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

+ **FAO(OS) 217/2013 & CMs 20033/2015, 38722/2016**

Date of decision: 6th July, 2017

SHRI NARENDER NATH Appellant

Through: Ms.Malavika Rajkotia,
Mr.Ranjay N., Ms.Arпита Rai,
Mr.Vaibhav Vats, Advs.

versus

SMT KRISHNA GUPTA & ORS. Respondents

Through: Mr.Sudhanshu Batra, Sr. Adv.
with Mr.H.D.Talwani,
Mr.S.N.Choudhary, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

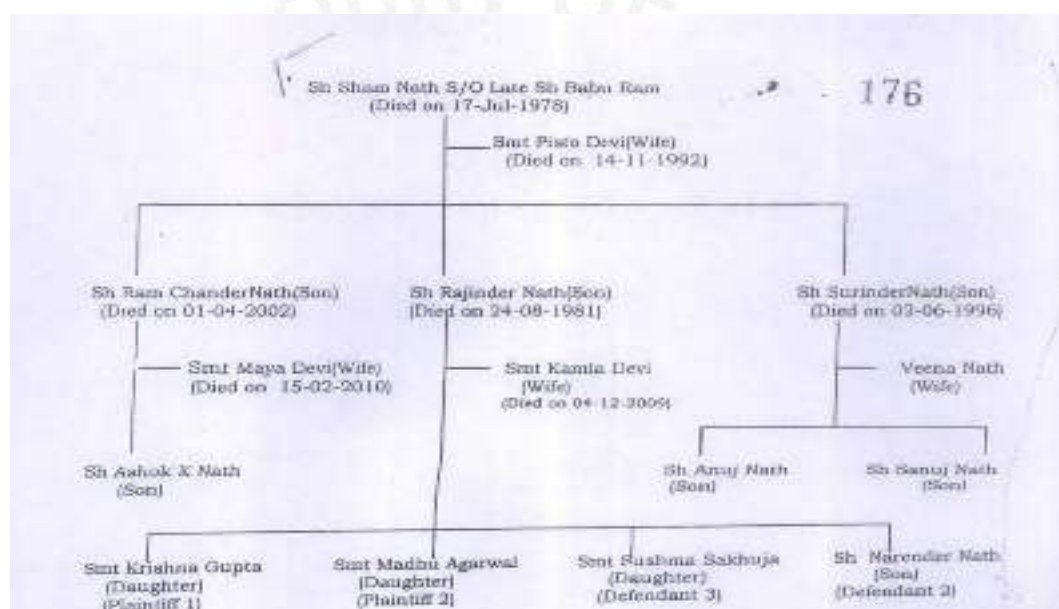
HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J.(Oral)

1. The present intra court appeal under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 read with Section 10 of the Delhi High Court Act, 1968 impugns order dated 11th February, 2013 passed in IA No.7915/2011 filed by the appellant (defendant no.2 in the suit) in CS(OS) No.663/2011.
2. The impugned order also disposed of application No.7857/2011 filed by Ram Chander Nath, HUF, defendant no.4 in the said suit. The said defendant has not preferred any appeal.

3. Respondent nos.1 and 2 Smt.Krishna Gupta and Ms.Madhu Agarwal are the two plaintiffs who have filed CS(OS) No.663/2011 seeking partition, possession, rendition of accounts, permanent and mandatory injunction in respect of properties of Rajinder Nath and Co. HUF, defendant nos.1 and Ram Chander Nath, HUF.

4. The following table gives the relationship between the parties to the present appeal and the suit:-



5. The plaintiff claims and asserts that pursuant to the amendment to the Hindu Succession Act, 1956 by way of Hindu Succession Amendment Act, 2005, the plaintiff being daughters have acquired a right, title or interest in the Joint Hindu Family properties and are entitled to seek and pray for partition etc.

6. The appellant's contention is that the judgment of the Supreme Court in *Prakash & Ors. vs. Phulavati & Ors.*, (2016) 2 SCC 36,

opines and holds that the aforesaid amendment is not retrospective and would not apply. Father of the respondent nos.1 and 2 i.e. the plaintiffs and the coparcener had expired on 24th August, 1981, which is before the aforesaid amendment. To this extent, the plea of the appellant may be correct. Equally the claim and cause of action pleaded in the plaint, is not restricted to the amendment vide Hindu Succession Amendment Act, 2005. Relevant in this regard would be averments made in paragraph 13 of the plaint, which read as under:-

“13. That Sh.Rajinder Nath died intestate on 24.08.1981 leaving behind his widow Smt.Kamla Devi, both the plaintiffs and defendants No.2 & 3 as his class I legal heirs. Therefore, the said legal heirs including Smt.Kamla Devi succeeded to and inherited all the individual assets of Sh.Rajinder Nath to the extent of 1/5th share for each of them in the said individual assets. The interest of Sh.Rajinder Nath in the joint family property to the extent of his 1/5th share in the assets of Rajinder Nath & Co. HUF was also inherited by the said class I legal heirs to the extent of 1/25th share for each of them. Subsequently Smt. Kamla Devi also died intestate on 04.12.2009 and all her individual assets as well as her 1/25th share in the assets of the Rajinder Nath & Co. HUF also devolved by succession and were inherited in equal share by her surviving Class-I legal heirs i.e. the aforesaid three daughters and the son Sh.Narender Nath.”

Thus, the first and the second respondents have asserted their claim on “deemed partition” principle on death of their father Rajinder Nath in 1981. It is pleaded that he had died intestate and, therefore, the two respondents are entitled to 1/25th share each in the assets of

Rajinder Nath & Co. HUF being Class-I legal heirs of their father. Claim or right is made also to assets or the share of Kamla Devi, their mother who is stated had died intestate on 4th December, 2009. The appellant relies on purported “Will” of Rajinder Nath and Kamla Devi, which are contested by the two respondents. This is a matter of issue and dispute to be adjudicated and decided.

7. The appellant submits that the suit is barred by limitation. Mr. Rajinder Nath had expired in 1981 and Kamla Devi had expired in the year 2009 and the suit for partition etc. was filed in March, 2011. The appellant’s submits that the respondents’ claim on account of inheritance to the estate of Rajinder Nath is covered and governed by the residuary Article 106 of the Limitation Act, 1963. Accordingly, the suit for partition having been filed 12 years post death of Rajinder Nath, would be hit and barred by limitation. Reliance is placed on the judgment of the Supreme Court in *Uttam vs. Saubhag Singh & Ors.* AIR 2016 SC 1169. The plea it is obvious is not in respect of estate of Kamla Devi, who as noticed above had died in 2009.

8. We have considered the submission but do not think that the submission/issue can be decided at this stage under Order VII Rule 11 of the Code.

9. The law of limitation does, *per se*, not prescribe any fixed time or period for filing of suit for partition in case of joint family property or jointly owned properties. Joint family properties, properties purchased in joint names or inherited can continue till partition is sought. Law does not prescribe any fixed time period in which a suit for partition must be filed by one joint owner against the other. (See

Vidya Devi v. Prem Prakash, AIR 1995 SC 1789). A finding of the contrary would require elucidation and finding on several facts including the plea of ouster, etc. At this stage, it cannot be said that the suit for partition having been filed in 2011, is hit and barred by limitation on the said account. These aspects and disputed questions will be answered after evidence is led by the parties.

10. The decision of the Supreme Court in **Uttam's case (Supra)** examines provisions of Hindu Succession Act. On the said Act coming into force on 17th June, 1956 inheritance would be as per the statutory provisions and not under Mitakshara coparcenary law, unless so mandated and permitted by the said statute. The legal position was summarized by the Supreme Court in Uttam's Singh case (supra) in the following words:-

*“20. Some other judgments were cited before us for the proposition that joint family property continues as such even with a sole surviving coparcener, and if a son is born to such coparcener thereafter, the joint family property continues as such, there being no hiatus merely by virtue of the fact there is a sole surviving coparcener. **Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe** (1988) 2 SCC 126, **Sheela Devi v. Lal Chand**, (2006) 8 SCC 581, and **Rohit Chauhan v. Surinder Singh** (2013) 9 SCC 419, were cited for this purpose. None of these judgments would take the appellant any further in view of the fact that in none of them is there any consideration of the effect of Sections 4, 8 and 19 of the Hindu Succession Act. The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:-*

- (i) *When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).*
- (ii) *To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.*
- (iii) *A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.*
- (iv) *In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.*
- (v) *On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.*
- (vi) *On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it*

as they hold the property as tenants in common and not as joint tenants.”

After having held so, the Supreme Court observed as under:-

“21. Applying the law to the facts of this case, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants in common and not as joint tenants. This being the case, on the date of the birth of the appellant in 1977 the said ancestral property, not being joint family property, the suit for partition of such property would not be maintainable. The appeal is consequently dismissed with no order as to costs.”

11. We do not think the paragraph 21 in Uttam's case (Supra) quoted above supports the contention raised by the appellant that the suit is barred by limitation. The expression “tenants in common” has been contrasted with “Joint tenancy”. The former refers to tenancy in which two or more tenants hold the same land by unity of possession by separate and distinct titles but there is no right of survivorship. In the latter, two or more tenants are entitled to interest at the same time and each has a right to survivorship.

12. We are informed that issues were subsequently framed by the learned Single Judge. No issue on limitation has been framed or pressed. The appellant herein had subsequently filed an application

for framing of additional issue and in the said application, the issue of limitation was not pressed/raised.

13. We, for the purpose of the present appeal, have examined and considered the arguments addressed before us. We do not make any comments or observations on merits. We have, while dismissing the appeal only, referred to the facts which are required to be taken into consideration as facts pleaded in the plaint. The evidence is yet to be led by the parties and thereafter disputed facts would be ascertained and decided as per law.

14. With the aforesaid observations, the appeal is dismissed.

SANJIV KHANNA, J

NAVIN CHAWLA, J

JULY 06, 2017

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