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

Reserved on : 9th May, 2018
Date of decision : 23rd May, 2018

+ **RFA 1006/2016 & CM APPL. 47222/2016**

ARUN KUMAR SHARMA & ORS Appellants

Through: Ms. Neha Garg, Advocate.
(M-9911536363)

versus

SANTOSH SHUKLA & ORS. Respondents

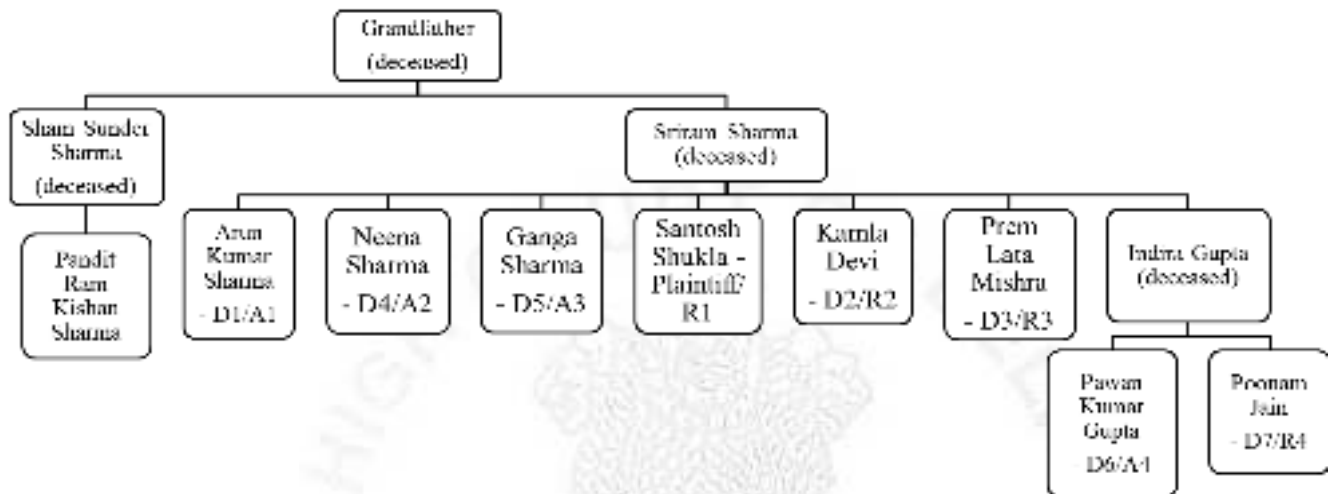
Through: Ms. Rita Rana and Mr. Vishwas
Ahuja, Advocates with Respondent
No.1 in person.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.

1. Late Sh. Sriram Sharma was the owner of property bearing no.1944, Katra Kushal Rai, Kinari Bazar, Kachcha Katra Delhi-110006 measuring 86.50 sq. yds. (*hereinafter*, 'suit property'). He passed way in 1980 leaving behind six daughters and one son. Sh. Arun Kumar Sharma - his son, Smt. Neena Sharma and Smt. Ganga Sharma – two daughters (Appellants No.1 to 3) are in possession of the suit property and were Defendant Nos.1, 4 and 5 in the subject suit (*hereinafter*, 'Defendants'). Smt. Santosh Shukla i.e., the Plaintiff is one of the daughters of Sh. Sriram Sharma and was married 35 years prior to filing of suit. The other two sisters, Smt. Kamla Devi and Smt. Prem Lata Mishra were married 40 and 60 years ago respectively.
2. One daughter Smt. Indira Gupta died leaving behind one son Sh.

Pawan Kumar Gupta – Appellant No.4, and Smt. Poonam Jain – Respondent No.4 herein was the married daughter of Smt. Indira Gupta. Smt. Poonam Jain remained ex-parte all along. Smt. Indira Gupta passed away in 1999. The family tree of the parties involved is below:



3. The suit was filed by the Plaintiff Smt. Santosh Shukla. The property was initially 173.50 sq. yds. A partition took place between Sh. Sriram Sharma and his brother due to which 86.5 sq. yds fell into the share of Sh. Sriram Sharma and his family. According to the Plaintiff, each of the children of Sh. Sriram Sharma has 1/7th share in the property. She got issued a legal notice on 15th May, 2013 seeking partition. The Defendants replied vide letter dated 1st June, 2013 refusing partition. Thus, the suit came to be filed in November, 2013 before the Trial Court seeking the following reliefs:

“It is, therefore, most respectfully prayed that this Hon’ble court may kindly be pleased to:

A. Pass a decree of partition in favour of the plaintiff and against the defendants No.1 thereby partitioning the suit property i.e., property bearing No. 1944, Katra Kushal Rai, Kinari Bazar, Kachcha Katra, Delhi -110006, measuring area about 86.50 sq. yds. (more specifically shown in red colour in the site plan)

in 1/7th equal share with meets and bounds.

B. Pass a decree of declaration in favour of the plaintiff and against the defendants thereby declaring the plaintiff as the owner of 1/7th equal share in the suit property i.e., property bearing No. 1944, Katra Kushal Rai, Kinari Bazar, Kachcha Katra, Delhi – 110006, measuring area about 86.50 sq. yds. (more specifically shown in red colour in the site plan).

C. Pass a decree of possession in favour of the plaintiff and against the defendants, thereby directing the defendants, their legal heirs, successors, attorneys to give and handover the peaceful and vacant possession of 1/7th share/portion to the plaintiff in the suit property i.e., property bearing No. 1944, Katra Kushal Rai, Kinari Bazar, Kachcha Katra, Delhi – 110006, measuring area about 86.50 sq. yds. (more specifically shown in red colour in the site plan), after partitioning the suit property with meets and bounds.

D. Pass a decree of permanent injunction in favour of the plaintiff and against the defendant No.1 thereby restraining the defendant No.1, his agents, legal heirs, successors, attorneys, family members or any other person acting on behalf of the defendant No.1 from selling, transferring, alienating or parting with the possession of any portion of the suit property i.e., i.e., property bearing No. 1944, Katra Kushal Rai, Kinari Bazar, Kachcha Katra, Delhi – 110006, measuring area about 86.50 sq. yds. (more specifically shown in red colour in the site plan) without partitioning of the suit property and without giving 1/7th equal share to the plaintiff from the aforesaid suit property.

E. Cost of the suit may also be awarded in favour of the plaintiff and against the defendant.

Any other and further order which this Hon'ble court deems fit and proper may also be passed in favour of the plaintiff and against the defendants."

4. The son, Sh. Arun Kumar Sharma filed his Written Statement and averred that, after the death of his father, Sh. Sriram Sharma in 1980, vide settlement application dated 10th October, 1983 filed in the pending suit between his father and uncle, partition took place between them by which the property was divided 50:50. According to Sh. Arun Kumar Sharma, on the same day when the compromise was recorded by the Ld. Trial Court i.e. 11th July, 1984 recording the partition between his father and uncle, upon returning from the Court, an oral partition/settlement took place between him and his siblings in the presence of their mother in respect of the residential house which is the suit property as also shop no. 2955, Katra Khushal Rai, Kinari Bazar, Delhi -110006. According to him, all the sisters, had been given their share on the same day. He further claimed that he has been paying the rent and taking care of both the shop and residence since that time.

5. Smt. Prem Lata Mishra and Smt. Kamla Devi gave their no objection and supported the case of Smt. Santosh Shukla. However, Smt. Meena Sharma and Smt. Ganga Sharma and the son of Late Smt. Indira Gupta supported Sh. Arun Kumar Sharma and relied on the verbal partition dated 10th October, 1983. The following issues were framed on 9th May, 2016:

- “(i) Whether the plaintiff is entitled for decree of partition of property bearing no.1944, Katra Kushal Rai, Kinari Bazar, Kachcha Katra, Delhi 110006 (herein after referred to be suit property)? OPP*
- (ii) Whether the plaintiff is entitled for decree of permanent injunction of the suit property? OPP*
- (iii) Whether the plaintiff is entitled for decree of possession of suit property? OPP*
- (iv) Whether the present suit is not filled within period of limitation? OPP*

(v) *Relief, if any.*”

6. The Plaintiff, Smt. Santosh Shukla deposed as PW-1. She deposed in her cross-examination that a partition took place between her father and her uncle though her father had already expired in 1980. According to her, her brother and all her sisters had signed on behalf of their father for recording of the said settlement. Thus, they were recognized as heirs to their father's estate. She stated that she used to visit the suit property generally.

7. A cousin of the Plaintiff i.e. Sh. Ram Kishan Sharma deposed as PW-2. He is the son of Sh. Sham Sunder Sharma with whom the 1983 settlement was entered into. He deposed that there are two temples in the suit property. He further stated in his cross examination as under:

“It is correct that a partition was made between Shri Sri Ram and Pandit Shyam Sunder and others in a case before Sh. Sardar Jaswant Singh, Sub-Judge, Ist Class, Delhi on dated 10.10.1983. The said compromised deed bears my signature at point ‘K’. It is incorrect that on the date 10.10.1983 the suit property was distributed amongst plaintiff and defendant. I can read and write English language. My affidavit PW2/1 was prepared by my counsel under my vernacular. After the death of my Uncle, my aunt was also expired. She is not alive presently. It is incorrect to suggest that the suit property was distributed among plaintiff and defendant prior to filing of suit. It is wrong to suggest that I am deposing falsely.”

Thus, he disputed that any settlement had taken place partitioning the share of Sh. Sriram Sharma.

8. Sh. Arun Kumar Sharma deposed as DW-1. He admitted that he was a minor at the time of the death of his father and that between 1980 to 1983,

he was working as a tea vendor. He admitted that there was no written document to support the plea of oral settlement between him and his sisters. He stated that some incidents took place on 21st April, 2013 or 15th May, 2013 when complaints had to be made to the police. He further stated in his cross-examination:

“It is correct to suggest that my father has been died in 1980 without any Will. It is wrong to suggest that I deposing falsely regarding the oral settlement as I want to grab the share of my other siblings. It is correct to suggest that my father has been died intestate and the suit property remains undivided. It is wrong to suggest that plaintiff is entitled for his share. It is wrong to suggest that I am deposing falsely.”

9. This deposition of Sh. Arun Kumar Sharma, especially the underlined portion, has been held against him by the Trial Court to hold that there was no partition between the siblings after the death of their father and that the property remains undivided. The finding of the Trial Court on this is as under:

“It may be noted that PW-1 in cross admitted that suit property was not partitioned and earlier a partition took place between her father late Sh. Hari Ram and his brother Shyam Sunder in the court of Sh. Jaswant Singh, Sub-Judge, Delhi. Defendant in his cross has admitted that he was working as a tea vendor from 1980 to 1983 and he further admitted that his father died intestate and suit property has not been divided. In view of the admission of the defendant, that suit property is owned by plaintiff and defendant and the suit property has not been divided, the suit filed by the plaintiff deserves to be decreed. As such, all the three issues are decided in favour of the plaintiff and against the defendants..... ”

10. A preliminary decree of partition came to be passed by the Trial Court in the following terms:

“RELIEF

From the above discussions, I am of the opinion the suit of the plaintiff is liable to be decreed and is hereby decreed. A preliminary decree is hereby passed in favour of the plaintiff and against the defendants holding that plaintiff is entitled to one seventh share in the suit property. A decree of declaration is passed in favour of the plaintiff and against the defendants declaring the plaintiff as owner of the suit property to the extent of 1/7th share. Further a decree of possession is also passed in favour of the plaintiff and against the defendants directing the defendants, their legal heirs and successors to hand over the physical and vacant possession of 1/7th share of the suit property to the plaintiff.

Now to come up for the partition of the suit property by metes and bounds on 29.11.2016.”

11. This Court had called for the Trial Court record on 21st December, 2016, and it was directed that the Trial Court proceedings would continue however, no final order would be passed. A perusal of the Trial Court record reveals that a Local Commissioner was appointed to submit a report regarding division of the property by metes and bounds. Local Commissioner has since submitted a report on 3rd February, 2017. However, thereafter, no proceedings have taken place in the Trial Court.

12. The question as to whether limitation applies in a partition suit is no longer *res-integra*. In ***Amrit Kaur v. Sarabjeet Singh (2008) 153 DLT 92*** a Ld. Single Judge of this Court had held that the law of limitation applies in a partition suit and a suit filed after 19 years from the death of the parents was held to be barred by limitation. The relevant portion of the said

judgement reads as under:

“8. Article 110 of the Schedule to the Act provides that a suit by a person excluded from a joint family property, to enforce a right to share therein is twelve years. The starting point is when the exclusion becomes known to the plaintiff.

9. It has been held that the object underlying this Article is to afford protection to a member of a joint Hindu family against prejudicial action by the other members of the family behind his back with respect to his interest in the family property. It has been held that this provision, prescribing the period of limitation, and the conditions of its applicability also apply to suits for partition (Radhoba v. Aburao AIR 1929 PC 231).

.....

13. The averments in the plaint are sufficient to deduce that the even according to the plaintiff, she was excluded from enjoyment of the joint family properties immediately after her father's death. The suit is, significantly enough, not accompanied by any document; it does not also rely on any document. No list of documents has been filed in the last two years. Further, the plaintiff does not advert to a single specific date when the defendants were asked to give her the share in properties, and when they refused. The entire case set up is on an oral demand. No notice, of lawyer, or even of the plaintiff, is relied upon. Thus, on a meaningful reading of the plaint, it has to be concluded that the allusion of demand in 2007, when other parts of the suit show that the grievance about the plaintiff's share having arisen in 1988, is an attempt to get over the question of limitation.

14. In the opinion of this court, an overall reading of the plaint shows that the alleged cause of action for filing this suit, for CS(OS) 1574/2006 Page 13 enforcement of the plaintiff's right in the Schedule A properties, according to her, arose in 1988; at best in 1993. In either case, the suit, filed in 2006 is clearly

time barred.”

13. In ***Sangita Rehan v. Surinder Kishan Grover*** 218 (2015) DLT 305, in a case where the suit for partition was filed 36 years after the death of the father, this Court held it to be barred by limitation. In the present case as well, Sh. Sriram Sharma passed away in the year 1980, however, the suit for partition came to be filed by the Plaintiff only in 2013, after almost 33 years. The long period that elapsed from the time of the father's death, partition between the father and the uncle and thereafter 33 years, clearly raises questions as to whether the right was waived. The Plaintiff, clearly did not assert her rights diligently and in time. But the fact remains that the Plaintiff regularly visited the suit property as stated by her in her cross examination. It appears that only in the year 2013 the relationship between the siblings went sour leading to the filing of the present suit. The Plaintiff sought partition at that stage and prior to that, there existed no cause of action to file the suit. It cannot therefore be held that the suit is barred by limitation.

14. The counsel for the Defendants has further contended that the Defendants have been in exclusive possession of the suit property. She submits that even a co-sharer can assert adverse possession. However, in such a case, such an assertion can succeed, only if it can be shown that the non-possessing co-sharer has been ousted from the property and the property has been in exclusive possession and enjoyment of one or more co-sharers and in a manner that is hostile to the said co-sharer. The concept of adverse possession between co-sharer and non co-sharer has been settled by the Supreme Court in ***Shambhu Prasad Singh v. Phool Kumari & Ors.*** (1971) 2 SCC 28 (hereinafter, '*Shambhu Prasad*'). The Supreme Court held as

under:

“On the question of adverse possession by a co-sharer against another co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessors. Accordingly, if a holder of title proves that he too had been exercising during the currency of his title various acts of possession, then, the quality of those acts, even though they might not be sufficient to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from a person challenging the possession the title which he holds. (See Kutbali Moothavar v. Paringati Kunharankutty AIR 1922 PC 181). As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be the evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other. (See Lakshmi Reddy v. Lakshmi Reddy and also Mohammad Baqar v. Naim-un-Nisa Bibi). But once the possession of a co-sharer has become adverse as a result of ouster, a mere assertion of a joint title by the dispossessed co-sharer would not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such a manner as it was possible to do. (See Wuntakal Yalpi Chanabasavanna Gawd v. Y. Mahabaleshwarappa). The mere fact that a dispossessed co-sharer comes and stays for a few days as a guest is not sufficient to interrupt the exclusiveness or the continuity of adverse possession so as not to extinguish the rights of the

disposed co-sharer (See Ammakannu Ammal v. Naxavanaswami Mudaliar)”

15. This position has also been reiterated by a Ld. Single Judge of this Court in ***Lata Chauhan v. L.S. Bisht 2010 (117) DRJ 715***. In the facts and circumstances of the present case, the evidence shows that the Plaintiff has visited the suit property. She has not retained possession in any portion of the property, nor is it her case that any belongings of hers are lying in the suit property. There is no doubt that Sh. Arun Kumar Sharma has not been able to establish that any money was in fact given in the form of their share to his sisters who no longer lived in the property. However, the material fact is that the three sisters who are seeking partition have been married 35, 40 and 60 years ago and were living in their matrimonial home and only visited the suit property occasionally.

16. The plaint does not state as to what happened between the period 1983 and 2013. Paragraph 7 of the plaint clearly states that the Plaintiff contacted her brother on 1st May, 2013 and thereafter got issued a legal notice. The complete silence in the plaint about any happenings prior to 2013 clearly shows that the Plaintiff tried to assert her right in the suit property for first time in 2013 and not before. The evidence on record, including the affidavit in evidence, does not give any details of the number of times when the Plaintiff had visited the suit property. The affidavit in evidence maintains complete silence despite a specific defence in the written statement that there was an oral family settlement. The oral settlement is quite conjectural as there is no document to prove the same. Except the fact that the Plaintiff and two sisters started living in the suit property there is nothing to show in what manner any payment was made to the Plaintiff for

her share.

17. While two sisters support the case of the Plaintiff, two other sisters support the case of the brother. The complete absence of any demand by the Plaintiff between 1980 and 2013, shows that the Defendants have been in exclusive possession and enjoyment of the suit property. The question therefore, is whether the possession was hostile. The Plaintiff does not appear to have asserted her rights prior to 2013, as per the evidence on record. Thus, the possession cannot be held to be hostile prior to 2013, though it was exclusive. The defence of adverse possession therefore fails.

18. The question then is as to whether the property was ancestral or self-acquired. In the present case, from the settlement which has taken place between Sh. Sriram Sharma and his brother Sh. Sham Sunder Sharma, the property has been acknowledged to be ancestral in nature. The father of the Plaintiff admittedly passed away in 1980. The question whether the Defendants would have to be treated as coparceners under Section 6 would depend on whether a partition actually took place in 1983 or not, prior to the amendment being introduced in 2005. If the partition indeed took place, then the same would bind the parties irrespective of the amendment in 2005. However, if the partition had not taken place, then the question arises as to whether prior to the death of the father, there was a notional partition of the property. The said partition would then include the entire 173.50 sq. yards. The coparceners would then be the two brothers and their two sons. The daughters of Sh. Sriram Sharma would then be entitled only to $\frac{1}{8}^{\text{th}}$ of $\frac{1}{4}^{\text{th}}$ of 173.50 sq. yards. However, parties have agreed to bind themselves by the 1983 partition which was filed in the Court, between the two families of Sh. Sriram Sharma and Sh. Sham Sunder Sharma leaving them to 86.5 sq. yards

each. Considering the 1983 partition filed in the Court, as a family settlement between the two families, the terms of the same would bind parties, in which case, the 86.5 sq. yards falling in the share of Sh. Sriram Sharma would lose the character of ancestral property and would devolve upon his wife, six daughters and the son i.e., 1/8th each. The parties have cited ***Prakash v. Phulavati (2016) 2 SCC 36*** (hereinafter, '*Phulavati*') and ***Damamma @ Suman Surpur v. Amar (2018) 3 SCC 343*** in support of their respective cases. However, since this Court has come to the conclusion that, after the partition between the two wings of the family, the property falling in the share of Sh. Sriram Sharma is to be treated as a self-acquired property, the said judgements would not be applicable. However, recently, in ***Mangammal @ Thulasi v. T.B. Raju [dated 19th April, 2018 in C.A. No. 1933/2009]***, the Supreme Court has confirmed that ***Phulavati (supra)*** binds as a precedent and as per the said judgements, the amendments of 2005 in HSA would apply only in respect of '*living daughters of living coparceners*' as on the date of the amendment. Thus, neither of the daughters of Sh. Sriram Sharma can be treated as a coparcener.

19. Insofar as the oral partition is concerned, the evidence on record is quite tenuous. Except the long silence of the Plaintiff and the other two sisters supporting her, there is nothing on record to show conclusively that the oral partition took place in 1983 within the family of Sh. Sriram Sharma. The only witness outside the family is PW-2, who has deposed that there was no distribution amongst the family members of Sh. Sriram Shsarma. The Defendant has not led any independent evidence to show that the oral partition took place either in the form of documents, payment of cash or any relinquishment deed given by the three sisters. Thus, it cannot be held that

there was an oral partition. In view of this finding, the Plaintiff is entitled to her share in the suit property.

20. However, in view of Section 23 of the Hindu Succession Act, 1956 (*hereinafter*, 'HSA'), is the Plaintiff entitled to Partition? In 1983, when the partition took place between the uncle and the father of the Plaintiff, the suit property lost its character of being ancestral in nature and is to be treated as a self-acquired property. Thus the devolution would be as per Section 8 of the HSA. However, the provisions of Section 23 would still apply in such a case. The suit property is a 'dwelling house' within the meaning of Section 23 of HSA. It is the settled position that as on the date of death of the father, Section 23 applied. Partition cannot be granted, if the suit property has been in the exclusive possession of the family. There is no evidence led to the effect that the said property was ever in occupation by any third party. The Defendants who are living in the suit property are the two unmarried sisters and the brother. If the property is a dwelling house, a female heir has no right to claim partition until the male heir chooses to divide his share. This position has been settled by the Supreme Court in ***Narashimaha Murthy v. Susheelabai & Ors. (1996) 3 SCC 644*** (*hereinafter*, '*Narashimaha Murthy*'). The bar under Section 23 of the HSA applies even in cases where there is only one Class 1 male heir along with female heirs. The Supreme Court held in ***Narashimaha Murthy (supra)*** as under:

"The above consideration would indicate that the legislature intended that during the lifetime of the surviving male heir(s) of the deceased Hindu intestate, he/they should live in the parental dwelling house as partition thereof at the behest of the femal heir would render the male heir homeless/shelterless. Obviously, to prevent such hardship and unjust situations, special

provision was made in Section 23 of impartibility of the dwelling house. Section 44 of the Transfer of Property Act, 1882 and also Section 4(1) of the Partition Act, 1893 appeal to prevent such fragmentation of the ancestral dwelling house. Singular includes plural under Section 13(2) of the General Clauses Act and may be applied to Section 23 as it is not inconsistent with the context or subject. Even without resorting to it or having its aid for interpretation, by applying common sense, equity, justice and good conscience, injustice would be mitigated. After all, as said earlier, the purpose of law is to prevent brooding sense of injustice. It is not the words of the law but the spirit and internal sense of it that makes the law meaningful. The letter of the law is the body but the sense and reason of the law is the soul. Therefore, pragmatic approach would further the ends of justice and relieve the male or female heir from hardship and prevent unfair advantage to each other. It would, therefore, be just and proper for the Court to adopt common sense approach keeping at the back of its mind, justice, equity and good conscience and consider the facts and circumstances of the case on hand. The right of residence to the male member in the dwelling house of the Hindu intestate should be respected and the dwelling house may be kept impartible during the life time of the sole male heir of the Hindu intestate or until he chooses to divide and gives a share to his sister or alienate his share to a stranger or lets it out to Ors., etc. Until then, the right of the female heir or heirs under Section 8 is deferred and kept in abeyance. So instead of adopting grammatical approach to construe Section 23, we are of the considered view that the approach of the Calcutta High Court and its companion Courts is consistent with justice, equity and good conscience and we approve of it. We accordingly hold that Section 23 applies and prohibits partition of dwelling house of the deceased Hindu male or female

intestate, who left surviving sole male heir and female heir/heirs and the right to claim partition by female heir is kept in abeyance and deferred during the life of the male heir or till he partitions or ceases to occupy and enjoy it or lets it out or till at a partition action, equities are worked out.”

Thus, the prayer for Partition cannot be granted in view of Section 23 of the HSA. The suit property being a dwelling house, no partition can be granted at this stage. Since the Plaintiff is a widow, under the proviso to Section 23 of the HSA, she is held entitled to 'right of residence'. Upon the male heir either passing away or choosing to divide, each of the legal heirs of Sh. Sriram Sharma is entitled to 1/8th share in the suit property along with 1/7th of the 1/8th share of the mother of the parties.

21. Appeal is accordingly allowed. The preliminary decree is set aside. The suit is dismissed/disposed of.

No orders as to cost.

PRATHIBA M. SINGH
JUDGE

MAY 23, 2018

Rahul