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

% **Judgment reserved on: 16.09.2016**
Judgment delivered on: 21.09.2016

+ **RSA 16/2007 and C.M. Nos. 639-640/2007, 4728/2008, 6937/2008, 7974/2009, 19979/2010, 4206/2011 & 10329/2015**

SUNIL MOHAN BUCKSHEE Appellant

Through: Mr. Madan Gera, Advocate.

versus

M.M.BUCKSHEE & ORS. Respondents

Through: Mr. Rajesh Yadav, Ms. Ruchira Arora & Mr. Dhananjay Mehlawat, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The present second appeal under section 100 CPC is directed against the judgment dated 04.10.2006 and decree dated 13.11.2006 passed by the First Appellate Court, namely the learned Additional District Judge, Delhi in RCA No.62/2005, whereby said first appeal under section 96 CPC preferred by the Appellant/Plaintiff has been dismissed, and the judgment and decree dated 31.03.2005 passed by the Trial Court, namely the learned Civil Judge, Delhi in Suit No. 208/02/93 affirmed.

2. The appellant/plaintiff filed the suit for partition and permanent injunction against the defendants in respect of property bearing no. D-394, Defence Colony, New Delhi. The suit had initially been filed against four defendants. Defendant No.1 is the real brother; defendants Nos. 2 & 3 are the half brothers, and; defendant No.4 is the mother of the plaintiff and defendant No.1, and step mother of defendant Nos 2 & 3.

3. The claim of the plaintiff/ appellant emerging from the record is that late Sh. K.C. Buckshee was the husband of defendant No.4/Mrs. Shanti Buckshee and father of the plaintiff, defendant No.1 Shri M.M. Buckshee, defendant No. 2 Lt. Col. Sh. M. L. Buckshee, and defendant No.3 Sh. K.M. Buckshee, and Sh. R.M. Buckshee – who died a bachelor in 1985. Sh. K.C. Buckshee was employed with K.C. Thapar and company at Calcutta after coming to India from Pakistan. Sh. K.C. Buckshee died intestate in the year 1952.

4. The plaintiff claimed that the parties to the suit were members of the Hindu Undivided Family (HUF) viz. 'K.C. Buckshee & Sons (HUF)'. Shri K.C. Buckshee acted as the *karta* of his HUF during his life time. After his demise in 1952, one of his sons-Sh. R.M Buckshee acted as the *karta* of the HUF till his demise in 1985. As noticed above, he was a bachelor and died intestate.

5. The plaintiff claimed that in the aftermath of the partition in 1947, Sh. K.C. Buckshee came to India from Layalpur, West Pakistan, leaving behind a major portion of his property in Pakistan. A claim was lodged before the Claim Officer, Jhalandhar by Sh. K.C. Buckshee to seek compensation in lieu of the residential property situated in Chak No.76, G.B. Tehsil &

District Layallpur, Pakistan. The said claim was assessed on 08.01.1953, and Rs. 20,000/- as compensation was given in favour of the 'Joint Hindu Family'. The plaintiff claimed that the said amount was utilized by the members of the HUF in purchasing various assets.

6. The plaintiff averred that in the year 1961-62, the members of HUF decided to purchase the property bearing No. D-394, Defence Colony, New Delhi (the suit property) for the purpose of raising a family residential house. The suit property was purchased in the name of defendant no.2 Lt. Col. M.L. Buckshee from the funds pooled in by the members of the HUF and defendant No.2. The construction was raised in 1963-64 from the funds of HUF, and contribution of funds made by Mata Niki Devi, grandmother of the plaintiff, and various members contributed towards the same. A sum of Rs. 60,000/- approximately was spent on the construction of the said property. Consequently, all the members of the HUF became co-owners / co-sharers to the extent of 1/5th share each.

7. The plaintiff averred that the said residential house was for the HUF and its members, and members of the HUF stayed in the said house at various points of time according to their needs. However, since defendant No.2 was permanently settled at Delhi and other members of the HUF were settled elsewhere, defendant No.2 primarily remained in the said house. Plaintiff also stayed in the said house during September, 1980 to February 1982 when he shifted to another accommodation in Greater Kailash Part-I, provided by his employer.

8. The plaintiff averred that though the owner of the said house was the HUF, the same was purchased in the name of defendant No.2 as "benami".

He was holding the same on behalf of the co-parceners of the HUF as a trustee. It was never intended that the suit property will be the exclusive property of defendant No.2. The plaintiff also averred that apart from the suit property, the HUF also owned several other properties, namely:

- (i) Plot of land situated at Block 3, Sector 19, NOIDA, U.P.
- (ii) Property bearing No.162, N.Biren Roi Road, Calcutta.
- (iii) Flat No.8762, Sector C, Pocket A, Vasant Kunj, New Delhi.
- (iv) 400 ordinary and one preferential share owned by HUF in Shri Gopal Paper Mills Limited, Calcutta.
- (v) 200 ordinary shares owned by HUF in United Collieries Limited.

9. The plaintiff averred that as regards the plot situated at Vasant Kunj, New Delhi aforesaid, he had filed a suit for declaration that he is a co-owner of the flat and for possession. He claimed that since the HUF paid Rs.15,000/- towards purchase of the said flat, the members of the HUF are entitled to their respective share in the said flat.

10. At this stage itself I may note that the said suit filed by the plaintiff in relation to flat at Vasant Kunj was dismissed, and his first appeal also stands dismissed.

11. The present suit was filed by the appellant/plaintiff, since the defendant no.2/Lt. Col. M.L. Buckshee was allegedly contemplating to sell or dispose of the suit property. The plaintiff reserved his right to file a suit

in respect of other HUF assets, including properties in Kolkata and Noida, etc. The suit in question was filed in February 1993. It has not been brought on record as to what other proceedings, if any, the plaintiff initiated in respect of the other properties claimed by him to belong to the HUF.

12. Defendants No.1 & 4 were proceeded ex-parte on 18.03.1993. They had not filed their written statements. Defendants No.2 & 3 filed their respective written statements, on the same lines, contesting the claim of the plaintiff. They averred that the plaintiff and defendant No.1 are step-brothers of defendants No.2 & 3, and defendant No.4 is the step-mother of the defendants No.2 & 3. They denied the existence of any such HUF, as alleged. They averred that Late Shri K.C. Buckshee had only one property in Layalpur (now Pakistan), and the claim made before the Claim Officer, Jhalandhar by Shri K.C. Buckshee was made by him in his individually capacity, and not as a member or *karta* of the alleged HUF. It was further averred that Shri K.C. Buckshee expired in 1952 i.e. before the claim was settled by the authorities for Rs.20,000/- in 1955. The amount of the said claim was paid to five sons of Shri K.C. Buckshee equally in their individual capacity in 1964, and not to the HUF. Therefore, there was no question of any asset being purchased out of HUF fund. They denied that Sh.R.M. Buckshee acted as Karta of the so-called HUF. Had the HUF existed, defendant No.2 – being the eldest male descendant, would have acted as the Karta. They further stated that if R.M. Buckshee claimed any HUF of the father K.C.Buckshee in 1960, he did so to reduce and split the income tax liabilities.

13. The property in question was purchased by defendant No.2/late Lt. Col. M.L. Buckshee from his own funds. The plot of the suit property was allotted to defendant No.2 by the Defence Ministry in February 1957 since he was a Major in the Army. The cost of the plot and ground rent was not payable in respect of the plot at the initial stage. It was payable in 20 annual installments of Rs.329.14, which were paid by defendant No.2 from his salary. The construction of the suit property was carried out of the funds/borrowings and loans taken by respondent no.2. Therefore, the property in question was claimed to be the self acquired property of defendant No.2, and not liable to be partitioned.

14. Construction was started by the defendant no.2 in 1963 on the said plot, and loan was obtained from his employer i.e. the Ministry of Defence after mortgaging the said plot. The said loan was repaid by the defendant no. 2 in about 15 years-prior to his retirement, out of his own resources. Defendant no. 2 denied any contribution by Mata Niki Devi, Grandmother of the plaintiffs/ defendants No. 1 to 3, or by any other member of the family. The construction was completed in 1964.

15. Defendant No.2 also averred that he had throughout been in possession of the suit property even after its construction. Being an Army officer, he was posted at different stations. The suit property was rented to an Embassy from 1964 to 1979, and the rent was received by defendant No.2 and shown as his income in his income-tax returns. He also denied that any member of the family stayed in the suit property. He averred that the plaintiff was permitted to stay in the suit property – being the youngest brother, when he was ill and out of job and he shifted since he got a job and

was married and was provided accommodation by his employer. He denied the allegation that the suit property was held by him “benami” for and on behalf of the HUF. It was further averred that neither defendant no 1-plaintiff’s real brother, nor defendant no.4-plaintiff’s mother, has come forward to support the claim of the plaintiff, as they were aware that plaintiff’s claim is false and dishonest.

16. In reply to the written statement of defendant No.2, plaintiff in para F of the replication dated 05.05.1993, inter alia, stated as follows:

“F. That Mr. R. M Buckshee, who became the Karta of the HUF after the demise of the Shri K. C. Buckshee was a very meticulous man and he had the habit of maintaining proper accounts and also a diary for each year where he used to write various financial and other important transactions. As karta of the HUF, he controlled all the funds and assets of HUF and when any members of the family required any funds, he furnished the same and made a note in the accounts/diary maintained by him.”

17. On the basis of pleadings of the parties, the following issues were framed vide order dated 19.03.1997 by learned Trial Court:

“(1) Whether the property in dispute is HUF property as claimed by plaintiff?O.P.P.

(2) Whether the construction on the plot in question was raised or carried out with the funds of HUF, if so, to what effect?O.P.P.

(3) Whether the plaintiff is entitled for a decree of partition and injunction as prayed for?O.P.P.

(4) Relief.”

18. The plaintiff Shri. Sunil Buckshee examined himself as PW1 and one witness Shri. Vijay Kumar Thapar as PW2. The defendant No. 3/ Shri K.M. Buckshee examined himself as DW1, and late Sh. M. L. Buckshee/ defendant No.2 examined himself as DW2. The said parties led in evidence a host of documents in support of their respective case.

19. The Trial Court considered issue no. 1 & 2 simultaneously. The trial Court found in favour of the appellant about the existence of the HUF. However, the trial Court held that the appellant could not provide any specific proof of the purchase of suit property out of HUF funds. Defendant no.2, on the other hand, had proved that the purchase price of the plot, and partial cost of construction was paid by him in small installments out of his salary. Paragraph 22 and 23 of the Trial court judgment read as follows:

"22. Ld.cl.s. for parties have also argued on various other issues involved in the case in reference to issues in hand. On the basis of pleadings, evidence and arguments of the parties the first question to be decided is whether there has been any HUF existing between the parties. The case of plaintiff is that there is presumption as to jointness of family under the Hindu Law unless severance is proved on the other hand defendant has denied any HUF. No severance has been alleged by defendants 2 and 3. In view of case law relied upon by cl. for plaintiff on this point and the stand taken by defendants in WS, I am of the opinion that contention made by plaintiff is forceful. The presumption of jointness has not been rebutted on record. Even otherwise certain documents produced by plaintiff proves the existence of HUF. Accordingly, it is clear that there has been HUF existing between the parties.

23. The next question which comes into view is that whether the suit property is HUF property or the same has been constructed with the aid and assistance of joint family property. The case of plaintiff is that in the year 1961-1962 the

members of huf decided to purchase the suit property and that property was purchased Benami in name of defendant no.2 by money pooled in by HUF and defendant no.2. Further that residential house was constructed in 1963-64 out of funds of HUF, so suit property is HUF property while case of defendant is that suit property was allotted by Ministry Of Defence in Feb. 1957 on perpetual lease to defendant no.2 who was Major in Army for which there was no initial payment and ground rent and cost of land were recoverable in twenty years which was paid by defendant no 2 out of his salary. Further that defendant no.2 took loan from his employer for construction in 1963 which was repaid in 15 years. During evidence the plaintiff has not given specific emphasis on the purchase of property out of HUF funds while the defendant no.2 has proved that price was payable in small installments which was paid out of his salary. As far as decision of purchasing the suit property Benami in the name of defendant No.2 is concerned , the same is not proved on record , as alleged by plaintiff, being on behalf of HUF. As far as construction out of joint funds is concerned, the plaintiff has relied upon certain books and diaries maintained by late Sh. R. M. Buckshee, the alleged karta of HUF M/S K. C. Buckshee & Sons. The question as to R.M. Buckshee being Karta and books maintained by him being books of family as a whole are the questions of facts. The only statement of plaintiff in this regard cannot be taken as a conclusive proof. Admittedly the plaintiff was of a very tender age at the relevant time. In such circumstances his own understanding of facts needs certain support. But no witness other than plaintiff has been examined in this regard. Neither the other defendants i.e defendant no.1and 4 have voluntarily come forward nor any attempt has been made by plaintiff. In view of the fact that defendant no.1 and 4 are also prospective beneficiaries under the relief claimed by plaintiff an adverse inference comes automatically in scene. Without establishing beyond reasonable doubt the relevancy of entries contained in books maintained by Sh.R.M.Buckshee the same cannot be helpful to plaintiff. Otherwise also the said entries do not reflect

specific purpose as claimed by plaintiff. The plaintiff has not been able to show how he has acquired possession of the documents produced by him in a bonafide manner. Unless proper custody is not established the documents cannot come to help of plaintiff.” [emphasis supplied]

20. Consequently, issue nos. 1 and 2 were decided against the appellant/ plaintiff and in favour of respondents/ contesting defendants. Resultantly, issue nos. 3 and 4 were also decided against the appellant/ plaintiff and in favour of the defendants. The suit was accordingly dismissed.

21. The First Appellant Court reversed the finding of the Trial Court with regard to the existence of the HUF. The First Appellate Court considered the question whether any HUF existed during the period when the suit property was acquired, and answered the same against the Appellant/ Plaintiff. Thus, all the issues were decided against the plaintiff/appellant.

22. During the pendency of proceedings some of the parties/ their legal representative have passed away, and their LR's have been brought on record. The parties are referred to as they are described in the suit.

23. The appellant seeks to assail the concurrent findings of fact returned by the trial court and the first appellate court. Both Court have returned concurrent findings of fact to the effect that the suit property was acquired by defendant No. 2 and constructed upon entirely out of his own funds and, even in respect of the contribution made by late Shri R.M.Buckshee to the tune of Rs. 25,000/-, the plaintiff had not been able to establish that the same were joint family funds. The finding of the trial court with regard to existence of the HUF, as noticed above, were reversed by the first appellate court, though in a qualified way. The first appellate court focussed its

attention to examine whether any HUF existed when the suit property was acquired by defendant No.2, or not. The first appellate court, therefore, did not go into the issue as to whether any HUF viz. “K.C.Buckshee and Sons” ever existed, or not.

24. Since the suit related only to the suit property held by defendant No.2, the limited and focussed examination of the said aspect-i.e. whether the said HUF existed at the time of purchase and construction of the suit property, in my view, cannot be found fault with.

25. Mr. Gera, learned counsel for the appellant submits that under the Hindu Law, every family is presumed to be joint, unless severance is proved. He submits that during the life time of K.C. Buckshee, the HUF existed. He further submits that K.C. Buckshee, father of the plaintiff and defendant nos.1 to 3 died on 12.04.1952 i.e. prior to coming into force of the Hindu Succession Act, 1956. At the time of his death, he had numerous assets. Thus, according to him, in any event, the HUF came into existence at the time of death of K.C. Buckshee and the assets left by K.C. Buckshee formed the nucleus of the said HUF. In support of the aforesaid submission, Mr. Gera has placed reliance, inter alia, on *Sushant vs. Sunder shyam* (2014) 206 DLT 418 (DB) and *Gulab Singh vs. Dal Chand Lowda & ors.* (2014) 141 DRJ 203

26. In support of his plea that the compensation received in lieu of the property held by K.C. Buckshee at Lyallpur, Pakistan, was HUF property, the plaintiff has sought to place reliance on Ex. PW-1/1 i.e. the order dated 08.01.1954 passed by the Claims Officer, Jalandhar in Case No.47. In the order passed by the Claims Officer, he records:

“Sh. Buckshee Krishan Chander now deceased is represented by his five sons.... who are now the legal representatives and heirs to his property in equal shares. Sh. Ranjeet Mohan. Buckshee represents his brothers as manager of the Joint Hindu Family. He is also the guardian of Sh. Sunil Mohan Buckshee Minor”. He further records “.....the benefit of the claim will go to the Joint Hindu Family consisting of the members mentioned above”.

27. Mr. Gera has also sought to place reliance on certain documents, namely, the income tax returns filed in the name of K.C. Buckshee & Sons HUF, the declaration made before the income tax authorities and the correspondence undertaken by R.M. Buckshee in his capacity as “Karta” of K.C. Buckshee & Sons HUF. I do not consider it necessary to specifically refer to and elaborate upon each of these documents. Some of them are Ex. PW-1/27, 1/26, 1/28, 1/29, 1/34, 1/35, 1/35B, 1/36, 1/36D and 1/38A.

28. Mr. Gera has also placed reliance on Ex. DW-2/PXA and Ex. DW-2/PXB, admittedly written in the handwriting of defendant no.2, wherein defendant no.2 firstly prepared an account statement of K.C. Buckshee & Sons HUF – showing the computation of Income for the year ending 31.03.1985 and, secondly, he asked the addressee of the said communication Shyam *“to let me know the HUF account number and details and composition of HUF”*.

29. Mr. Gera has also sought to place reliance on Ex. PW-1/55 – the passbook of S.B. A/c No.10223 in the name of K.C. Buckshee & Sons HUF. He also placed reliance on Ex. PW-1/D2 – a communication dated 19.10.1993 sent by Oriental Bank of Commerce to defendant no.4 in respect of the said bank account of K.C. Buckshee & Sons HUF. This letter

records that R.M. Buckshee was drawing the cheques as Karta of the HUF. Though this communication stated that as per the banks record, M.L. Buckshee, K.M. Buckshee, Manmohan Buckshee, S.M. Buckshee and Shanti Buckshee had requested for opening the account, however, except Mrs. Shanti Buckshee, no other person had signed the account opening form.

30. In support of his submission that there is a presumption in law that every Hindu family is a joint family, Mr. Gera relied on *Surjit Lal Chabda Vs. CIT* 101 ITR 776 (SC); *Jaganath Misra Vs. Lokanath Misra* AIR 1981 ORISSA 52; *Indranarayan Vs. Roopnarayan* AIR 1971 SC 1962; *Sanwal Das Vs Kuremal* AIR 1928 Lah 224 and *Prem Kumar Vs. CIT* 1980 121 ITR 347 (ALL). Learned Counsel further submits that this presumption is even stronger in the case of brothers and for the said proposition, he relied on *Bharat Singh Vs Bhagirathi* AIR 1966 SC 405. Once a family is found to be joint, it continues to be joint unless severance takes place. In this respect reliance has been placed *Chintamanni Ammal Vs. Nandagopal Goundar*(2007) 4 SCC 163 and *Nanak Chand Vs Lachhman Das* AIR 1917 Lahore 374.

31. Mr. Gera has argued that for purpose of raising initial construction on the suit property, defendant no.2 had spent Rs.60,000/-, out of which Rs.25,000/- was contributed by the HUF. He also sought to invoke the principle of blending by submitting that the blend of the self acquired property with even a small amount of HUF assets, results in the acquired property acquiring the character of a HUF property. In this respect reliance is placed on *Mangal Singh Vs. Harkesh* (AIR 1958 ALL 42); *Bhagwat*

Singh Vs CIT (38 ITR 436) P&H; ***V.D. Dhanwatey Vs. CIT*** (AIR 1968 SC 683); ***CIT Vs. K.S. Subbiah Pillai*** (HUF) (147 ITR 87) (MAD).

32. He submits that Rs.10,000/- was contributed by Mata Niki Devi, grandmother of the plaintiff. In this regard, he placed reliance on Ex.PW-1/5 which is a communication dated 14.11.1963 sent by Smt. Mata Niki to M/s K.T. & Brothers (Coal Sales) Ltd., Calcutta, wherein she requested the addressee to *“arrange to transfer a sum of Rs.10,000/- to your Delhi office with instructions that the same may be paid to Major Madan Mohan Buckshee as and when required by him”*. He also relies on Ex.PW-2/1 – a debit note dated 23.11.1963 issued by Karam Chand Thapar (Coal Sales) Ltd. addressed to the Delhi office instructing payment of Rs.10,000/- to Major Madan Lal Buckshee. PW-2 Sh. Vijay Kumar Thapar had deposed that he was working in Karam Chand Thapar (Coal Sales) Ltd. in Calcutta in the year 1963. He worked in the said company from 1958 till May 1965. He, inter alia, deposed he had seen the letter Ex.PW-1/5 dated 14.11.1963, which was received by him on 22.11.1963 and on the basis of this letter, the advice Ex.PW-2/1 was sent to the Delhi office. He has also referred to Ex.PW-1/6 which is an account statement, inter alia, recording on 26.11.1963 that *“Rs.10,000/- sent to Major Buckshee through Delhi Office to the debit of Mata Niki and Shanti Buckshee account”*.

33. He relies on Ex.PW-1/7 which records the remittances made by R.M. Buckshee to defendant No.2 Major M.L. Buckshee. The remittances recorded by R.M. Buckshee, contemporaneously, in Ex. PW-1/7 are the following:

26.11.63	Rs.10,000/-	Through Delhi Office to the debit of Mata Niki Devi and Shanti Buckshee account
23.03.64	Rs.5,000/-	– Do – from cash Jagadhari.
09.05.64	Rs.5,000/-	By draft on OBC, New Delhi to the debit of Shanti Buckshee account
19.06.64	Rs.2,000/- Rs.2,000/- Rs.1,000/-	By drafts on OBC, New Delhi Cash
03.08.64	Rs.1,000/-	Paid in cash on Nirmal's marriage

34. Mr. Gera submits that the remittances in the said account add up to Rs.26,000/-, out of which Rs.25,000/- was sent for the purpose of raising construction by defendant No.2.

35. Mr. Gera also refers to Ex.PW-1/9, the account statement prepared by Sh.R.M. Buckshee which reflects that an amount of Rs.5,500/- was received through Sh. Gopal Paper from Sh.V.P. Chadha against sale of 31 Jagadhari trees. Opposite the said entry, Sh.R.M. Buckshee had recorded “...Rs.5,000/- sent to Major M.L. Buckshee on 23.03.1964 through Delhi”. The said position is also reflected from the account Ex.PW-1/11, wherein Sh.R.M. Buckshee had recorded that Rs.5,000/- cash was sent through Delhi office to Major M.L. Buckshee on 23.03.1964. Mr. Gera submits that DW-2/ defendant No.2 in his cross-examination conducted on 06.12.2001, inter alia, deposed as follows:

“It is correct that I had asked my brother Shri R.M. Buckshee to send money for construction of property in question (vol.) for which two letters have already been filed(Sic). by the plaintiff. My brother Shri R.M. Buckshee had sent a sum of Rs.25,000/- for this purpose. This sum of Rs.25,000/- was received in different stages but I do not remember as to how much money was received on which date. Some of this money was taken by me from the office of Karam Thapar & Bros. on the instruction of Shri R.M. Buckshee and the remaining amount was sent by draft in different stages. The loan was given by my office in three installments but I do not remember the dates when the installments were released/ given to me. I do not remember as to whether I had already started the construction of the house in question prior to the release of first loan installment by my office.

It is wrong to suggest that Mata Nikki Devi remitted a sum of Rs.10,000/- for construction. I do not know whether this amount of Rs.10,000/- was sent by Mata Nikki Devi through Karam Chand Thapar & Bros. I do not remember as to whether a sum of Rs.5,000/- was sent by R.M. Buckshee to me on 23.03.64 out of the proceeds realized by the sale of Jagadhari trees.”

36. By referring to the above cross examination of DW-2/ defendant no.2 conducted on 06.12.2001, Mr. Gera submits that DW-2/ defendant no.2 did not deny receiving money from the sale proceeds of trees on land situated at Jagadhari. Mr. Gera submits that the 4 Acres land at Jagadhari was the same land which was allotted to the HUF in lieu of the property left at Layallpur in West Pakistan. Though no document has been filed by the plaintiff to connect the land at Jagadhari with the allotment made by the Claims Officer, he submits that no other land was allotted or owned by the HUF other than the Jagadhari land. He has also referred to the evidence to

submit that the land at Jagadhari with the house was sold and the sale proceeds were received.

37. Mr. Gera submits that Rs.5,000/- was sent to defendant No.2 from the account of the mother and R.M. Buckshee, i.e. Account No.1096, which has been shown as an HUF account. Rs.5,000/- was paid from Cash Book of HUF. Thus, Rs.15,000/- was clearly sourced from the HUF funds, even if the contribution made by Mata Nikki Devi of Rs.10,000/- were not to be considered as HUF funds.

38. Mr. Gera submits that since defendant no.2 claimed the suit property to be self acquired property, the burden of proving that it was a self acquired property was on defendant no.2. Defendant no.2 failed to establish that the HUF had made no contribution towards purchase and construction of the suit property. Admittedly, defendant no.2 had received Rs.25,000/- for construction of the suit property from R.M. Buckshee. He submits that the burden of proof to show that no HUF existed, or that the disputed property was his self acquired property fell on defendant no.2. He submits that the presumption in law was that the suit property was a HUF property.

39. He also submits that there is no pleading of defendant no.2 that he had borrowed Rs.25,000/- from his younger brother R.M. Buckshee as a personal loan. His pleadings in his written statement, *inter alia*, were:

(i) “....It is false to allege that the said property was purchased from the funds of HUF or from any other contribution as alleged”.

(ii) “... and thus the entire cost of land and construction as met by the answering defendant out of his own sources and the allegation that any funds of the alleged HUF or that of Smt. Niki Devi or any other member were used is just a cock and bull story false to the knowledge of the plaintiff”.

(iii) “...the construction was started in 1963 and completed in 1964. Whatever amount was spent on the construction the same was met by the answering defendant. It is absolutely false to allege that any member contributed any money towards the said house...” .

40. In his statement defendant no.2/ DW-2 stated that he had requested his younger brother for some money and he was good enough to advance Rs.25,000/-. This part of the testimony was objected to by the plaintiff/appellant, as being beyond pleadings. This part of the testimony was inadmissible in evidence and in support of this proposition, he relied on **Kashi Nath Vs. Jaganath** (8 SCC 740); **Bachhaj Nahar Vs. Nilima Mandal** AIR 2009 SC 1103. He has also submitted that the suit was not barred by limitation. No such plea was raised by the defendants in their written statement and no issue was framed by the court.

41. On the other hand, learned counsel for the defendant no.2 has supported the judgment of the courts below. He submits that concurrent findings of fact have been returned by the courts below based on appreciation of evidence, which cannot be said to be perverse or misdirected. The entire evidence has been considered by the two courts below and in the second appeal, it is not permissible for this court to interfere with the consistent findings of fact, as they cannot be said to be bordering on perversity.

42. Learned counsel submits that, firstly, there is nothing to show the existence of the HUF, except on paper, and that too for a limited period between 1974-75 and 1984-85. The said HUF was created on paper by R.M. Buckshee, only with a view to avoid capital gains tax when the properties jointly held by the brothers were sold. The entire proceeds were always divided equally between all the brothers, which would not be the case had the HUF been in existence. Learned counsel has referred to several documents led in evidence in support of his submission that the suit property was acquired exclusively by defendant no.2, and was constructed upon by him entirely from his own funds and personal borrowings which had been duly returned.

43. The legal principles invoked by the plaintiff are well settled and for this reason, I do not consider it necessary to deal with the said decisions individually or elaborately. However, for the appellant/plaintiff to succeed, it was essential for the appellant to establish the factual substratum to which the aforesaid legal principles could be applied. The two courts below have found that the plaintiff has failed in that endeavour.

44. Even if it were to be accepted that a HUF existed during the life time of Shri K.C. Buckshee, or, upon the demise of K.C. Buckshee in 1952, an HUF came into existence - consisting of his sons, in respect of properties left by him, firstly, there is no evidence to show that the HUF which may have come into existence upon the demise of K.C. Buckshee in 1952, continued to exist continuously thereafter till the acquisition and construction of the suit property.

45. Reliance placed by Mr. Gera on Ex. PW-1/1 to submit that the said document evidences the existence of the HUF has no merit. The Claims Officer passing an order while dealing with the claim of a refugee, has no authority or jurisdiction to create a HUF by passing an order to that effect. The recording by him in his order Ex. PW-1/1 that the benefit of the claim will go to the joint HUF consisting of the members, namely, the five brothers would not create a HUF, if one did not exist.

46. The aforesaid recording itself shows that:

(i) Shri K.C.Buckshee did not file the claim in respect of property left in Pakistan on behalf of the Hindu Undivided Family. The claim had been filed by him in his own individual name. This shakes the presumption of existence of a HUF during the life time of K.C. Buckshee, which is a rebuttable presumption.

(ii) Upon the demise of Shri K.C.Buckshee, he was represented by his five sons before the Claims Officer –as the legal representatives of Shri K.C.Buckshee, and they staked their claim “*in equal shares*”. The aforesaid itself shows that the legal heirs of late Shri K.C.Buckshee did not claim before the Claims Officer that the property left in West Pakistan was HUF property, or that the claim being pursued by them was on behalf of Shri K.C.Buckshee and Sons, HUF, or an HUF by any other name. The claim was not pursued by the “Karta” of the so called HUF. The fact that they staked their claim “*in equal share*” itself militates against the existence of an Hindu Undivided Family, as the shares of the co-partners in a Hindu Undivided Family are undefined until a partition takes place. In his cross-

examination dated 19.03.2001, the plaintiff admits that in respect of the property left behind by the father of the parties, there was only one claim which was adjudicated for Rs.20,000/- and the said claim of “20,000 was received by separate cheques in five names”. The witness also states that he had no idea whether there was any bank account in the name of HUF K.C. Buckshee & Sons, before 1952.

47. Even if a HUF existed during the life time of K.C. Buckshee, or it came into existence on the demise of late Sh. K.C. Buckshee in 1952, its status stood severed when the claim was pursued by all the heirs of late Sh. K.C. Buckshee jointly, not on behalf of the HUF, but on their own behalf by claiming 1/5th equal share each. The recording by the Claims Officer in the later part of the order to the effect that, “*the benefit of this claim will go to the joint Hindu family consisting of the members as mentioned above*” would not lead to creation of a Hindu Undivided Family, if it did not pre exist, or if it stood dissolved by the conduct of the parties.

48. K.C. Buckshee & Sons HUF was created by R.M. Buckshee when the property at 19, Sooterkin Street, Calcutta was sold. Apparently to avoid payment of capital gains, the income from sale of the said property was shown as that of the HUF, even though the sale proceeds from the said property were equally divided amongst the brothers by making investments in units etc.

49. The documents/ evidences referred to in para 27 above are of no avail to the appellant. Pertinently, there is no whisper of any HUF either during the lifetime of K.C. Buckshee, or even after his demise in 1952 uptill

10.8.1977 when, for the first time, R.M. Buckshee – who was not even the eldest son of K.C. Buckshee, sought to claim the existence of K.C. Buckshee & Sons HUF and filed the income tax returns/ declaration as Karta of the said HUF. Reference may be made to Ex.PW1/28- the affidavit of Shri R.M. Buckshee. The income tax return was filed for the first time in the name of K.C. Buckshee & Sons HUF as a consequence of sale of the property left by K.C. Buckshee at 19, Sooterkin Street, Calcutta. Pertinently by then, the suit property had already been acquired and constructed upon by defendant no.2.

50. The aforesaid position becomes evident from Exhibit PW-1/56, which shows that the sale proceeds in respect of the property No.19, Sooterkin Street, Calcutta were invested in individual names, or names of two members of the family, and no NSC was purchased in favour of the HUF.

51. Pertinently, the returns of the HUF were filed only for a few years and thereafter it was discontinued. In none of the returns of the HUF the suit property was claimed as an asset of the HUF. Pertinently, the suit property had been let out to an embassy between the period 1964 to 1979. This period covers the period during which the HUF filed its income tax return. However, the rental income from the suit property was never shown as rental income derived by the HUF. The entire rental income was received; appropriated, and; shown by defendant no.2 as his personal income in his income tax returns.

52. It has come on record that defendant No.2 was serving in the Army and in that capacity, he was allotted the suit plot and he paid the cost as well as the ground rent of the said plot in small instalments, which were deducted from his salary over several years. To this, there is no challenge and there could be none. Ex.DW2/11 is the letter of allotment dated 11.02.1957 in favour of defendant No. 2 issued by Government of India, Ministry of Defence. The same shows that the ground rent/collection charges for the first five years was Rs. 102/- and 6 annas per annum, and the same was Rs. 329/- and 14 annas per annum for the next 15 years. The plaintiff has not disputed the registration of the perpetual lease deed in respect of the suit property in favour of defendant No.2 on 31.12.1963.

53. Ex.DW2/2 is the communication sent by defendant No. 2 as early as on 21.02.1968 to the Income Tax Officer concerned, enclosing his answers to the questionnaire received by defendant No.2. In this questionnaire, defendant No.2, contemporaneously – when no such claim was made by any of the siblings in respect of the suit property, described the newly constructed property by him as D-394, Defence Colony, New Delhi, as this property, and not that of the HUF. In this document, he also disclosed the initial payment for the lease and the annual payment for the lease, as aforesaid, and that the date of construction of the property was January, 1964. He also disclosed the details of payment for purchase of materials made towards construction of the property. The total cost of construction of the property was disclosed as Rs. 60,000/-. He also disclosed the loan taken from the Government for raising construction as Rs.24,000/-. In response to a query, *“if loans have been taken from friends, relatives, etc., full details*

regarding the amounts and dates of loans', defendant No.2 answered as follows:

"From brother Shri R.M.Buckshee Rs.25000/- (Amount received in instalments. Details/dates not available)."

54. Thus, when the defendant No. 2 furnished information to the Income Tax Officer contemporaneously, in the background that no such claim/ dispute was pending, he claimed the suit property as his own property and even the loan was shown as that taken from his brother Shri R.M.Buckshee (of Rs. 25,000/-) and not from HUF of K.C.Buckshee and Sons. He also disclosed that the suit property had been let out to a tenant on 1st August, 1964, on a monthly rent of Rs. 800/-. In respect of this document, Mr. Gera has submitted that the original of the same was not produced. Moreover, the handwritten "Note" at the bottom shows that it records the date of a cheque, claimed to have been issued by defendant No.2 to Shri R.M. Buckshee as 18.07.1968, whereas the said document/ questionnaire is claimed to have been forwarded to the ITO vide letter dated 21.02.1968. Thus, according to Mr. Gera, the said questionnaire Ex.DW2/2 does not appear to be genuine and appears to have been prepared by the defendant No.2 only to create a defence to the claim in the suit.

55. I do not find merit in the aforesaid submission of Mr. Gera. The defendant No.2 led in evidence the communication issued by the Major-Officer Commanding to the Income-Tax Officer along with the questionnaire filled by defendant No.2 Major M.L. Buckshee on the subject – "Construction/ purchase of new house property". A copy of that letter was evidently placed in the file of the defendant No.2, and the

communication was sent to the ITO evidently by registered post. There is no reason to disbelieve the said document. So far as the discrepancy qua the 'note' is concerned, it is pointed out by learned counsel for the defendant No.2 that the said note was made by defendant No.2 in his personal copy since, at the end of the note, it reads "*refer building diary kept in white bag*". He submits that for his own record, memory and convenience defendant No.2 had made the said note. This explanation of defendant No.2 is clearly plausible and reasonable. There is nothing to suggest that the said "note" was made in the original of the questionnaire submitted by defendant No.2, or that it was made at the time when the questionnaire was filled. Pertinently, no question was put to DW-2/defendant No.2 with regard to the said "note" during his cross-examination by the plaintiff. The document itself being of 1968 vintage, i.e. more than 30 years old has a presumption of validity which has not been rebutted by the plaintiff.

56. Defendant No.2 also exhibited as Ex.DW2/12-the assessment order passed by the Municipal Corporation of Delhi on 23.03.1995 fixing the rateable value with effect from 01.12.1988. He also led in evidence the wealth tax assessment for the year 1970-71 as Ex.DW2/16, wherein he declared the suit property as his own immovable property. The suit property was shown as his individual property by defendant No.2. Though the particulars of the property are not mentioned in the said order, it is not the plaintiff's case that the immovable property referred to in the wealth tax order is some other property, other than the suit property. It is not the plaintiff's case that defendant No.2 owned any other property – either as

HUF property, or his own individual property. Defendant No.2 also produced Ex.DW2/5-the receipt issued in respect of the ground rent, interest and premium paid in respect of the suit property for Rs. 3,909.71 issued in his name by the Reserve Bank of India. From time to time, the L&DO raised demand upon defendant No.2 for government dues. The same is evident from Ex.DW2/8 – raising a demand for the balance amount of Rs. 1,304.65, Ex.DW2/9, and Ex.DW2/10, dated 12.06.1969 and 27.02.1969 issued by the L&DO raising demands on defendant No. 2 in respect of the suit property. Admittedly, it was the defendant No.2, who added the first and the second floors to the suit property in the year 1989. Neither the HUF, nor any of the other members of the so called HUF is even claimed to have made any contribution.

57. Now I come to the submission of the appellant, premised on the amount advanced by R.M. Buckshee to defendant no.2, as recorded in Ex. PW-1/7. The question that needs determination is whether the plaintiff has been able to establish that the amounts advanced by late Sh. R.M. Buckshee were joint family/ HUF funds. Further, even if they were jointly family funds held by R.M. Buckshee, were they consciously accepted by defendant no.2 as HUF funds. If they were not established to be joint family funds, or were not consciously accepted by defendant no.2 as joint family funds/ contribution, there would be no question of painting the suit property as a joint family property.

58. Defendant No.2, who was examined as DW2, deposed that he had requested his younger brother late Shri R.M.Buckshee for some money to complete the construction and that his brother Shri R.M.Buckshee had

advanced a sum of Rs.25,000/- which had been repaid by him to his brother. To establish the return of the said loan, defendant No.2 relied upon a letter Ex.PW1/74 wherein he, inter alia, states, *“I have received adv rent of the house, therefore, enclosing herewith a cheque for Rs.2000/- (PDQ 153182 dt. 21.4.65 of PNB, Alld).”* There was no reason for defendant No.2 to send the amount of Rs. 2,000/- to his brother Shri R.M.Buckshee, if what he had received from late Sh. R.M. Buckshee were HUF funds. If the same were HUF funds, defendant No.2 would not legally, or otherwise, be expected to return the amount, as he would have utilised the amount as a member of the HUF, for the benefit of the HUF. Secondly, and if at all, he would have returned the money to the so-called HUF, and not to his brother R.M. Buckshee. The loan, admittedly, was received by defendant No.2 from Shri R.M.Buckshee. The same was not received from the account of the HUF. The plaintiff has not been able to show that any amount was received by defendant No.2 from the account of the HUF, or that he returned the amount into the account of the HUF. The plaintiff also did not lead any evidence to establish that the monies held by R.M. Buckshee, and advanced by him were HUF funds.

59. I may also observe that during his examination, DW2 produced the letter dated 19.01.1962 which was marked as ‘Mark A’ written by him to his brother Shri R.M.Buckshee, and another letter dated 07.10.1964 which was marked as, ‘Mark B’ – also written to his brother Shri R.M.Buckshee. Photocopies of these letters were produced by the defendant No.2. Objection to production of these letters was raised on the ground that they were beyond pleadings. Pertinently, no objection was raised to the

production of these letters on the ground that they were not originals. Since defendant No.2 was the author of these letters addressed to Shri R.M.Buckshee, who had since died, the defendant No.2 could not have been in possession of the originals of these letters, and could not have caused the production of the originals. Pertinently, it was the plaintiff who had come into possession of the original records maintained by R.M. Buckshee. As would be seen a little later, he did not even produce the records/ accounts maintained by R.M. Buckshee, despite being asked to produce the same.

60. So far as the objection that these letters were beyond pleadings is concerned, I do not find any merit in the same. This is for the reason that the defendant No.2 countered the claim of the plaintiff that the HUF had contributed towards acquisition and construction of the suit property, by stating that he had acquired and constructed the suit property on his own. That statement of the defendant No.2 was sufficient, and it was not necessary for him to explain or elaborate in his written statement that he had taken a loan from his brother Shri R.M.Buckshee, which had subsequently been repaid. Pertinently, the plaintiff in his plaint did not make a pointed averment that defendant No.2 had received the HUF funds for purchase and construction of the suit property through Shri R.M.Buckshee. The averments made by the plaintiff in paras 5 and 6 of the plaint read as follows:

“5. That in the year 1961-62, the members of the HUF decided to purchase property bearing No. D-394, Defence Colony, New Delhi. The property was purchased for the purposes of residential house and the money was pooled in for

*the purchase of the said property by the HUF and also by defendant No.2. **Later on in the year 1963-64, a residential house was constructed on the said property, again out of the funds of the aforesaid HUF, including Smt. Nikki Devi, grandmother of the plaintiff, wherein various members contributed towards the same.***

6. *That the construction of the house started somewhere in the year 1962-63 and the same was completed in the year 1964. A sum of Rs. 60,000/- approximately was spent on the same. **During the construction also, various members of the HUF contributed the money and accordingly all of them became co-sharers/co-owners of the said property to the extent of 1/5th share each.***” (emphasis supplied)

Thus, the averment of the plaintiff that the residential house was constructed “... .. out of the funds of the aforesaid HUF” were qualified by stating that Smt. Nikki Devi, grandmother of the plaintiff had contributed and “*various members of the HUF contributed*”. As noticed above, the plaintiff neither gave any specific particulars of the alleged contribution by the HUF, nor produced any documentary evidence in support thereof.

61. In response to these paragraphs, the defendant No.2 stated as follows:

*“5. That para 5 of the plaint is not only wrong and incorrect but false to the knowledge of the plaintiff and the present suit is a flagrant misuse of the process of law. **It is false to allege that the said property was purchased from the funds of the HUF or from any other contribution as alleged.***

The plot D-394, Defence Colony, New Delhi, was allotted by the Ministry of Defence in February 1957 on perpetual lease to the answering defendant who was then a Major was payment and the ground rent and the cost of land were recoverable in twenty years, the annual instalment being Rs, 329.14 per annum which instalments were paid for all those years by the answering defendant out of his salary.

*That the answering defendant started construction in 1963 on the said plot and obtained loan from his employer, the Ministry of Defence after mortgaging the said plot and the said loan was repaid by the answering defendant in an about 15 years before his retirement and thus the entire cost of the land and the construction as met by the answering defendant out of his own sources and **the allegation that any funds of the alleged HUF or that of Smt. Niki Devi or any other member were used is just a cock and bull story false to the knowledge of the plaintiff.***

6. *That in reply to para 6 of the plaint, as already submitted above, the construction was started in 1963 and completed in 1964. **Whatever amount was spent on the construction the same was met by the answering defendant. It is absolutely false to allege that any member contributed any money towards the said house or is entitled to the alleged share either cosharer or co-owner,** and the only explanation for the suit is that the plaintiff is a dishonest person who already stolen and misappropriated belonged to the answering defendant and defendant No. 3 as heirs of the deceased Shri R.M.Buckshee and has also stolen all the records including the bank pass book, share certificates LTC policies and other documents for which suitable legal action is intended to be initiated shortly. After stealing the share he even tried to transfer the shares by forging the signatures of the deceased brother Shri R.M.Buckshee.” (emphasis supplied)*

62. As noticed above, the averment of the plaintiff in para 5 of his plaint was that during construction, apart from Smt. Nikki Devi “....*various members of the HUF contributed the money*”. Contribution by a member of the HUF (even if one is assumed to exist), is not the same thing as contribution by the HUF. Even if contribution is made by a person - who happens to be a member of the HUF, the contribution remains as of that person. It does not take the colour and characteristic of a contribution of

the HUF. Even if a person makes a contribution in the raising of construction of a property by his brother, by making such contribution, he does not come to acquire an interest in the property so constructed.

63. Since defendant No. 2 was not confronted with the allegation that the amounts consciously received by him from Shri R.M.Buckshee were, to his knowledge, funds of the HUF, there was no occasion for defendant No.2 to delve into the details of his personal transaction with Shri R.M.Buckshee - of his obtaining a brotherly loan from R.M. Buckshee, which he had promised to repay. As the defendant No.2 claimed to have repaid the personal loan taken from R.M. Buckshee, he was only expected to deny that any other member of the family had made any contribution in the raising of the construction. This is because, a person who advances a loan – which is also repaid, cannot be said to have made a “contribution” in the raising of the construction. Thus, the objection of the plaintiff/ appellant to the production of the documents mark ‘A’ and mark ‘B’ was meritless. These documents though photocopies, in my view, are admissible in evidence as the original could not be in possession of the defendant, and he was entitled to lead secondary evidence thereof. As they are old documents i.e. over 30 years old, presumption under Section 90 of the Evidence Act of their existence can be drawn.

64. In the document ‘Mark A’, defendant No.2, inter alia, state as follows:

“Now to be very frank, I am confused & puzzled about the money. I have only Rs. 2000/- with me. I can get loan of Rs. 24000/- from govt. at 4% interest which will take some time.

Total approx cost will be about Rs. 45,000/- with all modern fittings-2 beds with bath & drawing room, dining room at ground floor & one bed room with bath on 1st floor + garage.....”

He further stated,

“If you can arrange full amount which I will pay you by remitting full rents till the amount is cleared, I will start in March, if not then I will have to wait for the loan. Pl let me know your absolutely frank views and suitable course to be adopted.....” (emphasis supplied)

65. The aforesaid communication does not betray the position that the suit property was sought to be constructed by defendant No. 2 out of HUF funds. If that were so, he would have as a matter of right, demanded R.M.Buckshee and others in the family – allegedly holding HUF funds, to make contribution to raise construction. In the document mark ‘A’, Defendant No. 2 disclosed his own liquidity position to his brother R.M.Buckshee. He also disclosed as to what would be the approximate cost of construction. He also disclosed the time that it would take to raise construction and the expected rent which could be realized after raising construction on the property. He also undertook that if R.M.Buckshee (and not the HUF) could arrange the full amount, he would pay the same to Shri R.M.Buckshee (and not the HUF) by remitting the full amounts till the amount is cleared. He sought financial help from his brother, and while doing so, he sought his brother’s frank advice as to what he should do. This is certainly not a letter evincing the intention of defendant No.2 to tap into the HUF resources, even if there were any, to raise construction over the

suit property. It was request for a temporary financial help by one brother to another.

66. Mark 'B' is the copy of the communication dated 07.10.1964 sent by the plaintiff to his brother late Shri R.M.Buckshee. In this letter, he states, *"I have to pay you back huge amount which probably will take considerable long time. In the meantime, I am enclosing herewith two cheques No. C589677 & C 589652 for Rs. 2300/- only due from me for the following....."*. Defendant No. 2 also stated in this communication that, *"the house has been rented for 3 years with 6 months advance & 3 monthly payment afterwards. I received Rs. 4800/- in the month of August, & paid Rs. 3000/- to my mother-in-law which I took from her sometime back. I shall be paying you Rs. 2000/- every 3 months if all (sic) goes well, starting from January, 1965."* This communication also shows that the defendant No.2 accepted the amount from R.M. Buckshee, and not the HUF, as a personal loan which he intended to repay. He acknowledged his liability to his brother R.M. Buckshee and not to any HUF, and even returned the amounts to his brother R.M. Buckshee and not to the HUF.

67. In the present case, there is sufficient evidence on record to show that R.M. Buckshee had merely advanced a personal loan to his brother defendant No.2. The said loan was repaid by defendant No.2. Even if some part of the loan remained unpaid, the same was recoverable by R.M. Buckshee, and merely because it may not have been fully returned, the same would not create an interest in favour of R.M. Buckshee in the property of defendant No.2, much less in favour of the so called HUF. In any event, the contribution by a person who may be a member of the HUF

in the raising of construction over the property by another person, who too may be a member of the HUF, does not create any right or interest in the property so constructed, in favour of the HUF, or persons who may be members of the HUF, and, who may have so contributed.

68. Exhibit PW-1/7, on which reliance has been placed gives various entries with regard to amounts paid to M.L. Buckshee. The entry dated 26.11.1963 shows that the amount of Rs.10,000/- was sourced from the account of Mata Niki Devi and Shanti Buckshee. Monies held by these ladies would normally not qualify as HUF funds, even if a HUF existed. The plaintiff did not lead any evidence of existence of HUF as on 26.11.1963, much less to show that the monies held by these ladies were HUF funds.

69. Exhibit PW-1/5 - on which much reliance has been placed, is a document signed by Mata Nikki. In the cross-examination of PW-1 dated 19.03.2001, relation of Mata Nikki Devi with the parties has been admitted by PW-1, who stated "*Smt. Shanti Devi was my mother and Smt. Nikki Devi was her mother*". Thus, Mata Nikki Devi was the maternal grandmother of the plaintiff and Defendant Nos.2 and 3. Therefore, the deposit of Mata Nikki Devi with M/s Karam Chand Thapar & Bros., in any event, cannot be said to be deposit of HUF of K. C. Buckshee. The language of the said document Exhibit PW-1/5 is self-explanatory. The naani (grandmother) of the parties was free to offer any loan or help to her grandsons, including the defendant No.2, and any advance by her cannot be treated as advance from the HUF. Burden was on the plaintiff to prove that this amount was also advanced from the account of the HUF and was not Mata Nikki Devi's own

money. The said letter also talks about issuance of receipt of the remaining deposit of Rs.25,000/- and also to pay the balance amount along with interest to her. Exhibit PW-1/2, as also Exhibit PW-1/73, on the other hand, show that a sum of Rs.29,620.27 payable to Mr. K.C. Buckshee was a separate amount lying with M/s Karam Chand Thapar & Bros. which amount was taken by the legal heirs of late Sh.K.C. Buckshee by writing a letter on 14.12.1964 in equal shares. This is plaintiff's own document which may be read against him. This also shows that the said advance of Rs.10,000/- to defendant no.2 was not extended from the money due and payable to Mr. K.C. Buckshee, but from the amount deposited by Mata Nikki Devi with the said firm.

70. The entry of 23.03.1964 shows that 5,000/- was sourced from Jagadhari. Even if it were to be accepted that this amount came from sale of lands/ house/ trees at Jagadhari, there is nothing to show that the said property was HUF property. Merely because the brothers held the property jointly, it does not follow that the same is HUF property. The plaintiff did not lead any evidence to establish that the said property was acquired from HUF funds. There is no link established between the entitlement to allotment of land determined by the Claims Officer, and the land at Jagadhari. The entry of 09.05.1964 shows that Rs.5,000/- was sourced from Smt. Shanti Buckshee. Monies held by Smt. Shanti Buckshee could not be considered as HUF funds, in any case. The drafts aggregating to Rs.5,000/- dated 19.06.1964 are stated to be prepared against cash. Once again, the source of these funds are not shown to be from the HUF funds. The last payment of Rs.1,000/- dated 03.08.1964 is stated to be paid in cash

on Nirmal's marriage. The same does not suggest the withdrawal from the HUF funds, even if there were any such funds in existence. No such inference can be drawn, as the plaintiff may like the Court to draw that these funds were sourced from HUF funds for want of any cogent evidence.

71. As already indicated, it is the case of the plaintiff that late Shri R.M.Buckshee was a diligent man who kept proper accounts and was very meticulous in accounting etc. He admitted that that most of the said account book and diaries were with him up to the year 1985-86 after R.M. Buckshee died. He admits that there were 15-20 diaries in all. He stated that all relevant diaries had been filed by him after scanning through all the diaries. When it was suggested to the witness that he had studied all the account books thoroughly, he denied the suggestion and he stated that he had studied the relevant portion. The witness admitted receipt of notice Exhibit PW-1/D2 (exhibited on 19.03.2001) for production of the diaries but he stated that the said diaries were not presently in his possession in Delhi, and they could either be in Calcutta or in Hyderabad. The witness gave an evasive reply that he was not sure whether the books and diaries referred to in the notice given by Sh. Dewan, Advocate form part of the diaries/books lying at Calcutta or Hyderabad. The witness reiterated that whatever was in his possession at Delhi had been filed in the Court. He stated that in Hyderabad and at Calcutta, they were in a secured place, and they were around eight trunk full. He further states that he would require one month time to check and produce the diaries and account books called for. Reference may also be made to the order dated 19.04.2001 passed by the trial court, wherein it is recorded that in response to the notice under Order XII Rule 8 of CPC sent

by the defendant, four diaries were produced by the witness. The earlier order of 19.03.2001 of the trial Court is also relevant, where a direction was give to the witness to produce the record mentioned in Exhibit PW-1/D-2, i.e. the notice under Order XII Rule 8 of CPC. The contents of Exhibit PW-1/D-2 are relevant and are being reproduced:

“Take notice that the defendants 2 and 3 require you to produce the following documents in the abovenoted case before the Hon’ble Court on 28.2.2001.

1. All the account books and diaries of late Shri R.M. Buckshee and now in the custody of the plaintiff for the years 1965, 1966, 1967 and 1968.”

Therefore, clearly the plaintiff, who was in possession of the diaries and books of accounts, on the basis of which his entire claim is based, did not produce and rather withheld the books of account and diaries, except for the four diaries which were produced by him, as recorded in the order sheet. In a claim like the present one, it was imperative for the plaintiff to produce all the evidence in his possession. Otherwise, an adverse inference is liable to be drawn that the books of account which were withheld, contain entries which were adverse to the interest of the plaintiff, and which would have been detrimental to the claim made by him, if produced. In the absence of the books of accounts, the entries in diaries cannot be the sole basis for concluding that HUF money (even if any such funds existed) was advanced to defendant No.2 by the deceased R.M. Buckshee.

Pertinently, in his cross-examination dated 03.05.2001, the plaintiff admits that:

“In the diary of 1964 maintained by Sh. R.M. Buckshee on page dated 31.12.64 there is an entry regarding receipt of Rs.1800/- and Rs.500/- from Major M.L. Buckshee and the same is exbt. PW-1/D3. Exbt. PW-1/D4 is the entry of receipt of Rs.4000/- from Major M.L. Buckshee vide cheque dated 01.11.65 drawn on PNB, Allahabad. Exbt. PW-1/D5 is the entry of receipt of Rs.2000/- from Major M.L. Buckshee by cheque dated 02.02.66 drawn on PNB Allahabad. Exbt. PW-1/D6 is the entry of receipt of Rs.4000/- from Major M.L. Buckshee vide cheque dated 01.08.66. Exbt. PW-1/D7 is entry of receipt of Rs.6000/- from Major M.L. Buckshee vide cheque dated 15.08.67. Exbt. PW-1/D8 is the entry of receipt of Rs.5000/- from Major M.L. Buckshee vide cheque dated 18.07.68.”

The said diary shows that the money lent to M.L. Buckshee by Sh. R.M. Buckshee had been returned by him. In fact, a sum of Rs.23,300/- has been admitted by the plaintiff, to have been returned by Defendant No.2 to R. M. Buckshee. Since all the accounts books and diaries were not produced, it cannot be concluded that the remaining amount was not similarly returned. In fact, the past course of conduct of the transaction between defendant no.2 and R.M. Buckshee probabalises the stand of defendant no.2 that he similarly returned the entire personal loan taken by him from his brother R.M. Buckshee. Reliance placed on Ex. PW-1/7 is, therefore, of no avail to the plaintiff/ appellant.

72. Plaintiff has relied upon the income tax returns filed by late Shri R.M.Buckshee on behalf of the alleged HUF. Ex.PW1/38A, which is the computation of income of the alleged HUF for the year ending 31.03.1981, describes various incomes of the HUF including the details of a plot of land with built-up structure, situated at 162, N, Beron N. Road, Calcutta, acquired by the HUF and in its possession since 1962. The said return also

mentions another property being plot of land measuring 300 sq. meters in Block B, Sector 19, Noida, Ghaziabad. However, the suit property does not find any mention there, as an HUF property. Had the intention been to treat the suit property as HUF property, the same would have been reflected in the income tax returns of the HUF. Why this property would be left out, has not been explained by the plaintiff.

73. Pertinently, the plea of the plaintiff in his replication to the written statement of defendant No.2 under the heading Preliminary Submissions in paragraph (E), inter alia, states that “...in the year 1952, Mr. M.L. Buckshee who was the eldest of all and who from the very beginning did not have good relations with the father and other brothers was working as Major in the Army”. If that were the case, there would have been absolutely no reason to either advance any amount of the alleged HUF to him for acquiring the suit property in his name, or constructing thereupon, or not to reflect the suit property as that of the HUF in the accounts and income tax returns filed in the name of the HUF by R.M. Buckshee. Similarly, there would have been no question of M.L. Buckshee/ defendant no.2 taking any loan or contribution from the so called HUF.

74. So far as the plaintiff’s reliance on Exhibit DW-2/PXA and Exhibit DW-2/PXB is concerned, no doubt, they show that defendant No.2 had knowledge of existence of the HUF on the day the said documents were prepared. However, that happened much after the time when the suit property was acquired and constructed by defendant No.2.

75. In regard to Ex.PW-2/PXA, defendant No.2 had deposed that this letter was written by him after the demise of R.M. Buckshee on the instructions of the plaintiff. However, he had refused to sign the same.

76. So far as reliance placed on Exhibit PW-1/55, i.e. passbook of SB Account No.10223 in the name of K.C. Buckshee & Sons (HUF) is concerned, the same evidently is a part of the exercise undertaken by R.M. Buckshee to create a Hindu Undivided Family on paper with a view to evade tax liability. Exhibit PW-1/DW merely shows the existence of bank account in the name of K.C. Buckshee & Sons HUF, primarily opened and operated by R.M. Buckshee as the Karta. As noticed herein above, neither defendant no.2 nor defendant no.3, and not even the plaintiff had signed the account opening form.

77. There are other legal hurdles that the plaintiff has not been able to cross. Firstly, in paragraph 9 of the plaint, the plaintiff has enumerated various properties besides the suit property stated to be the properties of the HUF as well. However, the present suit has been filed for partition of only one property leaving remaining properties out of the purview of the present suit. It is settled law that a suit for partition must include all the properties claimed to be owned by the joint Hindu family and piecemeal partition is not permissible. Reference may be made to the decision in *U. N. Bharadwaj V. Y. N. Bharadwaj and ors.*, CS(OS) 641/2015 decided by this Court on 05.10.15 and; *Kenchegowda V. Siddegowda*(1994) 4 SCC 294.

78. There is yet another pertinent aspect of the case. In paragraph 10 of the plaint, the plaintiff has made following averment vis-à-vis the flat at Vasant Kunj:

“10. That as regards Vasant Kunj Flat, the property which was purchased by defendant No.3, it is pertinent to mention that the plaintiff had paid 40 per cent of the money to the defendant No.3 towards the purchase price of the flat and Rs.15,000 was advanced by the HUF for the purchase of the said flat. The plaintiff had filed a suit in respect of this property in the Delhi High Court for declaration and possession praying that he be declared as a co-owner of this flat, and the Hon’ble High Court was pleased to grant stay in favour of the plaintiff and against defendant No.3 restraining him from alienating, transferring or parting with possession in any manner in favour of any third party.”

79. During his examination-in-chief conducted on 15.10.1998 in Suit No. 1533/90 (Exhibit PW-1/D-1) the plaintiff herein stated:

“Sh. R.M. Buckshee since deceased had entered into an oral agreement with me under which I was entitled to hold 40% share in the aforesaid flat in my own individual capacity.”

He further deposed:

“When the payment of a First instalment for the suit flat was becoming due it was agreed between me and late R.M. Buckshee that I would surrender the flat that had been booked by me and later on my name would be added as a co-alottee of the suit flat. In these days there was premium for the DDA flats and I could have sold my flat to some third person. However, since the understanding was that my name would be added as a co-alottee of the suit flat.”

Thereafter, in his cross-examination he states as follows:

“I do not recollect if I have mentioned or not in my plaint that initial payment by defendant no.1 to DDA was for and on behalf of HUF. It is wrong to suggest that the stand regarding HUF investment taken by me is an after thought since I know that a benami transaction is illegal. In this suit I have claimed only 40% share in the suit flat on account of my personal investment. I have not claimed my HUF share out of remaining 60% because that is a subject matter of a separate suit. The said suit was filed by me after the filing of the suit after discussing the matter with other co-parceners. In that suit I am a defendant as one other co-parcener had filed that suit. In this suit other co-parceners were not impleaded as this suit was based on my personal and individual rights.”

80. Clearly, the plaintiff herein did not claim any share in the Vasant Kunj flat in the previous suit by claiming that the same flat was a joint family property. He was only claiming 40% share in the Vasant Kunj property on account of his personal investment. The plaintiff states that he was not claiming any HUF share out of the remaining 60%, because that is a subject matter of a separate suit. The only other suit filed by the plaintiff is for the suit property in Defence Colony, and, apparently, no claim has been made vis-à-vis the alleged HUF share in the Vasant Kunj flat in the present suit.

81. The plaintiff is blowing hot and cold at the same time. In the earlier suit, he claimed to have an individual share of 40% in the Vasant Kunj flat, while the remaining was claimed to be HUF share to the extent of 60%. Thus, he admits the position that the parties were capable of holding, and that they held individual/personal properties. However, in the present suit, the plaintiff claims that all properties were acquired from the HUF funds, and were HUF properties. Secondly, the stand of the plaintiff in the present

suit is that the entire property partakes the colour of HUF property because, accordingly to him, a fraction of the same was built upon by allegedly using HUF funds. However, he did not make any such claim in the earlier suit in relation to the Vasant Kunj flat. There he claimed to have an individual share to the extent of 40%, while claiming that 60% share was of the HUF.

82. As observed by the courts below, defendant nos.1 and 4 did not take a stand in favour of the case up by the plaintiff, and the plaintiff did not even produce them as witnesses. Pertinently, if the plaintiff were to succeed, they would be equal beneficiaries. As noticed above, some amounts remitted by R.M. Buckshee to defendant no.2 were shown to have been sourced from Smt. Shanti Buckshee/ defendant no.4, while she was not produced by the plaintiff to clarify whether the said amounts sourced from her, were held by her as her own monies or as HUF funds. Thus, an adverse inference could be drawn against the plaintiff.

83. As already observed herein above, it was essential for the plaintiff to establish the factual positions for invoking the principles laid down in the several decisions relied by the plaintiff. The aforesaid discussion shows that the plaintiff has miserably failed in that end. The presumption of the existence of the HUF during the lifetime of the father Sh. K.C. Buckshee, or of its coming into existence by operation of law upon the demise of the father, stood rebutted and it was nipped in the bud as his heirs did not act as a HUF. The legacy left by K.C. Buckshee was immediately divided equally in the respective shares of the parties. This is evident from the fact that the compensation received in respect of the property left at Pakistan was claimed equally by the brother, and not by the Karta of the so-called HUF in

the name of the HUF. No returns of the HUF were filed for over 20 years after the demise of K.C. Buckshee. K.C. Buckshee & Sons HUF was created for the first time in 1977 while filing the income tax returns for the year 1974-75 as a measure of capital gains tax avoidance accruing on account of sale of the property at 19, Sooterkin Street, Calcutta. Even the proceeds of the sale were pocketed by all the heirs of late Sh. K.C. Buckshee in equal shares and not by the so-called HUF. By then, the suit property had already been acquired, paid for and constructed by defendant no.2. Defendant no.2 let out the property and pocketed the proceeds personally. Neither the suit property nor its rental income was ever claimed as belonging to the HUF. Even the amount of Rs.25,000/- received by defendant no.2 from R.M. Buckshee was always treated as a personal loan from his brother and was even repaid by him. The plaintiff failed to establish that the amounts held by R.M. Buckshee which were advanced by defendant no.2 were from the HUF funds or to the knowledge of defendant no.2 were sent to him and accepted by him as HUF funds. On the contrary, the evidence shows that the said amount was received by defendant no.2 as a personal loan which he had repaid. The plaintiff failed to establish from the accounts produced by him that the said amounts were sourced from the HUF funds. He withheld large chunks of the record left by R.M. Buckshee and selectively produced some of the accounts. Thus, the presumption, so strongly relied upon by the plaintiff, about the existence of the HUF during the life time of K.C. Buckshee; or its coming into existence on the demise of late Sh. K.C. Buckshee; about the status of the HUF continuing; about the amount of Rs.25,000/- being the fund of the HUF, stood clearly and

completely destroyed. The legal principles relied upon by the plaintiff, therefore, are left hanging in the air without any factual foundation.

84. Accordingly, the substantial question of law framed on 10.04.2013, which reads as follows:

“As to whether the concurrent findings returned by the courts below in the light of the issues framed suffers from any perversity, if so, to what effect?”

is answered against the appellant and in favour of the respondents.

85. The appeal is, accordingly, dismissed with costs throughout. The Memo of Costs filed by the learned counsel for defendants shall form the basis of costs so far as costs in the appeal are concerned. Accordingly, costs of Rs.3,65,000/- is awarded in the appeal, apart from costs of the original and the first appellate proceedings.

VIPIN SANGHI, J.

SEPTEMBER 21, 2016