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

+ **CS(OS) 1159/2007, I.A. No.7138/2007 (u/O 39 R-1 & 2 CPC), I.A. No.18648/2011 (of proposed co-plaintiff)**

SHRI NAVAL KISHORE & ANR Plaintiffs

Through: Plaintiff No.1 in person.
Mr. S.K. Duggal, Adv. for P-2 with
P-2 in person.

Versus

SHRI JUGAL KISHORE & ANR. Defendants

Through: D-1 in person.
Mr. Prasoon Kumar, Adv. for D-2(iv)
& (v)

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **28.02.2013**

I.A. No.21439/2012 (of D-1 u/O 7 R-11 CPC)

1. This order is in continuation of yesterday's order dated 27th February, 2013.

2. Mr. S.K. Duggal, Advocate who states that he is for the plaintiff No.2 only, appears and contends that the amended plaint to which reference was made in yesterday's order was the proposed amended plaint and is not even signed by the plaintiff No.2 and is also not accompanied with the affidavit of the plaintiff No.2. He seeks adjournment to file the amended plaint.

3. The amendment was allowed vide order dated 2nd December, 2011 and two weeks time was granted for filing of the amended plaint. Over an

year has passed since then. The plaintiffs having not chosen to file the amended plaint, the amendment in any case is now of no effect in terms of Order VI Rule 18 of the CPC.

4. Upon being called upon to argue on merits, Mr. Duggal states that the claim of the plaintiff No.2 is only in respect of property bearing No.A-11, Panchvati, Azadpur, Delhi.

5. None has appeared for the plaintiff No.1. If the plaint is to be rejected, as *prima facie* found in yesterday's order, the plaintiff/plaintiffs cannot be permitted to keep the same pending by indulging in such dilatory tactics.

6. The suit was originally filed in the year 2007, only by Sh. Naval Kishore against his father (defendant No.1) and his grandmother Smt. Vishan Devi (defendant No.2) for partition of the following properties:

(a) Property No.A-36, Panchwati Colony, Azadpur, Delhi-33 consisting of second and third floors;

(b) Property No.A-11, Panchwati Colony, Azadpur, Delhi-33 consisting of basement, half undivided portion of ground floor and annexes at ground, first, second and third floors;

(c) Property No.I-1486-87, ad-measuring 100 sq. yds. comprised of Hall and Mezzanine, situated at Jahangirpuri, Delhi-33;

and for ancillary reliefs.

7. In the plaint as filed in the year 2007, it was the case of the plaintiff:-

- (i) that Sh. Sadhu Ram, grandfather of the plaintiff migrated to India on partition of the Country in the year 1947; that he had a flourishing family business in Pakistan and was possessed of immovable properties which were ancestral properties in his hands having inherited the same from his forefathers; the said business was a joint family business in the hands of Sh. Sadhu Ram as *Karta* of a Hindu Undivided Family (HUF) consisting of himself, his wife (defendant No.2), four daughters and a son namely the defendant No.1;
- (ii) that on migration to India, Sh. Sadhu Ram was allotted a property at Motia Khan, Delhi in lieu of his claim of properties left in Pakistan and was also paid a sum of Rs.80,627.11 as compensation and which property and compensation were joint family properties in his hands as *Karta* of the HUF; Sh. Sadhu Ram had also carried cash realised from sale of some ancestral properties in Pakistan and which cash and the compensation so received was invested by him in acquiring other properties and setting up a business to support and maintain the joint family;
- (iii) that the defendant No.1 was married to Smt. Umesh Latta on 7th May, 1970 and the plaintiff was born on 21st December, 1973;
- (iv) that Sh. Sadhu Ram purchased properties No.D-21 & D-23, Malka Ganj, Delhi in the years 1976-1982 in the name of the defendant No.1; the said property having been purchased from

the funds of joint family, was held *Benami* by the defendant No.1 which was/is a coparcenary of the joint family. The said properties have thus become ancestral properties;

- (v) that Sh. Sadhu Ram died on 5th March, 1982;
- (vi) after the death of Sh. Sadhu Ram, the defendant No.1 became *Karta* of the joint family consisting of himself, defendant No.2, his three daughters, plaintiff and his wife Smt. Umesh Latta;
- (vii) that the property at Motia Khan, Delhi was vacated and in lieu thereof a DDA flat at Shalimar Bagh, Delhi was allotted in the name of defendant No.2, after no objection had been submitted by the defendant No.1 and his three sisters; however since the same was in lieu of Motia Khan property, it was ancestral. The said DDA flat also became joint family property in the hands of defendant No.2, for the benefit of the family; that the defendants No.1 & 2 sold the said DDA flat as well as properties No.D-21 & D-23, Malka Ganj, Delhi in the year 1990 and from the sale proceeds thereof, second floor with terrace of property No.A-36, Panchvati Colony, Azadpur, Delhi was purchased by the defendant No.1 and which property also thus became joint family property in the hands of defendant No.1;
- (viii) that the third floor of the property No.A-36, Panchvati Colony, was constructed by the plaintiff from his own funds and resources in the year 2003;

- (ix) that Smt. Umesh Latta being the mother of the plaintiff and wife of the defendant No.1 purchased undivided half ground floor portion of the property No.A-11, Panchvati Colony in the year 1988 from her own funds;
- (x) that the half portion of the basement and annexes at ground, first, second and third floors of the property No.A-11, Panchvati Colony were purchased in the name of defendant No.2, also in the year 1988;
- (xi) later on remaining undivided half portion of the ground floor and basement of the property No.A-11, Panchvati Colony was purchased in the name of the defendant No.1 in the year 1998;
- (xii) that the portion of the property No.A-11, Panchvati Colony in the names of the defendants No.1 & 2 were acquired from funds and resources of joint family and are thus joint family property;
- (xiii) that property No.I-1486-87, Jahangirpuri has also been purchased and constructed from the funds of joint family and is thus joint family property.

8. The defendant No.2 died during the pendency of the suit and her legal representatives being the defendant No.1 and his sisters were substituted in her place vide order dated 16th December, 2008.

9. Smt. Umesh Latta, mother of the sole plaintiff and wife of the defendant No.1 filed I.A. No.17330/2011 for impleadment as co-plaintiff

and which was allowed as aforesaid on 2nd December, 2011 and amended plaint ordered to be filed and which as aforesaid has not been filed. A perusal of the proposed amended plaint on record shows that the plaintiff No.2 is pleading that the half undivided ground floor of property No.A-11, Panchvati Colony, Azadpur, Delhi has been purchased by her from her own funds and resources.

10. The defendant No.1 filed this application seeking rejection of the plaint pleading that as per the Title Deeds of the properties No.A-36 & A-11 Panchvati Colony filed by the plaintiff himself, the same are not in the name of any HUF but in the individual name of the defendant No.1; similarly, the remaining half portion of basement and the annexes of the property No.A-11, Panchvati Colony were also in the name of the defendant No.2 who has left a validly executed Will in favour of the defendant No.1 with respect thereto and that the property at Jahangirpuri is neither owned by the defendant No.1 nor by the deceased defendant No.2 and contending that the claim in the present suit is barred by the Benami Transactions (Prohibition) Act, 1988.

11. An analysis of the plaint aforesaid shows that though the plaintiff has pleaded HUF/joint family/coparcenary but the entire basis of the said pleas is the factum of the properties having been acquired by the defendants No.1 & 2 from the funds or from proceeds from sale of properties flowing from the grandfather of the plaintiff No.1 and who himself had inherited the said funds/properties from his own ancestor.

12. The present suit is yet another instance of a misconception quite

widely prevalent, of the son having a share in the properties inherited by his father from his grandfather. I have recently in the judgment dated 30th January, 2013 in CS(OS) No.823/2010 titled *Neelam Vs. Sada Ram* discussed the matter in detail and need is thus not felt to reiterate the same. Suffice it is to state that it has been held that a plea of a property being a joint family property is not the plea of existence of a coparcenary or an HUF and that for a case for claiming a share in the property otherwise than under the Hindu Succession Act, 1956 to be made out, it has to be pleaded that there existed an HUF since prior to coming into force of the Succession Act and which HUF by virtue of Section 6 of the Act has been permitted to continue. The plaintiffs have not been able to cite any document which may show existence of an HUF. The grandfather of the plaintiff Sh. Sadhu Ram died in the year 1982 i.e. much after coming into force of the Hindu Succession Act in the year 1956 and the properties inherited by the defendant No.1 from Sh. Sadhu Ram would not become ancestral properties in which the plaintiffs would have a share.

13. The counsel for the defendant No.1 is also correct in contending that the claim in suit is barred by the provisions of the Benami Transactions (Prohibition) Act.

14. Though the defendant No.2 had died during the pendency of the suit and the defendant No.1 has taken a plea qua her Will but in this suit, it is not necessary to adjudicate the said question also as neither of the plaintiffs are an heir of the defendant No.2 and the question of their being entitled to any share in her estate or their having *locus* to challenge her Will, does not arise.

15. Though the counsel for the plaintiff No.2 has argued that the plaintiff No.2 has a share in property No.A-11, Panchvati Colony, Azadpur, Delhi but there is no need for this suit for partition with respect thereto inasmuch as the plaintiff No.2 is stated to have acquired a distinct portion of the property in her own name and thus the question of partition thereof does not arise.

16. I may notice that the argument of the counsel for the plaintiff at the time of admission of the suit on 2nd July, 2007 also was of the properties being ancestral properties only and not of any coparcenary or HUF.

17. The plaint thus does not disclose any right of either of the plaintiffs to the properties of which partition is sought and the suit is thus dismissed. Though the plaintiffs have consumed considerable judicial time and a perusal of the order sheets shows that the plaintiffs, after obtaining the interim order were not interested in pursuing the suit and the same is also apparent from their conduct of yesterday and today, but considering the relationship of the parties, no costs.

18. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

FEBRUARY 28, 2013

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