

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

Judgment Reserved on: August 13, 2015

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Judgment Delivered on: August 28, 2015

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RFA(OS) 24/2013

PREMWATI REPRESENTED BY: LRS. Appellant

Represented by: Mr.Abhindra Maheshwari,
Advocate.

versus

BHAGWATI DEVI REPRESENTED BY: LRS Respondent

Represented by: Mr.Akshat Gupta, Advocate for
LRs of R-3 and for R-7 to 13.
Mr.Kirit Javali, Advocate for
R-4.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

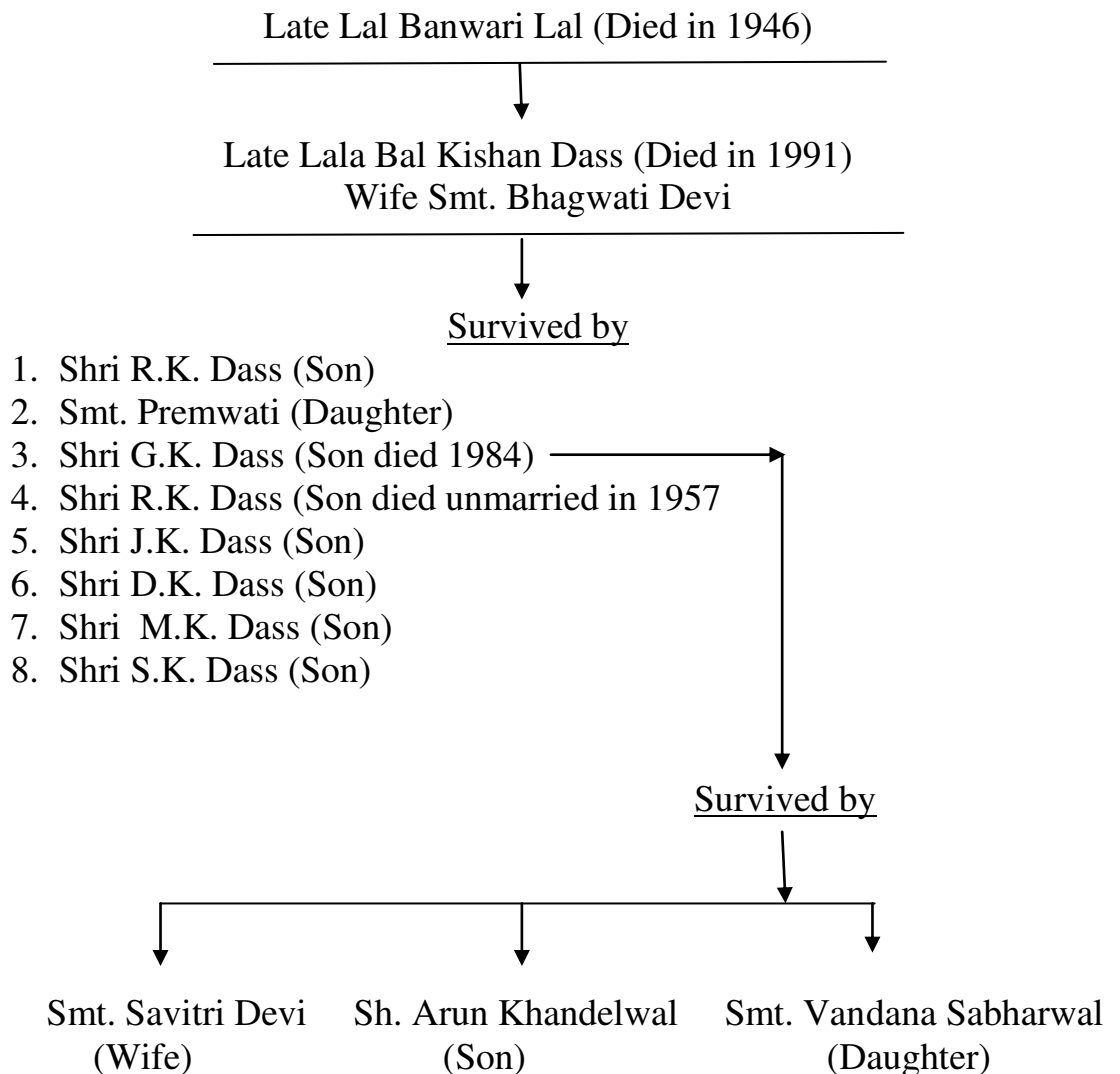
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Banwari Lal, common ancestor of the plaintiff and defendant Nos.1 to 6 constituted proprietorship concern under the name and style of M/s Bhana Mal Gulzari Mal, Chawri Bazar. Later Banwari Lal with his son Bal Kishan Das incorporated six private limited companies registered under the Companies Act, 1956 which took over the entire capital, assets and liabilities of M/s Bhana Mal Gulzari Mal, the sole proprietorship concern. The plaintiffs in the suit are Smt.Premwati, daughter of Bal Kishan Das and legal heirs of his son Gopal Kishan Das who died in 1984. The defendant No.1 is the wife and defendant Nos.2 to 6 the other legal heirs of Bal Kishan Das. The six companies incorporated by Banwari Lal and his son Bal Kishan Dass from the capital and assets of M/s Bhana Mal Gulzari Mal have been impleaded as defendant Nos.7 to 12 in the suit. It is the case of the plaintiffs

that defendant Nos.2 to 6 were controlling defendant Nos.7 to 12. The pedigree chart of Banwari Lal is as under:

FAMILY PEDIGREE OF PLAINTIFFS AND DEFENDANTS NO.1 TO 6



2. A suit for partition and rendition of accounts was filed by the plaintiffs being CS(OS) No.305 of 1996 on the premise that in the six companies, that is, defendant Nos.7 to 12 the capital assets and profit of the sole proprietorship concern of Banwari Lal, the legal ascendant of the

plaintiffs and the defendants, were utilised and the defendant Nos.1 to 6 were inter alia not filing the income tax return and wealth tax return or calling for annual general meeting of the companies, misappropriating all the funds, not paying ECI, wealth tax and had entered into agreements with builders for various properties and misusing the properties of the companies for their personal gains. Details of properties in the name of six companies being misused were also given. Further partition of various immovable properties was also sought.

3. In the written statement filed by defendant Nos.2 and 10 maintainability of the suit was questioned as defendant Nos.7 to 12 were private limited companies whose shares were owned by shareholders and were thus distinct legal entities and any relief against the companies could be granted only under the Companies Act, 1956. Subsequently, a written statement was also filed on behalf of defendant Nos.1, 3 and 6 wherein again maintainability of the suit was challenged and it was stated that defendant Nos.1 to 6 were all shareholders, Directors of the companies, that is, defendant Nos.7 to 12 and besides the shareholders no other person had the right to file the suit.

4. During the course of proceedings the plaintiff No.1, defendant No.1 and some of the other defendants passed away and thus the proceedings for substitution of legal heirs continued. On November 14, 2002 the learned Single Judge settled the following issue as preliminary issue and noted that if this issue is decided against the plaintiff and in favour of the defendants, nothing would survive in the suit:

“Whether the suit as framed is not maintainable in view of the provisions of Section 397 to 407 of the Companies Act? (OPD).”

5. This preliminary issue was decided vide order dated September 24,

2007 and it was held that the suit was maintainable. Parties were given time to file original/certified copies of the documents and the matter was listed for admission/denial whereafter settlement of issues was directed to take place. Vide order dated February 18, 2008 the following issues were settled in the suit:

- “1. Whether the plaintiff is entitled to 1/6th share in the properties mentioned in schedule to the plaint as claimed in the suit? OPP.*
- 2. Whether the properties mentioned in schedule of the plaint are the properties acquired from funds, money, estate and nucleus of M/s.Bhana Mal Gulzari Mal, a sole proprietorship concern of common ancestor Sh.Banwari Lal? OPP.*
- 3. Whether any partial partition had taken place in 1947 or complete partition was effected in 1959 as alleged by defendant nos.1, 3 and 6 in the written statement? OPD.*
- 4. Whether defendant nos.1 to 6 are liable to render true and correct accounts of the income from business and various properties as mentioned in schedules attached to the plaint? OPP.*
- 5. Whether the plaintiffs are entitled to seek partition of the properties mentioned in the schedules? OPP.*
- 6. Whether there was any privity of contract between plaintiff nos.1, 2 and 4 qua the defendant nos.7 to 12 and its effect? OPP.*
- 7. Whether the suit is liable to be dismissed for want of proper and appropriate Court fee? OPD.*
- 8. Whether the suit is liable to be dismissed on the ground that it is not properly verified as per rules? OPD.*
- 9. Relief.”*

6. Issue No.1 was subsequently corrected on September 11, 2009 and reads as under:

“Whether the plaintiff no.1 is entitled to 1/8th share and plaintiffs No.2, 3 and each to 1/3rd share out of 1/8th share in the properties mentioned in Schedule to plaint as claimed in the suit? OPP”

7. Evidence by way of affidavit was filed however, before the parties could tender their evidence and be cross-examined, the learned Single Judge vide the impugned judgment dated August 29, 2012 dismissed the suit for partition and rendition of accounts on the grounds that it fails to disclose any cause of action and is hit by ratio of judgments of the Supreme Court in the cases reported as AIR 1986 SC 1753 Commissioner of Wealth Tax, Kanpur etc.vs.Chander Sen, and AIR 1987 SC 558 Yudhishter vs.Ashok Kumar, as also the provisions of Section 4 of Benami Act.

8. Challenging the impugned judgment dated August 29, 2012 dismissing the suit, learned counsel for the plaintiffs/appellants contends that the learned Single Judge failed to notice that the preliminary issue on maintainability of suit had already been decided by the learned Single Judge vide order dated September 24, 2007 and thus the Court could not have interjected the proceedings when only evidence by way of affidavits had been filed and the parties had not entered the witness box, rendering the impugned judgment exercising power under Order XII Rule 6 CPC. The assets from which the defendant Nos.7 to 12 companies were incorporated were owned by the HUF of which late Bal Kishan Das was the Karta and the plaintiffs/defendants were entitled to the share in HUF properties being descendents of late Bal Kishan Das. Thus the corporate veil of the respondent/defendant Nos.7 to 12 was required to be lifted. Further the

various movable and immovable properties bought by the defendants were from the capital and assets of M/s Bhana Mal Gulzari Mal. The defendants have admitted that M/s Bhana Mal Gulzari Mal and Sons was a joint Hindu family concern. The decision in Commissioner of Wealth Tax, Kanpur etc.vs.Chander Sen and Yudhishter (supra) have been misconstrued by the learned Single Judge.

9. At this stage it would be appropriate to note the findings of the learned Single Judge dated September 24, 2007 deciding the issue of maintainability of the suit in terms of the provisions of Section 397 to 407 of the Companies Act, 1956 settled on November 14, 2002. There is no dispute that this order has attained finality and is thus binding on the parties. Vide the said order the Court observed that admittedly the plaintiffs do not have necessary voting strength to proceed under any of the provisions of the Companies Act because they are not even the shareholders. It was held that the relief was not barred under Sections 397 to 407 of the Companies Act and hence the suit was required to be proceeded. It was held:

“What emerges in the facts and circumstances is that a dispute as regard right of inheritance between the parties is imminently a civil dispute and cannot be said to be a dispute as regards oppression of minority shareholders by the majority shareholders and/or mismanagement. Plaintiffs are not even the shareholders. They are seeking partition of properties which are the companies and their rendition of accounts which will involve determination whether those properties are the properties acquired from the common properties of common ancestor or of defendant Nos.1 to 6 which cannot be adjudicated by a Company Court under the provisions of the Companies Act, 1956. Whether the Shares have been inherited by the plaintiffs or not and to what extent the shares have been inherited is to be determined by a Civil Court. Whether some of the properties of the companies have been misappropriated and transferred by defendant Nos.1 to 6 for their personal use and could not be transferred are also such disputes which cannot be

determined by the Company Court under the provisions of the Companies Act, 1956. For partitioning of the assets of the companies, Defendant nos.7 to 12, after determination that they were started from the assets of common ancestor and the share of the plaintiff, if dissolution of the companies is required for which invocation of the Company Court may be required, the Civil suit for partition will not be completely barred. Therefore, it cannot be inferred that the suit of the plaintiffs is barred under Section 397 to 407 of the Companies Act, 1956.”

10. The details of the shares in the companies, that is, defendant Nos.7 to 12 as placed on record by the plaintiff are :

S. No.	Name of person	M/s. Bhana Mal Gulzari Mal P.Ltd.	M/s. Bhana Mal & Co.P.Ltd.	M/s. Banwari & Sons P.Ltd.	M/s. Delhi Iron works P.Ltd.	M/s. Murad Nagar Iron Works P.Ltd.	M/s. Bankipur Iron Works P.Ltd.
1.	M/s. Bal Kishan Dass & Sons (HUF)	105	105	105	57	78	35
2	Seth Bal Krishan Dass	40	40	39	18	19	06
3	Sh. R.K.Dass	49	49	50	28	39	16
4	Sh. G.K. Dass	50	50	50	28	39	16
5	Smt. Bhagwati Devi	49	49	01	27	38	15
6	Seth Jai Kishore Dass	49	49	49	27	38	15
7	Seth Daya Kishan Dass	49	49	49	27	38	15
8	Seth Maya Kishan Dass	24	24	24	27	38	15
9	Shri Krishna Dass	19	19	20	27	38	15
10	Smt. Bishan Kumari	03	03	11	03	03	03
11	Smt. Savitri Devi	03	03	11	03	03	03

12	Smt. Pramila Kahndelwal	xx	xx	08	xx	xx	xx
13	Smt. Prem Kumari	03	03	11	03	03	03
14	Smt. Meera Khandelwal	26	26	34	01	01	01
15	Smt. Saroj Bala	10	10	18	xx	xx	xx
16	Master Vineet Khandelwal (Minor)	10	10	10	xx	xx	xx
17	Seth Shri Krishna Dass	10	10	10	xx	xx	xx
18	Seth R.K. Dass	01	01	xx	xx	xx	xx
19	Master Vipul Khandelwal (Minor)	xx	xx	xx	xx	10	xx
	Total	500	500	500	276	385	158

11. A perusal of the chart above shows that shares in the name of M/s Bal Kishan Dass & Sons (HUF), Seth Bal Krishan Das and Bhagwati Devi were inheritable by the legal heirs which included plaintiffs and defendant Nos.1 to 6 and that of G.K.Dass by plaintiff Nos.2 to 4.

12. In the decision reported as AIR 1969 SC 78 Dhulabhai vs.State of M.P. the Constitution Bench of the Supreme Court summarised the law on the jurisdiction of civil courts as under:

“35. Neither of the two cases of Firm of Illuri Subayya or Kamla Mills can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

(1) Where the statute gives a finality to the orders of the special Tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the

statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegality collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.”

13. Even though in the decision reported as 1990 (1) CompLJ 208 (SC) Worldwide Agencies (P) Ltd and another vs. Mrs. Margaret T Desor and others the Supreme Court noted that the word “member” for the purpose of Section 397 of the Companies Act, 1956 includes a personal representative of the deceased member who himself is not or cannot become himself as a member however the representative of the member of the company will not be able to get adjudicated his rights of inheritance by filing a petition under the Companies Act.

14. It is well settled as noted in catena of judgments following Dulhabhai’s case (supra) that except where a civil suit is specifically barred under a particular statute there can be no bar to a civil suit. A suit for its maintainability requires no authority of law. It is enough that no statute bars the suit. The jurisdiction of civil court is all embracing. It is determined on the basis of pleadings of the plaintiff in the suit.

15. In the decision reported as (2003) 6 SCC 220 Dwarka Prasad Agarwal (D) by Lrs. vs. Ramesh Chander Agarwal and others the Supreme Court while dealing with the right of a party to file a civil suit vis-a-vis Sections 10 and 9 of the Companies Act held that the jurisdiction of the civil court had not been ousted. It was noted that the disputes between the parties was imminently a civil dispute and not a dispute under the provisions of Companies Act. Section 9 CPC confers jurisdiction upon the civil courts to determine all dispute of civil nature unless the same is barred under a statute either expressly or by implication. Bar of jurisdiction of a civil court is not to be lightly inferred. A provision seeking to bar jurisdiction to a civil court requires strict interpretation.

16. The learned Single Judge vide the impugned judgment noted that though not pleaded by the defendants as per the averments in the suit the same would be barred either in view of the fact that there is no averment that there existed a Hindu Undivided Family between the parties or because of the provisions of the Benami Transaction (Prohibition) Act, 1988 (in short 'the Benami Act'). The learned Single Judge failed to notice that the plaint states that the entire properties, capital, assets of the sole proprietorship concern M/s Bhana Mal Gulzari Mal were utilised as assets of six private limited companies, that is, defendant Nos.7 to 12 and the shareholding pattern as noted above notes the share of M/s Bal Kishan Dass & Sons (HUF), Seth Bal Krishan Das, Bhagwati Devi and G.K.Dass and the plaintiffs have a right to claim legal inheritance of the shares from the four shareholders as noted above.

17. The learned Single Judge further noted that after the passing of the Hindu Succession Act, 1956 the position that if a male member of a family inherited any property from any of his three immediate paternal ancestors, the properties in his hand were the HUF properties has ceased to exist, thus after passing of the Hindu Succession Act, 1956 if a male member receives any property from any of his three immediate ancestors he receives the property as a self acquired property and not as HUF property. Since there were no averments in the plaint that the properties continued to be HUF properties or there existed a HUF which is continued the suit was barred in terms of the judgment of the Supreme Court in the cases of Commissioner of Wealth Tax, Kanpur etc.vs.Chander Sen and Yudhishter (supra). While arriving on this conclusion the learned Single Judge failed to notice the shareholding pattern of the companies wherein the shares were in the name of Bal Kishan Dass and Sons (HUF). Further inheritance from the individual shares of Seth Bal Kishan Dass, Smt.Bhagwati Devi and

G.K.Dass could also be claimed.

18. Benami transaction has been defined under the Benami Act to mean “any transaction in which property is transferred to one person for a consideration paid or provided by another. It contemplates cases where (a) there is a transfer of property, and (b) the consideration is paid or provided not by the transferee, but by another”. The reliance of the learned Single Judge on the provisions of Section 4 of the Benami Act to bar the suit is also misconceived for the reason that the property did not stand in the name of another person but the ancestors of the plaintiffs and on their death the plaintiffs could claim their respective shares.

19. In the light of the legal position as noted above and as already decided by the learned Single Judge holding the civil suit to be maintainable vide order dated September 24, 2007 the findings of the learned Single Judge vide the impugned judgment dated August 29, 2012 dismissing the suit are wholly unwarranted. The impugned judgment dated August 29, 2012 is set aside. The suit is restored to its original position and the learned Single Judge is requested to decide the same on merits after the parties have adduced their evidence. The suit shall be listed for directions before the roster bench on September 14, 2015.

20. Appeal is disposed of.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 28, 2015
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