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

% ***Pronounced on: 03rd March, 2023***

\+ **CS(OS) 1353/2009**

[redacted] ..... Plaintiff

Through: Ms. Mala Goel and Mr. Parvinder, Advocates.

versus

1. [redacted]

(i)

(ii)

2.

3.

..... Defendants

Through: Defendant no.1 in person.
Mr. Ashim Vaccher and Mr. Kunal Lakra, Advocates for D-2 and D-3.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J

I.A. 12452/2020 & I.A. 12460/2020

1. The two applications under Order VII Rule 11 CPC read with Order XII Rule 6 and Order VI Rule 4 of the Code of Civil Procedure, 1908 *(hereinafter referred to as* "CPC"*)* have been filed on behalf of the defendant No.1/[redacted](father of the plaintiff) and by defendant No.2/[redacted](brother of defendant No. 1 and defendant No. 3), and [redacted] mother of defendant Nos. 1 and 2 (paternal grandmother of the plaintiff) respectively for rejection of the Partition Suit filed by the plaintiff, claiming a share in the property of her father/defendant no.1 by claiming it to be HUF property in which she has a share being a coparcener.

2. The plaintiff through her mother/[redacted](estranged wife of defendant No.1), has filed the present Suit for Partition against the defendants on the assertion that all the parties to the suit constituted a joint family/Hindu Undivided Family (HUF) under Mitakshara law by virtue of them living and working jointly, and the suit properties so acquired constitute joint family properties owned by HUF of late [redacted]

comprising of defendant Nos. 1, 2 and 3. The grandfather ([redacted]) died on 29.06.2007 intestate and the plaintiff automatically became a coparcener at birth and has a share in properties enumerated in Annexure-A of the Plaint.

3. The defendants in their **respective applications (and also the Written Statement)** have claimed that the suit properties are not joint family properties nor do they belong to HUF nor that the plaintiff's grandfather died intestate. It is asserted that he had left a registered Will dated 04.11.2004 which is on the court record. It is submitted that without prejudice to contentions made by the defendants in their respective written statements, even if it is assumed that the suit properties belonged to the alleged HUF, then too, the Suit is liable to be rejected for the following reasons.

4. The grandfather had died on 29.06.2007, while the plaintiff was born on 16.05.2008. She was therefore not conceived at the time of his demise. The legislation had carved out an exception *vide* Section 6 of the Hindu Succession Act, 1956 providing that on the demise of the coparcener, his interest in coparcenary property would not be governed by this Act, but would devolve by survivorship. However, presence of Class I female heirs took away the exception and brought the *proviso* to Section 6 into effect. According to this *proviso*, the devolution of deceased coparcener's share in the property was brought under the exclusive purview of the Act and intestate or testamentary succession governed by Section 8 and 30 of the Act respectively, became the only available mode of devolution.

5. The Hindu Succession Act, 1956 underwent a sea of change after passing of Hindu Succession Amendment Act, 2005. On 09.09.2005, Section 6 of Hindu Succession Act, 2005 was amended and *vide* Section 6 (1) and 6 (2) daughters were made coparceners in Joint Hindu Family with all their rights and liabilities being equal to that of the son. Section 6 (3) of the HSA, 2005 completely changed the laws of inheritance. When a Hindu coparcener dies, after commencement of the Act, the application of this Act was made mandatory and the survivorship as a mode of succession or devolution of property of a Mitakshara coparcener, has been abrogated with effect from 09.09.2005. Section 6(3) of the amended Hindu Succession Act, 2005 provides for "*deemed division*" of the coparcenary property on the demise of a coparcener; abrogation of inheritance by survivorship and omission of any share to children of living son/daughter in deemed division of property. Therefore, intestate or testamentary succession *vide* Section 8 or 30 of HSA Act, 1956 (as amended in 2005) became the only mode of devolution. On the death of a coparcener, the Act explicitly states that the coparcenary property shall b*e deemed* to have been divided as if the partition had taken place. It is not a *notional partition* for calculation of the share of the deceased, but is a *deemed partition* of the property.

6. The sons and daughters are given an equal share with the share of the deceased son and daughter devolving upon their children. However, children of living son and daughter have not been allotted any share. For this reliance has been placed on *CWT Vs. Chander Sen* AIR 1986 SC 1753, *Uttam Vs. Saubhag Singh* (2016) 4 SCC 68, *M. Arumugam Vs. Ammaniammal and Ors.* MANU/SC/0015/2020 dated 08.01.2020.

Furthermore, Section 19 (a) of Hindu Succession Act, 1956 also provides that the persons (per stripes) shall receive their respective shares as an individual and not as a generational benefactor/ guardian.

7. In the present case, it an admitted fact that the suit properties were acquired during the lifetime of [redacted] (paternal grandfather of the plaintiff) and therefore the succession opened up for the first time on 29.06.2007, that is, on the day of his death. The plaintiff was not even conceived on that date as she was born on 16.05.2008. By virtue of Section 6 (3) of the HSA Act, 2005, the coparcenary property is deemed to have been divided as if the partition had taken place on 29.06.2007. The entire coparcenary property thus, devolved upon defendant no.1, 2 and 3 and assumed the character of self-acquired properties in which their sons and daughters do not acquire a share during their lifetime, by virtue of Section 6 (3) read with Section 8 of HSA Act, 2005. Thus, the plaintiff has no right to claim any share in the property.

8. Furthermore, the plaint is deficient of details of cause of action as per Order VI Rule 4 of the CPC. After Hindu Succession Act, 1956, the only way a property can take the character of HUF is if it is put into the common hotchpotch and the plaintiff is required to plead as to when (date/month/year) and how the HUF was created and when and how each property was put into the common hotchpotch. There are no averments whatsoever to this effect. The plaint is liable to be rejected as it lacks material particulars and discloses no cause of action.

9. **The plaintiff in her reply to the two applications under Order XII Rule 6 read with Order VII Rule 11 of the CPC** has taken a preliminary objection that a similar application bearing I.A. 5634/2011

dated 18.03.2011 had been filed by defendant no. 3 (paternal grandmother) but was dismissed on 28.05.2012. The same operates as *res-judicata* and the application is liable to be dismissed. It is further claimed that the plaintiff is a minor and the defendants who are her father, paternal uncle and grandmother, are hand in glove to delay the suit by not adducing the evidence in order to prevent the plaintiff from getting her share. The present application is mala-fide and is intended to delay the suit which is at the stage of defendant's evidence.

10. **On merits,** it is contended that defendant no. 3 has already admitted in paragraph 14 of her Written Statement that HUF was formed by [redacted], which was in existence at the time of his demise. Three properties have already been sold by her even though she had no right to sell the HUF properties. It is claimed that defendants have concealed the HUF status of the properties mentioned in the plaint and frivolous averments have been raised by way of this present application. The plaintiff is a coparcener of [redacted], HUF and she is therefore, entitled to claim partition in the suit properties which belong to HUF.

11. It is further claimed that the alleged registered Will dated 04.11.2004 of [redacted] is a fabricated document which was never executed by him. He died intestate and therefore, the plaintiff is entitled to claim partition of the undivided property. It is asserted that the application is without merit and is liable to be dismissed.

12. **Submissions heard**.

13. The plaintiff, the daughter of defendant no. 1, neice of defendant no.2 and granddaughter of defendant no. 3, has asserted that [redacted]

[redacted] had along with the defendant nos. 1 and 2 constituted an HUF under the Mitakshra Law. On the marriage of defendant nos. 1 and 2, their respective wives and subsequently their children on birth, also became members of HUF having all the rights that are available to a coparcener in HUF. The basis of her claim is that the deceased [redacted] along with his wife/defendant no. 3, [redacted], and his sons namely defendant nos. 1 and 2 had been working and residing together in a house in Som Vihar, R.K. Puram, New Delhi. After retirement from the Army, [redacted] started his business and with the joint efforts of Major [redacted] and defendant no. 1 and 2, family business known as *"Ace Detectives, India"* in 1984 and various other businesses thereafter, were set up and several joint family properties were acquired in Delhi, Gurgaon and Punjab. Some were purchased in the individual names of defendant no. 3, defendant no. 1 and some were purchased in the individual name of [redacted]. The case of the plaintiff is that the properties had been purchased in the individual names only for the income tax purpose, but that does not affect or alter the joint family status of the properties, which are stated to be as under:

> *"a. B2-2059, Vasant Kunj,at a rent of around Rs. 1,17,500/- per annum.*
>
> *b. 150, Vasant Apartments, at a rent of around Rs. 7,25,000/- per annum.*
>
> *c. 1502 Uniworld City Gurgaon, at a rent of around Rs. 60,000/- per annum.*
>
> *d. 271, Vasant Apartments, Vasant Vihar, at a rent of around Rs. 60, 000/- per annum.*
>
> *e. BC-38, Nirwana Country, Gurgaon,at a rent of around Rs. 75, 000/- per annum."*

14. The plaintiff has claimed a share in the aforementioned properties by claiming that the aforementioned properties belonged to the joint family and since she became a coparcener by birth, she is entitled to a share in the properties inherited by defendant no.1 from his father. *The plaintiff has thus, asserted her rights in the properties as coparcener of a Hindu Joint Family.*

15. The *first issue* that has been raised is whether the dismissal of an earlier application would bar the present application; the *second issue is* whether by virtue of Amendment Act, 2005, the plaintiff has acquired a share in the properties of her father, being a coparcener; the *third issue* whether the HUF continued after the demise of [redacted].

I. Whether the dismissal of earlier application under Order VII Rule 11 of the CPC read with Order XII Rule 6 CPC filed by Defendant No.3 operates as res-judicata:

16. The *first aspect* which may be considered is that a similar application bearing no. I.A. 5634/2011 had been filed under Order VII Rule 11 of the CPC on behalf of the defendant no. 3, paternal grandmother, wherein it was asserted that the properties that were owned by her, were in her own name and could not be termed as HUF properties belonging to the coparcenary. All the properties owned and possessed by her were protected by Hindu Women's Right to Property Act, 1937, Benami Transactions (Prohibition) Act, 1988 and Hindu Succession Act, 1956 and the suit was liable to be rejected under Order VII Rule 11 of the CPC.

17. This Court while dismissing the application *vide* Order dated 28.05.2012 had considered the plea of the property being HUF and observed as under:

> *"20. Adverting to the contention of the plaintiff that if once the family is proved to be a Joint Hindu Family, it is a matter of absolute indifference whether the name of one or the other member of the family appears in a particular document by which some property is purchased by the joint family, it is the case of the plaintiff that late Major* [redacted] *his wife (the defendant No.3) and his two sons (the defendant Nos.1 and 2) constituted a Joint Hindu Family and, as a matter of fact, in the written statement filed by the defendant No.3 the existence of* [redacted] *HUF is admitted. This leaves the Court with the vexed question as to whether the properties held in the individual names of the defendant No.1, the defendant No.2 and the defendant No.3 form part and parcel of the said HUF, for, it is the contention of the plaintiff that the aforesaid properties though standing in the individual names of the members of the Hindu Undivided Family were jointly owned by the family, as the said properties were purchased from the funds yielded from the joint family business. This being the contention of the plaintiff and the plaintiff having enclosed a list of Joint Hindu Family properties, nucleus whereof was the generation of funds from the Joint Hindu Family business, the Court is of the opinion that without the parties marshalling their respective evidence on this aspect of the matter it would be impossible to determine which of the aforesaid properties are Joint Hindu Family properties and which are not.*
>
> *21.* ***Much emphasis has been laid on behalf of the defendant No.3 on the fact that under Hindu Mitakshara Law, a Hindu female may be a member of a joint family but is not a coparcener and cannot blend***

her separate property with the joint family property. *Indubitably, the Hindu coparcenary is a much narrower body than the joint family and it includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the three generations next to the holder in unbroken male descent (see Mulla's Hindu Law, 14th Edition, page 262, paragraph 213). A Hindu female is, therefore, not a coparcener, though by virtue of the Hindu Succession (Amendment) Act, 2005, with effect from 09.09.2005, in a Joint Hindu Family governed by the Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. The aforesaid aspects of Hindu Law, however, have no bearing on the present case where undeniably a Hindu Undivided Family was in existence, which acquired huge properties from funds generated from the Hindu Undivided Family business.* ***It is not even the case of the defendant No.3 that she was an earning member of the family or that she had inherited property from her father's side of the family or owned self-acquired properties. Had that been the case, subject to her furnishing proof in this regard, the aforesaid properties could be said to be her absolute properties by virtue of the provision of Section 14 of the Hindu Succession Act, incapable of blending into the properties of the Hindu Undivided Family.***

22. Whatever be the position, the Court at this stage needs only to look at the assertions made in the plaint and the assertions made in the plaint are that the said properties are HUF properties and the plaintiff is entitled to a share in the same. ***As held by the Supreme Court in Kamala's case (supra), whether any property is available for partition is itself a question of fact and must be determined on the anvil of the evidence adduced by the parties. At the stage of consideration of an application under Order VII Rule 11(d), issues on***

the merit of the matter would not be within the realm of the Court."

18. The careful reading of the Order reflects that the only **plea taken in the earlier application** by defendant no. 3, grandmother was that she was the absolute owner of the properties in her name by virtue of Section 14 of the HSA, 1956 and Benami Transaction Act. The application was rejected on the ground that whether the properties in her name belonged to HUF, could be determined only by recording of evidence. There were no findings in respect of there being an HUF continuing amongst the defendants or in respect of the entitlement to a share in the alleged HUF property consequent to the amendment brought in Section 6 of the Hindu Succession Act in 2005.

19. The application essentially considered the rights of the Defendant No. 3, the grandmother in the properties held in her individual name and *essentially did not consider the rights of a person born subsequent to the demise of the head of the HUF, which is the ground asserted in the present application.* Moreover, the ground for seeking rejection of Suit is that the alleged coparcenary/HUF stood dissolved on the demise of Late [redacted] Therefore, the earlier application would not bar the present application on the principle of *res judicata*.

II. Whether the plaintiff is entitled to a share in the alleged coparcenary property by virtue of her birth in view of the amended Section 6 of the Hindu Succession (Amendment) Act, 2005:

20. The case of the plaintiff as stated in the plaint is that the plaintiff and defendants are Hindus and members of Hindu Joint Family governed

by Mitakshara law. The defendant No. 1 is the father, defendant No. 2 is the paternal uncle (chacha) and defendant No. 3 is the paternal grandmother (wife of [redacted] the grandfather of the plaintiff). Late [redacted] (Grandfather), his wife [redacted] defendant No. 3, and the two sons [redacted] and [redacted] defendant No. 2 and 1 respectively have been residing together in the joint family house at Som Vihar, R.K. Puram, and have been jointly working, residing, worshiping and eating together and thereby constituted a Hindu Undivided Family under the Mitakshara law. Upon the marriage of defendant No. 1 and 2, their respective wives also became members of Hindu Undivided Family. Their children on birth also became members of HUF and all the rights as coparceners in HUF became available to them all including the plaintiff. [redacted] did business together with his sons and from the joint business funds acquired various properties, which are claimed to have acquired the character of joint/ HUF property. The facts essentially as pleaded are that the properties have been acquired a joint family status in which all the family members acquired an interest. There is not a whisper in the entire pleadings about how and when the HUF was created and if the properties were ever put in a common hotchpotch. It is evident from the pleadings that the terms *"Joint Family"* and "*HUF*" has been used alternatively. Before proceeding further, it would thus, be pertinent to understand that the two concepts of Joint Hindu Family and HUF as defined under the law, are absolutely different.

21. In *Gowli Buddana vs. Commissioner of Income Tax, Mysore* AIR 1966 SC 1523, it was held that a Hindu Joint Family consists of all persons lineally descended from a common ancestor and includes their

wives and unmarried daughters. However, a Joint Family is a larger body consisting of a group of persons who are united by a tie of *sapindaship* arising by birth, marriage or adoption as was observed in *Surjit Lal Chhabra vs. Commissioner of Income Tax, Bombay* 1976 SCR (2) 164. The fundamental principle of Hindu Joint Family is the *sapindaship*. A Joint Family is not limited to three generations or only to male members but is a larger body which includes all the family members from a common ancestor.

22. It was further explained that a Hindu Coparcenery is however, a narrower body than the Joint Family. Only males acquired by birth and interest in joint or coparcenery property as members of the coparcenery. Coparceners acquire right in the coparcenery property by birth but their rights can be definitely ascertained only when a partition takes places. The extent of share of a coparcener cannot be definitely predicated since it is always capable of fluctuation; it increases by death of a coparcener and decreases by the birth of a coparcener. Traditionally, a coparcenary comprises only of male members while a Joint Family consisted of female members as well.

23. The essence of coparcenary under the Mitakshara law is unity of ownership in the coparcenary property by the whole body of coparceners. No individual member of the family whilst it remains undivided, can predicate his definite share in the HUF property. Furthermore, the right to the property was by survivorship and not by succession. After the Amendment Act of 2005, the females are also recognized as coparcener, but the essential incident of Joint Family and coparcenary continues to be the same.

24. This is explained in the case of *Commissioner of Income Tax, Kanpur & Ors. Vs. Chander Sen and Ors.* (1986) 3 SCC 567 by the Supreme Court that after the passing of Hindu Succession Act, 1956 the traditional view that inheritance of immovable property from paternal ancestors up to three degrees automatically constituted a HUF, no longer remains the legal position in view of Section 8 of the Hindu Succession Act, 1956.

25. This judgment was subsequently followed by the Supreme Court in the case of *Yudhister vs. Ashok Kumar* (1987) 1 SCC 204 wherein the Supreme Court reiterated this legal position that after the Hindu Succession Act, 1956 inheritance of ancestral property does not result in automatic creation of HUF property of up-to three generations.

26. In *Sunny (Minor) & Anr. Vs. Raj Singh & Ors.* (2015) 225 DLT 211 this Court considered the judgments of the Apex court in *Yudhister* (supra) and *Commissioner of Wealth Tax, Kanpur* (supra) and succinctly enumerated the principles relating to HUF property and its inheritance as under:

> *"(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"

27. Whereas prior to passing of the Hindu Succession Act, 1956 there was a presumption as to the existence of an HUF and its properties upto three generations, but after passing of the Hindu Succession Act, 1956 in view of the ratio 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 in as much as it is necessary for existence of an HUF and its properties. 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.

28. In *Surender Kumar v. Dhani Ram and Ors.* 2016 SCC OnLine Del 333 after referring to the entire aforementioned law, it was concluded that for an HUF and its properties to come into existence, it has to be first pleaded to exist as per the judgments of the *Chander Sen* (Supra) and *Yudhishter* (Supra) of Supreme Court of India in terms of Order VI Rule 4 of the CPC.

Pre 1956 scenario in regard to HUF:

29. In the pre 1956 era when the customary Hindu law was prevalent, the coparcenary with HUF properties which came into existence prior to passing of the Hindu Succession Act, 1956 and continued so even after the passing of Hindu Succession Act, 1956, the property inherited by the members of the HUF even after 1956 would be HUF property in their hands in which their paternal successors would have a right up to three degrees. In such a case, the status of Joint Hindu Family/ HUF properties continues.

30. In the present case, admittedly there existed no HUF prior to 1956 and therefore, there can be no automatic continuation after 1956.

Post 1956 scenario in regard to HUF:

31. The second scenario for creation of HUF post 1956, is when the self-acquired property in the hands of a person is thrown by him into a common hotchpotch making it into HUF properties. In order to claim the properties to be HUF according to the second principle, the facts as to how the properties are HUF properties, is required to be stated as a positive statement in the plaint. It has to be established to the satisfaction of the Court as to when these particular properties were thrown in common hotchpotch and hence, Hindu Undivided Family was created.

32. The plaintiff in the present case has used the term Hindu Joint Family and HUF interchangeably in the plaint. It is claimed that Major [redacted] along with his sons and their families, was residing in their house in Som Vihar and after his retirement in the year 1984 he started the business along with his sons. The plaintiff in the same breath asserts that the HUF started with the grandfather [redacted] and included his wife, two sons, their wives and children. It is quite apparent and evident that the plaintiff is claiming the existence of Joint Hindu Family with the members related through a common ancestor including the females, residing together as a family under the same roof. It is nowhere asserted that an HUF was constituted by [redacted]

33. In *Surender Kumar Khurana vs. Tilak Raj Khurana* (2016) 155 DRJ 71 (DB) it was explained that it would not be enough to say in the plaint simply that a Joint Family or HUF existed. Detailed facts as required by Order VI Rule 4 of the CPC as to when and how the HUF properties had become so must be clearly and categorically averred. Such averments have to be made by factual reference qua each property claimed to be an HUF property as to how the same came to be an HUF

property. In law, generally bringing in any and every property as HUF is incorrect as there is known tendency of litigants to include unnecessarily many properties claiming them to be an HUF.

34. The plaintiff in the present case, has failed to indicate which properties were put in the HUF. Rather her own case is that these properties were purchased in the individual names, though an explanation is sought to be given that this was done purely for the purpose of Income Tax.

35. In *Surender Kumar Khurana* (supra) it was further observed that what needs to be now considered after the passing of Benami Transaction (Prohibition) Act, 1988 now Prohibition of Benami Transactions (Prohibition) Amendment Act, 2016 which states that the property in the name of the individual has to be taken as owned by that individual and no claim is maintainable under Section 4(1) of the Benami Transaction Prohibition Act (Old) on the ground that the money has come from the person who claims the right in such property. An exception is created in Section 4 (3) (iv) which allows existence of concept of HUF as an exception to the main provision. However, in order to take out the exception from the main Sub-Sections 1 and 2 of Section 4, it has to be specifically pleaded as to how and in what manner an HUF was created and how specific property claimed to be HUF property, came into existence as an HUF property. If such specific facts are not pleaded then accepting the bald assertion of the property being HUF would be negating the mandate of the language contained in Benami Transaction Prohibition Act.

36. Unfortunately, all the details necessary to set up a claim of HUF is conspicuously missing from the plaint. The averments only are that Major K.C. Kapur after his retirement in the year 1984, with the joint efforts of defendant No.1 and 2 (the two sons) started a family business ACE Detective India which became successful and thereafter various family businesses were started and properties acquired in Delhi, Gurgaon and Punjab. Some properties were purchased and acquired in the name of defendant No. 3, mother of defendant No. 1 and 2. The joint family house in Som Vihar is also in the name of defendant No. 3. Some properties were purchased in the name of [redacted] and some properties in the name of defendant No. 1. It is asserted that since the properties were purchased from the funds of joint business, the properties came to be jointly owned by the family. These averments merely claim that there were joint business started by the grandfather with his two sons and from these businesses, various properties were purchased in the individual names of the family members. What is being talked about by the plaintiff is Joint Family properties and assets as they were acquired from the joint business and not an HUF. The plaintiff has merely claimed that the plaintiff and the defendants have a common ancestry through her grandfather [redacted] and all the male and female members including the wife and children of defendant No. 1 and 2 are part of this Joint Family/HUF. Interestingly none of the females or the children have been arrayed as a party to the suit It is evident that the plaintiff has claimed herself to be a part of Joint Hindu Family. As already mentioned above, there should have been specific averments in regard to the date and year when the HUF came into existence. The bald assertion has been

made by the plaintiff that the properties inherited by defendant No. 1 being ancestral, there existed an HUF of [redacted] Even if all the averments are accepted in *toto*, then too it merely establishes a joint family.

37. Axiomatically, the entire plaint neither makes any averment in regard to creation of HUF or the properties and assets having been put in the common hotchpotch to HUF. Their best case is of a Joint Family, a concept that is different from HUF. As already discussed above, even if there existed a Joint Family, the plaintiff does not acquire a right in the family properties. Such a vague claim which lacks even the basic facts, would not be sufficient to maintain a suit as held in the case of *Sunny (Minor)* (supra).

38. Moreover, if there was any intention of creating a joint interest then nothing prevented any of the family members from purchasing the various properties either in joint name or in the name of HUF or declaring them so in the Income Tax. The very fact that all the properties were purchased in the individual names further defeats the claim of there ever being a joint family. The explanation given that the properties were purchased in individual names solely for the purpose of Income Tax is on the face of it absurd for the simple reason that it is a known fact that income tax benefits are more on HUF property rather than individual property. Moreover, the plaintiff herself has stated that the Defendant no.3 has individually sold three properties to which no objection has been taken. This further defeats her claim of there being any HUF property.

39. The facts as in hand are *pari materia* with *Surender Kumar Khurana* (supra) wherein the properties and the businesses were claimed

to be owned by the Joint Family. It was held that the property purchased from the joint funds or being a joint property is not in law equal to HUF funds/ HUF properties or business. **Working together is not equivalent to existence of an HUF.**

40. To conclude, there is no reference whatsoever to the existence, creation or continuity of an HUF either prior to 1956 or post 1956 in the entire plaint. There is no averment whatsoever that the subject property was put in common hotchpotch at any point of time since 1984, the date on which it is claimed that [redacted] after his retirement started the joint businesses. It may thus, be concluded that there never existed any HUF or HUF properties in which the plaintiff can assert her share.

III. Whether the plaint discloses any right of the plaintiff to a share in the alleged HUF properties:

41. Even though the entire plaint is bereft of any facts about existence of HUF of [redacted], but much has been emphasized on the admission of the Defendant no.3 in her written statement that there existed a [redacted] HUF during his lifetime. Assuming this to be correct, the claim of the plaintiff to a share in the property by way of partition still may be considered on the presumption that there was an HUF of Major [redacted].

42. The basic premise on which the plaintiff has claimed a right in the properties of her father/defendant no.1 is in the light of amendments to Section 6 w.e.f. 09.09.2005, by virtue of which the daughter by birth has become a coparcener in her own right in the same manner as a son and has a right in the coparcenary property.

43. To understand the claim of the plaintiff, it would be relevant to reproduce the prayers made by the plaintiff made in the plaint which read as under:

> *"(i) A Preliminary Decree for Partition be passed in favour of the Plaintiff and against the Defendant Nos. 1 to 3 for her 1/3share in the 1/4 of share of Defendant no.l in the HUF immovable properties as given in ANNEXURE 'A' and also 1/3 share in the 1/3 share of Defendant No.l in the 1/4 late Shri, [redacted] in the HUF assets given in ANNEXURE , 'A'.*
>
> *....*
>
> *(vi) Preliminary Decree and Final Decree be also passed in favour of Plaintiff and against Defendants for her share in the immovable and moveable assets found to belong to HUF during pendency of the suit.*
>
> *(vii) Costs be awarded.*

44. The basis of plaintiff's claim to a share flows from the amended S.6 HSA w.e.f. 09.09.2005 relevant part of which reads as under:

> *"**Section-6** - Devolution of interest in coparcenary property-*
>
> *(1) On and from the commencement of the Hindu Succession (amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshra law, the daughter of a coparcener shall,-*
>
> > *(a) by birth become a coparcener in her own right in the same manner as the son;*
> > *(b) have the same rights in the coparcenary property as she would have had if she had been a son;*
> > *(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,*
> > *And any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:*
> >
> > *Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of*

property which had taken place before the 20th day of December,2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (l) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) ***Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshra law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place, and,-***

(a) The daughter is allotted the same share as is allotted to a son,

(b) The share of the pre-deceased son or a pre-deceased daughter ,as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of sub pre-deceased daughter; and

(c) The share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition , shall be allotted to the child of such pre-deceased child of the predeceased son or a pre-deceased daughter, as the case may be.

Explanation: - For the purpose of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

…

(5) Nothing contained in this section shall apply to a partition,

which has been effected before the 20th day of December, 2004.

Explanation: - For the purposes of this section "partition" means any Partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of court."

45. The bare perusal of this Section shows that after the Amendment Act, 2005 amending Section 6 and Section 8 in 2005, the concept of HUF property has undergone a complete change. The most significant change that has been brought is that the share of the coparcener on his demise is determined by a *"deemed partition"* or *"notional"* partition now implying that a partition takes place by fiction of law and the shares get determined in terms of Section 8 of the Act which recognizes the mode of devolution as intestate or testamentary succession. Thus, when the coparcener dies, the partition takes place amongst the members of HUF thereby the HUF ceases unless it is constituted afresh or is concertedly continued.

46. In due recognition of the change in law, the plaintiff herself states that on the demise of [redacted] by virtue of deemed partition, the properties got divided and each got 1/4th share and the 1/4th share of Major [redacted] devolved further upon defendant nos. 1 to 3 in equal 1/3rd share. Therefore, on the demise of [redacted] in 2007, the deemed partition took place and the shares of the three defendants were determined; it became the separate/ individual property of each of the three defendants.

47. In consonance with the deemed partition, the plaintiff states that she as daughter and her mother, being the wife of the defendant no.1, are entitled to claim 1/3rd share in the 1/4th share in the properties which have

come to the share of defendant no.1. However, the mother who allegedly also is entitled to a share as per averments in the plaint sues on behalf of the daughter but she herself is not a party to the suit.

48. In *Controller of Estate Duty, Madras vs. Alladi Kuppuswamy*, (1977) 3 SCC 385 it was further explained that until partition each member has got ownership extending over the entire property, conjointly with the rest and so long as no partition takes place, it is difficult for any coparcener to predicate the share which he might receive. The result of such co-ownership is that the possession and enjoyment of the property is common.

49. In a suit for partition all the co-owners are the proper and necessary party without whom the suit is liable to be rejected on this ground itself.

50. There is neither any assertion nor any claim that there is any HUF between the plaintiff and defendant no.1. There is also no assertion of the continuation of HUF after the demise of [redacted] Thus, as per the averments of the plaint itself, the HUF ceased to exist after the demise of [redacted] and the suit properties have devolved in equal share upon the three defendants by virtue of a notional partition. When admittedly, there is no existence of HUF after the demise of [redacted] the claim of the plaintiff to a share in the properties of Defendant No. 1 is mis-founded. She could have become a coparcener only if the alleged HUF of [redacted] had continued after his demise. Even if the entire contents of the plaint are accepted, though the defendants have disputed seriously that there ever existed an HUF of [redacted] or that his properties and businesses were ever put in the common hotchpotch, but as per the plaint itself, it came to an end on the demise of

[redacted] and for this reason the plaintiff has not claimed a share in the HUF property but a share in the property inherited by her father which even though may have come from the father or joint family funds but by virtue of amended Sections 6 and 8 Hindu Succession Act, 1956 (as amended in 2005) has become his individual property.

51. However, the amendment was carried out in the Section by Amendment Act, 2005 which provided that daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and would have same rights in the coparcenary property as she would have had she been a son. By virtue of Amendment Act, 2005 the daughter has been recognised as coparcener having the same right as the son.

52. In *Prakash vs. Phulavati* (2016) 2 SCC 36 it was held that the amendment was prospective but the right under the substituted Section 6 accrues to living daughters of living coparceners as on 09.09.2005 irrespective of when such daughters were born. It was thus held that coparceners from whom daughter is inheriting the right must be alive on the date of amendment i.e., 09.09.2005. This decision has been reconsidered in the case of *Vineeta Sharma v Rakesh Sharma* AIR 2020 SC 3717 wherein it has been clarified it is not necessary that to form a coparcenary or to become a coparcener the predecessor coparcener should be alive. *What is relevant is birth within degrees of coparcenary to which it extends.* Survivorship is the mode of succession and not that of the formation of a coparcenary. Therefore, the coparcener from whom the daughter would succeed and inherit the coparcenary rights need not be alive as on 09.09.2005. Even if the coparcener has died before the Amendment Act, 2005 (which came effective from 09.09.2005), it would

be irrelevant as the daughter is living on 09.09.2005. It has been explained that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. *It is the very factum of birth in a coparcenary that creates the coparcenary.* Therefore, the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The *first stage of a coparcenary is obviously its creation while the second stage is inheritance, which can be availed of by any coparcener and now even a daughter who is alive after the Amendment Act, 2005 provided the property has not been already partitioned.*

53. Having understood the incidents of coparcenary and that the girls after the amendment in 2005 are recognized as coparceners it needs to be now considered whether plaintiff is entitled to equal share as the defendant No.1. The ground for claiming the entitlement is her recognition as a coparcener. However, in *Prakashwati vs Bhagwati Devi* MANU/DE/4784/2012 Delhi High Court held that for a case for claiming a share in the property as a coparcener, it has to be established that there existed an HUF at the time of birth of the plaintiff. Indisputably, Major [redacted] had already expired on 29.06.2007 i.e. prior to the birth of the plaintiff on 16.05.2008 which implies that she had not even been conceived at the time of demise of [redacted] and the HUF stood dissolved/ partitioned before her birth. Therefore, no HUF existed at the time of her birth of which she can claim herself to be the coparcerner. As already observed, the plaintiff has not asserted any HUF of her father/ defendant no.1 of which she could claim to be the member.

54. It may thus, be concluded that there was no HUF existing at the time of birth of the plaintiff into which she could be born. Since the alleged HUF stood already dissolved, the plaintiff has no right to claim a share in the properties of her father.

55. There is no pleading to the effect that there was ever any coparcenary. It is simply claimed that Late [redacted] was survived by Plaintiff and the Defendants and other family members. The property would thus, devolve upon the plaintiff in accordance with rules of succession under Section 8 of HSA, 1956 which is either intestate or testamentary. The plaintiff has no right to claim a share in the properties of her father during his lifetime. Therefore, the plaint does not disclose any cause of action for partition.

56. Before concluding, this court is compelled to observe that this kind of proxy litigation by a wife in the name of the daughter cannot help parties to peaceful settlement of their disputes but only increases acrimony and bitterness, the worst victim of which are the children as in this case. It is only hoped that better sense would prevail upon both the parties to concentrate on real disputes and find mutually acceptable solutions rather than finding solution by waging battles in the court. May they cease these arm twisting tactics and move for harmonious solutions.

57. The two applications under Order VII Rule 11 of the CPC are allowed and the suit is hereby rejected as disclosing no cause of action.

CS(OS) 1353/2009 & I.As. 5659/2019, 7195/2020

58. In view of the judgement passed in I.As. 12452/2020 and 12460/2020, the present Suit along with pending applications are dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

MARCH 03, 2023
VA/PA