

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

% **Date of decision: 1st May, 2019.**

+ **CS(OS) 490/2018 & IAs No.13500/2018 (u/O XXXII R-1 CPC),
13501/2018 (u/O XXXIX R-1&2 CPC), 13502/2018 (u/O XI R-14
CPC), 1123/2019 (u/O VIII R-10 CPC) & 3267/2019 (u/O VI R-17
CPC)**

MUKUL KATARIA (MINOR) & ANR **Plaintiffs**

Through: Mr. Harsh Kumar, Adv.

Versus

RAM BHOOL & ANR **Defendants**

Through: Mr. C.M. Grover, Adv. for D-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The two minor plaintiffs namely Mukul Katariya and Chhavi, acting through their mother Smt. Pinki, have instituted this suit against their paternal grandfather defendant no.1 Ram Bhoool and their father defendant no.2 Deepak, for (i) partition of properties No.32 & 33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi claiming 1/6th share each therein; (ii) rendition of accounts; and, (iii) permanent injunction restraining the defendants from alienating, encumbering or parting with possession of the said properties and/or from dispossessing the plaintiffs therefrom.

2. The suit came up first before this Court on 1st October, 2018, when observing that the plaintiffs on the averments in the plaint were not found to have any share in the property but finding that the plaintiffs were residing in the properties and were required to be protected against forcible dispossession, the suit was entertained and vide *ex-parte* ad-interim order *status-quo* directed to be maintained qua possession of the plaintiffs, only of property No.33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi (and

not of property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi).

3. The order dated 8th January, 2019 records that both the defendants i.e. Rambhool and Deepak had been served on 22nd October, 2018. The defendants till date have not filed written statement. The plaintiffs filed IA No.1123/2019 under Order VIII Rule 10 of the Code of Civil Procedure, 1908 (CPC) which came up before this Court on 25th January, 2019. On perusal of the plaint to see whether the plaintiffs were entitled to a decree forthwith as sought vide detailed order citing judgments, it was reasoned that the plaintiffs had no share in the properties and were thus not entitled to the relief of partition. On request of the counsel for the plaintiffs, further hearing was adjourned. The plaintiffs, having realized the position in law as detailed in the order dated 25th January, 2019, have filed IA No.3267/2019 for amendment of the plaint. The defendants, inspite of opportunity have not filed reply to the said application also.

4. The plaintiffs instituted this suit pleading:

“4. That *Late Sh. Shiv Ram*, during his lifetime, accumulated a considerable amount of funds and bought two adjoining properties bearing no.32&33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110051, but unfortunately in 1996/1998 he died intestate. It is pertinent to mention here that two daughters were also left behind by *Sh. Shiv Ram*, one of which is alive, namely *Smt. Saroj*, and another has already expired, name of which is not in the knowledge of the plaintiffs.

5. That as there has been no partition of the HUF of the *Sh. Shiv Lal* till date...

6. That at the time of his death, *Sh. Shiv Ram* owned / controlled the following properties to the best of the knowledge of the Plaintiffs:

- i. 32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110031
- ii. 33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110031
- iii. Other Movable / liquid assets including monies in Bank Accounts (however the complete details of all bank accounts and other liquid assets are with Defendants).

7. That in 1982, *Sh. Shiv Ram*, out of his savings, bought one plot bearing no. 33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110031 admeasuring 153 yd² where the construction was raised and he started his residential life along with his wife *Smt. Anaro Devi*.

8. That on 01.08.1986, *Sh. Shiv Ram*, further from his savings, bought the adjoining plot bearing no. 32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110031 admeasuring 34 yd² in the name of his wife *Smt. Anaro Devi*, for the benefit of the family as manifested from the fact that the common construction was raised

over the combined property of 32-33, *Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110031*, and till the date of filing of the present suit the said property is built upto first floor with terrace.

9. That unfortunately in the year 1996/1998, *Sh. Shiv Ram* expired leaving behind his properties and other assets.
10. That on 20.06.2006, the defendant no.2 tied a nuptial knot with *Smt. Pinki* and on 27.09.2011, the plaintiff no.1 was born out of the said wedlock becoming the Class-I, Legal heir of the HUF of *Sh. Shiv Ram*, as there is an uninterrupted flow of title, and since then is living in the suit property alongwith his mother and defendants.
11. That being the patient of cancer and in ailing condition, *Smt. Anaro Devi* expired on 13.12.2013.
12. That on 11.08.2015, the plaintiff no.2 was born out of the wedlock of *Smt. Pinki* and defendant no.2 and thus became another Class-I, Legal heir of the HUF of *Sh. Shiv Ram* and since then is living in the suit property alongwith his mother and defendants.
14. That on 26.09.2017, the defendant no.1 with the malafide intention to oust the plaintiffs from their legal rights, filed a Suit for Possession against the defendant no.2 and mother of the plaintiffs, *Smt. Pinki*, who is residing in the suit property being her matrimonial

home, concealing the material facts from the court and claiming himself to be the owner of the 32, *Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110031* on the basis of revocable GPA, Will Deed, Agreement to Sell, Possession Letter, Receipt and Affidavit, all dated 20.09.2013.

19. That as a matter of fact, the defendant no.1 came out with an alleged GPA, Will, Agreement to Sell, Possession Letter, Receipt and Affidavit dated 11.09.2013 said to have been executed by *Late Smt. Anaro Devi* and on that basis he claims to have become the sole owner of one of the suit property at 32, *Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi-110031*. It is respectfully submitted that this claim of the defendant no.1 is completely illegal and untenable as *Late Smt. Anaro Devi* was not competent to execute such a series of documents.

It is further submitted that the timing of the so called G.P.A., Will Agreement to Sell, Possession Letter, Receipt and Affidavit is also to be noticed as the *Late Smt. Anaro Devi* was suffering from cancer and her mental and physical condition was deteriorating and she was under deep suffering at that point of time, and it is verily believed that Defendant no.1 exercised pressure for execution of the said alleged series of documents.

Moreover, the said GPA was revocable which became revoked after the death of the *Late Smt. Anaro Devi*.

It is submitted that *Late Smt. Anaro Devi* was also not legally competent to execute the said documents in the favour of the defendant no.1 as the property was actually a part of HUF property which was bought in the name of *Late Smt. Anaro Devi* for the benefit of the family and whole family has been living in the said property alongwith its other part, in fact the defendant no.2 was born at the said property and got married and brought his wife in the suit property and plaintiffs have also born in the said property. Further the so called witnesses to the alleged documents are not independent witnesses and are rather under the control of Defendants as the same are their close friends and under their control. Even the registration of the said documents is suspect and the Defendant no.1 has failed to furnish complete details of the same.

The Plaintiffs also seek rendition of accounts with respect to the bank accounts of *Late Shri Shiv Ram*, which are under the control of defendants who had been using the same since the death of *Late Sh. Shiv Ram*. As already mentioned above, all the documents and information pertaining to the accounts and income of *Late Sh. Shiv Ram* are in the power and custody of the

defendant no.1 and therefore it is necessary to seek the documents as well as the accounts from him.

20. That a male member of a joint family and his sons, grandsons and great-grandsons constitute a coparcenary. A coparcener acquires right in the coparcenary property by birth but his right can be definitely ascertained only when a partition takes place. When the family is joint, the extent of the share of a coparcener cannot be definitely predicated since it is always capable of fluctuating. It increases by the death of a coparcener and decreases on the birth of a coparcener and thus, at the time of filing of the present suit the share of the plaintiffs are ascertained at 1/6th Share each.”

5. On 25th January, 2019 and as recorded in the order of that date, it was observed that once the plaintiffs in the plaint had admitted that Shiv Ram was the absolute owner of the properties and died in 1996/1998 i.e. after the coming into force of the Hindu Succession Act, 1956, on the demise of Shiv Ram, the properties would be inherited by his Class-I heirs namely his son defendant No.1 Rambhool and his daughters only and the plaintiffs, who claim through defendant No.1 Rambhool would have no share in the property. Upon the counsel for the plaintiffs referring to paragraph 12 of ***Sheela Devi Vs. Lal Chand*** (2006) 8 SCC 581, it was pointed out that the same pertain to the pre-1956 era. Attention of the counsel for the plaintiffs was also drawn to ***Commissioner of Wealth Tax, Kanpur Vs. Chander Sen***

(1986) 3 SCC 567 and *Yudhishter Vs. Ashok Kumar* (1987) 1 SCC 204 and in the more recent past to *Harvinder Singh Chadha Vs. Saran Kaur Chaudha* 2014 SCC OnLine Del 3413, *Jai Narain Mathur Vs. Jai Prakash Mathur* (2016) 228 DLT 313, *Satyawati Vs. Suraj Bhan* 2017 SCC OnLine Del 7961, *Sunny (Minor) Vs. Raj Singh* (2015) 225 DLT 211, *Surender Kumar Vs. Dhani Ram* (2016) 227 DLT 217, *Sagar Gambhir Vs. Sukhdev Singh Gambhir* (2016) 231 DLT 247, *Neelam Vs. Sada Ram* 2013 SCC OnLine Del 384, *Bala Devi Vs. Chotu Ram* 2013 SCC OnLine Del 1159 and *Rajat Khanna Vs. R.P. Khanna* (2013) 200 DLT 203.

6. However, now that the plaintiffs have filed an application for amendment of the plaint, even though *mala fide*, after taking adjournment on 25th January, 2019, the said application has to be dealt first.

7. The plaintiffs seek to amend the plaint to plead that Shiv Ram created an HUF with himself, his wife, son and grandson by throwing his property No.33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi in common hotchpotch on 1st August, 1986 and by blending the said property with property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi subsequently bought in the name of his wife Smt. Anaro Devi and by raising common construction over the combined property.

8. The counsel for the plaintiffs has been heard on the application for amendment of the plaint and has also been heard further on the aspect of maintainability of the suit.

9. The plaintiffs, along with the plaint have filed (I) electricity bill of property No.33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi in the name of Shiv Ram; and, (II) registered General Power of Attorney,

registered Will, Agreement to Sell and Receipt of full and final payment executed by Smt. Anaro Devi in favour of Shiv Ram with respect to property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi.

10. I am of the view that the plaintiffs are not entitled to the amendment sought. The plaintiffs, in the plaint as filed unequivocally admitted accumulation by Shiv Ram of funds in his lifetime and purchase thereof by Shiv Ram of the subject property thereby admitting Shiv Ram to be the absolute owner of the said properties. The plaintiffs in the suit as originally filed claimed partition under a misconception that the property having been inherited by defendant No.1 from his father i.e. Shiv Ram who died after coming into force of the Hindu Succession Act, the son of the defendant No.1 i.e. the defendant No.2 and the plaintiffs being the children of the defendant No.1 would have a share in the property. It is only now, upon being informed of the legal position that the plaintiffs, with an intent to drag the suit to constitute another line of defence, besides the defence by their mother Smt. Pinki through whom they have filed this suit, in the suit filed by defendant No.1 for recovery of possession, are now seeking amendment. The amendment claiming Shiv Ram to have constituted an HUF and having thrown both the properties in the said HUF are inconsistent with the admission already made by the plaintiffs, of Shiv Ram being the absolute owner of the properties. Even now, save for a bare averment, there is nothing else pleaded and no reason given as to why the plaintiffs at the time of institution of the suit did not plead creation of an HUF by Shiv Ram and throwing of the properties of himself and his wife Smt. Anaro Devi in the said HUF. The plaintiffs, at their *ipse dixit* and whims, cannot be permitted to create an HUF of their great-grandfather. It is otherwise settled that no

amendments in withdrawal of admissions can be permitted. Reference in this regard can be made to ***Ram Niranjana Kajaria Vs. Sheo Prakash Kajaria*** (2015) 10 SCC 203, ***Gurucharan Kaur Vs. Ranjeet Singh Sandhu*** 2017 SCC OnLine Del 11489 and ***D.P. Mahajan Vs. Alok Mahajan*** 2017 SCC OnLine Del 12684. The plea now sought to be taken, of the property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi also having been put in HUF is also in withdrawal of admission made in the plaint, of defendant No.1 in the suit for possession filed by him claiming Smt. Anaro Devi to have executed Agreement to Sell etc. with respect to the property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi in favour of the defendant No.1 and which documents the plaintiffs in the plaint as existing plead to have been fabricated by the defendant No.1. Had there been any HUF and had the properties been put in HUF, the question of Anaro Devi executing Agreement to Sell etc. with respect to property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi in favour of defendant No.1 would not have arisen and/or the plaintiffs, while challenging the said documents would have pleaded that the documents could not affect the shares of the other members of HUF in property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi. The plaintiffs instead pleaded that the documents were forged and fabricated. The amendment sought is inconsistent to this effect also.

11. The plaintiffs are thus not entitled to the amendment sought.

12. IA No.3267/2019 is dismissed.

13. Else, with respect to a property of a female Hindu, I have recently in ***Nikhil Batra Vs. Diwakar Batra*** 2019 SCC OnLine Del 8253 held that the

same cannot be of a coparcenary and the matter having been dealt in detail, the need to discuss again is not felt.

14. The counsel for the plaintiffs today during his argument has also referred to (i) *Captain Bhupinder Kumar Suri Vs. Naresh Kumar Suri* 2017 SCC OnLine Del 7214; (ii) *Saurabh Sharma Vs. Om Wati* 2018 SCC OnLine Del 9186; (iii) *Surender Kumar Vs. Dhani Ram* AIR 2016 Delhi 120; (iv) *Ganduri Koteshwaramma Vs. Chakiri Yanadi* (2011) 9 SCC 788; (v) *Vinod Kumar Dhall Vs. Dharampal Dhall* (2018) 16 SCC 645; and, (vi) *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay* (1976) 3 SCC 142.

15. However, (a) though in *Captain Bhupinder Kumar Suri* supra I held that an HUF could be created even if did not exist earlier but on the basis of a declaration dated 25th February, 1969 in that case; in the plaint as originally filed in the present case, there was no plea of any HUF or of creation of any HUF by Shiv Ram and which plea was sought to be taken by way of amendment and which has been declined; (b) *Saurabh Sharma* and *Surender Kumar* supra are against the plaintiffs rather than in favour of the plaintiffs; (c) for *Ganduri Koteshwaramma*, *Vinod Kumar Dhall* and *Surjit Lal Chhabda* supra to apply, there has to be first a plea of creation of HUF and which is not there in the present case. Thus, the said judgments do not come to the rescue of the plaintiffs.

16. The plaintiffs, on the averments in the plaint are not found to have any share in the properties and are thus not entitled to the relief of partition and the suit, insofar as for the relief of partition is dismissed.

17. Similarly, the right to challenge the documents with respect to property No.32, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi set up by the defendant No.1, of Smt. Anaro Devi conveying the said property to the defendant No.1, is of the heir of Smt. Anaro Devi i.e. the defendant No.2 and not of the plaintiffs. The plaintiffs are thus also not found entitled to the relief of declaration of their own title as sought.

18. That leaves only the relief of permanent injunction restraining the forcible dispossession.

19. The defendants having failed to file the written statement, and believing the averments in the plaint to the effect of the plaintiffs being in possession of the property, adjudication of the relief against forcible dispossession does not require any trial and the plaintiffs are found entitled to a decree for permanent injunction forthwith.

20. A decree is accordingly passed, in favour of the plaintiffs and against the defendants, restraining the defendants from forcibly dispossessing the plaintiffs from the portion of properties No.32&33, Gali No.3, Sarojini Naidu Park, Shastri Nagar, Delhi in occupation of the plaintiffs, save by due process of law.

21. The parties to bear their own costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MAY, 01, 2019

‘bs’

(Corrected & released on 23rd May, 2019)