

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

+ C.R.P No. 113/2014

%

28th August, 2014

SMT. RAJ RANI JAIN

.....Petitioner

Through: Mr. Randhir Jain and Mr. Dhananjay
Jain, Advocates.

VERSUS

SH. RAVEESH CHAND JAIN

..... Respondent

Through: Mr. Yashwant Jain, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order of the trial court dated 7.6.2013 which has dismissed the application filed by the petitioner/plaintiff under Order XII Rule 6 CPC. The application under Order XII Rule 6 CPC was filed in a suit for recovery of possession and damages with respect to a portion of the property bearing no. 119, Bahubali Enclave, Delhi and which portion is in unauthorized occupation of the respondent/defendant and is shown in red colour in the site plan filed.

2. The case of the petitioner/plaintiff is that she is the mother of the respondent/defendant and she is the owner of the entire suit property. Respondent /defendant has unauthorisedly occupied the rear portion of the property of the ground floor comprising of two rooms, toilet, bathroom and kitchen as shown in red colour in the site plan. Petitioner/plaintiff/mother states that the issue with respect to the ownership of the petitioner/plaintiff of the suit property and that defendant has no ownership rights in the suit property was decided against the respondent/defendant by the judgment and decree of the trial court/ADJ Delhi dated 8.9.2003 and the appeal filed by the respondent/defendant in this Court being RFA No.873/2003 was dismissed vide judgment dated 12.9.2011. Consequently, the respondent/defendant is stated to be in illegal possession of the suit property. By averring finality with respect to the defences which are pleaded by the respondent/defendant as per the written statement, in view of the judgment dated 12.9.2011 in RFA No.873/2003, the subject application under Order 12 Rule 6 CPC was filed.

3. Trial court has dismissed the application by stating that there are no unequivocal admissions for decreeing of the suit. The relevant

observations of the trial court in this regard are contained in paras 10 to 16 of the impugned judgment and which read as under:-

“10. Perusal of the record shows that the plaintiff has filed the suit for the recovery of Rs.5,55,000/- and future damages @Rs.15,000/- per month against the defendant and the ld. counsel for the plaintiff has submitted that the plaintiff has pleaded in the plaint that she is the absolute owner of the suit property and their lordship of Delhi High Court while dismissing the appeal filed by the defendant in RFA No.873/2003 negated the plea of the defendant of Hindu undivided family property and defendant has not disputed the ownership of the plaintiff in his Written statement and in view of finality of the findings of Delhi High Court in RFA no.873/2003, the suit of the plaintiff for recovery of possession and recovery of damages is liable to be decreed, as the defendant is a trespasser who is unauthorizedly living in the suit property.

11. But, from the perusal of the record it is clear that the defendant has denied that absolute ownership of the plaintiff in his Written statement and he has stated that he is in possession of the suit property since the year 1987 and also stated that a compromise was entered into between him and his deceased father and his other brothers on 22.10.1997 in the PS Anand Vihar.

12. **“It is also settled principle of law for passing a judgment on admission u/o 12 rule 6 of CPC an unequivocal admission by the defendant is required to be made”** and in the case in hand no doubt that the defendant herein had filed a civil suit for partition and the said civil suit has already been dismissed by the court of Sh. Sunil Gaur, then the Ld. ADJ, Delhi vide his judgment dated 08.09.03 and the defendant herein had preferred an appeal which was registered vide RFA No.873/2003 and no doubt that the said RFA filed by the defendant herein has already been dismissed by their lordship of Delhi High Court and the plea of the defendant that the suit property is a Hindu undivided family property has already been negated. But, as the nature of the said suit, wherein such findings have been given by the court of then ADJ and confirmed by the Hon'ble High Court, was of partition in

nature, whereas, the nature of the present suit is for recovery of possession and recovery of mense profit and damages. It is not matter of doubt that since the plea of the Hindu undivided family property has already been negatived upto the Hon'ble High Court, so, this plea of the defendant that suit property is Hindu undivided family property is no more sustainable in the eyes of law, as such findings have already been achieved finality, but, it does not mean that the right of the defendant to protect his possession in the suit property can be ignored at this stage, in view of dismissal of his suit for partition, as the defendant has taken the plea that he is in possession of the suit property since the year 1987.

13. *It is settled principle of law that the pleadings cannot be dissected, but to be read, as whole, as held by their Lordship of Hon'ble High Court of Bombay in case **Western Coalfield Ltd V/s M/s Swati Industries AIR 2003 Bombay 369.***

14. *As their lordship of Delhi High Court in case **R.K.Markan V/s Rajiv Kumar Markan & Anr. 97(2002) Delhi Law Times 754,** is pleased to hold that “for passing a decree on the basis of admission of the defendants in the pleadings, law is well settled that the admission has to be unequivocal and unqualified and the admission in the written statement should also be taken as a whole and not in part.”*

15. *Their Lordship of Delhi High Court in case **State Bank of India v/s M/s Midland Industries and others** is pleased to hold that “***the admission must be unequivocal, for passing judgment***”. Whereas, their Lordship of Hon'ble Supreme Court in case **Jeevan Diesel and Electricals Ltd v/s Jasbir Singh Chdhar (2010) 6 SCC 601,** is also pleased to hold that “admission must be unequivocal for passing judgment”.*

16. Coming to the case in hand, the plaintiff has filed the present suit for possession of the suit property and for recovery of Rs.5,55,000/- and future damages @ Rs.15,000/- per month against the defendant, and the defendant has disputed the absolute ownership of the plaintiff and from the perusal of the Written statement, it is clear that the defendant has nowhere admitted that he is liable to pay any damages or mesne profits to the plaintiff

and since this is a settled principle of law that for passing a decree on the basis of admission u/o 12 rule 6 of CPC an unequivocal and unqualified, admission is required to be made by the defendant, which is lacking in the case in hand and in the absence of any unqualified and unequivocal admission by the defendant, the judgment on admission u/o 12 rule 6 CPC cannot be passed.”

4. I am indeed surprised at the reasoning and conclusions which are given by the trial court which does complete injustice to the application filed by the petitioner/plaintiff. For some unaccepted reasons, the trial court has avoided to refer to the aspect of binding nature of the earlier judgment between the parties dated 12.9.2011 passed in RFA No. 873/2003. The judgment dated 12.9.2011 operates as *res judicata* between the parties. All aspects therefore which are sought to be urged by the respondent/defendant by means of the written statement in the present suit either stand decided against the respondent/defendant in terms of the judgment dated 12.9.2011 or the respondent/defendant is prevented by the principle of constructive *res judicata* in arguing his claim of ownership in the suit property. At this stage, it is necessary to refer to the relevant paragraphs being 2 to 8 of the judgment of this Court dated 12.9.2011 in RFA No.873/2003 which holds that respondent/defendant has no ownership rights in the suit property, and which paras read as under:-

“2. A reading of the pleadings of the appellant/plaintiff shows that the appellant/plaintiff pleaded existence of an HUF. The

appellant/plaintiff thereafter further pleaded that the respondent no1/defendant no.2/mother in whose name the property was, was not the real owner of the property because she was only a housewife and funds for the purchase and the construction on the same were provided for by the grandfather and also by the appellant/plaintiff. The defendants/respondents contested the suit and denied the existence of HUF and also as to the property being a joint family property. It was denied that the plaintiff had any share in the property which belonged to the respondent No.1 and it was prayed that the suit for partition be dismissed.

2A. The Trial Court, after the pleadings were complete, framed the following issues:-

“1. Was the property to suit purchased/acquired out of Hindu Undivided Family Funds?

2. If issue no.1 is proved, does plaintiff have a share in its? If so, how much?

3. Relief.”

3. Before proceeding to analyze the evidence which has been led before the Trial Court, as also the findings/conclusions of the Trial Court, it is necessary to understand and appreciate as to how a Hindu undivided family comes into existence before the enactment of the Hindu Succession Act, 1956 or thereafter. A Hindu undivided family before 1956 came into existence if a male member inherited a property from any of his three paternal ancestors. An HUF could also be created when no HUF was in existence if a self-acquired property was thrown in a common hotchpotch. After 1956, merely because a person inherited a property from any of his three paternal ancestors would not automatically mean that an HUF comes into existence. This is clear from two judgments of the Supreme Court being *Commissioner of Wealth Tax vs. Chander Sen Etc. AIR 1986 SC 1753* and *Yudhishter vs. Ashok Kumar AIR 1987 SC 558*. After enactment of the Hindu Succession Act, 1956, an HUF can ordinarily come into existence for the first time only if an individual throws his self-acquired property into common hotchpotch by a declaration and thereafter the property is treated as a property of the Hindu undivided family. Persons being joint in mess would not automatically mean that there is an existence of an HUF property i.e. even if there is an existence of an HUF, there is no automatic presumption that HUF also owned properties. Keeping this position of the law in mind, let us turn to the facts of the present case.

4. I put it to counsel for the appellant during the course of the arguments as to whether even a single document was filed in the Trial

Court so as to prove the existence of an HUF, and, it is admitted that there is absolutely no documentary evidence showing existence of an HUF. Neither has the property as per the title deeds shown to have been purchased by the HUF nor has the property been shown in the property tax records/municipal records as an HUF property and nor have any income tax returns been filed showing the property to be an HUF property. Further, it has also not been proved by any form of documentary evidence that grandfather owned any ancestral property and by selling of which ancestral property, the funds were provided for the purchase of the plot and the construction of the property. Therefore, there is only oral self-serving statement of the appellant/plaintiff with regard to existence of HUF which cannot amount to discharge of onus when the defendants denied the same in their evidence. Further, a property can be an HUF property if the property stands in the name of any one male co-parcener. A female member is not a co-parcener and existence of a property in the name of a female member of the family would not mean that the said property would be an HUF property, assuming an HUF is in existence. There is also no documentary evidence of the property having been thrown into common hotchpotch by the respondent no.2/mother and therefore creation of an HUF by this form is also ruled out, and for which purpose we are assuming that a female can create an HUF by throwing her property into common hotchpotch, though in law the same is not possible.

5. Further, it is worth noting that the case of the appellant/plaintiff was in a way mutually destructive because on the one hand it was claimed that the property was of the HUF and on the other hand it was claimed that the appellant/plaintiff was the co-owner because he had paid monies towards purchase of the plot and for construction thereon. Surely, if ownership is claimed in the property because of payment of monies for the purpose of purchase of plot and construction thereon, the same would only mean a claim of co-ownership of the property by payment of consideration and not because there is an HUF. In fact, even this aspect of payment of consideration and co-ownership and at best assuming the same to be an HUF, have not been proved because there is no payment by crossed cheque to the respondent no.1/mother by the appellant/plaintiff and also there are no receipts showing any payment made to the respondent No.1/mother of amounts in cash. What was relied upon by the appellant in the Trial Court was a copy of his bank account showing repeated withdrawals totaling to a sum of about Rs.1,00,000/- and which was claimed to have been paid and entries therein were alleged to be reflective thereof amounts paid to the respondent No.1/mother. Firstly, the statement of account was not proved and exhibited on record and the same is only marked and hence cannot be looked at. Also, withdrawals by a person from his account

cannot automatically mean that the said amounts were also paid further to the respondent no.1/mother. After all the withdrawals would/could have been used by the appellant for himself also. Therefore, there is absolutely no proof whatsoever of any payment being made by the appellant/plaintiff to the respondent no.1/defendant no.2/mother.

6. Even on the aspect of payments by the grandfather for purchase of the plot and for construction of the property again there is not a single documentary evidence on record except the self-serving statement of the appellant/plaintiff. Even if we assume that the grandfather made certain payments towards purchase of the plot and construction thereon, yet, that would at best mean some gifts of payments by the grandfather to the respondent no.1/mother, and which in any case I have already stated above has not been established at all.

7. Therefore for all the aforesaid reasons of there not existing a single sheaf of paper to show the existence of HUF whether in public records or private records, any proof especially of any payments of money by the grandfather to the respondent no.1/mother and further also no proof whatsoever of any payments made by the appellant/plaintiff to the respondent no.1/mother, the Trial Court has rightly held that it cannot be said that the property was an HUF property or that the appellant/plaintiff had any share in the same. Some of the relevant observations and findings of the Trial Court are contained in paras 12 to 14 of the impugned judgment and which read as under:-

“12. The fate of this case primarily hinges on the evidence of the plaintiff and of defendant no.2(DW-2). After having carefully gone through the evidence of defendant no.2, I find that she has categorically stated in her evidence that she and her husband alone had constructed the suit property. It has come in her evidence that her husband (Defendant NO.1) took loan of Rs.60,000/- fro his provident fund account for construction of the suit property and she had also taken loan from Punjab national Bank by pledging jewellery of defendant no.2. Apart from this, it is evident from the evidence of defendant no.2 that she possessed sufficient assets in the shape of immovable property in the name and she had sold some of her properties of which details are given by her in her evidence. In judgment reported in 2002 (2) Recent civil Reports 749, the Division Bench of Hon’ble High Court has held that there is no presumption that joint family possesses joint property only and merely because family is joint, it cannot be said that the property held by its members is joint family property and the burden is on the person who asserts so. NO judgment to the contrary has been cited before me nor plaintiff has been able to

distinguish the above-cited judgment. In view of the above-referred legal position, I proceed to examine the evidence of the plaintiff referred to above.

13. After having analysed the evidence of the plaintiff in detail, I find that except his bald statement, there is no concrete evidence in respect of joint family nucleus of the suit property. Plaintiff has failed to prove on record the contributions alleged to have been made by his grand father in the purchase or construction of the suit property. Plaintiff claims to have himself contributed in the construction of the suit property and relies upon statement of his bank account mark A which is not duly proved on record. Otherwise, also statement of bank account mark A of the plaintiff is of no avail to the case of the plaintiff because plaintiff has not stated in his evidence as to on which dates he had withdrawn particular amount from his bank account for construction of the suit property. In fact plaintiff has admitted in his cross-examination that he had never made any payment by cheque to his father towards construction of the suit property. Plaintiff has also admitted in his cross-examination that properties at East Moti Bagh, Sarai Rohilla are in the name of defendant no.2 and one plot at Bhola Nah Nagar are in the joint name of defendant no.2 and Anuj Jain. Plaintiff has not got examined aforesaid Anuj Jain to prove that above-said properties were purchased in the name of defendant no.2 by his grand father. On the other hand, there is categoric evidence of defendant no.2 that the sale proceeds of Loni land (which was in her name) were utilized for purchase of the suit property. Not only this, defendant no.2 has stated in her evidence that house in East Moti Bagh, Sarai Rohilla (which was in her name) was sold by her for Rs.1,25,000/- and the sale proceeds were utilized in the construction of the suit property. Aforesaid evidence of defendant no.2 remains unchallenged in her cross-examination.

14. In view of what is observed above, I hold that the plaintiff has failed to prove that the suit property was purchased out of Hindu Undivided Family Funds. This issue is accordingly decided against the plaintiff.” (underlining added)

8. Learned counsel for the appellant sought to argue that the respondent no.1/defendant no.2/mother was only a housewife and therefore having no funds, it should be held that the property was an HUF property or that the appellant/plaintiff was in any case a co-owner by virtue of having made payments. Firstly, I may note that no payments at all have been proved to have been made which are stated to have been

made by the appellant/plaintiff to the respondent No.1/mother and in my opinion argument of learned counsel for the appellant that it was for the respondent no.1/mother to prove that the property was not an HUF property is misconceived. Admittedly, the title deeds of the property were in the name of the respondent No.1/mother and it was also accordingly acted upon in the public records and the onus of proof therefore that the property was not of the mother/respondent no.1 but was an HUF property or co-owned property was on the appellant/plaintiff and not otherwise as is sought to be argued on behalf of the appellant. The appellant, as already discussed above, has miserably failed to discharge the onus of proof of there existing an HUF or of his having made the payments to the mother/respondent no.1 or of the grandfather having made payments to the respondent no.1/mother."

(underlining added)

5. A reading of the aforesaid paras shows that almost all the defences in the present suit either of the petitioner/plaintiff/mother not having funds to purchase the property or the respondent/defendant having contributed to purchase the property and construct the property or there existing an HUF either because of the funds provided by the grandfather or other aspects, have squarely been decided against the respondent/defendant in the judgment dated 12.9.2011 in RFA No.873/2003. Consequently, all defences urged in the present suit as per the written statement filed stand decided against the respondent/defendant and the respondent/defendant is barred by the principle of *res judicata* from urging these aspects again.

6. The only new aspect which is urged in the present written statement is that the respondent/defendant claimed that he received ownership share in the suit property by virtue of a written compromise

entered into before the police station Anand Vihar on 22.10.1997, however, it is noted that the earlier suit, which was a suit for partition filed by the respondent/defendant, the issue as regards the claim of the respondent/defendant to the ownership rights in the suit property was very much in issue, and hence the respondent/defendant had to urge in the earlier proceedings all the basis of his claims of ownership rights in the suit property, and if that was not done, the respondent/defendant is now barred by the principle of constructive *res judicata* from raising any claims which ought to have been urged in the earlier proceedings. The principle with respect to doctrine of *res judicata* is that there must be finality achieved to litigation and parties must not be harassed over and over again merely by changing certain facts with respect to the main relief claimed viz of ownership rights in the suit property.

7. In view of the above, the impugned order dated 7.6.2013 is completely illegal and the issues in the present case stand covered against the respondent/defendant by the principle of *res judicata* enshrined in Section 11 CPC. So far as the relief of possession is concerned, suit of the plaintiff/petitioner/mother will hence stand decreed against the respondent/defendant for the portion shown in possession of the

respondent/defendant as per the site plan filed. Since the respondent/defendant/son is harassing the mother from 1998 and today we are in the year 2014, this appeal is allowed with actual costs. Petitioner/plaintiff will file an affidavit in this Court supported by the certificate of fees of her counsels in this appeal with respect to the fees paid to the counsels, and such fees paid will be the cost which will be payable by the respondent/defendant to the petitioner/plaintiff. The aforesaid affidavit accompanied by the certificate of the fees of the counsels be filed by the petitioner within a period of four weeks and costs be paid thereafter within a period of four weeks.

AUGUST 28, 2014
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VALMIKI J. MEHTA, J.