

(2014) 09 DEL CK 0223

Delhi High Court

Case No: IA No. 15579/2014 In CS(OS) 221/2008

Urmila Devi Sharma

APPELLANT

Vs

Pramod Kumar Sharma

RESPONDENT

---

**Date of Decision:** Sept. 22, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 10 Rule 1, Order 10 Rule 3, Order 14 Rule 5
- Evidence Act, 1872 - Section 165

**Hon'ble Judges:** Rajiv Shakdher, J**Bench:** Single Bench**Advocate:** Pravir K. Jain, Advocate for the Appellant; Sudhanshu Batra, Sr. Adv., Sushil Shukla and Sambhav Gupta, Advocate for the Respondent**Final Decision:** Disposed Off

---

**Judgement**

Rajiv Shakdher, J.

IA No. 15579/2014 (O. 14 R. 5 of CPC by Defendant)

1. This is an application filed under Order 14 Rule 5 of the CPC. By this application the applicant/ defendant (who has deceased and is now represented by his legal heirs) seeks reformulation of issue nos. 4 and 10 and the reversal of onus vis-a-vis issue no. 8, which has been placed on the applicant/ defendant.

2. Notice in this application was issued by me, on 20.08.2014. Mr. Pravir Jain appeared for the plaintiff and has decided to argue the matter, without a reply, based on the records of the case. Accordingly, the application was taken up for hearing on 26.08.2014. Since certain clarifications were required, the matter was listed for directions on 26.08.2014, 02.09.2014, 03.09.2014 and finally order in the application was reserved on 18.09.2014.

3. At the very outset, it must be stated, Mr. Jain concedes that, in so far as, order dated 13.05.2013, places the onus qua issue no.8 on the applicant/ defendant no.1,

the same needs to be reversed. In other words, Mr. Jain says that the onus qua issue no.8 can be placed on the plaintiffs. Therefore, with respect to this aspect, there is no controversy and even otherwise, I am of the view that the applicant/ defendant is correct in his contention that as regards issue no.8, onus should be placed on the plaintiffs. It is ordered accordingly.

4. This leaves me with the other contention raised by the applicant/ defendant, which is that issue no. 4 and 10 should be re-framed.

4.1 I must state that, in so far as issue no. 10 is concerned, the re- formulation of the said issue by applicant/ defendant, as suggested, is substantially the same except that the onus is sought to be placed on the plaintiffs. In the order dated 13.05.2013, in respect of issue no. 10, onus has been placed on the applicant/ defendant.

4.2 In so far as issue no.4 is concerned, the applicant/ defendant has not only re-formulated the issue, but also suggested that the onus should be placed on the plaintiffs and not on the applicant/ defendant as directed by order dated 13.05.2013.

5. Mr. Batra, learned senior counsel for the applicant/ defendant, says that since it is the assertion of the plaintiffs, that the property, in respect of which issue nos. 4 and 10 are framed, was purchased by late Sh. Bal Kishan Sharma, out of his own funds, the said issues should reflect that contention and, the onus, accordingly, should be placed on the plaintiffs. Mr. Batra further submits, that, consistent with the submissions of the plaintiffs, that the property in issue was purchased by late Sh. Bal Kishan Sharma, out of his own funds, the onus should be on the plaintiffs to demonstrate that the deceased, i.e., the applicant/ defendant was a benami of his father late Sh. Bal Kishan Sharma.

5.1 Mr. Batra, thus, submits that once the title documents, pertaining to the property in issue, evidence ownership in favour of late Sh. Pramod Kumar Sharma, the presumption in law, would be, that the consideration in respect of the same was paid by him and, therefore, if it is contended to the contrary by the plaintiffs, it would amount to stating that late Sh. Pramod Kumar Sharma was a benami of his father late Sh. Bal Kishan Sharma, and thus, logically issue no. 10, as framed, would require re-formulation and also reversal of onus. In support of his submissions, Mr. Batra relied upon a judgement of the Division Bench of this court dated 06.11.2008 passed in RFA No. 404/2007 titled Vijesh Chadha and Anr. vs. Rajindra Chadha.

5.2 Mr. Batra propounded that issue nos. 4 and 10, should read as follows:

4. Whether plot at Ghaziabad was acquired by late Sh. Bal Kishan Sharma in the name of Defendant No.1 out of his own funds. OPP

10. Whether the Defendant no.1 (since deceased) is the Benami owner of Raj Nagar, Ghaziabad property as alleged in para 2 and 9 of the plaint? OPP

6. Mr. Jain, on the other hand, submitted that the case of the plaintiffs, as set up in the suit, is that: the parties herein are members of a Hindu Undivided Family (HUF); late Sh. Bal Kishan Sharma was the karta of the HUF; and that, the HUF comprised of his two sons, late Sh. Pramod Kumar Sharma and plaintiff no.3 Mr. Pradeep Kumar Sharma; his wife, plaintiff no. 1, Mrs. Urmila Devi Sharma (since deceased); and his daughter, plaintiff no.2, Mrs. Satya Bala Sharma.

6.1 Mr. Jain contended that, in the plaint it is averred that late Sh. Bal Kishan Sharma, out of his own fund and earnings, had created a corpus by putting his income in the HUF hotchpotch. He stressed the fact that the said income, as per stand taken in the plaint, was treated as income of the joint family, and at the relevant time when, the property in issue, was purchased, i.e., in 1964-65, late Sh. Pramod Kumar Sharma and plaintiff no.3 were minors and were pursuing their studies.

6.2 Mr. Jain asserted that since the sons had no source of income, they could not have acquired the property in issue, which was, a 1200 sq. yds. Plot, situate at Raj Nagar, Ghaziabad (hereinafter referred to as the Ghaziabad property). Mr. Jain, in this behalf, took me through the averments made in paragraph 2 of the amended plaint.

6.3 In order to meet the contention of Mr. Batra, Mr. Jain also drew my attention to paragraph 9 of the amended plaint wherein there is a reference to the fact that the Ghaziabad property, i.e., the property in issue, was purchased by late Sh. Bal Kishan Sharma during his life time out of his own funds in the name of late Sh. Pramod Kumar Sharma, being his elder son.

7. I have heard the learned counsels for the parties and perused the record. There is no dispute before me that the amended plaint has been taken on record by this court.

7.1 A perusal of the amended plaint would show that averments have been made by the plaintiffs that late Sh. Bal Kishan Sharma had put his own funds and earnings in the HUF hotchpotch, which comprised of (at the relevant point in time) his two sons, including the deceased Mr. Pramod Kumar Sharma, applicant/ defendant; his wife Mrs. Urmila Devi Sharma, (since deceased)/ plaintiff no.1; his other son Mr. Pradeep Kumar Sharma/ plaintiff no.3; and his daughter Mrs. Satya Bala Sharma/plaintiff no.2.

7.2 It is also averred in the plaint that the said Ghaziabad property was purchased by late Sh. Bal Kishan Sharma in 1964-65 out of the funds of the HUF. There is also assertion to the effect that late Mr. Pramod Kumar Sharma (who is today represented by legal representatives), was a minor at that point in time and was studying in grade 11. Dependency on parent is, thus, clearly averred.

7.3 This aspect of the matter has also come through in the statement of plaintiff no. 1/ Mrs. Urmila Devi Sharma (since deceased) dated 03.05.2010, recorded by the court, under Order X Rule 1 of the CPC. The relevant extract of the deposition is quoted hereinbelow:

".... Q. Was the Ghaziabad property initially purchased by your husband or was it purchased in the first defendant's name

A. It was not purchased in the name of my husband but was acquired and purchased in the first defendant's name.

At the time of purchase of the said Ghaziabad property, my elder son, the first defendant was studying in 11th standard. For this too, the authority objected and questioned whether he was a minor. We showed them his horoscope to say that he had completed eighteen years at the time of acquisition of the said plot... "

8. It appears that some time in 1984-85, late Sh. Pramod Kumar Sharma sold the Ghaziabad property and in its place acquired a farm land at Bijwasan. As per the statement of plaintiff no.1/Mrs Urmila Devi Sharma (since deceased), recorded in court on 03.05.2010, it appears that the family asserted that the Ghaziabad property belonged to the HUF. The deposition of Mrs. Urmila Devi Sharma to that effect is extracted hereinbelow:

".... Sometimes in 1984-85 Sh. Pramod Kumar sold the Ghaziabad plot and acquired a property at Bijwasan. He informed about this development to me. I reminded him that since the Ghaziabad property belonged to the family, all of us had rights in the later property acquired with its sales proceeds, i.e., at Bijwasan. Initially, he agreed that all of us had such similar rights... "

9. More pertinently, in the original as well as in the amended written statement, late Sh. Pramod Kumar Sharma asserted that he was a partner in a firm by the name of Pincord Industries, Faridabad, since 1967, and that, both Ghaziabad property and the Bijwasan farm land was purchased by him with his own funds and earnings. In the written statement, it is asserted that the plaintiffs had made "wild allegations " in respect of the said properties. The exact assertion of Mr. Pramod Kumar Sharma in his unamended written statement dated 12.05.2008, in this regard, being crucial to the decision in the captioned application is extracted hereinbelow:

"....9. That without prejudice to the preliminary objections taken above, it is submitted that the plaintiffs have maliciously and unreasonably included the personal properties of the answering defendant No.1 in Ghaziabad and in Bijwasan, Delhi in the list of disputed family properties, whereas the fact remains that the plaintiffs are themselves aware that the answering defendant No.1 was an earning hand since 1967 being a partner of M/s Pincord Industries, Faridabad. The properties in Ghaziabad and Bijwasan were purchased by the answering defendant no.1 with his own funds and earnings and in his own name. The plaintiffs have

sought to put those properties under clouds by making wild allegations about the Benami nature of transaction without adverting to a single document or proof in this regard. On this count also, the suit filed by the plaintiffs deserves to be dismissed with exemplary costs.....

## REPLY ON MERITS

1. xxxx

2..... However, it is absolutely wrong and denied that late Shy. Bal Kishan Sharma ever acquired any property at Raj Nagar, Ghaziabad, U.P., much less in or around 1965-66, as alleged in para 2 of the plaint. It is humbly submitted that the answering defendant no.1 himself had bought in 1979, the plot no. R-13/7, Raj Nagar, Ghaziabad, U.P. from the Ghaziabad Development Authority, with his own earnings and reserves. A perpetual lease deed in respect of the said plot had been executed by the Ghaziabad Development Authority in favour of the answering defendant no.1 on 6-9-1979 and is registered as Document NO. 11581, Book No.1, Volume No. 2419 at pages 198 to 205. The answering defendant no.1 was born on 03.04.1948 and was gainfully employed since the year 1967 being a partner of M/s Pincord Industries, Faridabad, which had its working office in Delhi " 110006. The earnings of the answering defendant no.1 from the year 1967 to 1979 were sufficient, copious and adequate to meet the demands of the Ghaziabad Development Authority in respect of the purchase of the said plot. In fact, the answering defendant no.1 had been making all the payments to the Ghaziabad Development Authority from his own earnings, and such payments were duly reflected by the answering defendant no.1 in the income tax returns filed by him from time to time. Further, the answering defendant no.1 also took a certificate from the income tax Authority under S. 230A(1) and Form-34, while disposing off the said plot in the year 1987. The said plot has already been sold by the answering defendant no.1 in 1987 after obtaining permission from Ghaziabad Development Authority vide letter No. 1354/ Plot/ 86 dated 7-2-1987. Therefore, the answering defendant no.1 is not having any title deed or documents pertaining to the said plot under his possession. The title deeds and other documents pertaining to the said property at Raj Nagar, Ghaziabad were given by the answering defendant no.1 to the purchaser. If need be, records of Ghaziabad Development Authority may be got produced from the custody of Ghaziabad Development Authority, in this respect. The allegations in para 2 of the plaint that "the said property was acquired by Sh. Bal Kishan Sharma in the name of defendant no.1, he being the elder son of the said Sh. Bal Kishan Sharma " are absolutely wrong and denied... " (emphasis is mine)

9.1 Notably, the position as to the nature of the transaction has been adverted by Mr. Pramod Kumar Sharma in the amended written statement dated 05.10.2011, as well. The relevant part is extracted hereinbelow, in paragraph 9:

"..... 9. That without prejudice to the preliminary objections taken above, it is submitted that the plaintiffs have maliciously and unreasonably included the personal properties of the answering defendant No.1 in Ghaziabad and in Bijwasan, Delhi in the list of disputed family properties, whereas the fact remains that the plaintiffs are themselves aware that the answering defendant no. 1 was an earning hand since 1967 being a partner of M/s. Pincord Industries, Faridabad. The properties in Ghaziabad and Bijwasan were purchased by the answering defendant No.1 with his own funds and earnings and in his own name. The plaintiffs have ought to put those properties under clouds by making wild allegations about the Benami nature of transaction without adverting to a single document or proof in this regard. On this court also, the suit filed by the plaintiffs deserves to be dismissed with exemplary costs.

9A. That without prejudice to the preliminary objections taken above, the plaintiffs are precluded from raising any plea or issue based on "Benami" nature or purchase of Ghaziabad property as alleged in paras 2 and 9 of the plaint, to the effect, "so far as the plot at Ghaziabad is concerned, the same as already said, was acquired by late Bal Kishan Sharma during his life time out of his own funds in the name of defendant no. 1, he being the elder son "..... "

(emphasis is mine)

9.2 To be noted, while the stand of the applicant/ defendant no.1 in the unamended and amended written statement is substantially the same, what is sought to be excluded is a reference to the fact that the transaction with respect to Ghaziabad property finds a reference in Income Tax returns and order obtained thereto at time of its sale.

10. It may be important to note, at this stage, a fact, which is not denied, that a written statement was filed by Mr. Pramod Kumar Sharma, which is dated 09.03.2011 to the amended plaint, which this court directed to be removed from record as it did not confine itself to the changes incorporated in the amended plaint. This order was passed by this court on 18.08.2011. It is also important to note that this court had, prior to the written statement filed on 05.10.2011, vide order dated 21.07.2011 directed the defendant, late Sh. Pramod Kumar Sharma, to file proof of payments qua Ghaziabad property as well as the Bijwasan farm land. A specific direction was issued that he should file all documents to support the said plea, including balance sheets, income tax returns, relating to the period when, the Ghaziabad property was sold and the Bijwasan farm land was purchased. This direction was reiterated by the court vide order dated 18.08.2011. As a matter of fact, on 16.12.2011, time was taken to comply with the previous orders of the court.

11. Given the state of pleadings and the aforesaid circumstances, which includes the submissions of plaintiff no.1/ Mrs. Urmila Devi Sharma (since deceased) and Mr. Pramod Kumar Sharma/ defendant, one would have to bear in mind the following

crucial aspects which have emerged while considering the prayer made in the application for re-framing issue nos. 4 and 10. There is no doubt, that there is a presumption in Hindu law that a family is joint, unless the contrary is proved. There is, however, no presumption that any property, whether movable or immovable, held by a member of the joint family is a joint family property. Ordinarily, the burden lies upon a person, who asserts that a particular property is a joint family property to establish the said fact. However, if there is proof that there was sufficient joint family nucleus, from and out of which the said property in issue could have been acquired, the burden shifts to the person who sets up the claim that the property in issue is his personal property. Such a person would have to establish that the said property was acquired by him without assistance from the joint family funds/property. (See [Mst. Rukhmabai Vs. Lala Laxminarayan and Others,](#) ).

12. It would be trite to say that a joint and undivided family is the normal condition of a Hindu family, an undivided Hindu family is ordinarily joint not only in estate but also in food and worship. The mere severance in food and worship does not operate as separation of a joint Hindu family. Similarly, existence of a joint estate is not an essential pre-requisite for constituting a joint family. Member of a joint family can blend his own property in the common stock of the joint family property which would then become a joint family property. The act of throwing, so to say, ones separate property into the family hotchpotch has to be voluntary, with a clear intention of abandonment of all claims upon it.

13. In the background of the aforesaid, one would have to see what has emerged from the pleadings and the statements recorded of plaintiff no.1/ Mrs. Urmila Devi Sharma (since deceased) and Mr. Pramod Kumar Sharma/ defendant. The plaintiffs have pleaded that a HUF was formed with late Mr Bal Kishan Sharma as its karta comprising of his wife, two sons Mr. Pramod Kumar Sharma (since deceased), Mr. Pradeep Kumar Sharma/ plaintiff no.3, and his daughter Mrs. Satya Bala Sharma/ plaintiff no.2. It is also averred by the plaintiffs that late Sh. Bal Kishan Sharma had "put his income in the hotchpotch of joint hindu family ". The income of late Sh. Bal Kishan Sharma was treated as income of the joint family. Late Sh. Pramod Kumar Sharma, in his amended written statement, disputes the existence of a joint Hindu family on a supposition that every joint Hindu family should, for the purposes of its existence, have within its fold an ancestral property. Based on this pre-supposition, late Mr. Pramod Kumar Sharma averred that his father late Sh. Bal Kishan Sharma could not have put his money into the HUF fold, so to say, and thus create a nucleus qua HUF from his personal earnings. This stand overlooks the fact that the concept of Hindu coparcenary is a specie of a joint family, and if, there is a joint or coparcenary property, a person by birth would take interest in such a joint or coparcenary property. Therefore, in that sense, if one looks at the stands in this context, there is really no dispute about the existence of a joint Hindu family. The dispute is really as to whether there was in existence a joint estate from which the property in issue, which is the Ghaziabad property, is said to have been bought by

late Sh. Bal Kishan Sharma.

14. In this context one may note that, the stand of the plaintiffs is that the Ghaziabad property was bought in 1964-65; the said property was bought out of the funds which late Sh. Bal Kishan Sharma had put in the HUF and that the said property was acquired in the name of Mr. Pramod Kumar Sharma (who was the eldest son of late Sh. Bal Kishan Sharma), as at the relevant point of time, the rules did not permit "acquisition of property from Ghaziabad Development Authority, if a person had already acquired a property from the Development Authority".

15. The statement of plaintiff no.1/ Mrs. Urmila Devi Sharma (since deceased) dated 03.05.2010, is suggestive of the fact that at the relevant point in time, i.e., in 1964-65, Mr. Pramod Kumar Sharma was studying in grade 11 and that when the Ghaziabad property was sold, i.e., in 1984-85, she asserted, that it "belonged to the family".

16. The statement of Mr. Pramod Kumar Sharma dated 30.04.2010 shows, that he deposed in court that the Ghaziabad property was booked in 1966-67, and that, payments were made till the year 1986. On a question being put to him as to whether he remembered what was the amount paid till the death of his father in 1972, he responded by saying that he did not have recollection of this fact. He, however, voluntarily stated that he had made bulk of the payments after his father's death and that, since the authority concerned had demanded penalty, which he was unable to pay, it propelled him to sell the Ghaziabad property. He also conceded that in 1966, he was a student and was perhaps in first or second year of college. He, however, stated that, he had started working since 1963-64. He further went on to say that he used to work with M/s. Pincode (sic) Industries Ltd., Ghaziabad.

17. In the background of this stand, one has to also keep in mind the order dated 21.07.2011 issued by this court, to which I have already made a reference, whereby late Sh. Pramod Kumar Gupta, was directed to file proof of payments made qua Ghaziabad property as well as Bijwasan farm land which was purportedly made upon sale of the former. The record shows that in the year 1967 when, late Pramod Kumar Sharma in his statement made to court stated that, the property was booked (though as per the original unamended written statement, the Ghaziabad property was allotted in his favour on 23.02.1966 and a perpetual lease deed was executed by the Ghaziabad Development Authority in his favour on 06.07.1999), he would be approximately 19 years of age. Though there is an assertion that he has been working with a concern by the name of M/s. Pincord Industries Ltd., Ghaziabad, since 1967, despite orders of this court as to how the payments were made for purchase of the Ghaziabad property, nothing has been placed on record. Mr. Batra, when asked, admitted as much, as no documents were referred to by him, in that behalf. Statements made to court under Rule 3 of Order X of the CPC form part of the record. While they are not in the nature of evidence, they are certainly binding on the party making the statement.



18. Having regard to the above, the moot question which arises is: should the issue nos. 4 and 10 continue to obtain on record in the form in which they appear in the order of this court dated 13.05.2013, or should they be reformulated with the onus being placed on the plaintiffs as contended by the applicant/ defendant. The fact that no attempt was made when order dated 13.05.2013 was passed, that an issue should be framed with regard to existence of HUF, would show that parties are not at variance on this aspect; an aspect which I have discussed also in the foregoing paragraphs as well. Therefore, given the fact that in the peculiar circumstances of this case, which have emerged from the pleadings and the statements of parties, that the defendant was young in age, and that, he has despite orders of this court, not being able to produce the material which the court has ordered him to produce, an issue in respect of which the burden would have ordinarily been on the plaintiffs, in my view, shall shift to the applicant/defendant. It goes without saying that plaintiffs will have to lead evidence and discharge onus qua the reformulated issues and other issues in respect of which such a direction is issued in the order dated 13.05.2013.

19. No doubt, the judgement cited by Mr. Batra, in the case of Vijesh Chadha and Anr. vs. Rajendra Chadha, enunciates the principle that there is a presumption in law that where a person has a document of title in his favour, that person is the owner of the property. This principle, as enunciated, will have to be appreciated in the context of facts arising in that case. In that case the court was hearing an appeal from a final judgment of the trial court, whereas in this case, the lis is still on, the parties have not adduced evidence. In the instant case, the court exercised its power of putting questions to plaintiff no.1 as well as her son, Sh. Pramod Kumar Sharma (since deceased). The court vide its order dated 21.07.2011 also called upon Pramod Kumar Sharma (since deceased) to place on record documents showing payments, including balance sheets, income tax returns, relating to the period when, the Ghaziabad property was sold and the Bijwasan farm land was purchased. Undisputedly, information as sought has not been supplied.

19.1 The power of the court to elicit information and / or production of documents, apart from various provisions of the CPC, can also be traced to Section 165 of the Indian Evidence Act, 1872. The said section authorizes the court, in order to discover, or obtain proper proof of relevant facts, to ask any question, in any form, at any time, of any witness or any party, about any fact, relevant or irrelevant. It also authorizes the court to seek production of any document or thing. This power, of course, has to be exercised with the caveat set out in the two provisos to the said section. This power is invested in the court to enable it to cut through, when required, the labyrinth of procedural law to arrive at the true facts obtaining in a matter. Having regard to these aspects the said judgement is contextually distinguishable.

20. Accordingly, in place of existing issue nos. 4 and 10, following issues are framed:

(i). Whether the Ghaziabad property was purchased by late Sh. Bal Kishan Sharma from funds available with the HUF? OPP

(ii). If the issue no.(i) is answered in the negative, whether the Ghaziabad property was a separate property of late Sh. Bal Kishan Sharma? If so, what would be its effect? OPP

(iii). Whether the defendant paid any part of the consideration and/or charges qua the Ghaziabad property? If so, to what extent and to what effect? OPD

21. As noted above, in respect of issue no.8, the onus will rest on the plaintiffs. Issue no. 8, therefore, will read as follows:

8. Whether the plaintiffs are entitled for decree of permanent injunction as prayed for in prayer clause "E" of the plaint? OPP

22. The captioned application is disposed of in the aforesaid terms.

CS(OS) 221/2008

23. Learned counsels for the parties inform me that the matter is fixed before the Court Commissioner. Accordingly, list before the Court Commissioner, on the given date.