

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

+ **FAO No.194/2015**

% **Reserved on: 5th September, 2017**
Pronounced on: 8th September, 2017

KAPIL KUMAR AND ORS. Appellants

Through: Mr. Surender Chauhan,
Advocate

versus

MISHRO DEVI & ORS. Respondents

Through: Dr. (Major) J.C. Vashista,
Advocate with Ms. Yashika
Sood, Advocate for R-1 & R-2
Mr. G.S. Parasher, Adv. for R-3
& 4.
Mrs. Alpana malik and
Mr. Prashant Bhardwaj,
Advocates for R-5.
Mr. Manoj Lohat, Advocate for
R-6.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. This first appeal is filed under Order XLIII (1)(r) of the Code of Civil Procedure, 1908 (CPC) by the plaintiffs in the suit impugning the order of the trial court dated 23.02.2015 by which the trial court has dismissed the injunction application filed by the

appellants/plaintiffs under Order XXXIX Rules 1 and 2 CPC. Disputes pertain to the property bearing No.8706, Model Basti, Sidipura, Karol Bagh, New Delhi.

2.(i) There are a total of six plaintiffs in the suit. First three plaintiffs are the children of Sh. Ashok Kumar son of Sh. Manohar Lal and Smt. Mishro Devi. Plaintiff nos.4 to 6 are the children of Sh. Arjun Kumar son of Sh. Manohar Lal and Smt. Mishro Devi.

(ii) The father of the plaintiff nos.1 to 3, namely Sh. Ashok Kumar is defendant no.4 in the suit. The father of the plaintiff nos.4 to 6 Sh. Arjun Kumar is defendant no.3 in the suit. Smt. Mishro Devi, grandmother of the plaintiffs and the mother of defendant nos.3 and 4 is the defendant no.1 in the suit. Defendant no.2 in the suit is Sh. Pratap one other son of Sh. Manohar Lal.

(iii) The main contesting defendant in the suit is defendant no.6/Sh. Prakash Chand and who is the respondent no.6 in this appeal. As will be seen from the discussion hereinafter the suit as also the present appeal is the result of collusion between the appellants/plaintiffs and the respondent nos. 1 to 5/defendant nos.1 to 5, all of whom are members of one family, and they are pitted against respondent

no.6/defendant no.6 who is the co-owner to the extent of half of the suit property bearing no.8706, Model Basti, Sidipura, Karol Bagh, New Delhi and in favor of which respondent no.6/defendant no.6 both a preliminary and final decree of partition of the suit property stand passed against the sons of Sh. Manohar Lal and Smt. Mishro Devi.

3. The relief clauses of the plaint pertain to declaration for holding as illegal the compromise decree dated 21.8.2014 passed between the respondent no.6/defendant no.6 who is the half owner of the suit property and the sons of Sh. Manohar Lal and Smt. Mishro Devi, who are the contesting defendants in the suit. The compromise decree dated 21.8.2014 was passed in appeal filed by Smt. Mishro Devi against the preliminary and final decrees dated 27.2.2012 and 30.10.2012 directing partition of the suit property. Appellants/plaintiffs also seek declaration with respect to their co-ownership rights in the suit property. The relief clauses in the plaint read as under:-

- “a) A decree of declaration in favour of the Plaintiffs and against the Defendants thereby declaring that the compromise decree dated 21.08.2014 is null & void, illegal as the same is obtained by fraud by Defendant No.1 to 4 and Defendant 6 and consequently declare that the judgment and decree dated 21.08.2014 is a nullity and not binding upon the Plaintiffs.
- b) Further pass a decree of declaration in favour of the Plaintiffs and against the Defendants thereby declaring that the Plaintiffs are the Co-

owner/Co Sharer in possession of the suit property bearing no.8706, 1st Floor, Model Basti, Sidipura, Karol Bagh, New Delhi more specifically shown in colour red in the site plan to the extent of ¼ share each out of 1/5 share of the Defendant no.3 & 4 as per law of inheritance/succession and further

c) Pass a decree of permanent injunction in favour of the Plaintiffs thereby restraining the Defendants/more specifically Defendant no.6 not to dispossess the Plaintiffs from the suit property 8706, 1st Floor, Model Basti, Sidipura, Karol Bagh, New Delhi shown in colour red in the site plan under the garb of Compromise Decree dated 21.08.2014 obtained by playing fraud upon the Hon'ble Court and/or permanently restrain the Defendant No.1 to 6 not to interfere in the peaceful possession of the Plaintiffs in the suit property and further to restrain the Defendants not to create any third party interest in the suit property.

d) Pass such further order or orders which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in favour of the Plaintiffs and against the Defendants.”

4. A reading of the plaint shows that the appellants/plaintiffs who are the children of the sons of late Sh. Manohar Lal claim co-ownership rights in the suit property on the ground that the suit property is an ancestral property. The suit property is pleaded to be ancestral property having been originally owned by Sh. Kanhiya Lal and whose son was Sh. Manohar Lal. Sh. Manohar Lal's sons are the defendant nos.2 to 4 in the present suit with defendant no.1 in the suit Smt. Mishro Devi being the widow of late Sh. Manohar Lal. In sum and substance the case of the appellants/plaintiffs is that the suit property since is the ancestral property, they have a right in the same on the ground that paternal legal heirs have rights to an ancestral

property. In the suit challenge is made to the final judgment and decree dated 30.10.2012 and an earlier preliminary decree dated 27.2.2012 culminating into compromise decree dated 21.8.2014 directing partition of the suit property in a suit for partition. These preliminary and final decrees were passed in the suit for partition filed by the respondent no.6/defendant no.6. In the earlier suit for partition filed by the respondent no.6/defendant no.6 an appeal was filed by respondent nos. 2 to 4/defendant nos.2 to 4 the sons of Sh. Manohar Lal challenging the final decree. This appeal was numbered as RCA No.10/2013 and was dismissed by the Court of Ms. Anju Bajaj Chandna, ADJ vide judgment dated 19.11.2013. Another appeal being RCA No.77/2013 again came to be filed by Smt. Mishro Devi/respondent no.1/defendant no.1 and which was assigned to the Court of Sh. Jitender Kumar Mishra, ADJ wherein once again the preliminary decree and final decree dated 27.2.2012 and 30.10.2012 were challenged. This appeal against the preliminary decree being RCA No.77/2013 was dismissed by the ADJ vide judgment dated 23.9.2013 and the matter was fixed on the point of maintainability *qua* challenge to the final decree, and at this stage in those proceedings a

compromise decree was passed finalizing the shares of the parties in the suit property in terms of the compromise order dated 21.8.2014. The compromise order was passed after statements were recorded of the parties in the appeal.

5. The injunction application, and which has been dismissed by the impugned order, was contested by the respondent no.6/defendant no.6 and the present appeal is also contested by the respondent no.6/defendant no.6 pleading that the entire collusive efforts of the appellants/plaintiffs with respondent nos. 1 to 5/defendant nos.1 to 5 is only to prevent finality being achieved to the preliminary and final judgments and decrees with respect to the suit property passed on 27.2.2012 and 30.10.2012. It is stated that the suit, in fact, is without any cause of action and is barred in view of the ratios of 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 so elaborated upon by this Court in the judgment in the case of ***Sunny (Minor) and Anr. Vs. Raj Singh and Ors. 225 (2015) DLT 211.***

6. In my opinion, the present appeal is a completely frivolous appeal. In fact the suit filed is itself without any legal cause of action because plaintiffs, who are the grandchildren of Sh. Manohar Lal and the sons of defendant nos.3 and 4, have no rights in the suit property because there is no concept of having co-ownership rights in an immovable property simply because the property is an immovable property belonging to the parental ancestors. It has been clarified by the Supreme Court around 31 years back in the case of ***Chander Sen (supra)*** that after passing of the Hindu Succession Act, 1956 if any person inherits property from his parental ancestors, then, such inheritance is as a self-acquired property and not as an HUF property. As per the plaint, there is no pleading of the plaintiffs that there existed an HUF of Sh. Kanhaiya Lal or Sh. Manohar Lal and the only averment in the plaint is the claim of the plaintiffs to co-ownership of the suit property as the property was owned by their parental ancestors and thus this is no legal cause of action in view of the ratios of the judgments in the cases of ***Chander Sen (supra)*** and ***Yudhishter (supra)***. This aspect I have commented upon in detail in the judgment

in the case of *Sunny (Minor) (supra)* and the relevant paras of this judgment 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. Guman Singh expire because it is only if Sh. Tek Chand father of Sh. Guman Singh/defendant no.1 had expired before 1956 only then the property which was inherited by Sh. Guman Singh from his father Sh. Tek Chand would bear the character of HUF property in the hands of Sh. Guman 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. Guman Singh is missing. As already stated above, the dates/years of the death of Sh. Tek Chand and Sh. Guman 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. Guman Singh inherited the properties from Sh. Tek Chand before 1956 that the properties in the hands of Sh. Guman 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. Guman Singh, it cannot be held that Sh. Guman 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. Guman 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. Onus of important issues such as issue nos.1 and 2 cannot be discharged by oral self-serving averments in deposition, once the case of the plaintiffs is denied by the defendants, and who have also filed affidavit of DW1 Sh. Ram Kumar/defendant no.2 in the amended memo of parties for denying the case of the plaintiffs. An HUF, as already stated above, could only have been created by showing creation of HUF after 1956 by throwing property/properties in common hotchpotch or existing prior to 1956, and once there is no pleading or evidence on these aspects, it cannot be held that any HUF existed or was created either by Sh. Tek Chand or Sh. Gudan Singh. In my opinion, therefore, plaintiffs have miserably failed to discharge the onus of proof which was upon them that there existed an HUF and its properties, and the plaintiffs much less have proved on record that all/any properties as mentioned in para 15 of the plaint are/were HUF properties." (emphasis added)

7. Clearly therefore the trial court was justified in dismissing the injunction application because actually the suit was a

collusive suit as appellants/plaintiffs had no *locus standi* to file the suit as they do not have any right, title or interest in the suit property. I have given additional reasons with respect to the appellants/plaintiffs not having *locus standi* and the suit lacking cause of action in exercise of powers of this Court under Order XLI Rule 24 CPC read with Order XLIII Rule 2 CPC and the ratio of the recent judgment of the Supreme Court in the case of ***Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782.***

8. Clearly therefore the appellants/plaintiffs have no *prima facie* case. In fact not only there is no *prima facie* case, the suit itself is misconceived and lacks cause of action. The injunction application has therefore rightly been dismissed by the impugned order.

9. Since this appeal is an abuse of process of law and in fact the suit itself is without any cause of action at all, the appeal is dismissed with costs of Rs.1 lakh, and which costs shall be paid within six weeks to the respondent no.6/defendant no.6.

SEPTEMBER 08, 2017
Ne/nn

VALMIKI J. MEHTA, J