IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.367 of 1979

Against the Judgment and Decree dated 06.02.1979 passed by IVth Addl. Sub Judge, Siwan in Partition Suit No.49 of 1971 / 4 of 1978.

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Moti Prasad & Ors. .

................Defendants-appellants

Versus

Dwarika Prasad & Ors.

……......Plaintiffs - Respondents

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Appearance :

For the Appellant/s	:-	Mr. S. S. Dwivedi, Sr. Advocate Mr. Ranjan Kumar Dubey, Adv. with him.
For the Respondent	:-	Mr. Ganapati Trivedi, Sr. Advocate Mr. R. K. Sinha No.2, Adv. with him.

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Dated : 15th day of September, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. The defendants have filed this First Appeal against the Judgment and Decree dated 06.02.1979 passed by the learned IVth Addl. Subordinate Judge, Siwan in Partition Suit No.49 of 1971 / 4 of 1978 whereby the Court below decreed the plaintiff's suit for partition with respect to Schedule 2 to 6 of the plaint.

2. The plaintiffs filed the aforesaid partition suit claiming partition of the properties described in Six Schedules. According to the plaintiff, Schedule 1 consists of kasht land, Schedule 2 is homestead land which are in Siwan town, Schedule 3 contains the houses constructed on Schedule 2 lands, in Schedule 4, the acquired properties of village Baghra and Lahusi are described. In Schedule 5, the articles kept in Kirana shop is described and Schedule 6 in the money decree obtained by Bhola Ram against Durga Ram.

3. The plaintiff further alleged that Ram Sahay Ram had three sons, namely, Narain Ram, Ganga Ram and Ganesh Ram. Narain pre-deceased his father. Ganga and Ganesh also died. The heirs of Ganga are the defendant No.1 to 5. The defendant No.6 to 9 are the sister's son of Bhola Ram who is son of Narain. The plaintiffs are the heirs of Ganesh Ram. The plaintiff alleged that Ganesh Ram died leaving behind his widow, Asharfa Kuer and three daughters, namely, Lakhiya, Laichi and Yasoda. The sons of Lakhiya are the plaintiff No.1, 2 and 3 whereas Yasoda herself is plaintiff No.4.

4. The further case of the plaintiff is that Ram Sahay Ram died before revisional survey, therefore, the properties are recorded in the name of Bhola Ram, Ganga Ram and Ganesh Ram in revisional survey having equal shares. Some time after revisional survey, the aforesaid three persons separated in mess only but there was no partition. They had got ancestral Kirana business which remained joint even after separation wherein the three persons had equal shares. Out of the income of aforesaid Kirana shop, other two such shops at Siwan was established which were also joint business of all. Further, Asharfa Kuer had gifted her 1/3rd share in schedule '1' and '2' properties in favour of plaintiffs 1 to 3 by registered gift deed dated 14.07.1960. The aforesaid plaintiffs accepted and came in possession of the gifted properties. However, she had not gifted her 1/3rd share in Schedule '3' to '6' wherein the plaintiffs are entitled to 1/3rd share.

5. The plaintiff further alleged that they had filed partition suit No.929 of 1961 claiming partition of the gifted properties. The said suit was decreed and 1/3rd share was granted to the plaintiffs with respect to Schedule '1' land, therefore, the plaintiffs did not claim any share in Schedule '1' land. So far Schedule '2' land is concerned, it is stated that Asharfa Kuer had not transferred her share in these houses by the gift deed, therefore, the suit was dismissed with respect to Schedule '2' land but the Court below held that the plaintiffs have 1/3rd share in Schedule '2' land.

6. The plaintiff further alleged that Bhola Ram had advanced some loan to one Durga Ram out of the joint family income from business and he also got a money decree against Durga Ram.

Thereafter, he filed execution case No.107 of 1965 but during this period, Bhola Ram was murdered. Accordingly, the plaintiff claimed 1/3rd share.

7. The defendants No.1 to 5, i.e., heirs of Ganga Ram and defendant No.6 to 9 who are heirs of Bhola Ram who were added subsequently filed contesting separate written statement. Their main defence is that there is no unity of title and possession with respect to the suit properties. There was no ancestral Kirana business. No house was constructed from the income of any joint Kirana business nor any such properties as mentioned in schedule '4' was acquired. Since Asharfa Kuer became unchest, she was driven out by Ganesh Ram himself. Yasoda was not a daughter of Asharfa. Lakhiya died in the year 1934 and then Sheonandan married second time and the plaintiffs are sons of Sheonandan through second wife. Schedule '2' lands were purchased by Ganga Ram from his own fund on which Bhola Ram has constructed house spending Rs.4 lakhs from his personal fund. The defendants denied the construction of house from income of any joint business. Bhola Ram reunited with Ganga Ram when the sons of Ganga Ram were all minor and Ganesh Ram became ill. The Kirana shop in question belong to Ganga and Bhola and Ganesh had no concern with the same.

8. The defendant No.6 to 9 in their separate written statement alleged that Bhola Ram died in separation from Ganga Ram and Ganesh Ram. After his death, these defendants came in possession of the properties of Bhola Ram. The Kirana business exclusively belonged to Bhola Ram which he established after separation. They denied re-union with Ganga and Ganesh. Their further case is that Bhola Ram in the state of separation acquired all the suit properties out of his personal income, therefore, none others have got any right in the properties. These defendants admit half share of defendant 1 to 5 in the properties described in Schedule '4'. No advance was given by Bhola Ram out of joint family fund or income from joint family business. On these grounds, they alleged that the plaintiff's suit be dismissed.

9. In view of the aforesaid pleadings of the parties, the learned trial Court framed the following issues :-

(i) Is the suit as framed maintainable?

(ii) Have the plaintiffs any cause of action and right to sue?

(iii) If the suit is barred by the law of res-judicata?

(iv) Whether the defendant Nos.6 to 9 are heirs of Bhola Ram and they are entitled for any share in the suit properties?

(v) Did, Mt. Asarfa, the widow of Ganesh Ram inherited the property of her husband?

(vi) Whether the plaintiffs are heirs of Mt. Asarfa and they acquired the interest, if any, in the suit property?

(vii) Whether the plaintiffs have got unity of title and possession with respect to any suit property and they are entitled for decree of partition with respect to one third share?

(viii) To what relief, if any, are the plaintiffs entitled?

10. On the basis of material and evidence, the trial Court came to the conclusion that in the previous suit, it was held that Mostt. Asharfa had interest in the property of her husband and she was justified to execute the deed of gift in favour of plaintiff. As such Mostt. Asharfa had inherited the property of her husband vide paragraph 11. The Court below also found that in the previous suit, it was found that the plaintiffs are sons of Lakhiya who was daughter of Ganesh, therefore, it will operate as res-judicata. In Schedule '2', the plaintiff could not get any share because Asharfa had not gifted her share in the house standing on the land described in Schedule '2'. There is no evidence as to when Schedule '2' lands were purchased by Ganga Ram and what was the source of income for the aforesaid purchase, why Ganga Ram will allow Bhola to make construction about Rs.4 lakhs over his own land. The Kirana shop in question was the property of joint family and houses in question were not constructed by Bhola Ram in the year 1950 as alleged by the defendant. Bhola Ram was clever man and he was *karta*. The plaintiffs are entitled to 1/3rd share in Schedule '2' to '6'.

11. The learned senior counsel, Mr. S. S. Dwivedi, appearing on behalf of the appellant submitted that the learned court below has wrongly decreed the plaintiff respondent's suit although in previous suit, the claim for partition on Schedule '2' property was dismissed and in the present case Schedule '3' properties are the houses constructed on Schedule '2' properties. So far Schedule '4' property are concerned, those are the properties which stand in the name of the appellant. The learned counsel further submitted that the earlier suit was filed by these very plaintiffs for partition of Schedule '1' and '2' properties on the ground of gift deed executed by Asharfa Kuer. The trial Court recorded finding therein that the plaintiffs are not entitled to any share in Schedule '2' property but again they are praying for partition of the same property described in Schedule '2' of the present suit.

12. The learned senior counsel further submitted that there was no ancestral Kirana business nor any house was constructed from the income of any such joint Kirana business nor any properties as described in Schedule '4' was acquired out of the alleged joint Kirana business. Since the property are standing in the name of the appellants, it was for the plaintiffs to establish any joint Kirana family business but mere statement had been made that the business remained joint. According to the learned counsel, in the plaint itself, the plaintiffs have pleaded that some time after revisional survey, Bhola Ram, Ganga Ram and Ganesh Ram separated in mess but the ancestral Kirana business remained joint wherein they had 1/3rd share. Therefore, when separation is admitted, the onus was on the plaintiff to prove existence of joint Kirana family business and that it remained joint and each have got 1/3rd share. In the present case, no reliable evidence has been produced by the plaintiffs in support of the existence of Kirana shop, the nature of the articles and the income thereof. Moreover, the plaintiffs are the sons of daughter of Ganesh so they all were residing in their parents house. There is no evidence that they also were participating in doing the alleged joint family Kirana business. Even there is no iota of evidence in support of income from the so called Kirana shop nor there is evidence of existence of two other Kirana shop established out of so called income from the family business. Admittedly, the Schedule '4' properties measuring 5 bigghas stands in the name of sons of Ganga Ram which were acquired on 15.09.1949 and the separation as pleaded is just after the revisional survey which took place in the year 1914. In such circumstances, there is no presumption that the properties were acquired out of the joint family fund or nucleous.

13. The learned senior counsel further submitted that in the registered gift deed executed by Asharfa in favour of the plaintiffs clearly recites that she gifted all her properties which she inherited. The present plaintiffs pleaded that she had not gifted her $1/3^{rd}$ share in the Schedule ‘2’ to ‘6’ properties but Mostt. Asharfa Kuer in her evidence in the earlier suit has not stated that anything was left with her. On the contrary, in her evidence as well as in the gift deed, she clearly stated that she gifted all her properties, therefore, nothing remained with her. In such circumstances, the claim of the plaintiff is not maintainable. But the Court below wrongly approached the case and held that the plaintiffs are entitled to $1/3^{rd}$ share even in Schedule ‘2’ property.

14. The learned counsel further submitted that the house was constructed by Bhola Ram out of the Kirana business run by him which exclusively belong to him as he established after separation but the Court below although there is no reliable evidence adduced by the plaintiffs wrongly held that it was constructed out of the income from joint family business. On these grounds, the learned counsel submitted that the impugned Judgment and Decree be set and the plaintiff's suit be dismissed.

15. On the other hand, the learned senior counsel, Mr. Ganapati Trivedi, submitted that there is no defect in the impugned Judgment and Decree. The Schedule '1' and '2' of earlier title suit No.92 of 1961 is schedule '1' and '2' of the present suit but the earlier suit was filed for 1/3rd share on the basis of the deed of gift dated 14.06.1960 executed by Asharfa whereas the present suit has been filed on the basis of inheritance being the Nati of Asharfa Kuer. In the earlier suit, the appellants herein disputed the genuineness of gift but it was found that the gift deed is a valid deed. Therefore, the plaintiffs are entitled to claim 1/3rd share in the land as well as in the house. Earlier, the decree was not granted on land because the gifts were not made by Asharfa Kuer with respect to house. Since the gift has been held to be valid, the title conferred on the plaintiff with respect to the land but it was not practicable to grant decree for 1/3rd share in the land because houses were there over Schedule '2' properties. Now, the plaintiffs are claiming 1/3rd share on the houses also which are standing on the land (Schedule '2' property) on the basis of inheritance, i.e., 1/3rd share of Ganesh.

16. The learned senior counsel further submitted that the properties, acquired from the income of the business, have not been gifted to the plaintiffs which continued in joint possession, therefore, the plaintiffs are entitled to 1/3rd share. The civil disputes are decided on preponderance of probability. In the present case, if the conduct of the defendant is taken into consideration, it is apparent that they made all pleadings to deprive the plaintiffs of their due share. Firstly, they pleaded that Asharfa became unchest. Secondly, Lakhiya Devi pre-deceased her father and her husband married with another lady and the plaintiffs are sons of that lady. Thirdly, Ganesh Ram had no property at all at the time of his death and fourthly that after separation, Ganga Ram acquired some properties as well as he established Kirana shop but they miserably failed to prove the facts. Although a case of re-union between Bhola Ram and Ganga Ram is pleaded but no evidence was adduced. Admittedly, huge construction were made by Bhola Ram and if land was purchased by Ganga Ram why construction were made by Bhola Ram. This clearly indicate that it was the joint family property. The learned Court below considering all these aspects of the matter has rightly decreed the plaintiff respondent's suit.

17. In view of the above contentions of the learned counsels for the parties, the points arises for consideration in this First Appeal are as follows :-

(i) Whether the plaintiffs have been able to prove unity of title and possession with respect to the suit property described in Schedule '2' to '6' as such they are entitled to 1/3rd share

(ii) Whether the finding with regard to Schedule '2' property in the previous Judgment will operate as res-judicata or not with regard to Schedule '2' of the present suit.

18. **Point No.(i) & (ii)** :- In the plaint at paragraph 5, the plaintiff specifically pleaded that the eldest son of Ram Sahay Ram, namely, Narain Ram, pre-deceased his father and thereafter on the death of Ram Sahay Ram, the name of Ganga Ram, Ganesh Ram and Bhola Ram were recorded in revisional survey. At paragraph 6 further pleaded that just after this revisional survey, all the above three persons separated themselves in mess but the properties were not partitioned. It is further pleaded that since their ancestor Kirana shop was run by them and after separation, the said Kirana shop continued in partnership wherein each branch had 1/3rd share and in that way, the business continued. On the contrary, the defendant's case is that there was no joint kirana business of three brothers.

19. In support of their respective cases, the parties have adduced oral as well as documentary evidences. P.W.1 is the father of plaintiff No.1 and 2. P.W.2 and P.W.3 are the plaintiffs themselves. P.W.6 is plaintiff No.4. From perusal of the evidences of these witnesses, it appears that they had nowhere described about the income from alleged joint family business. None of the witnesses have disclosed the existence of any other two Kirana shops which were established from so called joint family Kirana shop. Admittedly, according to the plaintiffs themselves, three brothers separated just after 1914. No documentary evidence has been produced that how the plaintiffs continued in the alleged joint family business. Admittedly, the plaintiffs have produced the khatiyan which has been marked as exhibit '2' and '2/a' and there is only 21 katha land in the khatiyan which is the joint family land of the three brothers. The settled principle of law is that there is no presumption that a family possesses joint property or any property because it is joint. In the present case, the case of the plaintiffs themselves is that the three branch separated just after 1914. Therefore, now, the presumption of jointness is not available and there is no presumption available in favour of the plaintiff.

20. Further, the plaintiff claimed that after death of Ganesh, his property was inherited by Asharfa Kuer. Asharfa Kuer had been examined in the earlier suit. Her evidence is exhibit '3' in the present suit. In her evidence, she has clearly stated that after death of Ganesh, his 1/3rd share was inherited by her. Whatever property she got, she gifted all to the plaintiffs.

21. From perusal of the decree in earlier suit being title suit No.92 of 1961 which has been marked as exhibit '5A', it appears that the description of Schedule '2' property is same in the present suit. The Judgment of the aforesaid suit has been marked as ext. '4' in the present suit. While deciding the question of title with respect to schedule '2' property, the Court below at paragraph 21 & 22 clearly held that the plaintiffs have completely failed to prove that they have acquired title to the extent of 1/3rd in the houses and shops given in Schedule '2' of the plaint. As such, there is no unity of title and possession with respect to those and accordingly, held that they are not entitled to a decree for partition with respect to the properties given in schedule '2' of the plaint.

22. The learned senior counsel, Mr. Ganapati Trivedi submitted that the Court below in the earlier suit found that the gift is valid deed and, therefore, the plaintiffs are entitled to 1/3rd share in Schedule '2' property. The trial Court held that since the house and shops were not gifted by Asharfa Kuer, the plaintiffs are not entitled for any share. So far this submission is concerned, it may be mentioned here that there is no dispute that Schedule '2' herein were the Schedule '2' in previous suit. The Court below clearly recorded finding that there is no unity of title and possession over Schedule ‘2’ property as such dismissed the plaintiff’s suit holding that the plaintiffs are not entitled to 1/3rd share in Schedule ‘2’ property. The decree was granted for partition with respect to Schedule ‘1’ property only. In view of the above fact the reason which was assigned by the trial Court cannot be examined in this present case.

23. Section 11 of the CPC provides that **‘no Court shall try any suit and issue in which the matter directly and substantially in issue has been directed and substantiated in issue in a former suit between the same party.’** Here, admittedly, Schedule ‘2’ properties was the subject matter of earlier suit also. The earlier suit was also between the same party. The issue was as to whether there was any unity of title and possession between the parties with respect to Schedule ‘2’ properties. This issue had already been decided in the earlier suit. Now, in the present suit, this Court cannot say that because of some wrong reason or practical difficulty, the decree could not be granted, therefore, in the present suit, the same decree is granted herein. In the previous suit, the Court below clearly held that the plaintiffs are not entitled to any decree for partition with respect to the properties given in Schedule ‘2’ of the plaint vide paragraph 22. This finding with respect to Schedule ‘2’ property will operate as res-judicata in the present suit. The reason for not granting the decree cannot be examined in the present suit. Admittedly, the relief for partition with respect to Schedule '2' property has been refused may be on some flimsy ground or whatever it may be. In my opinion, therefore, the same finding shall operate as res-judicata in the present suit.

24. From perusal of the impugned Judgment, it appears that the trial Court has not considered this settled principle of law and examined the reasonings assigned by the Court in the earlier suit. I, therefore, find that the approach of the Court below is in the present case is wrong.

25. It is admitted fact between the parties that the houses were constructed prior to institution of earlier title suit No.92 of 1961. In other words, on the date of institution of the suit, Schedule '3' property of this suit were in existence. The plaintiffs were knowing that Asharfa Kuer had not gifted these properties. The Court below clearly held at paragraph 21 (Ext.'4') that the plaintiffs have completely failed to prove that they have acquired title to the extent of $1/3^{rd}$ in the houses and shops given in Schedule '2' of the plaint. From this, it becomes clear that the plaintiffs claimed partition with respect to land as well as houses and shops standing on it which was described in Schedule '2' of the previous suit. The said Schedule '2' property have been bifurcated in the present suit and the same has been described in Schedule '2' and Schedule '3'. In other words, lands have been described in Schedule '2' and houses and shops have been described in Schedule '2' of the property in the present suit. In view of the above findings recorded in the earlier suit, this finding will operate as res-judicata in the Schedule '3' property also which were included in Schedule '2' of the earlier suit.

26. The learned senior counsel, Mr. Ganapati Trivedi, submitted that the plaintiffs filed the previous suit on the basis of gift which was rejected but now the present suit had been filed on the basis of inheritance being the Natis of Asharfa Kuer. So far this submission is concerned, it may be mentioned here that it is immaterial as to on which ground, the earlier claim was made and on which ground the present claim is being made. The material fact is that the plaintiffs claimed for partition with respect to Schedule '2' and '3' of the present suit which were Schedule '2' in previous suit. The said claim was rejected. If at all the plaintiffs were entitled to a share on the basis of inheritance, they could have claimed the same in the previous suit itself but they did not. In my opinion, **Explanation IV to Section 11 CPC shall apply** which provides that **'any matter which might and ought to have been made ground of defence or**

attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.'

27. Further the same relief cannot be claimed first on one ground and then again on another ground and then again in third ground. Here, the claim was for partition which has been refused. On what ground the claim was made in previous suit, it is entirely a different matter.

28. From perusal of the impugned Judgment, it appears that the Court below gave much emphasis on the construction of the house by Bhola Ram. The Court below proceeded to decide the matter regarding construction on the basis of assumption and presumption. The Court below held that Schedule '2' property stands in the name of Ganga Ram. Then how he could have allowed construction of houses by Bhola Ram because there was huge construction. So far this approach of the Court below is concerned, I do not agree with the same. This will become the dispute between Ganga and Bhola Ram. The Court below again held that this indicates that it was a joint family property. I do not find myself in agreement with the aforesaid approach.

29. Exhibit A-1/3 is the registered sale deed dated 01.07.1920 and the other is registered sale deed dt.19.12.1913, ext. A-1/4. Both these sale deeds exclusively stands in the name of Ganga Ram. By these sale deeds, the Schedule '2' lands were acquired. The learned Court below presumed that the properties were acquired out of the joint fund because in the sale deed, there is no recital that the lands were purchased from the personal fund and further that no evidence is there that Ganga Ram possess the sufficient money to purchase the lands.

30. The above approach of the Court below in my opinion is contrary to the settled law. According to Hindu law when in a partition suit, a party claims that any particular item of the property is joint family property, the burden of proving that it is so rests on the party asserting it. To render the property joint, the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired. In the present case, from perusal of the khatiyan 'ext.2 and 2/A', it appears that there was only 21 katha of ancestral land. Now, therefore, admittedly there was no nucleous at all out of which the property could have been acquired. Since the plaintiffs are claiming, the same property to be of joint family property it is for them to establish by adducing reliable evidence. On the contrary their case is that just after survey, three branches separated. Therefore, in view of the pleading itself, they admitted separation. In such circumstances, there is no presumption of jointness arises. Much emphasis has been given by the learned counsel for the respondent that there was joint family Kirana shop and out of the income from the said shop, the properties have been purchased. So far this matter is concerned, it may be reiterated here that Asharfa Kuer had been examined as a witness in previous suit No.92 of 1961 and the plaintiffs themselves have proved her evidence as exhibit '3' in the present suit. In her evidence, she clearly stated that she was being paid her 1/3rd share out of the income from the joint family Kirana business. From perusal of examination-in-chief, I find that her statement is to the effect that in the profit, she was getting her share. Now, therefore, even if there was any joint family business, then also whatever profit was being earned was divided between them and Asharfa was getting her share.

31. Further, the only statements have been made that there was Kirana shop and out of the income of that Kirana shop, properties were purchased. No evidence had been adduced to show the extent of profit. No evidence had been adduced about the investment in the shop, i.e., what were the articles kept in the shop. Mere bald statements have been made as stated above. The question is if there was any Kirana business, then even after separation, it remained joint between them or not? The defendants have stated that Kirana business was established by Bhola Ram after separation. Separation was just after survey of the year 1914. Can it be believed that after separation, the shop continued to be joint between the three branches till the institution of the suit, i.e., previous suit in the year 1961 or the present suit in the year 1971. Admittedly, the construction of houses were made by spending more than 4 lakhs. According to the plaintiff, it was constructed out of income of Kirana shop. As stated above, except this statement, nothing had been brought on record. Further, out of the income of that Kirana shop, two other Kirana shops were established but there is no evidence regarding the existence of those two separate Kirana shops. What was the monthly or yearly income of the Kirana shop is not clear either in pleading or in evidence. The existence of the two Kirana shop has not been clarified. In Schedule No.5 of the plaint, the valuation of the articles in the Kirana shop has been mentioned as Rs.30,000/-. It may be mentioned here that this valuation is given in the year 1971, i.e., the year of filing of the suit. Now, can it be believed that out of the income of this shop, the investment whereof is only Rs.30,000/-, the joint family got 4 lakhs and above for construction of houses over Schedule ‘2’ property in the year 1950-51. The answer will be “No”. Again I may reiterate here that when Asharfa was getting her share out of the profit, how the Kirana shop, if any, remained joint and the fund, if any, was joint family fund of Asharfa also.

32. So far Schedule '4' property is concerned, it is admitted fact that 5 bighas of land are in the name of sons of Ganga Ram and properties have been purchased on 15.09.1949 by registered sale deed. Now, the plaintiff case is that this property was also purchased out of the income from Kirana business. Again, the question will be what was the extent of profit of the shop where the articles valued at Rs.30,000/- in the year 1971 were kept for selling and out of that income, the houses of more than rupees four lakhs cost were constructed and even huge property mentioned in Schedule '4' were acquired at the same time i.e., in the year 1949-50. The Schedule '4' was acquired in 1949 and houses were constructed in 1950-51. There is no any explanation at all in the pleading or in the evidence. The only statement is that the shops flourished like any thing. In my opinion, this is not a legal evidence and on this statement only the Court cannot record finding that the shop costs of which is only Rs.30,000/- in the year 1971 was giving profit so much so that within two years, the houses were constructed investing more than rupees four lakhs and the five bigha land of Schedule '4' were also acquired in the year 1949-50.

33. As discussed above, in ext. '3' deposition of Asharfa in previous suit, she has clearly stated that whatever property she had gifted all to the plaintiff. This is her statement in the registered gift deed executed by her in favour of the plaintiffs in the year 1960, i.e., 14.07.1960. In this registered deed, she clearly stated that she donated all her properties to the plaintiff. Admittedly, Asharfa is dead now. When she had no property left with her after gift, then what other property were inherited by the plaintiffs. Since the recital is in the registered deed, the same cannot be explained by oral evidence. She never stated that she is not gifting her this property or that property. It is the case of the plaintiff who pleaded in the present plaint that these properties were not gifted by her although she had $1/3^{rd}$ share. It is for them to prove this fact which is contrary to the statement of Asharfa in ext. '3' and in the registered gift deed executed by her. Further it was not the case of the plaintiff in the previous suit that any property was left with Asharfa after execution of the gift. Therefore, it appears that with a view to claim the lands in suit, this fact has been pleaded in the plaint of the present suit.

34. From perusal of the Judgment of the Court below, it appears that the Court below at paragraph 13 has observed that the plaintiffs are claiming as heir of Asharfa in the present suit, therefore, any observation or finding in previous suit will not bind the plaintiff. This observation of the Court below is contrary to the settled principle of law. The Court below while observing did not consider the principle of res-judicata.

35. In view of my above discussion, I find that the plaintiffs respondents have failed to prove unity of title and possession with respect to the suit property described in Schedule '2' to '6', therefore, they are not entitled to any share in those properties. The findings of the Court below, therefore, on both points is hereby reversed.

36. In the result, this First Appeal is allowed. The impugned Judgment and Decree are set aside and the plaintiff respondent's suit is hereby dismissed. The plaintiff shall bear the cost throughout.

(Mungeshwar Sahoo, J)

Sanjeev/-

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