

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

+ **RSA No.236/2017**

% **25th September, 2017**

SHASHI & ORS. Appellants

Through: Mr. H.S. Dahiya, Advocate.

versus

SAROJ MADAN AND ORS. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 35208/2017 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

C.M. Appl. Nos. 35207/2017 and 35209/2017 (for delays)

These are applications seeking condonation of delays of 8 days in filing the appeal and 21 days in re-filing the appeal.

For the reasons stated in the application the same are allowed and the delays in filing and re-filing the appeal are condoned.

C.M. stands disposed of.

RSA No.236/2017 and C.M. Appl. No. 35206/2017 (for stay)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellants, and who are the legal heirs of the deceased defendant, impugning the judgment of the First Appellate Court dated 19.4.2017 by which the first appellate court has refused to condone the delay of 436 days in filing of the first appeal. Trial court by its judgment dated 19.3.2015 had decreed the suit for partition filed by the four respondents/plaintiffs/sisters against their brother/defendant and who is now represented by the appellants being the legal heirs of the deceased defendant. The subject matter of the suit is property no.WZ-3, Gali No.2, Sri Nagar, Shakur Basti, Rani Bagh, Delhi, built on a plot admeasuring 116 sq. yds. Four sisters being the four respondents/plaintiffs claimed 1/5th share each in the suit property and consequently four respondents/plaintiffs pleaded that they were entitled to a total of 4/5th share and the appellants/defendant being entitled to 1/5th share.

2. For seeking condonation of delay, the only ground urged in the application under Section 5 of the Limitation Act, 1963, before the first appellate court is in para 3 and which para 3 reads as under:-

“3. That the appellant after passing of impugned judgment and decree tried their best to locate the property papers in the house but could not locate inspite of their best efforts. The efforts were also made by involving the relatives to settle the matter amicably within the family so that appellants are not rendered homeless on partition of the suit property as decreed. The widow appellant no.1 had also to discharge her responsibility of marrying her daughter after her husband had expired during the pendency of the suit in June 2014 which occupied her completely. The delay of 436 days after deducting time of 23 days in taking certified copy, took place in such hard and adverse circumstances.”

3. The aforesaid para in my opinion is completely vague and fails to explain the substantial delay of 436 days inasmuch as, i.e no sufficient cause exists for condonation of delay, it is not stated as to who had the ‘property’ papers. In any case, the papers were only property papers and not papers pertaining to the suit. Alleged efforts with respect to settlement are also without any particulars whatsoever with the fact that the defendant had died in June, 2014 i.e much before passing of the judgment by the trial court on 19.3.2015. No doubt, Section 5 of the Limitation Act has to be construed liberally as held by the Supreme Court in the case of *N. Balakrishnan Vs. M. Krishnamurthy AIR 1998 SC 3222* however there has to be some

reasonable explanation at least of the delay. In this very judgment, the Supreme Court has held that lack of negligence will not be a ground for condonation of delay, but gross negligence will deny condonation of delay. It is noted that after all by expiry of limitation vested rights accrue in favour of the other party with the rationale of existence of the Limitation Act being that there has to be quietus to litigation after a point of time.

4. In my opinion therefore only on the basis of averments made in para 3 of the application for condonation of delay, no grounds are made out for condonation of delay, however, in spite of the same since counsel for the appellants/defendant has also argued the issue on merits, and I have also heard the counsel for the appellants/defendant with respect to the merits of the case.

5. Admittedly, the suit property was purchased in the name of the father of the parties Sh. Jagdish Lal Gulati. Sh. Jagdish Lal Gulati admittedly died intestate. Ordinarily therefore once the suit property was the self-acquired property of Sh. Jagdish Lal Gulati, then, all his children being the four daughters/plaintiffs and one son/defendant would get 1/5th right in the suit property. The

appellants/defendant however prayed for the suit to be dismissed on the ground that suit property was HUF property. It was stated that the suit property was HUF property because the suit property was purchased on account of sale of the property in Andha Mughal and the Andha Mughal property was an HUF property inasmuch as it was purchased from the funds of the properties left behind in West Pakistan. The courts below as also this Court has therefore to examine whether the suit property belonged and was owned exclusively by the late Sh. Jagdish Lal Gulati/father or he inherited the same as an HUF property.

6. HUF is a legal concept. An HUF comes into existence, prior to passing of the Hindu Succession Act, 1956 if a male person inherits from three degrees of paternal ancestors above him any immovable property and in such circumstances a property inherited by a male person from his paternal ancestors in three degrees becomes a HUF property in his hands for three degrees of coparceners below. The concept of HUF arising on account of inheritance of an immovable property, and as it is ordinarily known in law, came to an end after the passing of the Hindu Succession Act and this is so held

by the Supreme Court over 31 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. After coming into force of Hindu Succession Act when a person inherits a self-acquired property of his paternal ancestor, then the inheritance is as a self-acquired property and not as a HUF property in the hands of the person who inherits the property. The ratio of the judgment in the case of *Chander Sen (supra)* was reiterated thereafter in the judgment of the Supreme Court in the case of *Yudhishter Vs. Ashok Kumar*, (1987) 1 SCC 204. After passing of the Hindu Succession Act, an HUF can come into existence only if the self-acquired property is thrown into common hotchpotch and it is required that a specific pleading exists as to how a self-acquired property is thrown into a common hotchpotch for becoming an HUF property. In the present case, however, this Court does not have to look into the issue of common hotchpotch because the case of the appellants/defendant was that suit property was an HUF property on account of the suit property having been purchased by the sale of the property at Andha Mughal and which Andha Mughal property was

allotted to the family on account of the property left behind in West Pakistan.

7. Admittedly, there is no documentary evidence led of the fact that the property which is purchased in the name of the father, i.e the suit property, was a HUF property. Suit property is not declared as an HUF property either in the municipal record or income tax record or any other government record. The only ground pleaded/orally deposed to for the father to hold the property as an HUF property as stated above is on account of the Andha Mughal property being a HUF property. The issue is that whether merely because Andha Mughal property was an evacuee property, whether it would become an HUF property. The property purchased at Andha Mughal or allotted at Andha Mughal and which was an evacuee property, would be a HUF property only if the properties left in West Pakistan by the family were HUF properties. Only if the properties left in West Pakistan were HUF properties the property allotted at Andha Mughal could be given a stamp of an HUF. In any case assuming that Andha Mughal property was property of the family because it is stated that it was allotted in the name of the grandmother of the parties namely Smt.

Dhan Devi, yet, the property in the name of the grandmother has never shown to be an HUF property in any public record as an HUF property and so existence of HUF is not proved by the appellants/defendant making self-serving statements and which does not amount to discharge of onus of proof. Self-serving statements are not discharge of onus of proof more so in the facts of the present case, where the suit property has been admittedly purchased by the title deed in the name of the father of the parties Sh. Jagdish Lal Gulati. Once the suit property was in the name of Sh. Jagdish Lal Gulati Section 4 of the Benami Transactions (Prohibition) Act, 1988 comes into play whereby ownership of Sh. Jagdish Lal Gulati cannot be denied with the only two exceptions being of an HUF existing or the property being purchased in trust in the name of father Sh. Jagdish Lal Gulati by the grandmother of the parties. As already stated above, the plea of HUF is not proved or substantiated inasmuch as the pleas were only oral depositions and hence rightly disbelieved by the trial court. Also, there is no pleading and nor any issue framed that the suit property was purchased in trust in the name of the father by the grandmother. Sh. Jagdish Lal Gulati being the son of the grandmother/Smt. Dhan

Devi, he on the death of the grandmother would solely inherit the suit property and the suit property hence cannot be inherited by the legal heirs of Sh. Jagdish Lal Gulati once Sh. Jagdish Lal Gulati was alive on the date of death of the his mother Smt. Dhan Devi. Therefore the father Sh. Jagdish Lal Gulati son of Smt. Dhan Devi would become the sole and exclusive owner of the suit property.

8. It bears reiteration that admittedly the suit property is purchased by the sale deed in the name of the father Sh. Jagdish Lal Gulati in terms of the sale deed dated 10.8.1965 executed by the vendor Sh. Chaudhary Ram Prakash.

9. Learned counsel for the appellants/defendant sought to argue that amendment made in the year 2005 to Section 6 of the Hindu Succession Act is prospective in nature and therefore daughters cannot claim the rights in this case because father died admittedly before 2005, however, the argument is misconceived because right of daughters under Section 6 of the Hindu Succession Act is to an HUF property, and Section 6 of the Hindu Succession Act does not at all comes into play in the present case because partition is asked of the suit property not because it is an HUF property but that the suit

property was exclusively owned by the father who died intestate and therefore all the children will succeed in equal shares to the property of the father.

10. Learned counsel for the appellants/defendant argued that Hindu family should also be presumed to be joint and therefore the suit property has to be an HUF property, however, the argument ignores the fact that HUF is a specific concept. No doubt, a Hindu family is presumed to be joint but a Hindu family is not presumed to have an immovable property. It is only if the Hindu Undivided Family is carrying on business or the property otherwise is proved as the HUF property, then the immovable property becomes an HUF property. Once the sale deed is admittedly not in the name of HUF but in the sole name of the father Sh. Jagdish Lal Gulati therefore it cannot be held that the suit property inspite of the facts of the present case has to be presumed to be an HUF property. This argument of the appellants/defendant is therefore rejected.

11. In view of the above discussion I do not find that the first appellate court in any manner faulted in dismissing the first appeal barred by time on account of delay of 436 days and in any case having

heard the appellants/defendant on merits even on merits there cannot be any valid challenge to the preliminary decree passed by the trial court for partition giving the four plaintiffs/respondents/daughters 4/5th share and 1/5th share to the son/defendant and who is now represented by the appellants.

12. Dismissed.

SEPTEMBER 25, 2017
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VALMIKI J. MEHTA, J