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

Reserved on :1st February, 2018

Date of decision :15th May, 2018

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RFA 301/2017

VINEETA SHARMA

..... Appellant

Through: Mr. Chandrachur Bhattacharyya,
Advocate. (M-9810878919).

versus

RAKESH SHARMA & ORS.

..... Respondents

Through: Mr. Subhasish Mohanty, Advocate
for R-1 & 2 (M-9810751634).

Mr. Sanjeev Singh & Mr.
Raghuvendra Singh Parihar,
Advocates for R-3 (M-9818925400).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The suit from which the present Appeal arises, was filed by Smt. Vineeta Sharma-Plaintiff/Appellant (*hereinafter 'Plaintiff'*) against her two brothers Mr. Rakesh Sharma-Defendant No.1 and Mr. Satyendra Sharma-Defendant No.2 and Mrs. Rameshwari Sharma – Defendant No.3 (*hereinafter, 'Defendants'*). Defendant No.3 is the mother of the Plaintiff and Defendants Nos.1 and 2.

2. Sh. Dev Dutt Sharma, had purchased a plot of land admeasuring 250 sq. yards bearing No.A-53, South Extension, Part-II, New Delhi from DLF Housing and Construction Ltd (*hereinafter, 'suit property'*). The property has 2½ floors, which were constructed by Sh. Dev Dutt Sharma. He was residing in a government accommodation and in 1974, after he retired, he

shifted to the suit property with his family and occupied the First Floor. The Ground Floor and *Barsati* were rented out to various tenants. One of the tenants was Bank of Baroda. An eviction petition was filed against the said bank by Shri Dev Dutt Sharma and during the pendency of the suit, he expired on 11th December, 1999. He expired intestate.

3. Sh. Dev Dutt Sharma had three sons, one daughter and a wife. One son, Dr. Shailendra Sharma expired on 1st July, 2001 and he was unmarried. At the time of the death of Dr. Shailendra Sharma, the Plaintiff claimed that being the daughter, she was entitled for ¼ share in the property. It was her case, that she used to frequently visit her parental home and she also had some movable items lying there. After the death of her father, vide legal notice dated 17th October, 2001, she sought partition of the property and upon refusal by the Defendants, the suit came to be filed.

4. The case of the Defendants was that after her marriage, she ceased to be a member of the Joint family. It was further claimed that Sh. Dev Dutt Sharma had created a Hindu Undivided Family (HUF) during his lifetime. Upon retirement of Sh. Dev Dutt Sharma, the family had shifted to the First Floor of the property in 1974 but in 1980, they had moved to the Ground Floor. The remaining floors had been rented out. The Plaintiff's marriage had taken place on 18th January, 1981 and it was pleaded that the father and brothers had contributed Rs.3,50,000/- for her marriage. The following issues were framed in the matter:

“1. Whether the suit is properly valued for the purposes of Court Fee and whether proper court fee has been affixed on the plaint in light of the plaintiff's claim that she is in constructive possession of the suit property?”

2. Whether the suit property is self-acquired/HUF property of the father?

3. Whether the property was settled by way of oral partition dated 21st July, 2001 and whether the same was acted upon by the parties?

4. Whether the suit is maintainable in view of Section 23 of the Hindu Succession Act?

5. To what shares are the parties entitled to?

6. Relief.”

5. The Plaintiff appeared as PW-1 and summoned four witnesses including the Manager (Marketing) - Bank of Baroda (PW-2), official from the MCD (PW-3), an official from the Tis Hazari record room (PW-4) and an officer from Sub-Registrar's Office (PW-5). The Defendants i.e. the two brothers were examined as DW-1 and DW-2.

6. After recordal of evidence, a Ld. Single Judge of this Court had rendered a final judgement that the property was a part of HUF property based on Income Tax and Wealth Tax returns vide decision dated 29th October, 2013. This judgment was set aside by the Ld. Division Bench of Delhi High Court vide order dated 29th April, 2014 on the ground that the documents which were not exhibited i.e. the Wealth Tax and Income Tax returns could not have been considered to hold that the property was an HUF property. However, the Ld. Division Bench recorded in paragraph 12 as under:

“We have not expressed any opinion on the merits of the controversy between the parties. At the remanded stage the learned Single Judge would decide the suit uninfluenced by any observation made by us as also uninfluenced by any observations made in the impugned decision.”

7. After the Division Bench order, fresh arguments were heard in the matter by the Trial court and vide the impugned judgment dated 24th November, 2016, the suit was dismissed on the ground that the same was barred under Section 23 of the HSA. The Trial Court dismissed the suit primarily on the ground that the Appellant was not a coparcener under Section 6 of the Hindu Succession Act, 1956 (*hereinafter, 'HSA'*) as the amendment came into effect only in 2005.

Analysis and Findings

8. At the outset, it needs to be recorded that the documents from the Income Tax department are in fact original documents which may have not been pointed out to the Ld. Division Bench at the stage of hearing of the Appeal. The Ld. Division Bench appears to have proceeded on the basis that the documents were not exhibited. This is clear from the observation of the Ld. Division Bench *“the finding of fact in paragraph 16 of the impugned decision is sans a reference to the exhibited documents and it appears that photocopies of some documents which are not even proved at the trial have been made the basis of finding of fact”*. Strictly speaking, only exhibited documents ought to be taken into consideration. However, these being government records in original, they ought to be read in evidence under the provisions of the Indian Evidence Act, 1872.

9. The findings on the various issues given by the Trial Court are as under:

- a. Issue no.1- Court fee was held to be properly paid.
- b. Issue no.2- On this issue, the Trial Court after examining the pleadings and the evidence held that the suit property is not part of the

HUF as claimed by the Defendants.

c. Issue no.3- The Trial Court held that there was no oral partition.

d. Issue no.4 - On this issue, following the judgment of the Supreme Court in ***Prakash v. Phulavati (2016) 2 SCC 36*** (hereinafter, '*Phulavati*'), the Trial Court held that the death of Sh. Dev Dutt Sharma having taken place in 1999 and the suit was filed in 2002 prior to the amendments in the HSA. Hence, the Trial Court held:

“41. The ruling ‘Prakash & Ors. Vs. Phoolwati & Ors’ (Supra) is squarely applicable to the facts of the present case. The instant suit was filed in the year 2002 when Section 23 of the Hindu Succession Act, 1956 was in force. The Hindu Succession (Amendment) Act, 2005 came into force on 09.09.2005 and as held by the Hon’ble Supreme Court in above discussed ruling has prospective effect and not retrospective. A female Hindu can file a suit for partition of dwelling house after the implementation of Hindu Succession (Amendment) Act, 2005. Thus, it is clear that the plaintiff being female heir of late Sh. D.D. Sharma is not entitled to seek partition of the dwelling house as she is barred by the provisions of Section 23 of Hindu Succession Act, 1956.”

The present appeal has therefore been preferred by the Plaintiff, Smt. Vineeta Sharma impugning this judgment of the Trial court.

10. The counsel for the Plaintiff has argued that the Trial Court was wrong in holding that the Plaintiff is not entitled to a share in the suit property in view of the amendments in the HSA. Counsel for the Plaintiff relies upon the fact that Section 23 of the HSA does not deprive the Plaintiff of her rights. Part of the property was always tenanted and hence it was not a “dwelling house” as contemplated under Section 23 of the HSA. He

specifically relies on the cross-examination of one the brothers - Mr. Rakesh Sharma-DW1 who deposed that the property was let out to various tenants over the years.

11. Counsel for the Defendants on the other hand submits that the property constitutes a '*dwelling house*'. Canara Bank vacated the property on 22nd August, 2001 and on the said date, when the eviction suit was filed the family was occupying the entire property. It was further submitted that the repealing of Section 23 of the HSA came into effect only on 9th September 2005 and a daughter was not to be treated as a coparcener prior 20th December, 2004. The Defendant relies on *Phulavati (Supra)*.

12. The counsel for the Plaintiff relied on the definition of the word "where" from Oxford dictionary. He came to submit that the position as was prevalent on the date when the father died cannot govern the parties. Since it was a self-acquired property, the Plaintiff is entitled to a share in the same. Judgement was reserved in this matter on 1st February 2018.

13. After judgement was reserved in the matter, the attention of this Court was drawn to the judgment of Supreme Court in *Danamma @ Suman Surpur v. Amar [Civil Appeal Nos. 188-189/2018]* (hereinafter '*Danamma*') which was pronounced on 1st February 2018 itself. The matter was accordingly, listed for directions and counsels were permitted to make further submissions in this regard. Counsel for the Appellant submitted that the *Danamma (supra)* judgment being subsequent to *Phulavati (supra)*, it would bind this Court and the Appellant is entitled to be treated as a coparcener. Counsel for the Respondent submitted that the house may have been rented out in the past but was now a dwelling house and *Danamma (supra)* does not apply and *Phulavati (supra)* would continue to apply.

14. This Court has considered submissions of the rival parties and the pleadings and evidence on record. It is the admitted position that the suit property was the self-acquired property of Sh. Dev Dutt Sharma. However, the same was assessed as being part of the Dev Dutt Sharma (HUF). There are Income Tax and Wealth Tax returns filed in the name of Sh. Dev Dutt Sharma (*karta*) as a Hindu Undivided Family (*hereinafter 'HUF'*), The Income Tax assessment orders as also the returns filed therein reflect the intention of Sh. Dev Dutt Sharma to treat the suit property as HUF property. One such assessment order for the 1972-73 expressly records as under:

"The return was filed on 15.3.1976 declaring an income of Rs.7,320/- from property in the status of HUF. Section 148 and 143(2) notices were served and complied with. Sh. S.K. Bakshi, Advocate attended. Filed letter dated 31.3.1976 along with the enclosure to prove the status and cost of the construction of the property at A-53, N.D.S.E. Part-II, South Extension, New Delhi.

The HUF came into existence under the assessee's declaration made on 23.5.66. An affidavit in original have been filed. The plot was purchased in the year 1955-56 for 4,353.75 and the construction was started in April, 1964 and was completed in April, 1966, the total cost of construction amounted to Rs.62,115/- which has been met from loan and advances and savings from agricultural income from ancestral property. Total cost of construction is supported by a certificate from government approved valuer and evidence to prove the source of income have been filed. The property remained let out....."

15. Thus, during the lifetime of Sh. Dev Dutt Sharma, the suit property was part of the HUF and has to be treated as such. The rent receipts have been issued by Sh. Dev Dutt Sharma to the tenants in the suit property but

the same could be deemed to be in his capacity as *karta* of the HUF. The suit for eviction against the Bank of Baroda was filed by Sh. Dev Dutt Sharma in his individual capacity but since he was the *karta* of the HUF and he treated it as such in all his tax returns, the intention was clear. Further, the plea in the written statement itself is quite clear and is to the following effect:

“It is worth while to mention that since the property is an HUF property, therefore the plaintiff has no right to share the property.

It is correct that the youngest son Dr. Shailender Sharma expired on 1.7.2001 and he was un-married. It is specifically denied that his share has fallen to the shares of the parties to the suit. It is specifically denied that the parties to the suit has 1/4th share each in the suit property.

It is worth while to mention here that the share of Dr. Shailender Sharma had fallen to the shares of replying respondents only as the property was an HUF property.

It is worth while to mention here that the suit property was assessed by the Income Tax Deptt. On the basis of HUF and the same was assessed by the Wealth Tax Authority.”

16. This plea is further supported in the evidence filed by DW-1. In cross examination also, DW-1 has stated as under:

“ My father declared Dev Dutt Sharma HUF in the year 1973-1974. I am not aware about my father’s contribution towards the creation of HUF, styled and named Dev Dutt Sharma HUF.

.....

I am not aware whether there is any account in the name of my father or in the name of Dev Dutt Sharma HUF. I am not aware of any such account that I have opened in the name of the HUF either with my father or otherwise. With certainty I say I was not a party to

the opening of any HUF account with my father.

.....

It is correct that during the proceedings of the said suit No.417/01 and even after the substitution of the LRs of our father and even till the disposal of the suit upon compromise being recorded on 22.08.2001, we have not claimed that the property in question is an HUF property in the name Dev Datta Sharma HUF.

.....

We did not take any steps to locate the Will upon being informed by late B.D. Sharma of its existence. It is also true that no intimation prior to 13.11.2001 was intimated to our sister namely Mrs. Vineeta Sharma about the existence of the Will after being informed by late Shri B.D. Sharma. I do not know whether my father had executed a Will or not.

I got to know about the creation of HUF namely Dev Datta Sharma HUF in or around 1973-74.

HUF was created by my father through an affidavit submitted to the Income Tax Authorities and Wealth Tax Authorities.

I do not know what was the investment and contribution made by my father towards creation of HUF.

Volunteered

My father had put property in question into the HUF. No affidavit or consent was taken from me in respect of creation of the HUF. Since I was not in Delhi at the time I am not aware whether any such consent or affidavit was taken from other brothers in respect of creation of such HUF.

After the demise of my father I have been substituted as karta in HUF. No steps have been taken by me to revive HUF after the demise of my father for or in relation to the HUF.

Volunteered

We have been contesting this case as HUF.

It is correct that after the demise of my father no

returns whatsoever were filed with the income tax authorities by or in the name of the HUF showing me as KARTA of HUF.

Volunteered

Since there was no income tax payable from the HUF, no return was filed in the Income Tax Department.

.....

Volunteered

My father had received the rent as Karta of HUF.

It is correct that Shri D.D. Sharma has not written anything on the receipts which may suggest that such receipts were issued by or on behalf of D.D. Sharma HUF.

Volunteered

However, Shri D.D. Sharma had shown the said amount received from me in the income tax records of the HUF.”

17. From the above pleadings, documents and oral evidence it is clear that Sh.Dev Dutt Sharma always intended to and did always treat the suit property as part of HUF. Though in the municipal records, relied upon by the Plaintiff, the property was assessed to House Tax in the name of Sh. Dev Dutt Sharma, a perusal of the I.T. Returns shows that the valuation as per municipal records has been mentioned in the Returns of the HUF under which the suit property is assessed. Thus, the suit property was treated as HUF property by Sh. Dev Dutt Sharma and has to be treated as such.

18. The next that question arises is as to the share of the Plaintiff in the suit property and her entitlement under Sections 6 read with Section 23 of the HSA. In *Phulavati (supra)*, the Supreme Court held:

“17. The text of the amendment itself clearly provides that the right conferred on a “daughter of a coparcener” is “on and from the commencement of the Hindu Succession (Amendment) Act, 2005”. Section

6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.”

18. The contention of the respondents that the amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by legislature. In the present case, the legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of the express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition,

by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

.....

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.”

19. In *Phulavati (supra)*, the Supreme Court considered *Ganduri Koteshwaramma & Anr v. Chakiri Yanadi &Anr., 2011 9 SCC 788* (hereinafter, ‘Ganduri’), *S. Sai Reddy v. S. Narayana Reddy (1991) 3 SCC 647* and the various judgments on this issue and held that the amendment to Section 6 of the HSA would be prospective. In the case of *Danamma (supra)* recently the Supreme Court has observed as under:

“24) Section 6, as amended, stipulates that on and from the commencement of the amended Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth. The section uses the words in the same manner as the son. It should therefore be apparent 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 as explained above, and as is well recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-s (1)(a) and (b).

25) Reference to the decision of this Court, in the case of State Bank of India v. Ghamandi Ram⁷ is essential to understand the incidents of coparceneryship as was always inherited in a Hindu Mitakshara coparcenary:

“According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Ch. I. 1-27). The incidents of coparcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties is common; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors.”

26) Hence, it is clear that the right to partition has not been abrogated. AIR 1969 SC 1330.

The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener.

27) In the present case, no doubt, suit for partition was filed in the year 2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. This Court in *Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.* held that the rights of daughters in coparcenary property as per the amended S. 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.”

20. While *Phulavati (supra)* held that the amendment to Section 6 of the HSA applies prospectively, in *Danamma (supra)*, the Supreme Court held that the daughter of a coparcener shall be a coparcener by birth. On facts, in *Phulavati (supra)*, the Supreme Court held that since the death of the father in the said case had taken place on 18th February, 1988, the daughter could not have claimed to be a coparcener on the date of commencement of Hindu Succession (Amendment) Act, 2005. Immediately upon the death, the notional partition had taken place and such a right could not have been taken away by a subsequent amendment. However, in the case of *Danamma (supra)*, the Supreme Court held that the share of the father who died in 2001 would also devolve upon his two daughters who would be entitled to

1/5th share in the property.

21. Recently however, the Supreme Court, on 19th April 2018, in ***Mangammal @ Thulasi & Anr. v. T.B. Raju [Civil Appeal 1933/2009]*** (hereinafter, 'Mangammal') has, while considering ***Phulavati (supra)*** and ***Danamma (supra)***, observed as under:

*“10) Moreover, under Section 29-A of the Act, legislature has used the word “the daughter of a coparcener”. Here, the implication of such wordings mean both the coparcener as well as daughter should be alive to reap the benefits of this provision at the time of commencement of the Amendment of 1989. The similar issue came up for the consideration before this Court in ***Prakash & Ors. vs. Phulavati & Ors., (2016) 2 SCC 36***, this Court while dealing with the identical matter held at Para 23 as under:-*

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born.....”
(emphasis supplied by us)

*It is pertinent to note here that recently, this Court in ***Danamma @ Suman Surpur & Anr. Vs. Amar & Ors, 2018 (1) Scale 657*** dealt, inter-alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the ***Danamma (supra)***, it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law whether daughter who born prior to 2005 amendment would be entitled*

to claim a share in ancestral property or not? In such circumstances, in our view, **Prakash & Ors. (supra)**, would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

11) Hence, without touching any other aspect in the present case, we are of the view that the appellants were not the coparceners in the Hindu Joint Family Property in view of the 1989 amendment, hence, they had not been entitled to claim partition and separate possession at the very first instance. At the most, they could claim maintenance and marriage expenses if situation warranted.”

22. Insofar as the High Court is concerned, in the light of the latest decision in **Mangammal (supra)** of the Supreme Court, the decision in **Phulavati (supra)** is to be applied. Moreover, this Court has to examine the correctness of the trial court judgment in the facts of the present case. The Trial Court, followed the law prevalent on the date when it pronounced the judgment i.e. 24th November, 2016. It held that the amended section 6 ought to be considered as being prospective in nature. On the date when the suit was filed, Section 23 of the HSA was in force and the entire home was treated as a dwelling house. There was no tenant in the suit property. The Plaintiff was not a coparcener on the date when her father passed away. Admittedly, the Plaintiff was married during her father's life time and she has neither deserted nor separated from her husband. Thus, she did not have right to seek partition when her father died as she was not a coparcener. Her rights would be governed by the un-amended Section 6 of the HSA. Thus, the Trial Court rightly applied the law as it prevailed on the date when the

Trial Court decided the matter.

23. The Appellate Court is examining the correctness of the judgment of the Trial Court which has rightly applied the law as it stood on the date when it had passed the judgment/decreed. The death of the father in this case took place prior to the amendment in the HSA had come into force. The Plaintiff is happily married and is living with her husband. The two brothers and the mother are living in the suit property which constitutes two floors and one barsati floor. It is the dwelling house of the entire family. Section 23 of the HSA would be applicable, as on the date of filing of the suit there was no tenant in the suit property.

24. Upon the death of Sh. Dev Dutt Sharma, under Section 6, notional partition of his share in the HUF property takes place. To the extent the property is notionally partitioned, the Appellant is entitled to her share as per Section 8 of the HSA. However, due to the operation of Section 23 which was applicable at the relevant time, she cannot seek partition until the brothers choose to divide their share. In ***G.Sekar Vs Geetha (2009) 6 SCC 99*** the Supreme Court, while considering the effect of Section 23 of HSA observed:

“17. Section 23 of the Act, however, carves out an exception in regard to obtaining a decree for possession inter alia in a case where dwelling house was possessed by a male heir. Apart therefrom, the right of a female heir in a property of her father, who has died intestate is equal to her brother.

18. Section 23 of the Act merely restricts the right to a certain extent. It, however, recognises the right of residence in respect of class of females who come within the purview of proviso thereof. Such a right of residence does not depend upon the date on which the

suit has been instituted but can also be subsequently enforced by a female, if she comes within the purview of proviso appended, to Section 23 of the Act.

.....
28. *Thus, a right in terms of Section 23 of the Act to obtain a decree for partition of the dwelling house is one whereby the right to claim partition by the family is kept in abeyance. Once, the said right becomes enforceable, the restriction must be held to have been removed. Indisputably, when there are two male heirs, at the option of one, partition of dwelling house is also permissible.”*

25. In ***Narashimaha Murthy v. Susheelabai (1996) 3 SCC 644***, the Supreme Court, while considering the dynamics between Section 8 and Section 23, as also the rights of a female heir to seek partition observed:

“13. Section 23 thus limits the right of the Class -I female heirs of a Hindu who died intestate while both male and female heirs are entitled to a share in the property left by the Hindu owner including the dwelling house. The marginal note itself indicates that Section 23 is a special provision: in other words, it is an exception to the general partition. So long as the male heir (s) chose not to partition the dwelling house, the female class - I heirs has been denied the right to claim its partition subject to a further exception, namely, the right to residence therein by the female Class - I heir(s) under specified circumstances. In other words, the male heir (s) becomes entitled to perpetuate the memory of the deceased-Hindu who died while remaining to live in the dwelling house during his or her life-time. Thereby the dwelling house remains indivisible. The male heir(s) thereby evinces animus possidendi. But the moment the male heir(s) chooses to let out the dwelling house to a stranger/third party, as a tenant or a licensee, he or they exhibit (s) animus decidendi and the dwelling

house thereby becomes partible. Here the conduct of the female Class -I heir(s) is the effect and the latter's claim for partition gets ripened into right as she/they is/are to sue for partition of the dwelling house, whether or not the proviso comes into play. Here the female heir(s) becomes entitled to not only mere partition of the dwelling house but also her right to residence after partition.

14. It is, therefore, clear that though the right to succession devolves upon the female heir under Section 8, being Class -I heir to the Hindu intestate, in respect of the dwelling house, her right to seek partition has been interdicted and deferred, only so long as the male heir(s), decide to remain occupied therein as undivided or continue to have it as a dwelling house. Though the words "the male heirs choose to divide their respective shares," suggest that at least two such male heirs must exist and decide not to partition the dwelling house in which event the right of the female heir is postponed and kept in the abeyance until the male heir or heirs of the Hindu intestate decide to partition it, it does not necessarily lead to the only inevitable conclusion that the operation of Section 23 must stand excluded in the case of the Hindu intestate leaving behind him/her surviving only son and daughter. Take the present policy of family planning to have only two children and invariably preferring to have a son and daughter. More than one son may not exist. The restriction is contingent and conditional and will cease To operate on the death of the sole male heir or the last of such male heirs of the intestate or if he or they choose (s) to partition and sell (s) his/their shares to a stranger or to let out to Ors. . Take a case of a Hindu male or female owning a flat in metropolis or major cities like Bombay etc. with two room tenement left behind by a Hindu intestate. It may not be feasible to be portioned for convenient use and occupation by both son and daughter and to be sold out. In that event the son and

his family will be thrown on streets and daughter would coolly walk away with her share to her matrimonial home causing great injustice to the son and rendering them homeless/shelterless. With passage of time, the female members having lost the moorings in the parental family after marriage, may choose to seek partition though not voluntarily but by inescapable compulsions and constrained to seek partition and allotment of her share in the dwelling house of intestate father or mother. But the son with his share of money may be incapable to purchase a dwelling house for his family and the decree for partition would make them shelterless. Take yet another instance, where two room tenement flat was left by deceased father or mother apart from other properties. There is no love lost between brother and sister. The latter demands her pound of flesh at an unacceptable price and the male heir would be unable to buy off her share forcing the brother to sell the dwelling flat or its lease-hold right or interest to see that the brother and his family are thrown into the streets to satisfy her ego. If the right to partition is acceded to, the son will be left high and dry causing greatest humiliation and injustice.”

26. In the present case, the Plaintiff is not covered by the Proviso to Section 23 and is thus not entitled to a right of residence. The Plaintiff is not even praying for a right of residence. The Plaintiff admittedly has two brothers and her mother who are all living in the suit property. The same thus constitutes a 'dwelling house'. The amendments of 2005 do not benefit the Plaintiff as the father of the Plaintiff passed away on 11th December, 1999. Thus, the only relief that the Plaintiff is thus entitled to is a decree of partition to the extent of 1/12th of the suit property i.e., 1/4th share in 1/3rd of the suit property which notionally fell into the share of her father at the time

of his death. However, the said decree of partition would not be enforceable until the Defendants choose to divide their respective shares in the suit property.

27. However, the above referenced decisions of the Supreme Court in *Phulavati (supra)*, *Danamma (supra)* and *Mangammal (supra)* raise important questions of law of general public importance as to the rights of female coparceners and their rights. Though the appeal is dismissed, the Plaintiff is issued certificate of fitness to appeal under Articles 133(1)(a) and 134A of the Constitution of India to the Supreme Court.

28. Appeal is disposed of in the above terms. Decree sheet be drawn accordingly.

PRATHIBA M. SINGH, J.
JUDGE

MAY 15, 2018/Rahul/dk