

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

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Date of decision: 9th February, 2016

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RFA No.571/2011

JAI NARAIN MATHUR & ORS

..... Appellants

Through: Appellant no.1 in person.

Versus

JAI PRAKASH MATHUR (DECEASED)

THROUGH LR's

..... Respondents

Through: Mr. Dharmendra Kumar, Adv. R-1(a)

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure (CPC), 1908 impugns the judgment and preliminary decree of partition dated 5th May, 2010 (of the Court of Additional District Judge (ADJ)-06 (Central), Delhi in CS No.397/09 filed by the respondent for partition, possession and permanent injunction with respect to land *ad measuring*, 1 *bigha* 10 *biswas* in Khasra No.132, 1 *bigha* in Khasra No.133 and 1 *bigha* 40 *biswas* in Khasra No.194 situated in Lal Dora of Village Majri, P.O. Karala, Delhi) declaring the respondent/plaintiff to be having 1/4th share in the property and restraining the appellants/defendants from selling, alienating or disposing of the same in any manner whatsoever. The appeal also impugns the order dated 1st October, 2011

of the learned ADJ in the proceedings pursuant to the preliminary decree for partition, *inter alia* directing the property to be auctioned.

2. The appeal came up before this Court first on 8th December, 2011 when the following order was passed:-

- “1. Appellant no.1 appears in person. I have pointed out to the appellant no.1 the judgments in the cases of Commissioner of Wealth Tax, Kanpur vs. Chander Sen AIR 1986 SC 1753 and Yudhishter vs. Ashok Kumar AIR 1987 SC 558 for the proposition that the appellant when he inherits property from his father, on the father’s death in 1982, will take the property as his own/individual property in his hands and not as ancestral property.*
- 2. Accordingly, in my opinion, prima facie, the impugned judgment wrongly holds the respondent/plaintiff/son entitled to the properties which the appellant inherited from his father.*
- 3. Till further orders unless varied by the Court, there shall be stay of the impugned judgment and decree dated 5.5.2010 and all orders consequential thereto.*
- 4. Notice be issued to the respondent on filing of process fee, both in the ordinary method as well as by registered AD post, returnable before the Registrar on 24th January, 2012.*
- 5. Respondent be additionally served through his counsel who was appearing in the suit in the Trial Court.*
- 6. Trial Court record be requisitioned.”*

3. After notice, on 17th April, 2012 the *ex parte ad interim* order was confirmed and the appeal admitted for hearing and ordered to be listed in the category of '*Regular*' matters as per its turn.

4. The appellants filed CM No.17493/2012 for early hearing and finding that the appellants had filed the appeal in person and the appellant no.1 was pursuing the appeal in person, an Amicus Curiae was appointed to assist the appellants. On 6th March, 2013 the counsel for the respondent informed of the demise of the respondent and the Amicus Curiae earlier appointed for the appellants was substituted. The application filed for substitution of the legal heirs of the deceased respondent remained pending till it was allowed on 20th March, 2014. Thereafter the appeal is being adjourned from time to time for hearing. During the hearings on 19th March, 2015 and 5th October, 2015 it was the contention of the counsel for the legal heirs of the deceased respondent that the appeal, insofar as against the preliminary decree for partition, had been filed belatedly and the appeal insofar as against the order in the final decree proceedings for auction of the property was barred by Section 97 of the CPC as the preliminary decree for partition had not been challenged. Thereafter the appeal came up on 8th February, 2016 when the appellant no.1 appeared in person and the Amicus Curiae earlier appointed did not appear; though the

appellant no.1 stated that he is ready to argue but the counsel for the legal heirs of the deceased respondent stated that he had not come prepared for arguments. In the light of the order dated 8th December, 2011 supra, attention of the counsel for the respondents was also invited to the judgment dated 18th January, 2016 of this Court in CS(OS) No.1737/2012 titled ***Surender Kumar Vs. Dhani Ram*** and to enable the counsel for the legal heirs of the deceased respondents to prepare, the matter posted for today. The counsel for the legal heirs of the deceased respondent has been heard and the Trial Court record requisitioned has been perused. The appellant no.1 in person has also made his comments.

5. It is the contention of the counsel for the legal heirs of the deceased respondent at the outset that the appeal insofar as against the preliminary decree for partition is time barred and cannot be looked into. He further contends that though as far back as on 19th March, 2015 an opportunity had been given to the appellant no.1 to file an application for condonation of delay of more than one year in filing the appeal against the preliminary decree but no application has been filed. He also contends that the appeal, insofar as against the order of auction of the property for distribution of the sale proceeds as per the shares declared in the preliminary decree is concerned, the same is not

maintainable in the light of Section 97 of the CPC. He thus contends that the appeal is liable to be dismissed on this ground alone.

6. I have considered the said preliminary objection of the counsel for the legal heirs of the deceased respondent and am of the opinion that the appeal, insofar as against the preliminary decree for partition, cannot be dismissed as barred by time at this stage for the reasons hereinafter appearing:-

- (i) The appeal was filed by the appellants in person with the appellant no.1 pursuing the same.
- (ii) Though the appeal against the preliminary decree for partition was barred by time but, though without noticing the same, finding the judgment and decree for partition to be contrary to the judgments of the Supreme Court, the same was entertained and the subsequent proceedings stayed.
- (iii) Though the counsel for the respondent has thereafter been appearing on 24th January, 2012, 6th March, 2012, 30th March, 2012 and 12th April, 2012 but no objection to the said effect is recorded in the orders of any of the said dates. Not only so, even the order dated 17th April, 2012 whereby the earlier *ex parte*

interim order was confirmed and the appeal admitted for hearing also does not record any such objection.

- (iv) Even thereafter when the counsel for the respondent appeared on 6th March, 2013 and 21st March, 2013 in response to the application of the appellants for early hearing of the appeal and intimation of demise of the respondent given, no such objection was taken.
- (v) It was only for the first time on 19th March, 2015 i.e. after the appeal had been pending for over four years that the objection in this regard was taken.
- (vi) No final decree for partition has been passed as yet. The order dated 1st October, 2011 which is also challenged in the appeal is as under:-

*“Court Auctioneer Ms. Shubra Mehndiratta was ordered to be called. Let she be called for the next date.
To come on 13.12.11.”*

It is thus not as if the matter has gone past the stage of final decree.

- (vii) If, as appears from the order at the time of issuing notice of the appeal and admitting the appeal, the preliminary decree for partition is without the respondent/plaintiff having any share in the property, the preliminary decree for partition is a nullity and no rights in immovable property which did not exist can be created thereby.
- (viii) A perusal of the Trial Court record shows the appellants/defendants to have been defending the suit, from which this appeal arises, also in person through the appellant/defendant no.1 and such parties who are appearing in person cannot be penalised for lack of knowledge of the technicalities of law and for non-compliance of the technical requirements viz. of non-filing of application for condonation of delay in filing the appeal.
- (ix) A perusal of the trial court file shows that after the preliminary decree for partition, on some dates modalities for physical partition were being explored and on other dates settlement talks were taking place.

- (x) The appellant/defendant no.1 appearing in person states that since the proceedings before the Trial Court had not culminated, he was not aware that he was required to file an appeal against a stage of proceeding which had attained finality and only when found that the court auctioneer had been called to auction the property, felt the need to approach the Court. I find the said explanation to be a plausible one. A layman in law ordinarily associates appeal only with culmination of proceedings in Court; since the Trial Court, after passing the preliminary decree also had given a date, it is believable that the appellants/defendants remained under the impression that there was no finality.
- (xi) Supreme Court, in *State of Madhya Pradesh Vs. Pradeep Kumar* (2000) 7 SCC 372 has held that non-filing of an application for condonation of delay along with Memorandum of Appeal is not fatal. It was reasoned that the effect of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him but to see whether it is possible to entertain his grievance if it is genuine.

(xii) In my opinion sufficient cause for condoning the delay in filing the appeal insofar as against the judgment and preliminary decree for partition is in the facts and circumstances is made out and the delay is condoned.

7. The counsel for the legal heirs of the deceased respondent next contends that the appellant/defendant no.1 appearing in person has admitted to the share of the respondent/plaintiff in the property. He has in this context invited attention to the reply dated 14th November, 2005 of the appellant/defendant no.1 in person to the suit bearing Exhibit Mark DW-1/1 in the Trial Court record at page 409.

8. I have carefully perused the said reply and am unable to decipher any such admission therein. What the appellant/defendant no.1 has stated therein is, what will be the shares of the other parties to the suit after his death. The same can by no stretch of imagination be construed as an admission by the appellant/defendant no.1 of any share of the respondent/plaintiff in the property during the life of the appellant/defendant no.1.

9. The counsel for the legal heirs of the deceased respondent then contends that the appellant/defendant no.1 by participating in the proceedings pursuant

to preliminary decree has also admitted to the share of the deceased respondent/plaintiff.

10. There is no merit in the said contention also. Had there been any admission, the suit would not have remained pending from 26th October, 2005 to 5th May, 2010 and issues would not have been framed. The impugned judgment and preliminary decree also are on merits and not on admissions.

11. Even otherwise I am of the opinion that a right in immovable property cannot be created by admissions in legal proceedings, without a pre-existing right. If the same were to be allowed, it would lead to enabling the parties to avoid stamp duty and registration for transfer/conveyance of property, merely by such admissions in legal proceedings.

12. Supreme Court, in ***Bhoop Singh Vs. Ram Singh Major*** (1995) 5 SCC 709 held that if a decree were to create for the first time, right, title or interest in immovable property in favour of any party to the suit, the decree or order would require registration. Subsequently, in ***Som Dev Vs. Rati Ram*** (2006) 10 SCC 788 it was held that it is the duty of the Court in each case to examine whether the parties had a pre-existing right in the immovable property or whether under the order or decree of the Court, one party having right, title or

interest in the immovable property is agreeing to suffer or to extinguish the same and create a right in *praesenti* in an immovable property in favour of another for the first time by compromise or admission. Recently, a Division Bench of the High Court of Hyderabad also in ***K. Bhoom Reddy Vs. The Land Acquisition Officer*** MANU/AP/0150/2015 held that admissions of ownership of immovable property are of no avail as merely on admissions title in immovable property does not stand conferred. Reliance in this regard can also be placed on ***Ammini Tharakan Vs. Lillyjacob*** MANU/KE/1038/2013 (DB), ***Kripa Shanker Pandey Vs. Baij Nath Pandey*** MANU/UP/4048/2010, ***Chandi Prasad Vs. D.D.C., Kanpur*** MANU/UP/2974/2011, ***Pritam Singh Vs. Bohti*** MANU/PH/2480/2014, ***Sukhdevi Vs. Ram Piari*** MANU/PH/0005/2014, ***Sukrit Sahani Vs. Fuchai Sahani*** MANU/BH/1033/2009 (DB) & ***Bachi Devi Vs. Shakuntala Kuer*** MANU/BH/1109/2015.

13. The respondent/plaintiff filed the suit from which this appeal arises pleading (i) that the respondent/plaintiff is the son of the appellant/defendant no.1 from his first marriage with Smt. Dhan Kaur and the appellants/defendants no.2&3 are the son and daughter respectively of the appellant/defendant no.1 from second marriage with Smt. Dhan Devi Mathur; (ii) that the grandfather of the respondent/plaintiff and the father of the

appellant/defendant no.1 namely Shri Sheesh Ram was the owner of the aforesaid land and other properties and died in mid 1980s leaving behind four sons including the appellant/defendant no.1 and two daughters and legal heirs of pre-deceased son; (iii) that till the year 1992 the aforesaid ancestral property was jointly possessed and enjoyed by the sons of Shri Sheesh Ram; however in the year 1992 a partition took place between them and in which the appellant/defendant no.1 got the land subject matter of the present suit; (iv) that the respondent/plaintiff has a right to the extent of 1/4th share, being the grandson of Shri Sheesh Ram, in the said property which the appellant/defendant no.1 had received from his father namely Shri Sheesh Ram; (v) that all the parties to the suit have since 1962s been living in United Kingdom; and, (vi) that the respondent/plaintiff had learnt that the appellants/defendants were intending to sell the said property.

14. A perusal of the aforesaid reproduction of the plaint in the suit from which this appeal arises shows that the deceased respondent/plaintiff claimed share in the property with respect to which partition was claimed solely on the ground of his father i.e. the appellant/defendant no.1 having inherited it from his own father namely Shri Sheesh Ram. The word “ancestral property” was used only to the said limited extent. It was not disclosed from where Shri

Sheesh Ram had obtained the said property. Though while giving the pedigree table of the legal heirs of Shri Sheesh Ram. the word “joint family” was used but it was not the case that there was any joint family.

15. I have in *Neelam Vs. Sada Ram* MANU/DE/0322/2013 and later reiterated in *Shri Naval Kishore Vs. Shri Jugal Kishore* MANU/DE/0978/2013, *Smt. Bala Devi Vs. Sh. Chhotu Ram* MANU/DE/0908/2013, *Rajat Khanna Vs. R.P. Khanna* MANU/DE/0971/2013 and by a Division Bench of this Court of which the undersigned was a part in *Harvinder Singh Chadha Vs. Saran Kaur Chadha* MANU/DE/1457/2014 observed that there is a widespread misconception not only amongst persons not in the know of law but also amongst persons who have studied law that a son has a share in the property inherited by his father from his own father. It is not so after the coming into force of the Hindu Succession Act, 1956. The counsel for the legal heirs of the deceased respondent admits that the parties to the present appeal are also governed by the said law. Though Hindu Succession Act made a change in the law applicable to Hindus in this regard but in the last over half a century, the understanding amongst the masses continues to be of the law as it was prior to

1956 i.e. of a son acquiring a share in the properties inherited by his father from his own father.

16. Shri Sheesh Ram, grandfather of the deceased respondent/plaintiff and father of the appellant/defendant no.1, according to the plaint died in December, 1982 i.e. much after coming into force of the Hindu Succession Act in the year 1956. The properties inherited by the appellant/defendant no.1 from his own father would thus be his personal individual property and the deceased respondent/plaintiff on account of being the son of the appellant/defendant no.1 would not get any share therein.

17. However need for any further discussion in this regard is not felt since this Court in ***Surender Kumar*** supra has elaborately dealt with the matter as under:-

*“5. The Supreme Court around 30 years back in the judgment in the case of **Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others**, (1986) 3 SCC 567, held that after passing of the Hindu Succession Act, 1956 the traditional view that on inheritance of an immovable property from paternal ancestors up to three degrees, automatically an HUF came into existence, no longer remained the legal position in view of Section 8 of the Hindu Succession Act, 1956. This judgment of the Supreme Court in the case of **Chander Sen (supra)** was thereafter followed by the Supreme Court in the case of **Yudhishter Vs. Ashok Kumar**, (1987) 1 SCC 204*

wherein the Supreme Court reiterated the legal position that after coming into force of Section 8 of the Hindu Succession Act, 1956, inheritance of ancestral property after 1956 does not create an HUF property and inheritance of ancestral property after 1956 therefore does not result in creation of an HUF property.

6. In view of the ratios of the judgments in the cases of **Chander Sen (supra)** and **Yudhishter (supra)**, in law ancestral property can only become an HUF property if inheritance is before 1956, and such HUF property therefore which came into existence before 1956 continues as such CS(OS) No.1737/2012 Page 5 of 16 even after 1956. In such a case, since an HUF already existed prior to 1956, thereafter, since the same HUF with its properties continues, the status of joint Hindu family/HUF properties continues, and only in such a case, members of such joint Hindu family are coparceners entitling them to a share in the HUF properties.

7. On the legal position which emerges pre 1956 i.e before passing of the Hindu Succession Act, 1956 and post 1956 i.e after passing of the Hindu Succession Act, 1956, the same has been considered by me recently in the judgment in the case of **Sunny (Minor) & Anr. vs. Sh. Raj Singh & Ors., CS(OS) No.431/2006** decided on 17.11.2015. In this judgment, I have referred to and relied upon the ratio of the judgment of the Supreme Court in the case of **Yudhishter (supra)** and have essentially arrived at the following conclusions:-

(i) If a person dies after passing of the Hindu Succession Act, 1956 and there is no HUF existing at the time of the death of such a person, inheritance of an immovable property of such a person by his successors-in-interest is no doubt inheritance of an

'ancestral' property but the inheritance is as a selfacquired property in the hands of the successor and not as an HUF property although the successor(s) indeed inherits 'ancestral' property i.e a property CS(OS) No.1737/2012 Page 6 of 16 belonging to his paternal ancestor.

(ii) The only way in which a Hindu Undivided Family/joint Hindu family can come into existence after 1956 (and when a joint Hindu family did not exist prior to 1956) is if an individual's property is thrown into a common hotchpotch. Also, once a property is thrown into a common hotchpotch, it is necessary that the exact details of the specific date/month/year etc of creation of an HUF for the first time by throwing a property into a common hotchpotch have to be clearly pleaded and mentioned and which requirement is a legal requirement because of Order VI Rule 4 CPC which provides that all necessary factual details of the cause of action must be clearly stated. Thus, if an HUF property exists because of its such creation by throwing of self-acquired property by a person in the common hotchpotch, consequently there is entitlement in coparceners etc to a share in such HUF property.

(iii) An HUF can also exist if paternal ancestral properties are inherited prior to 1956, and such status of parties qua the properties has continued after 1956 with respect to properties inherited prior to 1956 from paternal ancestors. Once that status and position continues even after 1956; of the HUF and of its properties existing; a coparcener etc will have a right

to seek partition of the properties. CS(OS) No.1737/2012.

(iv) Even before 1956, an HUF can come into existence even without inheritance of ancestral property from paternal ancestors, as HUF could have been created prior to 1956 by throwing of individual property into a common hotchpotch. If such an HUF continues even after 1956, then in such a case a coparcener etc of an HUF was entitled to partition of the HUF property.

8. The relevant paragraphs of the judgment in the case of **Sunny (Minor)** (supra) are paragraphs 6 to 8 and which paras read as under:-

“6. At the outset, it is necessary to refer to the ratio of the judgment of the Supreme Court in the case of **Yudhishter Vs. Ashok Kumar, (1987) 1 SCC 204** and in para 10 of the said judgment the Supreme Court has made the necessary observations with respect to when HUF properties can be said to exist before passing of the Hindu Succession Act, 1956 or after passing of the Act in 1956. This para reads as under:-

‘10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors.

MANU/SC/0265/1986MANU/SC/0265/1986 :
[1986]161ITR370(SC) where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or

*inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. **This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity.** At pages 577 to 578 of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918-919. Shri Banerji relied on the said observations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. **In that view of the matter, it would be difficult to hold that property which developed on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons.** If that be the position then the property which developed upon the father of the*

respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house.” (emphasis is mine)

*7(i). As per the ratio of the Supreme Court in the case of **Yudhishter (supra)** after passing of the Hindu Succession Act, 1956 the position which traditionally existed with respect to an automatic right of a person in properties inherited by his paternal predecessors-in-interest from the latter’s paternal ancestors upto three degrees above, has come to an end. Under the traditional Hindu Law whenever a male ancestor inherited any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him had a right in that property equal to that of the person who inherited the same. Putting it in other words when a person ‘A’ inherited property from his father or grandfather or great grandfather then the property in his hand was not to be treated as a self-acquired property but was to be treated as an HUF property in which his son, grandson and great grandson had a right equal to ‘A’. After passing of the Hindu Succession Act, 1956, this position has undergone a change and if a person after 1956 inherits a property from his paternal ancestors, the said property is not an HUF property in his hands and the property is to be taken as a self-acquired property of the person who inherits the same. There are two exceptions to a property inherited by such a person being and remaining self-acquired in his hands, and which will be either an HUF and its properties was existing even prior to the passing of the Hindu Succession*

Act, 1956 and which Hindu Undivided Family continued even after passing of the Hindu Succession Act, 1956, and in which case since HUF existed and continued before and after 1956, the property inherited by a member of an HUF even after 1956 would be HUF property in his hands to which his paternal successors-in-interest upto the three degrees would have a right. The second exception to the property in the hands of a person being not self-acquired property but an HUF property is if after 1956 a person who owns a self-acquired property throws the self-acquired property into a common hotchpotch whereby such property or properties thrown into a common hotchpotch become Joint Hindu Family properties/HUF properties. In order to claim the properties in this second exception position as being HUF/Joint Hindu Family properties/properties, a plaintiff has to establish to the satisfaction of the court that when (i.e date and year) was a particular property or properties thrown in common hotchpotch and hence HUF/Joint Hindu Family created.

(ii) This position of law alongwith facts as to how the properties are HUF properties was required to be stated as a positive statement in the plaint of the present case, but it is seen that except uttering a mantra of the properties inherited by defendant no.1 being 'ancestral' properties and thus the existence of HUF, there is no statement or a single averment in the plaint as to when was this HUF which is stated to own the HUF properties came into existence or was created ie whether it existed even before 1956 or it was created for the first time after 1956 by throwing the property/properties into a common hotchpotch. This aspect and related aspects in detail I am discussing hereinafter.

8(i). A reference to the plaint shows that firstly it is stated that Sh. Tek Chand who is the father of the defendant no.1 (and grandfather of Sh. Harvinder Sejwal and defendants no.2 to 4) inherited various ancestral properties which became the basis of the Joint Hindu Family properties of the parties as stated in para 15 of the plaint. In law there is a difference between the ancestral property/properties and the Hindu Undivided Family property/properties for the pre 1956 and post 1956 position as stated above because inheritance of ancestral properties prior to 1956 made such properties HUF properties in the hands of the person who inherits them, but if ancestral properties are inherited by a person after 1956, such inheritance in the latter case is as self-acquired properties unless of course it is shown in the latter case that HUF existed prior to 1956 and continued thereafter. It is nowhere pleaded in the plaint that when did Sh. Tek Chand father of Sh. Gugan Singh expire because it is only if Sh. Tek Chand father of Sh. Gugan Singh/defendant no.1 had expired before 1956 only then the property which was inherited by Sh. Gugan Singh from his father Sh. Tek Chand would bear the character of HUF property in the hands of Sh. Gugan Singh so that his paternal successors-in-interest became coparceners in an HUF. Even in the evidence led on behalf of the plaintiffs, and which is a single affidavit by way of evidence filed by the mother of the plaintiffs Smt. Poonam as PW1, no date is given of the death of Sh. Tek Chand the great grandfather of the plaintiffs. In the plaint even the date of the death of the grandfather of the plaintiffs Sh. Gugan Singh is missing. As already stated above, the dates/years of the death of Sh. Tek Chand and Sh. Gugan Singh were very material and crucial to determine the automatic creation of HUF

because it is only if Sh. Tek Chand died before 1956 and Sh. Gagan Singh inherited the properties from Sh. Tek Chand before 1956 that the properties in the hands of Sh. Gagan Singh would have the stamp of HUF properties. Therefore, in the absence of any pleading or evidence as to the date of the death of Sh. Tek Chand and consequently inheriting of the properties of Sh. Tek Chand by Sh. Gagan Singh, it cannot be held that Sh. Gagan Singh inherited the properties of Sh. Tek Chand prior to 1956.

*(ii) In fact, on a query put to the counsels for the parties, counsels for parties state before this Court that Sh. Gagan Singh expired in the year 2008 whereas Sh. Tek Chand died in 1982. Therefore, if Sh. Tek Chand died in 1982, inheriting of properties by Sh. Gagan Singh from Sh. Tek Chand would be self-acquired in the hands of Sh. Gagan Singh in view of the ratio of the Supreme Court in the case of **Yudhister (supra)** inasmuch as there is no case of the plaintiffs of HUF existing before 1956 or having been created after 1956 by throwing of property/properties into common hotchpotch either by Sh. Tek Chand or by Sh. Gagan Singh/defendant no.1. There is not even a whisper in the pleadings of the plaintiffs, as also in the affidavit by way of evidence filed in support of their case of PW1 Smt. Poonam, as to the specific date/period/month/year of creation of an HUF by Sh. Tek Chand or Sh. Gagan Singh after 1956 throwing properties into common hotchpotch.*

(iii) The position of HUF otherwise existing could only be if it was proved on record that in the lifetime of Sh. Tek Chand a Hindu Undivided Family before 1956 existed and this HUF owned properties include the property bearing no.93, Village Adhichini, Hauz Khas. However, a reference to the affidavit by way of evidence filed by PW1 does not

show any averments made as to any HUF existing of Sh. Tek Chand, whether the same be pre 1956 or after 1956. Only a self-serving statement has been made of properties of Sh. Gugan Singh being 'ancestral' in his hands, having been inherited by him from Sh. Tek Chand, and which statement, as stated above, does not in law mean that the ancestral property is an HUF property."

9. *I would like to further note that it is not enough to aver a mantra, so to say, in the plaint simply that a joint Hindu family or HUF exists. Detailed facts as required by Order VI Rule 4 CPC as to when and how the HUF properties have become HUF properties must be clearly and categorically averred. Such averments have to be made by factual references qua each property claimed to be an HUF property as to how the same is an HUF property, and, in law generally bringing in any and every property as HUF property is incorrect as there is known tendency of litigants to include unnecessarily many properties as HUF properties, and which is done for less than honest motives. Whereas prior to passing of the Hindu Succession Act, 1956 there was a presumption as to the existence of an HUF and its properties, but after passing of the Hindu Succession Act, 1956 in view of the ratios of the judgments of the Supreme Court in the cases of **Chander Sen** (*supra*) and **Yudhishter** (*supra*) there is no such presumption that inheritance of ancestral property creates an HUF, and therefore, in such a post 1956 scenario a mere ipse dixit statement in the plaint that an HUF and its properties exist is not a sufficient compliance of the legal requirement of creation or existence of HUF properties inasmuch as it is necessary for existence of an HUF and its properties that it must be specifically stated that as to whether the HUF came into existence before 1956 or after 1956 and if so how and in what manner giving all requisite factual*

details. It is only in such circumstances where specific facts are mentioned to clearly plead a cause of action of existence of an HUF and its properties, can a suit then be filed and maintained by a person claiming to be a coparcener for partition of the HUF properties.

10. A reference to the plaint in the present case shows that it is claimed that ownership of properties by late Sh. Jage Ram in his name was as joint Hindu family properties. Such a bald averment in itself cannot create an HUF unless it was pleaded that late Sh. Jage Ram inherited the properties from his paternal ancestors prior to 1956 or that late Sh. Jage Ram created an HUF by throwing his own properties into a common hotchpotch. These essential averments are completely missing in the plaint and therefore making a casual statement of existence of an HUF does not mean the necessary factual cause of action, as required in law, is pleaded in the plaint of existence of an HUF and of its properties.

11. I may note that the requirement of pleading in a clear cut manner as to how the HUF and its properties exist i.e whether because of pre 1956 position or because of the post 1956 position on account of throwing of properties into a common hotchpotch, needs to be now mentioned especially after passing of the Benami Transaction (Prohibition) Act, 1988 (hereinafter referred to as 'the Benami Act') and which Act states that property in the name of an individual has to be taken as owned by that individual and no claim to such property is maintainable as per Section 4(1) of the Benami Act on the ground that monies have come from the person who claims right in the property though title deeds of the property are not in the name of such person. An exception is created with respect to provision of Section 4 of the Benami Act by its sub-Section (3) which allows existence of the concept of HUF. Once existence of the concept

of HUF is an exception to the main provision contained in sub-Sections (1) and (2) of Section 4 of the Benami Act, then, to take the case outside sub-Sections (1) and (2) of Section 4 of the Benami Act it has to be specifically pleaded as to how and in what manner an HUF and each specific property claimed as being an HUF property has come into existence as an HUF property. If such specific facts are not pleaded, this Court in fact would be negating the mandate of the language contained in sub Sections (1) and (2) of Section 4 of the Benami Act.

12. *This Court is flooded with litigations where only self-serving averments are made in the plaint of existence of HUF and a person being a coparcener without in any manner pleading therein the requisite legally required factual details as to how HUF came into existence. It is a sine qua non that pleadings must contain all the requisite factual ingredients of a cause of action, and once the ratios of the judgments of the Supreme Court in the cases of **Chander Sen (supra)** and **Yudhishter (supra)** come in, the pre 1956 position and the post 1956 position has to be made clear, and also as to how HUF and its properties came into existence whether before 1956 or after 1956. It is no longer enough to simply state in the plaint after passing of the Hindu Succession Act 1956, that there is a joint Hindu family or an HUF and a person is a coparcener in such an HUF/joint Hindu family for such person to claim rights in the properties as a coparcener unless the entire factual details of the cause of action of an HUF and each property as an HUF is pleaded.”*

18. The aforesaid dicta applies squarely to the present controversy.

19. A perusal of the impugned judgment and preliminary decree shows that the learned ADJ also, inspite of noting that the appellant/defendant no.1 was

questioning even the maintainability of the suit on the ground that during his lifetime, his son i.e. the respondent/plaintiff could not claim partition of the property, proceeded on the misconception that the father i.e. the appellant/defendant no.1 having inherited the property from his own father, the respondent/plaintiff as a son had a share.

20. The counsel for the legal heirs of the deceased respondent has raised yet another submission. It is contended that since the deceased respondent was born in the year 1952 i.e. prior to the coming into force of the Hindu Succession Act, 1956, he would get a share in the properties of his grandfather by birth.

21. I am afraid there is no merit in the said contention also. Without the respondent/plaintiff having pleaded and proved and which he has not that there was any coparcenery or Hindu Undivided Family (HUF) which owned the property aforesaid, the question of the deceased respondent/plaintiff acquiring any share in the property does not arise. The contention of the deceased respondent/plaintiff on birth acquiring a share in a property held by his grandfather Shri Sheesh Ram in his individual capacity, is not sustainable in law. Moreover, that was not the case with which the deceased respondent/plaintiff had approached the Court. His claim was merely on the

basis of his father i.e. the appellant/defendant no.1 having acquired the property on the demise of his own father i.e. Shri Sheesh Ram in 1982.

22. No other argument has been urged.

23. The appeal is accordingly allowed. The impugned judgment dated 5th May, 2010 and the preliminary decree for partition are set aside as the deceased respondent/plaintiff is not found to be having any share in the property of which partition was claimed. Resultantly all proceedings before the Trial Court in pursuance to the preliminary decree for partition, also are of no avail. However I refrain from imposing costs.

24. Decree sheet be drawn.

RAJIV SAHAI ENDLAW, J

FEBRUARY 09, 2016

‘pp’..