

Amit Johri Vs. Deepak Johri and ors.

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Court : Delhi

Decided On : Nov-26-2012

Judge : Hima Kohli

Appellant : Amit Johri

Respondent : Deepak Johri and ors.

Advocate for Def. : Mr. Pratap Shanker, Mr. Ashish Kumar, Mr. J.K. Seth, Ms. Shalini Kapoor, Ms. Promil Seth

Advocate for Pet/Ap. : Mr. Rajiv K. Garg, Mr. Ashish Garg

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + I.A. No.18548/2011 (by defendants No.11 and 12 u/O VII R 1.CPC in CS(OS) No. 818/2011 Reserved on: Date of decision: IN THE MATTER OF: AMIT JOHRI 30 08.2012 26.11.2012 Plaintiff Through: Mr. Rajiv K. Garg, Advocate with Mr. Ashish Garg, Advocate versus DEEPAK JOHRI AND ORS. Defendants Through: Mr. Pratap Shanker, Advocate with Mr. Ashish Kumar, Advocate for D-1. Mr. J.K. Seth, Senior Advocate with Ms. Shalini Kapoor and Ms. Promil Seth, Advocates for D-11 and D-12. CORAM HON'BLE MS.JUSTICE HIMA KOHLI HIMA KOHLI, J.

1. The present application has been filed by the defendants No.11 and 12 under Order VII Rule 11 CPC, praying inter alia for rejection of the accompanying suit instituted by the plaintiff for declaration, partition, possession and permanent

injunction in respect of property bearing municipal No.1112, Chatta Madan, Gopal Maliwara, Chandani Chowk, Delhi, or in the alternative, for recovery of `50 lacs alongwith interest, on the ground that the plaintiff does not have a legal right to institute the said suit during the lifetime of his father, i.e., defendant No.1 and that he is not entitled to challenge the sale of the suit property by the defendants No.1 to 9 in favour of the defendants No.11 and 12.

2. The plaintiff has filed the accompanying suit on the allegation that the suit premises was originally owned by late Shri Laxmi Narain Johri, who had three sons, i.e., Shri K.K. Johri, Shri P.P. Johri and Shri Baldev Prasad Johri. The plaintiff is the great grandson of late Shri Laxmi Narain Johri, who had expired on 27.08.1972, the grandson of late Shri K.K. Johri, who had expired on 29.10.1985 and the son of Mr. Deepak Johri, defendant No.1 herein. As per the averments made in the plaint, defendant No.1 had inherited 1/3rd undivided share in the suit property, defendants No.2 to 6 had jointly inherited 1/3rd undivided share of late Shri P.P. Johri and defendants No.7 to 9 had jointly inherited the remaining 1/3rd share, being the legal heirs of late Shri Baldev Prasad Johri. Shri K.K. Johri had two sons, namely, Shri Deepak Johri, defendant No.1 and late Shri Rupak Johri, who was issueless and had expired intestate. Defendant No.1 had got married to defendant No.10 and out of the wedlock, the plaintiff herein was born on 02.11.1981. Later on, defendants No.1 and 10 parted ways after obtaining a decree of divorce by mutual consent on 27.09.2010.

3. The plaintiff claims half of his fathers 1/3rd share in the suit property on the ground that the said property was an ancestral property in the hands of his father. The averments that are relevant for deciding the present application have been made in paras 8 and 9 of the plaint. The applicants herein, i.e., defendants No.11 and 12 have purchased the suit property from the defendants No.1 to 9 by virtue of a Sale Deed dated 02.07.2010. Apart from a preliminary objection raised by the defendants No.11 and 12 on the same lines as in their written statement, this application has been filed by them stating inter alia that the suit property was not an HUF property in the hands of the defendant No.1, and on the demise of his father on 29.10.1985, he had inherited the same in his individual capacity and not as a Karta of an HUF.

4. Though a preliminary objection has been raised in the written statement to the effect that assuming without conceding that the suit property was inherited by Shri Deepak Johri as a Karta of an HUF and not in his individual capacity, in that event also, the plaintiff could not challenge the sale, as the defendant No.1 was entitled to sell the suit property for legal necessity and as also for the benefit of the estate, the aforesaid ground has however not been seriously urged by learned Senior Advocate appearing for the defendants No.11 and 12 in the course of his arguments. Instead, emphasis was laid by Mr. Seth, learned Senior Advocate appearing for the defendants No.11 and 12 on the fact that after the Hindu Succession Act, 1956 (hereinafter referred to as the Act) came into force, the general rules of succession in case of males has been clearly laid down in Section 8 of the Act and the said provision bars the plaintiff from instituting the present suit in the lifetime of his father, defendant No.1 herein.

5. It was urged on behalf of the defendants No.11 and 12 that from a plain reading of the plaint, it is apparent that the defendant No.1 was not holding the suit property as a Karta of an HUF vis--vis his son, the plaintiff and that defendant No.1 had inherited the property from his father in his individual capacity and there being no HUF comprising of the plaintiff and the defendant No.1, the plaintiff did not acquire any right, title or interest in the suit property during the lifetime of the defendant No.1 and resultantly, he had no right to challenge the Sale Deed dated 2.7.2010 that was executed by his father in favour of defendants No.11 & 12. In support of the aforesaid argument canvassed on behalf of the defendants No.11 and 12, the following decisions were referred to and relied upon: (i) Commissioner of Wealth-tax, Kanpur etc. vs. Chander Sen etc. AIR 198.SC 175. (ii) Yudhishter vs. Ashok Kumar AIR 198.SC 55. (iii) (iv) Commissioner of Income Tax vs. P.L. Karuppan Chettiar 1993 Supp(1) SCC 580. (v) Bhanwar Singh vs. Puran and Ors. (2008) 3 SCC 8. (vi) 6. Rahul Behl and Ors. vs. Smt. Ichayan Behl and Anr. DRJ 199.(21) 205 Pratap vs. Shiv Shanker 164(2009) DLT 47. Learned counsel for the plaintiff opposed the present application and denied the submission made by the other side that the suit property is to be treated as a self-acquired property in the hands of the defendant No.1. Instead, he asserted that the suit property was an ancestral property of his great grandfather, late Shri Laxmi Narain Johri and he had inherited the same from late Shri Chatta Bihari, who had expired on

29.05.1943. He submitted that Shri Laxmi Narain Johri had expired on 27.08.1972, leaving behind three sons including Shri K.K. Johri, and upon the demise of Shri K.K. Johri on 29.10.1985, defendant No.1 being his only son, he had inherited 1/3rd share in the suit property and when the plaintiff was born on 02.11.1981, he had acquired a right in the said portion in equal proportion, as a coparcener. Thus, counsel for the plaintiff asserted that the suit as instituted by the plaintiff is maintainable as he had acquired 1/6th share in the suit property that is an ancestral property and the defendants No.1 to 9 were not entitled to sell the same in favour of the defendants No.11 and 12 without obtaining the consent of the plaintiff.

7. Mr. Garg, Advocate refuted the submission made by the other side that Section 8 has any application to the facts of the present case and instead he relied upon the provisions of Section 6 of the Act by submitting that the suit property being a coparcenary property, the devolution of interest therein was to be guided by the said section. To fortify the aforesaid submission, he relied upon the judgments of the Supreme Court in the cases of C. Krishna Prasad vs. Commissioner of Income Tax, Bangalore reported as AIR 197.SC 49.and Sheela Devi and Ors. vs. Lal Chand and Anr. reported as (2006) 8 SCC 58.and urged that the case of the plaintiff would be governed by the provisions of Section 6 of the Act that prescribes the manner of devolution of interest in a coparcenary property and lays down that as long as the property remains in the hands of a single person, the same is to be treated as a separate property and such a person would be entitled to dispose of the coparcenary property as if it was a separate property. However, if a son is subsequently born to him or adopted by him, it becomes a coparcenary property and the son would acquire an interest thereon.

8. The Court has heard the counsels for the parties and carefully examined the averments made in the plaint and the present application.

9. It goes without saying that at the time of deciding an application under Order VII Rule 11 CPC, wherein rejection of the plaint is prayed for, the Court is required to confine itself to the averments that have been made in the plaint and at that stage, it is not required to examine the stand that has been taken by the defendants in

the written statement. In this regard, reference may be made to the decision of the Supreme Court in the case of Saleem Bhai and Ors. vs. State of Maharashtra, reported as (2003) 1 SCC 557.

10. In the present case, the only two paragraphs in the plaint that are material for deciding the objections that have been taken by the defendants No. 11 and 12 as to the maintainability of the present suit are reproduced hereinbelow:8. That the plaintiff states that he being the son of defendant No.1 got by birth the right in the aforesaid ancestral property. It is undisputed that the aforesaid house belonged to the great grandfather of the plaintiff and was inherited by him from his father thus upon his birth he was entitled to half the share in the 1/3rd share of defendant No.1.

9. That the plaintiff submits that he has unbridled right to inherit half of the 1/3rd share in the aforesaid property which defendant No.1 has ultimately inherited from Late Shri Laxmi Narain Johri, like the other defendants. However, the defendant No.1 kept assuring the plaintiff that he shall provide the plaintiff his part of the share as and when the same aforesaid property is divided among all the heirs but the same was proved to be false assurance.

11. While Section 6 of the Act governs the devolution of interest in a coparcenary property, i.e., a joint Hindu property that is governed by the Mitakshara law, Section 8 prescribes the general rules of succession in case of Hindu males dying intestate and leaving behind properties, which would then devolve as per the provisions of Chapter II, in the manner as stipulated in the said Section. The said Section is reproduced herein below for ready reference:8. General rules of succession in the case of males:The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter(a) (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule; (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and (d) 12. firstly, upon the heirs, being the relatives specified in class I of the Schedule; lastly, if there is no agnate, then upon the cognates of the deceased. It has been held in a series of judicial pronouncements that under Section 8 of the Act, a property that devolves on a Hindu cannot be

treated as an HUF property in his hands, vis--vis his own sons. As observed by this Court in the case of Bharat Bhushan Maggon vs. Joginder Lal and Ors., [CS(OS)No.116/2012], decided on 15.10.2012, the Hindu Succession Act lays down rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II, as stipulated in the aforesaid provision. Sub-section (a) of Section 8 of the Act provides that the property of a male dying intestate shall devolve firstly upon the heirs, being the relatives specified in Class I of the Schedule. The list of heirs mentioned in Class I of the Schedule shows that it includes sons, daughters etc. as also son of the predeceased son, but does not specifically include the grandson, being the son of a living son. Under the Hindu Law, as soon as a son is born, he gets a share in his fathers property and becomes a part of the coparcenery. Such a right accrues in favour of the son by virtue of his birth and not on the date of demise of the father or inheritance from the father. However, under Section 8 of the Act, the property that devolves on a Hindu would not be an HUF property in his hand, vis-avis his own sons.

13. The aforesaid conclusion was arrived at by the Supreme Court in the case of Commissioner of Wealth-tax, Kanpur (supra), wherein notice was taken of the divergent views that were expressed by the Allahabad High Court, Full Bench of Madras High Court, Madhya Pradesh High Court, Andhra Pradesh High Court and Gujarat High Court and it was held as below:¹⁹ It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.

20. In view of the Preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include sons son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by S.8, he takes it as karta of his own undivided family. The Gujarat High Courts view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under S.8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in S.8. Furthermore as noted by

the Andhra Pradesh High Court, the Act makes it clear by S.4 that one should look to the Act in case of doubt and not to the preexisting Hindu law. It would be difficult to hold today the property which devolved on a Hindu under S.8 of the Hindu Succession Act would be HUF property in his hand vis--vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis--vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under S.8 of the Act included widow, mother, daughter of predeceased son etc.

21. xxx xxx xxx 22. The express words of S.8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The Preamble to the Act reiterates that the Act is, inter alia, to amend the law. With that background the express language which excludes sons son but included son of a predeceased son cannot be ignored. (emphasis added) 14. Subsequently, in the case of Yudhishter (supra), the Supreme Court had followed the judgment in the case of Commissioner of Wealth-tax, Kanpur (supra) and observed as below:10. This question has been considered by this Court in Commr. of Wealth Tax. Kanpur v. Chander Sen, (1986) 3 SCC 567.(AIR 198.SC 1753), where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in fathers property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore, whenever the father gets a property from whatever source from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as a Karta of his own undivided family but takes it in his individual capacity. At pages 577 to 578 (of SCC): (at p.1760 of AIR) of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. Pages 924-926 as well as Maynes on Hindu Law 12th edition pages 918-919. Shri Banerji relied on the said observations of Mayne on

Hindu Law 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Maynes Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which devolved on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis--vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house. (emphasis added) The aforesaid decision in the case of Commissioner of Wealthtax, Kanpur (supra) was followed by the Supreme Court in the case of Commissioner of Income Tax vs. P.L. Karuppan Chettiar (supra).

15. In the case of Rahul Behl (supra), while deciding an application filed by the defendant No.1 in a suit that was instituted by the plaintiff therein, wherein defendant No.1 had challenged the maintainability of the suit on the ground that it did not disclose any cause of action because the suit property was a self-acquired property of the deceased grandfather of the plaintiff, a Single Judge of this Court had applied the provisions of Section 8 of the Act and had held that the father of the plaintiff therein had alone inherited the suit property to the exclusion of his sons because the said property had devolved on him in his individual capacity and the same became a self-acquired property in his hands and was not a part of coparcenary property. In support of the aforesaid observations, reference was made on the very same decisions as have been referred to hereinabove, i.e., Commissioner of Income Tax vs. P.L. Karuppan Chettiar (supra) and Yudhishter (supra).

16. The aforesaid proposition of law came up for examination before this Court in the case Pratap (supra), wherein the appellant (plaintiff in the court below) had claimed that the suit property was an ancestral property and being the son of the respondent, he was a coparcener in the said property and thus entitled to his one-

half share therein. Aggrieved by the findings of the court below that there did not exist any coparcenary or any HUF and the suit property was a self-acquired property of the respondent, the appellant had preferred an appeal, which was dismissed by holding that Section 8 of the Act prescribes that the property that devolves on a Hindu would not be an HUF property in his hands vis--vis his own sons. After referring to the decisions of the Supreme Court as cited above and that of the learned Single Judge in the case of Rahul Behl (supra), it was held as below:9. The aforesaid principle of law is squarely applicable to the facts of the case in hand. It is held that the trial Court did not err in arriving at a conclusion that upon the demise of his father, grandfather of the appellant, the suit property devolved on the respondent in his individual capacity and, thus, had to be treated as self-acquired property in his hands. The appellant failed to establish that there existed any coparcenary, in which the appellant and the respondent were coparceners or there existed any HUF of which, the respondent was a Karta. Therefore the claim of the appellant for partition of the suit property on the ground that the same was ancestral, was rightly turned down. The suit property has to be treated as self-acquired property in the hands of the respondent. The appellant cannot claim any share therein on the ground that the said property is ancestral in nature.

17. The plaintiff herein has not stated in paras 8 & 9 of the plaint or elsewhere that the defendant No.1 was holding the suit property as a Karta of an HUF wherein he was a coparcener. In the absence of any averment to the aforesaid effect, reliance placed by learned counsel for the plaintiff on the provisions of Section 6 of the Act appears to be misplaced.

18. The second argument of the learned counsel for the plaintiff that a perusal of the Sale Deed dated 2.07.2010 executed in favour of the defendants No.11 and 12 reveals that the defendants No.1 to 9 have described themselves as joint owners of the 1/3rd undivided share in the suit property, bears out his submission that there did not take place any partition of the suit property, is also found to be devoid of merits for the reason that it was for the plaintiff to have in the first instance, asserted the existence of a joint HUF. He has however not made even a single averment in the plaint to the effect that there ever existed a Hindu undivided family

or that he was a coparcener therein alongwith the defendant No.1, who was its Karta. In the absence of any such assertion made in the plaint, the claim of the plaintiff that he had acquired an interest in the coparcenary property, as an incidence of his birth, is quite untenable and has to be turned down.

19. Reliance placed by learned counsel for the plaintiff on the decision in the case of Sheela Devi (supra) is also found to be misplaced for the reason that in the aforesaid case, the Supreme Court had specifically noticed that a finding of fact had been arrived at by the court below to the effect that the properties in the hands of the father of the appellants therein, namely, Shri Babu Ram and his brother, who had inherited 1/5th share therein upon the demise of their father, were joint family properties, which is not the case here.

20. The brief facts of the aforesaid case is that one Shri Tulsi Ram, had left behind five sons including one Shri Babu Ram. Upon the demise of Shri Tulsi Ram, Shri Babu Ram had inherited 1/5th share in the suit property. Shri Babu Ram had expired in the year 1989, leaving behind him two sons (respondents/ plaintiffs) and three daughters (appellants). As the revenue authorities had passed an order including the names of all the five legal heirs of Shri Babu Ram as having 1/5th share each in the property that was inherited by Shri Babu Ram, his two sons challenged the said order on the ground that the sisters had not acquired any right, title or interest in the said property. The suit of the respondents/plaintiffs was decreed by the trial court and the said decree was affirmed by the Appellate Court. On a second appeal filed by the appellants/sisters, the High Court examined the question as to whether the provisions of Section 8 of the Act would apply or not and it arrived at the conclusion that to determine the said question, it was necessary to determine the nature of the suit property. It was on the basis of the findings of fact that were arrived at by the court below to the effect that the nature of the property must be recorded as Hindu coparcenary and ancestral property, that the High Court had concluded that the law applicable before the enactment of the Act would govern the rights of the parties and not the provisions of the Act. After examining the aforesaid case on its own facts and on the premise that the properties in the hands of Shri Babu Ram and his brothers were joint family properties, the Supreme Court had referred to a number of decisions on this

aspect, including the decision in the case of Commissioner of Wealth-tax, Kanpur (supra) and Commissioner of Income Tax vs. P.L. Karuppan Chettiar (supra) and held that in the said case, the Hindu Succession Act would prevail over the old Hindu law.

21. The aforesaid decision in the case of Sheela Devi (supra) was taken note of by the Supreme Court in its subsequent decision in the case of Bhanwar Singh (supra), where the applicability of Section 8 of the Act was under consideration. to Section 8 of the Act After noting the interpretation given in the case of Commissioner of Wealth-tax, Kanpur (supra) which was reiterated in the case of Yudhishter (supra) as also Commissioner of Income Tax vs. P.L. Karuppan Chettiar (supra), the Supreme Court had noticed the fact that in the case of Sheela Devi (supra), the properties in question were joint family properties and there existed a coparcenary. It was in the facts of the said case that succession to the property was held to be governed under Section 6 of the Act.

22. The facts of the case in hand are, however, distinguishable. In the present case, the plaintiff has not laid the very foundation of his case by making any averment in the plaint to the effect that the suit property is a coparcenary property or that there existed an HUF where the defendant No.1 was a Karta and the plaintiff was a coparcener. In the absence of any such averments, the provisions of Section 6 of the Act would not be attracted and instead, the parties would be governed by Section 8 of the Act. Furthermore, the provisions of Section 19 of the Act would also come into play. Section 19 prescribes that if two or more heirs succeed together to the property of an intestate, they shall take the property per capita and not per stirpes.

23. Therefore, the contention of the learned counsel for the plaintiff that while executing the Sale Deed in favour of the defendants No.11 and 12, defendants No.1 to 9 had described themselves as joint owners of the undivided 1/3rd share in the suit property, would not make any difference. Merely because the shares of defendant No.1 to 9 in the suit premises were undivided, would not entitle the plaintiff to claim that no actual partition of the suit property had taken place and that the same had remained joint in the hands of the three sons of Shri Laxmi

Narain Johri, i.e., Shri K.K. Johri, Shri P.P. Johri and Shri Baldev Prasad Johri and as a result thereof, he is entitled to claim partition from defendant No. 1 by treating the same as an ancestral property in his hands.

24. Moreover, even as per the plaintiff, the suit property was purchased by Shri Chatta Bihari, who had expired on 29.05.1943 and he was survived by Shri Laxmi Narain Johri as his sole legal heir. As mentioned above, Shri Laxmi Narain Johri had three sons and when he expired on 27.08.1972, all the three sons had acquired 1/3rd share each in the suit property and as the same had devolved upon them per capita and not per stirpes in terms of Section 19 of the Act, they were fully entitled to alienate their respective undivided shares. As a result, when Shri K.K. Johri expired on 29.10.1985, his 1/3rd share in the suit property devolved upon the defendant No.1, Shri Deepak Johri (father of the plaintiff) as the sole surviving legal heir and in his individual capacity. It cannot be said that the nature of said portion of the suit property was ancestral in the hands of the defendant No.1 or that it had acquired the colour of an HUF property, and defendant No.1 was a karta thereof, when the plaint is absolutely silent on this aspect. For the plaintiff to claim half of the 1/3rd share in the suit property during the lifetime of his father, it was for him to have made an averment in the plaint to the effect that there existed an HUF of which the defendant No.1 was a karta and the plaintiff was a coparcener. When the plaintiff has failed to lay the very foundation of his case by claiming the existence of an HUF and a coparcenery therein, he cannot be permitted to invoke the provisions of Section 6 of the Act that governs devolution of interest in a coparcenary property. Therefore, it has to be held that the provisions of Section 8 are applicable to the facts of this case.

25. In view of the above position, this court is of the opinion that the plaintiff cannot claim that the suit property had retained its ancestral colour in the hands of Shri K.K. Johri, as he had inherited 1/3rd share therein on per capita basis under Section 19 of the Act and he was legally entitled to further dispose of the said share in his individual capacity, under Section 8 of the Act.

26. Taking into consideration the aforesaid facts and circumstances, the present application succeeds and consequently, the suit instituted by the plaintiff is

rejected on the twin ground of lack of cause of action and for the reason that the same is barred by law. NOVEMBER rkb/sk/rs 26, 2012 I.A. No.18548/2011 in CS(OS) No.818/2011 (HIMA KOHLI)

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