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

+ CM(M) 1332/2019 & CM APPL.40233/2019

TAHIRA BEGUM & ANR

..... Petitioners

Through: Mr.M.Rais Farooqui and
Mr.Andleeb Husain, Advs.

versus

NITIN & ORS

..... Respondents

Through: Mr.Rahul Mehalwal, Adv. for
R-1, 2 and 3

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER (O R A L)

17.11.2022

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1. Mr. M.R. Farooqui, learned Counsel for the petitioner submits that CS SCJ 97668/16 (*Nitin v. Tahira Begum*) was liable to be dismissed under Order VII Rule 11(a) of the Code of Civil Procedure, 1908 (CPC) as devoid of any cause of action as the respondents, the plaintiffs in the suit, could not lay any claim to ownership over the suit property situated at 3124, Gali Dharam, Gali Sushila, Sita Ram Bazar, Delhi-110006. He submits, referring to paras 2 and 3 of the plaint instituted by the respondents, that the respondents are proceeding on a legally erroneous premise that Ishwari Lal, their father, was not the sole and exclusive owner of the suit property consequent to the death of his father Durga Lal. Mr. Farooqui invites my attention, in this context, to para 4 of the report in the judgment of a learned Single Judge of this Court in *Bishamber v. Sudhir Yadav*¹, which holds thus:

“5. It is not disputed before this Court that father of the appellant Sh. Dilip Singh expired in the year 1983. In law, ancestral property is no longer an HUF property in view of the

¹ 2017 SCC OnLine Del 9357

judgment of the Supreme Court in the cases of *Commissioner of Wealth Tax, Kanpur v. Chander Sen*², and *Yudhishter v. Ashok Kumar*³. As per the ratios of these judgments if after passing of the Hindu Succession Act in 1956 a person inherits property from his paternal ancestors then the inheritance is as a self acquired property and not as an HUF property in the hands of the person who inherits the same. Admittedly, there is no plea of any HUF existing of the appellant with his father and the only plea argued before this Court is that the appellant inherited ancestral property and therefore his sons and grandsons have equal right as that of the appellant in the suit property. Reliance in support of the arguments on behalf of the appellant is placed upon the judgment of the Supreme Court in the case of *Sheela Devi v. Lal Chand*⁴.”

2. In the absence of any averment, in the plaint, that the suit property was held by Durga Lal as HUF property, Mr. Farooqui submits that Ishwari Lal would, by operation of law and the Hindu Succession Act, 1956, be the exclusive owner of the suit property, which entitled him to dispose of the suit property as he so chose.

3. Though the contention requires consideration, this petition has been instituted under Article 227 of the Constitution of India and this Court is not, therefore, exercising appellate jurisdiction. In exercise of supervisory jurisdiction, this Court cannot examine matters which have not been urged before the court below.

4. A reading of the application under Order VII Rule 11 of the CPC, as filed by the petitioner, does not indicate that the aforesaid submission, as specifically canvassed before this Court by Mr. Farooqui, has been raised before the learned Civil Judge.

5. The dismissal of one application under Order VII Rule 11 of the CPC cannot foreclose the right of the petitioner from preferring

² (1986) 3 SCC 567

³ (1987) 1 SCC 204

⁴ (2006) 8 SCC 581

another application on a different ground. In that view of the matter, Mr. Farooqui seeks leave to withdraw this petition with liberty to file a fresh application before the learned Civil Judge, urging the aforesaid contention.

6. The petition is accordingly permitted to be withdrawn with leave and liberty as aforesaid.

7. It is made clear that, in the new application, the petitioner would not be entitled to urge any of the contentions which already stand considered by the learned Civil Judge in the impugned order dated 2nd August 2019.

8. All defences available to the respondents would also remain open, including the question of whether such a contention forms part of the written statement filed by the petitioner in defence to the suit.

9. With the aforesaid observations, this petition stands disposed of. Miscellaneous applications, if any, also stand disposed of.

C.HARI SHANKAR, J

NOVEMBER 17, 2022/kr