

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

+ **CS (OS) No.22/2010**

% **04th April, 2016.**

SHRI RAVINDER SINGH SUR Plaintiff
Through: Mr.Rishi Gupta, Adv.

versus

SHRI BALVINDER SINGH & ANR. Defendants
Through: Mr. Vipin Kumar, Adv.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. On 21.01.2016 after restoring of the suit, the issue arose with respect to maintainability of the suit in view of the judgment delivered in the case of ***Surender Kumar Vs. Dhani Ram and Ors., 227 (2016) DLT 217*** and hence by the Order dated 21.01.2016 plaintiff was accordingly put to notice as under:

“I.A. No.15394/2014 (under Order 9 Rule 9 CPC filed by the plaintiff)

1. No one appears for the non-applicants/defendants. By this application, plaintiff seeks restoration of the suit which was dismissed in default on 1.5.2014. The ground which is stated of restoration is that on the concerned date, the present Advocate of the plaintiff and who was also the Advocate on 1.5.2014 had to go to hospital and hence

he had asked a colleague to appear but he failed to appear resulting in dismissal of the suit. The application is supported by the personal affidavit of the counsel for the plaintiff Mr. Rishi Manchanda, Advocate.

2. Accordingly, for the reasons stated in the application, the same is allowed and the suit is restored to its original number.

I.A. stands disposed of.

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3. The suit as framed is not maintainable. Plaintiff is only a grandson of late Sh. Kartar Singh Sur and Smt. Surjit Kaur, and once there are class I legal heirs of the grandparents including the father of the plaintiff, the plaintiff who is grandson cannot have right to the properties of the grandparents.

4. Counsel for the plaintiff, at this stage, states that plaintiff has filed an application to amend the plaint being I.A. No.5718/2014 and as per which averments are made with respect to existence of HUF, however, existence of HUF besides being a totally separate cause of action for bringing in a totally new case and which is *prima facie* barred by Order 6 Rule 17 of Code of Civil Procedure, 1908 (CPC), but, even if we take the amended plaint, the suit would be barred in view of the judgment delivered by this Court in the case titled as ***Sh. Surender Kumar Vs. Sh. Dhani Ram and Others*** in CS(OS) No.1737/2012 decided on 18.1.2016.

5. Counsel for the plaintiff has accordingly been put to notice with respect to non-maintainability of the suit. Counsel for the plaintiff states that he has not brought the suit file today and the suit file was returned to the plaintiff on a misconception that this suit has to be transferred on account of lack of pecuniary jurisdiction and therefore adjournment is prayed.

6. Though this suit is adjourned, it is made clear that no adjournment shall be granted on the next date of hearing. List on 12th February, 2016.” (underlining added)

2. A reading of the Order dated 21.01.2016 shows that on 21.01.2016 the matter was adjourned to 12.02.2016 making it clear that no adjournment shall be granted on the next date i.e 12.2.2016.

3. On 12.02.2016 however, no one appeared on behalf of the plaintiff and therefore, the matter was renotified for today in the interest of justice. Once again today, adjournment is sought on behalf of the plaintiff, and which is very strongly opposed by the defendant stating that this is harassment of the defendant because the suit as framed is not maintainable inasmuch as the plaintiff cannot claim a share in the properties which belonged to his grandfather Sh. Kartar Singh Sur inasmuch as the two defendants are the living sons of Sh. Kartar Singh Sur, with the defendant No.2 being the father of the plaintiff. Defendants also drew the attention of this Court to the judgments of the Supreme Court in the cases of *Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others (1986) 3 SCC 567* and *Yudhishter Vs. Ashok Kumar (1987) 1 SCC 204* and which lay down a ratio that inheritance of ancestral property by a person after 1956 is inheritance as a self-acquired property and not as an HUF property. It is argued that in the present case, grandfather Sh. Kartar Singh Sur died in the year 2009 i.e after passing of the Hindu Succession Act, 1956, and therefore, once the defendants who are the sons of Sh. Kartar Singh Sur are alive, a grandson

being the plaintiff, son of defendant no.2 cannot claim any right in the suit properties belonging to Sh. Kartar Singh Sur.

4. I have considered all the aspects which are in issue in the present suit in the judgment in the case of *Surender Kumar (supra)* and the relevant paragraphs of this judgment are paras 4 to 12 and which paras read as under:

“4. Plaintiff claims that as a son of defendant no.1 and as a grandson of late Sh. Jage Ram, plaintiff is entitled to his share as a coparcener in the aforesaid suit properties on the ground that the properties when they were inherited by late Sh. Jage Ram were joint family properties, and therefore, status as such of these properties as HUF properties have continued thereby entitling the plaintiff his rights in the same as a coparcener.

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 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 self-acquired 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 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.

(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/0265/1986 MANU/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. Guran Singh expire because it is only if Sh. Tek Chand father of Sh. Guran Singh/defendant no.1 had expired before 1956 only then the property which was inherited by Sh. Guran Singh from his father Sh. Tek Chand would bear the character of HUF property in the hands of Sh. Guran Singh so that his paternal successors-in-interest became co-parceners 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. Guran Singh is missing. As already stated above, the dates/years of the death of Sh. Tek Chand and Sh. Guran 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. Gudan Singh inherited the properties from Sh. Tek Chand before 1956 that the properties in the hands of Sh. Gudan 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. Gudan Singh, it cannot be held that Sh. Gudan 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. Gudan 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. Gudan Singh from Sh. Tek Chand would be self-acquired in the hands of Sh. Gudan 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. Gudan 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. Gudan 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. Gudan 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.”

(underlining added)

5. I may note that as per the pleadings in the present suit, there is no averment even with respect to an HUF and all that is stated is that the properties are ancestral properties. In the judgment in the case of *Sunny (Minor) and Ors. Vs. Raj Singh and Ors., 225 (2015) DLT 211* and relevant portions of which have been cited in the case of *Surender Kumar (supra)*, it has been held by this Court that ancestral property is not automatically an HUF property. In the judgment in the case of *Surender Kumar (supra)*, this Court has gone one step further and observed that a bland plea of an HUF property existing, and which plea is on a better footing/averment than the averments of mere ancestral property will also not take the case of the plaintiff seeking partition further and that even such a suit is liable to be dismissed.

6. Since in the present case, the only cause of action pleaded in the plaint is that the plaintiff claims ownership to the properties of his grandfather Sh. Kartar Singh Sur, and which properties are said to be ancestral properties which have devolved upon the sons of Sh. Kartar Singh Sur i.e the defendants, with defendant no.2 being the father of the plaintiff, the plaintiff cannot have any legal right to the properties which are inherited by the defendants/sons of Sh. Kartar Singh Sur, and which sons of Sh. Kartar Singh Sur are alive, as they have inherited the properties as their self-acquired properties and not as HUF in their hands for the plaintiff to claim any share in such properties.

7. The suit is accordingly dismissed. Parties are left to bear their own costs.

VALMIKI J. MEHTA, J

APRIL 04, 2016
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