

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

+ **RFA No.20/2018 and C.M. No.14458/2018 (under
Order XLI Rule 27 CPC)**

% **13th April, 2018**

JAI PRAKASH Appellant

Through: Mr. S.C. Singhal, Advocate.

versus

ANOOP SINGHAL Respondent

Through: Mr. Sunil Satyarthi, Advocate
with Mr. Raman Gandhi,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the judgment of the Trial Court dated 30.10.2017 by which trial court has dismissed the suit filed by the appellant/plaintiff seeking recovery of possession and *mesne* profits with respect to the suit property being half portion of shop on the ground floor, one room with bathroom and kitchen on the first floor and one room kitchen,

bathroom on the second floor as shown in red colour in the site plan filed with the plaint which has been exhibited as Ex.PW1/1. The appellant/plaintiff is the father of the respondent/defendant.

2. The facts of the case as pleaded by the appellant/plaintiff are that the suit property was originally owned by his father Sh. Badri Prasad who died intestate. At this stage, I would like to note that it is agreed by both the parties before this Court that the father of the appellant/plaintiff Sh. Badri Prasad died intestate in the year 1984. The case of the appellant/plaintiff was that legal heirs of Sh. Badri Prasad i.e he and the other children of Sh. Badri Prasad have orally partitioned the entire property, of which suit property forms a part, whereby the suit property fell to the share of the appellant/plaintiff. It was pleaded that on 11.5.2012 the appellant/plaintiff came to know that respondent/defendant has stolen his passbook, cheque book and documents pertaining to his property bearing no. RZ 16D, Indra Park, Gali No.5, Palam Colony, New Delhi and when the appellant/plaintiff demanded these documents from the respondent/defendant the respondent/defendant thrashed the appellant/plaintiff and his wife out of the house and since when they are residing with another son of the

appellant/plaintiff at Mohan Garden. By a legal notice dated 3.7.2012, the appellant/plaintiff pleaded to have terminated the licence of the respondent/defendant to which reply was given by the respondent/defendant on 10.7.2012, and thereafter the subject suit for possession and *mesne* profits was filed.

3. The respondent/defendant contested the suit. In his written statement the respondent/defendant pleaded that it was not in his knowledge that the legal heirs of Sh. Badri Prasad mutually divided the entire property among themselves orally. It was however admitted that the suit property fell to the share of the appellant/plaintiff on partition. It was however pleaded that the respondent/defendant had left his job on 15.5.2012 at the request of the appellant/plaintiff and thereafter he has been running the shop. It was denied that the respondent/defendant had stolen any pass book or cheque book with respect to Palam Colony property. At this stage, this Court would like to note that in the written statement filed by the respondent/defendant there is no plea of existence of a Joint Hindu Family/Hindu Undivided Family which owned the suit property i.e there is no pleading by the respondent/defendant that there was an

HUF consisting of the respondent/defendant and the appellant/plaintiff and which is being stated because respondent/defendant has led evidence and urged before the trial court as also this Court that the suit property is a Joint Hindu Family property/HUF property. It is also required to be noted that respondent/defendant claimed in his evidence that he has spent moneys on the suit property and hence was an owner but once again in the written statement there is no such pleading of the respondent/defendant having rights in the suit property on account of respondent/defendant making payments for construction on the suit property.

4. After pleadings were complete, the trial court framed the following issues:-

- “i) Whether the plaintiff is entitled to a decree of possession as claimed? ... OPP
- ii) Whether the plaintiff is entitled to a decree of damages as mesne profit @ Rs.6000/- from the period 11.7.2012 till the date of filing of suit? ... OPP
- iii) Whether the plaintiff is entitled to a decree of mesne profit @ Rs.100/- per day from the date of filing of the suit till the amount recovered? ... OPP
- iv) Whether the plaintiff is entitled for mandatory injunction as claimed? ... OPP
- v) Relief."

5. Parties led evidence and these aspects are recorded in paras 6 to 8 of the impugned judgment and these paras read as under:-

“6. In order to support of his case petitioner examined himself as PW1 and lead his evidence by way of affidavit Ex.PW1/A and relied upon the documents:-site plan Ex.PW1/1, notice dated 03.07.2012, postal and courier receipts are Ex.PW1/3 and Ex.PW1/4 respectively, AD card Ex.PW1/5 and reply to the notice Ex.PW1/6. This witness was cross examined at length. However, the same shall be considered at the time of appreciation of evidence.

7. The defendant has examined two witnesses in support of his case. The defendant himself appeared in witness box as DW-1 and lead his evidence by way of affidavit Ex.DW1/A. D1. He has deposed on the similar lines to that of his written statement.

8. Smt. Pragya Tiwari, Draftsman Gr II appeared in the witness box as DW-2. She deposed that as per the official record the property bearing Survey no.49/60, Sadar Bazar Delhi Cantt is lease hold property and the said lease deed expired on 28.3.2006. She proved the record as Ex.DW2/1.”

6. Trial court has dismissed the suit for possession by relying upon the cross-examination of the appellant/plaintiff that the admitted case of the appellant/plaintiff was that the suit property was not equally divided among all the legal heirs of late Sh. Badri Prasad i.e the appellant/plaintiff has got a larger share and not equal share. Effectively the trial court has given a finding that there is no partition between the legal heirs of late Sh. Badri Prasad (with one such legal heir being the appellant/plaintiff) because of unequal partition. Trial court has also held that there are no details proved as to when the oral partition took place and the appellant/plaintiff did not examine any of his brothers or sisters to substantiate the plea of oral partition. Trial court has also held that appellant/plaintiff in his cross-examination

dated 29.8.2013 admitted that the suit property is an ancestral property in which the respondent/defendant has a share and therefore the suit accordingly had to be dismissed i.e effectively the trial court held that the respondent/defendant had ownership rights in the suit property as the suit property was ancestral property i.e impliedly it is held that it is an HUF property.

7. In my opinion the judgment of the trial court is completely illegal and has to be set aside. The reasons are contained hereinafter.

8. Firstly, trial court could not have held that there is no oral partition between the legal heirs of late Sh. Badri Prasad merely because property was not equally divided inasmuch as the only persons who had locus to question the validity of oral partition were the other legal heirs of late Sh. Badri Prasad, being the brothers and sisters of the appellant/plaintiff, but admittedly there is nothing on record and no evidence has been led by the respondent/defendant that the other legal heirs of late Sh. Badri Prasad are objecting to the partition. Also in any case even assuming for the sake of argument that there is no partition between the legal heirs of late Sh. Badri

Prasad, however the appellant/plaintiff is the co-owner of the suit property as the same has been inherited by him from his father Sh. Badri Prasad along with other children of Sh. Badri Prasad. Once the appellant/plaintiff had title to the property the respondent/defendant could stay in possession of the suit property only on proving existence of his title, and no such title has been pleaded or proved by the respondent/defendant as is discussed below.

9. The contention of the counsel for the respondent/defendant that there existed an HUF/Joint Hindu Family and this is admitted in the cross-examination of the appellant/plaintiff on 29.8.2013, and therefore the suit was rightly dismissed, is a misconceived argument inasmuch as there is no estoppel against the law. After passing of the Hindu Succession Act, 1956 when a person inherits property from his parental ancestors, mere inheritance of ancestral property after the year 1956 does not make the property HUF/Joint Hindu Family property. This is the settled law of land in view of the ratio of the judgments of the Supreme Court in the cases of *Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others*, (1986) 3 SCC 567 and *Yudhishter Vs. Ashok Kumar*,

(1987) 1 SCC 204. Therefore in my opinion an admission made by the appellant/plaintiff of the suit property being an ancestral property and respondent/defendant having a share, being against the law, and since there is no estoppel in law, the respondent/defendant cannot claim ownership rights in the suit property on the ground that respondent/defendant is also one of the owners of the suit property. In any case, I may note that no amount of evidence can be looked into on the plea which is not put forth and as already stated above there is no plea raised by the respondent/defendant in the written statement that the suit property was an HUF property and since there was no plea therefore no issue has thus been framed as regards the respondent/defendant having ownership rights in the suit property on the ground that suit property is an HUF property.

10. Another contention urged on behalf of the respondent/defendant was that respondent/defendant had spent moneys for construction on the suit property, but once again, and as already stated above, no such plea was raised in the written statement and no such issue got framed and therefore any evidence in this regard of claim of ownership by the respondent/defendant of the suit property

on account of having spent moneys cannot be looked into. In any case even if assuming there was a plea raised by the respondent/defendant and issue had been framed, no credible evidence has been led by the respondent/defendant except a self-serving statement in deposition, and therefore, it cannot be held that respondent/defendant had become a co-owner of the suit property with the appellant/plaintiff. Also the plea of the respondent/defendant is liable to be rejected because ownership in an immovable property can be transferred to the respondent/defendant only by means of a registered instrument as is the mandate of Section 17(1)(b) of the Registration Act, 1908 and for this reason also the contention of the respondent/defendant is negated of his becoming an co-owner on account of having spent moneys for construction on the suit property.

11. It is therefore held that trial court has seriously erred and arrived at complete illegal findings of the respondent/defendant having ownership rights in the suit property, and that suit for possession accordingly could not be decreed, with the fact that trial court has also wrongly held that there was no oral partition between the legal heirs of late Sh. Badri Prasad, and detailed reasons have already been stated

above. It is therefore held that the appellant/plaintiff is the owner of the suit property.

12. The appellant/plaintiff has duly deposed with respect to the suit property earning rent of Rs.6,000/- per month, and with respect to which neither there is cross-examination of the appellant/plaintiff by the respondent/defendant, and nor has the respondent/defendant has uttered even a single line in his examination-in-chief or cross-examination with respect to if rate of rent was not Rs.6,000/- per month then what was the rate of rent. This Court therefore has to accept the plea of the appellant/plaintiff of rent of suit property being Rs.6,000/-per month.

13. There is no merit in the application filed by the respondent/defendant for additional evidence being C.M. No.14458/2018 because respondent/defendant wants to lead evidence, and as argued before this Court, to prove existence of an HUF and evidence cannot be allowed on a plea on which there is no pleading in the written statement of the respondent/defendant and no such issue was got framed. Also the respondent/defendant cannot succeed in proving a case of HUF in view of the judgments of the Supreme Court

in the cases of *Chander Sen and Others (supra)* and *Yudhishter (supra)*.

This application is accordingly dismissed.

14. In view of the aforesaid discussion, this appeal is allowed. Suit of the appellant/plaintiff is decreed for possession with respect to the suit property being half portion of shop on the ground floor, one room with bathroom and kitchen on first floor and one room kitchen, bathroom on the second floor as shown in red colour in the site plan Ex.PW1/1. A money decree is passed in favour of the appellant/plaintiff and against the respondent/defendant, *pendente lite* and future, at the rate of Rs.6,000/- per month, and till respondent/defendant hands over possession of the suit property to the appellant/plaintiff. Appellant/plaintiff is also held entitled to interest on the *mesne* profits decreed at 8% per annum simple from the end of the month from which *mesne* profits become payable to the appellant/plaintiff by the respondent/defendant. Appellant/plaintiff is also entitled to costs of the suit as also costs of the appeal. Money decree will be drawn up in favour of the appellant/plaintiff on the appellant/plaintiff depositing the necessary court fee.

15. Appeal is accordingly allowed and disposed of in terms of aforesaid observations.

APRIL 13, 2018
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VALMIKI J. MEHTA, J

