Santokh Singh vs. Narender Singh reported as 2012(188) DLT 191, it is held as under:

“In view of the judgment of the Supreme Court in the cases of Chander Sen (supra) and Yudhister (Supra), it is no longer res integra that even if the appellant/plaintiff did receive funds from his father, the same were actually individual/ self-acquired in the hands of the appellant/plaintiff inasmuch as these funds were received in the year 1972-73 i.e. after passing of the Hindu Succession Act, 1956. There is absolutely no evidence on record that there ever existed any Hindu Undivided Family as is legally known between the parties, and, therefore, even if the appellant/plaintiff receives ancestral funds, since the same were received after passing of the Hindu Succession Act. 1956, the respondent/defendant can have no right, title and interest in the funds which the appellant/plaintiff received from his father, or the suit property purchased from such funds.”

10. I do not find any force in the contention of Id. Counsel for the appellant that the suit property was purchased from the sale of ancestral property or that money was contributed by appellant's husband Mr. Vinay Sharma. Ld. Trial Court has taken into consideration the fact that the appellant had filed the civil suit no. 481/11 for permanent injunction against the respondent and the mother-in-law wherein the appellant has

averred that the said suit property was purchased in the year 1989 by virtue of transferred documents in the name of the respondent's mother-in-law i.e. defendant no. 1. The document were transferred in the name of mother-in-law in good faith and social obligation. In para no. 6 of the plaint in suit no 481/11, the appellant has further averred that the plaintiff and her minor daughter stated living with consent of all her in-law and mother-in-law in the said property after the death of Sh. Vinay Sharma. It is also averred by the appellant in para no.19 of the plaint in suit no. 481/11 that 'the cause of action further arose when this fact came to knowledge of the plaintiff on 26.08.2011 when a legal notice was received on behalf of defendant no.2. As such the appellant, in my opinion, cannot take a contradictory stand in this case. What is stated in the plaint of the appellant in para no.11 which itself prove that the appellant herself admitted in that suit that she started living in the suit property with the consent of all her in-law and mother-in-law, which the Ld. Trial Court has rightly held that status of the appellant in the suit property was that of the licensee and the appellant had received the notice on 26.08.2011 sent by the respondent for the termination of her license.

11. The appellant is stopped from raising the plea regarding purchase of present property after the sale of the ancestral property as alleged in the WS in view of earlier averments in the plaint in suit no. 481/11. The defence taken in the WS now is nothing but an after thought and an improvement which cannot be accepted now in view of earlier pleas. Ld. Trial Court has taken into consideration in its right perspective the provisions of Benami Transaction (Prohibition) Act, 1988. I do not find any flaw therein". (underlining added)

5. A reading of the aforesaid paras show that between parties there was an earlier litigation being suit no. 481/2011. This was a suit for permanent injunction filed by the appellant-defendant. In this earlier suit, the appellant-defendant did not plead in the plaint any case of ancestral property and therefore the written statement in the present suit amounted to making a pleading for improvement in the pleading in the earlier suit. Also, the first

appellate court rightly notes that even assuming the plea of ancestral property being there, yet, there is a difference between an ancestral property and a HUF property, and the only exception to the bar under Section 4 of the Benami Transactions (Prohibition) Act, 1988 is by virtue of Section 4(3)(a) thereof whereby only if the property is an HUF property only then in such cases the bar contained in Section 4 of the Benami Act would not apply. Since in the present case, the plea of the appellant-defendant was only of the property being an ancestral property, and not HUF property, appellant-defendant was not entitled to the benefit of the exception contained in Section 4(3)(a) of the Benami Act. The legal position in this regard is now well settled by the judgments of the Supreme Court in the case of *Commissioner of Wealth Tax, Kanpur etc. Vs. Chander Sen reported as AIR 1986 SC 1753* and in the matter of *Yudhister Vs. Ashok Kumar reported as AIR 1987 SC 558 Commissioner of Wealth Tax* which hold that after passing of the Hindu Succession Act in 1956, if a male person inherits property in his hands from his paternal ancestors, the inherited property will be individual/self-acquired property and not a HUF property. HUF exists only if the property is inherited by a male Hindu prior to 1956 or if inherited after 1956, HUF is specifically created i.e mere inheritance of a property by

male Hindu after 1956 will not make the said inherited property to be an HUF property in his hands merely because of the factum of inheritance.

6. In the present case, once it is admitted that the documents of title of the suit property were in the name of the mother of the respondent-plaintiff (mother-in-law of the appellant-defendant), and the respondent-plaintiff had purchased rights in the property by means of the registered documents dated 26.12.2008, it would be the respondent-plaintiff who would be owner of the property, and it was the appellant-defendant who had to show that the property was an HUF property, but, appellant-plaintiff did not even plead a case of the suit property being an HUF property. Appellant-defendant only pleaded the property to be an ancestral property, but, ancestral property is not an HUF property in view of the judgments of the Supreme Court as stated above.

7. On a query, counsel for the appellant-defendant admits that though in the written statement of the appellant/defendant the year is not mentioned when the father-in-law of the appellant-defendant and the father of the respondent-plaintiff (i.e Sh. Ram Prakash Sharma) inherited the property from his paternal ancestors, but it is agreed before this Court that it was in 1983 that late Sh. Ram Prakash Sharma, father of the respondent-plaintiff

inherited the property from his paternal ancestors. Therefore, once inheritance is after 1956, then late Ram Prakash Sharma received the property in his hands as individual/self-acquired property and the property was not invested with the character of HUF property.

8. During the course of hearing I had put to counsel for the appellant that whether the appellant is interested in taking sufficient time to vacate the suit property, but counsel for the appellant after taking instructions states that the appellant is not ready and the appeal be decided on merits.

9. In view of the above, I do not find that both the courts below have at all erred in holding that the appellant-defendant cannot have any right to the suit property and that consequentially both the courts below have rightly decreed the suit for possession of the respondent-plaintiff.

10. No substantial question of law arises under Section 100 CPC and therefore the appeal is dismissed, leaving the parties to bear their own costs.

APRIL 04, 2014
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VALMIKI J. MEHTA, J.