

(2011) 09 DEL CK 0215

In the Delhi High Court

Case No : Regular First Appeal No. 873 of 2003

Sh. Ravish Chand Jain

APPELLANT

Vs

Smt. Raj Rani Jain and Others

RESPONDENT

Date of Decision : 12-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2011) 09 DEL CK 0215

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Prakash Khandelwal, for the Appellant; Randhir Jain and Dhananjai Jain, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this Regular First Appeal u/s 96 of the Code of Civil Procedure, 1908 (Code of Civil Procedure), is to the impugned judgment and decree dated 8.9.2003, and by which judgment the Court below dismissed the suit for partition filed by the Appellant/Plaintiff. In the suit the Appellant/Plaintiff had sought 1/6th share of the house bearing No. 119, Bahubali Enclave, Delhi.

2. A reading of the pleadings of the Appellant/Plaintiff shows that the Appellant/Plaintiff pleaded existence of an HUF. The Appellant/Plaintiff thereafter further pleaded that the Respondent no1/Defendant No. 2/mother in whose name the property was, was not the real owner of the property because she was only a housewife and funds for the purchase and the construction on the same were provided for by the grandfather and also by the Appellant/Plaintiff. The Defendants/Respondents contested the suit and denied the existence of HUF and also as to the property being a joint family property. It was denied that the Plaintiff had any share in the property which belonged to the Respondent No. 1 and it was prayed that the suit for partition be dismissed.

2A. The Trial Court, after the pleadings were complete, framed the following issues:

1. Was the property to suit purchased/acquired out of Hindu Undivided Family Funds?

2. If issue No. 1 is proved, does Plaintiff have a share in its? If so, how much?

3. Relief.

3. Before proceeding to analyze the evidence which has been led before the Trial Court, as also the findings/conclusions of the Trial Court, it is necessary to understand and appreciate as to how a Hindu undivided family comes into existence before the enactment of the Hindu Succession Act, 1956 or thereafter. A Hindu undivided family before 1956 came into existence if a male member inherited a property from any of his three paternal ancestors. An HUF could also be created when no HUF was in existence if a self-acquired property was thrown in a common hotchpotch. After 1956, merely because a person inherited a property from any of his three paternal ancestors would not automatically mean that an HUF comes into existence. This is clear from two judgments of the Supreme Court being *Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others*, and *Yudhishter Vs. Ashok Kumar*, . After enactment of the Hindu Succession Act, 1956, an HUF can ordinarily come into existence for the first time only if an individual throws his self-acquired property into common hotchpotch by a declaration and thereafter the property is treated as a property of the Hindu undivided family. Persons being joint in mess would not automatically mean that there is an existence of an HUF property i.e. even if there is an existence of an HUF, there is no automatic presumption that HUF also owned properties. Keeping this position of the law in mind, let us turn to the facts of the present case.

4. I put it to counsel for the Appellant during the course of the arguments as to whether even a single document was filed in the Trial Court so as to prove the existence of an HUF, and, it is admitted that there is absolutely no documentary evidence showing existence of an HUF. Neither has the property as per the title deeds shown to have been purchased by the HUF nor has the property been shown in the property tax records/municipal records as an HUF property and nor have any income tax returns been filed showing the property to be an HUF property. Further, it has also not been proved by any form of documentary evidence that grandfather owned any ancestral property and by selling of which ancestral property, the funds were provided for the purchase of the plot and the construction of the property. Therefore, there is only oral self-serving statement of the Appellant/Plaintiff with regard to existence of HUF which cannot amount to discharge of onus when the Defendants denied the same in their evidence. Further, a property can be an HUF property if the property stands in the name of any one male co-parcener. A female member is not a co-parcener and existence of a property in the name of a female member of the family would not mean that

the said property would be an HUF property, assuming an HUF is in existence. There is also no documentary evidence of the property having been thrown into common hotchpotch by the Respondent No. 2/mother and therefore creation of an HUF by this form is also ruled out, and for which purpose we are assuming that a female can create an HUF by throwing her property into common hotchpotch, though in law the same is not possible.

5. Further, it is worth noting that the case of the Appellant/Plaintiff was in a way mutually destructive because on the one hand it was claimed that the property was of the HUF and on the other hand it was claimed that the Appellant/Plaintiff was the co-owner because he had paid monies towards purchase of the plot and for construction thereon. Surely, if ownership is claimed in the property because of payment of monies for the purpose of purchase of plot and construction thereon, the same would only mean a claim of co-ownership of the property by payment of consideration and not because there is an HUF. In fact, even this aspect of payment of consideration and co-ownership and at best assuming the same to be an HUF, have not been proved because there is no payment by crossed cheque to the Respondent No. 1/mother by the Appellant/Plaintiff and also there are no receipts showing any payment made to the Respondent No. 1/mother of amounts in cash. What was relied upon by the Appellant in the Trial Court was a copy of his bank account showing repeated withdrawals totaling to a sum of about Rs. 1,00,000/- and which was claimed to have been paid and entries therein were alleged to be reflective thereof amounts paid to the Respondent No. 1/mother. Firstly, the statement of account was not proved and exhibited on record and the same is only marked and hence cannot be looked at. Also, withdrawals by a person from his account cannot automatically mean that the said amounts were also paid further to the Respondent No. 1/mother. After all the withdrawals would/could have been used by the Appellant for himself also. Therefore, there is absolutely no proof whatsoever of any payment being made by the Appellant/Plaintiff to the Respondent No. 1/Defendant No. 2/mother.

6. Even on the aspect of payments by the grandfather for purchase of the plot and for construction of the property again there is not a single documentary evidence on record except the self-serving statement of the Appellant/Plaintiff. Even if we assume that the grandfather made certain payments towards purchase of the plot and construction thereon, yet, that would at best mean some gifts of payments by the grandfather to the Respondent No. 1/mother, and which in any case I have already stated above has not been established at all.

7. Therefore for all the aforesaid reasons of there not existing a single sheaf of paper to show the existence of HUF whether in public records or private records, any proof especially of any payments of money by the grandfather to the Respondent No. 1/mother and further also no proof whatsoever of any payments made by the Appellant/Plaintiff to the Respondent No. 1/mother, the Trial Court has rightly held that it cannot be said that the property was an HUF property or that the Appellant/Plaintiff had any share in the same. Some of the relevant

observations and findings of the Trial Court are contained in paras 12 to 14 of the impugned judgment and which read as under:

12. The fate of this case primarily hinges on the evidence of the Plaintiff and of Defendant No. 2(DW-2). After having carefully gone through the evidence of Defendant No. 2, I find that she has categorically stated in her evidence that she and her husband alone had constructed the suit property. It has come in her evidence that her husband (Defendant No. 1) took loan of Rs. 60,000/- from his provident fund account for construction of the suit property and she had also taken loan from Punjab national Bank by pledging jewellery of Defendant No. 2. Apart from this, it is evident from the evidence of Defendant No. 2 that she possessed sufficient assets in the shape of immovable property in the name and she had sold some of her properties of which details are given by her in her evidence. In judgment reported in 2002 (2) Recent civil Reports 749, the Division Bench of Hon'ble High Court has held that there is no presumption that joint family possesses joint property only and merely because family is joint, it cannot be said that the property held by its members is joint family property and the burden is on the person who asserts so. NO judgment to the contrary has been cited before me nor Plaintiff has been able to distinguish the above-cited judgment. In view of the above-referred legal position, I proceed to examine the evidence of the Plaintiff referred to above.

13. After having analysed the evidence of the Plaintiff in detail, I find that except his bald statement, there is no concrete evidence in respect of joint family nucleus of the suit property. Plaintiff has failed to prove on record the contributions alleged to have been made by his grand father in the purchase or construction of the suit property. Plaintiff claims to have himself contributed in the construction of the suit property and relies upon statement of his bank account mark A which is not duly proved on record. Otherwise, also statement of bank account mark A of the Plaintiff is of no avail to the case of the Plaintiff because Plaintiff has not stated in his evidence as to on which dates he had withdrawn particular amount from his bank account for construction of the suit property. In fact Plaintiff has admitted in his cross-examination that he had never made any payment by cheque to his father towards construction of the suit property. Plaintiff has also admitted in his cross-examination that properties at East Moti Bagh, Sarai Rohilla are in the name of Defendant No. 2 and one plot at Bhola Nah Nagar are in the joint name of Defendant No. 2 and Anuj Jain. Plaintiff has not got examined aforesaid Anuj Jain to prove that above-said properties were purchased in the name of Defendant No. 2 by his grand father. On the other hand, there is categoric evidence of Defendant No. 2 that the sale proceeds of Loni land (which was in her name) were utilized for purchase of the suit property. Not only this, Defendant No. 2 has stated in her evidence that house in East Moti Bagh, Sarai Rohilla (which was in her name) was sold by her for Rs. 1,25,000/- and the sale proceeds were utilized in the construction of the suit property. Aforesaid evidence of Defendant No. 2 remains unchallenged in her cross-examination.

14. In view of what is observed above, I hold that the Plaintiff has failed to prove that the suit property was purchased out of Hindu Undivided Family Funds. This issue is accordingly decided against the Plaintiff.

(underlining added)

8. Learned Counsel for the Appellant sought to argue that the Respondent No. 1/Defendant No. 2/mother was only a housewife and therefore having no funds, it should be held that the property was an HUF property or that the Appellant/Plaintiff was in any case a co-owner by virtue of having made payments. Firstly, I may note that no payments at all have been proved to have been made which are stated to have been made by the Appellant/Plaintiff to the Respondent No. 1/mother and in my opinion argument of learned Counsel for the Appellant that it was for the Respondent No. 1/mother to prove that the property was not an HUF property is misconceived. Admittedly, the title deeds of the property were in the name of the Respondent No. 1/mother and it was also accordingly acted upon in the public records and the onus of proof therefore that the property was not of the mother/Respondent No. 1 but was an HUF property or co-owned property was on the Appellant/Plaintiff and not otherwise as is sought to be argued on behalf of the Appellant. The Appellant, as already discussed above, has miserably failed to discharge the onus of proof of there existing an HUF or of his having made the payments to the mother/Respondent No. 1 or of the grandfather having made payments to the Respondent No. 1/mother.

9. Learned Counsel for the Appellant then argued that though in the examination-in-chief of the Appellant he had said that grandfather had paid monies and there was no cross-examination on this aspect and consequently it should be held that the property was purchased by the funds of the grandfather. No doubt, not giving a suggestion in the cross-examination, can in certain cases lead to an inference of existence of a fact, however, it is settled law that the entire evidence has to be considered as a whole alongwith the other documentary evidence and also the depositions of the other witnesses. In a case such as the present, a mere failure to give a suggestion, in my opinion cannot lead to a conclusion that it should be held that the grandfather in fact had paid monies towards the purchase of this plot or construction thereon. In this regard, I would seek to refer to paras 10 and 11, and more particularly para 11 of the impugned judgment which shows evidence which was led that the grandfather did not contribute for the plot and the father of the Appellant/Plaintiff/Sh. Prem Chand Jain who deposed as DW1, stated in his evidence that the property was constructed by him from his own income and loan and selling of plots of the mother, details of which were given in the evidence.

10. A civil case is decided on balance of probabilities. Where valuable interests in an immovable property are concerned, mere oral statement cannot lead to discharge of onus of proof once the case is vehemently contested and evidence in rebuttal is also led. The facts of the present case negate the existence of an HUF or of the Plaintiff being a co-owner on account of having paid monies

towards purchase of plot or for construction thereon. The Trial Court has discussed in detail the evidence in the case and thereafter has arrived at a possible and plausible view. Unless that view is illegal and perverse, this Court would not interfere with the same. I do not find any illegality or perversity in the impugned judgment nor does the impugned judgment cause injustice which calls for this Court to interfere in the appeal so as to set aside the impugned judgment.

11. In view of the above, I do not find any merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.