

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.242 of 1972

[Against the judgment and decree dated 22.12.1971 passed by the 2nd Additional Sub-ordinate Judge, Motihari in Partition Suit No. 101 of 1964/136 of 1970.]

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Smt. Preamsheela Devi & Ors

... Plaintiffs-Appellants

Versus

Prem Kumari Devi & Ors.

.... Defendants- Respondents

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Appearance :

For the Appellant/s

: Mr. S.S. Dwivedi, Sr. Advocate

: Mr. J.S. Arora, Sr. Advocate

: Mr. Jyotindra Prasad Singh, Advocate

For the Respondent/s

: Mr. K.N. Chaubey, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

CAV JUDGMENT

Date: 16th December, 2016

The plaintiffs and defendants 3rd set have filed this first appeal against the judgment and decree dated 22.12.1971 passed by the learned 2nd Additional Sub-Ordinate Judge, Motihari in Partition Suit No. 101 of 1964 decreeing the plaintiffs' suit in part i.e with respect to Schedule-II, III and IV properties to the extent of 8/60th share and refused to grant any share in Schedule-I and I(ka) property.

2. The plaintiffs-appellants filed the aforesaid partition suit claiming 2/5th share in all the schedules of the plaint along with defendants 3rd set.



3. The plaintiffs claimed the aforesaid relief alleging that Kashi Prasad Sah had three sons namely, Heera Lal Sah, Ramashray Sah and Ramavtar Sah. The plaintiffs, defendants 1st set and defendants 3rd set are the heirs of Ramashray Sah. There had already been partition between the sons of Kashi Prasad Sah. Therefore, the branch of Heeralal Sah and Ramavtar Sah are not party in the suit. According to the plaintiff, Ramashray Sah died in the year 1917 leaving behind five sons namely, Narayan Prasad, Sheo Prasad, Raghunath Sah, Ramchandra Sah and Sita Prasad. Defendant No.1 is the son of Narayan Prasad and his descendants are other defendants. Defendant No. 4 is widow of Sheo Prasad Sah, namely, Rampati Devi and their descendants are also defendants. Original plaintiff was Raghunath Prasad Sah and his widow and one son and one daughter, Premsheela Devi are plaintiffs whereas one daughter and one son are defendant 3rd set, who are also appellants before this Court in the first appeal. Ramchandra Sah died in 1934 leaving behind Dhanno @ Rampyari. They had a son Lallan, who died in 1941 and Dhanno @ Ramprayri also died in 1963. Sita Prasad died in 1950 leaving behind widow and a son who are defendants.

4. Further, case of the plaintiffs is that Ramashray Prasad Sah died in 1917. Rampyari Devi died in 1963. Sita Prasad died in



1950. Ramchandra Prasad Sah died in 1934. Sheo Prasad died in 1951. According to the plaintiffs, there was a partition between three branches of Kashi Prasad Sah by a registered deed of partition. Some properties were left joint between them. After partition, in the year 1936, the heirs of Ramashray Prasad Sah started Cinema business. Since Sheo Prasad Sah, Lalbabu Sah and Sita Prasad Sah were interested in Cinema, the family Cinema/Theatre business was given in their charge for conduct of the business. All five branches were getting benefit. Subsequently in the year 1941, the five branches were separated in three places. Lalbabu Sah, Sheo Prasad Sah and Sita Prasad Sah remained together. Raghunath Prasad Sah separated alone. Lallan Prasad remained alone with his mother, Rampyari Devi. At that time, Lallan was minor and Rampyari Devi was a *Pardanashi* lady. So Lallan was under the guardianship of Sheo Prasad Sah and he died in that very state. In the year, 1946, Lalbabu Sah, Sheo Prasad Sah and Sita Prasad Sah leased out Cinema business to defendant No.16 on his behalf and on behalf of Rampyari Devi and Rampyari Devi was getting 1/5th share out of the income. Raghunath Prasad Sah had sold his share in Cinema business to defendant No.17 to 19. Whatever he had share in the Cinema, he sold it and nothing was left for him in the ancestral property mentioned in Schedule-I of the



plaint.

5. At the time of death of Rampyari Devi in the year 1963, the only nearest agnate reversener was Raghunath Prasad Sah, who inherited 1/5th share of Rampyari Devi i.e. branch of Ramchandra Prasad Sah. Raghunath Prasad Sah died in the year 1967 leaving behind the other plaintiffs and defendants 3rd set, who inherited the share of Ramchandra Prasad Sah entirely.

6. After notice, the defendant Nos. 1 to 6 and 10 to 15 have filed contesting written statement. Their main defence is that the suit is bad for partial partition. The Schedule-I and I(ka) property belonged to defendants 1st set alone. Neither Raghunath Prasad Sah nor Rampyari Devi had any title and they had nothing to do with Cinema or Theater business. Raghunath Prasad Sah had already separated in Mess, residence and business in the year 1924 and subsequent to that property was also partitioned and he also sold his entire property including his residence. The other four branches continued joint. There was a partition in the year 1941 and in that partition, Schedule-I and I(ka) properties were given to Lalbabu Sah, Sheo Prasad Sah and Sita Prasad Sah in their share. The ancestral house was given to Lallan Prasad Sah, besides his share in the family property. However, Lallan Prasad Sah died in the year 1941 and on his death, Rampyari Devi separated leaving with



Lalbabu Sah. Since her son had already died, she did not take any property and agreed to take maintenance only and in Panchayati, she was given properties for her maintenance.

7. Further, defence is that the Cinema building was constructed by Sheo Prasad Sah, Sita Prasad and Lalbabu Sah out of their personal fund and business was started by them. Joint family had nothing to do with it. The defendants have leased out the same to defendant No. 16.

8. Defendant Nos. 20 and 21 filed supporting written statement supporting the plaintiffs' case whereas the defendant Nos. 7 to 9 filed a written statement supporting the case of the contesting defendants aforesaid. Defendant No. 16 is the lessee.

9. On the basis of the aforesaid pleadings of the parties, the learned court below framed the following issues;

- "1. Is the suit as framed maintainable ?*
- 2. Have the plaintiffs got cause of action for the suit ?*
- 3. Is the court fee paid is sufficient ?*
- 4. Is the suit bad for non-joinder of party ?*
- 5. Is the suit barred for claim for partial partition ?*
- 6. Whether the entire Cinema business including machine, land and buildings standing in holding Nos. 36 S. Plot No. 1328, 1329, 1330 and 1358 belongs to the branch of Lalbabu, Shiva Prasad and Sita Prasad alone by partial partition in 1941 ?*
- 7. Did Raghunath Sah inherit the share of the branch of Ram Chandra Sah ?*
- 8. Have the plaintiffs got unity of title & possession ? If so in which of the properties in dispute to what extent ?*
- 9. Are the plaintiffs entitled to a decree for partition? If so for what share & in which property ?*
- 10. To what relief or reliefs, if any, are the plaintiffs titled ?"*



10. The learned court below after hearing the parties, on the basis of materials available on record, came to the conclusion that Rampyari Devi had actually taken maintenance only and had distributed her remaining share in the property amongst four brothers of her husband and their heirs. Therefore, nothing was left for Rampyari Devi to be inherited by Raghunath Prasad Sah. Rampyari Devi and Lallan had no share in the property detailed in Schedule-I and (ka). The statement in the plaint that there had been a partition in the family in the year 1941 cannot be ignored rather it is admitted that there was whole partition in the family in the year 1941. Accordingly, the plaintiffs' suit for partition of Schedule-I and Schedule-I(ka) property was dismissed.

11. The learned Senior counsel, Mr. S.S. Dwivedi, for the appellants submitted that the trial court wrongly held that it is pleaded by the plaintiffs that there had already been partition between the parties. The court below, therefore, approached the case in wrong angle because the plaintiffs in the plaint have only stated that there was partition between three branches of Kashi Prasad Sah and some properties were left joint. The suit properties in Schedule-I and Schedule-I(ka) were allotted in the share of Ramashray Sah. In the year 1941, the heirs of Ramashray Prasad



Sah separated in three places, wherein Raghunath Prasad Sah walked out separately. Rampyari Devi and Lallan Prasad started leaving separately but the court below held that the plaintiffs pleaded that there had been partition between the sons of Ramashray Prasad Sah. The court below also wrongly held that Rampyari Devi distributed her share between the other four branches. While recording these findings, the court below has not properly appreciated the evidences adduced by the parties. According to the learned Senior counsel, the pleading of the plaintiff is only to the effect that they were residing separately, that does not mean that there was partition by metes and bonds. When they separated, the share of the parties was defined and, therefore, the co-parcenary family ceased to exist. The share of Ramchandra Sah i.e $\frac{1}{5}^{\text{th}}$ devolved on Lallan Prasad. He died in the year 1941, therefore, $\frac{1}{5}^{\text{th}}$ share devolved of Rampyari Devi. On the death of Rampyari Devi in the year 1963, the $\frac{1}{5}^{\text{th}}$ share devolved on Raghunath Prasad Sah as he was the only nearest reversener alive at the time of death of Rampyari Devi in the year 1963.

12. The learned counsel further submitted that the defendants themselves filed probate application being Probate Case No. 31 of 1963 under Section 276 of the Indian Succession Act and prayed for issuance of probate with respect to $\frac{1}{5}^{\text{th}}$ share of



Rampyari Devi and this probate application has been marked as exhibit-10. This clearly indicate that there had been no partition between the parties till the death of Rampyari Devi. The court below did not consider the implication of the admission made by the defendants. This probate case was ultimately dismissed by the High Court in First Appeal No. 658 of 1968. The Judgment of the High Court was produced, which is exhibit-6, wherein the High Court clearly held that Ramchandra Prasad Sah had separated from his brothers and on the death of Ramchandra Prasad Sah, his entire properties went to his son Lallan, on whose death, his mother Rampyari Devi got the entire properties. Therefore, the case of the defendants that Rampyari Devi was only given maintenance is incorrect. In the year, 1963, the only heir of Rampyari Devi was Raghunath Prasad Sah and none of the other brothers of Ramchandra Prasad Sah. The court below without considering the implication of the finding of the High Court which is Division Bench decision held that there had already been partition in the year 1950 and in that partition, Rampyari Devi distributed her share by taking maintenance. According to the learned Senior counsel, the title cannot pass by mere relinquishment. The defendants had not produced any registered document transferring Rampyari's title in favour of the defendants. The only defence is that subsequently,



there was partition and some '*Kora*' were prepared but the court below did not consider the fact that in '*Kora*', Rampayri Devi is not a party. Moreover, these '*Kora*' are exhibit-I/5 and I/6, wherein there is no signature of Rampyari Devi. Moreover, these documents, exhibit-I/5 and I/6, which are said to be of the year 1953, were never produced in probate case and no such case was made in the probate case. For the purpose of this suit, the documents have been created.

13. The learned Senior counsel further submitted that exhibit-1 is a registered deed of partition by which the partition was effected between three branches i.e. three sons of Kashi Prasad Sah. In that partition, Schedule-III properties were allotted jointly in favour of Sheo Prasad Sah, Raghunath Prasad Sah, Sita Prasad Sah and Lalbabu Prasad Sah and Sheo Prasad Sah, who was representing minor Lallan Prasad Sah. Therefore, all the branches of Ramashray Prasad Sah were allotted the suit property jointly. This clearly shows that till 1936, there was no partition between the parties but the defendants pleaded that in the year 1924, Raghunath Prasad Sah had already separated which is falsified by exhibit-1. The court below has not considered these documents in its right perspective.

14. Learned Senior counsel submitted that it is admitted fact



that on the death of Rampyari Devi in the year 1963, the only nearest reversener was Raghunath Prasad Sah. Accordingly $1/5^{\text{th}}$ share of Rampyari Devi will go to Raghunath Prasad Sah and on his death, the plaintiffs and defendants 3rd set are entitled for $1/5^{\text{th}}$ share. The court below wrongly dismissed the plaintiffs' suit relying on 'Kora', which cannot be read against Rampyari Devi. No document has been produced showing transfer made by Rampyari Devi. No case has been pleaded by the defendants that in fact there was family arrangement. The learned court below wrongly held that there was subsequent partition between the parties and Rampyari Devi instead of taking her share, she only took about 5 Bighas of land for maintenance and distributed her other share to the defendants without there being any such registered document.

15. The learned Senior counsel further submitted that no doubt, it is the pleading of the plaintiffs that Raghunath Prasad Sah had already sold his $1/5^{\text{th}}$ share but on that ground, the plaintiffs' suit for partition to the extent of $1/5^{\text{th}}$ share of Ramchandra Prasad Sah could not have been rejected by the court below.

16. On the other hand, learned Senior counsel, Mr. K.N. Chaubey, appearing for the respondents submitted that the claim of the plaintiff to the extent of $2/5^{\text{th}}$ share is malafide as this claim was made, subsequently, by amending the plaint on the death of



original plaintiff No.1, Raghunath Prasad Sah. In the plaint itself, the plaintiffs claimed that Raghunath Prasad Sah had already sold his 1/5th share and has left nothing either in ancestral property or in the property mentioned in Schedule-I and I(ka). So far the finding recorded by the High Court in first appeal is concerned, according to the learned Senior counsel, it will not operate as *res-judicata* because the finding was recorded in a probate case wherein the title is foreign question and if it is decided incidentally, it will not be *res-judicata*. The learned Senior counsel, on this point, relied upon the decisions of the Supreme Court rendered in the case of ***Mrs. Hem Nolini Judah (since deceased) and after her legal heirs versus Mrs. Isolyne Sarojbhashini Bose and others*** reported in ***AIR 1962 SC 1471*** and in the case of ***Madhvi Amma Bhawani Amma and ors. versus Kunjikutty Pillai Meenakshi Pillai and ors.*** reported in ***AIR 2000 SC 2301***.

17. Learned senior counsel further submitted that in Money Suit No. 217 of 1954, the Schedule-I property was attached before judgment. The property was released in favour of the defendants, wherein it has been held that Raghunath Prasad Sah has got no interest or share in it. The document has been produced, which has been marked as Exhibit-P, which is of the year 1955. This Exhibit-P will operate as *res-judicata*. The learned Senior counsel further



submitted that Schedule-I property of the partition suit is not the property mentioned in schedule of the probate application. The properties mentioned in probate case are the properties which were given to Rampyari Devi in maintenance. Exhibit-I series have been produced, which are 'Kora', which show that there was some sort of family arrangement between the parties and pursuant to those family arrangement, the parties had sold some of the properties, therefore, the family arrangement has been acted upon and in such circumstances, it should be respected by the court and if it is acted upon, it is binding on the parties. In support of his contention, the learned Senior counsel relied on a decision of the Supreme Court rendered in the case of *Kashinathsa Yamosa Kabadi, Etc. Vs. Narsinga Bhaskarsa Kabadi, Etc.* reported in *AIR 1961 SC 1077* and *2010 (11) PLJR 74 SC*.

18. Learned Senior counsel further submitted that since the minor son of Rampyari Devi, namely, Lallan was minor and in that state, he died in the year 1941, Rampyari Devi remained alone, therefore, she relinquished in favour of the defendants and in Panchayati, she took 5 Bighas of land which is mentioned in the Kora. This is not a partition deed rather the documents contain only the list of the properties, therefore, are not required to be registered. The documents have been acted upon. The defendants themselves



have constructed the Cinema Hall out of their own income and Rampyari Devi never contributed anything as her husband died in the year 1934 and she was alone. Her son was minor. The learned court below has, therefore, rightly considered the documentary evidence and recorded a clear finding in favour of the defendants. In such circumstances, the judgment and decree of the trial court needs no interference in this first appeal, as such, this first appeal is liable to be dismissed with costs.

19. In view of the above submission of the learned counsel for the parties, the points arises for consideration is whether Rampyari Devi had already distributed her share in favour of the defendants in family arrangement, which had already been acted upon by the parties and, therefore, she had no interest in Schedule-I and Schedule-1(ka) property. As such, nothing remained for inheritance by Raghunath Prasad Sah or his heirs and whether the plaintiffs are entitled to 1/5th share in the property mentioned in Schedule-I and Scephudule-I(ka).

20. The plaintiffs' case is that on the death of Ramchandra Sah, in the year, 1934, his interest in the property devolved on his son, Lallan and on his death, the property was inherited by his mother, Rampyari Devi, as she was the class-1 heir. The partition took place between three branches of Kashi Prasad Sah by



registered deed of partition dated 17.10.1936 and subsequently, there was separation between heirs of Ramashray Prasad Sah. In the separation, Lallan and his mother remained at one place. Raghunath Prasad Sah walked out separately and the others remained at one place. At paragraph No.3 of the plaint, it is clearly pleaded to this effect. On the contrary, the defendants' case is that in the partition of the year 1941, the Schedule-I and Schedule-1(ka) property was allotted in favour of Sheo Prasad Sah, Sita Prasad Sah and Lalbabu Sah only. Lallan was adult in the year 1941 and Lallan Prasad died so his mother did not take any share in the property. For her maintenance, the properties mentioned in Schedule-I of the written statement was given to her.

21. In support of their respective cases, the parties have examined witnesses and also have produced documentary evidence. P.Ws. 1 to 8 are not material. P.W.-9 has stated that the properties in villages such as Bhawanipur, Bikudiya and Sugaon had been partitioned. The properties of other villages were still joint and on the death of Rampyari Devi, Raghunath Babu came in possession. P.W.-10 is the plaintiff himself. He has fully supported his case. According to this witness, Schedule-I and Schedule-I(ka) properties is the joint family property and the three brother were looking after the affairs of Cinema business. In the year, 1941, Raghunath Prasad



Sah separated and Lallan started residing with his mother. The three other brothers were residing jointly. Till then, there was no partition. He admitted that his father Raghunath Prasad Sah had sold his share to the defendants.

22. In view of the pleading and evidence, it becomes clear that Raghunath Prasad Sah had sold his share. The next question is what happened to the share of Ramchandra Prasad Sah. According to the defendants also, there was separation and Rampyari Devi with her sons was residing separately. It is admitted fact that prior to death of Raghunath Prasad Sah all his brothers had already died. Therefore, on the death of Rampyari Devi, in the year, 1963, the property of the branch of Ramchandra Prasad Sah will devolve on next nearest agnates i.e. reversener, Raghunath Prasad Sah unless the said Rampyari Devi had disposed of the property. D.W.-1 is a tenant, who has a shop near Cinema Hall. He has stated that he was giving rent to Lalbabu, who was owner of Cinema House. This is the nature of evidence of D.Ws.-2 to 5.

23. D.W.-6 has only stated that Rampyari Devi and Lallan Prasad did not take any share in the Cinema House because they had not repaid the loan amount taken for construction of Cinema House. At paragraph No. 10, in his cross-examination, he has stated that prior to earth-quake, the Cinema House had been constructed.



According to this witness, the defendant is dealing share of Rampyari Devi in the property of Schedule-I and Schedule-I(ka) but it is stated that Rampyari Devi and Lallan Prasad refused to take share.

24. D.W.-7 has also stated that Raghunath Prasad Sah went out alone in the year, 1936 and he sold his share. At paragraph-6, this witness also admitted that the Cinema House was constructed prior to 1934 and at paragraph -8, categorically, stated that till the death of Lallan Prasad, all the properties were joint between four brothers and in joint possession. According to the evidence of this witness also, the Cinema House was constructed prior to partition but then the remaining four branches were joint till the life time of Lallan i.e. in the year 1941.

25. D.W.-7 has stated that in the year 1934, Raghunath Prasad Sah went out alone. At paragraph-4 of his cross-examination, he has categorically admitted that Lallan Prasad had not separated from his uncles. He died in the state of minor. Therefore this witness also admitted that there was no partition till 1941.

26. D.W.-10, in his evidence at paragraph-8, has clearly stated that Rampyari Devi had not signed in any partition document. The most important witness is D.W.-15, who in his



examination in chief has clearly stated that the Cinema House was constructed by the five sons of Ramashray whereas the construction matter was being looked after only by Lalbabu, Kartik Babu and Brij Mohan Babu. According to this witness, the Cinema House i.e Schedule-I and Schedule-I(ka) property was joint property and the Cinema House was constructed by the five brothers. This construction was made prior to 1934 as has been admitted by other witnesses disclosed above. D.W.-16 has also stated that Raghunath Prasad Sah had only separated and the remaining brothers were joint. There was separation only between the four branches but the business remained joint and prior to this separation, the Cinema House was constructed. D.W.-30 is the defendant No.2. He has stated that in 1934, Sitaram Prasad Sah and Lallan Sah had opened the business of Cinema. In the partition of the year 1936, Raghunath was given his share who sold the same. The remaining properties remained in joint between four branches. In the year 1941, they partitioned the property between four branches. Cinema business was running in loss. Rampyari Devi did not take any share as they were given share in ancestral property of Bhawanipur and subsequently on the death of Lallan Prasad instead of taking her share, she opted to take 5 Bighas 11 Khata 6 Dhur for maintenance and left her other properties. In this partition, Raghunath Prasad Sah



had also participated and partition documents were prepared. It may be mentioned here that Exhibit-I series have been produced, in support of the partition. At paragraph No.34, he has categorically admitted the fact that there was no partition between the four branches after 1936 till 1941. These are the oral evidences of the parties.

27. From the above evidences, it become clear that it is the specific case of the plaintiff that after death of Rampyari Devi, 1/5th share of Ramchandra Prasad Sah which ultimately had gone to Rampyari Devi after the death of her son Lallan was inherited by Raghunath Prasad Sah, original plaintiff. Admittedly, Rampyari Devi had inherited 1/5 share. The defendants admitted this fact in the evidences as discussed above. Although, the defendants have claimed that the Cinmea House was started by them out of their own fund and income but the witnesses discussed above examined by the defendants have clearly admitted the fact that prior to 1934 all the brothers were joint and the Cinema house was constructed by them jointly. However, the defendants were looking after the construction matter.

28. Now, in view of this fact, the only question is whether after death of Rampyari Devi what will happen to her property. According to defendants, she refused to take any interest in



Schedule-I and Schedule-I(ka) property. It is admitted fact that she had 1/5th share and according to the plaintiff she was residing separately and this fact is not disputed by the defendants. The only defence is that in partition of the year 1941, she did not take nay share in the property and left for distribution of hear share between three branches.

29. The defendants have produced exhibit-I/5 and I/6, which are so called Kora. By this document, the defendants tried to show that the property was partitioned at three places excluding Rampyari Devi because she refused to take any share. From perusal of these exhibits- I/5 and I/6, I find that there is no signature of Rampyari Devi over these documents. Therefore, these documents cannot be read against Rampyari Devi in evidence. In other words by these documents, in no case, it can be said that the title which Rampyari Devi had was divested and the title vested on the three branches only i.e branch of defendants.

30. Exhibit-10 is the probate application in Probate Case No. 31 of 1963. From perusal of this documents, I find that the defendants had filed this probate application under Section 276 of the Indian Succession Act for grant of probate wherein Schedule-I has been described to the effect that in the property, Rampyari Devi had got 1/5th share in total. In the year, 1963, Rampyari Devi had



died and immediately thereafter this probate application was filed alleging that she had executed Will with respect to her property which was described 1/5th share in the probate application. This documents proves that Rampyari Devi had 1/5th share which was admitted by defendants in the year 1963. It is very strange to point out here that according to the defendants there had already been partition in the year 1941 and she refused to take any share in the property, except 5 Bighas and odd which she took for maintenance. In probate application the defendants admitted that Rampyari Devi had 1/5th share . It was not filed for the property which was given to her as maintenance as claimed by the defendants. This probate application was ultimately dismissed by the High Court in First Appeal No. 658 of 1968 and the judgment of the High Court is exhibit-6 in this case.

31. From perusal of this judgment, which is passed by the Division Bench, I find that the question of inheritance of property of Rampyari Devi was directly and subsequently in issue in that proceeding. The High Court clearly held that on the death of Ramchandra Prasad his entire property went to his son Lallan on whose death, his mother Rampyari got the entire properties. The statement in exhibit-1 i.e. Will to the effect that Rampyari Devi had been given the properties by way of maintenance was not correct



statement and the other incorrect statement in exhibit-1(Will) is that except three persons named in the exhibit-1 are the only heir of Rampyari Devi. Finding this, the High Court held that exhibit-1 i.e. Will cannot be probated because in correct statements are there. Therefore this question which is being raised by the defendant in this case is also to the same effect that Rampyari Devi was given only property for maintenance. The question is if she had interest in the property and she was living separately then how the property of her share will go to the defendant. According to the defendants she did not take share in the property but in support of this case, exhibit-1/5 and I/6 have been produced but theses documents are not signed either by Rampyari Devi or Raghunath Prasad.

32. At the time of hearing of this first appeal, the learned Senior counsel Mr. Chaubey, appearing for the respondents submitted that there was some sort of family arrangement in the year 1941 wherein only maintenance was given to Rampyari Devi. So far this submission is concerned, I may say that this is not the case pleaded by the defendant in the written statement that family arrangement was made. The specific case is that there was partition between four branches excluding Raghunath Prasad wherein she did not take interest. In other words, she relinquished her share. It is settled principle of law that relinquishment can be done only by



registered deed. The title of Rampyari Devi will be vested on the person who has no title on it. No such registered document has been produced. In such circumstances, the title of Rampyari Devi cannot be divested without there being any registered documents.

33. The Hon'ble Supreme Court in the case of *YELLAPU UMA MAHESWARI & ANR Vs. BUDDHA JAGADHEESWARARAO & ORS.* reported in *2015 (5) PLJR 494 SC* has clearly held that the relinquishment deed requires compulsory registration. Therefore, merely on the basis of pleading of the defendant that Rampyari Devi relinquished his share will not divest the title of Rampyari Devi.

34. The other aspect of the matter is that the so called 'Kora', exhibit-I/5 and I/6 were never produced in the probate case although it was pleaded by them that in partition, Rampyari Devi did not take any share and only for maintenance, some properties were given. Moreover, on these documents, there is no signature of Rampyari Devi. In my opinion, therefore, these documents did not help the defendants.

35. From perusal of the judgment of the trial court, it appears that the court below rejected the claim of the plaintiffs holding that Raghunath Prasad Sah had no share. So far share of Lallan Prasad is concerned, the court below relied upon the case of



the defendant that in partition of the year 1941, Rampyari Devi had not taken any share and while considering the devolution of share of Rampyari Devi, the settled principle of law regarding relinquishment was not considered. It is settled principle of law that by admission also title will not pass. If the law requires that for passing title, a registered document is necessary then title will pass only after the requirement of law is fulfilled i.e. transfer of property Act. No document has been produced which can show that Rampyari Devi ever transferred her share. It is the case of the defendant that Rampyari Devi distributed her share. In other words, she admitted the title of the defendants of her share. In such circumstances, in no case, it can be said that merely because statement is made by the defendant, title will not be vested on them with respect to the property of Rampyari Devi. The trial court has not considered this settled principle also.

36. The learned court below also held that they did not take any share in the Cinema business, in my opinion, on these grounds also title will not pass. It further appears that the court below considered that the property was attached in money suit under Order 38 Rule 5 C.P.C. which was released in favour of the defendants alone wherein it was held that it is the property of the defendants. So for this judgment is concerned also, it will not bind



the widow Rampyari Devi as she was not party. It further appears that there is no pleading in the written statement that the four brothers partitioned in the year 1941 but evidences have been adduced to that effect by them.

38. The court below dismissed the suit on the ground that the plaintiffs nowhere pleaded that Rampyari Devi had contributed for construction of the building and machinery. Ordinarily, co-sharer who has got a share in the building and the machinery will have a share in the business also. In my opinion, the approach of the learned trial court on this question of devolution is wrong. The simple case of the plaintiff that on the death of Rampyari Devi, 1/5th share went to Raghunath Prasad Sah as the only reversener alive on the death of Rampyari Devi. The subsequent act of the parties will not either pass title on a person who has no title or divest the title from the persons who has acquired title. This aspect was not considered by the court below.

39. It appears that the trial court also did not consider the decision of the Division Bench of the High Court in exhibit-10 wherein it is, categorically, held that the share of Rampyari Devi was inherited by Raghunath Prasad Sah. The plaintiffs and the defendants 3rd set i.e. appellants are the heirs of Raghunath Prasad Sah.



40. In view of my above discussion, I find that the defendants have failed to prove that the share of Rampyari Devi was partitioned between the parties during the life time of Rampyari Devi. Moreover, Rampyari Devi was the exclusive owner of the property after death of her son. Therefore, there is no question of partition arises. By relinquishing her share or by admission by Rampyari Devi, ownership of the property i.e. title will not pass to any person without a registered document. The plaintiffs have been able to prove that the property contained in Schedule-I and Schedule-I(ka) to the extent of 1/5th share devolved on the reversener of Rampyari Devi namely, Raghunath Prasad Sah. Since there was no partition, it was inherited by the plaintiffs. The court below wrongly held that nothing remained for inheritance by Raghunath Prasad Sah. The defendants on the same set of fact claimed that Rampyari Devi had executed Will in favour of the defendants. However, the High Court has discussed the probate case as they failed to prove the genuineness of the Will. Now same defence has been taken by them in the present suit for partition.

41. Learned counsel for the respondents submitted that the finding of the probate court will not operate as *res-judicata* is concerned, it may be reiterated here that the question is not a finding of fact. The question is the pure question of law.



Admittedly, Raghunath Prasad Sah, was the nearest reversener of Rampyari Devi in the year 1963 when she died. Naturally, therefore, 1/5th share of Rampyari Devi will go to the branch of Raghunath Prasad Sah. The finding of the learned trial court on theses points are therefore, hereby reversed.

42. In the result, this first appeal is allowed with cost of Rs. 25,000/-. The impugned judgment and decree with respect to Schedule-I and Schedule-I (Ka) only is set aside. The plaintiffs’ suit for partition is, thus, decreed and it is held that the plaintiffs and the defendants 3rd set, who are appellants, have got 1/5th share in the Schedule-I and Schedule-I(ka).

43. It is made clear that the cost must be paid by the defendants-respondents to the appellants within two months from today, failing which, the plaintiffs-appellants shall be at liberty to realize the same through the process of the Court.

Brajesh/-

N.A.F.R./A.F.R.	
Uploading Date	
Transmission Date	

(Mungeshwar Sahoo, J.)

