that before the learned Judges in that case no plea was taken that a decree for 1/2 share of the defendant be passed as the plaintiff was ready to relinquish all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant. It is correct that the learned Judges did refuse to grant a decree for 1/2 share, but, as earlier observed, the plea having not been put forth by the plaintiff who claimed decree for 1/2 share only, the learned Judges in my view were justified in just awarding the amount of damages and in ordering the refund of the amount of Rs. 2,000 which had been paid as earnest money. To emphasise, the learned Single Judge in that case had granted a decree of the share of the defendant on payment of Rs. 10,000 when the property had been agreed to be sold for an amount of Rs. 20,000. If the plaintiff in that case had wished to take benefit of the provisions of section 12(3) of the Act, then he was bound to pay the entire amount with a further undertaking that he was not to claim any interest in the remaining part of the contract and also not to claim compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant. In this view of the matter, I find that the decision in *Harinder Singh's case* (supra) is distinguishable and the same has rightly been decided on the facts of that case.

(11) As a result of the aforesaid discussion, I hold that a decree for specific performance can be ordered for lesser share of the property than agreed upon to be sold subject to the fulfilment of the conditions enumerated in Section 12. I further order that the appeal shall now go back for decision on other points on merits, before the learned Single Judge.

N. K. S.

Before S. P. Goyal and G. C. Mital, JJ.

RAM NARAIN PALIWAL,—*Applicant.*

versus

COMMISSIONER OF INCOME-TAX,—*Respondent.*

Income Tax Reference No. 27 of 1977

October 18, 1985.

Income Tax Act (XLII of 1961)—Section 171—Hindu Undivided Family consisting of a Karta, his widowed mother and his minor

sons—Such family carrying on business as a partner in a firm Hindu Undivided Family recognised and assessed as such in the previous years—Partial partition of assets of such a family—Whether valid. ... ...

Held, that a Hindu Undivided family can become a partner of another concern. Once the H.U.F. continues to be an assessee and was recognised as such, there can be partial partition of the H.U.F. assets. On a reading of section 171 of the Income Tax Act, 1961 there is no impediment in the way of the assessee to claim partial partition of H.U.F. assets. It would hardly matter whether mother was entitled to claim partition or not, and even if the karta was the sole male co-parcener, he could effect partition. The Income Tax law and particularly section 171 of the Act does not envisage that if members of H.U.F. are mother and son, such H.U.F. is debarred in law effecting complete or partial partition of H.U.F. assets. It cannot, therefore, be said that there could not be a valid partial partition of H.U.F. assets between a widow mother and her son.

(Para 5)

Income Tax Reference under section 256(1) of the Income-tax Act 1961, made by the Income-tax Appellate Tribunal (Chandigarh Bench) Chandigarh, referring the following question of law for seeking the opinion of this Hon'ble Court, arising out of Tribunal order dated 29th July, 1976 in I.T.A. No. 805 of 1975-76 and R.A. No. 141 of 1976-77 for assessment year 1973-74.

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that there could not be a valid partial partition of the HUF assets between a widow mother and her son."

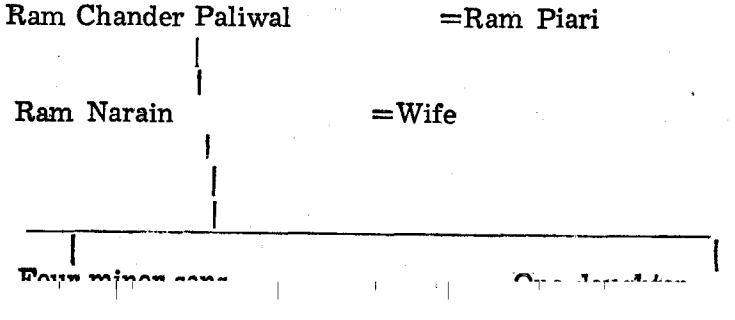
Balwant Singh Gupta, Advocate, *for the Petitioner.*

Ashok Bhan, Senior Advocate with Ajay Mittal, Advocate, *for the Respondent.*

JUDGMENT

Gokal Chand Mittal, J.

(1) In order to appreciate the case, the following pedigree table may be kept in view:



(2) Ram Chander Paliwal was karta of Hindu un-divided family (for short 'H.U.F.'), which carried on money lending business and owned immovable property. He died on 3rd September, 1963. The H.U.F. continued with Ram Narain as Karta.

(3) A firm under the name and style of M/s Ram Narain Sat Narain was started on 8th December, 1965 and Ram Narain representing the H.U.F. became a partner in the said firm with his share of 35 per cent. Out of the H.U.F. funds he invested Rs. 45,000 as a partner in that firm. On 31st March, 1973 the capital of the H.U.F. in the books of M/s Ram Narain Sat Narain was shown as Rs. 1,18,321.42. The said amount was divided by Ram Narain and Smt. Ram Piari and Rs. 59,160.71 was allotted to each of them. Separate accounts of the aforesaid two persons were opened in the books of M/s Ram Narain Sat Narain with opening credit balance of Rs. 59,160.71. A memorandum of partial partition was drawn up on 2nd April, 1973, wherein the terms of the aforesaid partition was recorded. During the course of assessment proceedings for the previous year ending on 31st March, 1973, a claim for partial partition under section 171 of the Income Tax Act, 1961, (hereinafter called 'the Act'), was made by H.U.F. The Income Tax Officer did not accept the assessee's claim for partial partition, firstly bcause Smt. Ram Piari had been wrongly described in the memorandum of partial partition as co-partener and secondly, because the wideowed mother could not compel for partition. It was also concluded that the existence of at least two co-parceners was essential for claiming partition. The H.U.F. filed an appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner, (Appellate Authority) relied on proviso to section 6 of the Hindu Succession Act, *Vidya Ben* v. *J. N. Bhat*, (1) and *Jai Parkash* v. *Ram Kali*, (2) for coming to a conclusion that a female heir could claim partition of the joint Hindu property. Consequently, the appeal was accepted and partial partition was allowed under section 171 of the Act. The Department came up in appeal before the Income Tax Appellate Tribunal. The Tribunal by order dated 29th July, 1976 allowed the appeal and after vacating the order of the Appellate Assistant Commissioner, restored the order of the Income Tax Officer after giving findings that Smt. Ram Piari had been wrongly described as a co-parcener in the memorandum of

(1) AIR 1974 Gujrat 23.
(2) 1974 Revenue Law Report 327.

partial partition as in law she should not be a co-parcener and was not entitled to claim partition. It first relied on para 316 of *Mulla's* Hindu Law for coming to the conclusion that mother cannot claim partition so long as the sons remained united and since Ram Piari had only one son and since that son cannot claim partition, i.e. partition against himself, no partition could take place. On behalf of the assessee reliance was placed on the provisions of section 3(3) of the Hindu Women's Right to property Act, 1937 for the proposition that a Hindu widow shall have the same right of claiming partition as a male owner and, therefore, the Appellate Assistant Commissioner was right in holding that she was entitled to claim partition. The Tribunal did not agree with this because 1937 Act was repealed by section 31 of the Hindu Succession Act, 1956. The Tribunal further dis-agreed with the Appellate Assistant Commissioner that section 6 of the Hindu Succession Act, 1956 gave right to a female to claim partition of H.U.F. property. The Tribunal distinguished the two decisions relied upon by the Appellate Assistant Commissioner and followed *Dali Chand Tej Rai* v. *C.I.T.* (3) a decision of the Rajasthan High Court, wherein it was held that a Hindu female had no right to claim partition of H.U.F. The Assessee sought reference and the Tribunal has referred the following question of law for our opinion :

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that there could not be a valid partial partition of the HUF assets between a widow mother and her son ?

(4) After hearing the learned counsel for the parties and on perusal of the order of the Tribunal and the statement of the case, we are of the view that there has been complete misunderstanding of the basic admitted facts of this case. If the dispute had to be settled between members of co-parceners of H.U.F. and the questions were raised whether Joint Hindu Family stood disrupted by death of Ram Chander Paliwal on 3rd September, 1963 and in case it stood disrupted then what would be the shares of the members of the Joint Hindu Family, then the considerations which have been taken notice of by the Tribunal would have fallen for consideration. Here, the Income Tax Officer and the Tribunal were called upon to determine the matter under section 171 of the Income Tax Act, 1961. Admittedly, the H.U.F. consisted of Ram Narain, his mother Ram Piari his wife

(3) 97 I.T.R. 383.

and his minor sons and that H.U.F. was recognised and continued to be assessed as such from 1963 till 31st March, 1973 in spite of the death of Ram Chander Paliwal, which took place on 3rd September, 1963. The point before the aforesaid authorities was not whether the H.U.F. could be an assessee or not. Even from the question referred, it is clear that there is an H.U.F. and what is to be determined is whether a partial partition of the H.U.F. assets was valid or not.

(5) It has been settled by the highest Court tha a H.U.F. can become partner of another concern. Once the H.U.F. continued to be an assessee till 31st March, 1973 there can be partial partition of the H.U.F. assets and that is, what has been done in this case. Partial partition of H.U.F. assets in the partnership firm of M/s Ram Narain Sat Narain was carried out by Ram Narain and since his mother was entitled to share the assets equally with him, she was also given equal share and memorandum of partition was drawn up. Under the circumstances, on a reading of section 171 of the Income Tax Act, we do not find any impediment in the way of the assessee to claim partial partition of H.U.F. assets. It would hardly matter whether mother was entitled to claim partition or not, and even if Ram Narain was the sole male co-parcener, he could effect partition. The Income tax law and particularly section 171 of the Act does not envisage that if members of H.U.F. are mother and son, such H.U.F. is debarred in law in effecting complete or partial partition of H.U.F. assets. On this process of reasoning, we are of the opinion that on the facts and circumstances of this case, the Tribunal was not right in holding that there could not be a valid partial partition of H.U.F. assets between a widow mother and her son, and answer the referred question in the negative i.e., in favour of the assessee and against the department.

(6) The reference stands disposed of with no order as to costs.

N.K.S.

Before R. N. Mittal, J.

ACHHRA SINGH,—*Appellant*

versus

SHER SINGH AND OTHERS,—*Respondents.*

Regular Second Appeal No. 1532 of 1976

December 19 ,1985.

Transfer of Property Act (IV of 1882)—Section 3 Explanation 1, 10, 41 *and* 126—*Absolute gift made of immovable priperty—Condition imposed by donor in the gift deed restricting the right of the*