

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

+ **RFA No.268/2006**

% **17th September, 2018**

HARISH CHANDER GUPTA & ORS.

..... Appellants

Through: Mr. Om Prakash Verma,
Advocate (M. No.9810031582).

versus

RAKESH GUPTA & ORS.

..... Respondents

Through: Mr. Shyam D. Nandan,
Advocate (M. No.9654848621).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.2 in the suit impugning the Judgment of the Trial Court dated 29.11.2005 whereby the trial court has decreed the suit for partition filed by the respondent no.1/plaintiff and has passed a preliminary decree declaring respondent no.1/plaintiff to be the owner of 41.50% share in

the suit property. Counsels for the parties agree that effectively, though not stated in the impugned judgment, as a result of the impugned judgment the defendant no.1 in the suit, Sh. Chander Prakash Gupta, respondent no. 2 herein, would be the owner of 41.50% share in the suit property and the balance 17% of the share in the suit property would jointly vest with defendant no.3/Smt. Madhu Gupta and Smt. Usha Gupta, represented by the appellants. The suit property is property bearing no. 2735, Gali Arya Samaj, Bazar Sita Ram, Delhi-6.

2. Parties to the suit are the children of late Sh. Anand Swaroop Gupta. Respondent no.1/Plaintiff, namely Sh. Rakesh Gupta, was the son of Sh. Anand Swaroop Gupta. Defendant no.1/Respondent no.2, namely Sh. Chander Prakash Gupta, was the other son of Sh. Anand Swaroop Gupta. Appellant no.1/ Defendant no.2, namely Sh. Harish Chander Gupta, is the husband of the predeceased sister of the plaintiff and defendant no.1 namely Smt. Usha Gupta. Defendant nos. 4 to 9 in the suit are the children of appellant no.1/defendant no.2 and Smt. Usha Gupta. Respondent no. 3/Defendant no.3 in the suit, namely Smt. Madhu Gupta, is the sister

of the respondent no.1/plaintiff and respondent no.2/defendant no.1 and Smt. Usha Gupta. Therefore, it is seen that Sh. Anand Swaroop Gupta died leaving behind two sons, namely Sh. Rakesh Gupta/respondent no.1/plaintiff and Sh. Chander Prakash Gupta/defendant no.1/respondent no.2 and two daughters, namely Smt. Madhu Gupta/respondent no.3/defendant no.3 and Smt. Usha Gupta represented by her husband/ appellant no. 1/defendant no.2 and her children defendant nos. 4 to 9/appellant nos. 2 to 7.

3. The issue to be decided is that whether or not the suit property was the self-acquired property of Sh. Anand Swaroop Gupta, who admittedly died intestate, and if the suit property was the self-acquired property of Sh. Anand Swaroop Gupta, then there will be four co-sharers in the suit property being the two sons Sh. Rakesh Gupta and Sh. Chander Prakash Gupta and the two daughters, namely Smt. Usha Gupta and Smt. Madhu Gupta. The respondent no.1/plaintiff however pleaded the existence of an HUF, which was admitted by the other brother, Sh. Chander Prakash Gupta, but the same was denied by appellant no.1/defendant no.2 and the other supporting defendant nos.4 to 9 i.e. branch of the daughter Smt. Usha

Gupta. I may note that during the pendency of the litigation, respondent no.1/plaintiff has also expired and he is now represented by his legal heirs including his widow Smt. Shakun Gupta. The amended memo of parties was filed on 22.01.2013.

4. In law, an HUF comes into existence if a person inherits a property from his parental ancestors prior to 1956, and thereafter, the said property continues in the name of the person who inherited it. Upon the death of the said person, after 1956, such property would be inherited as an HUF property. The only other way an HUF can come into existence after 1956 is if a person throws his property into common hotchpotch. If a person inherits a property from his parental ancestors after 1956, then such inheritance of property is deemed to be self-acquired in his hands as held by the Supreme Court in its judgments in the cases of *Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others*, (1986) 3 SCC 567 and *Yudhishter v. Ashok Kumar*, (1987) 1 SCC 204. I have had an occasion to examine this aspect in detail in the judgment in the case of *Surinder Kumar v. Dhani Ram and Others*, 227 (2016) DLT 217 and the relevant paras of this judgment 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/0265/1986MANU/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. 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.

13. In view of the above, actually the application filed under Order VII Rule 11 CPC in fact is treated as an application under Order XII Rule 6 CPC, inasmuch as, it is observed on the admitted facts as pleaded in the plaint that no HUF and its properties are found to exist. There is no averment in the plaint that late Sh. Jage Ram inherited property(s) from his paternal ancestors prior to 1956. In such a situation, therefore, the properties in the hands of late Sh. Jage Ram cannot be HUF properties in his hands because there is no averment of late Sh. Jage Ram inheriting ancestral property(s) from his paternal ancestors prior to 1956. There is no averment in the plaint also of late Sh. Jage Ram's properties being HUF properties because HUF was created after 1956 by late Sh. Jage Ram by throwing properties into a common hotchpotch. I have already elaborated in detail above as to how an HUF has to be pleaded to exist in the pre 1956 and the post 1956 positions and the necessary averments which had to be made in the present plaint. The suit plaint however grossly lacks the necessary averments as required in law to be made for a complete cause of action to be pleaded for existence of an HUF and its properties.”

5. The ratio of the judgment of this Court in the case of *Surinder Kumar (supra)* has been approved by the Division Bench of this Court in the case of *Sagar Gambhir v. Sukhdev Singh Gambhir and Ors 241 (2017)DLT 98; 2017 (162) DRJ 575*. The relevant para of the Division Bench judgment in *Sagar Gambhir's case (supra)* is para 10 which reads as under:-

“10. In Chander Sen's case (supra), the Supreme Court held that after the promulgation of the Hindu Succession Act, 1956, the traditional view under the Hindu Law no longer remained the legal position. This decision was followed in case (supra) the Supreme Court held that after the promulgation of the Hindu Succession Act, 1956, the traditional view under the Hindu Law no longer remained the legal position. This decision was followed in Yudhishter's case (supra). We agree with the legal position noted by the learned Single Judge which flows out of the two decisions of the Supreme Court, which would be as under:-

"(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."

6. The only ground on which the respondent no.1/plaintiff claims existence of the HUF is that the grandfather of Sh. Anand Swaroop Gupta, namely Sh. Darbari Lal, died prior to the year 1956. It may be noted herein that Sh. Darbari Lal left behind his sole legal heir, being his son Sh. Bhola Nath, who expired admittedly on 13.12.1972. Sh. Bhola Nath died leaving behind his sole legal heir, being his son Sh. Anand Swaroop Gupta, who died on 20.08.1975. As already stated above, Sh. Anand Swaroop Gupta died leaving behind two sons and two daughters namely Sh. Rakesh Gupta, Sh. Chander Prakash Gupta, Smt. Madhu Gupta and Smt. Usha Gupta.

7. As regards to the existence of an HUF, though the trial court did not frame any specific issue for the same, but the counsels for the parties agree that this was the basic issue which was decided by the trial court, and the trial court vide the impugned judgment has decided the said issue in favour of respondent no.1/plaintiff, stating that there existed an HUF because Sh. Darbari Lal died prior to the year 1956.

8. Learned counsel for the appellant no.1/defendant no.2 has very vehemently argued that merely because respondent no. 1/plaintiff has made a self-serving deposition, the same cannot be held to prove that Sh. Darbari Lal died prior to 1956. He argues that admittedly no death certificate of Sh. Darbari Lal, stating that he died before 1956, has been placed on record and no other document, from any public authority, has been filed showing that Sh. Darbari Lal died prior to 1956. It was also argued on behalf of the appellant no.1/defendant no.2 that if the HUF had come into existence because of the factum of death of Sh. Darbari Lal prior to 1956, then the suit property would have been shown in some public record at least; be it the property tax record or the income tax record etc; as an HUF property, but

admittedly the respondent no.1/plaintiff has not relied upon any such documentary evidence to show that the suit property is an HUF property. It is argued on behalf of the appellant no.1/defendant no.2 that the trial court has arrived at a wrong finding that Sh. Darbari Lal died prior to the year 1956 simply because Sh. Chander Prakash Gupta/Respondent no.2/Defendant no.1/DW-1 in his cross-examination stated that he had not seen the death certificate of Sh. Darbari Lal or that he did not know that if Sh. Darbari Lal died in the year 1955. It is further argued on behalf of the appellant no.1/defendant no.2 that the trial court, for the benefit of the respondent no.1/plaintiff, cannot rely upon the statement of a defendant who supports the plaintiff. Counsel for the appellant no.1/defendant no.2 argued that the case of the respondent no.1/plaintiff and defendant no.1/respondent no.2 was identical with both of them claiming 41.5% ownership of the property on the ground that the suit property was an HUF property, and therefore, it was the evidence which was led by the appellant no.1/defendant no.2 which had to be looked into, to decide the existence of HUF or otherwise.

9. Learned counsel for the respondent no.1/plaintiff could not dispute that there is no documentary evidence which is filed on record on behalf of respondent no.1/plaintiff or by the respondent no.2/defendant no.1 that Sh. Darbari Lal died prior to the year 1956. It is admitted that there is no death certificate of Sh. Darbari Lal filed showing that Sh. Darbari Lal died prior to 1956 and also there is no other documentary evidence, much less of any public authority, filed and proved by the respondent no.1/plaintiff or the respondent no.2/defendant no.1, stating that the suit property is an HUF property. Also, it has not been proved that the suit property was owned by Sh. Darbari Lal. In my opinion, on the basis of the self-serving statements, it cannot be held to be proved that Sh. Darbari Lal died prior to the year 1956 inasmuch as the respondent no.1/plaintiff was subsequently cross-examined by the appellant no.1/defendant no.2 that Sh. Darbari Lal did not expire prior to 1956. An oral statement of fact once is met and opposed by another oral statement, the onus of proof cannot be held to be discharged in facts of case such as the present for the trial court to have held that there existed an HUF and because Sh. Darbari Lal is proved to have died prior to 1956. I, therefore, hold

that the respondent no.1/plaintiff failed to prove that there existed an HUF simply because respondent no.1/plaintiff and the supporting defendant no.1/respondent no.2 deposed that Sh. Darbari Lal had died prior to the year 1956. Once it being established that there is no HUF, then, on the death of Sh. Darbari Lal, the suit property which is inherited by his son Sh. Bhola Nath, and from whom Sh. Anand Swaroop Gupta inherited the suit property, will not result in the suit property being an HUF in the hands of either Sh. Bhola Nath or Sh. Anand Swaroop Gupta.

10. For the sake of completion of the narration, I may note that defendant no.10 in the suit, Smt. Usha Verma was a purchaser of the shares of the Sh. Chander Prakash Gupta/respondent no. 2/defendant no.1 and Smt. Madhu Gupta/ respondent no.3/defendant no.3 in terms of the registered Sale Deed dated 09.05.2002/Ex.DW2/1 and Smt. Usha Verma thereafter in terms of her Sale Deed dated 18.06.2002 sold her share to the appellant no.1/defendant no.2. The appellant no.1/defendant no.2 alongwith his children being defendant nos. 4 to 9 are the legal heirs of one deceased daughter Smt. Usha Gupta and therefore effectively the appellant no.1/defendant no.2

alongwith other children of appellant no.1/defendant no.2 and Smt. Usha Gupta will jointly become entitled to $\frac{3}{4}$ th share of the suit property as they had $\frac{1}{4}$ th share and to this $\frac{1}{4}$ th share, each of Sh. Chander Prakash Gupta and Smt. Madhu Gupta was added because these two persons for their share had excluded the Sale Deed dated 09.05.2002 in favour of the defendant no. 10 and also sold these shares to appellant no. 1 in terms of the Sale Deed dated 18.06.2002. The children of appellant no.1/defendant no.2/Sh. Harish Chander Gupta are appellant nos. 2 to 7 in the present appeal.

11. To complete the narration, I would like to note that though the respondent no.2/ defendant no.1 and the respondent no.3/defendant no.3 had transferred specific portions in the suit property to the appellant no.1/defendant no.2 in terms of the registered Sale Deed dated 09.05.2002, but the counsel for the appellants agrees that since there was no oral partition of the suit property, as was pleaded, by the appellants in the trial court, therefore, the ownership rights which are purchased from the respondent no.4/defendant no.10 by the appellant no.1/defendant no.2 will be of an undivided interest in the suit property. Section 8 of the Transfer of Property Act, 1872

provides that the transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and therefore, since the respondent no.2/defendant no.1 and respondent no.3/defendant no.3 were only undivided owners of 1/4th interest each i.e. 25% interest each in the suit property, the appellant no.1/defendant no.2 in terms of the Sale Deeds dated 09.05.2002 and 18.06.2002 is taken to have purchased the undivided 25% shares of the respondent no.2/defendant no.1 and respondent no.3/defendant no.3 in the suit property, and resultantly, the appellant no.1/defendant no.2 will become 50% undivided owner of the suit property with all the appellants together becoming 25% owners of the suit property being the legal heirs of the deceased Smt. Usha Gupta.

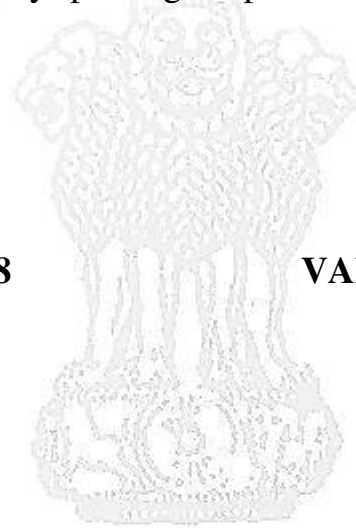
12. At this stage, counsel for the appellants agrees that all the appellants can be treated as joint equal owners of 75% share in the suit property and it is accordingly so ordered.

13. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court dated 29.11.2005 is set aside with costs in favour of the appellants and against the contesting legal heirs of the deceased respondent no.1/plaintiff. A

preliminary decree is passed declaring that the appellants are joint owners of 75% of the suit property bearing no. 2735, Gali Arya Samaj, Bazar Sita Ram, Delhi-6 and the legal heirs of deceased plaintiff i.e. respondent 1(i) to (iii) will be treated as equal joint undivided owners of the 1/4th share/25% share of the suit property. Appeal is accordingly allowed and disposed of in terms of the aforesaid observations by passing a preliminary decree as stated above.

SEPTEMBER 17, 2018
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VALMIKI J. MEHTA, J



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