



\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **FAO(OS) 70/2024 & C.M.Nos.29004-29006/2024****SHRI NEERAJ BHATIA**

..... Appellant

Through: Mr. Praveen Kumar with Mr. Surbhi Sharma, Ms. Vrinda Anand, Ms. Sudha Kumari and Mr. Neeraj Pal, Advocates

versus

SHRI RAVINDRA KUMAR BHATIA & ORS.

..... Respondents

Through: Mr. Rishabh Bansal with Ms. Dakshaa Arora, Ms. Himanshi Malhotra and Ms. Sakshi Pareek, Advocates for R-1 to 4 and 6 to 8. Mr. Alok Kumar Aggarwal with Ms. Anushruti and Ms. S. Raj Pal, Advocates for R-5.

Reserved on: 15th May, 2024Date of Decision: 19th July, 2024

%

CORAM:**HON'BLE THE ACTING CHIEF JUSTICE****HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA****J U D G M E N T****MANMEET PRITAM SINGH ARORA, J:**

1. Present appeal filed under Order XLIII Rule 1 and Section 104 of Code of Civil Procedure, 1908 ('CPC') read with Section 10 of the Delhi High Court Act, 1966, impugns the orders dated 23rd April, 2024 and 30th January, 2024 ('Impugned Orders') passed by the learned Single Judge of this Court in CS (OS) No. 210/2023, whereby, the Interlocutory Application



(IA) bearing no. 17669/2023 filed by Respondent Nos. 1 to 4 and 6 to 8 seeking permission for reconstruction of the property bearing No. A-125, Defence Colony, New Delhi-110024 ('subject property') admeasuring 217 sq. yds. has been allowed, subject to certain conditions as enumerated therein.

Relevant facts forming part of the record:

2. The subject property was admittedly the absolute and self-acquired property of late Sh. Balwant Lal Bhatia. The subject property was allotted by Government of India ('GoI') to late Sh. Balwant Lal Bhatia in pursuance to Union's scheme to rehabilitate the personnel, who served in British Indian Army. Late Sh. Balwant Lal Bhatia had served under the erstwhile British India Army, which later on became the Indian Army and in pursuance to the said scheme, he was allotted the subject property vide registered lease dated 24th August, 1957.

2.1. The subject property comprises a ground floor, first floor and second floor which was constructed in the year 1975-76.

2.2. Respondent Nos. 1, 3 and 6 are admittedly the only Class-I legal heirs of late Sh. Balwant Lal Bhatia as per the Schedule to Section 8 of the Hindu Succession Act, 1956 ('Act of 1956').

2.3. Late Sh. Balwant Lal Bhatia executed a registered Will dated 15th February, 1999 ('said Will') bequeathing separate floors in the subject property to each of three children in the following manner: (i) the ground floor to Respondent No. 3, (ii) first floor to Respondent No. 1 and (iii) second floor to Respondent No. 6. Respondent Nos. 1, 3 and 6 admit to the genuineness and validity of the said Will.

2.4. Upon demise of late Sh. Balwant Lal Bhatia on 07th March, 2004, Respondent Nos. 1, 3 and 6 acted upon the said Will and had the separate



floors mutated in their favour in the records of the Municipal Corporation of Delhi ('MCD') on 17th September, 2004. Respondent Nos. 1, 3 and 6 are in occupation and control of the separate floors of the subject property in accordance with the bequest made in the said Will. Respondent Nos. 1, 3 and 6 have separate electricity and water connections for each floor in their independent names.

2.5. Respondent No. 1 has a son, who is the Appellant in the present appeal and a daughter i.e., Respondent No. 2. Appellant resides with Respondent No. 1 on the first floor of the subject property.

2.6. Respondent No. 3 has two sons i.e., Respondent No. 4 and Respondent No. 5.

2.7. Respondent No. 6 as well has two sons i.e., Respondent No. 7 and Respondent No. 8.

2.8. In the present appeal, Appellant and Respondent No. 5 are the only grandchildren, who are contesting the exclusive inheritance rights of Respondent Nos. 1, 3 and 6.

3. Respondent No. 1, who is 82 years old, Respondent No. 3, who is 84 years old and Respondent No. 6, who is 75 years old felt the necessity to re-develop the subject property in the year 2020, as the super-structure was more than sixty years old. In addition, since the adjoining properties (sharing common walls) had been re-developed by the respective owners; due to excavation undertaken in the adjoining properties, the foundation of the building and walls of the subject property were damaged. Therefore, the Respondent Nos. 1, 3 and 6 were desirous of having new 'super-structure' built which would have the modern amenity of an Elevator, which is an essential facility in view of the advanced age of the said Respondents.



3.1. In furtherance of this proposal for re-construction, Respondent No. 1 requested the Appellant, his wife and his daughter to vacate the first floor of the subject property so as to enable the re-construction.

4. The Appellant aggrieved by the aforesaid request by Respondent No. 1 instituted the underlying suit for partition of the subject property and seeking injunction against the Respondents from unilaterally disturbing the possession of the Appellant from the subject property and/or inter-alia undertaking re-construction of the subject property.

4.1. In the plaint¹, the Appellant alleged that though the subject property was the self-acquired property of late Sh. Balwant Lal Bhatia, however, the subject property was blended by him in the common hotchpotch of the 'Hindu Undivided Family' ('HUF') on 20th August, 1993 by an 'oral declaration' and thus, the subject property was impressed with the joint family property character. It is alleged that late Sh. Balwant Lal Bhatia orally declared himself as the Karta of the HUF with the subject property being the joint family property.

4.2. The Appellant further alleged² that the subject property was 'orally partitioned' on 07th July, 1994 and floor-wise partition was made on the said date and the families of Respondent No. 3 and 1 are residing on the ground floor and first floor respectively in accordance with the said oral partition. The Appellant alleges that second floor was allotted to Respondent No. 6 in this partition, who however let out the said floor and is collecting the rent for the same.

4.3. Therefore, it is on the basis of the alleged 'oral declaration' dated 20th

¹ At paragraph 7 of the plaint.

² At paragraph 8 of the plaint.



August, 1993 and the alleged ‘oral partition’ dated 07th July, 1994, that the Appellant has instituted the underlying suit for partition and injunction on the plea that the subject property is a joint family property. Pertinently, the Appellant admits that there were no documents executed by late Sh. Balwant Lal Bhatia with respect to creation of the alleged HUF and there is no documentary evidence of the existence of the alleged HUF.

4.4. Appellant himself is a Marine Engineer, gainfully employed, and serving as a Chief Engineer in the Merchant Navy. He owns a 3-BHK property in Gurugram, which has been let out and the Appellant receives rental income from the said property.

5. Respondent No. 1 and his wife Mrs. Urvashi Bhatia have filed an application under Rule 22(3) (1) of the Delhi Maintenance and Welfare of the Parents and Senior Citizen Rules (Amendment) Rules, 2016³ against the Appellant and his wife Mrs. Karuna Bhatia seeking eviction of the Appellant and his wife from the first floor of the subject property, on the ground of mental harassment and ill treatment. The competent authority⁴ under the said statute vide order dated 14th May, 2024 has since passed an order of eviction against the Appellant and his family on the finding that the Appellant and his family have ill-treated Respondent No. 1 and his wife.

6. Respondent Nos. 1, 3 and 6 have opposed the reliefs claimed in the underlying suit and stated that the case of the Appellant that there was an alleged ‘oral declaration’ made by late Sh. Balwant Lal Bhatia on 20th August, 1993 is false and similarly, the allegation of ‘oral partition’ dated 07th July, 1994 is also false. Respondent Nos. 1, 3 and 6 have relied upon the

³ The Rules have been framed by Government of NCT under Section 32 of Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

⁴ Deputy Commissioner cum District Magistrate, South-East District, New Delhi.



registered Will dated 15th February, 1999, the mutation certificate dated 17th September, 2004 issued by MCD, property tax returns filed for separate floors, independent electricity and water connections for each floor among other documents evidencing the exercise of ownership rights by Respondent Nos. 1, 3 and 6 qua the separate floors to the exclusion of any grandchild.

7. Respondent Nos. 2, 4 and 7 and 8 are the children of Respondent Nos. 1, 3 and 6 and have supported the stand of their parents to state that the subject property remained the self-acquired property of late Sh. Balwant Lal Bhatia till his demise and have denied existence of any HUF.

8. Respondent No. 5 is the son of the Respondent No. 3 and though initially he took a stand that the subject property remained the self-acquired property of late Sh. Balwant Lal Bhatia until his demise, he subsequently changed his stand and now supports the Appellant's claim in the underlying suit. Pertinently, Respondent No. 5 does not reside in the subject property. He is however, not aggrieved by the directions in the Impugned Order dated 23rd April, 2024 permitting reconstruction of the subject property.

9. In view of the pendency of the underlying suit, Respondent Nos. 1 to 4 and 6 to 8 jointly filed I.A. No. 17669/2023 seeking leave of the Court (i.e., the learned Single Judge) to re-construct and re-develop the subject property and highlighted the urgency for re-development of the subject property. The application emphasises the restricted physical movements of the parties due to their advanced age and the need for a residence to be re-developed which is equipped with modern facilities including an Elevator to enable a dignified and convenient living; keeping in view the fact that Respondent Nos. 1 and 3 are octogenarians and Respondent No. 6 is 75 years old.



9.1. The said Respondent Nos. 1 to 4 and 6 to 8 also filed I.A. No. 14039/2023 under Order VII Rule 11 CPC seeking rejection of the plaint on the ground that the plaint does not disclose a cause of action.

10. Learned Single Judge vide Impugned Order dated 23rd April, 2024 after examining the averments in the plaint and the documents filed alongwith the plaint has returned a finding that there is absolutely nothing on record to establish the existence of a HUF qua the subject property as alleged by the Appellant in the plaint. The learned Single Judge held that Respondent Nos. 1 to 4 and 6 to 8 had made out a prima facie case and accordingly allowed I.A. No. 17669/2023 permitting the re-construction of the subject property on the conditions set out in paragraph 9 of the Impugned Orders dated 23rd April, 2024 and 30th January, 2024. This includes a direction that reconstruction shall not commence at least for a period of three months from the date of passing of the order dated 23rd April, 2024 in order to enable the Appellant to vacate the first floor of the subject property and make alternative arrangements for residence of his family.

10.1 By the same Impugned Order dated 23rd April, 2024, learned Single Judge framed issues and appointed a Local Commissioner for recording of evidence.

10.2 In view of the same, the learned Single Judge disposed of I.A. No. 14039/2023 i.e., the application filed by the Respondent Nos. 1 to 4 and 6 to 8 under Order VII Rule 11 CPC for rejection of the civil suit.

11. The present appeal has, therefore, been filed by the Appellant being aggrieved by the Impugned Orders passed by the learned Single Judge permitting reconstruction of the subject property in terms of I.A. No. 17669/2023.



Submissions of the learned counsel for the parties

12. Learned counsel for the Appellant states that the learned Single Judge has erred in directing the Appellant to vacate the first floor of the subject property as it amounts to passing of a decree of possession against the Appellant and in favour of Respondents.

12.1. He stated that the learned Single Judge has erred in granting relief of re-construction in a civil suit, which has not been prayed for. He states that the suit is for partition of the subject property and the Respondents have not filed any counter-claim seeking reconstruction of the subject property during the pendency of the suit or for a decree of possession against the Appellant herein.

12.2. He stated that on one hand the learned Single Judge disposed of the I.A. No. 14039/2023 filed by Respondents under Order VII Rule 11 CPC and yet on the other hand the Court issued directions for re-construction on the ground that the plea of HUF set up in the plaint is not substantiated by any documentary evidence. He stated that if the learned Single Judge was of the view that the averments made in the plaint fail to disclose a cause of action, it ought to have rejected the plaint. He stated that having not done so the learned Single Judge could not have issued the directions for re-construction of the subject property by the Impugned Order dated 23rd April, 2023.

13. In reply, learned counsel for Respondent No. 5 stated that he has no objection to the directions for re-construction of the subject property issued vide Impugned Orders dated 23rd April, 2024 and 30th January, 2024. He stated that Respondent No. 5 is satisfied with the Impugned Order though Respondent No. 5 otherwise supports the claim of the Appellant/plaintiff in the suit with respect to the nature of property.



14. In reply, learned counsel for Respondent Nos. 1 to 4 and 6 to 8 stated that the competent authority under the Rules framed under Maintenance and Welfare of Parents and Senior Citizens Act, 2007 ('Senior Citizens Act') has passed an eviction order dated 14th May, 2024 against the Appellant and his wife Mrs. Karuna Bhatia on the finding of their ill-treatment and misbehavior towards his elderly parents i.e. Respondent no. 1 and his wife.

14.1. He stated that the subject property was admittedly, the self-acquired property of late Sh. Balwant Lal Bhatia and the plea of alleged HUF is false and not borne out from the record. He stated that the plaint is liable to be rejected for no cause of action.

14.2. He stated that Respondent Nos. 1, 3 and 6 are the only Class-I legal heirs of late Sh. Balwant Lal Bhatia and since the said legal heirs admit the genuineness and validity of the Will, therefore, there is no requirement to seek a probate of the Will. He stated that the Will has been acted upon by the parties in the year, 2004 when the separate floors of the subject property were mutated in the name of Respondent Nos. 1, 3 and 6 in accordance with the bequest in the Will.

14.3. He stated that the Appellant is well placed economically in his professional life and the suit proceedings have been instituted to harass Respondent Nos. 1, 3 and 6.

14.4. He stated that I.A. No. 14039/2023 was filed by Respondent Nos. 1 to 4 and 6 to 8 seeking rejection of the plaint on the aforesaid pleas.

Findings and Analysis

15. We have heard the learned counsel for the parties and perused the record.

16. In this judgment we shall proceed to adjudicate upon the correctness of the Impugned Orders in so far as it firstly, allows I.A. No. 17669/2023



filed by Respondent Nos. 1 to 4 and 6 to 8 seeking permission for reconstruction of the subject property and secondly, disposes of the said Respondents' I.A. No. 14039/2023 filed under Order VII Rule 11 CPC without recording any reasons or opining on merits of the application.

Reconstruction of the subject property as prayed for in I.A. No. 17669/2023

17. The indisputable facts set out in the plaint and record of the statutory bodies evidence the following facts:

17.1. The plot admeasuring 217 sq. yds. (i.e., subject property) was allotted by GoI as a rehabilitation measure to late Sh. Balwant Lal Bhatia in view of his service in the British Indian Army, which later on became the Indian Army. The plot was allotted vide registered lease deed dated 24th August, 1957 and was admittedly⁵ the self-acquired property of late Sh. Balwant Lal Bhatia.

17.2. Late Sh. Balwant Lal Bhatia constructed ground floor, first floor and second floor, which was completed in the year 1975-76. It is the admitted case that first floor and second floor were added subsequently, the ground floor was built initially and late Sh. Balwant Lal Bhatia moved into ground floor of the subject property. The utility bills i.e., electricity meter and water meter were in the name of late Sh. Balwant Lal Bhatia.

17.3. Late Sh. Balwant Lal Bhatia's wife Mrs. Sushila Bhatia died on 7th August, 1993. He has two sons i.e., Respondent No. 1 and Respondent No. 3 and a daughter Respondent No. 6. After the demise of his wife, Respondent Nos. 1, 3 and 6 were the only Class-I legal heirs, as per Act of 1956, of late Sh. Balwant Lal Bhatia.

17.4. Late Sh. Balwant Lal Bhatia executed a duly registered Will dated

⁵ Paras 4 and 7 of the plaint.



15th February, 1999 and as per the Will he bequeathed the subject property amongst Respondent Nos. 1, 3 and 6 in the following manner: (i) ground floor was bequeathed to Respondent No. 3; (ii) first floor was bequeathed to Respondent No. 1; and (iii) second floor was bequeathed to Respondent No. 6. Pertinently in the said Will executed in 1999, the testator has asserted and recorded that he is the sole owner of the subject property and it is his desire to retain the ownership during his lifetime.

17.5. Late Sh. Balwant Lal Bhatia expired on 07th March, 2004. Upon his death his Class-I legal heirs i.e. Respondent Nos. 1, 3 and 6 approached the MCD for mutation of the separate floors of the subject property in their individual names. It is a matter of record that MCD issued a mutation certificate dated 17th September, 2004 recording the separate ownership of Respondent Nos. 1, 3 and 6 qua the distinct floors in the subject property. Accordingly, the property tax for each separate floor has since been paid by Respondent Nos. 1, 3 and 6 respectively as is evidenced from the record. The Respondent Nos. 1, 3 and 6 are, thus, the recorded owners of the subject property w.e.f. 17th September, 2004 in municipal records.

17.6. In furtherance of the said separate ownership of Respondent Nos. 1, 3 and 6 the electricity meters and water meters as well for each floor is separate and stands in the name of said Respondents respectively.

17.7. The said documents, therefore, clearly evidences that after the death of late Sh. Balwant Lal Bhatia, Respondent Nos. 1, 3 and 6 have been openly occupying and exercising control over the separate floors of the subject property since the year 2004 as its owners in accordance with the registered Will dated 15th February, 1999. Also, since Respondent Nos. 1, 3 and 6 are the only Class-I legal heirs of late Sh. Balwant Lal Bhatia, even



otherwise they alone are entitled to inherit the subject property to the exclusion of any other person.

17.8. The Appellant has denied the public documents referred to above at paragraphs 17.4 and 17.5. However, the said denial is *ex-facie* false as the said documents pertain to utilities (i.e., water, electricity and house tax), which are being consumed by the residents of the subject property including the Appellant, who is residing on the first floor. The Appellant has not placed on record any contra documents pertaining to house tax payments, electricity and water bills and, therefore, the denial of the said documents is false, without any basis and intended to interfere in the administration of justice.

17.9. We are, therefore, inclined to reject the bald denial of the Appellant with respect to the documents pertaining to utilities and property tax and proceed to rely upon the public documents filed by Respondent No. 1 to 4 and 6 to 8 as per Section 114 (f) and (g) of the Indian Evidence Act, 1872; especially since these documents form part of the records of the public authorities.

17.10. The aforementioned facts and documents, therefore, sufficiently evidences the exercise of exclusive ownership rights by Respondent Nos. 1, 3 and 6 qua separate floors in the subject property since 2004 (i.e., after the death of late Sh. Balwant Lal Bhatia) openly, continuously and uninterruptedly until March, 2023 (i.e., for 19 years), before the underlying suit was filed claiming rights adverse to the said Respondents.

18. In addition, the registered Will is a public document as per Section 74(2) of the Evidence Act, 1872, and the fact of its existence can be verified by the Appellant under Section 57 of the Registration Act, 1908 by



obtaining a certified copy from the office of the registrar (***Re: Appaiyasa vs. Andimuthu alias Thangapandi***⁶). The Appellant has not taken the aforesaid steps for verifying the Will with the office of the sub-Registrar and, therefore, the denial of the existence of the Will is without any basis. The said registered Will is a public document, its genuineness is admitted by all the Class-I legal heirs of late Sh. Balwant Lal Bhatia, no probate is required of the said Will for enforcing the same in view of the said admission of the Class-I legal heirs in State of Delhi and, therefore, the contents of the said Will can be read by this Court for examining the plausibility of the rival pleas of the parties.

19. The reliance placed by the Appellant on the judgment of ***Dhani Ram (Died) Through Lrs. and Others v. Shiv Singh***⁷ is not attracted in the facts of this case, as in that case Mr. Shiv Singh i.e., the legal heir, who was otherwise entitled to succeed to the property therein in case of intestacy as per Act of 1956, had been excluded by the Will of the testatrix and Mr. Shiv Singh was disputing the genuineness of the Will stated to have been executed in favour of Mr. Dhani Ram. The said Mr. Dhani Ram was not entitled to succeed to the estate of the testatrix under the law of intestacy. It was in these facts, the Supreme Court held that mere registration of the Will of the testatrix would not sanctify the document by attaching to it an irrebuttable presumption of genuineness.

20. However, in the case in hand, the Appellant has no *locus standi* to dispute the genuineness of the Will as he is not in the natural line of succession of late Sh. Balwant Lal Bhatia as per intestate succession.

⁶ 2023 SCC OnLine SC 1183 para 30.

⁷ 2023 SCC OnLine SC 1263.



(*Re:Arjun Som Dutt v. Madhvi Bery*⁸).

20.1. The presumption of ownership of the subject property is, therefore, *prima facie* in favour of Respondent Nos. 1, 3 and 6 for the following reasons: first, under Section 8 of the Act of 1956, since they are the only class I legal heirs; second, the affirmative acts of Respondent Nos. 1, 3 and 6 in exercising the proprietary rights since 2004 till March, 2023 wherein they have openly, continuously and uninterruptedly held themselves to be the owners of the subject property; and third, the registered Will of late Sh. Balwant Lal Bhatia, which records even in 1999 that the subject property is his self-acquired property and bequeaths the property exclusively to Respondent Nos. 1, 3 and 6.

20.2. Appellant, on the other hand, has sought to challenge the absolute ownership of Respondent Nos. 1, 3 and 6 on the basis of the allegation that late Sh. Balwant Lal Bhatia made an 'oral declaration' on 20th August, 1993 by 'blending' the subject property in the 'common hotchpotch' of a 'HUF' and impressed the same with 'joint family character'. It is further alleged that this oral declaration was followed by an 'oral partition' on 07th July, 1994, whereby separate floors were allotted to Respondent Nos. 1, 3 and 6 for the benefit of their family branch. The Appellant admits that there is no document or record whatsoever with regards to the existence of the alleged HUF or the subject property being declared as a 'joint family property' from 1993 till 2023 (i.e., 30 years) in any statutory records be it income tax department or any public authority. The Appellant has, therefore, failed to make out a *prima facie* case of ownership in his favour.

21. In the absence of any *prima facie* proof of the existence of the HUF

⁸2014 SCC OnLine Del 1365 para 15.



and/or blending of the subject property in the common hotchpotch, the order of the learned Single Judge granting leave to Respondent Nos. 1, 3 and 6, who are the Class I legal heirs as well as recorded owners of the property to re-construct the subject property is absolutely just and legal, and requires no interference.

22. The Respondent Nos. 1 and 3 are octogenarians and Respondent No. 6 is 75 years old. The said Respondents have set out cogent reasons for the imminent need for seeking to re-construct the building after demolition, which includes the reason of availing modern amenities including Elevator, which enhances the quality of living for old and aged persons. The building is admittedly more than sixty years old and in a dilapidated condition, therefore, the need of Respondents to re-construct a new building is reasonable. The balance of convenience is, therefore, in favour of the Applicant-Respondents. In view of the advanced age of Applicant-Respondents denial of permission for re-construction would lead to irreparable injury.

23. The trinity test of *prima facie* case, irreparable injury and balance of convenience are all satisfied in favour of Respondent Nos. 1, 3 and 6 and, therefore, in our opinion, learned Single Judge has rightly allowed the relief sought in I.A No. 17669/2023.

24. The contention of the Appellant that no direction of vacating the first floor of the subject property, could have been issued by the learned Single Judge on the basis of I.A. No. 17669/2023 as the Respondents have not filed any counter-claim for seeking reconstruction or prayed for a decree of possession, is without any basis. A coordinate Bench of this Court in ***Liberty***



*Sales Services v. Jakki Mull & Sons*⁹ examined this issue and held that an application by the defendant for obtaining an injunction against the plaintiff is maintainable without filing a counter-claim. The relevant portion of the judgement at pages 34 to 36 reads as under:

“In any event, there is sufficient legal authority that in certain exceptional circumstance, a defendant can obtain an injunction against a plaintiff. This principle sometimes is applied in our country to interim injunctions i.e. while dismissing the temporary injunction applications of a plaintiff, temporary injunctions have been granted in favour of the defendant against the plaintiff. But the real basis of the principle in England appears to be that it is applied to suits, i.e. while dismissing injunction suits, a decree of injunction is passed against plaintiff and in favour of defendants, in certain situations.

In Suganda Bai v. Sulu Bai (AIR 1975 Karn. 137) which no doubt related to Order 39 proceedings, G.K. Govinda Bhat CJ quoted Collisions v. Warrens (1901) 1 Ch. 912. There Buckley J. after referring to a number of decisions of the English Courts, quoted Lopes LJ in Carton v. Fey (1894(2) Ch. 541 (CA) (at 545) as follows:

“The question is this whether the defendant can move an injunction against the plaintiff without filing a counter claim or issuing a writ in a cross action. In my opinion, he can in some cases, but only in cases where the defendants claim to relief arises out of the plaintiff's cause of action, or is incidental to it.”

Buckley J, also referred to the view of Davey LJ in Carter v. Fey to the following effect

“In my opinion, it must be relating to or arising out of the relief sought in the action which is before the Court, and that any other injunction cannot be properly be granted in the action.”

This case was followed by the Calcutta High Court in Ashis Ranjan Das v. Rajendra Nath Mullick (AIR 1982 Cal. 529) quoting Lindley L.J. in Carter v. Fey:

“If the defendants application for an injunction were in any way connected with or incidental to the object and purpose of the plaintiff's action, he would have good ground for his contention.”

It will be noticed therefore that a defendant can move for an injunction against the plaintiff without filing a counter-claim or suit or cross-action

⁹ 1997 (41) DRJ 26 at pages 34 and 35.



provided such a claim to relief arises out of the plaintiff's cause of action or is incidental to it.

.....

.....

Following the aforesaid ruling, we hold that the relief claimed by the defendants in their IA against the plaintiff arises out of the same contract upon which appellant had filed the suit and the relief is also incidental to the refusal of the plaintiff's injunction. The learned Judge was right in directing plaintiff to remove its stock, furniture and ornamental items. Point 3 is held against the appellant."

(Emphasis supplied)

24.1. In the present case as well, since the Appellant had approached this Court seeking an injunction for restraining Respondent Nos. 1, 3 and 6 from undertaking the re-construction and disturbing his possession, and the learned Single Judge having concluded that the Appellant had no *prima facie* case the Court was well within its jurisdiction to direct the Appellant to vacate the subject property to enable reconstruction.

25. Thus, the appeal insofar as it seeks to challenge the directions in Impugned Orders dated 23rd April, 2024 and 30th January, 2024 passed in I.A. No. 17669/2023 on the above-mentioned grounds, is without any merits and the challenge to the said orders is hereby dismissed.

Disposal of I.A. No. 14039/2023 in the Impugned Order dated 23rd April, 2024

26. We shall now proceed to examine the correctness of disposal of I. A. No. 10439/2023 by the learned Single Judge in exercise of our powers under Order XLI Rule 33 CPC, which is applicable to the present appeal in view of Order XLIII Rule 2 CPC.

27. The Respondent Nos. 1 to 4 and 6 to 8 had filed I.A. No. 14039/2023 seeking rejection of the plaint under Order VII Rule 11 CPC on the ground that the plaint does not disclose a cause of action.

Powers of the Appellate Court

28. The learned Single Judge vide Impugned Order dated 23rd April, 2024



has simplicitor disposed of the said application without deliberating and/or adjudicating on the merits of the said application. Though, the Respondents have not filed an appeal against the Impugned Order dated 23rd April, 2024, disposing of the application, we are of the considered opinion that the application of the Respondents deserved to be allowed and the plaint ought to have been rejected for failure to disclose any cause of action.

29. In this regard, Order XLI Rule 33 of CPC gives very wide power to the Appellate Court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed by the learned Single Judge or as the nature of the case may require notwithstanding the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections. The powers of the Appellate Court to grant the relief which the Trial Court could have granted, are also prescribed in Section 107 of the CPC, which provides that the Appellate Court shall have the same powers as are conferred on the original Court. (*Re: State of Punjab v. Bakshish Singh*¹⁰).

Essentials of doctrine of blending not fulfilled

30. We have examined the averments made by the Appellant in the plaint wherein it is urged that late Sh. Balwant Lal Bhatia by an 'oral declaration' on 20th August, 1993 'blended' the subject property (i.e., his self-acquired property) in the 'common hotchpotch' of the 'HUF' and impressed it with the character of a joint family property. It is further stated that late Sh. Balwant Lal Bhatia announced that he will be the Karta of the said HUF. It is a matter of record that there is no subsequent physical record of the alleged oral declaration or of the existence of any such alleged HUF or joint

¹⁰ (1998) 8 SCC 222 at paras 7, 8, 9 and 10.



family property, on and from 20th August, 1993 till date.

30.1. The Appellant as the plaintiff, alongwith the plaint, has only relied upon copy of the lease deed dated 24th August, 1957 executed by GoI in favour of late Sh. Balwant Lal Bhatia. The said lease deed has been relied upon only to prove the absolute title of late Sh. Balwant Lal Bhatia in the subject property.

30.2. The entire cause of action of the Appellant/plaintiff is, therefore, only based on the alleged 'oral declaration' made on 20th August, 1993 and as a corollary an alleged 'oral partition' dated 07th July, 1994 with respect to the division of separate floors of the subject property to the three separate family branches of his children i.e., Respondent No. 1 (son), Respondent No. 3 (son) and Respondent No. 6 (daughter).

31. For the purposes of deciding the application I.A No. 14039/2023 filed under Order VII Rule 11 CPC, we are assuming all of the factual allegations in the plaint as true and are proceeding to determine whether the plaint raises a plausible claim in law, which would warrant framing of issues.

32. In the facts of this case, the crucial date mentioned in the plaint for creation of HUF is 20th August, 1993. Admittedly, no HUF existed prior to 20th August, 1993 and no coparcenary property existed prior to 20th August, 1993. The Appellant has alleged in the plaint that the subject property was 'blended' into the 'common hotchpotch' on this date by late Sh. Balwant Lal Bhatia by an oral declaration.

33. In law, for the 'doctrine of blending' to apply there must necessarily pre-exist a 'coparcenary property' as on 20th August, 1993. In the absence of the existence of a coparcenary property, late Sh. Balwant Lal Bhatia could not have blended his self-acquired subject property into a 'common



hotchpotch' on 20th August, 1993 as alleged in the plaint.

33.1. To appreciate this statement of law, it would be appropriate to first understand the genesis of formation of a coparcenary under Hindu Law.

33.2. First and foremost, it needs to be noted that a coparcenary is purely a creature of Hindu Law; and it cannot be created by an agreement of parties except in the cases of reunion (***Re: Bhagwan Dayal v. Reoti Devi***¹¹). Further elaborating on the said position of law, the Supreme Court in the judgment ***Vineeta Sharma v. Rakesh Sharma***¹² held as under:

“In re: Coparcenary and joint Hindu family

22. A joint Hindu family is a larger body than a Hindu coparcenary. A joint Hindu family consists of all persons lineally descended from a common ancestor and include their wives and unmarried daughters. A joint Hindu family is one in worship and holds joint assets. After separation of assets, the family ceases to be joint. Mere severance in food and worship is not treated as a separation, as observed in Raghunadha Anunga Bhima Deo Kesari v. Brozo Kishoro Patta Deo [Raghunadha Anunga Bhima Deo Kesari v. Brozo Kishoro Patta Deo, 1876 SCC OnLine PC 6 : (1875-76) 3 IA 154 : ILR (1876-82) 1 Mad 69] .

23. Hindu coparcenary is a much narrower body. It consists of propositus and three lineal descendants. Before 2005, it included only those persons like sons, grandsons and great-grandsons who are the holders of joint property. For example, in case A is holding the property, B is his son, C is his grandson, D is great-grandson, and E is a great-great-grandson. The coparcenary will be formed up to D i.e. great-grandsons, and only on the death of A, holder of the property, the right of E would ripen in coparcenary as coparcenary is confined to three lineal descendants. Since grandsons and great-grandsons become coparceners by birth, they acquired an interest in the property.

24. Coparcenary property is the one which is inherited by a Hindu from his father, grandfather, or great-grandfather. Property inherited from others is held in his rights and cannot be treated as forming part of the coparcenary. The property in coparcenary is held as joint owners.

25. Coparcener heirs get right by birth. Another method to be a coparcener is by way of adoption. As earlier, a woman could not be a coparcener, but she could still be a joint family member. By substituted Section 6 with effect from 9-9-2005 daughters are recognised as coparceners in their rights, by birth in the family like a son. Coparcenary is the creation of law. Only a coparcener has a right to

¹¹ 1961 SCC OnLine SC 52 para 47.

¹² (2020) 9 SCC 1.



demand partition. Test is if a person can demand a partition, he is a coparcener not otherwise. Great-great-grandson cannot demand a partition as he is not a coparcener. In a case out of three male descendants, one or other has died, the last holder, even a fifth descendant, can claim partition. In case they are alive, he is excluded.

In re: Formation of coparcenary

26. *For interpreting the provision of Section 6, it is necessary to ponder how coparcenary is formed. The basic concept of coparcenary is based upon common ownership by coparceners. When it remains undivided, the share of the coparcener is not certain. Nobody can claim with precision the extent of his right in the undivided property. Coparcener cannot claim any precise share as the interest in coparcenary is fluctuating. It increases and diminishes by death and birth in the family.*

.....

43. In Rohit Chauhan v. Surinder Singh [Rohit Chauhan v. Surinder Singh, (2013) 9 SCC 419:(2013) 4 SCC (Civ) 377] **,the concept of coparcenary of sharing equally with others and no definite share, was discussed thus:** (SCC pp. 423-24, para 11)

“11. We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the joint Hindu family and before the commencement of the Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static.”(emphasis supplied)

(Emphasis Supplied)

33.3. Prior to the enactment of Act of 1956, a coparcenary was created in law if a male Hindu inherits property from his father, such a property becomes ancestral in his hand as regards his son/sons. In such a case, the son/sons become a coparcener with the father as regards the property so inherited, and the coparcenary consists of the father and the son/sons. It is not only the son/sons, but also the grandson(s) and great grandson(s), who



acquired an interest by birth in coparcenary property¹³. This inherited property is also referred to as the ancestral property in the hands of the successor.

33.4. *Mulla* on Hindu Law in its 24th Edition at Page 321 at para 212 states that a coparcenary cannot be created by the act of parties and has illustrated the mode of creation of coparcenary by law and the relevant text of para 212 reads as under:

“Formation of coparcenary

(1). *The conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within four degrees counting from, and inclusive of, such ancestor (or three degrees exclusive of the ancestor). No coparcenary can commence without a common male ancestor, though after his death, it may consist of collaterals, such as brothers, uncles, nephews, cousins, etc.*

(2). *A coparcenary is purely a creature of law; it cannot be created by act of parties, save in so far that by adoption a stranger may be introduced as a member thereof.*

.....
Genesis of Coparcenary - *A coparcenary is created in the following manner: A Hindu male A, who has inherited no property at all from his father, grandfather, or great- grandfather, acquires property by his own exertions. A has a son B, B does not take any vested interest in the self-acquired property of A during A’s lifetime, but on A’s death, he inherits the self-acquired property of A. If B has a son C, C takes a vested interest in the property by reason of his birth, and the property inherited by B from his father A, becomes ancestral property in his (B’s) hands, and B and C are coparceners as regards the property. If B and C continue joint, and a son D is born to C, he enters the coparcenary by the mere fact of his birth. Moreover, if a son E is subsequently born to D, he too becomes a coparcener.”*

(Emphasis Supplied)

33.5. However, post the enactment of Section 8 of the Act of 1956 (i.e., w.e.f. 17th June 1956), the aforesaid position of law changed as regards creation of coparcenary by inheritance of property. After 1956, the self-

¹³*Mulla* on Hindu Law in its 24th Edition at Page 320 para 211.



acquired property of the father inherited by a son/sons does not result in formation of a coparcenary and the property inherited by the son/sons retains the character of a separate property in the hands of the son/sons; and consequentially, the grandson(s) and great grandson(s) do not acquire any right by birth in the inherited property (***Re. C.W.T vs. Chander Sen***¹⁴ and ***Yudhishter v. Ashok Kumar***¹⁵). Thus, post 1956, the self-acquired property of father inherited by a son is his separate property and does not acquire the character of coparcenary. The relevant paragraphs of the judgment of the Supreme Court in ***Yudhishter*** (Supra) reads as under:-

*“9.We are of the opinion that no much support can be sought for by the appellant from the said decision. **Here in the instant case, the question is whether the respondent who undoubtedly was governed by the Mitakshara school of law, had acquired a right to ancestral property by his birth. But this question has to be judged in the light of the Hindu Succession Act, 1956.** Reliance was also placed on State Bank of India v. Ghamandi Ram [(1969) 2 SCC 33 : AIR 1969 SC 1330 : (1969) 3 SCR 681] . At p. 686 of the Report (SCC pp. 36-37, para 5), this Court observed that according to the Mitakshara school of Hindu law all the property of a Hindu joint family was held in collective ownership by all the coparceners in a quasi-corporate capacity. The court approved the observations of Mr Justice BhashyamAyyangar in SundarsanamMaistri v. NarasimhuluMaistri [(1901-2) ILR 25 Mad 149, 154 : 11 MLJ 353] . But the question in the instant case is the position of the respondent after coming into operation of the Hindu Succession Act, 1956. Shri Banerji drew our attention to Mulla's Hindu Law 15th, Edn. at p. 924 where the learned commentator had discussed effect in respect of the devolution of interest in Mitakshara coparcenary property of the coming into operation of the Hindu Succession Act, 1956.*

*10. This question has been considered by this Court in **CWT v. Chander Sen [(1986) 3 SCC 567: 1986 SCC (Tax) 641]** 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 separated property or not, his son should have a share in*

¹⁴ (1986) 3 SCC 567 paras 15 to 22.

¹⁵ (1987) 1 SCC 204para 10.



*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 karta of his own undivided family but takes it in his individual capacity.** At p. 577 to 578 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., pp. 924-26 as well as Mayne's Hindu Law, 12th Edn. pp. 918-19. Shri Banerji relied on the said observations of Mayne on Hindu Law, 12th Edn., at p. 918-19. **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 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., p. 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 supplied)

33.6. The devolution of interest of a coparcener in a coparcenary property is governed by Section 6 of the Act of 1956. With the amendment of the Act of 1956 in 2005, the daughter(s) of a coparcener are included as coparceners along with his son(s) and have same rights in the coparcenary property. The creation of coparcenary is, thus, codified in law and the identity of coparceners is also determined by law.

33.7. There is no provision of law by which Hindus can create a coparcenary by an agreement. The coparcenary as discussed above is thus, created only by operation of law upon inheritance of ancestral property, prior to 1956.

34. In the present case, admittedly, there existed no coparcenary between late Sh. Balwant Lal Bhatia, his children and his grandchildren as he had not inherited any coparcenary property from his father, grandfather or great



grandfather and thus, there existed no common hotchpotch. Admittedly, late Sh. Balwant Lal Bhatia did not own any share/interest in any coparcenary property.

35. In Hindu law, the basis of ‘doctrine of blending’ of self-acquired property with the coparcenary property by throwing the same into the ‘common hotchpotch’ or the ‘common stock’ has a mandatory pre-requisite that the owner of the self-acquired property is himself a coparcener, who has an interest in the coparcenary property and desires to blend his self-acquired property with such a coparcenary property. This ‘doctrine of blending’ will not be applicable in the absence of the separate existence of a coparcenary and a coparcenary property. In regard to essentials of ‘doctrine of blending’, we may refer to judgment of the Supreme Court in *Mallesappa Bandeppa Desai v. Desai Mallappa*¹⁶ wherein para 11 reads as under:

*“11. The question which falls for our decision is: Does this principle apply in regard to a property held by a Hindu female as a limited owner? In our opinion, it is difficult to answer this question in favour of the appellants. **The rule of blending postulates that a coparcener who is interested in the coparcenary property and who owns separate property of his own may by deliberate and intentional conduct treat his separate property as forming part of the coparcenary property.** If it appears that property which is separately acquired has been deliberately and voluntarily thrown by the owner into the joint stock with the clear intention of abandoning his claim on the said property and with the object of assimilating it to the joint family property, then the said property becomes a part of the joint family estate; in other words, the separate property of a coparcener loses its separate character by reason of the owner's conduct and get thrown into the common stock of which it becomes a part. **This doctrine, therefore, inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property.** There can be no doubt that the conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner of the separate property to convert his property into an item of joint family property. A mere intention to benefit the members of the family by allowing them the use of the income coming*

¹⁶1961 SCC OnLine SC 270



from the said property may not necessarily be enough to justify an inference of blending; **but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener.** How this doctrine can be applied to the case of a Hindu female who has acquired immovable property from her father as a limited owner it is difficult to understand. **Such a Hindu female is not a coparcener and as such has no interest in coparcenary property.** She holds the property as a limited owner, and on her death the property has to devolve on the next reversioner. Under Hindu law it is open to a limited owner like a Hindu female succeeding to her mother's estate as in Madras, or a Hindu widow succeeding to her husband's estate, to efface herself and accelerate the reversion by surrender; but, as is well known, surrender has to be effected according to the rules recognised in that behalf. A Hindu female owning a limited estate cannot circumvent the rules of surrender and allow the members of her husband's family to treat her limited estate as part of the joint property belonging to the said family. On first principles such a result would be inconsistent with the basic notion of blending and the basic character of a limited owner's title to the property held by her. This aspect of the matter has apparently not been argued before the courts below and has not been considered by them. **Thus, if the doctrine of blending cannot be invoked in regard to the property held by Channamma, the appellants' claim in respect of the said property can and must be rejected on this preliminary ground alone.**"

(Emphasis supplied)

35.1. The Supreme Court relied upon the aforesaid judgment of **Mallesappa** (Supra) in **Goli Eswariah v. CGT**¹⁷ and reiterated that the pre-existence of a coparcenary is absolutely necessary before a coparcener can throw into the common stock, his self-acquired properties. The relevant para 5 of the aforesaid judgment reads as under:

"5. To pronounce on the question of law presented for our decision, we must first examine what is the true scope of the doctrine of throwing into the "common stock" or "common hotchpot". It must be remembered that a Hindu family is not a creature of a contract. As observed by this Court in MallesappaBendeppa Desai v. Desai Mallappa [(1961) 3 SCR 779] that the doctrine of throwing into common stock inevitably postulates that the owner of a separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property. The existence of a coparcenary is absolutely necessary before a coparcener can throw into the common stock his self-

¹⁷ (1970) 2 SCC 390



acquired properties. *The separate property of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by him into the common stock with the intention of abandoning his separate claim therein. The separate property of a Hindu ceases to be a separate property and acquires the characteristic of a joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as separate property. The act by which the coparcener throws his separate property to the common stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition he renounces his individual right in that property and treats it as a property of the family. No longer he declares his intention to treat his self acquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing to the common stock is a doctrine peculiar to the Mitakshra School of Hindu law. When a coparcener throws his separate property into the common stock, he makes no gift under Chapter VII of the Transfer of Property Act. In such a case there is no donor or donee. Further no question of acceptance of the property thrown into the common stock arises.”*

(Emphasis supplied)

35.2. The fundamental basis of the ‘doctrine of blending’ is thus, the pre-existence of coparcenary and coparcenary property as well as the existence of separate property of a coparcener. These are in fact pre-conditions and had been explained in *Mulla on Hindu law* in its 24th Edition at Para 225 at Page 340 which reads as under:

“Precondition for blending.-The existence of coparcenary property is essential for blending of a coparcener’s separate property with the coparcenary property, since, if there is no coparcenary property, there can obviously be no blending or throwing of self-acquired property into the common stock.

The doctrine of blending of properties cannot be stretched, so as to include properties inherited by a male coparcener from his relations on the maternal side. Such properties would be his separate properties and cannot therefore form a part of the corpus of the coparcenary property, unless, by evidence, it is established that such separate property has been thrown into the common stock and has been treated as joint property.

Property inherited from a collateral cannot be termed as ancestral property. If, however, the person who inherits such property throws it into the hotch potch, and it cannot be separated, the doctrine of blending will apply and such property will thereafter be treated as joint family



property.”

(Emphasis Supplied)

35.3. The aforesaid judgments of Supreme Court were duly considered by a coordinate Bench of this Court in ***Dr. Kewal Krishan Mayor v. Kailash Chand Mayor & Ors.***^{18and19} and it as well concluded that the pre-requisite of the doctrine of blending was the pre-existence of a coparcenary property. In the facts of that case late Mr. Bal Mukand (Mr. BM) was the common ancestor of the parties to the suit. In fact, Mr. BM had executed a letter dated 04th March, 1963 and on that day threw his two immovable properties into the common hotchpotch of his HUF comprising himself and his two sons, though admittedly there were no other properties of the HUF existing at the time. The coordinate Bench held that a HUF is not a creation of a contract and it could not have been created by Mr. BM by virtue of the declaration dated 04th March, 1963. The Court held that since, there, was no HUF of Mr. BM prior to 1963, it cannot come into existence by virtue of the declaration dated 04th March, 1963. The Court held that since there was no coparcenary or coparcenary property in existence as on 04th March, 1963, Mr. BM could not have blended his separate immovable properties in the common hotchpotch. The Court concluded that the two properties did not become coparcenary properties and they continued to remain self-acquired properties of Mr. BM. The relevant paras of the judgment read as under:

“36. As regards the other point about the deceased having thrown his two properties in common pool of the alleged joint Hindu family, learned Single Judge proceeded on the assumption that the law does not lay down that a separate property could not be impressed with the character of joint Hindu family in the absence of the existence of joint family or co-parcenary property. He further proceeded on the assumption that the existence of joint

¹⁸ 2001 SCC OnLine Del 936.

¹⁹ The division Bench reversed the finding of the learned Single Judge reported in ILR (1977) 1 Delhi 97.



family property is not necessary before a member of the family throws his self-acquired property in the joint stock. It is this erroneous assumption of law by the learned Single Judge, which in our view led him to incorrect conclusions.

37. Under the Hindu Law property may be divided under the two classes, namely, (a) Joint Family property; and (b) separate property. Joint family property may be further sub-divided according to the source from which it comes into, namely, (a) ancestral property; (b) separate property of coparceners thrown into the common coparcenary stock; and (c) property jointly acquired by members of a joint family with the aid of ancestral property. It is not the case of the plaintiff that the two properties were ancestral properties. His case is that these two properties (8/10 and 8/11 W.E.A. Karol Bagh, New Delhi) were separate properties of Lala Bal Mukand and were thrown by him into the common coparcenary stock by declaration (Ex. PW 1/3) made by him. This is the case set up by him in the plaint and for that it is necessary for us to deal with the question that under what circumstances property, which originally is separate and self-acquired property of a member of a joint Hindu family may become joint family property.

38. The law is now well-settled that such a separate or self-acquired property by operation of the doctrine of blending becomes joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established. The basis of the doctrine is the existence of coparcenary property as well as existence of separate property of a coparcener.

.....

.....

43. Thus the prerequisite of the doctrine on blending being existence of coparcenary or coparcener property as well as the existence of separate property, in case of any one of the basic requirement lacking there would be no question of applicability of the doctrine of blending. It was the case set up by the plaintiff and according to the plaintiff's deposition, who appeared as PW 2, only two properties, 8/10 and 8/11, Western Extension Area were thrown into common hotch-potch of the joint Hindu family. Rest of the properties, owned by Bal Mukand were kept by him in his personal name. He deposed that there was no other property held or owned by the joint family. He further deposed that before 1963 the two properties belonged exclusively to Lala Bal Mukand and at the time when these were put in common hotch-potch there was no other property of HUF existing. It has not been the case of plaintiff that there was any HUF in existence prior to 1963. It is also stated by him that the HUF headed by Lala Bal Mukand was formed in the year 1963. To be precise he stated that the return of income from HUF was not filed as the income from the HUF was not taxable. The HUF headed by Lala Bal Mukand was formed in the year 1963. Before 1963 the two properties belonged to Lala Bal Mukand. At the



relevant time the said two properties were put in the common hotch-potch, there were not other properties of HUF existing at that time.

.....

45. Admittedly Brahm Dutt had been separated. There is no presumption that when one member separates from the others that the later remain united; whether the latter remain united or not must be decided on the facts of each case. Admittedly the plaintiff did his Medicine in 1945 and started his separate practice. He had his separate mess. There was no sharing of income. In case that was the position can it be said that mere act of Lala Bal Mukand having executed document Ex. PW 1/3 will have the effect of constituting joint Hindu family in the year 1963. It is the case of plaintiff that HUF headed by Lala Bal Mukand was formed in 1963. **A Hindu family is not a creation of a contract. It cannot be so created.** Circumstances on the record would suggest otherwise.

46. It has come in the evidence of PW 1, Income Tax Practitioner that it was his suggestion to Lala Bal Mukand to make a declaration Ex. PW 1/3 to avoid tax liability. The plaintiff has not led any other evidence about the intention of Bal Mukand apart from the fact that admittedly there was no other joint family property. Whether a property was voluntarily thrown into the common stock with the intention of abandoning all separate claims had to be proved like a fact. There should be clear intention to waive separate rights. Each case has to be judged having regard to the facts and the surrounding circumstances. Whether Bal Mukand intended to abandon his rights and made an unequivocal declaration also has to be inferred from the facts and circumstances of the case. Document Ex. PW 1/3 is dated 4.3.1963 which is the basis of the plaintiff's claim to the two properties. **The plaintiff has not refuted the correctness and genuineness of document Ex. D-3, which is the Will of deceased dated 4.5.1963. In this Will the deceased within two months of declaration Ex. PW 1/3 dated 4.3.1963 described the two properties, namely, 8/10 and 8/11, Western Extension Area, Karol Bagh to be his separate and individual properties.** The intention of the deceased as per the version of PW 1 was clear that he was making declaration Ex. PW 1/3, as was suggested by PW 1, with a view to gain an advantage from the tax net. **There was no joint Hindu family of the deceased with plaintiff and defendant No. 1 prior to 1963, nor it came into existence during the period document Ex. PW 1/3 was executed.** In these circumstances document Ex. PW 1/3 cannot be said to have the effect of abandoning his individual rights in the property or creating any rights in favour of the plaintiff. **This theory of having blended his separate property and characterised it as a joint Hindu family property thus must fall to the ground simply on the ground that as on that date there was no coparcenery or joint Hindu family property with which the two properties could have been blended.** For this reason alone the findings of the learned Single Judge on issues 1 to 4 deserve to be set aside. It must be held that Lala Bal Mukand did not constitute joint Hindu family with the plaintiff and defendant No. 1 and that the properties 8/10 and 8/11, Western Extension



Area, Karol Bagh continue to be individual properties and never became joint Hindu family properties. No other point was urged.”

(Emphasis supplied)

36. In the facts of this case under appeal, as well there was admittedly no coparcenary and coparcenary property in existence as on 20th August, 1993 of late Sh. Balwant Lal Bhatia. The subject property was admittedly the self-acquired property of late Sh. Balwant Lal Bhatia. In these admitted facts and in view of the law settled by the Supreme Court in **Mallesappa** (Supra) and **Golly Eswariah** (Supra) as well as this Court in **Kewal Krishan Mayor** (Supra) as noted above, the alleged oral declaration dated 20th August, 1993 assuming it is true would have no effect in law and the same does not efface the exclusive ownership rights of late Sh. Balwant Lal Bhatia; and he would continue to remain the exclusive owner of the subject property. The alleged oral declaration dated 20th August, 1993 in the facts of this case could not change the character of the property to a joint family property. Thus, on a meaningful reading of the averments made in the plaint, the same fails to disclose any cause of action.

36.1. There is no basis in law for the Appellant/plaintiff to contend that a Hindu Male can by a mere declaration whether written or oral change the character of his self-acquired property into a joint family property even though there does not exist a coparcenary and a coparcenary property, as on the date of this declaration. If this contention of the Appellant/plaintiff is accepted, it would nullify the settled legal position that coparcenary is a creature of law and cannot be created by the action of parties and as noted above the genesis of creation of coparcenary is inheritance of a property from the common male ancestor. Therefore, late Sh. Balwant Lal Bhatia by the alleged oral declaration could not have converted the character of his



self-acquired property into a coparcenary property.

37. Further, the Appellant has alleged at para 8 of the plaint that the subject property was impressed with the character of joint family property on 20th August, 1993 with late Sh. Balwant Lal Bhatia acting as the Karta of the newly formed HUF. The Appellant has further alleged that on 7th July, 1994 the subject property was partitioned by late Sh. Balwant Lal Bhatia wherein ground floor came to the share of family branch of Respondent No. 3 (son), first floor came to the share of the family branch of Respondent No. 1(son) and second floor came to the share of family branch of Respondent No. 6 (daughter). If the aforesaid facts are assumed to be true then as per the stand of the Appellant, Respondent No. 6 i.e., Mrs. Pramila Bhatia was a coparcener of the alleged HUF and she received the second floor on partition in 1994 as its coparcener. The contention of the Appellant is fallacious as in 1993-1994, Mrs. Pramila Bhatia being the married daughter of Sh. Balwant Lal Bhatia could neither have been a coparcener nor could she have received the floor as her share on the alleged partition in 1994 [**Re: Mallesappa**²⁰ (Supra)]. These facts show that *ex-facie* the entire story set up by the Appellant is based on fictitious cause of action and is a gross abuse of the Court.

38. The Appellant/plaintiff at para 7 of the plaint has pleaded creation of the HUF and conversion of the character of subject property from self-acquired property into joint family property. In law²¹ the phrase ‘joint family property’ is synonymous with ‘coparcenary property’. The relevant para 7 of the plaint reads as under:

²⁰ At para 11 of this judgment.

²¹ Mulla 24th Edition para 218



“7. That on 07.08.1993, grandmother of plaintiff i.e. wife of Late Shri Balwant Lal Bhatia passed away and Balwant Lal Bhatia was overcome by emotion and became inconsolable. The last rites were performed and Tehravi was organized on 19.08.1993 at Arya Samaj Mandir, KotlaMubarakpur, New Delhi. The Plaintiff who was studying in college in Kolkata at that point of time had also come to participate in the rituals. After conclusion of rituals, while the relatives were present, Late Balwant Lal Bhatia on the next day after Tehravi, on 20.08.1993 had in the presence of his two sons, daughter and their children and also in the presence of brother and sister of Late Smt. Sushila Bhatia, namely Sri Hansraj Bhatia, and his wife Smt. Urmila Bhatia, Smt. Vidya Bhatia and her husband Shri Baburam Bhatia, and elder nephew of Late Smt. Sushila Bhatia; Shri Sushil Bhatia expressed his earnest desire that he wants to see his children and grandchildren happy and growing in his house and blended the property bearing no. A-125, Defence Colony, New Delhi-110024, which was his self-acquired property, in the common hotchpotch and impressed the same with joint family character and said that as long as he lives, he will be the Karta of the his Hindu Undivided Family/Joint Family with the suit property being the joint family property. In this manner, the self-acquired property of Late Shri Balwant Lal Bhatia was impressed with the character of a joint family property and was thrown in the common hotchpotch of the Hindu Undivided Family. It is imperative to state that the Plaintiff was living with his grandfather during his childhood and he continued to live with him on the ground floor while his father Defendant No. 1 was posted outside Delhi.”

38.1 Though in our considered opinion a self- acquired property cannot be converted into a joint family property by an individual in the absence of a pre-existing coparcenary property, however, we are proceeding to test the averments made in para 7 without applying this pre-condition to examine if the said plea gives rise to a cause of action.

38.2 As noted earlier, the Appellant/plaintiff fairly admits that there is no document executed by late Balwant Lal Bhatia after the alleged oral declaration dated 20th August, 1993. In our considered opinion, a bald oral declaration which admittedly was not followed by any written declaration by late Sh. Balwant Lal Bhatia addressed to any statutory authority as regards to formation of HUF and converting the character of self-acquired property into joint family property, assuming it was made, would not even give rise



to a possibility of creation of HUF and the plaint is, therefore, without any cause of action.

38.3 The admitted omissions on the part of late Sh. Balwant Lal Bhatia after 1993 such as: (i) non-registration of HUF as an entity with income tax as per Section 2(31)(ii) read with Section 139A of the Income Tax Act, 1961;(ii) non-declaration of this change of ownership to income tax authorities;(iii) no intimation of the change in the character of the property from self-acquired to HUF, to the Land and Development Office i.e., the land owning agency of the subject property so that mutation is effected in the name of the HUF; and (iv) no intimation to the MCD for mutating the property in the name of the HUF in the revenue records evidences that the alleged oral declaration was not given effect to by late Sh. Balwant Lal Bhatia during his lifetime; (v) continuation of the electricity and water meter bills in the name of Sh. Balwant Lal Bhatia between 1993 until his death.

38.4 In the absence of these essential overt physical acts by late Sh. Balwant Lal Bhatia, no amount of oral evidence of the oral declaration dated 20th August, 1993 in the absence of follow up action by late Sh. Balwant Lal Bhatia to give effect to the said alleged declaration would convert the self-acquired property into joint family property. Thus, in the absence of the particulars of the physical actions of late Sh. Balwant Lal Bhatia as referred to above in the plaint, the plaint lacks any cause of action.

38.5 Mere existence of the joint use of the self-acquired property of late Sh. Balwant Lal Bhatia by his sons, daughter and their family members would not in law lead to the presumption of the subject property being impressed with the character of a joint family property, as the joint use as a fact was since inception in 1973 as admitted in the plaint. Even otherwise,



use of the property by family members was in ordinary course and is not evidence of change of character of the ownership, which as observed above must be substantiated with written declarations to the statutory authorities. Consequently, the joint use would not serve as proof of creation of joint family property.

39. We, therefore, conclude that the averments made in the plaint even if assumed to be correct do not disclose any cause of action and the plaint is liable to be rejected under Order VII Rule 11 CPC.

Framing of issues not warranted in the facts of this case

40. This conclusion as regards no cause of action in the plaint can be maintained without referring to the contents of the registered Will dated 15th February, 1999 executed by late Sh. Balwant Lal Bhatia, which categorically records his declaration in 1999 that he is the sole owner of the subject property and desires to retain the ownership during his lifetime. As noted earlier, the contents of the registered Will executed by the Testator on 15th February, 1999 belie any alleged oral declaration dated 20th August, 1993 pleaded in the plaint.

41. In view of the findings above, the issues no. 1, 2, 4, 5 and 6 framed vide Impugned Order dated 23rd April, 2024 were not warranted to be settled. In fact, it is evident from the record that the plaint in the present case is the textbook illustration of a vexatious pleading where the Appellant/plaintiff by clever drafting after referring to the judgments available in public domain has parroted bald facts to create an illusion of an alleged HUF to make a false claim of joint family property. In addition to bald pleaded facts failing to give rise to a just claim, the same are not even supported by a single document annexed with the plaint. Moreover, it is matter of fact, though the suit has been pending for over a year and the stage



of filing documents has passed, no document is forthcoming from the Appellant/plaintiff to substantiate the pleas in the suit. The present proceedings clearly indicates that it is intended to deprive Respondent Nos. 1, 3 and 6 of their rightful inheritance.

42. Late Sh. Balwant Lal Bhatia, executed a registered Will dated 15th February, 1999. In this Will late Sh. Balwant Lal Bhatia bequeathed separate floors to each of his two sons (Respondent Nos. 1 and 3) and a daughter (Respondent No.6). The said Will has been accepted by Respondent Nos. 1, 3 and 6 and has been acted upon by them while seeking mutation before the MCD in the year 2004.

43. In the State of Delhi probate of a Will is not mandatory (Re: **Kanta Yadav v. Om Prakash Yadav**²²) and the legal heirs can act upon the Will without seeking a probate. Infact, public authorities routinely act upon a Will, in the absence of probate, so long as all the legal heirs admit to the genuineness of the Will. However, probate of the Will is required if it is contested by one of the legal heirs of the testator/testatrix, who are in the natural line of succession under the law of intestacy. In the facts of this case, Respondent Nos. 1, 3 and 6 are the only Class-I legal heirs of late Sh. Balwant Lal Bhatia as per the applicable law of intestacy and in the absence of this Will, even otherwise they would have inherited the subject property to the exclusion of all including the Appellant and Respondent No. 5.

44. The Appellant and/or Respondent No. 5 have no 'caveatable interest' to maintain the challenge to the Will as they are not in the line of succession as they are not the Class-I legal heirs of late Sh. Balwant Lal Bhatia under

²²(2020) 14 SCC 102.



Section 8 of the Act of 1956 (**Re:Krishna Kumar Birla v. Rajendra Singh Lodha**²³). Thus, the Appellant and/or Respondent No. 5 cannot maintain any challenge to the said Will and, therefore, no issue with respect to the validity of this Will framed vide Impugned Order dated 23rd April, 2024 at roman (iii) of Para 11 was warranted in the facts of this case.

45. Moreover, in view of Section 8 of Act of 1956, the subject property inherited by Respondent Nos. 1, 3 and 6 is their separate property, taken in their individual capacity, as the Class-I legal heirs of late Sh. Balwant Lal Bhatia and has not led to creation of a HUF or coparcenary. Therefore, the Appellant or Respondent No. 5 or any other grandchild has no right in the said property inherited by Respondent Nos. 1, 3 and 6 through late Sh. Balwant Lal Bhatia.

46. Learned counsel for Respondent No. 5 had stated that while he is not opposed to the proposal of re-construction and the Impugned Order dated 23rd April, 2024 granting permission, he stated that he admits the claim of the Appellant/plaintiff in the plaint and, therefore, opposes the rejection of the plaint under Order VII Rule 11 CPC. He states that since issues has been framed in the suit, therefore, matter should proceed to trial as per the judgment of Supreme Court in *Alka Gupta v. Narender Kumar Gupta*²⁴ and High Court in *Guru Tilak Vyayamashala v. Delhi Development Authority*²⁵.

47. In our considered opinion the submission of learned counsel for Respondent No. 5 are without any merits as we have returned a finding that assuming all contentions of facts raised by the Appellant in the plaint are

²³ (2008) 4 SCC 300 at para 86

²⁴ (2010) 10 SCC 141.

²⁵ 2011 SCC OnLine Del 3910.



true, even then the Appellant and/or Respondent No. 5 are not entitled to the relief of partition claimed in the plaint. Furthermore, it is a matter of record that Respondent No.5 initially opposed the claim of HUF, setup by the Appellant before the learned Single Judge, however, subsequently Respondent No.5 changed its stance and joined hands with the Appellant's on the claim of HUF being created. Moreover, Respondent No.5 has also not placed on record any documents evidencing proof of existence of a coparcenary and a coparcenary property of late Sh. Balwant Lal Bhatia prior to 1993.

48. Accordingly, I.A. No. 14039/2023 is hereby allowed and the plaint is rejected for being without any cause of action and in fact is predicated on false averments as noted above. The restrictions imposed on Respondent Nos. 1, 3 and 6 vide Impugned Order 30th January, 2024 with respect to non-creation of third-party interest in the subject property are hereby vacated.

Decree of Injunction against Appellant and Respondent No. 5 and mesne profits

49. Furthermore, keeping in view the law settled by the coordinate Bench in ***Liberty Sales Service*** (supra) we hereby grant an injunction in favour of Respondent Nos. 1, 3 and 6 directing the Appellant to peacefully vacate and handover the vacant possession of the subject property in terms of the Impugned Order on or before 23rd July, 2024, failing which, the Appellant will become liable to pay mesne profits of Rs. 2 lakhs per month to Respondent Nos. 1, 3 and 6 jointly and with effect from the date of filing of I.A. No. 17669/2023 i.e., 24th August, 2023. The amount of Rs. 2 lakhs has been fixed taking judicial notice of the rate of rent prevalent in the neighbourhood of Defence Colony which is admittedly an upscale and posh neighbourhood. So also, Respondent No. 5 is restrained from interfering in the peaceful possession of Respondent No. 1 in the subject property.



50. The competent authority under the Senior Citizen Act has also directed the Appellant and his wife vide order dated 14th May, 2024 to vacate the subject property on the finding that Appellant and his wife are causing trauma and mental harassment to the Respondent No. 1 and his wife. The decree of injunction passed against Appellant in this appeal is in addition to the directions of the competent authority.

Decree and Costs

51. Registry is directed to draw up a decree in terms of this judgment.
52. With the aforesaid directions, the present appeal is disposed of.

MANMEET PRITAM SINGH ARORA, J

ACTING CHIEF JUSTICE

JULY 19, 2024/hp/ms/sk