

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

+ **RFA(OS) 2/2019 and CM APPL. 606/2019**

Reserved on: 27.09.2019

Date of decision: 13.11.2019

IN THE MATTER OF:

SUDESH BALA AND ORS

..... Appellant

Through: Mr. N.S. Dalal and Ms. Suman

Chaudhary, Advocates

versus

VINOD KUMAR & ORS

..... Respondents

Through: None

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

HIMA KOHLI, J.

1. The appellants/plaintiffs, five in number, have challenged the judgment dated 23.10.2018, dismissing a suit for declaration, partition and permanent injunction [CS(OS) 632/2016] instituted by them against their brother (respondent No.1), sister-in-law (respondent No.2), nephew (respondent No.3) and mother (respondent No.4).

2. Before proceeding to examine the averments made in the plaint, it is relevant to record that despite service, the defendants/respondents had failed to appear in the suit proceedings. Vide order dated 05.05.2017, the right of the defendants to file the written statement was closed and vide order dated 04.07.2017, they were proceeded against *ex-parte*. The appellants/plaintiffs were then directed to lead their ex-parte evidence whereafter, arguments were addressed by learned counsel for the appellants/plaintiffs, resulting in passing of the impugned judgment, dismissing the suit. We may note that

notice was issued in the present appeal on 09.01.2019 and on the said date an *ex-parte status quo* order was passed in respect of the title and possession of the suit properties situated in Laldora Abadi of Village Samalkha, Delhi. Despite service being effected on them, none of the respondents have entered appearance.

3. Coming to facts of the case, the appellants/plaintiffs instituted a suit for declaration, partition and permanent injunction against their brother, his wife and his son (respondents No.1 to 3) and their mother (respondent No.4). The prayers made in the suit were for passing a decree of declaration in respect of the following four Sale Deeds and one Gift Deed, declaring them to be as null and void and not binding on the appellants/plaintiffs:-

(a) Sale Deed dated 15th September, 2004 executed by the defendant No.1 in favour of the defendant No.2 in respect of 1/16th share in Khasra No.58 (1-18) and 78/11 (2-0) situated in Extended Laldora of Village Samalkha, Delhi.

(b) Gift Deed dated 10th November, 2006 executed by the defendant No.2 in favour of the defendant No.1 in respect of 1/16th share in Khasra No.58 (1-18) and 78/11 (2-0) situated in Extended Laldora of Village Samalkha, Delhi.

(c) Sale Deed dated 14th February, 2006 executed by the defendant No.1 in favour of the defendant No.3 in respect of 1/16th share in Khasra No.58 (1-18) and 78/11 (2-0) situated in Extended Laldora of Village Samalkha, Delhi

(d) Sale Deed dated 5th May, 2009 executed by the defendant No.1 in favour of the defendant No.2 with respect to built up property measuring 70 sq. yds. i.e. 6/40 share in Khasra No.78/13/2 min (0-7) and 78/16 (1-9) situated in Extended Laldora of Village Samalkha, Delhi.

(e) Sale Deed dated 5th May, 2009 executed by the defendant No.1 in favour of the defendant No.2 in respect of built-up property measuring 200 sq. yds. i.e. 6/40 share in Khasra No.78/13/2 min (0-7) and 78/16 (1-9) situated in extended Laldora of Village Samalkha, Delhi

4. Besides the above reliefs, the appellants/plaintiffs had also prayed for a decree of partition in respect of the properties, subject matter of the Sale Deeds/Gift Deed and for permanent injunction, restraining the respondents/defendants from dealing with the subject properties.

5. The case set up by the appellants/plaintiffs in the plaint has been summarized in para 4 of the impugned judgment, which is extracted below for ease of reference:-

“4. It is the case of the plaintiffs in the plaint, (i) that the five plaintiffs are the sisters of the defendant No.1; (ii) that the defendant No.2 Smt. Leela Wati is the wife of defendant No.1 and defendant No.3 Nitin Kumar is the son of defendants No.1&2; (iii) that the defendant No.4 Smt. Chameli Devi is the mother of the plaintiffs and defendant No.1; (iv) that the father of the plaintiffs and the defendant No.1 was the owner of (a) built up house measuring 476 sq. yds. situated in Laldora Abadi Village Samalkha, Delhi; (b) built up house measuring 88 sq. yds. situated in Laldora Abadi of Village Samalkha, Delhi; and, (c) built up house measuring 35 sq. yds. situated in Laldora Abadi of Village Samalkha, Delhi; (v) that the father of the plaintiffs and defendant No.1 died on 2nd January, 1990 and his estate was inherited by the plaintiffs, defendant No.1 and defendant No.4 in equal shares; (vi) that the defendant No.1, in April, 2013, in settlement of the share of the plaintiffs in the father's estate, gave a built-up house measuring 88 sq. yds. to the plaintiffs with promise to give other properties also to the plaintiffs; (vii) that the defendant No.1 has however thereafter not given any other property to the plaintiffs; (viii) that in

October 2016, defendant No.3 disputed any claim of the plaintiffs in the properties and disclosed about the sale deeds, gift deeds aforesaid executed by the defendants inter se; (ix) that the sale deeds are a nullity as the same have been executed, without any sale consideration because the defendant No.2 is a house wife and even otherwise there is no question of sale transaction between husband and wife; (x) that at the time of the sale deed in favour of the defendant No.3, the defendant No.3 was a minor and could not have been possessed of sale consideration stated to be paid under the sale deed in his favour; (xi) even otherwise, once the defendant No.1 had executed sale deed, he could not have again executed another sale deed with respect to the same property; (xii) that the defendant No.1 even otherwise was not entitled to execute sale deed of more than 1/7th share in the property which alone was owned by him in the estate of the father; and, (xiii) that the plaintiffs, in December, 2016 again requested the defendants for their share but were refused.”

6. The appellants/plaintiffs were permitted to lead *ex-parte* evidence in the suit, wherein the appellant/plaintiff No.2 had appeared as PW-1, Shri Naresh, a resident of village Samalkha had appeared as PW-2, an employee summoned from the office of Sub-Registrar, Kapashera had appeared as PW-3 and an employee summoned from the National Institute of Open Schooling had appeared as PW-4.

7. PW-1 simply reiterated the averments that were made in the plaint. PW-2 stated in his affidavit by way of evidence that Late Shri Khazan Singh (father of the appellants and the respondent No.1 and husband of the respondent No.4) was the owner of the subject properties and he had died leaving behind the appellant, respondent No.1 and respondent No.4 as his legal heirs. PW-3 produced the records of the Sale Deeds/Gift Deed, subject matter of the suit, certified copies whereof were tendered by PW-1 in

evidence. PW-4 produced the mark-sheet of the respondent No.3 of the Senior Secondary School Examination taken by him to establish his date of birth.

8. After examining the evidence brought on record and hearing the arguments advanced by learned counsel for the appellants/plaintiffs, the learned Single Judge dismissed the suit instituted by the appellants/plaintiffs on the ground that they had failed to prove that the suit properties were owned by their deceased father and in the absence of any evidence in that regard, they were not entitled to seek any declaration in respect of the Sale Deeds/Gift Deed in question; that the recitals in each of the documents of Sale Deeds/Gift Deed, proved as Ex.PW-1/1 to PW-1/7, clearly stated that the seller/donor was the sole and absolute owner in possession of the suit properties, which were their self-acquired properties; that the appellants/plaintiffs miserably failed to prove that any of the suit properties were ancestral properties of their father by producing the relevant revenue records pertaining to the said properties; that the appellants/plaintiffs failed to prove that from the date of the demise of their father, i.e., 02.01.1990 till the date of institution of the suit, i.e., 21.12.2016, they had exercised any right of ownership or shared ownership in respect of said properties and lastly, that the appellants/plaintiffs were not competent to challenge the Sale Deeds/Gift Deed executed *inter se* the respondents/defendants No.1 to 4 on the grounds taken by them as they were rank outsiders and did not have any *locus standi* in that regard.

9. Mr. Dalal, learned counsel for the appellants/plaintiffs has assailed the impugned judgment on the ground that the learned Single Judge failed to appreciate that the parties to the suit are successors-in-interest of Late Shri

Khazan Singh and the suit properties were ancestral properties in his hands and therefore, the appellants and the respondents No.1 and 4 had inherited his properties in equal shares; that the learned Single Judge has arrived at an erroneous conclusion that the transferors/donors of the suit properties, subject matter of the Sale Deeds/Gift Deed were the sole and absolute owners in possession thereof and that based on mutation entries, the respondents No.1 to 3 could have acquired ownership rights in the suit properties.

10. We have perused the averments made in the plaint, examined the affidavits by way of evidence placed on record as also the documents filed in the suit and given our thoughtful consideration to the submissions made by learned counsel for the appellants/plaintiffs.

11. We may observe that in circumstances where the respondents/defendants had failed to present themselves after service of summons was effected on them in a suit and further, they had failed to file a written statement as required, the court was empowered to pronounce a judgment against them under Order VIII Rule 10 CPC or pass any appropriate orders in relation to the suit. However, the appellants/plaintiffs were directed to lead *ex-parte* evidence to prove their case. But the evidence produced by them was found to be woefully inadequate for granting them the relief of declaration or partition and permanent injunction, as prayed for in prayer clauses (a) to (e) of the plaint. As a result, the suit was dismissed.

12. It has been projected by the appellants/plaintiffs in the suit that their father, Late Shri Khazan Singh was the owner of three residential houses situated in Laldora Abadi of Village Samalkha, Delhi and upon his demise,

they, alongwith their brother and mother, respondents No.1 and 4 had inherited the suit properties in equal shares, to the extent of 1/7th each and they were in joint use and occupation of the suit properties. In para 5 of the plaint, a bald averment has been made to the effect that Late Shri Khazan Singh had inherited the suit properties from his forefathers and as he was a member of a joint Hindu family and being the head of the family, his name was reflected in the revenue records. In view of the provisions of Order VI Rule 4 CPC which mandates that necessary particulars alongwith relevant dates, particulars etc. must be clearly stated in the pleadings, it was incumbent upon the appellants/plaintiffs herein to have furnished the details of when and how was the HUF created and the suit properties became HUF properties along with the factual details of each of the suit properties that they have claimed are HUF properties.

13. The plaint however lacks material and essential particulars to substantiate the plea of the appellants/plaintiffs that there ever existed a joint Hindu family. There are no details as to when the HUF was constituted, who were the members of the said HUF and how the nucleus was created to acquire the joint family properties. Except for stating that Late Shri Khazan Singh was a member and later on, head of the HUF and he had acquired the suit properties, there is no positive averment in the plaint for the court to treat the said properties as ancestral properties in the hands of Late Shri Khazan Singh. Had the said particulars been first pleaded in the suit, the appellants/plaintiffs could have proceeded to prove the same by producing the relevant evidence, both, ocular and documentary.

14. The submission made that Late Shri Khazan Singh had inherited the suit properties from his forefathers or that he was a member of an HUF and

later on, became the head of the HUF, cannot itself create an HUF unless and until it was specifically pleaded by the appellants/plaintiffs that Late Shri Khazan Singh had inherited the suit properties from his paternal ancestors prior to the year 1956, when the Hindu Succession Act came to be legislated or that his predecessors-in-interest had created an HUF before the year 1956 and they had created a nucleus through which contributions were made to purchase immovable properties or even that Shri Khazan Singh had himself created an HUF by throwing his own properties into a common hotchpotch. The aforesaid essential averments have nowhere been pleaded in the plaint for claiming the existence of an HUF and asserting that the suit properties were HUF properties.

15. In the case of Commissioner of Wealth Tax, Kanpur and Ors. vs. Chander Sen and Ors. reported as (1986) 3 SCC 567, the Supreme Court had held that after enactment of the Hindu Succession Act, 1956, the traditional view that on inheritance of an immovable property from paternal ancestors upto three degrees, an HUF automatically came into existence, no longer remains the legal position in view of the provisions of Section 8 of the Hindu Succession Act, 1956. A similar view was expressed by the Supreme Court in the case of Yudhishter vs. Ashok Kumar reported (1987) 1 SCC 204, where it was reiterated that after coming into force of Section 8 of the Hindu Succession Act, 1956, inheritance of an ancestral property post 1956, does not create an HUF property and any inheritance of an ancestral property after 1956, does not automatically result in creation of an HUF property.

16. What emerges from the aforesaid decisions is that as per law, an ancestral property acquires the colour of an HUF property if the inheritance

had taken place before the year 1956 and if such an HUF property came into existence prior to the year 1956, then it continues to remain one even after 1956, the reason being that since an HUF had already come into existence prior to the year 1956, the status of the HUF as also the HUF properties would remain the same even thereafter. In those circumstances, members of the HUF would continue to remain as coparceners and they would be entitled not only to a share in the HUF properties, but also to claim partition of the HUF properties.

17. After the year 1956, in circumstances where an HUF did not exist prior to the year 1956, if it is pleaded in a suit that an individual's property is an HUF property, then the plaintiff is expected to furnish specific details relating to the relevant time as in, the date, month, year etc. when the HUF was created for the first time and a self-acquired property of an individual was thrown into a common hotchpotch, for it to acquire the colour of an HUF property thereby entitling the plaintiff to claim a share in the said property as a coparcener and seek partition. In circumstances where a person had expired after the enactment of the Hindu Succession Act, 1956 and no HUF was in existence at the time of his death, then even though his self-acquired property would be inherited by his successors-in-interest as an ancestral property, but the said property cannot be treated as an HUF property in their hands as there did not exist an HUF at the relevant point in time, i.e., at the time of the death of the predecessor-in-title.

18. The aforesaid legal position alongwith all the relevant facts to substantiate the plea that properties, subject matter of the suit are HUF properties, had to be clearly averred by the appellants/plaintiffs in the plaint, as a positive statement. In the absence of any such averment in the plaint

except for a passing reference made in para 5, we fully endorse the view of the learned Single Judge that the appellants/plaintiffs have failed to establish that the subject properties were ancestral in nature. There is no averment in the plaint as to when was the HUF created, which is stated to have owned the suit properties, whether the said HUF was in existence prior to the year 1956 or was created for the first time after the year 1956 and if it was created post 1956, did Shri Khazan Singh own the suit properties and had thrown them into the common hotchpotch.

19. The year 1956 also gains significance in view of the enactment of the Benami Transactions (Prohibition) Act in the year 1988, which declares that a property in the name of an individual has to be taken as owned by the said individual and no claim to such a property is maintainable on the ground that monies have come from the person, who claims a right in the property, though the title deeds of the said property are not in his/her name, as contemplated under Section 4(1) of the Act. In the instant case, the appellants/plaintiffs had instituted the suit in December 2016, after the omission of sub-section (3) to Section 4 of the Benami Transactions (Prohibition) Act, 1988, which allowed existence of the concept of HUF. On omission of sub-section (3) to Section 4 by virtue of Act 43 of 2016 that came into effect w.e.f. 01.11.2016, it cannot even be urged by the appellants/plaintiffs that the provisions of sub-section (1) and sub-section (2) of Section 4 of the Act would not apply. Even for taking such a plea, had it been available to them, the appellants/plaintiffs would have had to still plead as to how and in what circumstances did the HUF come into existence and how the properties sought to be described by them in the plaint as ancestral properties, had acquired the colour of HUF properties.

20. As was held by the Supreme Court in the case of D.S. Lakshmaiah and Anr. Vs. L. Balasubramanyam and Anr. reported as **(2003) 10 SCC 310**, there is no presumption of a property being a joint family property only on account of the existence of a joint Hindu family and the person who asserts so, has to prove that such a property is a joint family property. Only upon the said person proving that there was a nucleus which was used to acquire the joint family property, can a presumption be drawn of the said property being a joint family property for the onus to shift to the other side, who claims the property to be a self-acquired property. It will then be for him to prove that the said property had been purchased with his own funds and not out of the joint family nucleus that was available. The appellants/plaintiffs have failed to discharge the onus cast upon them in law, for the court to have shifted the onus on to the other side.

21. What to say of the appellants/plaintiffs proving that there was any joint Hindu family property or that the suit properties had been purchased by their father from the nucleus of the joint Hindu family, they have not even been able to produce any title documents existing in the name of Late Shri Khazan Singh in respect of the subject properties to establish that the same were owned by him and upon his demise on 02.01.1990, his legal heirs including the appellants/plaintiffs and the respondents No.1 and 4 were entitled to an equal share therein.

22. Even the recitals contained in the Sale Deeds/Gift Deed proved by the appellants/plaintiffs as Ex.PW1/1 to PW1/7, record that the seller/donor was the sole, absolute and exclusive owner in possession of the suit properties and that the said properties were mutated in the name of the seller/donor as an owner in the revenue records and further, that the said properties were

self-acquired properties of the transferor, who was fully entitled to transfer the same.

23. The appellants/plaintiffs have sought to poke holes in the Sale Deeds/Gift Deed executed *inter se* the respondents/defendants by claiming that the said Sale Deeds/Gift Deed are a nullity since there could not be a sale transaction between the husband and wife or that the respondents No.3 was a minor at the relevant point in time and could not have possessed any sale consideration as paid under the Sale Deed or that the respondent No.1 had executed a Sale Deed in respect of one property and therefore, he could not have yet again executed another Sale Deed in respect of the very same property. All these objections are insignificant when the appellants/plaintiffs have not even been able to establish their *locus standi* in respect of the properties in question.

24. We are also in agreement with the observations made in the impugned judgment that though there is no limitation period prescribed for seeking partition of an immovable property, but in circumstances where the father of the parties had expired as long back as on 02.01.1990 and a suit for partition came to be instituted after 26 years only in December, 2016, the burden on the appellants/plaintiffs had become more onerous to prove entitlement to the subject properties, which they miserably failed to discharge. We do not see any reason to differ with the view expressed in the impugned judgment that though the appellants/plaintiffs have averred in the plaint that in part settlement of their shares in their father's estate, in April, 2003, the respondent No.3 had given a built up house measuring 88 sq. yards to them with an assurance to give them their share in the other properties, the appellants/plaintiffs have failed to prove that any such premises was given to

them by the respondent No.1 by producing the documents of title, possession or transfer of the said premises in their favour or any other relevant records in respect of the said premises.

25. The appellants/plaintiffs have thus not been able to prove that there existed any joint Hindu family before or after the year 1956 and the suit properties were HUF properties or that the suit properties were owned by their father, who had treated them as ancestral properties and placed them in the common hotchpotch, for them to claim entitlement to a decree of declaration, declaring that the Sale Deeds/Gift Deed executed *inter se* the respondents No.1 to 3, ought to be declared as null and void and that a decree of partition and permanent injunction be passed in respect of the said properties.

26. In view of the aforesaid facts and circumstances, we are of the opinion that the impugned judgment does not warrant any interference and is accordingly, upheld. As a result, the present appeal fails and is dismissed as meritless alongwith the pending application with no order as to cost.

(HIMA KOHLI)
JUDGE

(ASHA MENON)
JUDGE

NOVEMBER 13, 2019
rkb/ajk