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

\+ **<u>RSA Nos.229/2007 & 230/2007</u>**

% **3rd November, 2016**

1. **<u>RSA No.229/2007</u>**

SH. JAWAHAR LAL (SINCE DECEASED) THROUGH LRS AND ORS.
..... Appellants

Through: Mr. Vishesh Issar, Advocate with Mr. Jaskaran Singh, Advocate.

versus

SH. AMAR NATH (SINCE DECEASED) THROUGH LRS AND ORS.
..... Respondents

Through: Mr. Pushkar Sood, Advocate with Mr. Satya Prakash, Advocate for respondent Nos.2 to 6.
Mr. Sunil Satyarthi, Advocate for respondent Nos.6(a) and (b).

2. **<u>RSA No.230/2007 and C.M. No.11864/2007 (stay)</u>**

SH. BRIJ MOHAN SRIVASTAVA AND ORS. ..... Appellants

Through: Mr. Vishesh Issar, Advocate with Mr. Jaskaran Singh, Advocate.

versus

SHRI DES RAJ AND ORS. ..... Respondents

Through: Mr. Pushkar Sood, Advocate with Mr. Satya Prakash, Advocate for respondent Nos.2 to 6.
Mr. Sunil Satyarthi, Advocate for respondent Nos.6(a) and (b).

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. These Regular Second Appeals under Section 100 of the Code of Civil Procedure, 1908 (CPC) are filed by the appellants who are the plaintiffs in the two suits filed for partition. Appellants/plaintiffs represent the branch of Sh. Jawahar Lal son of Sh. Nanak Chand. One suit was filed by Sh. Jawahar Lal being suit No.19/2002. Another suit bearing No.17/2002 was filed by the legal heirs of Sh. Jawahar Lal. The properties and businesses with respect to which the suits for partition were filed are stated in Schedule A and Schedule B of the plaint. Schedule B contains the movable properties and Schedule A contains the immovable properties and also the businesses. Since there are no longer any live issues with regard to movable properties, the counsel for the appellants concedes that no judgment is invited so far as movable properties in Schedule B are concerned. Even with respect to the properties and businesses which are mentioned in Schedule A, the judgment of this Court is invited only with respect to the claim of partition of property at serial No.5 bearing No.530, Kucha Pati Ram, Delhi and which property by means of sale deed Ex.DX-2

was purchased in the name of Smt. Samarkar Devi wife of Sh. Nanak Chand i.e the mother of Sh. Jawahar Lal.

2. The only issue which is argued before this Court is as regards whether this Kucha Pati Ram property was an HUF property for the appellants/plaintiffs being legal heirs of the son Sh. Jawahar Lal, and other legal heirs being the other sons of Sh. Nanak Chand/ their legal heirs to have a share in this property. Suit No.19/2002 was filed on 6.10.1978 and another suit being Suit No.17/2002 was filed on 23.7.1998. Both the suits were consolidated and resulted in the common Judgment of the Trial Court dated 23.11.2004 by which only property no.278, Mohalla Karkari, Ajmere Gate, Delhi was declared as an HUF property and the other properties and businesses were held not to be HUF properties and businesses. The operative Order of the Trial Court dated 23.11.2004 reads as under:-

> "23.11.2004
>
> Present: None.
>
> Vide a separate common judgment of even date the suit bearing no.17/02 and suit bearing no.19/02 have been disposed of wherein following opinion and relief has been granted to the parties.
>
> I am of the opinion that only one property which is residential in nature bearing no.278 Mohalla Karkari as shown in site plan is a joint family property which alone is subject to partition. The other properties are held not to be the joint family properties. Therefore, I appoint Ms. Sunita Jonwal Chamber No.12 and 18, Western Wing, Tis Hazari Courts, Delhi-54 R/o 103, Vasudha Apartments, Sector-9, Rohini as the Local Commissioner who shall suggest the mode of partition of the above mentioned suit property and file her report within 45 days of this Order.

The plaintiff is directed to supply the copy of the plaint and copy of the site plan to the Local Commissioner. The fee of the Local Commissioner is fixed at Rs.2500/- to be borne by both the contesting parties.

As the plaintiff has not been able to establish that the property at 1085, Maliwara was under the tenancy of the HUF M/s Nanak Chand Fakir Chand therefore, the declaration and permanent injunction sought in suit no.17/02 is denied. The suit bearing no.17/02 is thus dismissed.

Parties to bear their own costs. Preliminary decree-sheet be prepared accordingly. File be consigned to record room. One copy of this order be given dasti to the parties.

sd/-
CJ/Delhi
23.11.2004"

3. The contesting defendants in the suit are the legal heirs of Sh. Amar Nath and who are respondent nos. 1(a) to (f). Sh. Amar Nath was one of the three sons of late Sh. Nanak Chand and late Smt. Samarkar Devi. Sh. Nanak Chand and Smt. Samarkar Devi had three sons, namely Sh. Faqir Chand, Sh. Amar Nath and Sh. Jawahar Lal. So far as the present second appeals are concerned, the appellants/plaintiffs are supported by the legal heirs of Sh. Faqir Chand as they also claim that the property at Kucha Pati Ram is a joint family property. The main contesting respondents/defendants are the legal heirs of late Sh. Amar Nath and who are respondent nos. 1(a) to (f), but they unfortunately are not represented. These respondent nos. 1(a) to (f) are the main contesting respondents because they claim that Sh. Amar Nath inherited the property at Kucha Pati Ram in terms of a Will dated 24.9.1976 of the mother Smt. Samarkar Devi bequeathing the suit property

to her son Sh. Amar Nath and whose legal heirs are respondent nos. 1(a) to (f).

4. Let us now therefore consider the only issue urged before this Court as to whether house no.530, Kucha Pati Ram, Delhi is an HUF property or the said property was the individual property of late Smt. Samarkar Devi.

5. Learned counsel for the appellants/plaintiffs as also the other supporting respondents/defendants concede that there is no documentary evidence whatsoever led of any HUF business of the family and the HUF having sufficient funds for the purchase of this Kucha Pati Ram property in the name of the mother. In fact, admittedly no document whatsoever has been filed and proved on behalf of the appellants/plaintiffs or by any of the supporting respondents/defendants to show that there ever existed any joint Hindu family business and much less, having such amount of income available in excess for the purchase of the Kucha Pati Ram property. No document has been filed showing any bank account in the name of HUF M/s Nanak Chand Faqir Chand and of any moneys available in the said bank account being available for the purchase of Kucha Pati Ram property which was purchased in the year 1956. To complete the narration, in this regard, I may note that there are no profit and loss accounts filed and proved or no

balance sheet filed and proved or no other bank accounts etc filed and proved contemporaneous for the year 1956 when the Kucha Pati Ram property was purchased in the name of mother Smt. Samarkar Devi, and which could have been documents to show that this property would be an HUF property.

6. In law, once the property is in the name of an individual person, the onus of proof shifts upon the other persons who want to allege and prove that this property is not the individual property of the person in whose name the title deeds exist (being Smt. Samarkar Devi in this case) and the property is in fact the HUF property. It is in law necessary to establish on preponderance of probabilities not only existence of the HUF but also of availability of such funds with the HUF by which the property at Kucha Pati Ram could have been purchased, and thus in my opinion, the self-serving depositions of the appellants/plaintiffs cannot be said to be discharge of onus of proof for holding the property at Kucha Pati Ram to be declared as an HUF property and not as the self-owned property of the mother Smt. Samarkar Devi.

7. Learned counsel for the appellants/plaintiffs confines his arguments to what according to him were the admissions in the cross-examination of late Sh. Amar Nath, because according to the counsel for the

appellants/plaintiffs these admissions in the cross-examination of Sh. Amar Nath/DW-1 show that the Kucha Pati Ram property was HUF property. The cross-examination of Sh. Amar Nath/DW-1 which is relied upon is dated 21.2.1983, and therefore, I would reproduce this entire cross-examination of Sh. Amar Nath dated 21.2.1983 as under:-

> "xxxxxxxx on behalf of defts. Nos.2 to 6.
>
> Q. What you took shop in Ajmeri Gate area in 1952, in whose tenancy of Maliwara shop and G.B. Road shops were?
>
> Ans. The tenancy of Maliwara Shop was in the name of Faqir Chand and that of shop on G.B. Road was in the name of M/s New India Electroplating works in which plaintiff and Faqir Chand were the partners.
>
> At that time, the only property owned by we brothers was House No.278. That was purchased by our father and all the three brothers had inherited from him. There was also a plot on Karkari Road, Shahdara in the name of my father. I received notice copy of which is Ex.DX-1. I am not in possession of sale deed of House No.278 of the plot on Karkari Road. <u>But I have brought the Sale Deed of House No.530. I produce the Sale Deed of House No.530. House No.530 was purchased in 1956 in my presence. It was purchased for Rs.8500/-. The vendor signed it in my presence. I identify the signatures of the vendors on the sale deed Ex.DX-2 as they put their signatures in my presence. I have no</u> counter-foil receipts about the rents of House No.530 or of plot at Karkari Road. Previously there was a boundary wall and room on plot on Karkari Road but now there is only a room. <u>It was in the tenancy of Shambhu Nath at about Rs.200/- per year. Jawahar Lal and Faqir Chand used to realize the rent of that plot but I do not know who actually used to issue receipt. I never realized rent nor ever issued receipt.</u> There are no rent no rent notes in my possession nor have any account of correspondence summoned from me in the notice. My mother was illiterate and only she could put her thumb marks. <u>In House No.530, there were two tenants namely Jal Singh and Bhagwan Devi. Myself, plaintiff or Faqir Chand used to realize rents from the tenants on behalf of my mother which we used to hand over to her and also used to issue receipts. The receipts used to be issued in the name of my mother. Before,</u> 1950 after the death of our father, there was no partition of our family.
>
> Q. Whether there was any partition of the family?
>
> Ans. No.
>
> My mother had ornaments and money which were given to her by my father. House No.278 is assessed in the name of Nanak Chand and I had been paying the

house tax due to the reasons that I was assured by the plaintiff and Faqir Chand that they would vacate the premises and would give it to me.

Q. Faqir Chand had never remained in possession of House No.278?

Ans. His family is still in possession of that premises of a Kothri in that house on the ground floor.

<u>Q. House No.278, House No.530 and plot on Karkari Road are still joint of you three brothers?</u>

<u>Ans. It is correct.</u>

The Flour Mill in Maliwara and the business at G.B. Road were being run from the H.U.F. funds.

Q. Round about 1952, there was a partition of the business but not of the property?

Ans. I started my separate business and plaintiff and Faqir Chand started their separate partnership business but there was never any partition and the these are continuing the same uptil today.

The tenancy of shop in Maliwara was in the name of Faqir Chand after whose death, it was changed into the name of Chander Kanta, his widow and after her in the name of Des Raj defendant. I have no connection with that tenancy or the business. I have never any concern with the business or tenancy of M/s New India Electropolating Works. The no. of New India Electroplating works was 46/47, G.B. Road, Delhi. HUF was never having any bank account.

<u>Q. Your mother was not exclusive owner of house No.530, and as such was not entitled to bequeath it by Will?</u>

<u>Ans. It is incorrect.</u>

I was present when the Will was executed by my mother. It bears thumb impressions of my two sisters namely Nemo Devi and Ajyudhia Devi and signatures of my maternal uncle Shambhu Nath and my sister's son Ramesh Chand and also of one Ram Krishan who has died. At the time of the execution of Will by my mother, excepting the persons mentioned above. All the signatures and thumb impressions on the Will were put at the same time. The Will was written at the place of Deed Writer Shamimuddin near Tonda Stand, Hauz Qazi, Delhi.

It was written about noon time. It was got registered on the same day when it was executed.

Deferred.

sd/-

R.O.&.A.C. ADJ/Delhi.

Dt. 21.2.1983" (underlining added)

8. Learned counsel for the appellants/plaintiffs places reliance upon the answer to the question with respect to the three immovable properties including the property no. 530 and which answer of Sh. Amar Nath/DW-1 admits that the property no. 530 along with the two other properties are joint.

9. In my opinion, the argument urged on behalf of the appellants/plaintiffs is misconceived for various reasons. Firstly, a civil case is decided on the preponderance of probabilities i.e the entire pleadings and evidence are considered as a whole for arriving at a conclusion. One 'admission' in itself, unless so strong and overpowering to override every other aspect in the case; cannot be made the sole basis for a decision of a case. This I am saying so because in the written statement of Sh. Amar Nath, the fact that the property at Kucha Pati Ram was the sole property of the mother Smt. Samarkar Devi was specifically stated and it was specifically denied that the Kucha Pati Ram property was an HUF property. In the other portions of the cross-examination of DW-1 Sh. Amar Nath, he has specifically stated that the property was let out by the mother Smt. Samarkar Devi and in whose name the rent receipts were issued and also the rent was collected for the mother Smt. Samarkar Devi. Amar Nath has also denied the suggestion put in the cross examination that the mother could not

have executed the Will in his favor. The amount for the purchase of the property as per the statement of Sh. Amar Nath in the cross-examination is from the ornaments of the mother and the moneys which were given to the mother Smt. Samarkar Devi by the father Sh. Nanak Chand. Though learned counsel for the appellants/plaintiffs sought to argue that once moneys are given to Smt. Samarkar Devi by her husband Sh. Nanak Chand as admitted in the cross-examination by Sh. Amar Nath, the property at Kucha Pati Ram should be held to be an HUF property, but, in my opinion, merely because father Sh. Nanak Chand gave moneys to the mother Smt. Samarkar Devi, i.e the husband gave the money to his wife for the purchase of the property, would not mean that funds for the purchase of the property would become HUF funds or the property purchased from such funds would become an HUF property. Also, the admission in the cross-examination of DW1/Sh. Amar Nath that the three properties are joint is not that the properties are joint family properties but the properties are joint and it is conceded before me on behalf of the counsel appearing for the parties that the H.No. 530 is a residential house where the family of the three sons of Sh. Nanak Chand and Smt. Samarkar Devi are residing together, and which consequently shows that the H.No. 530 at Kucha Pati Ram was a joint house in the sense that families were together residing in the same. Therefore, one stray answer of the property at Kucha Pati Ram being joint, in my opinion, is neither so categorical for the same to be treated as an admission of the Kucha Pati Ram property being an HUF property and also that it is seen that the admission is neither categorical and nor do the other portions of the evidence corroborate this fact because the other portions of the evidence clearly shows that the mother Smt. Samarkar Devi acted as the sole owner of the property by letting out the property and rent was collected from the tenants for her.

10. In view of the above, no substantial question of law arises in these Regular Second Appeals for the property no. 530 Kucha Pati Ram, Delhi to be declared as the HUF property of M/s Nanak Chand Faqir Chand.

Dismissed.

NOVEMBER 03, 2016 **VALMIKI J. MEHTA, J**
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