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

+ CS(OS) 2668/2014 and I.A. 16929/2014

HARVINDER PAL SINGH Plaintiff
Through: Mr. Rajan Chaudhary, Advocate

versus

LAJ PAL SINGH & ORS Defendants
Through: Mr. Manish Bhasin, Advocate

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI

ORDER
% 12.10.2015

1. The present suit has been instituted by the plaintiff praying *inter alia* for seeking partition of and for determining his share in premises No.142, Anand Vihar, near Saraswati Vihar, Pitampura, Delhi.
2. As per the averments made in the plaint, Shri Harjinder Singh, grandfather of the plaintiff and father of the defendant No.1, had purchased and developed the suit property from his own funds and raised three floors in his lifetime. Shri Harjinder Singh had died intestate in the year 2000 and at the time of his demise, he was survived by three sons including the defendant No.1 and two daughters. The two daughters had relinquished their shares in the properties owned by late Shri Harjinder Singh in favour of their

brothers (defendants No.1 to 3). The plaintiff has averred that he was born from out of the wedlock of the defendant No.1 and Smt. Surinder Kaur. The relationship between the defendant No.1 and his wife was strained and in the year 1987, when defendant No.1 had got a divorce from his wife, the plaintiff was five years old and he had remained in the custody of the defendant No.1. After his divorce, defendant No.1 had got re-married in the year 1988 and from the second marriage, begot a son and a daughter (defendants No.4 and 5). The plaintiff claims entitlement to 1/12th share in the suit premises, as the son of the defendant no. 1.

3. Defendants No.1 to 5 have averred in the written statement that the suit is liable to be rejected under Order VII Rule 11 CPC on the ground that it is devoid of any cause of action. Learned counsel for the defendants states that even as per the plaintiff, it is an undisputed position that the suit premises is a self-acquired property of late Shri Harjinder Singh and on his expiring intestate, the suit premises was inherited by six class I heirs, namely, his widow, three sons and two daughters. Pertinently, the plaintiff has nowhere in the plaint mentioned the fact that his paternal grandmother was alive at the time of the demise of her husband, Shri Harjinder Singh and she would also be entitled to a share in the suit premises.

4. Learned counsel for the defendants no. 1 to 5 states that the plea taken in the written statement is that after the demise of Shri Harjinder Singh, all his class I heirs were entitled to 1/7th share each in the suit premises, as envisaged under Section 8 of the Hindu Succession Act. However, the widow and two daughters of late Shri Harjinder Singh had relinquished their respective shares in favour of the defendants No.1 to 3 and on the basis of the said Relinquishment Deed, which was duly registered, the suit premises has devolved on the defendant no.1 to 3 exclusively and they are entitled to 1/3rd share each therein.

5. Learned counsel for the defendants states that Section 9 of the Hindu Succession Act, 1956 (hereinafter referred to as 'the Act'), prescribes the order of succession amongst the heirs specified in the Schedule and the defendants No.1 to 3 alongwith their siblings, being, the children of Shri Harjinder Singh and their mother are entitled to all his movable and immovable assets. He particularly refers to Section 10 of the Act, which deals with the manner of distribution of the property of an intestate amongst the heirs under class-I of the Schedule.

6. Learned counsel for the plaintiff does not dispute the fact that a specific averment has been made in para 1 of the plaint that the suit

premises was the self-acquired property of late Shri Harinder Singh and he had died intestate in the year 2000. He submits that the only plea taken by the plaintiff is that the defendant No.1 had divorced his first wife (the plaintiff's mother) and had abandoned the plaintiff who was brought up by his grandmother and the defendant No.2 (uncle).

7. The Court has considered the rival submissions made by the counsels for the parties and perused the pleadings in the suit.

8. To test the submission of the counsel for the plaintiff that his client had the unbridled right to sue his father and uncles for partition of the suit premises, on the ground that the same is an ancestral property and he being the son of the defendant no.1, has got a right in the suit property by birth, it is necessary to consider the relevant provisions of the Hindu Succession Act, which are as follows:-

8. General rules of succession in the case of males:-

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter-

- (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Order of Succession among heirs in the Schedule

– Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

10. Distribution of property among heirs in class I of the schedule – The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:-

Rule 1 – The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2 - The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3 – The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4 – The distribution of the share referred to in Rule 3-

- (i) Among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters gets equal portions; and the branch of his predeceased sons gets the same portion;
- (ii) Among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions."

9. For examining the plea taken by learned counsel for the defendants that the suit is liable to be rejected under Order VII Rule 11 CPC, as being devoid of cause of action, as per settled law, this

Court is required to examine the averments made by the plaintiff in the plaint and not look at the defence taken by the defendants in the written statement. In the present case, the only two paragraphs in the plaint that are of material consideration for deciding the objection taken by the defendant no. 1 to 5 as to the maintainability of the suit and the *locus standi* of the plaintiff to institute the same are reproduced herein below for ready reference:-

"1. That the plaintiff is the son of the defendant No.1. **It is stated that the grandfather of the plaintiff namely Harjinder Singh purchased and developed the property bearing No.142, Anand Vihar, Near Swarwati Vihar, Pitampura, Delhi (hereinafter referred to as the suit property) "from his own funds"**. It is stated that the said property comprises of three floors, i.e., Ground Floor, First Floor and Second Floor. (emphasis added)

2. That the grandfather of the plaintiff was retired Govt. Servant who acquired several properties during his life time apart from the aforesaid property in question. It is stated that Harjinder Singh (grandfather of the plaintiff) died in the year 2000. It is stated that at the time of his death, the grandfather of the plaintiff left behind several properties including properties at Village Lasahara near Chakdana, Dist. Jalandhar, Punjab including the suit property. It is stated that the Grandfather of the plaintiff died intestate living behind three sons namely Tej Pal Singh, Preetpal Singh and Lajpat, i.e., defendant No.1 apart from two daughters namely Paramjeet Kaur and Palwinder Kaur. It is stated that Paramjeet Kaur and Palwinder Kaur relinquished their shares in the properties in favour of the defendants No.1-3. It is stated that Smt. Paramjeet Kaur died leaving behind Parvinder Singh, son, Mandeep Kaur and Davinder Kaur (daughters). It is stated that the suit property is a joint family as the same has been jointly inherited by all the defendants." (emphasis added)

10. It is clear from a reading of the plaint that the plaintiff has not made any averment therein to the effect that the suit property was an ancestral property or a HUF property in the hands of late Shri Harjinder Singh or for that matter, in the hands of his class-I heirs. Rather, the plaintiff has described the property as a self-acquired property of his grandfather. As a result, the prescription in Section 8 of the Act, that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II, and the order of succession as laid down in Section 9, would come into play. Sub section(a) of Section 8 of the Act prescribes that the property of a male Hindu dying intestate shall devolve firstly, upon the heirs, being the relatives specified in class I of the Schedule. The list of heirs mentioned in class I of the Schedule includes sons, daughters etc. as also sons of pre-deceased son but it does not include the grandson, being a son of the living son. Section 9 lays down the order of succession amongst the heirs in the Schedule appended to the Act and Section 10 spells out the manner in which the property of an intestate shall be divided amongst the heirs in class I of the Schedule.

11. In this context, it is relevant to refer to an earlier decision of this Court in the case of Amit Johri vs. Deepak Johri and Ors. reported as **196 (2013) DLT 29**, where while examining an application filed by

the defendants therein under Order VII Rule 11 CPC for rejection of the suit for partition, declaration etc. instituted by the plaintiff against his father and other relatives on the ground that he did not have a legal right to institute the same during the lifetime of his father, it was held as below:-

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

13. The aforesaid conclusion was arrived at by the Supreme Court in the case of Commissioner of Wealth-tax, Kanpur (supra), wherein notice was taken of the divergent views that were expressed by the Allahabad High Court, Full Bench of Madras High Court, Madhya Pradesh High Court, Andhra Pradesh High Court and Gujarat High Court and it was held as below:-

"19. It is necessary to bear in mind the Preamble to the

Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.

20. In view of the Preamble to the Act, i.e., that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by S.8, he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under S.8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in S.8. Furthermore as noted by the Andhra Pradesh High Court, the Act makes it clear by S.4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. **It would be difficult to hold today the property which devolved on a Hindu under S.8 of the Hindu Succession Act would be HUF property in his hand vis-à-vis his own son;** that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under S.8 of the Act included widow, mother, daughter of predeceased son etc.

21. xxx xxx xxx

22. The express words of S.8 of The Hindu Succession Act, 1956 cannot be ignored and must prevail. The Preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law. **With that background the express language which excludes son's son but included son of a predeceased son cannot be ignored."** (emphasis added)

14. Subsequently, in the case of Yudhishter (supra), the Supreme Court had followed the judgment in the case of Commissioner of Wealth-tax, Kanpur (supra) and observed as below:-

10. This question has been considered by this Court in Commr. of Wealth Tax. Kanpur v. Chander Sen, (1986) 3 SCC 567: (AIR 1986 SC 1753), where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore, whenever the father gets a property from whatever source from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. **This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as a Karta of his own undivided family but takes it in his individual capacity.** At pages 577 to 578 (of SCC): (at p.1760 of AIR) of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. Pages 924-926 as well as 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 devolved on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his**

hand vis-à-vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property.

If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house.” (emphasis added)

The aforesaid decision in the case of Commissioner of Wealth-tax, Kanpur (supra) was followed by the Supreme Court in the case of Commissioner of Income Tax vs. P.L. Karuppan Chettiar (supra).

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

16. The aforesaid proposition of law came up for examination before this Court in the case Pratap (supra), wherein the appellant (plaintiff in the court below) had claimed that the suit property was an ancestral property and being the son of the respondent, he was a coparcener in the said property and thus entitled to his one-half share therein. Aggrieved by the findings of the court below that there did not exist any coparcenary or any HUF and the suit property was a self-acquired property of the respondent, the appellant had preferred an appeal, which was dismissed by holding that

Section 8 of the Act prescribes that the property that devolves on a Hindu would not be an HUF property in his hands vis-à-vis his own sons. After referring to the decisions of the Supreme Court as cited above and that of the learned Single Judge in the case of Rahul Behl (supra), it was held as below:-

“9. The aforesaid principle of law is squarely applicable to the facts of the case in hand. It is held that the trial Court did not err in arriving at a conclusion that upon the demise of his father, grand-father of the appellant, the suit property devolved on the respondent in his individual capacity and, thus, had to be treated as self-acquired property in his hands. The appellant failed to establish that there existed any coparcenary, in which the appellant and the respondent were coparceners or there existed any HUF of which, the respondent was a *Karta*. Therefore the claim of the appellant for partition of the suit property on the ground that the same was ancestral, was rightly turned down. The suit property has to be treated as self-acquired property in the hands of the respondent. The appellant cannot claim any share therein on the ground that the said property is ancestral in nature.”

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

12. It is pertinent to note that aggrieved by the aforestated decision, the plaintiff, Amit Johri had filed an appeal before the Division Bench which was dismissed by a detailed judgment dated 24.2.2014, reported at **MANU/DE/0503/2014** entitled 'Amit Johri vs. Deepak Johri & Ors.'.

13. In the instant case, the plaintiff has not made any averment in

the plaint to the effect that the suit property is a coparcenary property or that there existed a joint HUF where the deceased, Shri Harjinder Singh was a *Karta* or that after the demise of Sh. Harjinder Singh, the defendant No.1 became a *Karta* of the HUF and the plaintiff is a coparcener therein. In the absence of any specific averments made in the plaint, it cannot be stated that the provisions of Section 6 of the Act, that deals with devolution of interest in a coparcenary property, would be attracted. Instead, it is a case where the parties would be governed by Section 8 of the Act. Furthermore, Section 19 of the Act, that prescribes that if two or more heirs succeed together to the property of an intestate, they shall take the property *per capita* and not *per stirpes* would also come into play as Shri Harjinder Singh was survived by six class-I heirs.

14. As noted above, it is the plaintiff's own case that the suit property was purchased by Shri Harjinder Singh from his own funds and he had died intestate in the year 2000 and he was survived by his widow and five children (three sons and two daughters). The widow and two daughters had executed a duly registered Relinquishment Deed in favour of the defendants No.1 to 3 and based on the said Relinquishment Deed, they would be entitled to 1/3rd share each in the suit property, that had devolved on them *per capita* and not *per*

stirpes in terms of the prescription under Section 19 of the Act. As a result, the defendants No.1 to 3 are fully entitled to deal with their respective $\frac{1}{3}^{\text{rd}}$ undivided shares. It is impermissible for the plaintiff to claim a share, much less $\frac{1}{12}^{\text{th}}$ share in the suit property during the lifetime of his father in view of the bar placed in Section 8 of the Act. Therefore, it has to be held that having failed to lay the foundation of his case by claiming the existence of an HUF and a coparcenery therein, the plaintiff is not entitled to invoke the provisions of Section 6 of the Act that deals with devolution of interest in a coparcenary property.

15. In this view of the matter, the present suit instituted by the plaintiff is not maintainable for the reason that no cause of action has arisen in his favour entitling him to claim partition during the lifetime of his father and that too in respect of a self-acquired property of his grandfather. Accordingly, the suit is dismissed on the ground that the plaint does not disclose any cause of action in favour of the plaintiff for claiming partition of the suit premises.

16. At this stage, learned counsel for the plaintiff states that the plaintiff may be granted liberty to institute fresh proceedings for the relief of permanent injunction against the defendants as per prayer clause (ii) of the plaint.

17. While rejecting the plaint as not maintainable for the relief of partition prayed for in prayer clause (i), liberty is granted to the plaintiff to institute a fresh suit for the relief of permanent injunction in respect of the suit premises. If the plaintiff does institute such a suit, the defendants shall be at liberty to take all the pleas that may be available to them both, in law and facts, including a plea that the plaintiff is not in physical possession of any part of the suit property, which shall be considered and decided in the said proceedings, in accordance with law.

HIMA KOHLI, J

OCTOBER 12, 2015

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