$~31

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

\+ CS(OS) 1960/2000

MASTER ARJUN GUPTA ..... Plaintiff

Through: Mr. B. P. Aggarwal, Adv.

versus

BAL KISHAN DAS GUPTA THRU LR'S AND ORS. ..... Defendants

Through: Mr. Lalit Gupta & Mr. Himank Ahuja, Advs. for D1 (i) & D2-Dr Anup Gupta.
Mr. Rikky Gupta, Adv. for D-3 & 4 & LR (ii) & (iii) of D-1.
Mr. Abhishek Aggarwal, LC with Mr.Shreshtha Garg and Ms.Mugdha Pandey, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 26.07.2019

SANJEEV NARULA, J.

1. Plaintiff by way of the present suit, seeks partition, rendition of accounts, declaration and maintenance in respect of properties and businesses mentioned in Schedule A & B.

Case of the Plaintiff

2. Since both the Plaintiffs were minors at the time of filing of the suit, it was filed through their mother as the legal guardian. The Plaintiffs assert that properties and businesses mentioned in schedule –'A' and 'B' are joint

family properties and businesses. After the death of the father of the Plaintiffs, their grandfather [Defendant No. 1- late Sh. Balkishan Das] told their mother to leave the house and also refused to provide any maintenance to them. Later, on 1st July 1998, Plaintiff's mother married cousin of their father [Mr. Vipin Kumar Gupta]. Plaintiffs' father- Mr. Dinesh Gupta was a member of the joint family and had a right in joint family properties and businesses. Plaintiffs as legal heirs inherited his share and are entitled to l/4th share in the properties and businesses owned by the joint family. They requested Defendant No. 1 to divide the joint family properties and businesses and give them their father's share, but Defendant No. 1 refused to do so and hence, the present suit was filed.

3. During the pendency of the suit, Defendant No. 1 died intestate. Since legal heirs of Defendant No. 1 were already on record, no other legal heirs were impleaded. Dr. Anoop Gupta [Defendant No. 2] is the son of Defendant No. 1 [and brother of Plaintiffs' father] and is a partner in various businesses other than his clinic and medical business. Defendant No. 3-Shri Anand Gupta is the son of Defendant No. 1 and Defendant No. 4- Smt. Alka Gupta is the daughter of Defendant No. 1.

Case of Defendants

4. Defendants specifically deny the existence of joint family businesses or properties. According to the Defendants, all the properties and businesses mentioned in Schedule A & B were either partnership business or individual businesses/properties owned by them individually or jointly. These properties were purchased by the respective individuals out of their own

funds and none of the properties is a joint family property or HUF property.
5. Suit has been instituted by Plaintiff’s mother at the instance of Mr. Vipin Kumar Gupta (her Second Husband), as a counter blast to the litigation that was pending between the family branch of Mr. Vipin Kumar Gupta and Defendant's family. The details of the pending suits are as under:

1. Suit No. 484/2007, before, Sh. Atui Kumar Garg, ADJ, Karkardooma Court.
2. Suit No. 1633/2001, before, Delhi High Court.
3. Suit No. 56/2004, before, Sh. Vinay Singhai, DJ, Tis Hazari Court.
4. Suit No. 259/2005, before, Sh. Praveen Singh, DJ, Tis Hazari Court.
5. Crl. Complaint No. 473/1/2006, before, Sh. Rajesh Kumar Singh, MM, Patiala House Court.

6. Plaintiffs and their mother have concealed the details of the properties owned by their mother and father individually (which have been inherited by them). No HUF ever existed. No income tax return, wealth tax return or any other return was filed in the name of HUF or joint family. Each member was filing his own income tax return. Defendants have filed various documents along with the Written Statement in support of their claim. The documents include the statement of loan taken by Defendant No. 2 and his wife from various banks for purchase of the properties, and its repayment. The loan facility taken by Defendant No. 2 and his wife was to the tune of around Rs. 539 lakhs. While Defendant No. 2 is a doctor by profession running medical

business, his wife is a scientist. Defendant No. 2 has placed on record title documents in respect of properties viz.

i. Shop No. 7, Sunder Nagar Market, New Delhi

ii. Property No. 17, Todar Mal Lane, Bengali Market, New Delhi

iii. Property No. 1, Aviation Employees Co-operative Group House Building Society known as Gagan Vihar, Shahdara, Delhi

iv. Flat No. B-208, Narwana Apartments, Plot No. 89, Patpar Ganj, Delhi

v. Basement portion of Property bearing No. 11-A/12/A&B, Lajpat Nagar, New Delhi

vi. One hall/room measuring 700 Sq. Ft. bearing no. G-14 in Property No. 1/42 Lalita Park, Vikas Marg, Delhi

vii. Flat No. 139, First Floor, Antriksh Bhawan, 22, K.G.Marg, New Delhi

viii. Shop No. 4, Guru Amardas Bhawan Apartments, 78, Nehru Place, Kalkaji, New Delhi.

x. Shop No. 78, Community Centre, New Friends Colony, New Delhi.

7. In respect of property No. A-221, New Friends Colony, New Delhi, it is stated by Defendant No. 2 that it is a self-acquired property of Ms. Alka Gupta, wife of Defendant No. 2, who is not a party to the present suit. Regarding Shop no. 2, Sunder Nagar Market, it is stated that it was self-acquired property of Defendant No. 1 who died intestate and the property devolved on the heirs by successorship. Regarding various businesses, detailed description has been given by Defendants viz. institution of suit, constitution of the partnership, date of incorporation etc. Properties and

business were inherited by Smt. Upma Gupta, the mother of the Plaintiffs but there is no disclosure made by the Plaintiffs. The details of such properties are as under:-

a) Flat No. E-605 (three bed room flat) In Narwana Apartments, Plot No. 89, Narwana Nagar, Patparganj, Delhi

b) Share to the extent of 6.25% in the property bearing no. 19, Community Centre, New Friends Colony, New Delhi

c) 20% share in the partnership business of the firm M/s Nathu Ram Ramesh Kumar (known as Nathu Sweets) Bengali Market, New Delhi.

d) Business of LIC agency

e) Business of Nathu Builders (P) Ltd. of which company Late Sh. Dinesh Gupta was one of the Directors which / position is now held by Smt. Upma Gupta.

f) Flat No. 258, DSIDC Sheds, Hardware Market, Shopping Complex, Kirti Nagar, New Delhi

g) Share Certificate of leading/blue chip companies worth Rs.20 lacs in the years 1994 which shares are presently worth more than Rs. l crore.

8. Smt. Upma Gupta admitted that she was an income tax assessee for several previous years and all other family members were also income tax assesses in their individual capacity. She was also owner of an agricultural land in Village Nathur, District Bijnore, UP as is stated by her in para 12 of her affidavit. Her husband Late Sh. Dinesh Gupta was owner of DSIDC shed at Kirti Nagar, which was transferred in her name after death of her

husband. Later on, the same was sold and Plaintiffs are entitled to share in the said shed. This fact was also concealed from the Court.

9. Defendant No.1 (i) –Dr. Anoop Gupta, in its written statement in Para-7, states as follows;

> “7. The present suit is liable to be dismissed as the plaintiffs have concealed material facts from this Hon'ble Court. The plaintiffs are guilty of abusing the process of this Hon'ble court by approaching this Court with unclean hands. The Plaintiffs (through their mother and guardian), with deliberate intentions, have not disclosed the properties, which have come into their hands after the death of their father Sh. Dinesh Gupta. Late Sh. Dinesh Gupta had owned and possessed the following properties and businesses which facts have been deliberately concealed by the plaintiffs from this Hon'ble Court.
>
> 1. Flat No. E-605 (a three-bed room Flat) in Narwana Apartments, Plot No. 89, Narwana Nagar, Patparganj, Delhi-110091.”

10. Learned counsel for the Plaintiffs argued that in para – 6 of the order dated 14th May, 2007 the observations made by the court qua property bearing no. A-221, New Friends Colony, New Delhi are incorrect. Per contra, Mr. Gupta, learned counsel for the defendant contends that this order was never assailed by the Plaintiff, and the observations of the Court were on the basis of the submissions advanced during the course of the hearing and are factually correct.

Proceedings in the suit

11. On 14th May, 2007 this Court passed a detailed order dismissing the

application filed by the Plaintiff under Order 39 Rule 1 & 2 CPC holding that the Plaintiff has failed to show a prima facie case that any of the property and business for which the suit has been filed was joint family property or joint family businesses wherein their father had any share. However, it was also ordered that the observations made in the said order would not have any bearing on the merits of the case.

12. On 23rd May, 2011, this Court framed the following issues:

> "1. Whether the properties and businesses mentioned in Schedule 'A' and 'B' attached to the plaint were owned by a joint family, as alleged in the plaint? OPP
>
> 2. Whether the plaintiff is entitled to the decree for partition in respect of the properties mentioned in Schedule 'A' and 'B' attached to the plaint? OPP
>
> 3. Whether the plaintiff is entitled to rendition of accounts? OPP
>
> 4. Relief."

13. During the pendency of the suit, Plaintiffs who were minor at the time of filing of the present suit, attained majority. An application under Order 32 Rule 12 CPC (I.A. 19651/2012) was filed by the Plaintiffs and the said application was allowed on 1st March, 2013 and the Plaintiffs were allowed to be represented in their own rights and prosecute the present suit without any guardian.

14. Trial commenced on 31st August, 2013. On 27th August, 2013, the Plaintiff filed list of witnesses.

15. Smt. Upma Gupta, stepped into the witness box as PW-1. On 4th August, 2014, she was partly cross examined and further cross examination was deferred. On 15th January, 2015, an adjournment was sought on the ground that PW-1 Smt. Upma Gupta was unwell, however, the said contention was not accepted and the Court declined to grant an adjournment and accordingly, evidence of the said witness was closed. Thereafter, the matter was listed for recording of the evidence of other witnesses of Plaintiffs namely PW-2, Sh. Raj Kumar Goel and Sh. Anil Gupta. The other two witnesses namely Sh. Shakeel Ahmad and Sh. Arun Sukund were not present before the Court on the said date. On the request of the learned counsel for the Plaintiff, liberty was granted to file affidavits of the said witnesses subject to payment of cost. On 21st April, 2015, the evidence of Sh. Shakeel Ahmad and Sh. Arun Sukund was closed and the witnesses Sh. Raj Kumar Goel and Sh. Anil Gupta were directed to remain present for recording of their statements. Thereafter, on 20th October, 2015, the affidavit of Sh. Raj Kumar Goel was tendered in evidence and partly cross examined. His further cross examination was deferred. On 3rd February, 2016 the matter was transferred to New Delhi District Court (Patiala House). Before the District Court on 4th July, 2016, the entire evidence of the Plaintiff was closed as there was no appearance on behalf of the Plaintiff. On 14th December, 2016 on the submission of the learned counsel for Defendant No.2, relating to the valuation of the suit property, it was directed that the matter be sent back to this Court. After transfer, the matter was taken up by this Court on 20th March, 2017 and the following orders were passed:

> "1. In this suit for partition of immovable property, the onus of all the issues framed is on the plaintiff and the plaintiff has not

led any evidence.

2. The counsel for all the other defendants except defendant no.l(i) Dr. Anoop Gupta states that since the plaintiff has not led any evidence, the said defendants also do not want to lead any evidence and have already made a statement to that effect. The counsel for defendant no.l(i) Dr. Anoop Gupta however states that evidence is required to be led.

3. lA No. 12799/2014 of the defendants no.l(iii) & 3 under Order VII Rule 11 of the CPC is also pending consideration.

4. Since the other defendants have already stated that they do not want to lead any evidence, it is deemed appropriate to consider the plea for rejection of the plaint at the final stage only.

5. The counsel for defendant no.l (i) Dr. Anoop Gupta states that affidavit by way of examination-in-chief of one of the witnesses has already been filed and the remaining affidavits by way of examination-in-chief if any shall be filed within four weeks.

6. List before the Joint Registrar on 29th March, 2017 for fixing the dates of trial.

7. It may be noticed that the counsel for the plaintiff has not urged anything in respect of the order dated 8 February, 2017."

16. As noted in the aforesaid order, at that stage, counsel for the Defendant No.1 (i) Mr. Anoop Gupta expressed the desire to lead evidence and pursuant thereto Mr. Anoop Kumar Gupta filed an affidavit by way of evidence. However the said witness did not present himself for cross examination and ultimately on 21st May, 2019, a statement was made by Mr. Anoop Gupta (DW-1) to the effect that he does not want to offer himself for cross examination. In view of the fact that the Plaintiff did not lead any evidence in the case, accordingly, evidence of Mr. Anoop Gupta was closed. It is also pertinent to note that on 8th August, 2016, the learned counsel for

the Defendant No.1 (ii) (iii), Defendant No.3 and 4 – Mr. Anand Gupta and Mrs. Alka Gupta had already given a statement before Court that they do not wish to lead any evidence in defence. Accordingly, the evidence in the matter stood completed and the matter was listed for final hearing.

Analysis

Issues No.1 , 2 &3

17. The onus of proof of all the issues was on the Plaintiff. The position that emerges in view of the aforesaid proceedings is that the Plaintiffs have chosen not to lead any evidence on the said issues. Plaintiffs were allowed to prosecute the present suit in their own right on 1st March, 2013, however they have chosen not to appear before the Court and depose in the matter. Issues as framed, cast the onus on the Plaintiffs to establish that the properties and business mentioned in Schedule A and B attached with the plaint, were owned by the joint family. In case Plaintiffs would have successfully proved the first issue, only then the Plaintiff's entitlement to the decree of partition under Issue No.2 would have to be examined. The third issue is also interlinked with Issue No.1.

18. The burden of proving that any particular property is a joint family property at the first instance is upon the person who claims it to be so. Plaintiffs have all throughout asserted and claimed that such properties were joint family properties and joint family businesses. It was thus imperative for the Plaintiffs to have proved the said issues by leading evidence. The legal principle is well established in several judgments of the Apex Court

that there is no presumption of property being a joint family property only on account of existence of joint Hindu Family [Ref: ***Appalaswami v Suryanarayanamurti*** AIR 1947 PC 189; ***Mudi Gowda Gowdappa Sankh v Ram Chandra Ravagowda Sankh*** (1969) 1 SCC 386; ***DS Lakshmaiah v L. Balasubramanyam*** (2003) 10 SCC 310; ***Makhan Singh v Kulwant Singh*** (2007) 10 SCC 602]. Since the Plaintiffs have not led any evidence on the issues, they have failed to discharge the onus of proof.

19. In fact, a perusal of the plaint shows that the foundation for claiming the properties to be joint family properties and joint family businesses is clearly missing. Nevertheless, since the Plaintiffs made such assertions, the issues were framed. The entire pleadings on this plea of joint family properties and joint family businesses are contained in paras- 11, 12, 13, 14 & 15, which for the sake of ready reference are being reproduced hereunder:

> "11. That the father of the Plaintiffs late Shri Dinesh Gupta being a member of the joint family has right in the joint family property and businesses. The family businesses have been developed and progressed with hard labour of the father of the plaintiffs, and by earnings out of the said businesses properties have been purchased.
>
> 12. That after the death of the father of the Plain tiffs Shri Dinesh Gupta, the Plaintiffs became entitled for the share of their father in the joint family properties and businesses. The details of joint family properties are mentioned in Schedule "A" to the Plaint. The details of businesses are mentioned in Schedule "B" to the Plaint. Apart from the proper ties and businesses mentioned in Scheduled "A" and "B" there are other joint family properties and businesses which the plaintiffs are not aware. The defendant No.1 be directed to

disclose the other properties, businesses, bank accounts, lockers, shares, debentures and other assets of the joint family which are in the names of defendants No.1 to 3 being the members of the joint family. After discloser of the same, the same be added and treated as subject matter of the present suit.

13. That the deceased late Shri Dinesh Gupta who constituent of a joint Hindu Family died leaving behind heirs. The Plaintiffs thus became entitled to ¼th of the share in the properties and businesses which belong to the joint family. The Defendant No.4 is the married daughter of Defendant No. 1 and has no right in the properties and businesses as she was married out of the funds of the joint family. The Defendant No. 4 is imp leaded in the present suit as proper parties for adjudication of the present suit.

14. That the Plaintiffs are facing great hardship in life as they required to be maintained properly and get good education according to the status of the family of their father.

15. That the Plaintiffs have requested the Defendant No. 1 to divide the properties and businesses and give Y share of "their father out of the joint family properties and businesses to the extent of l/4th for which their father was entitled he been alive, the Defendant No. 1 has refused to do so and threatened that he will not give a single penny and dispose of and transfer the properties and businesses according to his own wishes. Therefore, the Plaintiffs have no alternative except to approach this Hon'ble Court and file the present suit. The plaintiffs are in possession of Rs.10,000/= through their mother in cash which was left by Shri Dinesh Bupta besides a. gold chain and a pair of gold bangles valued at about Rs.10,000/= The plaintiffs are ready to throw these items in the common hotch potch."

20. It has been held in the case of ***Sunny (Minor) v Raj Singh*, 225 (2015) DLT 211** that mere pleadings in the plaint as to existence of a joint family property is not sufficient but the party asserting the HUF nature of property

is required to make positive statement explaining how and when the property acquired the status of HUF property. The relevant portion of the judgment is being reproduced hereunder:

> *"If one party asserts that a property is indeed a joint family property, the law requires that the Plaintiff should establish by leading cogent evidence before the Court, to prove this fact. In the present case, evidently, the Plaintiff has not led any evidence and therefore the Court has no hesitation to hold that the Plaintiff has failed to discharge the onus of proof on all the three issues enumerated above. Further, 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, and a pleading to that effect in the plaint is not sufficient to establish the property as a joint family property. 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."

21. Learned counsel for the Plaintiff argues that the Defendant/ Dr. Anoop Gupta has filed its affidavit by way of evidence but has deliberately chosen not to present himself for cross examination as he wanted to avoid the cross examination in relation to the property bearing No. A/221, New Friends Colony, New Delhi in respect whereof there is already litigation and criminal trial is pending. At the highest, the affidavit of the said witness can be read against the Defendant, since he has chosen not to present himself for cross-examination. However, the said affidavit does not discharge the Plaintiff of the obligation to prove the issues. The said affidavit does not make any admission of joint family properties or the businesses and since the Defendant has chosen not to appear before the Court and his affidavit is considered as evidence, the same does not help the Plaintiff in any way. The case of joint family properties and businesses has been set up by the Plaintiff and not the Defendant. Accordingly, in absence of any proof shown to the Court, all the issues are decided against the Plaintiffs. Resultantly, the suit is dismissed.

22. Mr. Gupta, learned counsel for the Defendants points out that on the basis of the present suit, the entire business and the properties which were subject matter of the present suit were under an order of injunction, from the date of institution of the present suit till 14th May, 2017. He submits that having regard to the aforesaid fact and also for the reason that the Plaintiff has successfully dragged this litigation for nearly 19 years by making only an assertion and then electing not to even attempt to prove the same, the

Court should impose heavy costs.

23. I agree with the submission of Mr. Gupta. The suit was a frivolous attempt on the part of the Plaintiff and the dismissal should be accompanied with costs. It is thus ordered hat Defendants shall be also entitled to cost of litigation which is assessed to be Rs. 5 lakhs that shall be paid by the Plaintiffs and shared equally by both the Defendants. At this stage, Learned counsels for the Defendant state that cost awarded by the Court be paid towards charity. It is thus ordered that costs awarded shall be paid as under:

> Rs. 1.5 laks to be paid to Indian Women and Child Welfare Trust, Rs. 1.5 lakhs to be paid to National Defence Fund for welfare of Armed Forces and Rs. 2 lakhs to Shaurya Foundation Trust.

CCP(O) 18/2006, I.A. 12799/2014

24. In view of the findings of the Court, there is no case made out for the contempt action and the same is dismissed. Pending applications are also disposed of.

SANJEEV NARULA, J

JULY 26, 2019
Pallavi