

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.39 of 1987

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1 (i) Sanjeet Kumar, son of late N. K. Prasad
 1 (ii) Manorma Devi, wife of late N. K. Prasad
 1 (iii) Priti, daughter of late N. K. Prasad
 1 (iv) Jay Shree Shaw, wife of Dilip Shaw, daughter of late N. K. Prasad
 1 (v) Rajni Devi, wife of Anil Kumar Shaw, daughter of late N. K. Prasad
 1 (vi) Pinki Kumari, wife of Arjun Kumar, daughter of late N. K. Prasad

.... Appellant/s

Versus

1. Krishna Chandra Prasad. Sah, son of late Ramswaroop Sah
 2. Ramesh Chandra, son of late Ramswaroop Sah @ Ram
 3. Kiran Devi, daughter of late Ramswaroop Sah @ Ram
 4. Sita Kumari, daughter of late Ramswaroop Sah @ Ram
 5. Shiv Chandra Prasad, son of late Ramswaroop Sah(defendant 1st Party)
 6. Smt. Kaushlya Devi, wife of late Ramswaroop Sah.....(defendant 2nd Party)
 7(b) Banarsi Sah
 7(c) Manohar Sah
 7(d) Badri Sah
 7(e) Vijay Sah
 7(f) Sunil Sah
 7(g) Binod Sah, all sons of late D.P. Sah
 7(h) Veena Kumari, daughter of late Durga Prasad Sah, resident of Mohalla-
 Hatsarganj, P.S. Town Hajipur, Distt. Vaishali.
 8(a) Ram Kishun Sah
 8(b) Jagdish Sah
 8(c) Dhur Sah, all sons of late Ratia Devi
 8(d) Dropadi Devi
 8(e) Pokhari Devi, all daughters of late Ratia Devi, all resident of Mohalla-
 Baghmati, P.S. Town Hajipur, Distt. Vaishali.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Baidya Nath Prasad- 2
 Mr. Harendra Nr. Sinha
 Mr. Ratan Kr. Sinha
 Mr. Rajesh Kr. Pandey
 For the Respondent/s : Mr. Ratan Kumar Sinha
 Mr. Girish Chandra Verma

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 1-04-2015

Being aggrieved and dissatisfied with the judgment
 dated 15.07.1986 and decree dated 28.07.1986 passed by the Sub-
 Judge, Vaishali at Hajipur in Title Suit No.18 of 1966/ 107 of 1973

partly decreeing the suit relating to Schedule-1st property while dismissing the suit with contest with regard to properties mentioned in Schedule-II to V(A) of the plaint, appellant-plaintiffs (plaintiffs for brevity) filed instant appeal.

2. Asking for relief of half share in Schedule-I to V(A) of the plaint, direction to the defendant-respondents (defendant for brevity) to furnish details of profit and expenditure (Accounts) of shop as well as carving out half share, appointment of Pleader Commissioner for carving out *Patti* to the extent of half share followed with preliminary decree as well as final decree along with putting the plaintiffs in possession thereof, cost of the suit, any other relief or reliefs which the plaintiff is found entitled for, a suit for partition has been filed by the plaintiff for which a genealogical table has been appended at the foot of the plaint wherefrom, it is evident that Dukhit Sah was the common ancestor who died leaving behind four sons namely Ram Swaroop Sah @ Ram, Narsingh Prasad Sah, Baldeo Prasad and Nand Kishore Prasad. At the time of death, Baldeo Prasad and Nand Kishore Prasad were minors and on account thereof, Ram Swaroop Sah and Narsingh Prasad being majors, began to look after them as well as they continued with running of a grocery shop existing since before under tenancy of Dukha Sah. However, the jointness did not survive long and on account thereof, the parties shown their intention to separate whereupon, a Panchayati was

convened, Panches were appointed and during course thereof, it was decided that Nand Kishore Prasad (minor), the plaintiff will remain with Ram Swaroop Sah while Baldeo Prasad (minor) will remain with Narsingh Prasad on account of their minority and accordingly, the properties were bifurcated in two parts that means to say half and half. Schedule-A has been allotted to the share of Ram Swaroop Sah @ Ram as well as Nand Kishore Prasad (minor) while Schedule-B to Narsingh Prasad and Baldeo Prasad (minor). The valuation of the shop was fixed at Rs.900/- out of which, Rs.450/- half share, was paid to Narsingh Prasad and Baldeo Prasad (minor) and on account thereof, the shop allotted to the share of Ram Swaroop Ram and Nand Kishore Prasad exclusively, who became owners of the shop and accordingly, registered deed of partition, was brought in picture on 15.01.1948. Subsequently thereof, as plaintiff Nand Kishore Prasad remained minor, and the shop was being cared by his elder brother Ram Swaroop Sah @ Ram, who in due course of time shifted shop under different premises under tenancy of different persons at due interval. The shop is still running in the same status. However, taking advantage of minority of the plaintiff, the name of the shop has been changed from Ram Swaroop Sah @ Ram, Nand Kishore Prasad to Ram Swaroop Sah @ Ram, Shiv Chandra Prasad with ulterior motive. It has further been averred that from the earning of the shop as well as earning from Joint Family Property, Ram Swaroop Sah @ Ram being

Karta of the joint family, purchased so many immovable properties detailed under different Schedules, took mortgage. Even in name of his wife, Kaushlya Devi. Because of the fact that the defendants began to torture the plaintiff and on account thereof, it has become difficult for plaintiff to remain in jointness, on account thereof, asked for partition which the defendants declined and on account thereof, complying with necessary requirements, filed instant suit for partition.

3. Ram Swaroop Sah @ Ram and his son Shiv Chandra Prasad were arrayed as defendant 1st party while Smt. Kaushlya Devi, wife of Ram Swaroop Sah @ Ram was added as defendant 2nd party (respondents identified in same way for brevity) while after filing of respective written statements on their behalf, Durga Prasad Sah as well as Shish Lal, wife of Ram Pratap Sah have been made as defendant 3rd and 4th party. However, they have not appeared before the learned lower Court and contested the suit nor their appearance happens to be before the Appellate Court.

4. By way of filing of written statement, defendant no.3 Mosmat Kaushlya Devi, apart from putting ornamental objection had submitted, as the properties stand in her name and as she does not belong to member of the joint family as not being coparcener on account thereof, plaintiff has to pay ad valorem court fee against those properties in case, wants to have a verdict relating to the same standing in her name. It has further been pleaded that neither there



happens to be unity of title nor unity of possession relating to Schedule-V property and on account thereof, the suit is found non-maintainable. This defendant had further admitted the genealogical table, however, controverted the mode of partition having effected in the year 1948. It has been submitted that partition had taken place much before 1948 wherein shares of all the four brothers have been duly identified as well as they became separate by metes and bounds. Consequent thereupon, the averments made in the plaint with regard to mode of partition as well as constitution of joint family amongst Ram Swaroop Ram and Nand Kishore Prasad, continuity of jointness, running of shop in jointness and asking for partition in the aforesaid background, have all been denied in likewise manner, status of Ram Swaroop Ram as Karta of the family.

5. Further, specific plea has been raised on her behalf that her father happened to be a businessman having flourishing shop as well as her mother possessed ornaments, cash appertaining to Rs.30,000/- out of which, she got ornaments as well as cash appertaining to Rs.10,000/- on partition amongst her sisters after death of her father. From the aforesaid amount, she managed her independent business of money lending and from the profits, she had taken mortgage in her name as well as also purchased properties in her name which happens to be her self acquired property without having any concern with anybody nor it could be said to be joint property. It

has further been averred that plaintiffs forcibly made house trespass for which he is being prosecuted. So, submitted that as the plaintiff has got no title, interest relating to the properties having in her name being her self acquired property and on account thereof, instant partition suit is not maintainable relating to those properties.

6. On behalf of Ram Swaroop Sah @ Ram, a written statement has been filed independently wherein, the first objection has been raised relating to impleading of defendant no.3 as she does not happen to be coparcener nor she constitutes joint family. Therefore, having been impleaded as defendant will axe upon the fate of the partition suit unless and until, ad valorem court fee is paid against the properties standing in name of defendant no.3, Kaushlya Devi.

7. It has further been submitted that apart from excluding those Schedules, there happens to be no subsistence of jointness amongst the plaintiffs and these defendants even with regard to Schedule-1st property.

8. Although, the genealogical table has been admitted and in likewise manner, minority of plaintiff and Baldeo Sah at the time of partition, however, running of shop under tenancy of Durga Prasad Sah has been denied. It has further been submitted that Dukhit Sah died leaving behind 03 Kattha of land while 2 ½ of land they got from their maternal grand father. It has further been averred that disruption in the joint family took place in the year 1944 at which

time, plaintiff Nand Kishore Prasad and Baldeo Prasad had attained the age of understanding.

9. It has also been submitted that this defendants along with Narsingh Prasad had opened a partnership grain shop with Durga Prasad Sah wherein Durga Prasad Sah got 08 Anna share while share of this defendant was 04 Anna while that of Narsingh Prasad was 04 Anna share, after death of their father. The aforesaid shop was running under tenancy of Bhola Sah and on account thereof, was not a joint family establishment rather was a partnership firm in which Durga Prasad Sah, Narsingh Prasad and Ram Swaroop Sah were the partners.

10. It has further been pleaded that at the time of partition in the year 1944 as Baldeo Prasad and Nand Kishore Prasad were minors and on account thereof, it was resolved that one minor would be looked after by Ram Swaroop Sah @ Ram and another by Narsingh Prasad and accordingly, placed under the respective guardianship. Nand Kishore Prasad being more attached with Ram Swaroop Sah remained with Ram Swaroop Sah while Baldeo Prasad more attached with Narsingh Prasad remained with Narsingh Prasad.

11. Then, it has been submitted that as immovable properties were not partitioned in the year 1944, therefore, the same was subject to partition in the year 1948 at which time, minority of Baldeo and Narsingh continued as a result of which joint *Patti* of



Nand Kishore and Ram Swaroop to the extent of 08 Anna share was bifurcated while remaining 08 Anna joint *Patti* was carved out in favour of Narsingh and Baldeo. The assets of the partnership shop was calculated to a tune of Rs.900/- out of which, Ram Swaroop Sah @ Ram paid half share i.e. Rs.450/- after borrowing the same from Durga Prasad Sah and on account thereof, there happens to be incorrect disclosure in the deed of partition on this score. It has further been disclosed that Ram Swaroop Sah @ Ram purchased Schedule-IV(A) Property independently after borrowing money from Durga Pd. Sah, who had also financed Ram Swaroop Sah @ Ram at an earlier occasion. The first one at the time of making payment to Narsingh Prasad facilitating retaining of shop and later on, during course of purchase of Schedule-IV(A) Property. On account thereof, Ram Swaroop retired from the partnership firm (shop) which, accordingly became exclusive property of Durga Sah. As such, Nand Kishore Prasad had/ has got no claim over the aforesaid shop. However, it has wrongly been scribed under deed of partition dated 15.01.1948.

12. It has further been pleaded that at the time of partition in the year 1948 only Schedule-I Property was available and on account thereof, claim of plaintiff with regard to other properties happens to be unpurged one. It has further been submitted that after having partitioned in the year 1944 followed with 1948 the status of *Joint Mitakshra Family* evaporated consequent thereupon, status of

plaintiffs along with these defendants became as co-owner relating to 02 Kattha 15 Dhoor of land only.

13. It has also been submitted that after borrowing from friends, personal savings, this defendant opened a grocery shop under caption of “Ram Swaroop Sah Shiv Chandra Prasad” having no concern with the plaintiff and on account thereof, plaintiff was not at all entitled for partition. It has also been submitted that assertion of the plaintiff on that very score that earlier shop running under firm, “Ram Swaroop Nand Kishore Prasad” has been changed as “Ram Swaroop, Shiv Chandra Prasad” is wrong, incorrect. The earlier shop was running in name of Ram Swaroop, Durga Sah which subsequently changed as proprietorship firm in the sole name of Durga Prasad and then, Durga Prasad to Banarsi Lal and accordingly, denied the assertion of the plaintiff regarding acquisition of the other properties from joint family earning as well as claim of the plaintiff asking for half share.

14. It has also been averred that Schedules-IV, IV(A), V(A) are under *Khas* possession of this defendant while Schedule-V happens to be *Khas* possession of Kaushlya Devi. It has also been pleaded that the plaintiff had born in the month of September in the year 1934 and became major in the year 1952. Then denying the other averments prayed for dismissal of the suit.

15. Learned lower Court had framed following issues

after going through the pleadings of the respective parties.

- I) Whether the suit as framed is maintainable?*
- II) Has the plaintiff got cause of action or right to bring the suit?*
- III) Is there unity of title and possession between the parties with regard to the suit properties?*
- IV) Is the plaintiff entitled to a decree for partition as claimed by him?*
- V) To what relief, if any, is the plaintiff entitled?*

And after appreciating, discussing the evidences inconsonance with the issues, the learned lower Court had decreed the suit with regard to Schedule-I Property while negatived the plea of the plaintiff regarding remaining properties. Hence, this appeal.

16. It has been submitted on behalf of appellant-plaintiffs that learned lower Court wrongly and illegally rejected claim of the plaintiffs with regard to other properties detailed under different Schedules on wrong, incorrect presumption as well as assumption. In support of such plea, it has been submitted that there happens to be admission on the part of the contesting defendants that at the time of partition, plaintiff was minor and further, at the time of partition, the property was divided to the extent of half and half. The first half was represented by Ram Swaroop Sah @ Ram for himself as well as on behalf of Nand Kishore Prasad Sah (minor), the plaintiff



while the latter part being represented by Narsingh Prasad for himself as well as Baldeo Prasa (minor). It is also manifest from the deed of partition that a shop was running, which was allotted to the share of Ram Swaroop Sah (defendant) and Nand Kishore Prasad (plaintiff) and on account thereof, its valuation was ascertained and half of the valuation amount appertaining to Rs.450/- was paid to Narsingh Prasad. Therefore, the defendant was/ is precluded from raising such plea that part of recital of partition deed (Exhibit-6) found to be correct with regard to immovable property while it happens to be incorrect relating to identity of the shop. When authenticity of Exhibit-6 is out of question, then in that event, mode of partition of the properties available at that very time could not be questioned that too, when Ram Swaroop Sah himself including others were the party thereof, and had acknowledged the same.

17. Though, in the written statement, Ram Swaroop Ram had not disclosed the year of birth of plaintiff in the month of September, 1935, however, could not substantiate the same. Contrary to it, plaintiff had filed and exhibited certificate wherefrom date of birth appears to be of 1943 and on account thereof, attained the age of majority that means to say, 18 years in the year 1971.

18. From Exhibit-6, registered deed of partition, it is apparent that Durga Prasad Sah has got no presence in between concerning shop, save and except a disclosure that the shop was



running under the tenancy of Durga Sah which, the defendant, Ram Swaroop Sah could not deny and that being so, as well as taking into account minority of the plaintiff up-till 1971, would not have allowed Ram Swaroop Sah to make any sort of deviance against the interest of minor. Furthermore, was under obligation to preserve and protect the interest of minor till attaining of his majority so that he would have an option either to continue with jointness or to withdraw there from.

19. It has also been submitted that defendants have failed to disclose any kind of justifiable exigencies on account of which, he was forced to sell the shop. Contrary to it, it has been pleaded to have relinquished on account of purchase of land wherein Durga Sah had financed which had exceeded his interest, but opening of another shop in name of Ram Swaroop Ram, Shiv Chandra Prasad, just after a gap of few years that too while plaintiff was under minority is another circumstance to be taken note of.

20. It has also been submitted that as Ram Swaroop Sah developed dishonest intention whereunder he digested the share of plaintiff and that happens to be reason behind, that all the properties given under different Schedules were acquired while plaintiff was under minority as well as carrying chicane intention put objection over authenticity of Exhibit-6 relating to the shop running since before. That happens to be reason behind that Ram Swaroop Sah failed to explain the same.



21. Apart from this, it has also been contended that a coparcener can purchase the joint family property in name of others including that of his wife and that being so, land having in name of Kaushlya Devi could not be considered having its independent identity and consequent thereupon, finding of the learned lower Court contrary to Exhibit-6 as well as ignoring the dishonest intention of the respondent-defendants, which is found duly exposed from their pleading as well as from their evidences, would not have negatived claim of the appellant-plaintiffs more particularly considered status of wife as *benamidar* as held and reported in ***A.I.R. 1966 Pat 110*** and on account thereof, happens to be inconsistent with the basic principle of law. Hence, is fit to be set aside.

22. On the other hand, it has been pleaded on behalf of respondent-defendants that judgment impugned is based upon sound principle of law as well as on the materials available on the record. It has been submitted that the party, who approaches the Court for the verdict in his favour is under obligation to prove its case by placing cogent, reliable, legal evidence. Because of the fact that plaintiffs had not succeeded in proving its case of unity of title as well as possession with regard to the other properties detailed under different Schedules of the plaint, the learned lower Court rightly rejected the claim of the plaintiff with regard thereto. It has also been submitted that defendant, Kaushlya Devi by examining seven

witnesses as well as exhibiting relevant documents had succeeded in proving having in possession of sufficient money which she got from her *Naihar* on partition after death of her father along with purchase of the properties detailed under Schedule-V of the plaint from those savings as well as after sale of ornaments which she got from her mother and that being so, Schedule-V is her personal acquisition.

23. In likewise manner, on account of self acquisition by Kaushlya Devi, it happens to be her *Istridhan* properly identifiable under the Hindu Law coupled with the fact that she has got independent title as well as possession without having any sort of interference by the stranger including the family members.

24. It has also been submitted that even considering the family to be joint as has been held by the learned lower Court, the coparcener is entitled for self-acquisition and unless and until, the self-acquisition is thrown as a bounty to the joint family, same cannot be treated as a Joint Family Property nor, unless proved that it has been purchased by the joint family fund, could be treated as Joint Family Property.

25. Furthermore, it has also been submitted that wife does not constitute the joint family on account of non-recognition of she being a coparcener, therefore, the properties standing in name of wife would not be subject to partition nor any sort of order could be passed with regard thereto, unless and until there happens to be proper

institution of the suit on payment of ad valorem court fee. Therefore, the learned lower Court rightly rejected the claim of the appellant-plaintiffs and being so, did not require any sort of interference.

26. Apart from this, it has also been submitted that at the time of partition effected much prior to 1948, the parties have partitioned amongst themselves according to their convenience. However, in the year 1948, proper disruption of joint family was allowed by identifying shares of each coparcener including the appellant-plaintiffs, though was minor at that very moment and as well as from Exhibit-6, the deed of partition created on account thereof, also speaks like so. In the aforesaid background, respondent Ram Swaroop Sah had acted only as a guardian whereunder he look after his affairs provided him education, acted in welfare of appellant-plaintiff and that happens to be reason behind that after completing education, appellant-plaintiff became teacher which is itself apparent from the exhibit made on behalf of appellant. Subsequently thereof, appellant-plaintiff had developed greedy eye over the self-acquisition of Kaushlya Devi and on account thereof, filed instant partition suit though there was no necessity in terms of Exhibit-6, the deed of partition. So, submitted that appeal is fit to be dismissed.

27. In order to substantiate its case, appellant-plaintiffs had examined altogether twenty five (25) PWs out of whom, PW-1 Brahmdev Prasad, PW-2 Dilip Kumar Srivastava, PW-3 Vishwanath

Prasad, PW-4 Md. Moiuddin Kalim, PW-5 Ram Dayal Sao, PW-6 Joga Das, PW-7 Shashi Kumar Prasad Sinha, PW-8 Binod Chaudhary, PW-9 Banke Prasad Singh, PW-10 Nand Kishore Prasad Sah, PW-11 Vidya Nandan Choudhary, PW-12 Mit Lal Singh, PW-13 Raghu Sharma, PW-14 Nand Kishore Sharma, PW-15 Jagdish Prasad Singh, PW-16 Ravindra Prasad, PW-17 Yogendra Tiwari, PW-18 Ram Lakhan Sah, PW-19 Shiv Chandra Sah, PW-20 Baleshwar Prasad, PW-21 Visheshwar Prasad, PW-22 Ashok Kumar Singh, PW-23 Rajeshwar Rai, PW-24 Krishna Chandra Prasad Singh, PW-25 Thuthu Lal and also exhibited documents as Exhibit-1 order of the Municipal Officer, Hajipur dt. 22.5.71, Exhibit-2 receipt of Hajipur municipality, Exhibit-3 signature of Ram Swarup Sah on the partition deed dated 15.1.48, Exhibit-4 entry no.49 by the name of Shiv Chandra Prasad Sah in the register of Dakhila Bahi (Balki documents register), Ext. 3/A Signature of Principal, Raj Narain College, Hajipur, Ext.5 Application of Nand Kishore Pd. Dated 03.08.1960, Ext. 6 Registered Musama of the petition dated 15.01.1948, Ext. 7 to 7b rent receipt of Ram Balabh Pd. Bahuna, Ext. 8 to 8A Serial No.290 and 329 marked from damaged register (Documents Register), Ext.3/b Signature of Ram Swaroop Ram on the application of Nand Kishore Prasad of Raj Narain Collecte, Hajipur, Ext. 9 C.D. of Voucher of Sri Ram Swaroop Sah dated 28-04-1974, Ext.8/b Serial No.28 / 607/96 from File No. (in Railway etc. projects), Ext.10 Endorsement with

signature of Prabhunath Prasad member of Municipality Hajipur dated 28-04-1969, Ext. 3/c Signature of Ram Swaroop Sah on the Serial 9, Ext.8/c Serial entry no.34 from demand and collection register, Ext.11 Commissioner's report, Ext.12 Judgment of criminal case G.R. 89 of 1966 dated 09-12-1967, Ext.13 Matriculation Certificate of Nand Kishore Prasad, Ext. 14 R. S. Khalian of village Adalpur, Ext. 15 application of registration certificate of sale case filed by Ram Swarup Ram on 01.6.60, Exts.16 and 16/a two post cards, Exts. 17 to 17/a deposition of Kaushlya Devi and Narsingh Sah of G.R. 89/66/ 250/67, Ext.18 entry of khata of year 1965/66 on page no.1, Ext. 18/a entry of 1370 Fasali of Rokar Bahi in page 277, Ext. 18/b do page no.278, Ext. 18/c entry of Rokar Bahi of Year 1964/65 in page no.260, Ext. 18/d do page no.261. In likewise manner, respondent-defendants had also examined their witnesses as DW-1 Nand Kishore Chaudhary, DW-2 Vasishtha Narayan Srivastava, DW-3 Mishri Lal Rai, DW-4 Mahendra Sah, DW-5 Yogendra Chaudhary, DW-6 Kaushalaya Devi, DW-7 Harendra Sah, DW-8 Shivji Prasad, DW-9 Raghunath Prasad, DW-10 Kishuni Sah, DW-11 Mahendra Chaudhary, DW-12 Baleshwar Prasad, DW-13, Naresh Prasad Sah, DW-14 Krishan Chandra Prasad, DW-15 Kesho Lal Sah, DW-16 Durga Prasad, DW-17 Paras Nath Verma, DW-18 Ram Chandra Prasad as well as also exhibited some documents as Ext. A- Kewala executed by Most. Sudama to Koshila Devi, Ext.A/1- Kebala executed by Most. Bibi

Rajidan in favour of Mali Kaushlya Devi dated 11.05.1962, Ext.A/2 Kewala executed by Bed Prakash and others in favour of Kaushlya Devi dated 23.08.1964, Ext.A/3 Kewala executed by Ram Pd. Mahto to Kaushlya Devi dated 01.05.1956, Ext.B to B/1 Electric Bill, Ext. A-2b to A-2/12–electric receipt, Ext.B-2 to B-2/14 Forms C Declaration, Ext.C-2 to C-2/5 Declaration form 9C (Bihar Sales Tax), Ext.D-2 Punchnama, Ext.E-2 Khata Bahi Page No.194 to 195, Ext.F-2 Rokar Bahi page no.137, Ext. G-2 Rent receipts of Ram Niwas Ram Ballabh Balima at Hajipur to Shri Ram Swarup Sah, Shiv Chandra Sah, Ext. H-2 Challan of 1956 of Sales Tax, Ext. H-2/1 Challan of 1960, Ext. H-2/2 to H-2/3 challan of 1961 to 1962, Ext. I-2 certificate of registration (Sales Tax), Ext. J-2 order sheets of sales tax of 1962/63.

28. After hearing rival contentions as well as going through the respective pleadings inconsonance with the finding recorded by the learned lower Court that there was unity of title as well as possession in the background of prevalence of jointness whereunder the learned lower Court had decreed the suit granting 1/2th share in favour of appellant-plaintiff relating to Schedule-1 Property. Now, the question remains surviving relating to remaining Scheduled Property and that being so, the only one point remains under controversy :-

- a) Whether the property detailed under different schedules than Sechedule-1 of the plaint also*

happens to be the Joint Family Property?

*b) Whether plaintiff is entitled for partition thereof,
if so, to what extent?*

29. Before coming to adjudicate upon the aforesaid points, it is apparent that Schedule-III properties happen to be the movable property as detailed by the plaintiff, which has not been properly substantiated during trial and that being so, is found completely perfuse. Hence, appears to be a futile attempt, in case, is taken to consideration.

30. In likewise manner, is the status of Schedule-IV, VA Property being usufructuary mortgage, is found completely eclipsed by Bihar Money Lender's Act and being so, same has also lost relevance so far present text is concerned. Hence, now the lis lies only with regard to Schedule-II, IVA, V of the plaint.

31. Now, coming to aforesaid two points, the same is bound to be enlightened in terms of Exhibit-6 which happens to be admitted document, a deed of registered partition. The learned lower Court had also taken note of more particularly under Para-10 of the judgment. However, concluded that plaintiff and Ram Swaroop Sah were not at all constituting the Joint Family. Really, Exhibit-6 denotes the same.

32. Exhibit-6 is the sheet tank of instant suit. Exhibit-6 was prepared on 13.01.1948. The only mistake, what the learned



lower Court had committed instead of going through the recitals thereof, presumed it to be a document of partition whereunder share of each brother irrespective of their status might have been identified to the extent of 1/4th share each that means to say complete disruption of joint family has been presumed, which is not the text of the Exhibit-6. However, in Para-17 of the judgment, though the learned lower Court contrary to its finding recorded under Para-10 of the judgment, has held subsistence of unity of title and possession regarding Schedule-1st of the plaint and decreed the suit accordingly, to that extent. How it could be ? Once the document is accepted, then it should be accepted in its entirety and not in piecemeal manner.

33. From Exhibit-6, it is apparent that respondent-defendant no.1 for himself as well as being guardian of appellant-plaintiff was added as first party while Narsingh Prasad Sah was for himself as well as for his minor brother Baldeo Sah appeared as second party and the mode of partition of property happens to be half and half as detailed therein. Not only this, it is also apparent from Exhibit-6 that a shop was running under tenancy in the house of Durga Prasad Sah, its valuation was fixed, out of which the first party that means to say, defendant no.1 paid Rs.450/- half of the same to Narsingh Prasad Sah and being so, the shop exclusively came under the share of first party that means to say, the defendant no.1 himself including plaintiff constituting first party. From the document, it is not

at all emerging out that shares of minors were identified and the status of defendant no.1 as well as Narsingh Prasad Sah were that of guardian only. That means to say, jointness of family relating to Ram Swaroop Sah along with Nand Kishore Pd. Sah has been duly acknowledged and in likewise manner, Narsingh Pd. Sah with Baldeo Pd. Sah, and that happens to be duly acknowledged under Hindu Law.

34. It is also apparent from the judgment impugned that the learned lower Court failed to acknowledge the aforesaid event coupled with the fact that at the time of partition, appellant-plaintiff was minor which, the defendant no.1 also admitted in his pleading more particularly under Para-9. It is also apparent from Exhibit-6 that respondent-defendant no.1 had undertook to protect the interest of his minor brother that means to say, plaintiff. It is also apparent from written statement more particularly under Paras-9, and 12.

35. It is also apparent from Para-10 as well as Para-12 of the written statement that the shop was partitioned only amongst respondent-defendant no.1 with Narsingh Prasad Sah and further, in the aforesaid background, the other eventualities have been disclosed which lastly culminated in extinguishment of the shop. Subsequently thereof, it has been submitted under Para-18 of the written statement that he had started his new assignment in name of Ram Swaroop Sah, Shiv Chandra Prasad in the year 1951, 1952 and that being so, controverted the pleading of the plaintiffs. The witnesses have been

examined in the aforesaid background. However, is found contrary to Exhibit-6.

36. From Exhibit-6, as well as it happens to be an admission on the part of the respondent-defendant no.1 with regard to status of plaintiff being minor in the year 1948. From Exhibit-13, it is evident that date of birth of appellant-plaintiff happens to be 09th July, 1943 and being so, he could have attained majority on 08.07.1961. That means to say, up-till 08.07.1961 in terms of Exhibit-6, the defendant no.1 was under obligation to have affairs of appellant-plaintiffs properly protected. Apart from this, it is also apparent from the pleading as well as evidence including exhibits that all kind of activities done by defendant no.1 happens to be much before 1961 that means to say, before attaining majority of the plaintiff.

37. At the present moment, two laws are found of proper relevance to have application relating to protecting interest of a minor. The first one the **Guardians and Wards Act, 1890** and the second one the **Hindu Minority and Guardianship Act, 1956**. Apart from other relevant provisions certain obligations have been cast upon the guardian and amongst others, **Section 24 as well as 27 of Guardians and Wards Act** is of vital importance and for better appreciation the same is quoted below:-

24. Duties of guardian of the person:- A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and

education, and such other matters as the law to which the ward is subject requires.

27. Duties of guardian of property:- *A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it, if it were his own and subject to the provisions of this Chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property.*

38. In terms of the Hindu Minority and Guardianship Act, 1956, the same is found in addition to the Guardians and Wards Act, 1890 and on account thereof, both the acts will have conjoint effect while protecting the interest of a minor, who as per Section 4 of the Act acknowledgeable till he attains the age of 18 years.

39. It is further evident, apart from pleadings that defendant no.1, being the elder brother as well as on account of accepting his status to be the guardian of plaintiff and further in accordance with Guardians and Wards Act was under obligation to protect the property of a minor, as laid down under Section 27 (referred supra) is found properly barricaded, more particularly, in accordance with Section 8 of the Hindu Minority & Guardianship Act. Furthermore, as per Section 13 of the Hindu Minority & Guardianship Act, it is also evident that welfare of minor happens to be of paramount consideration which, the Court should see while

adjudicating upon the lis.

40. As stated above, Exhibit-6 speaks regarding the property which the first party constituting defendant no.1 along with plaintiffs have got on partition and the recital thereof, also speaks regarding presence of a shop which they got and consequent thereupon, the status of Exhibit-6 is found above board in accordance with Section 91 of the Evidence Act and further, is found duly protected in accordance with Section 92 of the Evidence Act. Furthermore, taking into account the status of the plaintiff to be minor having under guardianship of respondent, then in that event, acceptance by defendant no.1 for his own as well as on behalf of appellant-plaintiff, has got no ambiguity on the score of their status as well as with regard to presence of a shop under tenancy in the house of Durga Prasad Sah is also found duly protected by Section 94 of the Evidence Act and being so, the contrary evidence on that very score was not at all entertainable more so, when defendant no.1 had not claimed any sort of ambiguity, confusion or fraud pertaining to Exhibit-6. As the law does not allow oral evidence against written document, hence whatsoever pleading, evidence contrary to Exhibit-6 have been produced, are found forbidden in the eye of law.

41. Hence, the defendant no.1 was under obligation to have protected the interest of appellant-plaintiff till 08.07.1961, the day on which plaintiff would have attained the age of majority and

further, he was accordingly responsible for his deeds/ misdeeds affecting the right, title and interest of the minor,

42. Defendant no.1 had died and on account thereof, his legal heirs have been substituted. His son Krishna Chandra Prasad has been examined as DW-14. In Para-2, he had stated that his father Narsingh Prasad Sah and Durga Prasad Sah opened a shop in partnership wherein his father had four Anna share, Narsingh Sah had four Anna share and Durga Sah had eight Anna share. This shop was opened in the house of Polta Sah. It was not a Joint Family Property. The shop continued upto 20 years. Narsingh Prasad Sah relinquished in the year 1948. His father after obtaining money from Durga Sah had paid him (Narsingh Pd. Sah) to the extent of his share. Thereafter, the shop continued up to three years in partnership with Durga Sah. Land was purchased by his father on a consideration money of Rs.15,00/- after having money borrowed from Durga Sah. Consequent thereupon, his father also relinquished his share and withdrew from the partnership. Subsequently thereof, again his father had opened a shop on account of his independent exercise in name of Ram Swaroop Sah @ Ram Shiv Chandra Prasad, had purchased properties from the earnings without having any concern with the plaintiff. During cross-examination at Para-7, he had stated that he had not seen the shop run by Narsingh Prasad Sah and Ram Swaroop Sah. He had not seen any document regarding partnership of Narsingh Pd. Sah, Ram Swaroop



and Durga Prasad Sah, but had admitted that he had traced out the aforesaid event in the *Panchnama*. He further at Para-8 had stated that all the properties whatsoever been purchased was not in his presence nor he had seen any event whereunder his father had borrowed money from his friends. He had further stated that the land lying at Mohalla Hatisarganj was not purchased by his mother. Again controverted the same and said that aforesaid land was purchased by his mother as is evident from Para-11.

43. As stated above, recitals of Exhibit-6, though admitted is also found protected in terms of Section 92 as well as 94 of the Evidence Act coupled with the fact that Krishna Chandra, DW-14 in a layman manner without identifying the each category which he rightly done in the background of being aged about 33 years on the date of his evidence that means to say on 12.03.1986. That means to say, his birth happens to be of the year 1953. The most surprising feature coming out from his evidence is lacking of source. How, he has come to know about aforesaid incidence, he had not deposed.

44. Being the status of appellant-plaintiff to be minor and further in terms of exhibit-6 was constituting joint family with defendant no.1 and as the DW-14 had failed to depose anything on that very score, it is also apparent that defendant no.1 during course of filing of written statement had failed to account for the properties, savings, expenses of the property wherein interest of plaintiff, minor

was involved apart from status of the family.

45. Kaushlya Devi, defendant no.3 has shown her independent status, filed written statement on her behalf independently, contested the suit independently, examined the witness independently, whereunder she on her own examined as DW-6. Before coming to her evidence, her pleading is to be seen wherefrom it is evident that she had pleaded her independent identity as well as purchasing of land from the money which she got from her *Naihar* after death of his father, a shopkeeper as well as after sale of ornaments given by her mother. Seven witnesses have been examined on her behalf, all are oral one without substantiating the source that means to say any chit of paper suggesting presence of shop run by father of Kaushlya Devi as well as any paper suggesting sale of ornaments. Apart from this, during her evidence, it is evident that she also happens to be inconsistent with the family affair including that of status of the family including status of plaintiff.

46. DW-6, the defendant no.3, Kaushlya Devi, during course of her evidence, even in her examination-in-chief, intruded over affair of the family and under Para-2 of her examination-in-chief denied following pleading of her husband, defendant no.1. In Para-1, she had stated that her father had a shop. After death of her father, shop extinguished and accordingly, she got Rs.19,000/- in partition having effected amongst sisters also got amount after sale of

ornaments given by her mother, who stayed with her after death of her father. Her assertion is found completely ruined from her own evidence under Para 4, suggesting contrary to Ext.6, as well as having evasive evidence over source. Not only this, when the Para 9 of her evidence is considered it is apparent that her individual status became suspicious.

47. DW-8, Shiv Raj Prasad claiming himself to be son of sister of P.W.6 has come forward to depose in her favour. When his evidence has been gone through, he is found inconsistent with the evidence of P.W.6. Furthermore, from Para 3 of his cross-examination wherein he stated that he has got short memory, makes the evidence more blur. Even under Para 4 he controverted P.W.6 regarding status of shop possessed by father of P.W.6.

48. D.W.9 has come over partition of shop belonging to Bishun Ram. Surprisingly, from his examination in chief, it is apparent that he had not deposed over mode of partition as well as whether partition was effected during life time of Bishun or after his death. He had stated with regard to shop only. He had not stated regarding presence of house belonging to Bishun although from his cross-examination Para-2, it appears that he happens to be relative. From Para 5, it is apparent that he had deposed in clear tone that Bishun had no house. Mother of Kaushalya Devi was residing in rented house. Further, it is evident that he had begun his business in

the year 1948, while P.W.6 had stated that her father died 3-4 years after death as her father-in-law, in that event, made the situation completely confused. Remaining witnesses, in the background of contrite status of star witnesses, loosen its reliability and did not give any authentic support to defendant no. 3.

49. As such, from analyzing the evidence adduced on behalf of defendant no. 3, it is abundantly clear that she failed to substantiate her place of having the land purchased in her name out her individual effort and on account thereof, as well as taking into account conduct of the defendant no. 1, it is apparent that the property having in name of defendant no. 3 could not be held to be independent acquisition of defendant no. 3. Her status, even the learned lower Court recognized as benamidar as held and reported in **A.I.R. 1966 Pat. 110**.

50. Moreover, it is also apparent from the judgment of the learned lower Court more particularly from Para-16 that after analyzing the evidence adduced on behalf of respective parties both documentary as well as oral, has concluded *“I am therefore, not in a position to hold that the sale deeds mentioned in Schedule-V and the mortgage mentioned in Schedule-VA are the self acquired property of defendant no.3”*.

51. We may notice here the judgment of Apex Court in ***Bhagwati Prasad Sah & Ors. Vs. Dulhin Rameshwari Kuer***

AIR 1952 SC 72: 1951 SCR 603, wherein it has inter alia observed as under:

“7. Before we discuss the evidence on the record, we desire to point out that on the admitted facts of this case neither party has any presumption on his side either as regards jointness or separation of the family. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other co-parceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief.”

This principle has been reiterated by the Apex Court in ***Addagada Raghavamma & Anr. Vs. Addagada Chenchamma & Anr. AIR 1964 SC 136***. It has also been reiterated in ***(2014) 4 Supreme Court Cases 707 (Kesharbai alias Pushpabai Eknathrao Nalawade (dead) by LRs. And another versus Tarabai***

Prabhakar Rao Nalawade and others).

52. Thus, from the evidence having adduced on behalf of respective parties, there happens to be emergence of following eventualities.

- a) Exhibit-6 is admitted one.*
- b) As per Evidence Act, Exhibit-6 cannot be put under challenge.*
- c) Acknowledging status of plaintiff at the time of partition in terms of Exhibit-6, no definite and conclusive evidence has been produced regarding valid and legal cause in disappearance of a shop when rest effect has duly been perceived.*
- d) Failed to score details of account relating to shop and its utilization to the extent of welfare of minor as well as other properties detailed under Schedule I of Exhibit-6.*
- e) All the activities regarding acquisition were completed before attainment of majority by plaintiff.*
- f) No conclusive source of income with regard to Kaushlya Devi has been substantiated.*
- g) All the acquisitions in name of Kaushlya Devi has been made before plaintiff could attain majority.*
- h) Shop having styled as Ram Swaroop Shiv Chandra also stood before attainment of majority by the plaintiff.*
- i) There happens to be no impediment over entering that acquisition was from joint family fund in absence of due discharge of burden by the defendants taking into account*

peculiar facts and circumstances of the case having the acquisition while plaintiff was minor and defendant no.1 was manager of the joint family constituting plaintiff defendant no.1.

j) No positive evidence on the score of property having in name of Kaushlya Devi was being looked after, managed by her, independently.

k) Neither plea has been taken nor the benami transactions (Prohibition, Act) 1988 is found applicable.

l) Acceptance by the learned lower court under para 15, 16 of the judgment regarding identity of Kaushlya Devi as Benamidar of her husband.

53. That being so, the aforesaid points are decided in favour of appellant-plaintiff against all the defendants identifying Schedule-II, IVA, V of the Properties to be the Joint Family Property including the shop and on account thereof, appellant-plaintiff is found entitled for having 1/2th share as claimed for and is accordingly, held so. Hence, the judgment recorded by the learned lower Court is set aside to that extent. Consequent thereupon, appeal is allowed. However, in the facts and circumstances of the case, the parties shall bear their own costs.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-1.04.2015
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