

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.124 of 1980

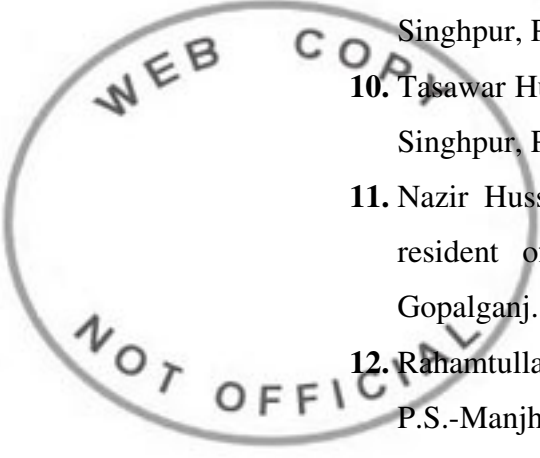
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Kedar Mian Alias Kadir Mian, (since deceased) son of Kurban Mian, through his legal representatives A-1(a) Alamgir Mian, S/o Kadir Mian, A-1(b) Mt. Sabaji Mian (since deceased), wife of Kadir Mian, through her legal representative Alamgir Mian, S/o Kadir Mian, R/o village-Narayanpur, Tola Singhpur, Police Station Manjha Garh, P.O.-Lachhwar, District-Gopalganj.

.... APPELLANT/S

Versus

1. Ali Hassan Mian (Since deceased) through his legal representatives 1(a) Md. Alam, S/o Late Ali Hassan Mian, 1(b) Noor Alam, S/o Late Ali Hassan Mian, resident of village Naraianpur, Tola Singhpur, P.O.- Lachwar, P.S.- Manjhagarh, District-Gopalganj.
2. Mohammad Mian (Since deceased), son of Jamir Mian through his legal representatives 2(a) Mosmat Jainul Begum, wife of Mohammad Mian, 2(b) Noor Nisa, D/o Mohammad Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, District-Gopalganj.
3. Rose Mohammad Mian (Since deceased), son of Jamir Mian through his legal representatives 3(a) Mohammad Ali, son of Late Rose Mohammad, 3(b) Bibi Mohiban (Since deceased) through his legal representative 3(b)(a) Md. Ali Sah, son of Late Mohammad Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, District-Gopalganj.
4. Bibi Latifan (Since deceased), daughters of Jamir Mian through his legal representatives 4(a) Sarfu Mian, D/o Bibi Latifan, 4(b) Samima, D/o Bibi Latifan, 4(c) Nagima, D/o Bibi Latifan, resident of village Naraianpur, Tola Shivpur, P.O.- Lachwar Mian Mirganj, P.S.-Thawey, District-Gopalganj.
5. Bibi Matifan (Since deceased), D/o Jamir Mian through his legal representatives 5(a) Ahmad Mian (Since deceased), H/o Bibi Matifan, through his legal representatives who are already on record as respondent nos.5(b) to 5(e), 5(b) Saukat S/o Bibi Matifan, 5(c) Subrati son of Bibi Matifan, 5(d) Mariyam D/o Bibi Matifan, 5(e) Sariyam D/o Bibi Matifan, resident of village Naraianpur Tola, P.O.- Lachwar Mian Mirganj, P.S.-Thawey, District-Gopalganj.
6. Kifayat Mian, son of Soral Mian, resident of village Naraianpur, Tola Singhpur, P.s.-Manjagarh, District-Gopalganj.
7. Safayat Mian, sonof Soral Mian, resident of village Naraianpur, Tola Singhpur, P.s.-Manjagarh, District-Gopalganj.

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8. Mostt. Rojiden (Since deceased), wife of Saral Mian through his legal representatives, who are already on record as respondent no.6 and 7, resident of village Naraianpur, Tola Singhpur, P.s.-Manjagarh, District-Gopalganj.
 9. Matwar Hussain Mian son of Bhola Mian, resident of village Naraianpur, Tola Singhpur, P.s.-Manjagarh, District-Gopalganj.
 10. Tasawar Hussain Mian son of Bhola Mian, resident of village Naraianpur, Tola Singhpur, P.s.-Manjagarh, District-Gopalganj.
 11. Nazir Hussain Mian, son of Hasare Hussain Mian @ Hatli Hussain Mian, resident of village Naraianpur, Tola Singhpur, P.s.-Manjagarh, District-Gopalganj.
 12. Rahamtullah son of Gafur Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.
 13. Bibi Sahebani (Since deceased) D/o Gafur Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj, (Name of respondent no.13 is expunged at the rise of appellant vide order no.39 dated 08.04.2015).
 14. Bibi Maimub Khatun D/o Gafur Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.
 15. Bibi Saimul Khatun D/o Gafur Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.
 16. Bibi Gulaichi (Since deceased) W/o Saheban Mian, through his legal representatives, who are already on record as respondent no. 17 & 18, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.
 17. Bibi Julbani D/o saheban Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.
 18. Bibi Firoza D/o saheban Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.
 19. Bibi Sitami (Since deceased) wife of Bhola Mian, through his legal representatives, who are already on record as respondent no.9, 10 and 20 to 22, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj
 20. Bibi Gulbani D/o of Bhola Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.
 21. Bibi Hussaini D/o of Bhola Mian, resident of village Naraianpur, Tola Singhpur, P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj
 22. Bibi Fulbatia D/o of Bhola Mian, resident of village Naraianpur, Tola Singhpur,

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P.S.-Manjhagarh, P.O.-Mirganj, District-Gopalganj.

.... .. RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Shashi Shekhar Dwivedi, Sr. Advocate
Mr. Rakesh Chandra, Advocate
Mr. R.K. Debey, Advocate
Mrs. Sangeeta Sharma, Advocate
For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 18-09-2015

Plaintiff-appellant has preferred instant appeal against the judgment dated 26.11.1979 and preliminary decree dated 10.12.1989 passed by Subordinate Judge, Gopalganj in Title Suit No.135 of 1976 dismissing the suit on contest against the contesting defendants as well as ex-parte against remaining.

2. When the appeal was taken up for hearing, on first day there was presence of respondent but subsequently thereof, the learned counsel became absent and on account thereof, hearing proceeded in terms of Order XLI Rule-17(2) of the CPC.

3. Asking for declaration of half share relating to the immovable properties detailed under Schedule-I, II as well as 1/6th share in Schedule-III as well as IV of the plaint and further, carving out the patti by way of appointment of Survey Knowing Pleader Commissioner followed with delivery of possession, cost of the suit, any other relief or reliefs which the plaintiff is found entitled for, enlisted the details of properties under Four schedule for which, the plaintiff / appellant furnished different genealogical table. The first one relates with his own family wherefrom, it is evident that Kurban Mian was the common

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ancestor who died leaving behind five sons Jamadar, Jamir, Gajar, Kadir and Nazir. Jamadar, Gajar and Nazir died issue less. Jamir died leaving behind three sons Ali Hassan, Id Mohammad, Rose Mohammad and two daughters Biwi Latifan, Biwi Matifan (defendant no.1 to 5).

4. Then second genealogical table has been furnished disclosing that there was Nibban Mian who died leaving behind two sons Amir and Saral. Amir died issueless. Saral also died leaving behind two sons Kifayat and Safayat, wife of Md. Rozidan (Figured as defendant).

5. The third one relates with Jafar Mian who died leaving behind two sons, namely, Jumma and Bhukhal. Bhukha died issueless. Jumma also died leaving behind Matwar Hussain, Taswa Hussan, sons of Jumma while Nazir Hussain grandson of Jumma (Figured as defendant).

6. It has further been disclosed that wife of Jamadar and Gajar have predeceased them while Jamadar and Gajar died leaving behind their remaining brothers Jamir, Kadir and Nazir.

7. It has further been disclosed that Khata No.35 lying at village Narayanpur, contents different survey plot number covering an area 8 Bigha 13 Kattha 16 Dhur having recorded in name of Kurban Mian, Nirban Mian and Jafar Mian having their interest $\frac{1}{4}$, $\frac{1}{4}$, $\frac{1}{2}$ respectively. In likewise manner, Khata No.223 of village-Narayanpur stood recorded in sole name of Kurban Mian. Khata No.236 of village Narayanpur has been recorded of all the sons of Kurban Mian, Md. Fulmatiya and Amir Mian

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having $1/3^{\text{rd}}$ share each. It has also been disclosed that Fulmatiya had executed sale deed in respect of her share in favour of Ali Hassan, defendant no.1. It has further been disclosed that Khata No.240 containing Khesra No.496 of village Narayanpur has been recorded in name of all the sons of Kurban Mian, Fulmatiya and Bhukhal having $1/3^{\text{rd}}$ each.

8. It has further been averred that the lands falling under Khata No.35 was partitioned amongst Kurban Mian, Nirban Mian and Jafar Mian before survey but Khatian was prepared jointly in their names however, in remark column possession of respective parties in consonance with the allotment of respective survey plot numbers has been made which has been detailed under Schedule-I of the plaint, while land covering under Khata No.223 happens to be detailed under Schedule-II, Khata No.236 under Schedule-II and Khata No.240 under Schedule-IV.

9. The plaintiff has further narrated that he has got $1/2$ share in Schedule-I & II, $1/6^{\text{th}}$ in Schedule-III land, $1/6^{\text{th}}$ in Schedule-IV land and the parties are over the land accordingly.

10. It has further been disclosed that Most. Gulaki was mother of Kurban Mian who died long-long ago. It has also been pleaded that Jamir and Kadir partitioned amongst themselves and some of the plots have exclusively been allotted while some has been retained jointly and in the aforesaid background a 144 proceeding commenced in between plaintiff as well as defendant no.1 to 3 which was dropped on 02.11.1976. In the aforesaid proceeding defendant no.1 to 3 had falsely claimed that the lands

detailed under Schedule-I of the plaint was allotted to their share exclusively while the land lying at village-Kamalhata which was belonging to Dullam Mian was allotted to the plaintiff.

11. On this score, it has been pleaded that wife of Dullam Mian namely Fulia and wife of Kurban Mian, namely, Shankunti were own sisters. Dullam Mian was resident of Kamalhata. He was issueless. He gifted (Hibba) the property to his wife. Fulia @ Fulmatiya in due course of time, gifted the property to Kadir Mian and Nazir Mian vide registered deed of gift dated 03.09.1920 and in pursuance thereof, Kadir Mian and Nazir Mian came over the land. Later on, Nazir Mian gifted (Hiba) the property to Kadir and on the basis thereof, Kadir Mian got exclusive possession.

12. It has also been averred that defendant no.1 to 3 have falsely claimed that plaintiff got the land lying at village-Kamalhata in his share on partition. Then thereafter met with other legal requirements for filing the plaint.

13. Defendant no.1 to 5, have only appeared before the learned lower court filed their W.S. as well as in the instant appeal. However, during course of hearing they remained absent, after having their presence through their counsel on the first day hearing. As such hearing proceeded in ex-parte manner, subsequently. Remaining defendant did not appear before the learned lower court as well as in this appeal.

14. In W.S. filed on behalf of Defendant No.1 to 5 (Respondent No.1 to 5) apart from raising ornamental objection,

it has been averred that all the members of family of Jafar Mian has not been impleaded as such, suit is bad for non-joinder of necessary party. It has also been disclosed that plaintiff has not furnished correct genealogical table of Jumma Mian and on account thereof, para-1 of the plaint has been challenged over genealogical table relating to Jafar Mian as well as Jumman Mian. Contents of para-3, para-4, para-5, para-6, para-7 of the plaint have been admitted. Para-8 of the plaint has been objected upon and on that very basis, Schedule has also been challenged.

15. Then, the disclosure made under para-9 of the plaint identifying share of the plaintiff as well as defendant has been controverted and on this score, it has been pleaded that plaintiff has got no concern with the land falling under different schedule. It has been submitted that Jamir Mian and Kadir Mian got themselves separated and during course thereof, the lands lying at village-Narayanpur has been allotted to Jamir Mian while the land lying at village-Kamalhata has been allotted to Kadir Mian. Since thereafter, the parties have got no concern with each other and are independently, exclusively in possession over the respective lands. It has been submitted that plaintiffs have illegally drawn up a proceeding under Section 144 Cr.P.C. as a result of which, it was dropped.

16. Then it has been submitted that disclosure made by the plaintiff that the land lying at village-Kamalhata belonged to Dullam Mian who made Hibba in favour of his wife Fulia who, in due course of time gifted to Kadir and Nazir and handed over

possession is correct. It has also been submitted that the story propounded by the plaintiff that Nazir Mian had made Hibba in favour of Kadir Mian with respect to his share and on the basis thereof, Kadir Mian exclusively came over the land is false and an imaginary story advanced illegally by the plaintiff. Contrary, it has been pleaded that Nazir Mian never made Hibba in favour of Kadir and after death of Nazir Mian, being issueless, the property left by him devolved upon remaining heirs and during course of partition, the remaining properties to the extent of Jamir Mian was allotted to Kadir on his request who remained at Kamalhata while the land lying at village Narayanpur has been allotted to Jamir Mian and after death of Jamir Mian, defendant no.1 to 5 are over the same. As such, in the background of having partition effected amongst the family of Jamir and Kadir, neither the suit is maintainable nor the plaintiff has got any right, title, interest relating to the land lying at village-Narayanpur. In the aforesaid background the plea of ouster has also been taken as since thereafter, the defendants are over the land independently hostile to plaintiff within their full knowledge. Accordingly, prayed for dismissal of the suit.

17. On the basis of the respective pleadings, the learned lower court had framed following issues:-

- 1) Is the suit as framed maintainable?
- 2) Has the plaintiff got any cause of action for the suit?
- 3) Whether the story of partition propounded by the

defendants and also the story of family arrangement said to have been made between Kadir and Jamir is correct?

- 4) Whether the suit is bad on account of ouster, exclusion and adverse possession?
- 5) Whether the suit is bad on account of partial partition?
- 6) Whether the story of joint possession of the plaintiff and defendant nos.1 to 5 with respect to the partition claimed lands correct?
- 7) Is the plaintiff entitled for a decree of partition, if so, to what extent?
- 8) To what relief or reliefs, if any, is the plaintiff entitled?

And taken up issue no.3,6,7 jointly answering adverse to the plaintiff leading to dismissal of the suit, hence this appeal.

18. Learned counsel, representing the appellants, has challenged the finding recorded by the learned lower court on each and every issue. In order to assail the same, it has been submitted that learned lower court was basically wrong in inferring that jointness is presumption relating to Hindu family while no such inference is available with regard to Mohammedan family. Furthermore, the finding of the learned lower court that in Mohammedan family the plea, if taken by the plaintiffs, puts an obligation upon the plaintiff to prove joint possession.

19. To buttress such plea, it has been submitted that though concept of jointness is not available but tenant in common is the legal notion, so far, Mohammedan family is concerned and even then, their status, if is not divided, will continue in same manner. That plea has been taken into consideration by the full Bench of Lahore High Court in AIR 1941 Lahore 152.

20. It has also been submitted that right from inception of the present litigation, plaintiff had pleaded that there was partition amongst Kurban Mian, Nirban Mian and Jafar Mian by metes and bound before survey but as they were not vigilant hence, Khatiyani was jointly prepared. However, remark column speaks regarding possession of respective parties according to share, which never been objected by any one, however to avoid defect, if any, on that score, they also been impleaded as party. Moreover, they did not opt to appear and contest the suit, which shows their conduct, having no grievance against the entries made under Khatiyani identifying possession in accordance with respective shares. Furthermore, it has been submitted that as per remark column of the Khatiyani, it is evident that all the brothers of plaintiff, have their joint presence with regard to respective allotted plot no. As there was no partition by metes and bound rather for convenience sake, there was family arrangement and as, the defendant no.1 to 5 developed dishonest intention on account thereof, it has become incumbent upon the plaintiff to ask for partition for metes and bound in order to protect their

right share and for that suit has been filed.

21. It has also been submitted that there happens to be complete absence of cogent and reliable evidence available on the record to suggest that partition ever taken place in between plaintiff and defendant no.1 to 5 by metes and bound. In the aforesaid background, even if possession of defendant no.1 to 5 is found with regard to disputed lands, that happens to be out and out possession of a co-sharer and on account thereof, it cannot be a case of ouster nor adverse possession as has been held by our own High Court reported in AIR 1967 Pat. 275.

22. It has also been submitted that learned lower court had put much reliance over the Jarpesgi deed executed by Jamil Mian, and further, the aforesaid document was redeemed by Jamir Mian. On this score, the learned counsel drew attention towards the evidence of Ali Hussain Mian defendant no.1, as DW-11 wherein at para-7 he had stated that he know Subhan brother of Kurban. His wife had executed sale deed in favour of his grand father. That land has been mortgaged by Jamir. He has further stated that the aforesaid land is not under dispute however, again corrected that this land happens to be under dispute. So, it has been submitted that the action of the learned lower court in negativating the plea of plaintiff-appellant, in the background of mortgaged deed in consonance with the oral evidence of the party is not at all found on sound plank.

23. It has also been submitted that taking into account the evidence of respective parties oral as well as documentary, it

is apparent that partition by metes and bound has not been proved at the end of the respondent no.1 to 5 and on account thereof dismissal of the suit by the learned lower court is not found to be in accordance with law and is accordingly fit to be set aside.

24. After hearing learned counsel for the appellant as well as going through the respective pleadings along with evidences documentary as well as oral, following points appear to be pertinent for just decision of instant appeal.

- I. Is the suit as framed maintainable ?
- II. Has the plaintiff got any cause of action for the suit ?
- III. Whether plaintiff-appellant is entitled for partition and if so, to what extent?
- IV. What other relief or reliefs the plaintiff-appellant is entitled for?

25. Plaintiff-appellant in order to support its case, had examined altogether six PWs out of whom PW.1 Karmullah, PW.2 Istafa hussain, PW.3 Alamgir, PW.4 Ram Bhajan Chaudhary, PW.5 Sajawal Rai, PW.6 Hira Prasad as well as exhibited Ext.1 Series-Rent receipt, Ext.2 Khatian. In likewise manner Defendant No.1 to 5, Respondent no.1 to 5 had examined altogether fourteen DWs out of whome, DW.1 Surendra Nath Sukla, DW.2 Ramchandra Prasad, DW.3 Junab Ali Mian, DW.4 Prabhunat h Singh, DW.5 Sofayat Hussain, DW.6 Mahbood Hassan, DW.7 Umesh Prasad Srivastav, DW.8 Raghunath Pandit, Dw.9 Hamid Mian, Dw.10 Fida Hussain, DW.11 Ali Hussain

Mian, DW.12 Kifayat Hussain, DW.13 Ayodhya Prasad, DW.14 Noor Alam. Side by side, exhibited Ext.A Series-Rent receipt, Ext.B-Money order receipt, Ext.C Jarpesgi executed by Jamir Mian in favour of Raubiya Devi dated 05.06.1961, Ext.D-Execution report over summon, Ext.E Series Jarpesgi- Jamir Mian executed in favour of Bibi Atizan dated 29.04.1964 (Two), Jamir Mian in favour of Alamgir.

26. From perusal of the respective pleading, it is evident that the facts incorporated under para-3, para-4, para-5, para-6, para-7 of the plaint have been admitted by the defendant-respondent under para-11, 12, 13, 14, 15 of the W.S. With regard to disclosure made under para-8 of the plaint, wherein there happens to be disclosure with regard to partition in between Kurban Mian, Nirman Mian, Jafar Mian having effected before survey and further, recording of Khatiyani accordingly in the remark column, have been challenged. But the same is found correct as per exhibit-2, Khatiyani against which, no oral or documentary evidence has been produced by the defendant no.1 to 5.

27. This theme is to be seen through another angle. Though plaintiff-appellant has pleaded family arrangement, the defendant no.1 to 5, respondent no.1 to 5 have pleaded partition by metes and bound, which could be affected only had there been partition by metes and bound amongst Kurban, Nirman and Jafar, and that being so, the objection raised on behalf of defendant no.1 to 5 respondent no.1 to 5 before the learned lower

court is not found convincing one as well as reliable. Even during course of evidence, DW.11-Ali Hussain Mian (DW.1) had not objected entry made in the remark column of Khatiyana hence the entry as is evident from Ext.2, Khatiyana is accepted and in likewise the theory advanced by the plaintiff-appellant that the entry in khatiyana was as per possession of the respective parties in lieu of partition having effected in between Kurban, Nirman and Jafar.

28. Marching ahead towards point no.3, a pause is required to see the pleading of the respective parties. As per para-11 of the plaint it is evident that there is specific assertion of the plaintiff-appellant that Jamir and Kadir became separate and on account thereof they became in separate possession over certain plots and over some plot in jointness, which has been replied under para-19 of the W.S. where under assertion of para-11 of the plaint has been denied. It has further been asserted that partition was effected in a manner where under the lands lying at village-Kamalhata was allotted to Kadirman and the land lying at village Narainpur has been allotted to Jamir Mian and on account thereof, they have exclusive possession thereof.

29. As such, apart from plea of pre-partition having effected in the family, the story of ouster, adverse possession has also been taken up by the defendant-respondent. Therefore, it looks desirable to have a glimpse over the aforesaid factual as well as legal aspect which has got bearing in deciding point no.3.

30. With regard to pre-partition, evidences have to be



seen. It is apparent from the L.C. record that plaintiff-appellant had not filed original deed of gift having executed in favour of Kadir Mian as well as Nazir wherefrom the area having gifted by their Mausi would have been traced out as well as in the aforesaid background, it would also be convenient to infer that even considering the plea of the defendant-respondent, how much area Nazir had and further, having bifurcated in between Kadir and Jamir, how much area Jamir would have to accept that in lieu of relinquishment of aforesaid area by Jamir, plaintiff-appellant Kadir gave up his share with regard to the land lying at village Narayanpur. Even during course of evidence none of the parties have disclosed the aforesaid theme nor their pleading suggests.

31. Now coming to oral evidence, from evidence of PW.1, para-2, it is evident that he had stated that he was not present when Kadir and Jamir partitioned the lands lying at village-Kamalhata and Narayanpur. In para-3, he had stated that both the parties have one ox. They independently plough on exchange and cultivate their land separately. PW.2 in para-3 had stated that there is 20-21 plots under dispute, the smallest has an area of two kattha which is in possession of Kadir Mian. He had detailed the boundary. Then had disclosed that the biggest happens to be five kattha five dhur which is in possession of both the parties. In para-5, he had stated that the disputed land lying at village-Kamalhata happens to be under possession of Kadir Mian which he got along with Nazir on account of gift by their



Mausi. PW.3 is the Alamgir, son of Kadir plaintiff-appellant. He had stated in his examination-in-chief at para-1 that he has got possession over disputed land. On 1-2 plots he has got exclusive possession while remaining is under joint possession. He had further disclosed that there happens to be no partition by metes and bound. He had disclosed his share in the land detailed under schedule and further said that as per share, the parties are in possession over the land. Then he had detailed the other events relating to Kamalhata, stating that Najir had made oral gift (Hibba) in favour of Kadir. On cross-examination at para-5 he had stated that at the time, when he gained understanding, there was no separate possession of respective parties over the land under dispute. When Jabir and Kadir separated he is unaware. In para-6 he had stated that he has kept one ox at Narayanpur and plough on exchange with Hakim Mian and others. In para-8 he had stated that the dispute arose over demand of share for which panchayati was convened. In para-10 he had stated that he used to plough the plot after having been ploughed by the defendants. Grains are distributed. PW.4 has come up to depose relating to Kamalhata. PW.5 is formal, PW.6 is formal.

32. So far, evidence of defendant-respondent no.1 to 5 are concerned, DW.3 was instigated by his counsel in the open court. However, in para-1 he had stated that presently Kadir Mian is not residing at Kamalhata. In para-2, he had stated that after death of Nazir Mian, all his property gone to Kadir Mian. Again said that Jamir had also received. Kadir and Jamir



partitioned about 30:35 years ago. In para-3, he had detailed the land lying at village-Kamalhata to the extent of 1.5 Bigha, 1³/₄ Bigha. He further stated that the land at village Narayanpur happens to be 2.5 Bigha, 2³/₄ Bigha. In para-4 he had admitted that Kadir has house at village Narainpur. In para-6 he has admitted that Kadir had constructed house at Narainpur 30 years ago in his land. Kadir has homestead Dih land at village-Narayanpur. He had further admitted that he had encroached land of Kadir to some extent. DW-4, a resident of different village in chief had stated that he had seen possession of Jamir Mian over the land under dispute. After his death, Hassan Mian has got possession. From para-4, it is evident that he happens to be professional witness. DW-5 had also stated that he is seeing possession of Jabir Mian over the land under dispute. After his death, his sons have possession over the land. He had also stated that Kadir Mian resides at Kamalhata. He happens to be grand son of one of the Khatiyani Raiyat Nirman. He had admitted the entry of the Khatiyani as well as its remark column. He had further admitted that as per Khatiyani entry, the lands are coming in jointness. Jamabandi is also in jointness running in the name of Jamir Mian.

33. PW.9 a resident of another village had stated that the land lying at village Narayanpur happens to be under possession of Jamir Mian. Kadir Mian resides at Kamalhata. After his death, the lands are coming in possession of his sons. During cross-examination at para-7 had stated that about 3 Bigha land lies at

village Narainpur, while about 2 Bigha land lies at village Kamalhata. He had further admitted marriage of daughter of Jamir at his village. PW.11 is Ali Hassan, son of Jamir one of defendant. He had stated that Mausi of his father had gifted land to Nazir and Kadir. Nazir Mian died on account thereof, Jamir and Kadir have share in the land left by Nazir. There was partition amongst Jamir and Kadir and during course thereof, Kadir remained at Kamalhata, while his father remained at Narayanpur. Since thereafter, Kadir has got no concern with the land lying at village Narayanpur. His father was exclusively allotted the land by Kurban Mian. Then had denied the assertion of the plaintiff that Nazir Mian had made oral gift in favour of Kadir relating to his share. Then had exhibited mortgage deed having executed by his father to different persons including Alamgir PW.4. During cross-examination at para-5, he had stated that in Kamalhata his grandfather had less than two bigha of land. He had seen his possession over the land In para-6 he disclosed that at village-Narayanpur Kurban Mian had less than three bigha of land. In para-7 he had stated that he can say month of partition only. He is unable to say whether the land lying at village Kamalhata was allotted to Kadir and the land lying at village Narayanpur was allotted to Jamir. He had further disclosed that he heard about the partition but again said that he was present at that very moment. He had further said that he has got no document relating to partition. He had further stated that Kadir had no residential house at his village. Kadir does not

reside in his village since his childhood.

34. Now coming to the documentary evidence Exhibit 'A' Series is the rent receipt which is of not much relevance. It is settled principle of law that Zamabandi is not a document of partition. Moreover, DW.6 had not stated its basis. Coming to other exhibits, first of all Ext.E is taken. A Jarpesgi deed dated 29.04.1964 executed by Jamir Mian in favour of Atifan relating to Khata No.235, which Jamir Mian had purchased from Most. Kalwatiya vide sale deed dated 10.03.1947. From Schedule of the plaint, it is apparent that Khata No.235 is not under partition. Ext.E/1 is another Jarpesgi executed by Jamir Mian in favour of Rupia Devi dated 05.06.1961. From perusal of the same, it is apparent that it relates with Khesra No.107(m) of Khata No.35 which is not the subject matter of dispute. Ext. E/2 is executed by Jamir Mian in favour of Alamgir son of Kadir. It relates with Khata No.223, Khesra No.105 and the aforesaid document happens to be dated 29.10.1952. In case the aforesaid document is accepted, then in that event, Alamgir, who has been examined as PW.3 on 15.11.1979 was found to be aged about 40 years and deducting 27 years, on the date of alleged mortgage deed, he was aged about 13 years only. Moreover, the attention of PW.3 has not been drawn on this score nor the DW-11 had spoken with regard to age of the Alamgir at that very moment C.C. of document has been filed and exhibited as Alamgir failed to produce document, and for that summon was issued. Furthermore, from para-3 of deposition of DW-11, it is evident

that he had stated that aforesaid amount of Rs.200/- was paid to Alamgir by money order (Ext.B) but again, as is evident from the evidence of Alamgir Mian, PW.3. his attention has not been drawn on that very score. Furthermore, it is apparent that DW.11 had not spoken that the amount was received by the Alamgir, and Ext.B contains his signature. At the other end, plaintiff-appellant exhibited Ext.1 Series, rent receipt, Ext.2 Series Khatiyan whee from joint entries have been treated out.

35. Therefore, after having parallel scrutiny of the evidence of the respective parties, it is apparent that the parties are totally confused on that very score and on account thereof, the plea of pre-partition by metes and bound is found not duly substantiated even on the score of preponderance of probability.

36. Both the parties have admitted that Mausi of Jamir Mian, Kadir Mian, Nazir Mian had gifted the properties in favour of Kadir and Nazir by virtue of registered deed of gift dated 03.09.1920 lying at village Kamalhata. Though the document has not been exhibited but there happens to be no dispute with regard to devolution of the property relating to Kadir & Nazir. Subsequent thereof, there happens to be version and counter version relating to share of Najir who died issueless as, according to plaintiff-appellant Nazir had gifted (Hibba) to Kadir during his lifetime while according to defendant-respondent 1 to 5, he had not. It is needless to say that in a partition suit, the status of defendant is also found duly acknowledged like plaintiff and in that event, it was expected at the end of defendant-respondent 1

to 5 to have brought up the aforesaid issue within ambit of instant partition suit. Because of the fact that defendant respondent 1 to 5 failed on that very score and further, keeping the aforesaid issue opened for future reference. Now the status of the parties in consonance with the theme of partial partition is to be seen. Mulla's in principle of Mohammedan law has explained "*There is no joint tenancy in Mohammedan law and the heirs are only tenants-in-common. Therefore an heir can claim partition in respect of one of the properties held in common without seeking partition of all the properties*"

37. In **S.M.A. Samad and others Vs. Shahid Hussain and others**, reported in **AIR 1963 PATNA 375 at para-11**, it has been held as follows:

"11. The next contention of Mr. Sinha was that the suit, being for partition of only one plot out of several plots of land left by Tejarat was not maintainable. The ordinary rule that a suit for partial partition of the properties owned by the parties to the suit is not maintainable does not however, apply to the case of co-owners who hold land as tenants-in-common as distinguished from the co-sharers holding land as joint tenants. In the case of tenancy-in-common, each co-owner, has got interest in each item of the property held as tenancy-in-common, and he is entitled to claim partition in respect of even one of these items without seeking for partition of the other items, provided that there is no inconvenience in the circumstances of a particular case. This view is supported by the decision cited at the bar on behalf of the parties."

38. Therefore, asking for partition of only Narayanpur property is found maintainable.

39. Theme of partition has elaborately been explained by the Hon'ble Apex Court in **Shub Karan Bubna @ Shub Karan v. Sita Saran Bubna & Ors.** reported in **(2009) 9 SCC 689.**

“5. “Partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. “Separation of share” is a species of “partition”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of

the plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

(i) whether the person seeking division has a share or interest in the suit property/properties;

(ii) whether he is entitled to the relief of division and separate possession; and

(iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2)."

40. In ***Syed Shah Ghulam Ghouse Mohiuddin & Ors. Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri (Ead) by L. Rs. & Ors.*** reported in **1971(3) SCR 724 at page 745**, it has been held:-

"Possession by one co-owner is not by itself

adverse to other co-owners. On the contrary, possession by one co-owner is presumed to be the possession of all the co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. In the present case there is no evidence to support this conclusion. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them.”

41. In the background of the finding recorded under forgoing paragraphs that there happens to be no cogent, reliable evidence with regard to partition of the property as detailed in Schedule-I, II, III, IV by metes and bound as well as taking into account the status of the parties, it is found and held that plaintiff-appellant is found entitled for partition of the property as detailed under Schedule-I, II, III, IV. Furthermore, plaintiff-appellant is entitled $\frac{1}{2}$ share relating to Schedule No.I and II and $\frac{1}{6}$ th with regard to Schedule No.III and IV. Consequent thereupon the judgment and decree passed by the learned lower court is set aside. Appeal is allowed. However, in the facts and circumstances of the case, parties will bear their own cost.

(Aditya Kumar Trivedi, J.)

Patna High Court.
Dated 18th day of Sep., 2015
Prakash Narayan

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