

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

% **Date of decision: 16th March, 2018**

+ **C.R.P. 95/2017 & CM No.14697/2017 (for stay)**

JATINDER PAL SINGH DANG & ANR Petitioners

Through: Mr. B.B. Gupta, Sr. Adv. with
Mr. N.S. Dalal and Mr. Apoorv
Gupta, Advs.

Versus

GUNPREET SINGH DANG & ANR Respondents

Through: Mr. Giriraj Subramaniam and
Mr. Simarpal Singh Sawhney,
Advs. with R-1 in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 18th January, 2017 in Civil Suit No.8199/2016 of the Court of Additional District Judge (ADJ)-04, South District, Saket Courts, New Delhi] of dismissal of the application of the two petitioners/defendants under Order VII Rule 11 of the CPC for rejection of the suit for partition of immoveable properties filed by the respondent No.1/plaintiff against the two petitioners, respondent No.2, Sub-Registrar of Documents and respondent No.3 Mallika Dang.

2. The petition came up before this Court first on 19th April, 2017 when the counsel for respondents No.1&3 appeared on advance notice; notice to respondent No.2, Sub-Registrar of Documents, being

a proforma defendant/respondent was dispensed with. The petition was adjourned to 21st July, 2017.

3. On 21st July, 2017, the adjournment was sought on behalf of the counsel for the petitioners/defendants. On going through the impugned order with the assistance of the counsel for the respondents No.1&3, it was *prima facie* observed that no error was found therein. Clarifying that the petitioners/defendants having sought adjournment will not be entitled to take adjournments in the suit before the Trial Court, the hearing was adjourned to 22nd September, 2017 and thereafter to 13th November, 2017.

4. On 13th November, 2017, the senior counsel for the petitioners/defendants was heard and on perusal of the plaint and on the senior counsel for the petitioners/defendants citing ***Surender Kumar Vs. Dhani Ram*** AIR 2016 Delhi 120, the *prima facie* view expressed earlier was dislodged; though adjourning the hearing on that day on the request on behalf of the counsel for the respondent No.1/plaintiff, the personal presence of the respondent No.1/plaintiff, who was disclosed to be a Chartered Accountant, on the next date of hearing was directed.

5. Thereafter the proceedings were adjourned from time to time.

6. The senior counsel for the petitioner/defendants today states that in fact it is the wife of the respondent No.1/plaintiff who is a Chartered Accountant and not the respondent No.1/plaintiff who is present in person in the Court today.

7. The senior counsel for the petitioners/defendants and the counsel for the respondent No.1/plaintiff have been heard. It is informed that the respondent No.3 Mallika Dang is the daughter of the petitioner No.1 and sister of petitioner No.2.

8. The respondent No.1/plaintiff sued for partition, pleading *inter alia* as under:

- “1. That the Plaintiff is constrained to institute the instant suit as the Defendant No.1 and 2 are illegally trying to alienate his substantial share in the HUF properties which he is entitled as coparcener.*
- 2. That the Defendant No.1, 2 and 3 are father, brother and sister of the Plaintiff respectively.*
- 3. That Late Sh. Joginder Singh Dang was grandfather of the Plaintiff herein and he was karta of the Hindu Undivided Family and Plaintiff as well as the Defendants were member of the said HUF. The Grandfather of the Plaintiff has purchased all properties (mentioned hereinbelow). That it is also relevant to mention here that the Grandfather of the Plaintiff, Late Sh. Joginder Singh Dang was a very successful businessman, who made his millions in the real estate and transport business. He was the chairman of the green roadways. Late Sh. Joginder Singh died in the year 2013 and he had great love and affection for the Plaintiff. The Plaintiff took care of his Grandfather during the days of his illness. The Plaintiff grandmother died on 5th February, 1994.*

4. *That the plaintiff claims his right qua HUF properties which are the subject property for the present suit are as follows:*

- (1) Property bearing no.108, Sainik Farms presently held in the name of Plaintiff and the defendant No.1.*
- (2) Property bearing no.18/14 Sainik Farms presently held in the name of defendant No.1.*
- (3) Property bearing no.51 Sainik Farms, Presently held in the joint name of defendant No.1.*

The abovementioned properties will be hereinafter referred to as the "suit property"

5. *That though the properties were treated as HUF properties since beginning. However, grandfather of the Plaintiff, before his demise, specifically throws all the abovementioned properties (suit properties) in common hotchpotch at around December, 2010 and intended to treat these properties as HUF properties. Additionally, due to affection with Plaintiff herein, grandfather wished that after demise, his share in the HUF should solely devolve upon the Plaintiff herein and all the Parties to the instant suit, including the Defendant No.1 and 2 are aware of it. Furthermore, Plaintiff's grandfather executed a Will stating his abovementioned wish. The said Will is in custody of the Defendant No.1 as he captured all the relevant documents after demise of Plaintiff's grandfather. It is relevant to mention here that the Defendant No.1 was one of the witnesses to the abovementioned will. It is pertinent to mention*

here that the Plaintiff's grandfather has not executed any other Will/testament.

6. *That it is pertinent to mention here that even after demise of Plaintiff's grandfather, all the members of HUF in October/November, 2014 orally agreed to divide the properties at appropriate time and to respect the said Will."*

And claiming the following reliefs:

- "i) Pass a decree of partition by metes and bound awarding 2/5th share to the Plaintiff in the suit property;*
- ii) grant a decree of declaration to the effect that the plaintiff is owner of 2/5th share in the suit property;*
- iii) Direct Defendant No.4 to not to register any documents (in the nature of Sale Deed, GPA, Will etc.) in respect of suit property till the final adjudication of dispute;*
- iv) To grant a cost to the plaintiff; and*
- v) Any other relief that this Hon'ble Court may deem fit may also be granted in favour of the plaintiff."*

9. The petitioners/defendants as well as the respondent No.3 / defendant Mallika Dang applied under Order VII Rule 11 of the CPC *inter alia* pleading (a) that none of the properties are subject matter of HUF nor is there any HUF nor was any property purchased by HUF; (b) that the properties in question are the personal properties of the defendant No.1 and his wife (i.e. petitioner No.1 and the respondent No.3); (c) that the plaint does not disclose as to how the properties are

HUF properties; (d) that the respondent No.1/plaintiff claims that the HUF was started by Joginder Singh Dang; Joginder Singh Dang had two sons and two daughters; if there was any HUF, then the other son of Joginder Singh Dang, besides the petitioner/defendant No.1 and the daughters of Joginder Singh Dang would also be members of HUF and the very fact that the respondent No.1/plaintiff had not impleaded them, showed the falsity of the plea of the existence of HUF; (e) that the other son and the two daughters of Joginder Singh Dang were living separately from the petitioner/defendant No.1.

10. Besides the aforesaid grounds, certain other grounds also were taken by the petitioners/defendants in the application under Order VII Rule 11 of CPC for rejection of the plaint.

11. The learned ADJ, vide the impugned order, dismissed the application of the petitioners/defendants under Order VII Rule 11 of the CPC dealing only with the other grounds taken in the application and without making any mention of or dealing with the aforesaid grounds also taken in the application for rejection of the plaint.

12. It was in the aforesaid circumstances, that on 21st July, 2017, on going through the impugned order only that it was *prima facie* observed that there was no error therein. The counsel for the respondent no.1 / plaintiff on that date did not disclose that in the application under Order VII Rule 11 of CPC, the grounds mentioned hereinabove were also taken in the application and which had not been dealt with in the impugned order. Thereafter, when the senior counsel for the petitioners/defendants appeared on 13th November, 2017, he

contended on the basis of the averments in the plaint that the same did not disclose existence of any HUF and did not press the other grounds taken in the application under Order VII Rule 11 of CPC.

13. The counsel for the respondent No.1/plaintiff has argued that the properties were acquired with the monies of the paternal grandfather of the respondent No.1/plaintiff and the respondent No.1/plaintiff thus has a share therein.

14. The date of demise of the paternal grandfather of the respondent No.1/plaintiff has not been pleaded, though from the averment that he, in or around December, 2010, threw the properties in the common HUF, it is quite evident that he was alive till then. Today, it is informed that he died on 30th May, 2013.

15. The Hindu Succession Act, 1956 changed the ancient law of succession as in force prior thereto. While in the ancient Hindu Law, a grandson had a share in the estate of his paternal grandfather, it is no longer so, under the Hindu Succession Act, 1956, Schedule where to in Class I heirs includes only the sons and daughters of the deceased Hindu and does not include the grandchildren of the deceased Hindu. The paternal grandfather of the respondent No.1/plaintiff namely Joginder Singh Dang died long after 1956 i.e. on 30th May, 2013 and the counsel for the respondent No.1/plaintiff also fairly admits that the respondent No.1/plaintiff cannot claim any share in the properties, even if believed to be of the grandfather, though the respondent No.1/plaintiff has in the plaint itself, as aforesaid, pleaded the same to be in the name of petitioner No.1/defendant.

16. Before coming to the aspect of HUF, I may notice that the counsel for the respondent No.1/plaintiff, during the hearing, has also claimed that the paternal grandfather of the respondent No.1/plaintiff namely Joginder Singh Dang has left a Will which is in possession and custody of petitioners/defendants and the respondent No.1/plaintiff has no copy even thereof but has admitted that the properties with respect to which the suit from this petition arises is not premised on that Will.

17. Similarly, the counsel for the respondent No.1/plaintiff has also contended that though the petitioners/defendants pleaded the properties to be in the names of petitioners/defendants but have not placed the title deeds thereof before this Court and have shied from producing the title deeds thereof before the Suit Court or before this Court and the said fact alone disentitles the petitioners/defendants from disputing the properties to be of Joginder Singh Dang.

18. The senior counsel for the petitioners/defendants has argued that since the respondent No.1/plaintiff, in para 4 of the plaint, has admitted the properties to be in the name of the petitioner/defendant No.1, the petitioners/defendants were not required to place the title deeds in view of the admission of the respondent No.1/plaintiff.

19. That brings me to the crux of the matter i.e. qua HUF.

20. The counsel for the respondent No.1/plaintiff has contended that ***Surender Kumar*** supra relied upon by the senior counsel for the petitioners/defendants itself does not support the

petitioners/defendants. Attention is invited to para 7(ii) and para 10 thereof and it is argued that as per the said judgment also, an HUF can come into existence after 1956 even if did not exist prior thereto, when an individual's property is thrown into a common hotchpotch and that the respondent No.1/plaintiff in paras 5 & 6 of the plaint as reproduced above has pleaded such throwing in of the properties by Joginder Singh Dang, paternal grandfather of the respondent No.1/plaintiff into HUF.

21. I am unable to agree. The respondent No.1/plaintiff, as aforesaid, has admitted the properties being held in the name of the petitioner/defendant No.1 and not in the name of his paternal grandfather Joginder Singh Dang. Once, it was so, the throwing of the properties into the common hotchpotch at or around December, 2010, could not have been by Joginder Singh Dang in whose name the properties did not stand and without the petitioner/defendant No.1 in whose name the properties admittedly stood joining in the same. It is not the plea that the petitioner/defendant No.1 joined in throwing of the properties into the HUF.

22. The counsel for the respondent No.1/plaintiff has argued that since the plaint is not happily worded and the respondent No.1/plaintiff be permitted to amend the same.

23. Such adjournments cannot be granted. It is significant that the respondent No.1/plaintiff, notwithstanding the application under Order VII Rule 11 of the CPC having been filed *inter alia* on the said ground, did not feel the need to amend the plaint and this petition

itself has been pending before this Court now for nearly one year and after arguments have been addressed thereon, amendment cannot be so permitted. Moreover, a litigant upon finding that on the facts pleaded has no case, cannot be permitted to change the facts according to the arguments which have proceeded in the Court and to avoid challenge to his claim on such arguments. Facts cannot be permitted to be so changed.

24. Mention in this regard may be made of the dicta of the Supreme Court in *Fatehji and Company Vs. L.M. Nagpal* (2015) 8 SCC 390 where though this Court in exercise of appellate powers had interfered with the order of rejection of a plaint in a suit for specific performance on the ground of the claim therein being barred by time, the Supreme Court restored the order of the Trial Court of rejection of the plaint reasoning that oral pleas of extension of time for performance of the agreement could not be allowed to perpetuate a suit which as per the written documents and the date of performance mentioned therein was barred by time. The same is the position here with respect to the averments in para 6 of the members of the HUF after the demise of Joginder Singh Dang having orally agreed to divide the properties at appropriate time. Without the respondent No.1/plaintiff pleading a case of coming into existence of an HUF and being able to sustain a plaint thereon, cannot be permitted to harass his other family members by keeping the suit pending. Rather, during the hearing, the counsel for the respondent No.1/plaintiff himself has pleaded that the respondent No.1/plaintiff is the estranged son of the

petitioner/defendant No.1 and has been ousted from the family. However, on enquiry, it is informed that the date of estrangement is January, 2016.

25. ***Surender Kumar*** supra in para 7(ii) thereof holds that the averments of throwing a property into common hotchpotch have to be clearly pleaded and which requirement is a legal requirement because of Order VI Rule 4 of CPC which provides that all necessary factual details of the cause of action must be clearly stated. Reference on the aspect of existence of HUF may be made to the dicta of this Court in ***Jai Narain Mathur Vs. Jai Prakash Mathur*** 2016 SCC OnLine Del 986. The respondent No.1/plaintiff in the plaint has merely pleaded the throwing in of the properties in common hotchpotch in around December, 2010 but has otherwise not pleaded a single act which may have been done in this regard and from which the intent to change the title of the properties from that in the individual name of the petitioner/defendant No.1 to HUF can be deciphered. As aforesaid, the wife of the respondent No.1/plaintiff is stated to be a practising Chartered Accountant and the father-in-law of the respondent No.1/plaintiff is also stated to be a practising Chartered Accountant and there is no plea of any Income Tax Return of the HUF being filed or of the properties ceasing to be shown as properties in the individual name of the petitioner/defendant No.1 or any other thing having been done with respect to the properties.

26. I may mention that the Courts are necessarily required to today interpret and deal with the laws as per the prevailing time. In earlier

times, the principle of, a bare averments in the plaint being sufficient to put the process of the Court in motion was developed on the basis of litigations being *bona fide*. These days it is increasingly found that litigations are being used as a tool of oppression, to entangle family properties and to thereby coerce the parents and/or siblings to giving into the otherwise illegal demands of certain family members. Respondent No.1/plaintiff, by taking a simple plea of the properties, though being of his father, having been acquired from the monies of the grandfather and having been thrown by the grandfather into HUF, cannot be permitted to harass and trouble his parents and his siblings and to put their properties under a cloud.

27. I am therefore satisfied that the plaint does not show a cause of action for the respondent No.1/plaintiff to have a share in the properties of which partition is sought.

28. The learned ADJ erred in not taking up the aforesaid ground of rejection of the plaint.

29. Axiomatically, the impugned order is set aside and the application of the petitioners/defendants under Order VII Rule 11 of the CPC is allowed.

30. Resultantly, the plaint in the suit from which this Revision Petition arises, is ordered to be rejected.

RAJIV SAHAI ENDLAW, J.

MARCH 16, 2018

‘bs’..