

## IN THE HIGH COURT OF JUDICATURE AT PATNA

### Second Appeal No.114 of 1987

- =====
1. Bijay Kumar, son of Udai Chand Lal, resident of village + P.S.- Forbesganj, District- Purnea.
  2. (a) Om Prakash Jaiswal  
(b) Nand Gopal Jaiswal  
(b) Ashok Kumar Jaiswal  
All sons of Late Krishna Bihari Jaiswal, resident of Sadar Road Forbesganj, P.S.- Forbesganj, District- Araria.  
(d) Meena Choudhary, D/o- Late Krishna Bihari Jaiswal, wife of Sri Bharat Bhushan Choudhary, Resident of Flat No. 604, 6<sup>th</sup> Floor, Utkarsh, Anuradha Apartment, Civil Lines, P.S.- Civil Lines, District- Nagpur (Maharashtra).  
(e) Gyanti Choudhary, D/o- Late Krishna Bihari Jaiswal, wife of Anant Prasad Choudhary, Resident of Anant Kothi in front of Transformer, Road No. 23, Rajiv Nagar, P.S.- Rajiv Nagar, District- Patna.  
(f) Neelam Jaiswal, D/o- Late Krishna Bihari Jaiswal, wife of Sri Badri Prasad Jaiswal, Resident of Prince Anwar Sah Road, 58/84, Near Ram Mandir, Kolkatta-45.  
(g) Sushma Kalwar, D/o- Late Krishna Bihari Jaiswal, wife of Dr. Balak Prasad Jaiswal, Resident of Nahar Katiya, Thana Road, P.S.- Nahar Katiya, District- Dibrugarh (Assam).  
(h) Babli Jaiswal, D/o- Late Krishna Bihari Jaiswal, wife of Sri Niraj Krishna Jaiswal, Resident of Plot No. 16 to 19 and 21 to 25, Sector 17 Mumbai (Maharashtra).

.... .... Appellant/s

Versus

1. (a) Arun Chand Das  
(b) Bimal Chand Das  
(c) Dinesh Chand Das  
(d) Mahendra Chand Das  
(e) Upendra Chand Das  
(f) Kamlesh Das  
(g) Vikram Das All sons of Nagarchand Dass  
(h) Geeta Devi, w/o- Late Kiranchand Das.  
(i) Suman Kumar (minor, son of Late Kiran Chand Das.  
(j) Phool Kumari, w/o- Shyam Narayan Das and d/o- Late Nagar Chand Das  
All residents of Mauja + P.O.- Motihari, P.S.- Forbesganj, District- Araria.
  2. (a) Jago Devi, wife of Late Amar Chand Das  
(b) Bucho Devi, wife of Dr. D.N. Das and D/o- Late Amar Chand Das, r/o- village Mahaua Bazar, P.S.- Bhargawan, District- araria  
(c) Prem Chand Das  
(d) Dr. Anil Chand Das  
Both sons of Late Prithvi Chand Das  
(e) Munna Das, s/o- Late Jagat Chand Das & grand son of Late Amar Chand Das
- Nos. 2(a), 2(c), 2(d) and 2(e) are residents of village Matihari, P.s.- Forbesganj, District- Araria.
3. (a) Shankar Das, s/o- Late Kamal Chand Das  
(b) Name not known,

(c) Name not known,  
 (d) Name not known,  
 All daughters of Late Kamal Chand Das.  
 All residents of village Matihari, P.S.- Forbesganj, District- Araria  
 (e) Prakash Chand Das s/o- Late Phool Chand Das, grand son of Late Kamal Chand Das, resident of Subhash Chowk, P.O.- and P.S.- Forbesganj, District- Araria.

.... .... Respondent/s

with

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**Second Appeal No. 115 of 1987**

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1. Bijay Kumar, son of Udai Chand Lal, resident of village + P.S.- Forbesganj, District- Purnea.
2. (a) Om Prakash Jaiswal  
 (b) Nand Gopal Jaiswal  
 (b) Ashok Kumar Jaiswal  
 All sons of Late Krishna Bihari Jaiswal, resident of Sadar Road Forbesganj, P.S.- Forbesganj, District- Araria.  
 (d) Meena Choudhary, D/o- Late Krishna Bihari Jaiswal, wife of Sri Bharat Bhushan Choudhary, Resident of Flat No. 604, 6<sup>th</sup> Floor, Utkarsh, Anuradha Apartment, Civil Lines, P.S.- Civil Lines, District- Nagpur (Maharashtra).  
 (e) Gyanti Choudhary, D/o- Late Krishna Bihari Jaiswal, wife of Anant Prasad Choudhary, Resident of Anant Kothi in front of Transformer, Road No. 23, Rajiv Nagar, P.S.- Rajiv Nagar, District- Patna.  
 (f) Neelam Jaiswal, D/o- Late Krishna Bihari Jaiswal, wife of Sri Badri Prasad Jaiswal, Resident of Prince Anwar Sah Road, 58/84, Near Ram Mandir, Kolkatta-45.  
 (g) Sushma Kalwar, D/o- Late Krishna Bihari Jaiswal, wife of Dr. Balak Prasad Jaiswal, Resident of Nahar Katiya, Thana Road, P.S.- Nahar Katiya, District- Dibrugarh (Assam).  
 (h) Babli Jaiswal, D/o- Late Krishna Bihari Jaiswal, wife of Sri Niraj Krishna Jaiswal, Resident of Plot No. 16 to 19 and 21 to 25, Sector 17 Mumbai (Maharashtra).

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1. (a) Arun Chand Das  
 (k) Bimal Chand Das  
 (l) Dinesh Chand Das  
 (m) Mahendra Chand Das  
 (n) Upendra Chand Das  
 (o) Kamlesh Das  
 (p) Vikram Das All sons of Nagarchand Dass  
 (q) Geeta Devi, w/o- Late Kiranchand Das.  
 (r) Suman Kumar (minor, son of Late Kiran Chand Das.  
 (s) Phool Kumari, w/o- Shyam Narayan Das and d/o- Late Nagar Chand Das  
 All residents of Mauja + P.O.- Motihari, P.S.- Forbesganj, District- Araria.
2. (a) Jago Devi, wife of Late Amar Chand Das  
 (b) Bucho Devi, wife of Dr. D.N. Das and D/o- Late Amar Chand Das, r/o- village Mahaua Bazar, P.S.- Bhargawan, District- Araria  
 (c) Prem Chand Das  
 (d) Dr. Anil Chand Das

Both sons of Late Prithvi Chand Das  
(e) Munna Das, s/o- Late Jagat Chand Das & grand son of Late Amar Chand Das

Nos. 2(a), 2(c), 2(d) and 2(e) are residents of village Matihari, P.S.- Forbesganj, District- Araria.

3. (a) Shankar Das, s/o- Late Kamal Chand Das

(b) Name not known,

(c) Name not known,

(d) Name not known,

All daughters of Late Kamal Chand Das.

All residents of village Matihari, P.S.- Forbesganj, District- Araria

(e) Prakash Chand Das s/o- Late Phool Chand Das, grand son of Late Kamal Chand Das, resident of Subhash Chowk, P.O.- and P.S.- Forbesganj, District- Araria.

.... .... Respondent/s

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**Appearance :**

**( Both in SA No. 114 of 1987 and 115 of 1987)**

For the Appellant/s : Mr. Sanjeev Nikesh

Mr. Shailendra Kumar Dwivedi

Mr. Ranjeet Choubey

For the Respondent/s : Mr. Narayan Singh, Sr. Advocate

Mr. Birendra Kumar

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**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL**  
**C.A.V. JUDGMENT**

**Date: 03 -02-2015**

Defendant 1<sup>st</sup> set have filed S.A. No. 114 of 1987 assailing the judgment and decree dated 5.12.1986 passed by Subordinate Judge, Araria in T.A. No. 257 of 1963 whereby the appeal was dismissed affirming the judgment and decree dated 16<sup>th</sup> July, 1963 decreeing in part Title Suit No. 195 of 1955-63 as also S.A. No. 115 of 1987 aggrieved by and dissatisfied with the judgment and decree dated 5.12.1986 passed by Subordinate Judge, Araria in Title Appeal No. 255 of 1963 whereby the Lower Appellate Court allowed Title Appeal No. 255 of 1963 filed by the plaintiff. Both the appeals have, therefore, been heard together for disposal.

The background in which these two appeals have arisen are set out with relevant brevity hereinbelow:

The plaintiff respondent filed T.S. No. 195 of 1955-63 for declaration of title and recovery of possession as also partition to the extent of  $5 \frac{3}{4}$  decimals of land in plot no. 470 under Khata no. 113. The case of the plaintiff is that the suit land measuring a total area of 0.31 acres belonged to Manik Chand Das (father of the plaintiff and defendant second party) and Uday Chand Das (cousin of plaintiff and defendant second party). Manik Chand Das and Uday Chand Das partitioned wherein 05 decimals out of plot no. 470 towards east fell in the share of Uday Chand Das and the remaining area of plot no. 470 fell in the share of Manik Chand Das. Both of them constructed their house(s). During earthquake of 1934, house of Manik Chand Das was badly damaged and accordingly, he sold 04 decimals of land of plot no. 470 towards north to the defendant 1<sup>st</sup> party through a registered sale deed. Manik Chand Das being father of the plaintiff and defendant second party died in the year 1938 whereafter plaintiffs and defendant second party separated in the year 1943. Defendant second party wanted to sell their land in plot no. 470. Before such sale, there was an agreement reached between the plaintiff and the said respondent that half of  $11 \frac{1}{2}$  decimals of land in plot no. 470 along with building material standing thereon would fall in the share of the plaintiff and the remaining half would go to the share of



defendant second party who later sold his half portion in plot no. 470 to the defendant 1<sup>st</sup> party on 30.04.1943 and the remaining half land remained with the plaintiff. The plaintiff remained in possession over 5  $\frac{3}{4}$  decimals of land in plot no. 470 but while in service and taking advantage of his absence, the defendant 1<sup>st</sup> party in collusion with defendant second party built structure on the portion of the land falling in the share of the plaintiff.

The defendant 1<sup>st</sup> party only contested the suit and filed written statement stating therein that the plaintiff was not in possession over any portion of plot no. 470. Defendant 2<sup>nd</sup> party alone was in possession over entire 11  $\frac{1}{2}$  decimals of land after the sale of 04 decimals of land to defendant 1<sup>st</sup> party. The plaintiff had in fact taken some other land in lieu of his share in plot no. 470 and was never in possession of any portion of plot no. 470. The defendant no. 1 after purchase of 04 decimals of land became owner in possession of entire 15  $\frac{1}{2}$  decimals of land of plot no. 470. The suit was allowed in part by the Trial Court. Against the judgment of the Trial Court, both the plaintiffs and defendants first set filed Title Appeal No. 255 of 1963 and 257 of 1963 respectively. The Appellate Court by a common judgment dated 2.5.1978 allowed T.A. No. 257 of 1963 and dismissed T.A. No. 255 of 1963. The plaintiff filed S.A. Nos. 355 of 1978 and 354 of 1978 before this Court. By a common judgment dated 24.4.1985, both the appeals were allowed and the case was



remanded to the Appellate Court to consider afresh on two specified points/issues namely the question of *res judicata* and the limitation and decide the appeals afresh on merit expeditiously. The Appellate Court in the light of said direction of the Court re-heard both the title appeals. The plaintiff did not appear in support of T.A. No. 255 of 1963 and to oppose T.A. No. 257 of 1963 whereas the defendants appeared in both the appeals before the Lower Appellate Court. In the light of direction of this Court, the Lower Appellate Court by a common judgment and decree dated 5.12.1986 disposed of both the appeals and held that plaintiff was entitled to '8' *aana* share in the suit property whereas the defendant 1<sup>st</sup> set was entitled to another '8' *aana* share in the suit property. T.A. No. 255 of 1963 was allowed whereas T.A. No. 257 of 1963 was dismissed. Aggrieved by the common judgment passed by the lower Appellate Court in both the appeals, the defendant 1<sup>st</sup> set have filed the two appeals which have been made cognate and heard.

While admitting the appeal, the following substantial question of law was framed:

“(i) Whether the appellants and the respondents respectively in two appeals in the Court below were same person were not heard.”

In course of hearing, the appellants by an affidavit exchanged between the parties raised the following additional substantial

questions of law and pressed them:

“1. Whether the learned Lower Appellate Court has fairly appreciated the evidence of the parties and after scrutinizing the evidence has reversed the finding of the learned Lower Appellate Court as required under Order 41 Rule 31 of the Code?

2. Whether relief can be granted to the plaintiffs-respondents in an appeal filed by defendant-appellant against the part impugned judgment and decree particularly when plaintiff-respondent had filed an independent appeal bearing T.A. No. 255 of 1963 in which the plaintiff did not appear?

I have heard learned counsel appearing in support of the two appeals and Mr. Narayan Singh who has appeared on behalf of the plaintiffs-respondents in both the appeals.

The original substantial question of law framed in the appeal as well as additional substantial question of law framed at serial no. 2 hereinabove are taken up together for consideration. It has been argued on behalf of the appellants that after the remand by this Court, the two appeals each filed by plaintiffs-respondents (T.A. No. 255 of 1963) and the defendant 1<sup>st</sup> set-appellant (T.A. No. 257 of 1963) were heard together. Nobody had appeared on behalf of the appellants in T.A. No. 255 of 1963 (plaintiffs-respondents) whereas the defendants appeared in both the appeals being T.A. No. 257 of 1963 (as appellants) and T.A. No. 255 of 1963 (as respondents). The learned



Lower Appellate Court in such view of the matter ought to have dismissed Title Appeal No. 255 of 1963 for non-prosecution but the Appellate Court acting in grossly illegal manner considered the said appeal also and by common judgment and decree set aside the judgment and decree passed by the learned Lower Appellate Court. The suit was decreed in favour of the plaintiff who was declared to have his share to the extent of 2 kathas 16 dhurs (half share) in the suit property. Relying on Order 41 Rule 17 of C.P.C. and the order passed by this Court in *Harbansh Pershad Jaiswal [2014 (3) PLJR 415(SC)]*, it has been contended that the judgment and decree passed by the Lower Appellate Court is wholly bad in law and merits to be interfered with.

Per contra, the counsel for the plaintiff-respondent supported the judgment under appeal. The counsel has submitted that both the appeals admittedly were cognate and the result of one appeal was bound to affect the result of the another appeal. If the case of the defendant was to be negated then naturally the case of the plaintiff was to be upheld. The Court could not have made out a third case. He also drew attention of the Court to the order dated 28.1.1983 whereby S.A. Nos. 355 of 1978 and 354 of 1978 were heard and by a common order disposed of in order to contend that the Lower Appellate Court was directed by this Court to decide afresh both the appeals on merit. The Lower Appellate Court had, therefore, acted not without

jurisdiction in considering both the appeals even if one party of those two appeals was appearing and decided the same on merit.

Order 41 Rule 17 of C.P.C. reads as under:

**“17. Dismissal of appeal for appellants’ default.-** (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Explanation.- Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.

(2) Hearing appeal *ex parte*- Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.”

Counsel for the appellant(s) has relied on *Harbansh Pershad Jaiswal (Supra)* to buttress his submission. In the said case, the suit filed by the respondents was decreed in part and dismissed with respect to part of the schedule property. Both parties filed appeal thereagainst. Common points were involved and, as such, both of them were heard analogously. The appellant(s) did not appear on call whereas the respondent (appellant in cognate appeal) appeared. In absence of appellant, both the appeals were heard and the appeal of the appellant was dismissed on merit and that of the respondent was allowed. The appellant raised a plea that in absence of the counsel, the appeal of the appellant could not have been decided on merit by the 1<sup>st</sup> Appellate Court. Reliance in particular was placed on Order XLI Rule 17(1) of C.P.C. The Appellate Court considering the factual matrix of

the case found that both appeals were cognate in which the respondent had appeared as the appellant. There was no legal infirmity in allowing cognate appeal as provided under Sub-rule(2) of Order XLI Rule 17 of C.P.C. This Court would profitably extract hereinbelow paragraph 16 of the judgment in ***Harbansh Persad Jaiswal (supra)***:

“16:Reverting to the facts of the present case, as already pointed out above, the respondent had filed the Suit seeking partition of two properties claiming half share each in both these properties mentioned in Schedules-A and B. The trial court had decreed the Suit in respect of Schedule-B property but dismissed the same qua Schedule-A property. Both the parties had gone in appeal. In so far as appeal of the respondent is concerned, the same has been allowed ex parte as nobody appeared on behalf of the appellants. This course of action was available to the High Court as sub-rule(2) of Order XLI, Rule 17 categorically permits it. Though the appellants moved application for setting aside this order, the same was dismissed on the ground that no reasonable or sufficient cause for non-appearance was shown. Therefore, this part of the order of the High Court is without blemish and is not to be interfered with. Appeal their against is dismissed.”

This Court would note from the facts of the present case that the suit was one in which rival claims were made by the parties. Negating the case of the defendant by dismissing the appeal preferred by him/them which the 1<sup>st</sup> Appellate Court could have legally passed, the inevitable consequence would be allowing the case of the plaintiff. The 1<sup>st</sup> Appellate Court being the final Court of fact and law and the appeal being extension of the suit had the requisite jurisdiction to hear and decide the appeal of the defendant on merit.



This Court finds yet another reason to negate the contention of the appellant(s). Both the appeals were earlier heard and disposed of by the 1<sup>st</sup> Appellate Court by a common judgment which was set aside, on appeal, by this Court and those appeals were restored on the file of the 1<sup>st</sup> Appellate Court for hearing and disposal on merit expeditiously. The First Appellate Court, therefore, decided the appeals on merit. In view of the aforesaid, both the substantial questions of law under reference are answered against the appellants.

Now, adverting to the additional substantial question of law framed at serial no. 1, it is noted that the judgment under appeal has been criticized as perverse being violative of the guidelines provided for disposal of appeal under Order XLI Rule 31 of C.P.C.

I have carefully gone through the judgment under appeal. Although, the Appellate Court framed point general in character/nature for determination of the appeal but on going through the judgment, it is more than explicit that the 1<sup>st</sup> Appellate Court independently appraised the evidence adduced by the parties and recorded its own reasons/conclusions on all material aspects to hold that the plaintiff was the exclusive owner of 2 kathas 16 dhurs of land and he had no concern with 2 kathas 16 dhurs of land already sold to the defendant 1<sup>st</sup> party. Further, the Lower Appellate Court in the light of direction of this Court while remanding the appeals considered the points which were directed to be considered and answered them

against the contesting defendant (appellant before the 1<sup>st</sup> Appellate Court) and in favour of the plaintiff. No contention has been raised by the appellant(s) against these findings of the 1<sup>st</sup> Appellate Court. When the judgment under appeal reflects independent appraisal of evidence and conclusions derived therefrom supported by reason then the same cannot be said to be in gross breach of the principles that govern disposal of appeal. There is, thus, substantial compliance of the provisions contained in Order XLI Rule 31 of C.P.C. in disposing of the appeal by the 1<sup>st</sup> Appellate Court. Discussions made above lead me to decide the additional substantial question of law under reference against the defendant-appellant.

In the result, the appeal(s) fail and are dismissed.

No order as to costs.

**(Kishore Kumar Mandal, J)**

Pankaj

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