

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

+ **RFA No.888/2017**

% **24th October, 2017**

ROMESH KUMAR Appellant

Through: Mr. Vinay Sabharwal, Advocate.

versus

RAKESH KUMAR & ANR. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.37694/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.37692/2017 (for condonation of delay)

2. For the reasons stated in the application, delay of 83 days in filing the appeal is condoned.

C.M. stands disposed of.

RFA No.888/2017 and C.M. No.37693/2017 (stay)

3. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit

impugning the judgment of the Trial Court dated 28.1.2017 by which the trial court has decreed the suit for possession filed by the respondent no.1/plaintiff. The suit property is one room with attached latrine bathroom and common kitchen at the first floor of property no.C-86 situated in the area of village Khureji Khas, Illaqua Shahdara, Jitar Nagar, Delhi-110051 admeasuring 147 sq. yards. Respondent no.1/plaintiff is the father and the appellant is the son and who was the defendant no.1 in the trial court. Respondent no.2 is the wife of the appellant i.e the daughter-in-law of the respondent no.1/plaintiff and she was the defendant no.2 in the trial court.

4. Respondent no.1/plaintiff pleaded that he had purchased the suit property C-86 in two parts. One part was purchased from the erstwhile owner Sh. Hukumat Rai in terms of the sale deed dated 10.7.1971 and the other part was purchased by the respondent no.1/plaintiff from his brother Sh. Dinesh Kumar vide sale document dated 13.8.1993. Respondent no.1/plaintiff pleaded that in July, 2010 the respondent no.1/plaintiff had entered into a collaboration agreement with a builder for construction over the suit land, and thereafter, in terms of the collaboration agreement the suit property

was developed and constructed and its peaceful possession was handed over to the respondent no.1/plaintiff. Since the appellant/defendant no.1 and the respondent no.2/defendant no.2 requested the respondent no.1/plaintiff to stay in the suit property, the respondent no.1/plaintiff on account of their being his son and daughter-in-law allowed them to stay in the suit property under an oral licence without any licence fee. The defendants had to vacate the suit property by December, 2012 but since they failed to vacate hence after serving the legal notice dated 19.1.2013, the respondent no.1/plaintiff filed the subject suit.

5. It was only the appellant/defendant no.1 who contested the suit. Respondent no.2/defendant no.2 did not appear and hence was proceeded *ex-parte*. The appellant/defendant no.1 filed his written statement and prayed for dismissal of the suit. The main defence raised by the appellant/defendant no.1 was that the suit property was not purchased by the respondent no.1/plaintiff from his own funds but the suit property is an ancestral property which belonged to the grandfather of the appellant/defendant no.1, and therefore, the appellant/defendant no.1 has a right in the suit property. Though not

so specifically pleaded effectively the case of the appellant/defendant no.1 is that the suit property is an HUF property because the suit property was inherited by the respondent no.1/plaintiff from his own father i.e the grandfather of the appellant/defendant no.1 and consequently respondent no.1/plaintiff is not the exclusive owner but the suit property in his hands is an HUF property to which the appellant/defendant no.1 has equal rights with the respondent no.1/plaintiff.

6. After pleadings were complete, the trial court framed the following issues:-

- “1. Whether the plaintiff proves that the suit property is his self acquired property? OPP
2. Whether the defendants prove that the suit property is ancestral in nature as contended by them at para 2 of the WS? OPD
3. Whether the plaintiff is entitled for recovery of possession against the defendants and the mesne profits as claimed? OPP
4. Whether the plaintiff is entitled for the nature of injunctions as sought for? OPP
5. What relief.”

7. Respondent no.1/plaintiff examined himself as PW-1 and appellant/defendant no.1 examined himself as DW-1. The evidence was thereafter closed.

8. As regards issue no.1, trial court has held that the appellant/defendant no.1 failed to prove that the suit property was ever in the name of the grandfather Sh. Khacheru Singh. The appellant/defendant no.1 only orally stated in his deposition that the suit property was purchased by his grandfather in the name of his father (plaintiff in the suit) and his uncle Sh. Dinesh Kumar. No documentary proof was however filed by the appellant/defendant no.1 to substantiate and prove his case, and therefore, trial court has rightly decided issue no.1 against the appellant/defendant no.1 that the suit property is self-acquired property of the respondent no.1/plaintiff. In fact issue no.2 was related to the issue no.1 and both the issues should have been decided together but have been decided separately. Issue no.2 has also been decided in favour of the respondent no.1/plaintiff holding that the appellant/defendant no.1 failed to prove that the suit property was ever owned by the grandfather Sh. Khacheru Singh.

9. In my opinion, there is another very important reason for holding that the appellant/defendant no.1 has no legal right or entitlement in the suit property or that in fact appellant/defendant no.1 did not even have a legal cause of action to file the suit. In fact the

suit had to be dismissed *in limine* on merits. This is because the only case of the appellant/defendant no.1 was that the suit property was ancestral property i.e HUF property and therefore he had a right in the suit property with his father/plaintiff in the suit, however in law, after passing of the Hindu Succession Act, 1956 a property which is inherited by a person from his paternal ancestors is no longer an HUF property and the person who inherits the same from his paternal ancestors after 1956 takes the same as a self-acquired property. After 1956, inheritance of the self-acquired property, even though it is inherited from paternal ancestors does not result in creation of an HUF and the inherited property becoming an HUF property and this is so held by the Supreme Court in the judgments 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***. Admittedly, the grandfather Sh. Khacheru Singh died in the year 1999 in terms of the statement made by the counsel for the appellant/defendant no.1 before this Court, and therefore, inheritance by the respondent no.1/plaintiff from Sh. Khacheru Singh, assuming that Sh. Khacheru Singh was owner of the suit property (and

which he never was), would not mean that the suit property becomes an HUF property in the hands of the respondent no.1/plaintiff.

10. I have had an occasion to consider this aspect in the judgment in the case of ***Surinder Kumar Vs. Dhani Ram and Others, 227 (2016) DLT 217***. The relevant paras of this judgment are paras 5 to 12, and these paras read 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 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/0265/1986MANU/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. Guman Singh from Sh. Tek Chand would be self-acquired in the hands of Sh. Guman 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. Guman 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. Gagan 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)

11. I have given my additional reasoning, of the plaint not disclosing a legal cause of action that the property at best on being an ancestral property does not become an HUF property on account of inheritance after the year 1956, in view of my powers under Order XLI Rule 24 CPC inasmuch as remand should only be done if the trial court decides the suit only on preliminary issue or fresh evidence is required to be led before the trial court. This is so held by the Supreme Court in the judgment in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another* (2015) 11 SCC 782.

12. In view of the above discussion, there is no merit in the appeal and the same is therefore dismissed, leaving the parties to bear their own costs.

OCTOBER 24, 2017
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VALMIKI J. MEHTA, J