

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

+ **RFA No.1064/2017 & RFA No. 1065/2017**

% **Reserved on: 22nd December, 2017**
Pronounced on: 3rd January, 2018

+ **RFA No. 1064/2017 & CM Nos. 47059-60/2017**

DAYANAND RAJAN & ANR. Appellants
Through: Mr. Praveen Kumar Singh,
Advocate.
Appellant no.2 in person.

versus

RAM LAL KHATTAR Respondent

+ **RFA No. 1065/2017 & CM Nos. 47073-74/2017**

DAYANAND RAJAN & ANR. Appellants
Through: Mr. Praveen Kumar Singh,
Advocate.
Appellant no.2 in person.

versus

RAM LAL KHATTAR Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. These two Regular First Appeals are under Section 100 of the Code of Civil Procedure, 1908 (CPC) filed against the two

judgments of the trial court dated 19.8.2017. The impugned judgments dated 19.8.2017 were passed in two connected suits. RFA No. 1065/2017 pertains to a suit for possession, damages etc filed by the respondent/Sh. Ram Lal Khattar against the appellant no.1/defendant no.1 with respect to two rooms in the property bearing no.F-82, East of Kailash, New Delhi. RFA No. 1064/2017 pertains to a suit filed by the appellant no.1/Sh. Dayanand Rajan seeking partition of the property bearing no.F-82, East of Kailash, New Delhi. Parties to both the suits are the children and legal heirs of late Sh. Khan Chand. Suit for possession which has been decreed by the impugned judgment dated 19.8.2017 is the suit filed by the respondent/Sh. Ram Lal Khattar and in which suit there were three defendants namely Sh. Dayanand Rajan, Smt. Sohan Devi (since deceased) and Sh. Shyam Lal. The plaintiff in this suit Sh. Ram Lal Khattar, the defendant no.1 and the defendant no.3 were real brothers. Smt. Sohan Devi being the wife of late Sh. Khan Chand is the mother of the parties. Defendant nos. 2 and 3 in the suit filed by Sh. Ram Lal Khattar, namely one brother Sh. Shyam Lal/defendant no.3 and mother Smt. Sohan Devi/defendant no.2 were proforma defendants inasmuch as the relief

of possession and damages etc was claimed by the respondent/Sh. Ram Lal Khattar only against the appellant no.1/Sh. Dayanand Rajan. So far as RFA No. 1064/2017 is concerned, the same pertains to a suit for partition with respect to property F-82 as stated above and in which suit there were three defendants with Smt. Sohan Devi being the defendant no.1 and Sh. Ram Lal Khattar and Sh. Shyam Lal being defendant no.2 and 3.

2. For the sake of convenience, reference is made to the facts of RFA No. 1064/2017 and which pertains to the suit for partition filed by the appellant no.1/Sh. Dayanand Rajan.

3. Subject suit for partition with respect to the property F-82, by pleading that the suit property was purchased by the appellant no.1/plaintiff along with the defendants in the suit in the year 1976 but the suit property was purchased in the name of Sh. Ram Lal/defendant no.2/respondent as Sh. Ram Lal was the eldest male member of the family. It was pleaded that there was an HUF existing and that on the death of the father Sh. Khan Chand in 1970, the HUF comprises of the sons of late Sh. Khan Chand and their mother. It was pleaded that defendant no.2 in the suit Sh. Ram Lal/respondent being the eldest

brother became the karta on the death of the father. It was pleaded that the suit property was purchased with the HUF funds but in the name of the respondent/Sh. Ram Lal since he was the eldest member of the family. Plaint thereafter refers to various other properties and their different ownerships with which we are not concerned. It was also pleaded by the appellant no.1/plaintiff that he had contributed towards construction made on the suit property. Therefore, the suit was filed by the appellant no.1/plaintiff pleading existence of an HUF and the suit property being HUF property which had not been partitioned and therefore should be partitioned in terms of the prayer clauses made in the plaint.

4. Suit was contested by Sh. Ram Lal Khattar/respondent/defendant no.2. It was pleaded by the respondent/defendant no.2 that he was the sole owner of the suit property which was purchased by him in the year 1976. It was pleaded that in 1976 the appellant no.1/plaintiff was only 18 years of age. It was also denied that appellant no.1/plaintiff had contributed in the purchase/construction of the suit property. It was pleaded that respondent/defendant no.2 was having a shop in the year 1976 and

from the business of this shop the suit property was purchased. It was denied that there was any HUF or that the respondent/defendant no.2 was the karta. It was further pleaded by the respondent/defendant no.2 in his written statement that appellant no.1/plaintiff has not mentioned as to how much he had in his savings for incurring expenses for carrying out construction and which was carried out by the respondent/defendant no.2 in 1976-77 from his own funds. It was further pleaded that when construction was raised again in 1985, it was the defendant no.3 who had sent bank drafts from gulf countries totaling to Rs.2,10,000/-and since respondent/defendant no.2 was not having a bank account it was appellant no.1/plaintiff who was depositing the amount in his account and he failed to render account of the same and in fact purchased other properties from these monies as detailed in the written statement. It was pleaded that disputes arose when the appellant no.1/plaintiff in spite of repeated requests failed to vacate the two rooms in the suit property. Hence the suit for partition was prayed to be dismissed.

5. Pleadings were complete and issues were framed and parties led common evidence for the two suits. These aspects are recorded in paras 12 to 14 and these paras read as under:-

- “12. Vide order dated 17.05.2000 following issues were framed:
- 1) Whether the suit is not maintainable under the provisions of Order 2 Rule 2 CPC as alleged ? OPD.
 - 2) Whether the suit is barred as alleged in para 2 of the preliminary objections ? OPD
 - 3) Whether the suit property was purchased by the plaintiff and defendant no. 2 in the year 1976, out of the funds of joint family ? OPP.
 - 4) Whether the plaintiff contributed /spent any amount for the construction/development of the suit property ? OPP.
 - 5) Whether the plaintiff is living in the suit property as licensees, as alleged ? OPD
 - 6) Relief.
13. To prove his case plaintiff, Dayanand Rajan examined himself as PW-1 and led his evidence by way of affidavit which is Ex PW-1/A. Plaintiff has also proved documents as Ex PW-1/1 to Ex PW-1/24 and remaining documents are marked.
14. Defendant no. 2, Ramlal examined himself as DW-1 and lead his evidence by way of affidavit Ex DW-1/A. Defendant no. 3, Shyam Lal has also examined himself as DW-2 and lead his evidence by way of affidavit Ex DW-2/A and has also relied documents Ex DW-2/1 to Ex DW-2/7. Defendant No. 3 has also examined Sh. Gurdayal Khattar as DW-3 and Smt. Radha Rani as DW-4 in support of his defence.”

6. The main issue was issue no.3 as to whether there existed an HUF or that whether at all the appellant no.1/plaintiff had also contributed moneys for construction of the suit property. Trial court in this regard has noted that on the issue to be determined of whether there existed an HUF between the parties it is seen that the suit property was purchased from DDA in the name of the

respondent/defendant no.2 and which continued in the sole name of the respondent/defendant no.2. Trial court has also noted that it is not disputed as per the evidence led by the parties that all types of taxes and civic amenity charges were being paid by the respondent/defendant no.2 including towards house tax, electricity etc. Trial court further notes that HUF cannot be said to have come into existence because no documents are filed to prove existence of HUF including income tax returns. Even DW-2 to 4 who deposed in support of the case of the appellant no.1/plaintiff, these witnesses deposed on behalf of the defendant no.3/Sh. Shyam Lal, could not tell the name of the HUF or whether HUF was recorded in any documents or that the HUF was registered with the income tax department or whether any income tax returns was filed showing existence of the HUF. Trial court has referred to the various case laws cited by the parties and has arrived at a finding that an HUF only comes into existence by throwing of a property into a common hotchpotch but there is no evidence led of how the suit property was thrown in common hotchpotch. Trial court has further held that merely assuming that contribution was given by the appellant no.1/plaintiff for any

construction of the suit property, and which was also not proved, it could not mean that any HUF has come into existence.

7. The relevant observations of the trial court in this regard are contained in paras 18(a) to (g) of the impugned judgment and these paras read as under:-

“18. Issue No. 3 & 4

Whether the suit property was purchased by the plaintiff and defendant no. 2 in the year 1976, out of the funds of joint family ? OPP.

Whether the plaintiff contributed/spent any amount for the construction/development of the suit property ? OPP.

a) The onus to prove both the above issues is upon the plaintiff. To discharge his onus plaintiff has relied various documents and at the strength of the document Ex PW-1/1 to Ex PW-1/24, it is contended that suit property is a HUF property though the same was purchased in the name of Sh. Ram Lal, defendant no. 2. It is further contended that suit property was purchased from the common fund of the HUF. Now the first and the foremost question which is to be determined between the parties is whether there exists any HUF between the parties. Admittedly, parties in the present suit are related to each other. Plaintiff and defendant no. 2 and 3 are real brothers and defendant no. 1 was their mother. It is the admitted case of the plaintiff that the suit property was purchased from DDA in the name of defendant no. 2 and still in the name of defendant no. 2. It is also not disputed from the evidence of the parties that different types of taxes i.e. house tax, electricity etc. are being paid in the name of defendant no. 2. During the course of arguments it is also contended on behalf of the plaintiff that defendant no.2 has not proved the ownership document on record qua the suit property. Though, same are placed on record in the connected suit filed by defendant no. 2 against the plaintiff which is clubbed vide order dated 24.10.2011. Therefore, those documents cannot be read for any purpose. **This contention of the plaintiff is not tenable because it is not denied by any of the parties to the present suit that defendant no.2 is not the owner of the suit property.** Moreover, it is settled proposition of law that the fact which is admitted need not be proved. Hence, this court has no hesitation to hold that defendant no. 2 is the owner of the suit property. The question which is to be answered is whether suit property is a HUF property or purchased out of funds of the HUF.

b) It is the case of defendant no. 2 that the suit property is neither a HUF property nor defendant no. 2 is the Karta of the said HUF. It is further contended by the defendant no. 2 that no income tax return was filed in the name of HUF. Neither the HUF was registered with the income tax department nor any bank account exists in the name of HUF. Moreover no income tax was paid in the name of HUF. It is also contended that plaintiff has failed to discharge his onus as to when did the HUF was constituted or when did defendant no. 2 blended /surrendered suit property in the family hotchpot. It is further contended that there is no evidence on record that defendant no. 2 at any point of time blended or throwing or merger the suit property with the alleged HUF. To substantiate his argument defendant no. 2 relied the case laws titled as “ K. S. Subbiah Pillai Vs Commissioner of Income Tax” 1999 (3) SCC 170/1999 AIR (SC) 1220 /(1999) 237 ITR 11 (SC), Lakkireddi Chinna Venkata Reddi Vs Lakkireddi Lakshmana 1963 AIR (SC) 1601/1964(2) SCR 172, G. Narayana Raju Vs G. Chamaraju 1968 AIR (SC) 1276/1968 Law Suit (SC) 167 and Commissioner of Income Tax Bombay City VS Gordhandas K Vora 1973 LawSuit (Bom) 153/1974 (96) ITR 50.

c) It is further argued by the defendant no. 2 that defendant no. 3 examined himself as DW-2 and he has also examined Sh. Gurdal Chand Khattar and Smt. Radha Rani as DW 3 and 4 in support of his case. It is further contended that perusal of testimony of DW no. 2 to 4 and the plaintiff shows that no evidence has come on record to prove the version of plaintiff and defendant no. 3 that there was HUF.

d) I have perused the testimony of DW-2 to 4 and the plaintiff. All these witnesses have categorically during cross examination deposed that they do not know when HUF was constitute. Even they could not tell the name of the HUF. They were also not aware if the paper in respect of HUF were prepared. They also shown ignorance if the HUF was registered with the Income Tax department. Moreover they were not aware whether any income tax return was filed by the said HUF. DW-4 Smt. Radha Rani has admitted that plaintiff had purchased a flat at Vikaspuri. She has also admitted that no amount was sent to defendant no. 2 through her from gulf countries. She has also admitted the fact that defendant no. 2 has taken loan by mortgaging the suit property. DW-3 has deposed that he never made any complaint against the defendant no. 2 for turning him out of the house. Defendant no. 3 (DW-2) has deposed that “it is correct that he used to send money from abroad in the name of plaintiff Sh. Dayanand Rajan”. He has also admitted that defendant no. 2 used to run business in the shop in his name. He has also admitted that the said business in the shop was neither in his name nor in the name of his brother and mother. He has also admitted that defendant no. 2 has taken loan by mortgaging the suit property. DW-2 has also admitted that his son is pursuing study at Canada.

e) It is the case of plaintiff that the father of plaintiff and defendant no. 2 and 3 died in the year 1970 and the suit property admittedly was

purchased in the year 1976 and at the time of purchase of the property plaintiff and defendant no. 3 were bachelors. It is further averred that a family settlement was arrived at as per the wishes of deceased father of the defendant no. 2 and 3 and the plaintiff by which DW-3 Gurdayal Singh was given separate share of the property by the deceased father. But as per testimony of plaintiff and defendants admittedly the suit property was purchased in the year 1976 i.e. after 6 years of the death of the deceased father of the parties. As per testimony of plaintiff, defendant no. 3 has contributed Rs. 2.10 lakhs and Rs. 43,000/- to the defendant no. 2. It has also come on record that plaintiff has also purchased an immovable property in his name in Vikaspuri and another property in his name in village Kirariat Nangloi. On one hand plaintiff is stating that defendant no. 2 being the eldest brother after Gurdayal Singh was the Karta of the HUF but from the testimony of DW-3 it is clear that he was also having grievance against defendant no. 2. If there was HUF as claimed by the plaintiff and defendant no. 3, why plaintiff has not blended /merged his property in the HUF. Moreover, from the evidence it is clear that defendant no. 3 has supported the case of the plaintiff. Though initially he filed joint written statement supporting the defence of defendant no. 2. Defendant no. 2 has stated that plaintiff has not furnished the true and correct account of the amount received from defendant no. 3 i.e. Rs. 2.10 lakhs and Rs. 43,000/-. Plaintiff has also failed to mention as to how much amount he got from his savings. Defendant no. 2 was not having any bank account and the amount sent by defendant no. 3 in the year 1985-86 at the time when the second time construction was carried out was to be spent on the construction. But, plaintiff did not do so and became dishonest. Plaintiff has not rendered true and correct account. Rather, he purchased the immovable property as mentioned above in his name. This court is in agreement with the contentions raised by defendant no. 2 if there was an HUF why plaintiff has not blended or merged his property in the common hotchpot. This court is of the view that plaintiff deliberately has not given any explanation regarding immovable property purchased by him during the relevant time.

f) Further, at the strength of case laws relied, plaintiff has contended that since he has contributed in the purchase and construction of the suit property, plaintiff has acquired a share. I have perused the case law relied by the plaintiff. The case titled as "Ram Chander Prasad @ Jaiswal Vs Sh. Rajesh Kumar Jaiswal & Ors" (2001) 2 CALL T 570 (HC), "C. V. Ramaswamy Naidu & Ors. Vs C. S. Shyamala Devi and Ors" (1978) 1 MLJ 505 are not applicable to the facts of the case as the plaintiff has failed to prove on record, the contribution given by him for purchasing the suit property or on construction of the same. The document relied by the plaintiff to show the contribution are marked documents and not proved as per law. So far as, reliance of case laws titled as "Appasaheb Peerappa Changade Vs Devendra Peerappa Changade & Ors" AIR 2007 SC 218, is

concerned, plaintiff has not succeeded in discharge his initial burden that suit property was purchased out of the HUF funds. It is pertinent to mention that the suit property was purchased in the year 1976 and plaintiff was bachelor at that time and only defendant no. 2 was married. Plaintiff has not lead any evidence as to what was his income and source in the year 1976. The other two case laws titled as “Sri. Mareel Martins Vs. M. printers and ors” 2012 (3) SC 1987 and “Nathoo Ram Vs DDC & Ors” MANU/UP/1059/2017, are not applicable and are distinguishable on facts. So far as reliance of law as laid down in case titled as “Malesappa Bandeppa Desai and Ors. Vs Desai Mallappa & Ors. AIR 1961 SC 1268” is concerned, defendant no. 2 has discharged his onus that suit property was purchased out of his own funds as he was running a shop. It has also come in the evidence that after the construction, part of the suit property was rented out. Hence, plaintiff has succeeded in proving that suit property was purchased from his own funds by taking loan from DDA.

g) Even for the sake of arguments it is presumed that defendant no. 3 has contributed in the construction of property, it would not entitle him to claim any right, title and interest in the suit property. Though defendant no. 2 in the connected suit has admitted that defendant no. 3 has contributed in the construction of second phase. Giving contribution does not mean that there was a HUF. At the most defendant no. 3 could have initiate the appropriate proceedings to recover the said amount from defendant no. 2. At the time of purchase of the suit property plaintiff and defendant No. 3 were bachelors and defendant no. 2 has admitted that he has treated them like his son and helped in educating them, so that they can succeed in their life and lead life with full self respect. Moreso defendant no. 2 has fulfilled his duty being the eldest brother by sharing his kitchen with plaintiff and defendant no. 3. In view of these reasons, this court is of the considered view that there was no HUF as alleged by the plaintiff and the defendant no. 3. Plaintiff has also failed to prove that the suit property was purchased in the year 1976, out of the joint family funds. Hence, both the issues are decided in favour of the defendant no. 2 and against the plaintiff.” (emphasis added)

8. I do not find any fault whatsoever with the reasoning and conclusions given by the trial court because an HUF can come into existence prior to passing of the Hindu Succession Act in the year 1956 by a person inheriting property from his paternal ancestors up to four degrees or after the year 1956 an HUF can come into existence

only if a person throws his property into a common hotchpotch. After the year 1956, merely on account of inheritance of ancestral property an HUF does not come into existence and this is so held by the Supreme Court in the judgments in the case 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. I have had an occasion to examine this aspect in detail in the judgment in the case of *Surinder Kumar Vs. Dhani Ram and Others*, 227 (2016) DLT 217 and the relevant paras of the *Surinder Kumar* (*supra*), and which judgment applies the ratios of the cases of *Chander Sen* (*supra*) and *Yudhishter* (*supra*), 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/0265/1986 MANU/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. Gugan Singh expire because it is only if Sh. Tek Chand father of Sh. Gugan Singh/defendant no.1 had expired before 1956 only then the property which was inherited by Sh. Gugan Singh from his father Sh. Tek Chand would bear the character of HUF property in the hands of Sh. Gugan Singh so that his paternal successors-in-interest became coparceners 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. Gugan Singh is missing. As already stated above, the dates/years of the death of Sh. Tek Chand and Sh. Gugan 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. Gugan Singh inherited the properties from Sh. Tek Chand before 1956 that the properties in the hands of Sh. Gugan 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. Gugan Singh, it cannot be held that Sh. Gugan 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. Gugan 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. Gugan Singh from Sh. Tek Chand would be self-acquired in the hands of Sh. Gugan 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. Gugan 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. Gugan 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. Gugan 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)

9.(i) Accordingly, applying the ratio of the judgment of this Court in the case of *Surinder Kumar (supra)*, as also ratios of the judgments in the cases of *Chander Sen (supra)* and *Yudhishter (supra)*, it is seen that existence of HUF has to be proved as a matter of fact of the same having come into existence prior to the year 1956 on account of inheritance of paternal ancestral property prior to the year 1956 or after the year 1956 the HUF coming into existence by throwing by a person of his individual property into common hotchpotch. In the facts of the present case, there is no case which is set up by the appellant no.1/plaintiff that HUF came into existence prior to 1956 and again there are no averments that if HUF came into existence after 1956 then how the respondent/defendant no.2 threw his

individual property being the suit property into a common hotchpotch. The only pleading and evidence led of an existence of HUF is on the ground that appellant no.1/plaintiff had contributed towards construction and purchase of the suit property, but such averments in law will not amount to creation of HUF or the suit property being an HUF property.

(ii) In fact, appellant no.1/plaintiff was only 18 years of age when the suit plot was purchased and the appellant no.1/plaintiff failed to file any documentary proof that he ever contributed for purchase of the property which is admittedly purchased by the respondent/defendant no.2 from DDA and therefore mere oral testimonies cannot mean discharge of onus of proof which was upon the appellant no.1/plaintiff for proving the existence of HUF. To take away rights of a person in an immovable property by making an individual property as an HUF property, then that much amount of evidence, especially the documentary evidence, has to be led which will satisfy the judicial conscience of a court of creation and existence of HUF. In the present case appellant no.1/plaintiff has miserably failed to discharge this onus of proof. Therefore, in my opinion, there

is no illegality in the reasoning and conclusions of the trial court that the suit property was owned by the respondent/defendant no.2 and in whose name there were title deeds with the fact that the appellant no.1/plaintiff did not dispute that the suit property was purchased in the name of respondent/defendant no.2 and his only case was that there existed an HUF and which case the appellant no.1/plaintiff failed to prove.

10. In view of the above discussion, I do not find any error in the impugned judgment. This appeal is accordingly dismissed.

RFA No. 1065/2017

11. This appeal is also dismissed first to the extent that the same challenges the judgment of the trial court which has held that no HUF exists and that the suit property was not an HUF property. The aforesaid discussion and reasoning given with respect to the RFA No. 1064/2017 is also adopted herein for holding that the trial court rightly came to the conclusion that there was no HUF and the suit property is not an HUF property.

12. Learned counsel for the appellant no.1 *qua* this appeal further argued that the trial court in the impugned judgment has wrongly allowed a sum of Rs.2000/- as *mesne* profits/damages although no evidence was led, but this argument in my opinion is misconceived because though no doubt evidence has not been led, trial court yet was justified in the facts of this case in drawing an inference of rate/amount of use and occupation charges of two rooms at Rs.2000/- per month. Though trial court has not referred to Sections 57 and 114 of the Indian Evidence Act, courts can however in view of these provisions draw inferences and take judicial notice with respect to rate of rent and use and occupation charges which are payable, and therefore I do not find any illegality in reasoning and conclusion of the trial court given in para 18 of the impugned judgment for ordering payment of damages at Rs.2000/- per month. In fact the appellant no.1 is lucky that the trial court has not awarded any interest on arrears of *mesne* profits.

13. In view of the aforesaid discussion, this appeal is also without any merit, and is accordingly dismissed.

JANUARY 03, 2018

VALMIKI J. MEHTA, J