

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

+ **RFA No. 242/2018**

% **23rd January, 2019**

BRIJ MOHAN GUPTA Appellant

Through: Mr. Subodh K. Pathak,
Advocate with Mr. Yash
Anand, Advocate, Mr. Adil
Alvi, Advocate and Ms. Pranita
Shekhar, Advocate (M.
No.9810025083).

versus

SONA DEVI (SINCE DECEASED) & ORS. Respondents

Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No. 3108/2019 (for reviving the appeal)

1. This application is allowed and the appeal is revived in
view of what is recorded in the order dated 12.03.2018.

C.M. stands disposed of.

C.M. No. 3109/2019 (for additional grounds)

2. This application is allowed and the appellant is allowed to urge additional grounds and additional questions of law especially challenge made to the order of the trial court dated 14.09.2018.

C.M. stands disposed of.

C.M. No. 3110/2019 (exemption)

3. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No. 3111/2019 (for condonation of delay)

4. For the reasons stated in the application, delay of 18 days in filing the appeal is condoned subject to just exceptions.

C.M. stands disposed of.

RFA No. 242/2018

5. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff/brother (and son of original defendant no. 1- the mother) impugning the Judgment of the trial court dated 18.11.2017 by which the trial court has dismissed the suit for declaration and partition filed by the appellant/plaintiff with respect to property bearing no. A-19, Ashok Vihar, Phase-1, New Delhi.

6. The case of the appellant/plaintiff in the plaint was that the suit property was allotted by DDA to him but at the request of the father/Sh. Sampat Rai, the perpetual Lease Deed dated 03.07.1972 of the suit property was executed by the DDA in the name of the father, Sh. Sampat Rai. It was however pleaded that the appellant/plaintiff had paid the consideration for purchase of the property and some of the consideration for the purchase of the property was paid out of the HUF business. The suit property was pleaded to be an HUF property. The lease of the plot was registered in the name of the father as the father, Sh. Sampat Rai, was the *karta* and head of the family. The appellant/plaintiff also by the subject suit impugns the Will dated 10.02.1993 executed by the father by which the appellant/plaintiff was disinherited *qua* the suit property and the father gave the suit property to defendant nos. 2 to 3 being his two other sons, namely Sh. Satish Kumar Singhal and Sh. Prehlad Rai. In the suit since one son (brother of plaintiff), Sh. Prehlad Rai, had expired, he was represented by his son Sh. Nikhil Singhal who was sued as defendant no. 2. Sh. Prehlad Rai had died during the pendency of the said suit. The daughters of Sh. Sampat Rai were also made party to the suit as defendants but it was pleaded that the daughters

had relinquished their shares in the suit property in favour of their brothers i.e. sons of late Sh. Sampat Rai. The suit for partition was therefore prayed to be decreed.

7. The suit was essentially contested by two family members, and who were the defendant nos. 2 and 3 in the suit, legal heir of the deceased Sh. Prehlad Rai namely Sh. Nikhil Singhal, and Sh. Satish Kumar Singhal. The mother of the parties, Smt. Sona Devi, who was sued as defendant no. 1 expired during the pendency of the suit. The defence of the contesting defendants was that there was no HUF. It was denied that the suit property was an HUF property. It was denied that the appellant/plaintiff ever paid any amounts for purchase of the suit property to the DDA. It was stated that the appellant/plaintiff was posted as a Junior Engineer at PWD in Manipur and he did not have enough money to rear his own family, what to talk of giving funds to the father, Sh. Sampat Rai, for purchase of the property. The father, Sh. Sampat Rai, had purchased the suit property from his own funds. It was also pleaded by the contesting defendant nos. 2 and 3 that the father had executed his Will dated 10.02.1993 bequeathing the suit property to the defendant nos. 2 and 3. It was

also the case of the defendant nos. 2 and 3 that in fact the appellant/plaintiff had himself relied upon this Will dated 10.02.1993 because on the basis of this Will, the appellant/plaintiff had got his name mutated with respect to the land situated at District Jind in Haryana. The suit was accordingly prayed to be dismissed.

8. After the pleadings were complete, the trial court framed the following issues:-

“(1). Whether the Will dated 10.02.1993 propounded by the defendant nos. 1, 2 and 3 was validly executed by late Sh. Sampat Rai and is genuine Will of the testator Sh. Sampat Rai? OPD

(2). Whether the father of the plaintiff was not entitled to execute the Will dated 10.02.1993 as claimed by the plaintiff? OPD

(3). Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD

(4). Whether the plaintiff is entitled to the partition of the property as claimed by him? OPP

(5). Relief.”

9. The appellant/plaintiff led evidence and filed his affidavit by way of evidence as Ex.PW1/A, but during his cross-examination, he flared up and left the court and did not want to be cross-examined further. Accordingly, the affidavit of evidence of the

appellant/plaintiff was struck-off. This is recorded in paras 45 and 46 of the impugned judgment and these paras read as under:-

“45. It is pertinent to mention that to prove his case, plaintiff tendered his affidavit in evidence as Ex. PW1/A and partly cross-examined by Ld. Counsel for the defendant no. 3 but during his cross-examination, it was observed by the Court that *"Witness is unnecessarily shouting and leveling allegations against the opposite party. He is also started cursing the opposite party without any provocation and reason. Witness is warned and to behave properly. He is not even ready to listen to his counsel. He is again warned to behave properly and to maintain decorum of the court. The witness is not ready to listen at all and has left the witness box stating that he does not want to be examined any further. In these circumstances, there is no other option left except to close the plaintiff's evidence. The witness is discharged."*

46. In view of the above reasons, vide detailed order dated 12.05.2016, Ld. Predecessor directed that testimony of PW-1 Sh. Brij Mohan Gupta will not be read in evidence. The plaintiff vide separate statement closed his evidence in affirmative on 09.08.2016.”

10. The respondents/defendants thereafter led evidence and proved various documents. The respondent no. 3/defendant no. 3/Sh. Satish Kumar Singhal, the third son appeared as D3W1. The documents which were proved by respondent no. 3/defendant no. 3 are numerous documents towards the suit property being owned by the father, Sh. Sampat Rai, carrying on his business, etc. and these documents are referred to in para 47 of the impugned judgment, and this para 47 reads as under:-

“47. Defendant no. 3 Sh. Satish Kumar Singhal got himself examined as D3W1, he tendered his evidence by way of affidavit as Ex. D3W1/A and proved on record the documents i.e. copy of Perpetual lease deed dated 03.07.1972 and registration dated 26.07.1972 as Ex.D3W1/1(OSR), copy of possession letter dated 03.07.1972 as Ex.D3W1/2(OSR), copy of letter dated 05.07.1979 of DDA as D3W1/3(OSR), copy of letter dated 18.07.1972 of DDA as Ex.D3W1/4(OSR), copy of possession letter dated 24.08.1971 as Ex.D3W1/6(OSR), copy of letter received on 02.03.1971 issued by Sh. Sampat Rai as Ex.D3W1/7(OSR), copy of letter dated 03.08.1971 of DDA as Mark D3W1/A, copy of letter dated 07.05.1970 of DDA as Ex.D3W1/8(OSR), letter dated 19.04.1971 of DDA as Ex.D3W1/9(objected), copy of letter dated 03.11.1987 issued by sh Sampat Rai as Ex.D3W1/10(OSR), certified copy of mutation as Ex.D3W1/11(OSR), Income tax clearance certificate as Mark D3W1/B and Mark D3W1/C, copy of assessment order dated 29.05.1962 as Ex.D3W1/15, copy of assessment order dated Nov, 1980 as Ex.D3W1/16, four Acknowledgments dated 19.09.1979 as Ex.D3W1/17, copy of Assessment order dated 10.03.1972 as Ex.D3W1/18, copy of assessment order dated 16.02.1963 as Ex.D3W1/19, copy of letter issued by Sh. Sampat Rai as Ex.D3W1/20, copy of letter dated 18.01.1979 of CPED as Ex.D3W1/21, copy of letter dated 01.01.1979 alongwith documents as Ex.D3W1/22(colly), copy of five acknowledgments as Ex.D3W1/23(colly), seven copies of house tax payment receipts of different years as Ex.D3W1/24(colly), copy of letter dated 16.08.1972 of DDA as Ex.D3W1/25, copy of site plan as Ex.D3W1/26, copy of letter dated 29.05.1988 of DDA as Ex.D3W1/27, copy of letter dated 03.04.1980 of DDA as Ex.D3W1/28, copy of letter dated 08.10.1980 as Ex.D3W1/29, copy of letter dated 14.10.1980 of DDA as Ex.D3W1/30, copy of receipt of DDA dated 13.03.1981 as Ex.D3W1/31, copy of certificate of architect dated 28.04.1981 as Ex.D3W1/32, copy of letter dated 29.04.1981 issued by Sh. Sampat Rai as Ex.D3W1/33, copy of receipt of DDA dated 30.04.1981 as Ex.D3W1/34, copy of receipt dated 18.11.1981 of DDA as Ex.D3W1/35, copy of letter dated 18.11.1981 of DDA as Ex.D3W1/36, copy of receipt of DDA bearing no. 370318 as Ex.D3W1/37, copy of letter dated 05.04.1982 as Ex.D3W1/38, copy of letter dated 15.05.1982 of DDA as Ex.D3W1/39, copy of letter dated 06.07.1982 issued by Sh. Sampat Rai as Ex.D3W1/40, copy of letter dated 25.05.1982 of DDA as Ex.D3W1/41, copy of letter dated 12.07.1982 of DDA as Ex.D3W1/42, copy of letter of DDA with respect to the

letter of Sh. Sampat Rai dated 28.12.1982 as Ex.D3W1/43, copy of letter of DDA dated 29.01.1983 as Ex.D3W1/44, copy of receipt of DDA dated 09.05.1983 as Ex.D3W1/45, copy of Form-C as Ex.D3W1/46, copy of letter dated 25.05.1983 of DDA as Ex.D3W1/47, copy of Form-D as Ex.D3W1/48, copy of receipts of payment of fees of sewer as Ex.D3W1/49, copy of deposit voucher dated 27.08.1987 as Ex.D3W1/50, copy of letter issued by Sh. Sampat Rai dated 03.11.1987 as Ex.D3W1/51, copy of deposit voucher dated 15.02.1990 as Ex.D3W1/52, copy of letter of DDA dated 23.07.1990 and 26.07.1990 as Ex.D3W1/53, copy of letter of DDA dated 12.03.1991 and 14.03.1991 as Ex.D3W1/54, copy of receipt of cremation ground and death certificate of Sh. Sampat Rai as copy of letter of DDA dated 23.07.1990 and 26.07.1990 as Ex.D3W1/55, and Ex.D3W1/56, copy of application for mutation as copy of letter of DDA dated 23.07.1990 and 26.07.1990 as Ex.D3W1/57, copy of deposit voucher dated 07.11.1994 as Ex.D3W1/58, copy of letter dated 29.12.1994 of DDA as Ex.D3W1/59, copy of letter dated 20.02.2002 of DDA as Ex.D3W1/60, copy of acknowledgment of DDA as Ex.D3W1/61, copy of deposit voucher dated 16.01.2002 as Ex.D3W1/62, copy of letter addressed to DDA dated 16.01.2002 as Ex.D3W1/63, copy of letter dated 15.01.1999 issued by Sh. Satish Kumar Singhal as Ex.D3W1/64.”

11. The two attesting witnesses to the Will dated 10.02.1993 namely, Sh. Bharat Bhushan Jain and Sh. Sanjay Kumar Jain were brought into the witness box on behalf of the respondents/defendants and these persons deposed as D3W2 and D3W3 respectively. The aspects with respect to deposition and cross-examination of these two attesting witnesses are recorded in paras 56 to 60 of the impugned judgment and these paras read as under:-

“56. D3W2 Sh. Bharat Bhushan Jain deposed that he has seen original Will dated 10.02.1993 from the judicial record, which

is already exhibited as Ex. PW1/D3X5, the same bears his signatures at point A already marked in red colour on page no.3. He identifies signatures of Sh. Sampat Rai on the said Will which are at points A, B & C already marked in blue colour on all the pages of the said Will. He also identifies the signatures of other attesting witness of the said Will at point B already marked in red colour. He also identifies the signatures of petition writer on the said Will at point X. They all signed the said Will in the presence of each other.

57. D3W2 in his cross-examination deposed that deceased Sh. Sampat Rai was having permanent residence at Dehradun. He knew him as he used to visit his son Sh. Prehlad Rai. He had met him about 5-7 days prior to signing of the Will Ex. PW1/D3X5. He expressed his desire to execute a Will. He told him whatever his wish he get it typed from the petition writer. He accompanied him to the petitioner writer Sh. Umesh Sharma. He knew Sh. Umesh Sharma who was working for many years at Rohtak as petition writer. He along with deceased Sampat Rai and one Sanjay Jain went to the petition writer. He came from his house. Deceased Sampat Rai came from his own house separately. Sh. Sanjay Jain already reached at petition writer. He told him that he want to execute the Will on 10.02.1993. The deceased disclosed to him, his desire to execute Will at the shop of Sh. Prehlad Rai. Sh. Prehlad Rai was also present at that time. He did not discuss in whose favour he wish to execute the Will. He did not disclose to him about any previous Will executed by him. He denied the suggestion that deceased Sampat Rai executed a Will dated 10.04.1990 prior to present Will. The time was fixed to visit petition writer was about 1.00 p.m.. Sh. Sanjay Jain was not present at the time of fixing of the time. Sh. Prehlad Rai was the husband of sister of father of Sh. Sanjay Jain ('Fufa'). He never met wife of deceased Sampat Rai. He is Income Tax Advocate at Rohtak. He denied the suggestion that the Will Ex. PW1/D3X5 has been fabricated in collusion with Sh. Prehlad Rai and it does not bear the signatures of deceased Sampat Rai.

58. D3W3 Sh. Sanjay Kumar Jain deposed that he has seen original Will dated 10.02.1993 from the judicial record, which is already exhibited as Ex. PW1/D3X5 The same bears his signatures at point B on page no.3 already marked in red colour. He identifies signatures of Sh. Sampat Rai on the said Will which are at points A, B & C already marked in blue colour on all the pages of the said Will. He also identifies the signatures of

other attesting witness of the said Will at point A already marked in red colour. He also identify the signatures of petition writer on the said Will at point X. They all signed the said Will in the presence of each other. He also identify the signatures of 'Numbardar' on the said Will at point Y on the back side of the first page of the said Will.

59. D3W3 in his cross-examination deposed that he has not talked to Sh. Bharat Bhushan Jain during the lunch, who is the other witness examined today before lunch. Sh. Prehlad Rai was his 'Fufa' who has since expired. He can identify the signatures of Sh. Prehlad Rai. He has seen the document Ex. D3W3/PX1. The same is signed by Sh. Prehlad Rai at point A. He is not conversant with the signatures of Sh. Satish Kumar, the other brother of Sh. Prehlad Rai. Sh. Prehlad Rai was having motor parts business in Rohtak at Hissar Road, Rohtak. He does not know its number. He denied the suggestion that Sh. Prehlad Rai was doing the business of sale of old motor parts on the Patri on the road side and was not having any regular shop. He denied the suggestion that he is not aware of the number because he was not having any shop. There was no number of the shop of Sh. Prehlad Rai at that time. Deceased Sampat Rai used to reside at Dehradun and sometime used to come to reside with his son at Rohtak for 2-3 months at a time. His House was at a distance of two 'Galies' from house of Sh. Prehlad Rai. He had met deceased Sampat Rai on the day of execution of the Will and thereafter he remained in Rohtak for two months when he met him thereafter he never met him during his lifetime.

60. D3W3 in his cross-examination further deposed that deceased Sampat Rai had disclosed his desire about 5-7 days prior to execution of the Will. He was alone at that time. No other person was present. He told him that after 2-4 days he will get prepare the Will at Rohtak Tehsil. Deceased Sampat Rai told him on 10.02.1993 to visit the Rohtak Tehsil for execution of the Will. The Will was got prepared at Rohtak Tehsil. Deceased Sampat Rai and myself went together at about 1 or 1.30 p.m. He was present at the time of preparation of the Will. He told that prior to this Will he had executed another Will. He was not having the copy of the said earlier Will. Deceased was literate person and told about the earlier Will to the petition writer. The other attesting witness namely, Sh. Bharat Bhushan Jain came there when the Will was already got typed. He does not remember whether Sh. Bharat Bhushan Jain read the contents of the Will or not. He does not remember whether he had read the

contents of the Will or not. He is graduate. He is doing transport business. He denied the suggestion that on the day of execution of Will he was selling old moter parts. Today he does not remember the period for which deceased Sampat Rai stayed at Rohtak. He admitted that in April, 1993 deceased Sampat Rai got fracture in his leg and he was hospitalized for the said treatment. Deceased Sampat Rai had not expressed any reason to execute the Will stated by him. He denied the suggestion that the Will Ex. PW1/D3X5 has been fabricated in collusion with Sh. Prehlad Rai & Sh. Bharat Bhushan Jain and it does not bear the signatures of deceased Sampat Rai.”

12. The trial court has accordingly held that there did not exist any HUF and that it was the father, Sh. Sampat Rai, who was the owner of the suit property because the title documents were executed by the DDA in his favor. The trial court has also held that the appellant/plaintiff failed to lead any documentary evidence to show that he had made any contribution for the purchase of the suit property. The trial court has also held that appellant/plaintiff has failed to prove, much less by documentary evidence, that any HUF was existing of which the father, Sh. Sampat Rai, was the *karta*. On the basis of the evidence of the two attesting witnesses to the Will dated 10.02.1993 executed by Sh. Sampat Rai, the trial court has held the Will as proved.

13. So far as the reasoning and conclusion of the trial court that there exists no HUF, the same is consolidated and stated in para 79 of the impugned judgment and this para 79 reads as under:-

“79. On the other hand, plaintiff averred that there was HUF and he had invested the money on the instructions of his father in purchase of the suit property. However, no document proved on record by the plaintiff. He has not examined even a single witness to prove his plea that he invested in the purchase of properties in the name of his father. There is no documentary or oral evidence proved on record that there was existence of HUF and the suit property belongs to HUF. On the other hand, contesting defendants proved on the basis of above discussed, cogent, coherent evidence and DDA official's record that late Sh. Sampat Rai was the exclusive owner of the suit property. Hence, in my considered opinion, being the owner of the self acquired suit property, late Sh. Sampat Rai was competent to execute Will especially the Will Ex. PW1/D3X5 dated 10.02.1993. On the basis of above observation and discussion, issue no. 2 is decided in favour of contesting defendants and against the plaintiff.”

(Underlining Added)

14. At this stage, this Court would like to note that after passing of the Hindu Succession Act, 1956, inheritance by a person of a self-acquired property from his paternal ancestors upto three degree above will not result in the creation of an HUF. The only way in which an HUF can be said to exist after 1956 is if a person before 1956 had inherited the property from his paternal ancestors or if after 1956 a person throws his individual property into common hotchpotch for creating an HUF. This is the subject matter of the ratios of the two

judgments of the Hon'ble Supreme Court in the cases of *Commissioner of Wealth Tax, Kanpur and Others v. Chander Sen and Others*, (1986) 3 SCC 567 and *Yudhishter v. Ashok Kumar*, (1987) 1 SCC 204. I have relied upon the ratios of these two judgments in the case of *Surinder Kumar v. Dhani Ram and Others*, 227 (2016) DLT 217 and held that after 1956, an HUF can only come into existence in two circumstances, first, the property being inherited by a person from his paternal ancestors prior to 1956 and second, if no HUF was existing prior to 1956 then an HUF can only be created by throwing the property into common hotchpotch. Even with respect to the creation of the HUF by throwing the property into common hotchpotch, this Court in the subsequent judgment in the case of *Mrs. Saroj Salkan v. Mrs. Huma Singh and Ors.* in CS(OS) No. 683/2007 decided on 05.05.2016 has held that in view of Order VI Rule 4 CPC, there should be specific pleadings and specific averments as to when the HUF was created after 1956 by throwing the property into common hotchpotch. The principles of law laid down by this Court in the cases of *Surinder Kumar (supra)* and *Mrs. Saroj Salkan (supra)*, and by reference to the ratios of the aforesaid two judgments of the

Hon'ble Supreme Court have been reiterated by a Division Bench of this Court in the case of *Sagar Gambhir v. Sukhdev Singh Gambhir (Since Deceased) Thr His Legal Heirs & Anr.*, 241 (2017) DLT 98; 2017 (162) DRJ 575, and the relevant para of this judgment is para 10 and which reads as under:-

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

"(i) If a person dies after passing of the Hindu Succession Act, 1956 and there is no HUF existing at the time of the death of such a person, inheritance of an immovable property of such a person by his successors-in-interest is no doubt inheritance of an 'ancestral' property but the inheritance is as a self-acquired property in the hands of the successor and not as an HUF property although the successor(s) indeed inherits 'ancestral' property i.e. a property belonging to his paternal ancestor.

(ii) The only way in which a Hindu Undivided Family/joint Hindu family can come into existence after 1956 (and when a joint Hindu family did not exist prior to 1956) is if an individual's property is thrown into a common hotchpotch. Also, once a property is thrown into a common hotchpotch, it is necessary that the exact details of the specific date/month/year etc. of creation of an HUF for the first time by throwing a property into a common hotchpotch have to be clearly pleaded and mentioned and which requirement is a legal requirement because of Order VI Rule 4 CPC which provides that all necessary factual details of the cause of action must be clearly stated. Thus, if an HUF property exists because of its such creation by throwing of self-acquired property by a person in the common hotchpotch, consequently there is entitlement in coparceners etc. to a share in such HUF property.

(iii) An HUF can also exist if paternal ancestral properties are inherited prior to 1956, and such status of parties qua the properties has continued after 1956 with respect to properties inherited prior to 1956 from paternal ancestors. Once that status and position continues even after 1956; of the HUF and of its properties existing; a coparcener etc. will have a right to seek partition of the properties.

(iv) Even before 1956, an HUF can come into existence even without inheritance of ancestral property from paternal ancestors, as HUF could have been created prior to 1956 by throwing of individual property into a common hotchpotch. If such an HUF continues even after 1956, then in such a case a coparcener etc of an HUF was entitled to partition of the HUF property."

15. In the present case, when we refer to the plaint, there is no averment made by the appellant/plaintiff as to how the HUF came into existence i.e. whether because of the father, Sh. Sampat Rai, inheriting property from his paternal ancestors before 1956 or if Sh. Sampat Rai created an HUF after 1956 by throwing the property into a common hotchpotch on a specific date, month and year. The relevant pleadings made by the appellant/plaintiff in the plaint with respect to the HUF are stated in paras 4,5,6,7 & 5 and 6 (repeated), and which show inadequate pleadings with respect to the existence of an HUF, and these paras read as under:-

"4. That in the aforesaid year of 1959, the salary of the plaintiff, income from agricultural land, income from HUF business was the only source of income of the family of the father of the plaintiff. The money received from the salary of plaintiff, the agricultural land which was HUF and from HUF business was used and utilized for the purchase of property No A-19, Ashok Vihar,

Phase-I, Delhi to meet out the liabilities and expenditures and also to perform the marriages of the daughters of late Shri Sampat Rai.

5. That the family was joint. Plaintiff had been sending the money to his father and all the income in the hands of the father was of HUF income either from the agricultural land, business or the amount made available by the plaintiff.

6. That in the year 1959, the plaintiff was posted in PWD at Manipur Imphal as Junior Engineer and from there he used to send 2/3rd of his income to his father.

7. That on or about 1967, the plaintiff participated in the auction held by the DDA in respect of property No. A-19, Ashok Vihar, Phase-I, Delhi. The bid of the plaintiff was accepted. He was declared successful bidder in the said auction by the DDA and the plaintiff became entitled to the allotment of the said property. The auction money was deposited by the plaintiff. Since the plaintiff was a member of HUF and, as such, to avoid any misunderstanding in the family to maintain cordial relations, he got the said property leased in the name of his father who was Karta and manager of the HUF. The perpetual lease was obtained in the name of the father of the plaintiff, even though the entire cost of the plot was borne by the plaintiff alone. The payments were made by various cheques to the D.D.A. by the plaintiff from his personal account. The said amount was received by the plaintiff from his employer CPWD. The plaintiff deposited Rs. 18,500/- by means of cheques bearing no.159861 dated 10.11.1967(1967) drawn on Punjab National Bank, R.K. Puram, New Delhi, another cheque no. 513871 dated 30.7.1967 (30.7.1967) for a sum of Rs. 9260/- was also deposited by the plaintiff with the DDA from his account No. 417 maintained by him in State Bank of India, R.K. Puram, New Delhi. The plaintiff also deposited Rs. 6937/- which includes penalty and interest. He also paid the stamp and registration charges for the registration of lease deed.

5. (*numbering repeated*) That in fact the plaintiff was the owner of the property in question as he has made the entire investment/payment from his own account received by him from his employer. Even as per rules of the DDA, it is the plaintiff alone who was entitled for the allotment of plot as he has given the bid in his own name and he has deposited the entire amount including the bid amount and the balance amount from his own income and the HUF business and its income has nothing to do with the same.

6. (*numbering repeated*) That, however, since the plaintiff was having faith and interest in the family, as desired by his father, he got the lease of the plot registered in the name of his father being the Karta and head of the family. The father of the plaintiff was head of the family and he used to act and hold things for and on behalf of his family which consisted of the plaintiff and other family members. The plaintiff, thus, have right and interest in the plot No. A-18, (A-19), Ashok Vihar, Phase-I, Delhi, the agricultural land, HUF business and various lands held in the name of his father, the mother being the head of the family.”

16. Therefore, there were not even sufficient pleadings made by the appellant/plaintiff as required by law for the existence of an HUF. In any case, and as observed by the trial court in para 79 of the impugned judgment, that no documentary evidence, whatsoever, has been filed by the appellant/plaintiff to show the existence of an HUF. On the contrary, the respondents/defendants have filed various Income Tax Assessment Orders of the father, Sh. Sampat Rai, and in these Income Tax Orders show assessment of Sh. Sampat Rai only as an individual i.e. there is no existence shown of any HUF. These documents are already referred to in para 47 of the impugned judgment, and this para has already been reproduced above. In my opinion, therefore, the trial court has committed no error in rejecting the case of the appellant/plaintiff that there did not existed any HUF and that the suit property was not an HUF property.

17. So far as the issue of the father having left behind his Will dated 10.02.1993, and which was proved through the two attesting witnesses and exhibited as Ex.PW1/D3X5 is concerned, once again, in my opinion, the trial court was completely justified on the basis of the deposition of the two witnesses for holding that the father, Sh. Sampat Rai, did execute his Will dated 10.02.1993. The trial court has also held that the Will is also to be taken as proved as against the appellant/plaintiff because the appellant/plaintiff himself relied upon this Will for the purpose of getting mutation of the agricultural land at District Jind, Haryana. These aspects are observed by the trial court in paras 83 and 84 of the impugned judgment, which read as under:-

“83. It is pertinent to mention here that deceased testator late Sh. Sampat Rai in the Will Ex. PW1/D3X5 specifically revoked the earlier dated 06.04.1990. The Will is in regard to complete immovable estate of deceased including agricultural land at Safidon, Jind (Haryana). Although plaintiff did not got himself presented in the witness box and his cross-examination could not be completed. However, defendants in their evidence brought more vital fact with regard to admission of Will Ex. PW1/D3X5 by the plaintiff and he acted upon the same to get mutation of agricultural land at Safidon, District Jind, Haryana in his name on the basis of said Will Ex. PW1/D3X5. D3W7 Sh. Sanjay Kumar, Halqa Patwari from Revenue Department, Safedon appeared and proved revenue record as Ex. Pw1/D3X2 having entry no. 6944 and sale deed dated 28.03.2013 proved by D3W8 Sh. Chetan, Registry Clerk as Ex. D3W8/1. As per Ex.D3W6/A, revenue record, the plaintiff applied for mutation.

84. There is a specific observation and submission of a copy of registered Will dated 10.02.1993 by the plaintiff with the revenue

authorities for getting the mutation of the agricultural land in his favour as per Will. The revenue authorities accordingly mutated the agricultural land as per share of the plaintiff in his name. The plaintiff himself admitted and acted upon the registered Will Ex. PW1/D3X5 of his father late Sh. Sampat Rai. His averment in the suit comes out to be false and there is a concealment of this vital and important fact by the plaintiff. The fact is further corroborated by the sale deed Ex.D3W8/1, which was executed by plaintiff himself by selling 3 Kanal 13.6 Marla of agricultural land, of which he become the owner after mutation on the basis of Will dated 10.02.1993. These documents established beyond reasonable doubt that plaintiff had full knowledge of the Will in question and also taken benefit being the beneficiary.”

18. Therefore, in my opinion, the trial court was completely justified in holding that the deceased father, Sh. Sampat Rai, died leaving behind his Will dated 10.02.1993 and the same was proved as Ex.PW1/D3X5.

19. Ld. counsel for the appellant/plaintiff could not refer to this Court any document to show that the appellant/plaintiff ever in his income tax return or any other private document showed existence of the suit property as an HUF property. In fact, in my opinion, since the appellant/plaintiff was a Government servant, therefore it cannot be said that in such a situation that an HUF was existing because for an HUF business to exist, in which the appellant/plaintiff is a coparcener, the appellant/plaintiff must participate in the HUF business, which surely he could not have because he was a government servant. This

Court, therefore, uphold the findings of the trial court that there did not exist an HUF and that the suit property was not an HUF property. I also accept the reasoning, finding and conclusions of the trial court with respect to the father leaving behind his Will dated 10.02.1993/Ex.PW1/D3X5 inasmuch as this Will was proved by both the attesting witnesses who stood the test of cross-examination, and this aspect has to be taken with the fact that the appellant/plaintiff himself relied upon the Will for getting the agricultural land situated at District Jind in Haryana mutated in his name. Though the ld. counsel for the appellant/plaintiff argued that as per the Will dated 10.02.1993, the agricultural land at District Jind, Haryana was to fall 1/3rd to the share of the appellant/plaintiff, however, this fact cannot take away from the fact that the appellant/plaintiff himself relied upon the Will of the father dated 10.02.1993, and therefore, there remains no doubt with respect to the validity of the Will dated 10.02.1993 executed by the father, Sh. Sampat Rai.

20(i) Finally, this Court would like to note that when this appeal had originally come up for hearing and admission on 12.03.2018, the appeal was disposed of with liberty to revive the same

after the decision in an application under Order XVIII Rule 3 which was proposed to be filed by the appellant/plaintiff before the trial court. This application under order XVIII Rule 3 CPC was filed by the appellant/plaintiff before the trial court and the trial court has dismissed the same vide its Order dated 14.09.2018, and the same has been annexed to the application of the appellant/plaintiff being ***C.M. No. 3109/2019***, which has been allowed today. The appellant/plaintiff has questioned this order by arguing that the trial court has wrongly dismissed the application for leading rebuttal evidence because the appellant/plaintiff had, before the respondents/defendants had led evidence, only closed his evidence in affirmative, and once onus of issues was on defendant nos. 2 and 3 in the suit, the trial court was legally bound to fix the case for rebuttal evidence of the appellant/plaintiff after the completion of evidence of defendant nos. 2 and 3.

20(ii). However, in my opinion, the trial court has rightly rejected this argument by observing that it was not as if that the suit was decided immediately after the defendants' evidence was closed, but in fact, there were two dates which were fixed for final arguments

and the suit was thereafter decided and that if the appellant/plaintiff really wanted to lead rebuttal evidence, the appellant/plaintiff would have made such a prayer, whether by an application in writing or orally before the trial court, and before the suit was decided by the impugned Judgment dated 18.11.2017, however, no such request had been made, and the trial court has now held by passing the Order dated 14.09.2018 that the appellant/plaintiff is estopped from claiming that he wanted to lead rebuttal evidence. In my opinion, the trial court has also rightly observed in the impugned Order dated 14.09.2018, dismissing the application under Order XVIII Rule 3 CPC, that the appellant/plaintiff has not filed his list of witnesses and also has not averred what evidence and of which persons has to be led with respect to the rebuttal evidence which was proposed to be led by the appellant/plaintiff. I have also noted above that the appellant/plaintiff did lead his evidence-in-chief originally, but on account of acrimonious attitude of the appellant/plaintiff in leaving the court in the middle of his cross-examination, his evidence was closed and his affidavit by way of evidence filed prior to leading of evidence by the defendant nos. 2 and 3 in the suit was thus not read as evidence in the

absence of lack of complete cross-examination. Even before this Court, no averment has been made by the appellant/plaintiff with regard to what documents the appellant/plaintiff will now file to show the existence of the HUF, with the fact that so far as the Will dated 10.02.1993 of the father is concerned, the appellant/plaintiff has himself relied upon this Will and therefore accepted the validity of the Will of the father, and which in any case was proved through both the attesting witnesses.

21. Ld. counsel for the appellant/plaintiff in an act of desperation, has sought to claim rights in the suit property by alleging settlement between the brothers, however, it is noted that no such issue was got framed, and therefore even if such a plea was taken by the appellant/plaintiff in his pleadings, such a plea would be deemed to be abandoned.

22. In view of the aforesaid discussion, there is no merit in the appeal. Dismissed. All pending applications are also disposed of.

JANUARY 23, 2019
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VALMIKI J. MEHTA, J