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

\+ CS(OS) 1472/2011

MRS. SANTOSH VISHWESHWARNATH WADHWA .....Plaintiff
Through: Mr.Sudhanshu Batra, Sr. Adv. with
Mr.S.K Jha, Ms. Neha Singh, Advs.

versus

MR. GULSHAN CHHABRA & ORS. ..... Defendants
Through: Mr.Sanjeev Narula, Adv.

**CORAM:**
**HON'BLE MR. JUSTICE VALMIKI J. MEHTA**

**O R D E R**

**% 29.04.2016**

1. The suit for partition is with respect to the three immovable properties as stated in para 7 of the plaint as under:-

> "7. The plaintiff submits that Shri Hari Chand Chabra expired on 27.11.1992 and his wife Smt. Ram Chameli Chabra expired on 27.06.2003. Both Shri Hari Chand Chabra and his wife died intestate. Thus the following properties which form part of the estate of Late Shri Hari Chand Chhabra devolved upon the plaintiff and the three defendants.
> (a) Residential property– A-6/11, Rana Pratap Bagh, Delhi-110007.
> (b) Residential property– 188, Kohat Enclave, Pitampura, Delhi-110034.
> (c) Commercial property– C/66, New Sabzi Mandi, Azadpur, Delhi-110033."

2. Admittedly, the second property at 188, Kohat Enclave, Pitampura, Delhi 110034 has been purchased by means of a title deed in the name of

defendant no.1. Once this property is purchased by a title deed in the name of defendant no.1, defendant no.1 would be the owner of the same and no rights can be claimed in this property by the plaintiff as per Section 4(1) of the Benami Transactions (Prohibition) Act, 1988 (in short the 'Benami Act') unless the plaintiff has pleaded in the plaint a case falling within the two exceptions as contained in Section 4(3) of the Benami Act viz of the property being an HUF property or this suit property being purchased by the defendant no.1 as a trustee.

3. Admittedly, there are no averments with respect to the property being purchased by the defendant no.1 as a trustee as the only averment made in the plaint is in para 8 which states that this property was purchased by the father Sh. Hari Chand Chabra in the name of defendant no.1 from the funds of Sh. Hari Chand Chabra. Such averments will not mean that these averments pertain to the property at 188, Kohat Enclave, Pitampura, Delhi 110034 being purchased in trust i.e property being purchased with the defendant no.1 being a trustee.

4. I may note that the concept of benami property was a permissible legal concept prior to the enactment of the Benami Transactions (Prohibition) Act, 1988 in view of the Sections 81, 82 and 94 of the Indian

Trusts Act, 1882 and which sections were repealed by Section 7 of the Benami Act. The transaction of benami did contain an element of trust, but on Sections 81, 82 and 94 of the Indian Trusts Act being repealed by Section 7 of the Benami Act, the trust in the nature of these particular Sections, 81, 82 and 94 of the Indian Trusts Act would be excluded from the purview of Section 4(3)(b) of the Benami Act. Hence, the plaintiff cannot claim right in the Kohat Enclave property on the ground that this property was purchased by the father from his funds with the defendant no.1 being only a trustee.

6. The second exception of Section 4(3) of the Benami Act of existence of an HUF is also found not to be pleaded as a complete cause of action in the plaint. No doubt, the plaintiff pleads in para 1 of the plaint that plaintiff and defendants along with the father Sh. Hari Chand Chabra formed an HUF, but in law, HUF is a specific concept which has to be pleaded exhaustively as per Order VI Rule 4 of the Code of Civil Procedure, 1908 (CPC) and taking note of Section 8 of the Hindu Succession Act, 1956 as pronounced upon by the Supreme Court in the cases of ***Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, (1986) 3 SCC 567*** and ***Yudhishter Vs. Ashok Kumar, (1987) 1 SCC 204.*** As per these judgments inheritance of a property by a male person after 1956 does

not result in creation of an HUF and the property inherited is an HUF property only as per the position of inheritance before 1956. I have dealt with these aspects extensively in the judgment in the case of ***Sh. Surender Kumar Vs. Sh. Dhani Ram and Others 222 (2016) DLT 217*** and have observed that whenever a suit for partition is filed pleading existence of an HUF and its properties there have to be clear cut pleadings in view of Order VI Rule 4 CPC and also the effect of passing of the Benami Act, specifically as to how an HUF is created i.e whether before 1956 on account of inheritance of ancestral property or after 1956 when a particular property is thrown into common hotchpotch by reference to the time/date etc when it was so done. None of these averments are found in the plaint and therefore, applying the ratio of the judgment of ***Sh. Surender Kumar's*** case ***(supra)***, the suit is to be dismissed with respect to the property at 188, Kohat Enclave, Pitampura, Delhi 110034 inasmuch as no pleading exists for the suit to fall within the two exceptions as contained in Section 4(3) of the Benami Act. The relevant paras of the judgment in the case of ***Sh. Surender Kumar (supra)*** are para nos. 7 to 13 and which paras read as under:-

> "7. On the legal position which emerges pre 1956 i.e before passing of the Hindu Succession Act, 1956 and post 1956 i.e after passing of the Hindu Succession Act, 1956, the same has been

considered by me recently in the judgment in the case of ***Sunny (Minor) & Anr. vs. Sh. Raj Singh & Ors., CS(OS) No.431/2006*** decided on 17.11.2015. In this judgment, I have referred to and relied upon the ratio of the judgment of the Supreme Court in the case of ***Yudhishter (supra)*** and have essentially arrived at the following conclusions:-

(i) If a person dies after passing of the Hindu Succession Act, 1956 and there is no HUF existing at the time of the death of such a person, inheritance of an immovable property of such a person by his successors-in-interest is no doubt inheritance of an 'ancestral' property but the inheritance is as a self-acquired property in the hands of the successor and not as an HUF property although the successor(s) indeed inherits 'ancestral' property i.e a property belonging to his paternal ancestor.

(ii) The only way in which a Hindu Undivided Family/joint Hindu family can come into existence after 1956 (and when a joint Hindu family did not exist prior to 1956) is if an individual's property is thrown into a common hotchpotch. Also, once a property is thrown into a common hotchpotch, it is necessary that the exact details of the specific date/month/year etc of creation of an HUF for the first time by throwing a property into a common hotchpotch have to be clearly pleaded and mentioned and which requirement is a legal requirement because of Order VI Rule 4 CPC which provides that all necessary factual details of the cause of action must be clearly stated. Thus, if an HUF property exists because of its such creation by throwing of self-acquired property by a person in the common hotchpotch, consequently there is entitlement in coparceners etc to a share in such HUF property.

(iii) An HUF can also exist if paternal ancestral properties are inherited prior to 1956, and such status of parties qua the properties has continued after 1956 with respect to properties inherited prior to 1956 from paternal ancestors. Once that status and position continues even after 1956; of the HUF and of its properties existing; a coparcener etc will have a right to seek partition of the properties.

(iv) Even before 1956, an HUF can come into existence even without inheritance of ancestral property from paternal ancestors, as HUF could have been created prior to 1956 by throwing of individual property into a common hotchpotch. If such an HUF continues even after 1956, then in such a case a coparcener etc of an HUF was entitled to partition of the HUF property.

8. The relevant paragraphs of the judgment in the case of ***Sunny (Minor) (supra)*** are paragraphs 6 to 8 and which paras read as under:-

> "6. At the outset, it is necessary to refer to the ratio of

the judgment of the Supreme Court in the case of ***Yudhishter Vs. Ashok Kumar, (1987) 1 SCC 204*** and in para 10 of the said judgment the Supreme Court has made the necessary observations with respect to when HUF properties can be said to exist before passing of the Hindu Succession Act, 1956 or after passing of the Act in 1956. This para reads as under:-

> **'10.** This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors. MANU/SC/0265/1986MANU/SC/0265/1986 : [1986]161ITR370(SC) where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become 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 separated 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 Kar of his own undivided family but takes it in his individual capacity.** At pages 577 to 578 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 Mayne's 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 Mayne's Hindu Law, 12th Edn. page 919. **In that view of the matter, it would be difficult to hold that property which developed on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons.** If that be the position then the

> property which developed 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."
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> (emphasis is mine)

7(i). As per the ratio of the Supreme Court in the case of ***Yudhishter (supra)*** after passing of the Hindu Succession Act, 1956 the position which traditionally existed with respect to an automatic right of a person in properties inherited by his paternal predecessors-in-interest from the latter's paternal ancestors upto three degrees above, has come to an end. Under the traditional Hindu Law whenever a male ancestor inherited any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him had a right in that property equal to that of the person who inherited the same. Putting it in other words when a person 'A' inherited property from his father or grandfather or great grandfather then the property in his hand was not to be treated as a self-acquired property but was to be treated as an HUF property in which his son, grandson and great grandson had a right equal to 'A'. After passing of the Hindu Succession Act, 1956, this position has undergone a change and if a person after 1956 inherits a property from his paternal ancestors, the said property is not an HUF property in his hands and the property is to be taken as a self-acquired property of the person who inherits the same. There are two exceptions to a property inherited by such a person being and remaining self-acquired in his hands, and which will be either an HUF and its properties was existing even prior to the passing of the Hindu Succession Act, 1956 and which Hindu Undivided Family continued even after passing of the Hindu Succession Act, 1956, and in which case since HUF existed and continued before and after 1956, the property inherited by a member of an HUF even after 1956 would be HUF property in his hands to which his paternal successors-in-interest upto the three degrees would have a right. The second exception to the property in the hands of a person being not self-acquired property but an HUF property is if after 1956 a person who owns a self-acquired property throws the self-acquired property into a common hotchpotch whereby such property or properties thrown into a common hotchpotch become Joint Hindu Family properties/HUF properties. In order to claim the properties in this second exception position as being HUF/Joint Hindu Family properties/properties, a plaintiff has

to establish to the satisfaction of the court that when (i.e date and year) was a particular property or properties thrown in common hotchpotch and hence HUF/Joint Hindu Family created.

(ii) This position of law alongwith facts as to how the properties are HUF properties was required to be stated as a positive statement in the plaint of the present case, but it is seen that except uttering a mantra of the properties inherited by defendant no.1 being 'ancestral' properties and thus the existence of HUF, there is no statement or a single averment in the plaint as to when was this HUF which is stated to own the HUF properties came into existence or was created ie whether it existed even before 1956 or it was created for the first time after 1956 by throwing the property/properties into a common hotchpotch. This aspect and related aspects in detail I am discussing hereinafter.

8(i). A reference to the plaint shows that firstly it is stated that Sh. Tek Chand who is the father of the defendant no.1 (and grandfather of Sh. Harvinder Sejwal and defendants no.2 to 4) inherited various ancestral properties which became the basis of the Joint Hindu Family properties of the parties as stated in para 15 of the plaint. In law there is a difference between the ancestral property/properties and the Hindu Undivided Family property/properties for the pre 1956 and post 1956 position as stated above because inheritance of ancestral properties prior to 1956 made such properties HUF properties in the hands of the person who inherits them, but if ancestral properties are inherited by a person after 1956, such inheritance in the latter case is as self-acquired properties unless of course it is shown in the latter case that HUF existed prior to 1956 and continued thereafter. It is nowhere pleaded in the plaint that when did Sh. Tek Chand father of Sh. Gugan Singh expire because it is only if Sh. Tek Chand father of Sh. Gugan Singh/defendant no.1 had expired before 1956 only then the property which was inherited by Sh. Gugan Singh from his father Sh. Tek Chand would bear the character of HUF property in the hands of Sh. Gugan Singh so that his paternal successors-in-interest became co-parceners in an HUF. Even in the evidence led on behalf of the plaintiffs, and which is a single affidavit by way of evidence filed by the mother of the plaintiffs Smt. Poonam as PW1, no date is given of the death of Sh. Tek Chand the great grandfather of the plaintiffs. In the plaint even the date of the death of the grandfather of the plaintiffs Sh. Gugan Singh is missing. As already stated above, the dates/years of the death of Sh. Tek Chand and Sh. Gugan Singh were very material and crucial to determine the

automatic creation of HUF because it is only if Sh. Tek Chand died before 1956 and Sh. Gugan Singh inherited the properties from Sh. Tek Chand before 1956 that the properties in the hands of Sh. Gugan Singh would have the stamp of HUF properties. Therefore, in the absence of any pleading or evidence as to the date of the death of Sh. Tek Chand and consequently inheriting of the properties of Sh. Tek Chand by Sh. Gugan Singh, it cannot be held that Sh. Gugan Singh inherited the properties of Sh. Tek Chand prior to 1956.

(ii) In fact, on a query put to the counsels for the parties, counsels for parties state before this Court that Sh. Gugan Singh expired in the year 2008 whereas Sh. Tek Chand died in 1982. Therefore, if Sh. Tek Chand died in 1982, inheriting of properties by Sh. Gugan Singh from Sh. Tek Chand would be self-acquired in the hands of Sh. Gugan Singh in view of the ratio of the Supreme Court in the case of ***Yudhister (supra)*** inasmuch as there is no case of the plaintiffs of HUF existing before 1956 or having been created after 1956 by throwing of property/properties into common hotchpotch either by Sh. Tek Chand or by Sh. Gugan Singh/defendant no.1. There is not even a whisper in the pleadings of the plaintiffs, as also in the affidavit by way of evidence filed in support of their case of PW1 Smt. Poonam, as to the specific date/period/month/year of creation of an HUF by Sh. Tek Chand or Sh. Gugan Singh after 1956 throwing properties into common hotchpotch.

(iii) The position of HUF otherwise existing could only be if it was proved on record that in the lifetime of Sh. Tek Chand a Hindu Undivided Family before 1956 existed and this HUF owned properties include the property bearing no.93, Village Adhichini, Hauz Khas. However, a reference to the affidavit by way of evidence filed by PW1 does not show any averments made as to any HUF existing of Sh. Tek Chand, whether the same be pre 1956 or after 1956. Only a self-serving statement has been made of properties of Sh. Gugan Singh being 'ancestral' in his hands, having been inherited by him from Sh. Tek Chand, and which statement, as stated above, does not in law mean that the ancestral property is an HUF property."

9. I would like to further note that it is not enough to aver a *mantra,* so to say, in the plaint simply that a joint Hindu family or HUF exists. Detailed facts as required by Order VI Rule 4 CPC as to when and how the HUF properties have become HUF properties must be clearly and categorically

averred. Such averments have to be made by factual references qua each property claimed to be an HUF property as to how the same is an HUF property, and, in law generally bringing in any and every property as HUF property is incorrect as there is known tendency of litigants to include unnecessarily many properties as HUF properties, and which is done for less than honest motives. Whereas prior to passing of the Hindu Succession Act, 1956 there was a presumption as to the existence of an HUF and its properties, but after passing of the Hindu Succession Act, 1956 in view of the ratios of the judgments of the Supreme Court in the cases of ***Chander Sen (supra)*** and ***Yudhishter (supra)*** there is no such presumption that inheritance of ancestral property creates an HUF, and therefore, in such a post 1956 scenario a mere *ipse dixit* statement in the plaint that an HUF and its properties exist is not a sufficient compliance of the legal requirement of creation or existence of HUF properties inasmuch as it is necessary for existence of an HUF and its properties that it must be specifically stated that as to whether the HUF came into existence before 1956 or after 1956 and if so how and in what manner giving all requisite factual details. It is only in such circumstances where specific facts are mentioned to clearly plead a cause of action of existence of an HUF and its properties, can a suit then be filed and maintained by a person claiming to be a coparcener for partition of the HUF properties.

10. A reference to the plaint in the present case shows that it is claimed that ownership of properties by late Sh. Jage Ram in his name was as joint Hindu family properties. Such a bald averment in itself cannot create an HUF unless it was pleaded that late Sh. Jage Ram inherited the properties from his paternal ancestors prior to 1956 or that late Sh. Jage Ram created an HUF by throwing his own properties into a common hotchpotch. These essential averments are completely missing in the plaint and therefore making a casual statement of existence of an HUF does not mean the necessary factual cause of action, as required in law, is pleaded in the plaint of existence of an HUF and of its properties.

11. I may note that the requirement of pleading in a clear cut manner as to how the HUF and its properties exist i.e whether because of pre 1956 position or because of the post 1956 position on account of throwing of properties into a common hotchpotch, needs to be now mentioned especially after passing of the Benami Transaction (Prohibition) Act, 1988 (hereinafter

referred to as 'the Benami Act') and which Act states that property in the name of an individual has to be taken as owned by that individual and no claim to such property is maintainable as per Section 4(1) of the Benami Act on the ground that monies have come from the person who claims right in the property though title deeds of the property are not in the name of such person. An exception is created with respect to provision of Section 4 of the Benami Act by its sub-Section (3) which allows existence of the concept of HUF. Once existence of the concept of HUF is an exception to the main provision contained in sub-Sections (1) and (2) of Section 4 of the Benami Act, then, to take the case outside sub-Sections (1) and (2) of Section 4 of the Benami Act it has to be specifically pleaded as to how and in what manner an HUF and each specific property claimed as being an HUF property has come into existence as an HUF property. If such specific facts are not pleaded, this Court in fact would be negating the mandate of the language contained in sub-Sections (1) and (2) of Section 4 of the Benami Act.

12. This Court is flooded with 1al ingredients of a cause of action, and once the ratios of the judgments of the Supreme Court in the cases of ***Chander Sen (supra)*** and ***Yudhishter (supra)*** come in, the pre 1956 position and the post 1956 position has to be made clear, and also as to how HUF and its properties came into existence whether before 1956 or after 1956. It is no longer enough to simply state in the plaint after passing of the Hindu Succession Act 1956, that there is a joint Hindu family or an HUF and a person is a coparcener in such an HUF/joint Hindu family for such person to claim rights in the properties as a coparcener unless the entire factual details of the cause of action of an HUF and each property as an HUF is pleaded.

13. In view of the above, actually the application filed under Order VII Rule 11 CPC in fact is treated as an application under Order XII Rule 6 CPC, inasmuch as, it is observed on the admitted facts as pleaded in the plaint that no HUF and its properties are found to exist. There is no averment in the plaint that late Sh. Jage Ram inherited property(s) from his paternal ancestors prior to 1956. In such a situation, therefore, the properties in the hands of late Sh. Jage Ram cannot be HUF properties in his hands because there is no averment of late Sh. Jage Ram inheriting ancestral property(s) from his paternal ancestors prior to 1956. There is no averment in the plaint also of

> late Sh. Jage Ram's properties being HUF properties because HUF was created after 1956 by late Sh. Jage Ram by throwing properties into a common hotchpotch. I have already elaborated in detail above as to how an HUF has to be pleaded to exist in the pre 1956 and the post 1956 positions and the necessary averments which had to be made in the present plaint. The suit plaint however grossly lacks the necessary averments as required in law to be made for a complete cause of action to be pleaded for existence of an HUF and its properties."

7. Accordingly, the suit is dismissed because a legal cause of action is not pleaded to exist as per the plaint for the plaintiff to claim any share and partition of the property 188, Kohat Enclave, Pitampura, Delhi 110034.

8. The following issues are framed:

(i) Whether the plaintiff is entitled to any share and seek partition of the properties at A-6/11, Rana Pratap Bagh, Delhi 110007 and C/66, New Sabzi Mandi, Azadpur, Delhi 110033? OPP.

(ii) Whether the plaintiff is not entitled to any share in the property at A-6/11, Rana Pratap Bagh, Delhi 110007 inasmuch as this property was owned by the mother Smt. Ram Chameli Chabra who died leaving behind her Will dated 28.05.2003 bequeathing this property to defendant nos.2 and 3? OPD-2 & 3

(iii) What is the extent of the share of the father Sh. Hari Chand Chabra in the partnership firm M/s. Hari Chand & Sons which was carrying on business at C/66, New Sabzi Mandi, Azadpur, Delhi and consequently what would be the share of the plaintiff in the share of the father Sh. Hari Chand Chabra in this partnership firm? Onus put on the parties.

(iv) Whether the plaintiff is entitled to rendition of accounts of the business of M/s. Hari Chand & Sons which as per the plaintiff is carried out by the defendants after the death of Sh. Hari Chand

Chabra? OPP.

(v) Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD

(vi) Relief.

9. Parties will file their list of witnesses within six weeks from today.

10. List before the Joint Registrar for fixing the dates of trial on 27th July, 2016.

**VALMIKI J. MEHTA, J**

**APRIL 29, 2016**
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