

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

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Date of decision: 25th April, 2017

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CS(OS) No.1361/2008

JANAK RAJ CHOUDHARY

.... Plaintiff

Through: Mr. Swastik Singh and Mr. Himanshu
Dagar, Advs.

Versus

RAJENDER PRAKASH CHOUDHARY & ORS.Defendants

Through: None.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff, a minor acting through his mother, instituted this suit pleading (i) that the defendant no.1 father of the plaintiff has abandoned the plaintiff, the plaintiff's mother and the plaintiff's sister, and is in illegitimate relationship with defendant no.7 Nitasha; (ii) that the defendant no.2 Prashant Choudhary is the brother of the plaintiff; (iii) Daya Ram Chaudhary, late paternal grandfather of the plaintiff and the father of the defendants no.1, owned various moveable and immoveable properties mostly consisting of land and farmhouses in Delhi, Rajasthan and Haryana; (iv) Daya Ram Chaudhary, paternal grandfather of the plaintiff, besides the defendant no.1 had three other sons; (v) Daya Ram Chaudhary, paternal grandfather of the plaintiff died intestate on 23rd September, 1999 and as such properties left by him were inherited by defendant no.1, his two brothers and legal heirs of another brother; the paternal grandmother of the plaintiff was also alive at that time, though died on 7th October, 2004; (vi) that the estate of Daya Ram Chaudhary paternal grandfather of the plaintiff was divided amongst his three sons and the legal heirs of the fourth son; (vii) that the plaintiff and his brother defendant no.2

being the sons of the defendant no.1 also had right over the 1/4th share of ancestral / Hindu Undivided Family (HUF) property inherited by the defendant no.1, being co-parceners under the law; (viii) all the properties purchased / acquired by Daya Ram Chaudhary paternal grandfather of the plaintiff were HUF properties and were purchased in the names of various family members who were to be in HUF; (ix) that in the 1/4th share in the estate of Daya Ram Chaudhary inherited by defendant no.1, the plaintiff and the defendant no.2 and defendant no.1 have 1/3rd share each; (x) that the plaintiff is thus entitled to lawful partition of his 1/12th share in the whole estate left by Daya Ram Chaudhary, paternal grandfather of the plaintiff; (xi) that as many as 12 immovable properties listed in para 9 of the plaint were inherited by defendant no.1 from Daya Ram Chaudhary, paternal grandfather of the plaintiff; (xii) however defendant no.1 started selling, transferring, alienating and disposing of the properties so inherited by him; (xiii) that the defendant no.1 has so sold the properties to defendant no.3 Ved Parkash, defendant no.4 Ramesh Bhatia, defendant no.5 Rajender Singh, defendant no.6 Karnail Singh and defendant no.7 Nitasha as per particulars given in para 16 of the plaint; (xiv) that the properties being joint, the defendant no.1 had no right to sell the same; (xv) that Daya Ram Chaudhary paternal grandfather of the plaintiff was also the Managing Director of Qutab Properties Limited which company also owned several properties but particulars whereof are not in the knowledge of the plaintiff; (xvi) that the plaintiff demanded partition which was denied; (xvii) that the plaintiff previously instituted CS(OS) No.155/2006 for partition of the properties and to restrain the defendant no.1 from dealing with the properties but due to family influence and on the oral undertaking given by the defendant

no.1 that he will sever all relationships with other women in his life and take care of the plaintiff and would not dispose of the properties, the suit was withdrawn to save the family pride; (xviii) however the defendant no.1 broke his promise and continues to live with defendant no.7 Nitasha; and, (xix) the plaintiff is in possession of two properties and is apprehensive that the defendant no.1 will sell the same also.

2. Hence this suit (i) for a direction to the defendant no.1 to provide to the plaintiff the details of the estate left by Daya Ram Chaudhary paternal grandfather of the plaintiff and the manner of distribution thereof amongst the legal heirs of Daya Ram Chaudhary; (ii) for a direction to the defendant no.1 to provide details of accounts of the 1/4th share received by him in the estate of Daya Ram Chaudhary paternal grandfather of the plaintiff; (iii) for partition by metes and bounds of the said estate inherited by defendant no.1 from Daya Ram Chaudhary paternal grandfather of the plaintiff; (iv) for permanent injunction to restrain the defendants from dealing with the properties; and, (v) for cancellation of the transfers effected by the defendant no.1 in favour of defendants no.3 to 7.

3. Vide order dated 31st July, 2008 the plaint was registered and summons issued to the defendants no.1 to 3 & 7 only and not against the defendants no.4 to 6. Vide the same order the defendant no.1 was also restrained from selling, alienating or creating third party interest in respect of property bearing no.32, Empire Estate, M.G. Road, Sultanpur, Delhi and 39, Gadaipur, Mehrauli, New Delhi.

4. Separate written statements were filed by the defendant no.1, defendant no.2 and defendant no.3 only and to which replications have been filed by the plaintiff.

5. Defendant no.7 Nitasha though appeared but did not file any written statement and thereafter stopped appearing and was vide order dated 12th January, 2009 proceeded against *ex parte*.

6. The defendant no.2 also stopped appearing and was on 27th April, 2009 proceeded against *ex parte*.

7. The defendant no.1 in his written statement has *inter alia* pleaded (i) that the plaintiff as the son of the defendant no.1 has no share in the estate inherited by the defendant no.1 from his own father; reference is made to ***Commissioner of Wealth Tax, Kanpur Vs. Chander Sen*** AIR 1986 SC 1753; (ii) the plaintiff has no right to seek partition of the properties belonging to late Daya Ram Chaudhary as these properties were self acquired properties and defendant no.1 has inherited the properties by virtue of registered Will dated 15th January, 1992 left by late Daya Ram Chaudhary; (iii) that pursuant to the registered Will, there has been an oral partition and mutual family settlement between the heirs of late Daya Ram Chaudhary; (iv) that the suit is not maintainable; (v) that the suit is barred by provisions of Order XXIII Rule 1 and Order II Rule 2 of the Code of Civil Procedure, 1908 (CPC); (vi) the plaintiff though has impleaded two of the sons of late Daya Ram Chaudhary as defendants no.1&3 but has not impleaded the other two sons / their heirs of late Daya Ram Chaudhary; (vii) that the suit is not properly valued for the purpose of court fees and jurisdiction; (viii) though all properties of late Daya Ram Chaudhary were self acquired but

late Daya Ram Chaudhary had created an HUF comprising of his sons and had put his properties into HUF assets for Income Tax purposes; (ix) that in terms of the registered Will dated 15th January, 1992 of late Daya Ram Chaudhary the properties have been inherited; (x) that the defendant no.3 has paid other sons / his brothers cash equivalent to their respective share in the properties left behind by late Daya Ram Chaudhary and has become the sole owner in possession of the immovable properties mentioned in para 4 of the brief facts in the written statement; (xi) the other heirs of late Daya Ram Chaudhary have vide registered Release Deed dated 21st April, 2005 released their shares in the said properties in favour of defendant no.3; (xii) that the defendant no.3 has sold one of the properties to the defendant no.4 Ramesh Bhatia; (xiii) that all the heirs of late Daya Ram Chaudhary, before the oral partition amongst themselves, on 31st January, 2000 sold their respective shares in another property to the defendant no.5 Rajender Singh; (xiv) six farmhouses have also been sold to other persons who are not parties to the suit; (xv) denying that the defendant no.1 has abandoned the plaintiff or his mother and sister; (xvi) that the defendant no.1 in his written statement to CS(OS) No.155/2006 earlier filed by the defendant no.2 herein and the plaintiff mentioned all the aforesaid facts; an application for amendment of the plaint in that suit to implead defendants no.4 & 5 herein was filed but was declined on 1st February, 2007 and which order was allowed to attain finality; that realizing the non-maintainability of that suit, an application under Order XXIII Rule 1 of the CPC was filed by the plaintiff in that suit for withdrawal of the suit and no liberty was sought to re-file the suit; the Court after satisfying itself on 31st July, 2007 granted leave to withdraw the suit and no liberty was granted to sue again; (xvii) reference is

made to *Sarguja Transport Service Vs. S.T.A.T.* (1987) 1 SCC 5; (xviii) that the cause of action in CS(OS) No.155/2006 and in this suit is the same; and, (xix) denying that all the properties purchased / acquired by late Daya Ram Chaudhary were HUF properties.

8. The defendant no.2 in his written statement has supported the case of the plaintiff.

9. The defendant no.3 has contested the suit on the same lines as the defendant no.1.

10. In the aforesaid state of pleadings, the following issues were framed on 20th July, 2009:-

- “i.) Whether the suit property is part of the Hindu undivided family property owned by the grand father of the plaintiff? (OPP)*
- ii.) Whether the plaintiff is entitled to partition of the property and to what extent? (OPP)*
- iii.) Whether the property acquired by defendant no.1 is his absolute property? (OPD)*
- iv.) Whether the suit is barred under Order 2 Rule 2 CPC? (OPD)*
- v.) Relief.”*

and the suit posted for trial.

11. The plaintiff on attaining majority applied and was vide order dated 3rd March, 2014 permitted to continue the suit in his individual capacity.

12. During the minority of the plaintiff affidavit by way of examination-in-chief of Kalpana Chaudhary mother of the plaintiff was filed. The plaintiff however after attaining majority has filed his own affidavit by way of examination-in-chief and given up his mother as his witness.

13. The Joint Registrar in his order dated 14th March, 2017 has recorded that one more opportunity was sought by the plaintiff to summon the official witness. The Joint Registrar however observed that the matter is pending for plaintiff's evidence since 7th September, 2009 and more than seven years had passed since then; that the plaintiff on earlier occasions had been given last opportunity and had availed of more than sufficient opportunity to conclude his evidence. It is further recorded that none has been appearing for the defendants for the last several dates. The Joint Registrar accordingly closed the plaintiff's evidence and ordered the matter to be placed before this Bench.

14. As aforesaid, the suit was entertained only against the defendants no.1,2,3 and 7. Summons even of the suit were not issued to the defendants no.4 to 6 and which order of refusal of issuance of summons to defendants no.4 to 6 has attained finality. Of the defendants no.1,2,3 & 7 also, defendant no.7 as aforesaid was proceeded against *ex parte* on 12th January, 2009 and the defendant no.2 supports the plaintiff.

15. The defendants no.1&3 are now proceeded against *ex parte*.

16. The counsel for the plaintiff on being asked to satisfy this Court of the share of the plaintiff in the properties inherited by his father (defendant no.1) from his own father, particularly in the light of **Chander Sen** supra and recent pronouncements of this Court in **Harvinder Singh Chadha Vs. Saran Kaur**

Chadha 2014 SCC OnLine Del 3413 (DB), *Satyawati Vs. Suraj Bhan* 2017 SCC OnLine Del 7961 and *Surender Kumar Vs. Dhani Ram* (2016) 227 DLT 217 contended that in the present case the existence of HUF had been admitted and sought liberty to file written submissions. Accordingly the file was ordered to be taken up in Chamber for dictation. The counsel for the plaintiff filed written submissions which have been perused.

17. Besides the unrebutted evidence of the plaintiff himself, the counsel for defendants no.1&3 during admission / denial on 15th May, 2009 admitted four documents of the plaintiff on which exhibit PX-1 to PX-4 were put. These documents are (i) certified copy of the written statement filed by defendant no.1, defendant no.3 and the other legal heirs of late Daya Ram Chaudhary in CS(OS) No.155/2006 earlier filed by the plaintiff and defendant no.2; (ii) certified copy of the application filed by the plaintiff and the defendant no.2 for withdrawal of CS(OS) No.155/2006; and, (iii) the order dated 31st July, 2007 in CS(OS) No.155/2006 of dismissal of the suit as withdrawn leaving the parties to bear their own costs (though the order dated 15th May, 2009 records four documents to have been admitted but no exhibit P-4 / PX4 is to be found on the file). The plaintiff also during admission / denial on 14th May, 2009 admitted certified copy of the order dated 1st February, 2007 in CS(OS) No.155/2006 dismissing the application of the plaintiff and the defendant no.2 as plaintiffs in that suit for amendment of the plaint and certified copy of the plaint in CS(OS) No.155/2006 earlier filed by the plaintiff and the defendant no.2.

18. The plaintiff in his replication to the written statements of the defendants no.1&3, qua the plea of the suit being barred by Order XXIII Rule 1 of the CPC

has merely reiterated that the plaintiff and the defendant no.2 were prevailed upon by the defendant no.1 to withdraw that suit.

19. As far as the reliefs claimed in this suit of setting aside of the transfers of the properties in favour of defendants no.4 to 6 are concerned, the suit having not even been entertained qua the defendants no.4 to 6, the question of the plaintiff being entitled to the said reliefs does not arise. The suit qua the said reliefs is thus dismissed.

20. The plaintiff in his unrebutted affidavit by way of examination-in-chief has merely reiterated the contents of the plaint and has put exhibit marks PW-1/B and PW-1/C on the photocopies claimed to be *jamabandis* containing details of the few land owned by Daya Ram Chaudhary. The said documents cannot be said to have been proved in accordance with law. Reference if any required can be made to (i) ***United India Insurance Co. Ltd. Vs. Anbari*** (2000) 10 SCC 523; (ii) ***Ram Suresh Singh Vs. Prabhat Singh*** (2009) 6 SCC 681; (iii) ***N. Srihari Vs. N. Prakash*** (2010) 14 SCC 460; (iv) ***Shalimar Chemical Works Ltd. Vs. Surendra Oil & Dal Mills*** (2010) 8 SCC 423; and, (v) ***Biswajit Chakraborty Vs. Mira Sen Ray*** 2002 SCC OnLine Cal 283. The plaintiff has also put PW-1/D on a list of details of lands in Haryana claimed to have been owned by Daya Ram Chaudhary. The said list cannot also be said to be proof of title in the lands in Haryana alleged to have been owned by Daya Ram Chaudhary.

21. Exhibit PW-1/F to PW-1/H have been put in the affidavit by way of examination-in-chief of the plaintiff on the photocopies of some sale deeds. One of the said sale deeds is executed by Qutab Properties (P) Limited through

its Managing Director Daya Ram Chaudhary and the other two by Daya Ram Chaudhary himself. Neither of the said sale deeds is proved in accordance with law. Even otherwise they do not advance the case of the plaintiff any further as they are executed by Daya Ram Chaudhary himself and the plaintiff in the plaintiff has not challenged the alienation by Daya Ram Chaudhary himself.

22. The plaintiff in his examination-in-chief has put exhibit PW-1/J on a photocopy of a sale deed shown to have been executed by defendant no.1 in favour of defendant no.7 on 2nd January, 2008. Though the said sale deed also is not proved in accordance with law but the question of the plaintiff being entitled to challenge the said sale deed would arise only if the plaintiff first proves the property sold thereunder to be property of any HUF of which plaintiff can be said to be a member. Exhibit PW-1/N and Exhibit PW-1/O have been put at sale deeds in favour of defendant no.1 and defendant no.3 of house no.32, Empire Estate, M.G. Road, Sultanpur, Delhi of which the plaintiff claims to be in possession and Release Deed executed by defendant no.1 and other legal heirs of Daya Ram Chaudhary in favour of defendant no.3 of their shares in certain amounts.

23. As far as the first of the said documents is concerned, the sale deed, though not proved, shows that 32, Empire Estate, M.G. Road, Sultanpur, Delhi in which the plaintiff claims to be residing was not inherited by the father of the plaintiff from his own father but has been acquired by the father of the plaintiff i.e. defendant no.1 in his own name. The question of the plaintiff getting any share therein does not arise. Similarly the plaintiff can challenge the Release Deed executed by his father only if has a right as a member of the HUF.

24. That brings me to the main controversy. The plaintiff as aforesaid relied only on admission in the written statement of defendants no.1&3 of Daya Ram Chaudhary having created an HUF for Income Tax purpose. The plaintiff has however failed to prove as to which of the properties with respect to which reliefs are claimed in the suit was owned by the said HUF. This Court in ***Sangeeta Vs. Ramphool*** (2016) SCC OnLine Del 5774 and ***Jagdish Singhal Vs. Ram Bhaj Bansal*** (2017) SCC OnLine Del 8031 has held the detailed pleadings required to be made in this context. The plaintiff has not proved any Income Tax records or any other records to show that any of the properties qua which reliefs are claimed was HUF property. Merely from admission of creation of HUF it cannot be inferred that all the properties qua which relief is claimed were of the HUF.

25. The plaintiff along with his written submissions has filed photocopies of three judgments i.e. (i) ***State of Maharashtra Vs. Narayan Rao Sham Rao Deshmukh*** (1985) 2 SCC 321; (ii); ***Vineeta Sharma Vs. Rakesh Sharma*** 2013 (139) DRJ 244; and, (iii) ***Narainsingh Vs. Amraram*** MANU/RH/0408/1992 on the aspect of HUF but without the plaintiff first establishing that any of the properties were of the HUF, the plaintiff cannot avail any benefit thereof.

26. The plaintiff, in his written submissions, with respect to issue no.(iv) contended that the onus was on the defendants and the defendants have failed to discharge the same.

27. I am unable to agree.

28. The plaintiff has thus under issue no.(i) failed to prove that the properties qua which the suit is filed were part of the HUF of his grandfather. The said issue is thus decided against the plaintiff.

29. Axiomatically, issue no.(ii) is also decided against the plaintiff.

30. Without the plaintiff showing that any of the properties inherited by his father defendant no.1 from his own father was of the HUF of the paternal grandfather of the plaintiff, the personal properties of the grandfather dying in the year 2001 would be inherited by the father of the plaintiff as individual properties as per the law already cited above and the plaintiff will have no share therein.

31. According to me the present suit is barred under Order XXIII Rule 1 of the CPC also. The plaintiff having unequivocally withdrawn the earlier suit on the same cause of action and which was defended by the defendants no.1&3 on the same lines as this suit, is not entitled to maintain the same suit. Reference in this regard can be made to (i) *Sarguja Transport Service Vs. State Transport Appellate Tribunal* (1987) 1 SCC 5; (ii) *Raje Bala Vs. Pankaj* (1989) SCC OnLine Del 320; and, (iii) *Laxmidas Ramji Vs. Lohana Bai Savita Tulsidas* AIR 1970 Guj 73 (DB). The plaintiff has also failed to prove the reasons stated for withdrawal of the earlier suit.

32. Resultantly the suit is dismissed, I refrain from imposing any costs.

RAJIV SAHAI ENDLAW, J.

APRIL 25, 2017

‘pp’..

(Corrected and released on 27th May, 2017).