

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No. 39 of 2005

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1. Neeraj Devi wife of Rajendra Prasad Singh @ Rajendra Rai @ Rajendra Singh
 2. Smt. Munni Devi D/o Rajendra Prasad Singh @ Rajendra Rai @ Rajendra Singh and wife of Ram Badn Rai
(Both have been transposed as respondents vide order dated 12.10.2011)
 3. Anil Prasad Singh @ Anil Rai @ Anil Kumar Singh son of Baidnath Singh @ Baidnath Rai
- All R/o village- Fulwaria, Paragana Kilki, P.S.- Fulwaria,P.O.- Barauni, District- BegusaraiDefendant/Appellants.

Versus

1. Janki Devi wife of Sri Shiv Bhajjan Singh D/o Late Jutti Singh @ Jutti Rai, R/o village- Fulwaria, Paragana Milki, P.S.- Fulwaria, P.O.- Barauni, District- BegusaraiPlaintiff/Respondent Ist Set
 2. Saroj son of Rajednra Prasad Singh @ Rajendra Prasad Rai
 3. Manoj Son of Rajednra Prasad Singh @ Rajendra Prasad Rai
 4. Vivek Kumar son of Anil Prasad Singh @ Anil Prasad Rai
 5. Kamlesh Kumar son of Anil Prasad Singh @ Anil Prasad Rai
 6. Ram Chandra Pd. Singh son of Late Tenger Singh
 7. Ram Sewak Singh son of Late Tenger Singh
 8. Hari Lal Sah son of Late Sukkan Sah
 9. Sone lal Sah son of Late Sukkan Sah
- 2 to 9 are R/o village Fulwaria Paragana Milki, P.S.- Fulwaria, P.O.- Barauni, District- Begusarai
10. Lakshmi Devi wife of Durga Sahu D/o Sukan Sahu, R/o village- Lakhminia, P.s.- Ballia, P.O.- Lakhminia, District- Begusarai
.....Defendants/Respondents 2nd Set

With

First Appeal No.178 of 2006

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1. Neeraj Devi wife of Rajendra Prasad Singh @ Rajendra Rai @ Rajendra Singh
 2. Smt. Munni Devi D/o Rajendra Prasad Singh @ Rajendra Rai @ Rajendra Singh and wife of Ram Badn Rai
 3. Anil Prasad Singh @ Anil Rai @ Anil Kumar Singh son of Baidnath Singh @ Baidnath Rai
- All R/o village- Fulwaria, Paragana Kilki, P.S.- Fulwaria,P.O.- Barauni, District- BegusaraiDefendant/Appellantss.

Versus

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2 to 9 are R/o village Fulwaria Paragana Milki, P.S.- Fulwaria, P.O.- Barauni, District- Begusarai

10. Lakshmi Devi wife of Durga Sahu D/o Sukan Sahu, R/o village- Lakhminia, P.s.- Ballia, P.O.- Lakhminia, District- Begusarai

.....Defendants/Respondents 2nd Set

Appearance :

For the Appellant/s : Mr. J.S. Arora, Advocate
Mr. Manoj Kumar, Advocate
Mr. Gaurav Pratap, Advocate

For the Respondent/s : Mr. Chitranjan Sinha, Sr. Advocate
Mr. Ashok Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA
C.A.V. JUDGMENT
Date: 24-06-2015

Defendants No. 1, 2 and 3 namely, Baidnath Singh (now deceased), Rajendra Singh (now deceased) and Anil Prasad Singh being aggrieved and dissatisfied with the judgment dated 30.11.2014 decree of which sealed and signed on 11.12.2004 passed by learned Sub-Judge- Ist, Begusarai in Title Suit No. 171 of 1997 have preferred this appeal wherein the suit filed by plaintiff-respondent Ist set was decreed on contest with cost against the defendants no. 1, 2 and 3 and ex-parte against defendant 2nd party and also with contest against defendant 3rd party and defendant no. 4, 4A, 5 and 6 without cost holding that the plaintiff-respondent Ist set is entitled to get her half share given in Schedule II property.

2. Briefly stated, the case of the plaintiff-respondent first set was that Babu Narsingh Rai @ Narsingh Singh was the ancestor of the parties who died leaving behind two sons, namely, Babu Jutti Singh @ Jutti Rai and Babu Tengar Singh @ Tengar Rai. Babu Jutti Singh died leaving behind one son, namely, Baidnath Singh @ Baidnath Rai defendant no. 1 and a daughter Janki Devi, the plaintiff, in the year 1969 whereas wife of Jutti Singh pre-deceased Babu Jutti Singh. The defendants no. 2 and 3 are sons of defendant no. 1 and defendants no. 4, 5 and 6 are sons of defendants no. 2 and 3. The defendant no. 1 and his two sons,



in the state of jointness with the plaintiff, executed a sale deed on 29.12.1979 to Saryugiya Devi and she and her successor came in possession over the land of Khesra No. 2032 and others area 9 Kattha, 17 Dhurs and 10 Dhurki. Saryugiya Devi died leaving behind her two sons Harilal Sah and Sonelal and a daughter, Laxmi Devi, and they have been made defendant 3rd party. Babu Tengar Singh died leaving behind his sons who are defendants 2nd party and other successors of Babu Tengar Singh have not been made party as no relief has been sought against them and as such the defendants no. 7 to 9 have been made as proforma defendants. Genealogical table is given in Schedule I of the plaint. Lands situated in village Tulsipur, Rasulpur, Harpur and Fhulwaria were recorded in the name of Babu Narsingh Singh and Ram Lal Rai in Khatiyana and after amicable partition half of the lands were allotted to Narsingh Rai and after death of Babu Narsingh Rai @ Narsingh Singh those lands came in possession of Babu Jutti Singh and Tengar Singh jointly. In the year 1976, both partitioned ancestral property half and half and Jutti Singh and his sons came in cultivating possession over those lands which are described fully in Schedule II of the plaint which are lands under partition. The sons of Tengar Singh also partitioned their properties and those lands have not been given in the plaint but even after partition rent receipts are being issued jointly in the name of Babu Jutti Singh and Babu Tengar Singh. The plaintiff being a patient of epilepsy from her childhood, her father married her with Seho Bhajan Singh in the year 1945 and kept her in his residential house in village Fulwaria and the plaintiff is living continuously with her husband and her husband was a teacher in Umar Uchh Vidyalaya, Teghra who has superannuated. The plaintiff is residing with her husband and children in the northern portion of the residential house which was provided by her father and in southern portion of the said residential house the defendants Ist party are residing. The plaintiff is in



possession of one room, kitchen, verandah, latrine, courtyard in the northern portion since 1945. Her father died in the year 1969 and the plaintiff and defendant Ist party came in joint possession over the land and property described in Schedule II of the plaint. They used to partition their crops as per their share but defendant Ist party has become dishonest and started creating trouble in giving the share to the plaintiff and, as such, the plaintiff asked the defendant Ist party to partition the suit land, then, they refused and further committed criminal act for which Fulwaria P.S. Case No. 7 of 1997 was instituted. The plaintiff claims half share in the suit property.

3. The defendants 1, 2 and 3 filed their joint written statement contesting the claim of the plaintiff. On behalf of minor defendants Sri Janak Kishore Prasad, Advocate who was later on appointed GAL filed written statement. Defendant No. 10 Harilal Sah and defendant no. 11 Sonelal Sah also filed joint written statement. Other defendants have not appeared in the suit, resulting ex-parte hearing was taken up against them. According to defendants no. 1, 2 and 3, the suit as framed is not maintainable. The plaintiff has got no cause of action. The suit is barred by estoppel, waiver, acquiescence and also under the provisions of Specific Relief Act. The Suit is bad for non-joinder of necessary party. The plaintiff has given incorrect genealogy for wrongful gain. The plaintiff has got no concern with the defendant Ist party except that of tenant. The plaintiff is the tenant of defendant Ist party. She is not the daughter of Jutti Singh nor she is the sister of defendant no. 1. The lands were recorded in the name of Narsingh Rai one share, Ramlal Rai and Manno Rai one share in the survey Khatiyani. Thus, Narsingh Rai has 8 Anna share and remaining 8 Anna belonged to Ramlal and Manno Rai. Subsequent to last cadastral survey, there was partition by metes and bounds in the year 1910 and Narsingh Rai became separate, whereas Ramlal and



Manno remained joint wherein Ramlal was Karta. Ramlal died in the early age leaving behind two daughters, namely, Manchurni and Fekani in jointness with his brother Manno Rai and Manno Rai had a son namely, Debu Rai and daughter Genu Devi. After the death of Ramlal, Manno became the Karta. Manno Rai got Fekani married at village Pachmba and Manchurni at village Ajdha and Genu Devi at village Aalapur. Fekani died in jointness with her uncle leaving behind his only daughter, namely, Janki Devi who is the plaintiff in the suit. As Ramlal died in the jointness in the year 1934 with Mannu Rai, hence, neither Fekani Devi nor Manchurni inherited in any Khatiyani property. Narsingh Rai died leaving behind two sons Jutti Rai and Tengar Rai. Jutti Rai died in the year 1955 leaving behind him his widow Maya Devi and his son Baidnath Rai who is defendant no. 1. Maya Devi also died on 14.01.1956. The plaintiff is not the daughter of Jutti Rai rather she is the daughter of Fekani Devi and natni of Ramlal. The plaintiff never executed the sale deed along with defendant no. 1 in favour of Saryugiya Devi on 29.12.1979. All the statement made in the plaint is contrary to the facts stated above are false and concocted. The plaintiff was never kept by Jutti Rai in his family rather she approached the defendant no. 1 to let out one room on monthly rent as her husband had been posted as teacher at Teghra. There was strain relation between sons of Debu Rai and the husband of the plaintiff and, as such, they did not agree to accommodate the plaintiff in their house and the plaintiff has been residing in one room of this defendant on monthly rental who was not paying rent regularly. The character of the husband of the plaintiff was not good resulting he was suspended and convicted for his immoral activity. These defendants have been requesting the plaintiff to vacate the room but she requested and on compassionate ground she was allowed to remain in the house. It is false that the plaintiff has her separate latrine. She was allowed to have a kitchen on the verandah and, as such,



only one northern room with Veranda was let out to the plaintiff. The plaintiff never remained in joint possession over Schedule II land. She is not the daughter of Jutti Singh and, as such, question of jointness and division of properties does not arise. When heavy pressure was put to vacate the room, the husband of the plaintiff filed false criminal case and stopped the payment of the rent since the month of December, 1996 and onwards and, as such, the plaintiff is a rank tress passer. The plaintiff has got no share in the suit property.

4. On behalf of minor defendants also with same allegation written statement has been filed. Defendants no. 10 and 11 have filed joint written statement and they have supported the case of the plaintiff.

5. The learned court below on the basis of the pleadings of the parties framed following issues:

- (I) Is the suit as framed maintainable ?
- (II) Has the plaintiff got any cause of action for the suit ?
- (III) Whether Janki Devi, the plaintiff is the daughter of Jutti Rai ?
- (IV) Whether, Jutti Rai died in the year 1969 or 1955 ?
- (V) Is the plaintiff entitled to a decree as prayed for ?
- (VI) To what other relief or reliefs, the plaintiff is entitled to ?

6. The learned court below took up the issues no. III and IV together and after considering the pleadings and evidences available on the record, came to the conclusion that Janki Devi, the plaintiff, is the daughter of Jutti Rai and Jutti Rai died in the year 1969 and not in the year 1955, thereafter, issue no. V was taken and the learned court below held that the plaintiff is entitled to get half share in the suit property given in Schedule II of the plaint. Issues No. 1 and 2 were also decided in favour of the plaintiff and against the defendants. Issue No. VI was also

decided in favour of plaintiff.

7. Learned counsel for the defendants-appellants has argued that the entire approach of the court below in considering the pleadings and evidences available on the record is erroneous which resulted into wrong finding. The learned court below has adopted different standard in appreciating the evidences of the plaintiff and defendants. The documents (exhibits) filed on behalf of plaintiff has wrongly been relied upon whereas the documents (exhibits) filed on behalf of defendants have been ignored. Learned court below ought to have dismissed the suit and wrongly held that Jutti Rai died in the year 1969. Learned court below has misconstrued Section 23 of the Hindu Succession Act. The statement of PW 1 as stated in paragraph 9 has not been considered. Similarly the statement of DW 12 as given in paragraph 1 has not been considered. Learned court below has wrongly relied upon Ext. 5. The learned court below has erred in holding that Janki Devi is the daughter of Jutti Singh. In no case, the plaintiff will be entitled for half share as in between Jutti Singh and his son Baidnath Singh there will be notional partition and Jutti Singh will get 50 % and Baidnath Singh will get 50 % and after the death of Jutti Singh, if it is held that Janki Devi is the daughter, she will get ½ share in 50 %, and half share will go to Baidhnath Singh, thus, Baidnath Singh will get 3/4th share whereas the plaintiff will get 1/4th share. As according to the plaintiff, Jutti Singh died in the year 1969 itself. The plaintiff has to prove her case which she has failed and, as such, the suit was fit to be dismissed. Learned counsel for the appellant relied upon a decision reported in **(2014) 2 SCC page 269** in the case of **Union of India and Ors. vs. Vasavi Cooperative Housing Society Limited & Ors.** Further reliance has been placed upon a decision reported in **AIR 1958 page 600** in the case of **Mt. Jasoda Kuer and Anr. V. Dulhin Phul Kuer & Ors.** The plaintiff has to prove that she is the daughter of Jutti Singh. Most of the DWs who



have come to say that the plaintiff is not the daughter of Jutti Singh rather she is the daughter of Fekani Devi. No cross-examination on that point has been done and, as such, those facts not taken in cross-examination must be taken to be admitted one and for that reliance has been placed upon a decision reported in **AIR 1961 Calcutta Page 359** in the case of **A.E.G. Carapiet v. A. Y. Derderian**. Further reliance has been placed upon a decision reported in **AIR 2002 SC page 3652** in the case of **Sarwan Singh v. State of Punjab**. According to the learned counsel for the appellants, the evidences adduced on behalf of defendants are more reliable and they being fully acquainted with the relationship have stated that Janki Devi is not the daughter of Jutti Singh rather she is the daughter of Fekni Devi. In the last, it has been argued that the plaintiff, even for the sake of argument, is taken that she is the daughter of Jutti Singh, she will not be entitled for half share, as according to the case of plaintiff, Jutti Singh died in the year 1969 and for that reliance has been placed upon a decision reported in **AIR 2006 Supreme Court Page 3332** in the case of **Anar Devi & Ors. V. Parmeshwari Devi & Ors.**

8. On the other hand, on behalf of respondent Ist set it has been argued that PW 1, PW 2, PW 4, PW 8 besides PW 12, the plaintiff, are the competent witnesses and they have stated that Jutti Rai had a son and daughter, the plaintiff. DWs have been cross-examined and the learned court below after considering all the evidences, available on the record, has rightly come to the conclusion that the plaintiff is the daughter of Jutti Singh and Jutti Singh died in the year 1969 not in the year 1955. Hundreds of witnesses after taking oath can tell lie but documents cannot. Inference drawn from the documentary evidences is more important than the inference drawn from oral evidences. All the DWs have come to say that Jutti Singh died in the year 1955 and further the plaintiff is the daughter of Fekni Devi and not the daughter of Jutti Singh which are against the documents. Ext. 5 is the



certified copy of sale deed of the year 1969 wherein Jutti Singh is identifier and he has identified the husband of the plaintiff in that sale deed and this goes to prove, conclusively, that Jutti Singh was alive till the execution of that sale deed in the year 1969. Further Ext. 8 is the certified copy of voter list of the year 1966 wherein Jutti Singh has been shown alive and in that voter list the plaintiff and her husband are also included as voters in one house including Baidhnath Singh. And this Ext. 8 cuts the root of the case of the defendants Ist set. Ext. 10 is the certified copy of sale deed of the year 1930 which was executed in favour of Fekani Devi and that Fekani Devi is the mother of Jutti Singh, so it cannot be said that the plaintiff is the daughter of Fekani Devi. Learned court below after considering the oral and documentary evidences, has rightly come to the conclusion that the plaintiff is the daughter of Jutti Singh and Jutti Singh died in the year 1969. So far as the share of the plaintiff is concerned, after amendment in the year 2005, the daughter is entitled as coparcener and due to that amendment the plaintiff is entitled to half share. Learned counsel for the respondents has relied upon a decision reported in **AIR 2011 (9) SC page 2077** in the case of **Prema v. Nanje Gowda & Ors.**

9. On the basis of rival contentions of the parties, the following points are for consideration in this appeal:

(1) Whether the plaintiff Janki Devi is the daughter of Jutti Rai and whether Jutti Rai died in the year 1969 or 1955 ?

(2) Is the plaintiff entitled for decree of partition and, if so, to what extent ?

10. According to the plaintiff, she is the daughter of Jutti Singh and Jutti Singh died in the year 1969 leaving behind one son Baidnath Singh, defendant no. 1, and daughter, the plaintiff, as legal heirs and she is residing in the house allotted by her father towards northern side since 1945 whereas other portions of

the house was occupied by her brother Baidnath Singh. According to the defendant Ist set, the plaintiff is stranger to the family and she is the daughter of Most. Fekani Devi and Natni of Ramalal Rai the other branch. The plaintiff is residing in the house in one room as tenant.

11. The plaintiff, to prove her case, has examined altogether 18 witnesses. PW 1 is Dayanand Singh. He has stated that Jutti Rai was his Fufa who was married with his elder Fua Maya Devi. Jutti Rai had one son and a daughter Janki Devi. He has stated that Janki Devi was married with Shiv Bhajan Singh and started living in the house of Jutti Singh. During cross-examination, he states that he has not seen any paper showing Janki Devi is daughter of Jutti Rai. Janki Devi was suffering from epilepsy and she was treated but he has not seen any medical prescription of her treatment. PW 2 Krishna Dev Prasad, aged about 70 years, claims that he has studied at Teghra School with Shiv Bhajan Singh and Shiv Bhajan Singh is the son-in-law of Jutti Singh. He further states that he used to visit to the house of Jutti Singh who died 30-31 years ago. He has been cross-examined and in cross-examination nothing has come to disbelieve his testimony. PW 3 Nand Kishore Singh, aged about 40 years, has stated that Jutti Singh had one son and one daughter Janki Devi. He is the grandson of Tengar Singh. Tengar Singh and Jutti Singh partitioned their landed property and Jutti Singh died 30-31 years ago. In cross-examination he states that his father is alive and his uncle is not in service and both have knowledge of the suit. PW 4 Ram Lalit Singh, son of Debu Singh, aged about 46 years, has deposed that Janki Devi and Baidnath Singh are daughter and son of Jutti Singh and Chethru and Uman were brothers and the plaintiff and defendant no. 1 are heirs of Chethru Rai. He is the grandson of Mannu Rai. He further states that Ramlal had no daughter, namely, Fekani Devi rather he had three daughters namely Surya Devi, Dauna Devi and Manchur Devi. He



further states that Jutti Rai died in the month of December, 1969. The plaintiff resides in the house of her father and she was not the tenant there. He has also been cross-examined but nothing has come to disbelieve his testimony. PW 5 Din Diwakar Sharan is a Pleader Commissioner who has proved his report along with his spot note and rough sketch map marked as Ext. 1. According to his report, the plaintiff is residing in the northern portion of the house with full amenities. PW 6 Radhey Shyam Prasad, aged about 70 years, has stated that he had seen Jutti Singh and Tengar Singh and his house is situated 1 and ½ chain from their house and he used to visit their house from his childhood. Jutti Singh had one son Baidnath Singh and one daughter Janki Devi and Jutti Singh died 30-31 years ago. He further states that Ramlal had only 3 daughters and no male issue and Jutti Rai had one brother and one sister. But he cannot remember the name of his sister. PW 7 Mahendra Singh is a formal witness. He has proved the affidavit sworn by Dhananjay Singh. PW 8 Niranjana Kumar Singh has stated that Tengar Singh and Jutti Singh were brothers. He is the grandson of Tengar Singh. Jutti Singh had one son Baidnath Singh and a daughter Janki Devi and Jutti Singh died in the year 1969. During cross-examination, he states that Maya Devi was the wife of Jutti Singh. This witness is the grandson of Tengar Singh. PW 9, PW 10, PW 11 are formal witness. PW 12 is Janki Devi, the plaintiff herself, and she has supported her case as pleaded in the plaint but she has not stated regarding epilepsy. PW 13 Ramesh Prasad Singh is the deed writer and a formal witness. PW 14 Shiv Bhajan Singh is the husband of the plaintiff and has supported the case of the plaintiff and has stated that his wife is the daughter of Jutti Singh. He got married with Janki Devi in the year 1945 and wife was suffering from epilepsy and after the marriage he started living in his sasural in the house of his father-in-law. He has fully supported the case of the plaintiff stating that Jutti Singh died in the month of



December, 1969. He has denied that his wife is tenant in the house of her father. He has further stated that he executed a sale deed of land situated in Mauja Malti on 31.7.1969 in favour of Rajkali Devi and in that sale deed his father-in-law, Jutti Singh, signed as a witness and identifier. That sale deed has been marked as Ext. 5. He stated that he was teacher in Teghara High School but denied the allegation that he was suspended on the allegation of kidnapping of girl and was sentenced by the court. PW 15 is Ishwar Chandra Singh, the son of plaintiff, and he has supported the case of his mother. PW 16 and PW 17 are the formal witness. PW 18 Wassiuddin Ahmad is the Assistant of Registry Office , Munger who has produced the sale deed register from his office called for by the Court and entry made therein. It has been marked as Ext. 10 and accordingly, the certified copy of sale deed has been substituted as Ext. 10. Ext. 1 is the Commissioner Report which also proves the case of the plaintiff that she is residing in northern portion of the house with full amenities. Ext. 2 is the affidavit sworn in by Dhananjay Sing. Exts. 3 and 3/A are service reports. Ext. 4 is rent receipts. Ext. 5 is the certified copy of sale deed executed Shiv Bhajan Singh wherein Jutti Singh was the identifier and it goes to prove that Jutti Singh was alive till the execution of sale deed i.e. Dated 31.7.1969. Ext. 6 is matriculation certificate of Shiv Bhajan Singh, Ext. 7 is family register of 3.5.1971, Ext. 8 is the certified copy of voter list of the year 1966 wherein Jutti Rai has been shown alive and in that voter list the name of Janki Devi with her husband Shiv Bhajan Singh are mentioned. Ext. 9 is memo no. 3706 office of AG Bihar, Patna. Ext. 10 is certified copy of sale deed dated 14.7.1930 and this sale deed has been executed in favour of Fekani Devi wife of Narsingh Singh, meaning thereby Fekani Devi is the mother of Jutti Singh. Ext. 11 is memo of partition.

12. On behalf of defendant Ist party 13 witnesses have been examined.



DW 1 Gyanand Kesri is a formal witness. DW 2 Baidnath Prasad Singh, aged about 73 years of village Nipania and he has come to say that Ramlal had two daughters, namely, Fekani Devi and Mantorni Devi and Fekani Devi got married with Brahamdev Singh of village Pachambha and Janki Devi, the plaintiff, is the daughter of Brahamdev Singh and she got married with Shiv Bhajan Singh of village Bikrampur. He has further stated that Mannu Rai had one son, Debu Rai, and he used to visit Debu Rai. According to this witness, Jutti Rai had only one son namely, Baidnath Singh and he had no daughter. During cross-examination, he has admitted that he had no concern with village Fulwaria and the family of Jutti Rai. He cannot say the marriage place of boys and girls of his village. DW 3 Syed Md. Hussain Imam is aged about 65 years and he is of village Chakrahima. According to this witness, Jutti Rai had no daughter and he had visiting terms with Jutti Rai. Janki Devi and Shiv Bhajan Singh are tenant in the house and Janki Devi is the daughter of Brahamdev Singh of village Achambha. During cross-examination, he states that he has no concern with village Achambha. Jutti Singh is of village Fulwaria. DW 4 Gobardahan Jha is aged about 76 years. He is of village Fulwaria. According to him, Jutti Rai had only one son Baidnath Singh. Ramlal Rai were two brothers and he had two daughters namely, Fekani and Manturni and Fekani was married in village Pachambha and she had one daughter namely, Janki Devi who was married with Shiv Bhajan Singh. According to this witness, Jutti Singh died in the winter season and his wife died in Tilshankranti in the year 1956. Brahamdev Singh is the father of Janki Devi. During cross-examination, he states that he had no concern with the family of Jutti Singh nor seen the horoscope of his family members. He had not seen the death certificate of Jutti Rai. Ext. 5 and Ext. 8 falsifies the statement of this witness regarding death of Jutti Rai and it reveals that he has come to depose falsely. DW 5 Batoran Rai is aged about 71 years. He is of



village Bariyarpur. According to this witness, Jutti Rai of village Fulwaria had only one son Baidnath Singh and he had no daughter and Jutti Singh died in the year 1955. Shiv Bhajan Singh got married with the daughter of Brahamdev Singh in village Pachambha. Shiv Bhajan Singh got his education in Barauni. He was knowing Ramlal Singh and Mannu Rai of village Fulwaria and Ramlal had two daughters and his one daughter was married at village Pachambha and Fekani Devi is mother of Janki Devi. Janki Devi was residing in the house of Baidnath Rai on rent in village Fulwaria. During cross-examination, he states that he never served Jutti Rai nor managed books of accounts of his family. He has no concern with village Pachambha. PW 6 Kusheshwar Rai is aged about 68 years. He is of village Fulwaria. According to him, Jutti Rai had only son namely, Baidnath Rai and no daughter and Jutti Rai died in the year 1955. DW 5 and 6 are stating falsely in view of Ext. 5 and Ext. 8 and no reliance can be placed upon such witnesses. DW 7 Ramagya Singh is aged about 43 years. He is the resident of village Bikrampur. He states that Shjiv Bhajan Singh and the plaintiff are residing in rented house in village Fulwaria and Kiran Chandra Singh is the son of Shiv Bhajan Singh. He is his friend and went to Pachambha, Sasural of Shiv Bhajan Singh along with Kiran Chandra Singh and Brahamdev Singh, father-in-law of Shiv Bhajan Singh. During cross-examination, he becomes incompetent. He has stated that Shiv Bhajan Singh is not his Gotiya and he is residing in village Fulwaria prior to his service. He has not seen any deed of tenancy nor receipt. He has no concern with village Pachambha and Brahamdev Singh. DW 8 Ganesh Singh, aged about 75 years, is of village Pachambha. He has stated that Brahamdev Singh was married in village Fulwaria and he had only one daughter Janki Devi who got married with Shiv Bhajan Singh. During cross-examination, he was unable to say the name of grandfather and great grandfather of Brahamdev Singh.



He has not seen any paper disclosing that Janki Devi was the daughter of Brahamdev Singh. DW 9 Ganesh Jha, aged about 85 years, is of village Nipaniya. He has stated that Brahamdev Singh of village Pachambha was his Jajman who had a daughter Janki Devi and she was married in village Bikrampur with one Shiv Bhajan Singh and he has performed the marriage ceremony. During cross-examination he admits that he was in Railway service till 1986. He further states that Shokhara and Fulwaria are adjacent to each other and there are 400 family of Brahamans in both villages. DW 10 Anirudh Mishra is aged about 78 years. He is of village Fulwaria and has deposed that Ramlal Rai and Mannu Rai were his Jajman and Ramlal had only two daughter Fekani and Manturni. Fekani was married in village Pachambha and she was having one daughter Janki Devi. During cross-examination, he states that he has not prepared the Lagan Patri and Janampatri. DW 11 Chandrashekar Rai is aged about 84 years. He has stated that Ramlal Rai of village Fulwaria was his Mause, who had two daughters, Fekani and Manturni. Fekani was married with Brahamdev Singh and Brahamdev Singh had only one daughter Janki Devi. During cross-examination, he cannot say the name of grandfather of Ramlal and he has not seen the genealogical table of the family of Brahamdev Singh. He has no proof that Ramlal was his Mause. DW 12 Tarni Kumar, aged about 80 years, is of village Daniyalpur. He states that Jutti Singh was his Fufa and he had only one son and no daughter. During cross-examination he states that there is no proof that Jutti Singh was his Fufa. He cannot say the name of his Fufa. DW 13 is the defendant no. 1 himself. He has come to support his case as made out in the written statement.

13. According to the learned counsel for the appellants, the points taken in chief of DWs have not been cross-examined and, as such, their testimony should be accepted. Whereas on behalf of respondents it has been submitted that



they have been cross-examined and 2-3 lines which have come in cross-examination are sufficient to discard their testimonies and further documentary evidences also falsifies the statement of DWs. According to the plaintiff, she being the daughter of Jutti Rai was allowed to reside in the northern portion of the house with full amenities by her father after marriage in the year 1945, her husband took education living at village Fulwaria and has worked in Teghra High School and retired. Whereas, according to defendant, they were residing as tenant. The defendants have not produced any paper showing relationship of landlord and tenant between him and the plaintiff and also to show that Shiv Bhajan Singh was suspended from his school and he was convicted. Whereas, from Ext. 1, it reveals that plaintiff was found residing in northern eastern portion of the house with full amenities with bathroom and kitchen and this report and evidence are not disputed. Ext. 6 is the matriculation certificate of Shiv Bhajan Singh who passed his matriculation examination from Umar High School, Teghra and Ext. 9 is a copy of letter sent to Shiv Bhajan Singh from AG Bihar, Patna which relates to retirement benefit of Shiv Bhajan Singh. From Ext. 7 it reveals that Janki Devi and her husband are residing with their children in village Fulwaria. From Ext. 8 which is certified copy of voter list of the year 1966 of village Fulwaria in which name of Jutti Rai son of Narsingh Rai is recorded in house No. 237 at serial no. 1044 and in the same house name of Baidnath Singh is also recorded and further at serial no. 1048 and 1049 name of Shiv Bhajan Singh and his wife Janki Devi were recorded which shows that Jutti Rai was alive on 1.1.1966 and plaintiff and her husband were residing in the house of Jutti Rai as his family members. From Ext. 5 which is the certified copy of sale deed, dated 6.11.1969, executed by Shiv Bhajan Singh in favour of Sm. Rajkali Devi in which Jutti Singh son of Narsingh Singh has identified Shiv Bhajan Singh and also signed as a witness therein, which shows



that Jutti Singh was alive on 6.11.1969. Ext. 11 is memorandum of partition between Tengar Singh and his sons which shows that Jutti Singh and Tengar Singh partitioned family property amicably among themselves 5-6 years ago prior to this memorandum of partition, dated 28.3.1970, and in almost all plots $\frac{1}{2}$ and $\frac{1}{2}$ share were allotted. It also goes to reveal that Jutti Rai was alive in the year 1964-65. Ext. 2 is the affidavit sworn by Dhananjay Singh defendant no. 7 in support of the case of the plaintiff. This document is of no importance as Dhananjay Singh has not come to depose. Ext. 10 is the certified copy of sale deed of the year 1930 executed by Sheetal Chaudhary in favour of Fekani Devi wife of Narsingh Rai and it goes to show that a lady named Fekani Devi was the mother of Jutti Rai. On behalf of plaintiff witnesses are of the branch of Tengar Rai and Debu Rai. PWs 3, 4 and 8 are the competent witnesses who have supported the case of the plaintiff. Learned court below has rightly held that the evidences of PWs 2, 3, 4 and 8 are relevant under Section 50 of the Evidence Act. The learned court below after careful consideration of the evidences and pleadings of the parties, has rightly come to the conclusion that the plaintiff is the daughter of Jutti Rai and Jutti Rai died in the year 1969 not in the year 1955. Accordingly, the point no. 1 is decided in favour of the respondent and against the appellants. The finding of the learned court below to this extent is hereby affirmed.

14. The plaintiff has succeeded in proving her case as made out in the plaint. The rulings relied upon by the learned counsel for the appellants are not helpful to the appellants in the present facts and circumstances of the case. Here, the plaintiff has been able to prove that she is the daughter of Jutti Rai and Jutti Rai died in the year 1969 not in the year 1955.

15. Point no. 2: In the facts and circumstances stated above and in view of the findings arrived at, the plaintiff is entitled to a share in the suit



properties. According to the appellants, plaintiff cannot be entitled for $\frac{1}{2}$ share and for that it has been argued that according to Section 6 of the Hindu Succession Act, 1956, when a coparcener dies leaving behind any female relative specified in class 1 of the schedule to the Act or male relative specified in that class, through such female relative his undivided interest in the Mitakchara coparcenary property would not devolve upon his surviving coparcener by survivorship but upon his heirs by intestate succession. In the present case, Jutti Rai and his son Baidnath Singh constituting coparcenary notional partition has to be assumed between two, before the death of Jutti Rai and, his half interest would devolve, on his death, upon the plaintiff and Baidnath Singh and thus the plaintiff would have $\frac{1}{4}^{\text{th}}$ share.

16. The Hon'ble Apex Court in the case of **Anar Devi** (Supra) in the similar circumstances has held so.

17. On the other hand, on behalf of respondents, it has been argued that after amendment in the year 2005, the daughter and son both will get equal share and for that the case of **Prema** (Supra) has been relied upon.

18. After careful consideration of the arguments of both the learned counsels it reveals that in the case of **Prema** (Supra) the father was alive and in his lifetime the partition suit was filed by the daughter. Here, Jutti Rai died in the year 969 and after his death partition suit has been filed by the daughter and, as such, before the death of Jutti Rai notional partition has to be assumed between him and his son Baidnath Rai. i.e. $\frac{1}{2}$ remains to Jutti Rai and $\frac{1}{2}$ remains to Baidhnath Rai and after the death of Jutti Rai out of $\frac{1}{2}$ share $\frac{1}{2}$ would again devolve upon his son and $\frac{1}{2}$ upon his daughter. Thus, the plaintiff is entitled to get $\frac{1}{4}$ share and not $\frac{1}{2}$ share. Paragraph 11 of the judgment of the Hon'ble Apex Court in the case of **Anar Devi** (Supra) is as follows:



“11. Thus we hold that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, by survivorship but upon his heirs by intestate succession. Explanation 1 to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and i.e., that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition on the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition.”

19. Thus, the plaintiff is entitled to $\frac{1}{4}$ share in the suit properties and accordingly, the findings of the learned court below to that extent is hereby set aside.

20. In the result, point no. 2 is decided partly in favour of appellants to the extent indicated above.

21. In the result, these appeals are partly allowed holding that the plaintiff-respondent Ist Set is entitled to $\frac{1}{4}$ share in the suit property.

22. As in First Appeal No. 39 of 2005 the preliminary decree has been partly set aside to the extent that the plaintiff-respondent Ist set is entitled to only ¼ share and not ½ share and, as such, the final decree prepared accordingly, as per preliminary decree, is also hereby set aside. Let a fresh final decree be prepared as per the preliminary decree.

23. In the result, both the appeals are hereby partly allowed to the extent indicated above.

(Jitendra Mohan Sharma, J)

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