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

\+ **RFA(OS) 86/2019 and CM APPL. 46658/2019**

Date of decision: 16.1.2020

IN THE MATTER OF:

SUKRUTI DUGAL ..... Appellant

Through: Mr. Rakesh Kumar Khanna, Senior Advocate with Mr. Atul T.N. and Ms. Vaishali Gupta, Advocates

versus

JAHNAVI DUGAL AND ORS ..... Respondents

Through: Mr.Anil Sapra, Senior Advocate with Ms. Preeti Shah and Mr. Sarthak Katiyal, Advocates for respondent No.2.

Mr. Suhail Dutt, Senior Advocate with Mr.Mandeep Singh Vinaik, Mr. Sankalp Goswami, Mr. Deepak Bashta, Mr. Shashank Bhardwaj and Mr. Azhar Alam, Advocates for respondents No.3 to 5

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

HIMA KOHLI, J.

1. The appellant/plaintiff has called in question, the legality of the judgment dated 23.09.2019, passed by the learned Single Judge in CS(OS) 649/2018, whereunder an application filed by the respondent No.3/defendant No.3 under Order VII Rule 11 read with Section 151 CPC for rejection of the plaint has been allowed by treating the same as an application under Order XII Rule 6 CPC and consequently, the suit instituted by her has been dismissed for want of cause of action.

2. The facts of the case have been succinctly captured in paras 2 and 3 of the impugned judgment and are reproduced hereinbelow for ease of reference:-

> *"2. The present suit seeks relief of partition, rendition of accounts and permanent injunction. As per the facts narrated in the plaint, the case of the Plaintiff is that Late Sh. Somnath Dandona was the Karta of the Hindu Undivided Family (hereinafter referred to as "HUF") and the parties to the present suit are the members/coparceners of the HUF who were living under a common roof. The assets of the HUF comprise of the following immovable properties:- (a) House No. 275, ground floor, Kailash Hills, New Delhi. (b)House No. E-25, Vasant Marg, Vasant Vihar, New Delhi. (c) Plot No. 77, Karanpur Road, Dehradun, Uttaranchal.*
>
> *3. It is contended that Late Sh. Somnath Dandona expired on 25th March 2008 and his widow Late Smt. Shyam Kumari Dandona died on 5 th February 2019. During their lifetime, the family existed as an HUF. Both of them died intestate, and are survived by Janhavi Duggal (Defendant No. 1-mother of Plaintiff) and Sh. Paresh Dandona (Defendant No. 3-maternal uncle of the Plaintiff). Defendant No. 2 is the brother of Plaintiff. Defendant No. 4 and Defendant No. 5 are sons of Sh. Paresh Dandona (cousin brothers of Plaintiff). Plaintiff claims that being a member of the HUF, she is entitled to share in the properties noted above. It is contended that in the month of AugustSeptember 2018, Plaintiff requested the Defendants for partitioning the HUF properties. In October 2018, Defendants assured the Plaintiff that a family settlement would be drawn up, however later, despite persistent requests, it was never done. Defendant No. 1 refused to give Plaintiff her share in the HUF properties. Subsequently, Plaintiff came to know that the properties are being sold and accordingly, the present suit was filed to protect her interest. In the written statement, Defendant No. 3 [Sh. Paresh Dandona] inter alia contended that the suit properties were self acquired property of Late Sh. Somnath Dandona and Mrs. Shyam Kumari Dandona and the same has*

devolved by survivorship on Defendant No. 1 and Defendant No. 3 and no other person has any right to lay a claim over the same. It is further contended that by virtue of a consent decree passed in CS(OS) 1175/2010, the property at Vasant Vihar has been divided into two portions, one for Defendant No. 1 and the other one for Defendant No. 3. The property at Kailash Hills has fallen into the share of Defendant No. 1 under the said settlement."

3. On 13.3.2019, the appellant/plaintiff filed an application under Order VI Rule 17 CPC (I.A. 3975/2019) praying *inter alia* for amendment of the plaint on the ground that it was disclosed to her for the first time during the course of the hearing before the learned Single Judge on 07.03.2019, that a partition suit instituted by her mother, respondent No.1 against her brother, respondent No.3 registered as CS(OS) 1175/2010, was disposed of on the basis of a consent decree dated 04.02.2015. Claiming that she was unaware of the said proceedings and the compromise arrived at between her mother and her uncle was behind her back, the appellant/plaintiff sought permission to amend the plaint by incorporating relevant averments therein to assail the compromise decree passed in the captioned suit and for an additional relief of declaration to the effect that the said consent decree was not binding on her since she was not a party to the compromise. As a matter of chance, on the very same date, i.e., on 13.03.2019, the respondent No.3 also moved an application under Order VII Rule 11 CPC (I.A. 3976/2019), seeking rejection of the plaint on the ground that it was devoid of any cause of action and lacked material particulars about the creation of an HUF. By virtue of the impugned judgment, the learned Single Judge has allowed both the applications.

4. The application moved by the appellant/plaintiff for seeking amendment of the plaint was contested by the respondent No.3 who filed a detailed reply wherein, a question was raised as to the maintainability of the said application on the ground that once the court is seized of an application filed by him under Order VII Rule 11 CPC, it is precluded from entertaining the amendment application filed by the appellant/plaintiff under Order VI Rule 17 CPC. On merits, it was urged that the plaint did not disclose any cause of action for seeking partition of the suit properties and the appellant/plaintiff had failed to demonstrate that the suit properties are HUF properties by establishing a linkage between the funds of the HUF and the suit properties. It was further pleaded that the amendment application is barred by the principles of *resjudicata* in view of the compromise arrived at between the respondent No.1 and respondent No.3 in CS(OS) 1175/2010.

5. By the impugned judgment, the challenge laid by the respondent No.3 to the maintainability of the amendment application filed by the appellant/plaintiff was turned down. Declining to evaluate the merits of the proposed amendments or the additional reliefs prayed for in the plaint, the learned Single Judge allowed the amendment application filed by the appellant/plaintiff and observed that the appellant/plaintiff not being a party to the compromise arrived at between her mother and uncle in CS(OS) 1175/2010, she is not barred from instituting a suit for partition.

6. Coming next to the application filed by the respondent No.3 under Order VII Rule 11 CPC, the learned Single Judge proceeded to examine the averments made in the amended plaint that was taken on record on allowing the amendment application filed by the appellant/plaintiff. To test the submission made by the respondent No.3 as to whether the grounds for

rejection of the plaint would survive post amendment, starting on the right note, the learned Single Judge observed that in order to examine as to whether a plaint is liable to be rejected under any of the provisions enumerated in Order VII Rule 11 CPC, the court is required to examine the averments made in the plaint alone and the same shall have to be assumed to be correct and at that stage, it is not permissible to look into the pleadings taken in the written statement or any other piece of evidence.

7. Keeping in mind the aforesaid principles of law, the learned Single Judge noted that the respondent No.3 herein had contended that the plaint did not disclose any cause of action to seek partition of the suit properties in view of the fact that Shri Somnath Dandona, father of the respondents No.1 and 3 and grandfather of the appellant/plaintiff and the respondent No.2 (both children of his daughter, respondent No.1) and of respondents No.4 and 5 (both children of his son, respondent No.3) had acquired both the suit properties, i.e., premises No.E-25, Vasant Marg, Vasant Vihar, New Delhi and House No. 275, Ground Floor, Kailash Hills, New Delhi, from his personal funds and no funds of a HUF had been used in the said acquisition as no HUF was in existence at that point in time or even prior thereto.

8. It is well settled that the defence taken by the respondents/defendants in their written statement filed in opposition to the plaint cannot be taken into consideration while examining the merits of the application moved for seeking rejection of the plaint under Order VII Rule 11 CPC as that would fly in the face of the settled position of law that to arrive at a conclusion as to whether a plaint is devoid of any cause of action, the court is required to restrict itself to examining the plaint as a whole on a premise that what has been stated therein, is correct and additionally, by referring to the documents

filed by the plaintiff in support of the averments made in the plaint. [Ref.: Inspiration Clothes & U. vs. Collby International Ltd., **88 (2000) DLT 769**; Tilak Raj Bhagat vs. Ranjit Kaur, **159 (2009) DLT 470**; Bhau Ram vs. Janak Singh, **V (2012) SLT 536**; Tilak Raj Bhagat vs. Ranjit Kaur, **2012(5) AD (Del) 186**; Indian City Properties Ltd. vs. Vimla Singh] **198 (2013) DLT 432**; and Razia Begum vs. DDA & Ors. **215 (2014) DLT 290 (DB)**].

9. In Popat and Kotecha Property vs. State Bank of India Staff Association reported as **(2005) 7 SCC 510**, the Supreme Court had cited its earlier decisions in T. Arivandandam vs. T.V. Satyapal reported as **(1977) 4 SCC 467**, Roop Lal Sathi vs. Nachhattar Singh Gill reported as **(1982) 3 SCC 487**, I.T.C. Ltd. vs. Debts Recovery Appellate Tribunal reported as **(1998) 2 SCC 70**, Raptakos Brett & Co. Ltd. vs. Ganesh Property reported as **(1998) 7 SCC 184** and Saleem Bhai vs. State of Maharashtra reported as **(2003) 1 SCC 557** and held thus:-

> *"16. The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam v. T.V. Satyapal (1977 (4) SCC 467).*
>
> *XXX XXX XXX*
>
> *19. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage*

and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities."

10. In Mayar (H.K.) Ltd. and Ors. vs. Owners and Parties Vessel M.V. Fortune Express and Ors. reported as **(2006) 3 SCC 100**, the Supreme Court had the occasion to examine the spectrum of an application moved under Order VII Rule 11 CPC for rejection of the plaint and had held thus:-

"11. Under Order 7 Rule 11 of the Code, the Court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief claimed is undervalued and the valuation is not corrected within a time as fixed by the Court, where insufficient court fee is paid and the additional court fee is not supplied within the period given by the Court, and where the suit appears from the statement in the plaint to be barred by any law. Rejection of the plaint in exercise of the powers under Order 7 Rule 11 of the Code would be on consideration of the principles laid down by this Court. ***In T. Arivandandam vs. T.V. Satyapal and Another, (1977) 4 SCC 467****, this Court has held that if on a meaningful, not formal, reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled.* ***In Roop Lal Sethi vs. Nachhattar Singh Gill, (1982) 3 SCC 487****, this Court has held that where the plaint discloses no cause of action, it is obligatory upon the court to reject the plaint as a whole under Order 7 Rule 11 of the Code, but the rule does not justify the rejection of any particular portion of a plaint. Therefore, the High Court could not act under Order 7 Rule 11(a) of the Code*

for striking down certain paragraphs nor the High Court could act under Order 6 Rule 16 to strike out the paragraphs in absence of anything to show that the averments in those paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or delay the fair trial of the case, or constitute an abuse of the process of the court. In ***ITC Ltd. Vs. Debts Recovery Appellate Tribunal, (1998) 2 SCC 70****, it was held that the basic question to be decided while dealing with an application filed by the defendant under Order 7 Rule 11 of the Code is to find out whether the real cause of action has been set out in the plaint or something illusory has been projected in the plaint with a view to get out of the said provision.* ***In Saleem Bhai and Others vs. State of Maharashtra and Others, (2003) 1 SCC 557****, this Court has held that the trial court can exercise its powers under Order 7 Rule 11 of the Code at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial and for the said purpose the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.*

11. In Hardesh Ores Pvt. Ltd. vs. M/s. Hede & Company reported as **2007 (5) SCC 614**, the Supreme Court held as follows:-

"25. The language of Order VII Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of Clause (d) of Order VII Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. ***The test is whether the averments made in the plaint if taken to be correct in their***

> ***entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether Clause (d) of Rule 11 of Order VII is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense****. As observed earlier, the language of Clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this Court in Liverpool and London S.P. and I Association Ltd. v. M.V. Sea Success I and Anr.* ***(2004) 9 SCC 512*** *and Popat and Kotecha Property v. State Bank of India Staff Association,* ***(2005) 7 SCC 510****." (emphasis added)*

12. As can be seen from the aforesaid discussion, a plaint cannot be rejected on the basis of allegations levelled by the defendant in the written statement or for that matter, in an application moved under Order VII Rule 11 CPC, for seeking rejection of the plaint. In exercise of its powers under Order VII Rule 11 CPC, the court is required to look into the averments made in the plaint, which alone are germane. The entire plaint must be read as a whole to determine as to whether it discloses a cause of action. In undertaking the said exercise, the court is not expected to consider a particular plea and instead, the averments made in the plaint in entirety, have to be taken to be correct. Since a cause of action comprises of a bundle of facts, the same are required to be proved by the plaintiff only at the time of the trial. Only the material facts are required to be stated in the plaint without referring to the evidence except in circumstances where the pleadings relate to misrepresentation, fraud, undue influence, wilful default etc. As long as the court is satisfied that the plaint discloses some cause of

action that requires determination, the plaint ought not to be rejected. At the end of the day, the court must be mindful of the fact that the underlying object of Order VII Rule 11 CPC is to nip in the bud, irresponsible and vexatious suits. At the same time, the opinion of the court that the plaintiff may not ultimately succeed in the suit, ought not to form the basis for rejecting the plaint.

13. In the light of the aforesaid parameters laid down for deciding the application moved by the respondent No.3 under Order VII Rule 11 CPC, it was expected of the learned Single Judge to have examined the averments made by the appellant/plaintiff in the amended plaint, as the same had been permitted to be taken on record, read in conjunction with the documents filed by the appellant/plaintiff. Before proceeding to examine the amended plaint, we may note that in para 5 of the original plaint, the following averment had been made by the appellant/plaintiff for seeking the relief of partition, permanent injunction and rendition of accounts in respect of the suit properties, described in para 1 as 'HUF properties':-

> *"5. That the aforesaid late Shri Somnath Dandana, maternal grandfather of the Plaintiff was the karta of the Hindu Undivided family and the parties herein are the members/the coparceners in the HUF and were living under the common roof. That the HUF consist the following immovable properties:-*
>
> *I. House No.275, ground floor, Kailash Hills, New Delhi.*
> *II. House No.E-25, Vasant Marg, Vasant Vihar, New Delhi.*
> *III. Plot No.77, Karanpur Road, Dehradun, Uttranchal.*"

14. The amended plaint filed subsequently, is more elaborate on the aspect of existence of a Hindu Undivided Family. It has been averred therein

that the parties to the suit are members of the HUF and are coparceners; that Shri Somnath Dandona, maternal grandfather of the appellant/plaintiff (father of the respondents No.1 and 3) was the *Karta* of the HUF and all the parties to the suit being members/coparceners in the HUF, were living under a common roof; that three immovable properties were owned by the HUF including the residential premises at Kailash Hills, Vasant Vihar and a plot at Dehradun, Uttranchal; that during the lifetime of Shri Somnath Dandona and his wife, the family was a HUF and even after their demise on 25.03.2008 and 05.02.2010 respectively, the family had continued to remain a HUF family; that during the pendency of the suit, the appellant/plaintiff had come to know that on 07.03.2019, the respondents No.1 and 3 had settled their *interse* disputes and distributed the shares of the HUF properties amongst them, behind her back. Thus, claiming that she is also a member of the HUF and entitled to a share in the HUF properties, that was created by her maternal great grandfather, the appellant/plaintiff has asserted in the plaint that the consent decree dated 04.02.2015 passed in CS(OS) 1175/2010, was not binding on her. The averments made in para 13 of the amended plaint are material and are reproduced hereinbelow:-

> *"13. That it is submitted that since the plaintiff and the defendants are having constructive, physical and notional possession of the suit properties and are having share in the HUF / Suit properties and the plaintiff does not want to keep and maintain her share in property in joint name with defendants and wants the property should be separated/partitioned by metes and bounds so that the plaintiff and defendants can enjoy their respective shares. It is stated that there existed an HUF prior to coming into force of the Hindu Succession Act, 1956 and which HUF has been continuing since then till date. More specifically, it is submitted*

as per the knowledge derived from within the family, that the great maternal grandfather namely Mr. Kedarnath Dandona of the plaintiff has created the HUF way back pre partition of the country. It is further submitted that the family of the great grandfather (who passed away in the late 1950's) was consisting him, his wife and two sons which includes the grand maternal father of the plaintiff. It is further submitted that the elder brother of maternal grandfather of the plaintiff namely Mr. Baijnath Dandona who passed away in the early 1990's has never married and he always remained the part of the said HUF along with the maternal grand father of the plaintiff. It is further submitted that after the demise of the great maternal grand father of the plaintiff pre 1947, his elder son being the eldest male member of the family has become the karta of the HUF created by the great grand father of the plaintiff. It is further submitted the elder son of the great grand father of the plaintiff has also died in the year early 1990's and thereafter, the demise of his elder brother, the maternal grand father of the plaintiff being the surviving eldest male member of the family has become the karta of the said HUF. It is further submitted that during the period from creation of the HUF and till date all the movable and immovable properties either purchased by the great grand father of the plaintiff or his sons were put into the common hotch potch of the HUF and since then all the properties are the properties of the HUF and all the members of the HUF are entitle for their share in the same."

15. As for the documents filed by the appellant/plaintiff alongwith the amendment application moved by her, which should also have been taken into consideration while deciding the application filed by the respondent No.3 under Order VII Rule 11 CPC, the same include the following documents:-

(a) Correspondence exchanged between Shri S.N. Dandona and his Chartered Accountant, where he has referred to a judgment passed in

his HUF case (letters dated 22.02.1973 and 14.03.1974)

(b) Copies of the Income Tax Returns filed by the HUF for the Assessment Year 1994-95.

(c) Copies of the computation of wealth of the "Specified HUF", wherein the Vasant Vihar property has been included in the list of assets.

(d) Reply dated 18.02.1985, submitted by the father of the appellant/plaintiff and the husband of the respondent No.1 to the Income Tax Department, wherein Shri S.N. Dandona has been described as the Karta of the HUF and the respondent No.1, as a member of the HUF with a Permanent Account Number of the HUF quoted therein.

(e) Letter dated 05.02.1985, addressed by Shri S.N. Dandona to a relative furnishing information about his HUF case and *inter alia* describing himself as the Karta of the HUF.

(f) Copy of the handwritten declaration by Shri S.N. Dandona dating back to the year 1972, wherein he declared himself to be a member of the B.J. Dandona (HUF) comprising of his elder brother, Shri B.J. Dandona, himself, his son and his daughter and stating *inter alia* that though the land measuring 1024 sq. yards situated at E-25, Vasant Vihar, New Delhi., was in his name and of his wife, he had decided to vest all the rights and title including income accruing from the said property, in the hands of the family.

16. While passing the impugned judgment, the learned Single Judge has proceeded to examine the law relating to inheritance of ancestral properties in the context of the existence of an HUF and then arrived at a conclusion

that the appellant/plaintiff had failed to explain as to how the suit properties could be described as HUF properties in the absence of any categorical averment made in the plaint relating to the date on which each of the suit properties were thrown in the common hotchpotch or without mentioning the details relating to the manner in which the said properties had been purchased from HUF funds etc. The learned Single Judge also observed that the appellant/plaintiff had filed photocopies of the Income Tax and Wealth Tax returns and had relied on the same to claim the existence of a HUF. After scrutinizing the said documents at some length, the learned Single Judge discarded them by observing that they did not demonstrate that there was an HUF or the suit properties in question had been placed in the family hotchpotch for them to be treated as HUF properties. As a result, the application moved by the respondent No.3 under Order VII Rule 11 CPC was allowed.

17. We are afraid, that was not the stage for the learned Single Judge to have returned any findings on the merits of the pleas taken by the appellant/plaintiff in the amended plaint or to have undertaken an exercise to test the veracity of the documents filed by her either for their authenticity, or reliability. All that should have awaited a regular trial of the suit. Once the averments made by the appellant/plaintiff in the amended plaint disclosed a right to sue, the plaint could not have been rejected for want of cause of action by undertaking a detailed analysis of the averments made therein and going through the documents filed by the appellant/plaintiff with a toothcomb to adjudge their correctness or authenticity. On a bare reading of the amended plaint, there are enough facts disclosed therein, that would require determination. One must not forget that the averments made by the

appellant/plaintiff at that stage, have to be assumed to be correct and the Court is expected to exercise its powers under Order VII Rule 11 CPC on that premise. It is a different matter that after the trial, the appellant/plaintiff may not ultimately succeed in proving her case. In our view, the learned Single Judge fell into an error by expressing skepticism regarding the pleas taken by the appellant/plaintiff about the existence of the HUF or the status of the suit properties by referring to the absence of relevant details regarding the acquisition of the suit properties described as "HUF" properties in the amended plaint, the manner in which a HUF was created, the details of the members of the HUF etc. At the stage of deciding an application moved under Order VII Rule 11 CPC, there was no occasion for the court to have dwelled at such a length on the aforesaid aspects. As per the judicial dicta, this is the stage where the court must adhere strictly to the limitations imposed on its discretion placed under Order VII Rule 11 CPC. We are of the opinion that in the instant case, on a reading of the averments made in the amended plaint, taken as a whole, coupled with the documents filed by the appellant/plaintiff, it did disclose a cause of action, sufficient to have turned down the application moved by the respondent No.3 under Order VII Rule 11 CPC.

18. When deciding an application moved under Order VII Rule 11 CPC, the pleas taken in defence by the respondents/defendants are also completely irrelevant and must not be looked into by the court. Therefore, the submission made by learned counsel for the respondents that the consent decree passed in CS(OS) 1175/2010, whereunder the residential property at Vasant Vihar has been divided into two portions, one of which has fallen to the share of the respondent No.1 and the other to the share of the respondent

No.3 and the other property at Kailash Hills has gone to the share of the respondent No.1, bars the appellants/plaintiff from filing a suit for partition or that during the meetings that had taken place between the respondents No.1 and 3 preceding the settlement, both the appellant and her brother, respondent No.2 herein were present, are all pleas that can only be gone into by the court after the pleadings in the suit would have been completed, the documents filed by the parties put to admission and denial and issues framed.

19. The course of action adopted in the impugned judgment of converting the application filed by the respondent No.3 for rejection of the plaint on the ground of want of cause of action, into an application under Order XII Rule 6 CPC and then dismissing the suit instituted by the appellant/plaintiff, is thus found to be untenable. The decisions relied on by learned counsel for the respondent No.3 in the cases of Surender Kumar vs. Dhani Ram and Ors. reported as **227 (2016) DLT 217** and Surender Kumar Khurana vs. Tilak Raj Khurana & Ors. reported as **2016 (155) DRJ 71 (DB)** can also not be of any assistance when the proceedings in the suit were at a nascent stage and at that stage, the court is only required to examine the averments made by the appellant/plaintiff in the amended plaint as it stands and coupled with that, go through the documents filed with the plaint. We are of the firm view that at that point in time, no adverse inference could have been drawn against the appellant/plaintiff pertaining to the existence of the HUF or the description of the suit properties in the plaint as HUF properties, in the absence of any admissions on her part. The effect of the consent decree between the respondent No.1, mother of the appellant/plaintiff and her maternal uncle, shall have to await trial in the suit particularly, when the respondent No.3

does not deny the fact that the appellant/plaintiff was neither a party, nor was she a signatory to the Settlement Agreement executed by her mother and uncle *qua* the suit properties. In view of the averments made in the amended plaint read in conjunction with the documents referred to hereinabove, copies whereof were filed by the appellant/plaintiff with the amendment application, there was no occasion to allow the application filed by the respondent No.3 under Order VII Rule 11 CPC by treating the same as an application moved under Order XII Rule 6 CPC.

20. In the light of the foregoing discussion, the impugned judgment insofar as it has allowed the application moved by the respondent No.3 under Order VII Rule 11 CPC by treating the same an application under Order XII Rule 6 CPC, is not sustainable and is accordingly quashed and set aside. The present appeal is allowed and the suit instituted by the appellant/plaintiff is restored to its original position for it to be taken up from the stage at which the amended plaint was allowed to be taken on the record. There shall be no orders as to costs.

(HIMA KOHLI)
JUDGE

(ASHA MENON)
JUDGE

JANUARY 16th, 2020
rkb/ap