

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.148 of 1977

Against the part of judgment and decree dated 10.11.1976 passed by 5th Additional Subordinate Judge, Biharsharif in Title Suit No.121 of 1973/01 of 1976.

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Sri Shyam Kishore Prasad & Anr.

.... Plaintiffs-Appellants

Versus

Shiv Mahto & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellants : Mr. Rajendra Prasad, Sr. Advocate.
Mr. Pramod Kumar, Advocate with him.

For the Respondents : Mr. J.S.Arora, Advocate.
Mr. Vimal Kumar Data, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 24-11-2015

The plaintiffs have filed this first appeal against part of the judgment and decree dated 10.11.1976 passed by learned 5th Additional Subordinate Judge, Biharsharif in Title Suit No.121 of 1973/01 of 1976 whereby the prayer of the plaintiffs for partition regarding some properties has been refused holding that those properties are the self acquired property of the defendant nos.2 to 4.

2. The plaintiffs-appellants filed the aforesaid suit claiming for partition to the extent of their 20 paise share in the suit property described in Schedule-I to III.

3. The plaintiffs' case, in short, is that Bhattu Mahton was

the common ancestor of the parties who had three sons, namely, Hemraj Mahton, Dahu Mahton and Bedu Mahton. Bhattu Mahton had one brother Triloki Mahton. The defendant nos.1 to 4 and the plaintiff no.1 are the sons of Hemraj Mahton. The defendant nos.5 and 6 are sons of Bandhu Mahton (defendant no.2), the second son of Hemraj Mahton. Hemraj Mahton had five sons, namely, Balgovind Mahton (defendant no.1), Bandhu Mahton (defendant no.2), Mahabir Mahton (defendant no.3), Dayali Mahton (defendant no.4) and Chandeshar Mahton (plaintiff no.1). The plaintiff nos.2 and 3 are the sons of plaintiff no.1. The defendant nos.9 and 10 are sons of Mahabir Mahton (defendant no.3). Likewise the defendant no.11 to 13 are sons of defendant no.4. Bhattu Mahton died in the year 1934 leaving behind his sons and nephew Akloo Mahton. Dahu Mahton died in the year 1925. Likewise Bedu Mahton also died in the year 1944 whereas Hemraj Mahton died in the year 1953. After their death the sons and nephew continued in jointness. Since Dahu Mahton died issueless, his share was inherited jointly by the remaining members. In the survey record the properties have been recorded in the name of Hemraj Mahton. The properties have been acquired thereafter with the help of income of joint family property and there is no self acquired property by any of the member of the family.



4. The further case is that the maternal grandfather of Hemraj Mahton, namely, Rewa Mahton died and on his death his properties were inherited by Hemraj Mahton. There had been partition through Court and the parties came in separate possession of their respective shares. However, Bedu Mahton instead of taking his share received equivalent amount and went to reside in his *nanihal*, therefore, heirs of Bedu Mahton have no concern with the suit property. The heirs of Triloki Mahton are also separate, therefore, the heirs of both of them have not been made party. The defendant no.3, Mahabir Mahton was the karta of the joint family and was looking after the family affairs. He did not disclose the income of the family properties since two months prior to filing of the suit and then subsequently suit was filed for partition.

5. The defendant nos.3, 5 and 9 filed separate contesting written statement. The minor also filed written statement through GAL. Besides taking various legal pleas mainly the defendants contended that in Partition Suit No.39 of 1959 decree was passed for partitioning the property against Akloo and his heirs. Appeal was filed being F.A. No.422 of 1961 wherein the parties compromised. On the basis of the compromise decree was passed and the properties allotted in the share of the plaintiffs and defendants in the present suit have been described in Schedule I of the written



statement. The properties inherited by Hemraj Mahton from village Brijpur is described in Schedule II of the written statement. Out of the property inherited by Hemraj Mahton he had already sold 3 decimals of land. The purchaser Chandrika Mahton had constructed a house thereon. The plaintiff no.1 and defendant nos.1 to 4 have jointly sold 29 decimals of plot no.3076 and 13 decimals of plot no.2988 by registered sale deed dated 08.12.1956. Thereafter the parties partitioned the remaining property of Schedule I and II of the written statement in January 1968 and since then there is no jointness. In the partition the properties allotted in favour of the plaintiff is described in Schedule III of the written statement and the properties allotted in favour of defendant nos.1 to 4 are described in Schedule IV to VII. In plot no.3017 the defendant no.1 has installed a surface well.

6. The further case of the defendants regarding the property of village Brijpur and Sumka the defence is that the grandfather of Hemraj Mahton of village Brijpur had one son, namely, Komal Mahton and two daughters, namely, Budhia Devi and Punia Devi. Komal Mahton had a daughter Bulki Devi. Hemraj Mahton was the son of Budhia Devi. All died and only mother Tejo Kuer and Bulki Kuer remained so Tejo Kuer kept her grandson Hemraj Mahton and Mitarjeet Mahton, son of Punia Devi.



Thereafter she also died leaving behind only Bulki Devi. Bulki Devi on being pleased with them gifted 9 acres 77 decimals land and house to Hemraj Mahton and Mitarjeet Mahton by a gift dated 19.09.1930. They divided their gifted property in equal share. The properties allotted to Hemraj Mahton are described in Schedule IV of the written statement, out of which he had sold 3 decimals. The defendant no.4 has purchased several lands out of the income from the property which he got from his father-in-law. The details of the properties purchased by him have been mentioned as plot nos.3003, 1448, 1443, 1491, 1635 and 1616 by registered sale deed dated 12.06.1953 and other dated 22.07.1955, 18.12.1956 etc. and also various other properties by other sale deeds of the year 1957 and 1961.

7. The further case is that Bishuni Kuer, the fufu of Mahabir Mahton, defendant no.3, was married to Tuni Mahton of village Sumka. He died issueless so Bishuni Kuer kept Mahabir Mahton with her since his childhood. Mahabir Mahton was looking after her property measuring 3 acre 76 decimals. She gifted her entire property to Mahabir Mahton 35 years ago and since then he is coming in possession of the same. Out of the said property Mahabir Mahton had exchanged 1 acre 99 decimals with the land of Chetan Mahton of village Berma in the year 1959 and in lieu thereof he got



1 acre 65 and half decimals and registered exchange deed dated 20.05.1959 was executed by him and Bishuni Kuer. The lands are comprised in plot nos.254, 255 and 256 and the lands given in exchange at village Sumka are plot nos.194, 195, 196, 176, 178, 182 and 144. The remaining lands were sold to Chetan Mahton. Since the gift was oral gift deed, Bishuni Kuer herself joined in the execution of sale deed and exchange deed. The consideration amount was only utilized by Mahabir Mahton and purchased 1.96 acres from Dwarika Prasad by sale deed dated 19.05.1959 and came in exclusive possession. Those lands are also subject matter of the present suit being plot nos.5, 7, 86, 170, 183, 297 and 299. Plot no.299 was purchased from Chamari Mahton by registered sale deed dated 30.09.1958. From the sale proceed the defendant no.3 purchased pot no.3016 by registered sale deed dated 01.11.1947 and took settlement of 9 decimals of plot no.3089 by a deed dated 10.07.1953. Therefore, all these properties are self acquired properties of defendant no.3, which are not liable for partition.

8. The further case is that Bandhu Mahton has also purchased plot no.116 out of his own money and came in exclusive possession thereof. The defendant no.3 and plaintiff no.1 have jointly purchased 15 decimals of plot no.587 in the name of their sons by sale deed dated 11.06.1954 wherein both of them have got

half share and the remaining brothers have got no concern. It is further alleged that the karta of the joint family was Akloo Mahton and after partition Balgovind became the karta of the family but after partition all the five brothers became karta of their respective families. Defendant no.3 was never the karta of the joint family.

9. On the basis of the aforesaid pleadings the learned court below framed the following issues:

- (i) Is the suit, as framed, maintainable?
- (ii) Have the plaintiffs got any cause of action to institute this suit?
- (iii) Is the suit under valued and court fee paid insufficient?
- (iv) Is the suit bad for defect of parties?
- (v) Is the suit barred by limitation and adverse possession?
- (vi) Is the suit hit by section 34 of the Specific Relief Act?
- (vii) Is there any community of interest and unity of title and possession between the plaintiffs and the defendants with respect to the suit properties?
- (viii) Is the genealogy attached to the plaint correct and complete?
- (ix) Is the story of partition as alleged by the defendants correct?
- (x) Whether the defendants no.2 to 4 have acquired the properties mentioned in the written statement from their personal fund?
- (xi) Are the plaintiffs entitled to a decree for partition? If so, for what share and for which properties?
- (xii) To what relief or reliefs, if any, are the plaintiffs entitled?

10. After trial the court below recorded the finding that the defendants failed to prove previous partition alleged by them in the year 1968. The learned court below also recorded the finding

that the properties acquired by the defendant no.3 are the self acquired properties of defendant no.3 as such not liable for partition and granted decree of partition regarding the other properties to the extent of 20 paise. Against this part of the decree whereby the court below held that the properties are standing in the name of defendant no.3 are the self acquired property of defendant no.3 and not liable for partition, the present first appeal was filed.

11. It appears that during the pendency of this first appeal an application under section 21 of the Arbitration Act, 1940 was filed by the parties jointly. On 28.09.1981 Division Bench of this Court (since at that time First appeal was being heard by Division Bench) passed the order as follows:

“This is an application under Section 21 of the Arbitration Act, 1940 for referring the dispute to the arbitration of five persons mentioned in paragraph-5 of the petition with Shri Gajadhar Singh, mentioned at serial-3 of paragraph-5 of the petition as the Umpire of the Board of arbitrators.

2. All the parties have joined the petition. Minors are represented by D.R. Guardian Advocate Mr. Kalyan Kumar Ghose, who seeks leave on behalf of the minors to join, as he contends that it is benefit for the minors to have the matter referred to the aforesaid board of arbitrators.

3. Having heard the learned counsel for the parties, we think it just and proper that leave be granted to the minors. Let the dispute with regard to the subject matter of this appeal be referred to the aforesaid board of arbitrators with Shri Gajadhar Singh as the Umpire of the Board. Let the relevant papers of this case be transmitted to Shri Gajadhar Singh aforementioned for the needful along with a copy of the petition under Section 21 of the

Arbitration Act.”

12. Subsequently the Arbitrators submitted the award along with order sheets which was placed before the Division Bench by the office note dated 13.05.1982. Thereafter objection to the Arbitration award was filed by the respondent no.1, Balgovind on 12.07.1982 under section 30 of the Arbitration Act, 1940. On the same date the respondent nos.3 and 9, namely, Mahabir Mahton and Murat Mahton son of Mahabir Mahton filed separate objection under section 30 of the Arbitration Act, 1940. Against the said objection reply/counter affidavits have been filed by the appellants.

13. On 06.03.1984 considering the above fact regarding reference to Arbitrators and objection to the award Division Bench again directed that the objections may be heard along with the hearing of the appeal itself and directed that let the arbitration matter also be disposed of at the time of hearing of the appeal itself.

14. In view of the above facts and circumstances and the orders passed I heard the learned counsels for both the parties on the objections also and on merit of the first appeal also and both the points are hereby decided in this judgment itself.

15. The learned senior counsel Mr. Rajendra Prasad for the appellants submitted with regard to arbitration matter that according to section 21 the reference can be made by the appellate court also

and in the present case rightly the appellate court referred the matter to the arbitrators. Before the Arbitrators the objectors herein filed their written statement and then considering their objections the Arbitrators have submitted award. The objections have been filed after the expiry of the period of limitation, therefore, the objection cannot be considered. However, during course of hearing limitation application has been filed by the objectors praying for condoning the delay in filing the objections under section 30 of the Arbitration Act. According to the learned senior counsel the grounds taken in the limitation application cannot be accepted at this stage. Moreover, since last more than 30 years have passed, there was no limitation application. It was filed only when the objection was raised regarding limitation by the appellants. Moreover the grounds for condoning the delay are not tenable and it cannot be said that in fact the objectors were prevented by sufficient cause from not filing the objections within one month. The notice was given to the parties as soon as the office note was placed before the Bench. As soon as the advocate of the parties came to know that awards have been submitted, it will be deemed that it was noticed to the parties as it is settled principle of law that notice to advocate is notice to party. The office note dated 13.05.1982 was placed before the Bench and order was passed on 17.05.1982. At least from 17.05.1982 the objection



could have been filed within 16.06.1982 but the objections have been filed on 12.07.1982 which is hopelessly barred by law of limitation.

16. So far merit of objection is concerned, the learned senior counsel submitted that none of the grounds mentioned in section 30 of the Arbitration Act, 1940 is attracted in this case, therefore, the objections are liable to be rejected outrightly. Except the grounds mentioned in section 30 the award cannot be set aside on any other ground. No doubt, there are some mistakes in the award which are curable and, therefore, the same can be rectified by the court itself but for that purpose the award as a whole cannot be set aside. Further the arbitrators in this case even visited the spot i.e. the disputed properties and thereafter have passed a reasoned award. Therefore, the objection raised by the objectors that they were never heard is wrong because they have already filed their written statement before the Arbitrators and the Arbitrators are not required to hear the parties. The award has been submitted within the period prescribed and now therefore, the objections are frivolous objection as such the award is liable to be made rule of the court after rejecting the objections. If the award is made rule of the court, the first appeal on merit is not required to be heard and the lower court judgment and decree will be merged in the judgment of the high Court making

the award rule of the court.

17. So far merit of the first appeal is concerned, the learned senior counsel submitted that Bishuni Kuer was not the fufu of only Mahabir Mahton rather she was fufu of all the five brothers. The intention of the fufu was to gift the property to all the five brothers as she had love and affection with her five nephews and accordingly, she had gifted the properties orally to all the five brothers. After gift the property measuring 3.76 acre and the house measuring 4 katha came in possession of the joint family property as such it became joint family property and each brother has got 20 paise share. Further defendant no.3 was the karta and he executed the deed of exchange or acquired the property through sale deeds in the capacity of karta and, therefore, all the properties either acquired through exchange or by purchase in the name of defendant no.3 are the joint family property because the property of Bishuni Kuer was given in exchange and the consideration obtained by selling the property of Bishuni Kuer was used in purchasing the properties by the karta in his own name.

18. The learned senior counsel further submitted that to grab the properties a false plea was raised in the written statement that there had already been partition in the year 1968. However, on the basis of evidence the learned court below has clearly recorded a



finding that there had been no partition as pleaded by the defendants. In view of this finding now it becomes clear that all the properties were acquired either by exchange or by selling the property of the joint family which was obtained by gift from Bishuni Kuer was during jointness of five brothers and since these acts were performed by the karta, it will be deemed that the properties are joint family properties. The learned court below has not appreciated the fact and law properly. The case of the defendant no.3 is also that Bishuni Kuer gifted orally to him. In such circumstances the dispute is whether Bishuni Kuer gifted orally to five brothers or to defendant no.3 only. None of the parties have produced any document regarding gift but admittedly the parties are claiming title on the property of Bishuni Kuer who was fufu of all the five brothers. The court below has not considered in this light and has wrongly dismissed the plaintiffs' suit with respect to the properties holding that those are the self acquired property of Mahabir Mahton, defendant no.3. On these grounds the learned senior counsel submitted that the first appeal be allowed and the impugned part of the judgment and decree be set aside and the plaintiffs suit be decreed in toto.

19. The learned counsel Mr. J.S. Arora for the respondents, so far the arbitration matter is concerned, submitted that by the order



dated 28.09.1981 the High Court referred the subject matter of dispute in appeal and not the entire matter which was not in dispute before the appellate court but the Arbitrators decided the whole suit itself. The respondents have not filed any cross objection to that part of the decree by which partition has been granted. Therefore, the Arbitrators acted in excess of their jurisdiction as such misconducted themselves. On this ground alone the award is liable to be set aside as it is invalid award. Secondly, the learned counsel submitted that although the defendants filed written statement before the Arbitrators but no opportunity was granted to the defendants for hearing in the proceeding and, therefore, also the award is invalid and that the Arbitrators misconducted themselves in not giving opportunity of hearing.

20. The learned counsel next submitted that the Arbitrators in the award held that Balgovind, the respondent no.1, shall hold the allotted properties till his lifetime and thereafter it will go to the other brothers. This restriction cannot be imposed in case of inheritance and partition of ancestral properties. Since this is the restriction imposed by the Arbitrators on this ground also, the award is invalid as the Arbitrators acted contrary to the Hindu Succession Act. The learned counsel next submitted that the Arbitrators did not decide the question i.e. the controversy between the parties



regarding as to whether the properties, which are not ancestral properties, are the self acquired property of the defendants Mahabir Mahton, Balgovind Mahton, etc. or is the joint family property because that was the subject matter before the appellate court. The Arbitrators straightway divided the property treating the properties as joint family property without recording any finding on the controversy. Since a title is being vested on the plaintiff by the award, the award is necessarily required to be registered otherwise the title of the property the value of which is more than 100 will not be vested on the plaintiff. Since the award is not registered, the same cannot be made a rule of the court. On this score also the Arbitrators misconducted themselves and passed an invalid award which is liable to be set aside.

21. So far the limitation question raised by the appellants is concerned, the learned counsel submitted that the Division Bench by terms of order dated 06.03.1984 directed that the objections may also be heard along with the hearing of the appeal. Therefore, the objectors were under impression that the objections shall be heard even if no limitation application has been filed and it is not necessary to file limitation application. When the objection is being raised at the time of hearing, separate limitation application has been filed praying for condoning the delay in filing the objection. The



learned counsel further submitted that the Arbitrators did not give notice to the defendants as to when the award was passed and it was submitted before the court. The copy of the award was also not given to the defendants. When the award was placed before the court, the defendants approached the Arbitrators for obtaining copy of the award and then after getting the copy of the award they have filed the objection to the award, therefore, there is no intentional delay in filing the objection rather it was the bonafide mistake. Therefore, the delay, if any, is liable to be condoned.

22. So far merit of the case is concerned, the learned counsel submitted that although the defendants pleaded that there had already been partition between the parties in January, 1968, the court below recorded finding that the defendants failed to prove partition in 1968 and accordingly has granted the decree with respect to all the ancestral properties. So far that part of the decree is concerned, the defendants have neither filed the appeal nor cross objection in this appeal. In such circumstances, so far that part of the decree granting partition for ancestral property is concerned, it became final. The plaintiffs have challenged the other part of the decree whereby it has been refused to partition, the self acquired property of the defendants. Now, therefore, the only dispute remained between the parties is whether the properties standing in



the name of the defendants are self acquired property or it is the joint family property. The learned counsel submitted that on the basis of evidences and materials the learned court below has rightly held that the properties are self acquired properties not liable for partition. The properties have been acquired by the defendant no.3 by exchanging the property of fufu, Bishuni Kuer in his own name and after selling the property of Bishuni Kuer, he purchased separate property out of the consideration amount. Therefore, in no case the property can be treated as the joint family property. It is for the plaintiffs to prove their case that it is joint family property but in the present case the plaintiffs have failed to prove, therefore, the findings recorded by the court below cannot be interfered with. The learned counsels relied upon various decisions on different points. I shall consider the same later on.

23. In view of the aforesaid rival contentions of the learned counsels for the parties, the following points arise for consideration in this first appeal:-

- (i) Whether the award filed by the Arbitrators is valid, legal and whether the award be made rule of the court or is liable to be set aside?
- (ii) Whether the properties standing in the name of defendants are self acquired properties as held by the trial court or are the joint family properties liable for partition?

24. **Point No.(i)** : It appears that before this court

application under section 21 of Arbitration Act was filed by the parties praying for reference of the matter to the Arbitrators. The said application under section 21 was heard on 28.09.1981 and the High Court as quoted above referred the dispute to the Arbitrators with regard to the subject matter of this appeal. Therefore, in view of this reference order the only subject matter of this appeal has been referred to the Board of Arbitrators.

25. Section 21 of the Arbitration Act, 1940 reads as follows:

Section 21 :- Parties to suit may apply for order of reference:- Whether in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to Arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.

26. This provision has been interpreted by the Hon'ble Supreme Court in the case of **Ct. A. Nachiappa Chettiar & Ors. Vs. Ct. A. Ct. Subramaniam Chettiar (A.I.R. 1960 SC 307)** and it has been held that for the applicability of Section 21, two conditions must be satisfied before an application in writing for reference is made. All the interested parties to the suit must agree to obtain a reference and the subject matter of the reference must be any matter in difference between the parties in the suit. When these two conditions are satisfied the application for reference must be made at any time before the judgment is pronounced. The word "Court" in

section 21 cannot be interpreted to mean only the trial court. Similarly the word “suit” cannot be construed in the narrow sense of meaning only the suit and not an appeal. The word “Court” in section 21 includes the appellate court proceeding before which are generally recognised as continuation of the suit and the word “suit” will include such appellate proceeding.

27. In view of this provision and the law laid down by the Supreme Court under section 21 of the Arbitration Act, 1940 the reference may be made to the Arbitrators regarding any matter in difference between the parties in the suit. Now, therefore, if the word “suit” includes appeal then the difference between the parties in the appeal can be referred to arbitration. In the present case, admittedly so far “suit” is concerned, the difference between the parties was with regard to ancestral properties and non-ancestral properties. So far ancestral properties are concerned, the trial court has granted the relief to the plaintiffs. Therefore, this part of the decree has become final as it was not challenged by the defendants. In such circumstances by no stretch of imagination it can be said that this matter is in difference between the parties in the appeal. Before this court in this first appeal the only difference between the parties is with regard to non-ancestral properties. According to the plaintiffs-appellants, these non-ancestral properties are also the joint

family properties whereas according to the defendants these are their self acquired properties. In the reference order specifically it has been mentioned that the dispute with regard to the subject matter of this appeal be referred. Therefore, the subject matter of this appeal refers to the difference between the parties with regard to non-ancestral property which was referred to the Board of Arbitrators.

28. From perusal of the award submitted by the Arbitrators, it appears that the Board of Arbitrators instead of deciding this difference between the parties regarding non-ancestral properties have also partitioned the ancestral properties which were not in difference between the parties. Therefore, the Board of Arbitrators acted beyond the reference made to them.

29. The learned senior counsel Mr. Rajendra Prasad for the appellants submitted that in the application the parties agreed that the subject matter of suit should be referred. He also placed the application. It may be mentioned here that what was the intention of the parties and what they had mentioned in the application is not material because the statements were made in the applications for the purpose of section 21 of the Arbitration Act, 1940. The Arbitrators are not required to act according to the applications filed by the parties. The reference order in this case was made with respect to only non-ancestral properties and, therefore, according to



reference order the Arbitrators got the jurisdiction to decide the matter in dispute in the appeal. In view of the above facts, prima facie it appears that the Arbitrators acted beyond the jurisdiction and have decided the matter, which was neither referred to them nor was in difference between the parties nor was the subject matter of the appeal. Therefore, I find no force in the submission of the learned counsel for the appellants.

30. From perusal of the order sheet of the arbitration proceeding before the Board of Arbitrators, I find that the defendants had filed their written statement but the Board of Arbitrators never fixed any date nor they heard the defendants-objectors on any date. Therefore, from the record itself it is apparent that no opportunity was granted to the defendants-objectors of hearing, thereby the Board of Arbitrators misconducted themselves in the arbitration proceeding.

31. As stated above, the controversy between the parties, which was the subject matter of this first appeal, is as to whether the non-ancestral properties are the joint family properties as claimed by the plaintiffs or are self acquired properties as claimed by the defendants. This controversy was required to be decided by the appellate court and by reference this controversy was referred to the Arbitrators. Therefore, the controversy, which should have been



decided by the appellate court after reference, should have been decided by the Arbitrators but the Arbitrators did not decide the controversy and they only partitioned the property as if the matter was refereed for partitioning. Therefore, also the award is not according to the reference order and the controversy between the parties still remained. On this ground also the Board of Arbitrators misconducted themselves and in fact the award has been passed, which is invalid.

32. In **A.I.R. 1988 SC 1166 (Continental Construction Co. Ltd. Vs. State of M.P.)** the Supreme Court has held that an Arbitrator is not a conciliator nor can act arbitrarily rather he is to proceed according to law to decide the dispute between the parties. In the present case as discussed above, the Arbitrators neither granted opportunity of hearing to the defendants-objectors nor they decided the controversy i.e. the differences between the parties in the appeal, which was referred to them nor they acted according to law.

33. The Hon'ble Supreme Court in **A.I.R. 1999 SC 2262 (Grid Corporation of Orissa Ltd. and another Vs. Balasore Technical School)** has held that if the Arbitrators have misconducted themselves or have misconducted the proceedings or where the award is otherwise invalid the award is liable to the set

aside. In the present case, I have discussed the misconduct of the Board of Arbitrators and how they misconducted the proceeding.

34. In the award a restriction has been put by the Board of Arbitrators on the right of Balgovind Mahton, which is contrary to the Hindu Succession Act. If Balgovind Mahton inherited the property, he became the absolute owner and the Arbitrators had no right or jurisdiction to restrict the exercise of right conferred on Balgovind after inheritance. This is also an instance of misconduct. The learned senior counsel for the appellants submitted that if there is defect in the award, the same may be rectified by the appellate court. So far this submission is concerned, it may be mentioned here that this is not a mistake but in fact the Arbitrators misconducted themselves by passing the award and thereby the award became illegal and invalid.

35. The learned senior counsel Mr. Prasad submitted that the Arbitrators are not required to give a reasoned award according to 1940 Act, therefore, the validity or otherwise of the award cannot be examined by this Court on the ground that no reason has been assigned for not giving any finding regarding the controversy between the parties. So far this submission is concerned, it is well established that the Arbitrators had the jurisdiction to give an unreasoned award but in the present case no finding has been



recorded in the award regarding the controversy between the parties. The subject matter of the appeal i.e. the matter in difference between the parties was referred to the Arbitrators by the High Court. The High Court never referred the matter for partitioning the non-ancestral and ancestral property as a whole. Therefore, whether the award is a reasoned award or unreasoned award it does not matter anything. The controversy between the parties, which was referred, still remained undecided by the Arbitrators. Instead of deciding the difference they directly partitioned the properties without recording any finding as to whether the properties are liable for partition or not.

36. In **A.I.R. 1974 SC 1066 (Ratan Lal Sharma Vs. Purshottam Harit)** the supreme Court has held that an award which creates rights of the parties in properties in question must be registered otherwise the same cannot be looked into nor that can be made rule of the court. Admittedly in present case the award has not been registered.

37. So far limitation is concerned, no doubt there is delay in filing the objections by the defendants but from perusal of the order of this court dated 06.03.1984 it appears that the court directed that the objection shall be heard with the appeal itself. No objection was raised by the appellants that the objection cannot be heard as is



liable for dismissal outrightly because the objections are barred by law of limitation. In such circumstances I find that here there is no willful laches on the part of the defendants-objectors in filing the award. The learned senior counsel Mr. Prasad for the appellants submitted that the limitation application has been filed after 30 years when the objection is raised by the appellants at the time of hearing of the appeal. So far this submission is concerned, it may be mentioned here that there is no limitation prescribed for filing limitation application. Moreover as stated above, there may be bonafide confusion or mistake but it cannot be said that it was willful laches or intentional delay. Further the copy of the award was not given to the parties nor any notice was given to the parties by the Arbitrators for filing the award before the Court. In view of the above facts I find that the defendants-objectors were prevented by sufficient cause from not filing the objection to the award within the prescribed period. Accordingly, the limitation application i.e. I.A. No.6814 of 2015 is hereby allowed and the delay in filing the objection is hereby condoned.

38. In view of my above discussion I find that the award dated 23.02.1982 filed by the Board of Arbitrators in this first appeal cannot be made rule of the court and is liable to be set aside on the grounds stated above. Accordingly, the award is set aside. The Point

No.(i) is thus answered against the appellants and in favour of the contesting respondents.

39. **Point No.(ii)** : This point relates to the merit of the case. Since the cases of respective parties have been narrated above elaborately, it is not reiterated here to avoid bulkiness. It may be mentioned that considering the nature of dispute the oral evidences are not very material to decide the controversy. It is admitted fact that originally 3.76 acres agricultural land and 4 decimals of homestead lands belonged to Bishuni Kuwar, which she inherited from her father-in-law and she was the absolute owner. Bishuni Kuwar is the sister of Hemraj Mahton i.e. fufu of all the five brothers i.e. sons of Hemraj Mahton. Therefore, these properties of Bishuni Kuwar are not the ancestral property of the family of the parties. The plaintiffs claimed that Bishuni Kuwar gifted the properties to all the five brothers, therefore, the plaintiffs have got 1/5th share in the same. On the contrary, Mahabir Mahton, defendant no.3 claimed that in fact it was gifted to him alone. It is admitted fact that no document has been produced as it is said that the gift was oral gift. Here, since the plaintiffs are claiming 1/5th share i.e. 20 paise in this property also, the burden lies on the plaintiffs to prove that the property is the joint family property.

40. The Hon'ble Supreme Court in case of **the Union of**

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SCC 269 has held that the burden always lies on the plaintiff to make out and establish a clear case for granting declaration sought for and weakness if any of the case set up by the defendants would not be a ground to grant relief to the plaintiff. The plaintiff could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. Even if the title set up by the defendants is found against them, in the absence of establishment of the plaintiff's own title the plaintiff must be non-suited.

41. In the present case as stated above, the property belonged to Bishuni Kuwar. The plaintiffs are claiming title and possession i.e. partition, therefore, the onus is on the plaintiffs to prove how they are entitled to a share in this property. The plaintiffs' case is only that Bishuni Kuwar gifted orally to five brothers. So far this case is concerned, it may be mentioned here that in Hindu Law there cannot be any oral gift.

42. Section 123 of the Transfer of Property Act reads as follows:

Transfer how effected:

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and

attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

43. In view of the above position by oral gift no title is conferred on the plaintiffs, therefore, it can safely be said that the plaintiffs have no title on this property as such there is neither unity of title nor unity of possession. In such circumstances there cannot be any partition with regard to the property granting share to the plaintiffs arises.

44. The learned senior counsel Mr. Prasad for the appellants submitted that the defendant no.3 is also claiming that it was gifted orally to him. In such circumstances defendant no.3 has also no valid title according to law and the properties are in joint possession of the five brothers, who are joint as has been found by the trial court. So far this submission is concerned, I have already quoted the decision of the Supreme Court in the preceding paragraph. Here, the plaintiffs cannot be granted decree considering the weakness of the case of the defendant no.3. The burden is on the plaintiffs to prove title. However, now let us consider this matter in another way according to the evidence produced by defendant no.3.

45. The defendant no.3, Mahabir Mahton has produced



Ext.F, which is a deed of exchange whereby the property of Bishuni Kuwar was exchanged. In this Ext.F Bishuni Kuwar is the vendor no.1 and Mahabir Mahton is vendor no.2. The property is of village Sumka. Likewise Exts.D/1 to D/4 are the sale deeds whereby Bishuni Kuwar as vendor no.1 sold her properties of village Sumka by registered sale deeds. Defendant no.3 is vendor no.2. From these documents it is clear that in fact Bishuni Kuwar either exchanged her own properties or sold her properties to third person. The consideration amounts were given to the defendant no.3 by her. It is the case of the defendant that he has acquired the properties in his name out of this consideration amount. Now the question is even if there is no gift in favour of defendant no.3 then also in fact the exchange deed or the sale deeds have been executed by Bishuni herself as vendor no.1. If she exchanged the property and then sold it wherein the defendant no.3 joined as co-vendor and received the consideration amount then it cannot be said that the sale deeds are executed by defendant no.3 alone as karta of the family. Bishuni Kuwar herself is the vendor.

46. So far the case of the plaintiffs that defendant no.3 was the karta is concerned, Article 236 of the Hindu Law by Mulla 16th Edition provides that property belonging to a joint family is ordinarily managed by the father or other senior member for the time



being of the family. The manager of a joint family is called karta. Here the eldest member in the family was defendant no.1, Balgovind Mahton. After him, Bandhu Mahton, defendant no.2, and thereafter Mahabir Mahton is the third son. There is no circumstances shown by the plaintiffs to show how during lifetime of defendant no.1 and defendant no.2, the defendant no.3 became the karta. Only statements have been made in the pleading. It is settled law that a senior member of a family is entitled to manage the family properties and is presumed to be the manager until the contrary is shown. The senior member may give up his right of management and a junior member may then manage the property. The post of kartaship is neither selective nor elective. The right is attached with the senior most member of the undivided family. In the present case, except the statements in the pleading and in the deposition nothing has been produced by the plaintiffs to prove the contrary that in fact defendant no.3 was the karta although the defendant nos.1 and 2 were alive. No evidence has been produced to show that either the defendant no.1 or the defendant no.2 ever relinquished their right of kartaship or they did not desire to be the karta and they requested defendant no.3 to act as karta. According to the case of the defendant no.3 which is not denied by the plaintiffs, he was residing with Bishuni Kuwar i.e. fufu. Now in such circumstances how he

will be the manager or the karta of the joint family property situated in another village that too in presence of the eldest member defendant no.1 and also defendant no.2. By mere saying that defendant no.3 is karta will not do.

47. Here, so far the proprieties acquired by defendant no.3 is concerned, there is no evidence produced by the plaintiffs to show that out of the joint family income the defendant no.3 has acquired the property or that the joint family has acquired the property in the name of defendant no.3. On the contrary as would be evident from the exchange deeds and sale deeds mentioned above the properties have been acquired out of the amount received in consideration of the selling of property of Bishuni Kuwar. Therefore, the said consideration which was received by defendant no.3 for the property sold by Bishuni Kuwar cannot be termed as joint family fund or nucleus of the joint family. The properties either exchanged or sold were exclusively belonged to Bishuni Kuwar who sold the property and consideration amount was received by defendant no.3 and then he purchased the property in his own name. The deeds are registered deeds and there is presumption of genuineness of the same and unless the said deeds are declared to be either void or voidable or that by the said deeds no title conferred on the purchasers, the same shall remain valid. The plaintiffs never sought for any declaration

that since the properties were gifted to all the five brothers, Bishuni Kuwar could not have sold the property or exchanged the property. Therefore, whatever deeds were executed by Bishuni Kuwar in favour of third party were the deeds validly executed by the owner. No doubt defendant no.3 only joined as co-vendor which will not make any difference because the ownership remained with Bishuni who transferred the property or exchanged. Therefore, whatever property acquired by defendant no.3 in lieu of either exchange or with the help of consideration amount received from the purchasers cannot be the joint family property.

48. In view of the above discussion I find that the properties mentioned in the written statement of defendant nos.2 to 4 are their self acquired property. The finding of the court below on this point is, therefore, hereby confirmed.

49. In the result, I find no merit in this first appeal and accordingly, this first appeal is dismissed. In the facts and circumstances of the case there shall be no order as to cost.

Harish/-

(Mungeshwar Sahoo, J)

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