IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.626 of 1984

Against the judgment and decree dated 21.07.1984 passed by Subordinate Judge, Gopalganj in Title Suit No. 39 of 1979.

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Dharamath Upadhyaya & Ors

.... Defendants-Appellants

Versus

Bhoglata Devi & Ors

....Plaintiffs-Respondents

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Appearance :

For the Appellants : Mr. Shashi Shekhar Dwivedi, Senior Advocate.
Mr. Ranjan Kumar Dubey, Advocate.
Mr. Parth Gourav, Advocate.

For the Respondents : Mr. Binod Kumar Singh, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 05-01-2016

The defendants have filed this First Appeal against the judgment and decree dated 21.07.1984, passed by the learned Sub-ordinate Judge, Gopalganj in Title Suit No. 39 of 1979, whereby the court below decreed the plaintiff's suit for partition.

2. The plaintiffs-respondents filed the aforesaid suit claiming 1/3rd share in the suit property alleging that one Ram Baran Upadhyay had four sons, namely, Raghunath @ Raghunandan Upadhyay, Dewan Upadhyay, Shital Upadhyay and Chandrika Upadhyay. Raghunandan Upadhyay died issueless in the year 1954. His wife also died thirty years ago. Ram Baran Upadhyay died in the

year 1939. The plaintiff No.1 is the grand son of Dewan Upadhyay. The mother of plaintiff No.1 is plaintiff No.4 and his two sons are plaintiff Nos.2 and 3. The two sisters of plaintiff No.1 are defendant Nos.10 and 11.

3. The further case is that Dewan Upadhyay died in the year 1965. Shital Upadhyay died in the year 1960 and the contesting defendants Nos.1 to 6 are the descendants of Shital Upadhyay. Defendants Nos.7 to 9 are descendants of Chandrika Upadhyay. According to the plaintiffs, there was separation between three brothers, namely, Dewan Upadhyay, Shital Upadhyay and Chandrika Upadhyay in the year 1947 in business and mess, but the ancestral property remained joint. Some plots were cultivated jointly and some plots were in separate possession, but there was no partition by metes and bounds. There was seven bighas of ancestral land, which were fertile. There was money lending business of the joint family in Gajipur District, wherefrom joint family had substantial income. After the death of Raghunandan and Rambaran, Shital Upadhyay became the Karta, as he was clever man. Dewan was a simple man, who was looking after the cattle of the joint family, whereas Chandrika Upadhyay was living at Gajipur in connection with money lending business. He was sending money to Shital Upadhyay. In the village Shital Upadhyay was also doing money lending business. All the

earnings used to come to Shital Upadhyay, who was Karta of the family. Panditai business was also done by Shital Upadhyay and as Karta, he acquired several properties, either in his own name or in the name of his brothers and also in the name of his sons. He also acquired a double story house at Mirganj by joint family fund in his own name. He also acquired land at Gopalganj out of joint family fund, whereon he constructed a house and let out to tenants. The ancestral property has been described in schedule-I and Dih Basgit land in schedule-II, whereas the acquired land has been described in schedule-III. On these grounds, the plaintiffs claimed 1/3rd share and stated that the defendant Ist set have got 1/3rd share and defendant 2nd set have got 1/3rd share and accordingly, they have been coming in possession.

4. The defendant Nos. 1 to 4 contested the suit by filing contesting written statement. Besides taking various legal plea, the main defence is that in fact, there was complete partition between Dewan Upadhyay, Shital Upadhyay and Chandrika Upadhyay on 10.05.1930 and all the properties were partitioned and they are coming separately in possession of their respective shares. The properties allotted to Dewan Upadhyay are described in schedule-Ka of W.S. and Shital Upadhyay in schedule-Kha and property of Chandrika Upadhyay has been described in schedule-Ga of the

written statement. Ram Baran Upadhyay in fact, died in the year 1929 and after his death, Dewan Upadhyay being the eldest brother became the Karta of the family. There was neither money lending joint family business nor any joint family fund. Shital Upadhyay never purchased any property by joint family fund.

5. The further case of the defendants is that, the house at Mirganj was mortgaged and was taken by Shital Upadhyay in mortgage, out of his own money. After partition, Shital Upadhyay also purchased one katha and ten dhurs land in the year 1942 at Gopalganj, whereon he had constructed a house. All these lands are his self acquired property. The father of one Radha Kant Jha mortgaged 5 bighas, 19 kathas and 15 dhurs land in favour of Jagdish Mishra. Subsequently, in the year 1934, Jagdish Mishra assigned half of jarpeshgi interest to Chandrika Upadhyay and put in possession. Thereafter, in the year 1939, Radhakant Jha wanted to sell the land to Chandrika Upadhyay, but he had no money, so he requested his brothers and all the three brothers jointly purchased the land to the extent of $1/3^{rd}$ each. The three brothers also purchased 5 bighas, 19 kathas and 19 dhurs land from Sheonandan Upadhyay by registered sale deed dated 27.07.1943 for Rs. 4395/-. In this sale deed, share of Dewan Upadhyay was $1/4^{th}$, share of Shital Upadhyay was ½ whereas Chandrika Upadhyay had $1/4^{th}$ share. Accordingly, the share has been

defined in the sale deed itself. The house at Mirganj is not the joint family property which is in the name of third persons.

6. On the basis of the aforesaid pleadings of the parties, the learned court below framed the following issues:

(i) Whether the plaintiffs have got valid cause or action for the suit?
(ii) Whether the suit, as framed, is maintainable?
(iii) Whether the plaintiffs are entitled to get the disputed land partitioned, if so, what is their share?
(iv) Whether there was any partition took place in the year 1930 alleged by the defendant or in the year 1947 as alleged by the plaintiff?
(v) To what relief or reliefs, if any, are the plaintiffs entitled to?

7. On the basis of evidences and materials available on record, the learned Court below recorded finding that there has been no partition between the parties as alleged by the defendants. The plaintiffs have been able to prove that there was separation only in the year 1947 and the properties acquired are the joint family property, acquired by Shital Upadhyay as Karta, out of joint family fund. So far Mirganj house is concerned, Surajdeo Upadhyay is benamidar of Shital Upadhyay and accordingly, decreed the plaintiff's suit.

8. The learned senior Counsel, Mr. S.S. Dwivedi, for the appellants submitted that, for the purpose of this suit, the plaintiffs alleged that Shital Upadhyay was Karta of the family, whereas the defendants have specifically denied that in fact, Dewan Upadhyay

was the Karta as he was eldest brother, after death to Raghunandan Upadhyay. Except the statement and pleading that Shital Upadhyay was Karta, nothing is there on record to show that in fact, he was Karta of the family. Likewise, there was no joint family money lending business. The plaintiffs in the plaint, itself admitted the fact that Shital Upadhyay was also doing Panditai business and money lending business. Therefore, the earning from Panditai business and money lending business of Shital Upadhyay is admitted. But the Court below wrongly held that the money lending business, which was being done by Chandrika Upadhyay at Gajipur, is the joint family money lending business without their being any reliable evidence.

9. The learned Counsel further submitted that admittedly the Mirganj property stands in the name of Surajdeo Upadhyay. But the Court below hold that Surajdeo Upadhyay is benamindar of Shital Upadhyay without considering the fact that Surajdeo Upadhyay is not a party to the suit and that there was neither any pleading nor any evidence adduced by the plaintiffs. It is not the case of the plaintiffs that Surajdeo Upadhyay was benamidar of Shital Upadhyay, nor it is the case of defendants. Therefore, the learned Court below made a third case and recorded wrong finding and on this score alone, the impugned judgment and decree are liable to be set aside.

10. The learned Counsel further submitted that the learned

Court below has misinterpreted the recital of the sale deed dated 27.07.1943 (Ext.L-1/4), wherein the shares of the three brothers has specifically been defined and wrongly come to the conclusion that this exhibit shows jointness between the three brothers. The learned Counsel further submitted that many sale deeds and mortgage deeds have been produced by the plaintiffs as well as by the defendants to show that the parties were transacting independently since long. They were acquiring lands by mortgage and also by sale deed and in fact, there was inter se transaction between the two brothers, but the Court below wrongly came to the conclusion that since after 1930, three brothers have purchased some properties jointly and no reason has been assigned as to why they purchased jointly. It indicates that there was no partition between three brothers. According to the learned Counsel, the approach of the Court below is wrong. The learned Counsel further submitted that the Court below misinterpreted Ext.3 and 4, which are Mahajani Bahi and Post Card. The Exhibit-6 is the sale deed, which is in the name of Shital Upadhyay, but it has been produced by the plaintiff in the Court. The Court below considered that since the sale deed is in custody of the plaintiffs, it indicates that there was no partition between the parties and likewise the Mahajani Bahi (Exhibit-3) is of Shital Upadhyay of the year 1934, which was produced by the plaintiffs and Court below presumed that the business was joint family business, otherwise how the plaintiffs produced the Mahajani Bahi. The approach of the Court below is contrary to law. The plaintiffs never explained as to how these documents came in possession of the plaintiffs and merely because the documents have been produced from the custody of the plaintiff, the case of partition alleged by the plaintiff can not be said to have been proved. These documents only show that the Mahajani business was run by Shital Upadhyay and that the sale deed is in the name of Shital Upadhyay. Exhibit-'K' has been filed by the plaintiff to show that in fact, the sale deed of Exhibit-6 has been lost and therefore, anyhow the plaintiffs might have got the sale deed, but merely because it has been produced by him, it can be said that there was no partition or that the properties are joint family property.

11. The learned Counsel further submitted that Exhibit-6/A is sale deed dated 22.05.1920, which is in the name of Shital Upadhyay and at that time Rambaran Upadhyay was alive. According to the plaintiffs' case, during life time of Rambaran Upadhyay, he was the Karta being the father, then how this property was purchased by Exhibit-6/A on 22.05.1920 by Shital Upadhyay. In this sale deed, there is recital that the business of Shital Upadhyay is Mahajani, which is evident and proved by Exhibit-3, the Mahajani Bahi produced by the plaintiffs. In such circumstances, the Court below

wrongly held that there was jointness and out of the joint family income, the properties have been acquired.

12. The learned Counsel further submitted that out of total twenty nine bighas suit lands, acquired lands are in the name of three brothers, there is no dispute regarding these properties. So far five bighas land purchased through Exhibit-6/C equal to exhibit-L-1/4 is concerned; there is specific share of Shital Upadhyay half share and the other two brothers 1/4th each. Exhibit-A-1/8 is Jarpeshgi deed dated 02.06.1941 and Exhibit- L-1/1 is sale deed dated 17.08.1942, with regard to one bigha, two kathas and eight dhurs and one bigha, fourteen kathas and ten dhurs respectively in the name of Swaminath S/o Shital Upadhyay, but the Court below has held that these lands are also joint properties. The plaintiff has also sold 9 kathas and 17½ dhurs of plot No. 1724, which is 1/3rd by registered sale deed (Exhibit-A-1/3) and according to the defendant-appellants, there had been partition between the three brothers and in the schedule of the written statement, which property was allotted in whose share has been mentioned and by this sale deed (Exhibit-A-1/3), the plaintiff himself had sold his 1/3rd share mentioning in the boundary of the sale deed the name of son of Shital Upadhyay, which clearly indicates that there was complete severance and separation between the parties. The plaintiff in his cross-examination has clearly admitted that he had sold

and mortgaged other properties also. The Court below, therefore, misinterpreted the above documents and evidences and wrongly recorded the finding, as such the First Appeal be allowed and the impugned judgment and decree be set aside and the plaintiff's suit for partition be dismissed.

13. On the other hand, learned Counsel Mr. Binod Kumar Singh, appearing for the plaintiffs-respondents submitted that the Court below has rightly appreciated the evidences and recorded the finding that there had been no partition between the parties as alleged by the defendants. As they have been partitioned between the three brothers, then why all the three brothers subsequently purchased jointly by registered sale deeds. There is no mention in the registered sale deed by which they purchased the lands jointly, that there was partition between them in the year 1930. This indicates that there was no partition. It is the case of the plaintiffs that there was joint family money lending business and Chandrika Upadhyay was doing money lending business at Gajipur. The Bahikhata has been produced by the plaintiffs. If it was not the joint family business, then how the plaintiffs produced the Bahikhata of Chandrika Upadhyay. From the different mortgage deeds produced by the parties, it is clear that the parties were doing money lending business and that was their profession. Out of the said money lending business, there was

sufficient saving and because Shital Upadhyay was Karta, he was purchasing the lands in the name of different persons including in his name and his sons' name. Because there was no partition, therefore, the documents were also in possession of the plaintiffs, as such the sale deed Exhibit-6/C, which is in the name of Shital Upadhyay, has been produced from the custody of the plaintiffs, which clearly indicates that there was no partition between three brothers.

14. The learned Counsel further submitted that although there was no pleading regarding benamidar, but Surajdeo Upadhyay has been examined as D.W.-9, in whose name the house of Mirganj stands, who has not stood the test of cross-examination made by the plaintiffs. The Court below considered his innocence regarding acquisition of the Mirganj house by him. Therefore, the Court below rightly presumed that Surajdeo Pandey is not the real owner, rather Shital Upadhyay has purchased the property in the name of his relation Surajdeo Pandey. In such circumstances, it can not be said that, in fact, the Court has made a third case. According to the learned Counsel, it is only a technical objection and moreover, there are overwhelming evidence produced by the plaintiff to prove that Surajdeo Pandey is resident of different village and is not in possession of the property and in fact, in the Municipal Corporation, the name of Shital Upadhayay is recorded with respect to Mirganj

house. In such circumstances, the Court below on the basis of evidences has rightly recorded the finding. Secondly, although D.W.9 Surajdeo Pandey was knowing the suit and the contention of the plaintiff that the Mirganj house is the joint family, he never prayed for being added as party in the suit, which clearly indicate that in fact, he is not the owner of the property. Now, therefore, when the Court below has recorded the finding that he is not the owner rather Shital Upadhyay is the real owner, the appellant cannot be allowed to say that third case is being made by the Court. Both the parties entered into trial by setting of their respective case. According to the plaintiff’s case, all the properties are joint property, whereas according to the defendant-appellants, Mirganj house is not the property of family, rather it is the property of Surajdeo Pandey, but the Court below on the basis of evidence found that this is a joint family property. In view of the above facts, this finding can not be interfered with.

15. The learned Counsel further submitted that the grand father of the plaintiff, namely, Dewan Upadhyay was a simple person and was looking after cattle in the village, therefore, Shital Upadhyay became the Karta of the family, after death of elder brother and their father Rambaran Upadhyay. It is admitted fact that the grand father Dewan_Upadhyay was illiterate man. Further it is the case of the

plaintiff that joint money lending business was being run by Chandrika Upadhyay at Gajipur, who was sending money to Shital Upadhyay. This indicates clearly that Shital Upadhyay was doing all the affairs of joint family and on the basis of the income received from the joint family money lending business, the properties have been acquired. Since, there was no partition and that during jointness the properties have been acquired by the Karta and since there was nucleus in the family, the Court below has rightly recorded the finding that the properties are joint family property.

16. The learned Counsel further submitted that in Exhibit-6/c, it has wrongly been stated that Shital Upadhyay has got half share and Chandrika Upadhyay and Dewan Upadhyay, both have got 1/4th share, because from recital of the sale deed, it appears that there was unequal payment of consideration by the three brothers and the Court below considering this unequal payment and considering that Dewan Upadhyay has paid excess consideration, the recital in the sale deed is wrong and in fact, all the three brothers have got equal share. In the registered sale deed dated- 18.03.1939, Exhibit-6/b, 17 bighas of land has been purchased by the three brothers and there is no specific share mentioned, which clearly indicate that in the year 1939 three brothers were joint. In both these sale deeds Ext.6/C and 6/B, there is no recital that there was partition in the year 1930. Still today, no separate

jamabandi has been opened. By Exhibit-6/F registered sale deed dated-16.02.1953 and Exhibit-6/D the sale deed of the same date, the heirs of three brothers sold the lands to third persons, which also indicate that they were joint, otherwise how they executed jointly and sold joint family property. The plaintiff has also produced Exhibit-5 the rent receipts, which shows that the rents were paid through Dewan Upadhyay or Chandrika Upadhyay. Although the property is recorded in the name of Shital Upadhyay.

17. It may be mentioned here that this appeal was heard and hearing was concluded on 09.10.2015 and judgment was reserved. Subsequently, the learned Counsel Mr. Binod Kumar Singh, for the respondents submitted that he is going to file amendment application and an application for additional evidence on that day itself. The learned Senior Counsel Mr. S.S. Dwivedi, for the appellant, submitted that since hearing has been concluded, he will not receive the copy of the applications. Accordingly, order was passed that if application will be filed, the same shall be considered in the judgment. It appears that on the same date subsequent to recording the aforesaid order, the plaintiff-respondent filed three Interlocutory Applications i.e. (i) I.A. No. 8477 of 2015 under Order 41 Rule 27 C.P.C, (ii) I.A. No. 8483 of 2015 under Order 6 Rule 17 C.P.C and (iii) I.A. No. 8476 of 2015 under Order 1 Rule 10 (2) C.P.C.

18. In view of the above contentions of the parties, the following points arise for consideration in this First Appeal:

(i) Whether the defendants have been able to prove that there was previous partition, as such there is no unity of title and possession between the parties or whether the plaintiffs have been able to prove that all the suit properties are joint family property as such they are entitle to $1/3^{rd}$ share?

(ii) Whether the Interlocutory Applications filed by the plaintiff-respondent after conclusion of hearing suit be allowed or not?

19. **Point No.(i)**- It is the specific case of the plaintiff that there was separation between the three brothers in the year 1947 and some properties were cultivated jointly and some were cultivated separately according to their convenience. On the contrary according to the defendants, there had been complete partition in the year 1930. So far genealogy is concerned, there is no dispute. Rambaran Upadhyay died in the year 1929. There was seven bighas ancestral property. Out of the said land, there was much income. There was also joint family Mahajani business. Chandrika Upadhyay was looking after the Mahajani business at Gajipur and he was giving the income to Shital Upadhyay. In the house, Shital Upadhyay was doing Mahajani business and out of the income, the properties have been purchased by Karta, Shital Upadhyay, either in his name or in the name of his brothers. On the other hand, according to the defendants,

there was no joint family business and the brother Shital Upadhyay was not the Karta. In support of their respective case, the parties have examined witnesses. According to the plaintiff, there was separation in the year 1947, whereas according to the defendant, there was separation in the year 1930. Therefore, the question regarding separation between the parties is admitted. The only dispute is the period of separation. The defendants claimed complete partition in the year 1930, whereas according to the plaintiff, there was separation in mess, residence and business in the year 1947, but there was no partition with regard to the joint family property.

20. So far oral evidences are concerned, P.W.1 who claimed to be the Pattidar of the parties, stated partition between three brothers in the year 1947. Likewise P.W.2, P.W.3, P.W.5 the co-villagers have stated that there was partition between the three brothers in the year 1947. Likewise P.W.6 and P.W.7 also stated about partition in the year 1947. On the contrary D.W.3, D.W.5 and D.W.7 have stated that there was partition in the year 1930. Admittedly there is no documentary evidence in support of the partition of the year 1930 nor there is any documentary evidence of separation in the year 1947. On the basis of this statement of the witnesses, no categorical finding can be given particularly when in this present case many documentary evidences have been produced by

the parties in support of their respective cases. Now, therefore, in support of the oral evidences, let us examine the documentary evidences.

21. The plaintiff has produced Exhibit-3 Mahajani Bahi, which is of the year 1934. From perusal of this Mahajani Bahi, which has been marked Exhibit-3 it appears that it was maintained by Shital Upadhyay only. There is no mention that it is the Bahi of the joint family. By no stretch of imagination on the basis of this Exhibit-3, it can be said that the money lending business, which was being run by Shital Upadhyay belonged to the joint family business. Here it may be mentioned that only pleading has been made in the plaint that Shital Upadhyay was Karta.

22. According to Hindu Law, the property belonging to a joint family is ordinarily managed by father or other senior member and the manager is called the Karta. In the present case, admittedly the elder brother was Dewan Upadhyay, who was alive. According to Hindu Law, as enumerated in Article-236 of Hindu Law by Mullah, so long as the members of a family, remain undivided the senior member of the family is entitled to manage the family property. However, it is settled principles of law that right is on the senior member, who may give up his right of management and in that case a junior member may be appointed as Manager. Unless the right is

given up by the senior member, the junior member has no right to manage the joint family property. This post of Karta is neither selective nor elective. In the present case, except the mere statement in the pleading, there is nothing to show that, in fact the elder brother Dewan Upadhyay expressed his inability to manage the property or he ever given up his right to manage the joint family property, as a result of which, Shital Upadhyay became the Karta of the family. Now, therefore, only because, it is pleaded in the plaint that Shital Upadhyay was the Karta, it can not be relied upon without any rhyme or reason.

23. We have seen above that this Exhibit-3 is managed by Shital Upadhyay only. The court below held that, if the brothers were not joint, how this Mahajani Bahi of Shital Upadhyay was produced from the custody of plaintiff. I failed to understand as to how, if a document is produced from custody, the disputed question regarding partition or jointness will be presumed. Here only the fact is that the Mahajani Bahi has been produced by the plaintiff. Except this, it has got no relevancy with regard to either the jointness or separation. However, these documents prove the fact that in the year 1934, Shital Upadhyay was doing Mahajani business separately, which is being admitted by the plaintiff in the plaint.

24. Exhibit-4 has been produced, which is postcard.

This postcard has got no relevancy regarding the question for decision as to whether there was partition or no partition. This has been produced to show that Chandrika Upadhyay was doing mahajani business. This letter was written to Chandrika Upadhyay to come to Gajipur for giving evidence; therefore, this postcard has got no relevancy.

25. Exhibit-5 has been produced by the plaintiff, which is rent receipt in respect to Gopalganj land, which was paid by Dewan Upadhyay. Likewise Exhibit-5/A is also rent receipts of the year 1937. These are the rent receipts. Therefore, on the basis of these rent receipts, which shows that Dewan Upadhyay has paid rent, no finding regarding either jointness or partition can be recorded.

26. Exhibit-6 is the registered sale deed, which stands in the name of Shital Upadhyay relating to Gopalganj property. It appears that although this sale deed is in the name of Shital Upadhyay, it has been produced from the custody of plaintiffs. Much emphasis has been given on this document by saying that if, there was partition in 1930, how this sale deed dated 08.03.1932, came in possession of the plaintiff. Again I may reiterate here that the genuineness or otherwise of this sale deed is never challenged. It further appears that Exhibit-'K' has been produced by the defendant, which is informatory petition to the police regarding lost of this sale

deed (Exhibit-6). Now, therefore, information was lodged regarding the lost of sale deed and the sale deed has been produced from the custody of the plaintiffs. The question is, can it be said that even if the sale deed is in the name of Shital Upadhyay, because it is produced by the plaintiff, the property covered by this sale deed is the joint family property. The answer will be no. The only fact is that this sale deed has been produced from the custody but thereby the title of the real owner Shital Upadhyay will not be divested.

27. Further, from perusal of evidence of P.W.3, who is plaintiff himself at paragraph-42 clearly stated that, how it came in his possession, he cannot say and he does not know. Therefore, the plaintiff himself is unable to show, how this sale deed came in his possession.

28. The plaintiff has also produced the sale deed Exhibit-6/A dated 22.05.1920. The learned counsel Mr. Binod Kumar Singh, on the basis of this sale deed submitted that there is recital in the sale deed that there was Mahajani business, which clearly indicates that the Mahajani business was joint family business and according to the plaintiff, out of the income from mahajani business, the properties have been purchased by the Karta. So far this submission is concerned; I find that this sale deed is of the year 1920. Admittedly, according to the plaintiffs themselves, Rambaran Upadhyay died in

the year 1929, therefore, on the day of acquisition of landed property by Exhibit-6/A, which admittedly stands in the name of Shital Upadhyay, Rambaran Upadhyay was alive. At that time Shital Upadhyay was not Karta. It is not the case of the plaintiff that Rambran Upadhyay being the Karta purchased the property in the name of Shital Upadhyay. Now, if Shital Upadhyay was not Karta during life time of Rambaran, how this property was acquired by Shital Upadhyay. In the recital, it is mentioned that the profession of Shital Upadhyay is mahajani. In view of this recital, in this registered sale deed, it becomes clear that Shital's profession was Mahajani. By no stretch of imagination, it can be said that it was the joint family mahajani business. If Rambaran Upadhyay was alive, why the property was not purchased by Rambaran Upadhyay, there is no explanation. From this document, it becomes clear that the profession of Shital Upadhyay was Mahajani, which was being done by him since 1920.

29. The learned Counsel Mr. Binod Kumar Singh, submitted that the profession of the family was Mahajani, which is evident from this Exhibit-6/A, therefore, there was sufficient income, otherwise no advances could have been paid by the members of the family. This indicates that there was sufficient nucleus in the joint family, out of the Mahajani business, because repeatedly since prior to

1920, properties were being acquired in mortgage and out of the mortgage property also, there was sufficient income. So far this submission is concerned, no doubt it is admitted that the profession was mahajani, but there is no evidence of the fact that this business was the joint family mahajani business. These documents show that Shital Upadhyay was doing Mahajani business and the property has been acquired by him in the year 1920, during life time of karta, Rambaran Upadhyay and elder brother of Shital Upadhyay, namely, Dewan Upadhyay. So far custody is concerned, it is not required to reiterate the same principle stated above.

30. The plaintiffs have produced Exhibit-6/F and Exhibit-6/D, the registered sale deeds of the year 1953, executed by three brothers. The learned Counsel for the respondent submitted that, if three brothers were not joint, how they executed these sale deeds jointly. So far this submission is concerned, it may be mentioned here that according to the plaintiff's case also, there was separation between the three brothers in the year 1947. Further the properties, which have been sold by the three brothers were acquired jointly by them in the year 1939, therefore, they sold the property. Now on the basis of these sale deeds, there cannot be any presumption that the three brothers were joint. At best it can be said that the property had not been partitioned, but by no stretch of imagination, it can be said

that all other properties are joint family properties.

31. The defendant-appellants' case is that there can be no partition of the self acquired property of Shital Upadhyay. The property sold by these two sale deeds Exhibit-6/F and 6/D were acquired by three brothers in the year 1939, by Exhibit-6/B.

32. The most important document is Exhibit-6/C, which is dated 27.07.1943, which is registered sale deed. The defendants have also filed the sale deed, which has been marked as Exhibit-L-1/4. According to the plaintiff, the three brothers were joint till 1947. In this sale deed, there is clear recital that Shital Upadhyay has half share, Chandrika Upadhyay has $1/4^{th}$ share and Dewan Upadhyay has $1/4^{th}$ share. If three brothers were joint in mess, business, property and residence, how the share has become different. It is not the case of the plaintiff that the three brothers contributed separately according to their capacity and purchased the property, therefore, their share has been defined. There is no explanation at all regarding the defined share of three brothers. The only submission made by the plaintiff-respondents is that, it is wrongly mention in the sale deed. As I have stated above, it is not the case pleaded by the plaintiff and this sale deed is of the year 1943, when there was no dispute between the three brothers. Merely, because it is submitted that there is mistake or that the payment of consideration has been wrongly mentioned in the sale

deed, it can not be said that three brothers were joint. Moreover, according to the plaintiff, Shital Upadhyay was the Karta and he acquired property in his name and in the name of other brothers. Why this property was acquired in the name of three brothers with specified shares. There is no explanation. Therefore, this recital defining shares of three brothers clearly indicate that in the year 1943, at least the three brothers were separate and therefore, falsify the case of the plaintiff.

33. Exhibit-A-1/8 is jarpeshgi deed dated-02.06.1941, which is in the name of Swaminath S/o Shital Upadhyay and likewise Exhibit-L-1/1 is the sale deed dated 17.08.1942, in the name of Swaminath S/o Shital Upadhyay. Since both these are registered documents, it is for the plaintiff to prove that these properties are not the self acquired property of the person in whose name the property stands. Here we have seen that Shital Upadhyay was doing mahajani business. Chandrika Upadhyay was doing mahajani business at Gajipur. No evidence has been produced to show that when and by what means, Chandrika Upadhyay ever gave money to purchase these property to Shital Upadhyay. Mere statements have been made. Likewise we have seen above that there is no evidence as to how Shital Upadhyay became the Karta, although Dewan Upadhyay was elder brother than Shital Upadhyay. Even in the year 1920, Shital

Upadhyay has acquired property by Exhibit-6/A during life time of their father Rambaran Upadhyay. It clearly indicates that Shital Upadhyay had mahajani business and he acquired property in the year 1920. The only submission or pleading is that all the properties are joint family property acquired out of joint family mahajani business. There is no evidence to prove that any business was joint family business. Profession has been mentioned as mahajani. The documentary evidences produced by the plaintiff and the statements pleaded in the plaint, itself shows that Shital Upadhyay was also doing mahajani business.

34. From perusal of Exhibit-A-1/2, A-1/3,A-1/4,A-1/5 which are redemption notes made on the mortgage deeds of the year 1935,1931,1933,1941, 1959 etc., which are in the name of Shital Upadhyay or his sons, it appears that Shital Upadhyay was acquiring property since 1920 continuously, either in his name or in his sons name. The only explanation given by the plaintiff is that all these redemption notes are forged, which can not be relied upon. As endorsements have been made, when there was no dispute between the parties.

35. It is admitted by the plaintiff in the plaint itself that Chandrika Upadhyay was doing money lending business at Gajipur and he was also doing Panditai business. How it can be said that it

was joint family business. Moreover because the plaintiff is saying, it can not be accepted as it is admitted by plaintiff that Chandrika Upadhyay was doing money lending business in the village. From perusal of sale deed dated 27.07.1943 Exhibit-6/C, it appears that there were jarpeshgi of the year 1921 in the name of Dewan Upadhyay and in the name of Shital Upadhyay. The jarpeshgi in the name of Dewan Upadhyay is dated 13th May, 1921 and the jarpeshgi dated 11.07.1930 was in the name of Shital Upadhyay. This is clear recital in this sale deed which clearly indicates that Shital Upadhyay was acquiring land by mortgage and likewise Dewan Upadhyay was also acquiring land by mortgage. Can it be said now that Dewan Upadhyay was only looking after cattle and he was not Karta and Shital Upadhyay was a clever man?

36. Exhibit-A/1 is redemption note made by Dular Sah, which shows that Chandrika Upadhyay made a note of redemption in favour of Shital Upadhyay in respect of Mirganj land. So far this redemption is concerned, as stated above, it is only alleged that it is forged and fabricated. Except this, nothing has been brought on record. Admittedly neither Shital Upadhyay nor Chandrika Upadhyay disputed this endorsement. Therefore, the plaintiff, who is not party to this deed gave only explanation that it is forged. Can this explanation be relied upon? The answer will no.

37. The learned Counsel for the plaintiff- respondent submitted that Shital Upadhyay had taken the jarpeshgi as karta in the name of his brother Chandrika Upadhyay in the year 1935 and subsequently Shital Upadhyay become dishonest and again he took Jarpeshgi in his own name, which is evident from Exhibit-A-1/2. Chandrika Upadhyay kept the amount of Rs. 400/- in Amant. So far this submission is concerned, it goes against the plaintiff. Exhibit A/1 is the jarpeshgi in the name of Chandrika Upadhyay in the year 1935. Subsequently Shital Upadhyay took the jarpeshgi in his own name, which is evident from Exhibit-A-1/2. Therefore, as far back as in the year 1935, the property was taken in mortgage by one brother Chandrika Upadhyay and subsequently the same was again taken by Shital Upadhyay from Chandrika Upadhyay. If the submission of the plaintiff is accepted that Shital Upadhyay in fact, had taken the jarpeshgi in the name of Chandrika Upadhyay, then in such case question will be why again he will take jarpeshgi in his own name. The explanation given by the plaintiff can not be accepted. From these two documents now it becomes clear that there was even inter se transaction between the two brothers i.e., Chandrika Upadhyay and Shital Upadhyay.

38. A division bench of this Court in A.I.R 1977 Patna 59 has held that independent transfer may not show previous partition but

inter se transaction is strong evidence of previous partition. As stated above, here admittedly the mortgage of the year 1935 was in the name of Chandrika Upadhyay, which was subsequently again taken by Shital Upadhyay, which clearly indicate that both the brothers were separate otherwise, there was no question of taking mortgage by one brother and subsequently the said property was again taken in mortgage by another brothers. If both the brothers were joint and in fact Shital Upadhyay being the Karta had taken the property in mortgage, then why again he adjusted the amount and took the mortgage in his own name. The explanation given by the plaintiff cannot be accepted.

39. From the discussion made above, it appears that the properties were acquired separately by the three brothers since prior to 1920 i.e. during the life time of Rambaran Upadhyay. Admittedly Chandrika Upadhyay was residing at Gajipur. It is admitted by the plaintiff that they separated in mess, residence and business since 1947. It is also clear that the brothers were selling the property separately and also selling the properties acquired by them jointly.

40. A division bench of this Court in A.I.R. 1971 Patna 215 (Arjun Mahto Vs. Monda Mahtain) has held that if the parties for a long time have independent management of properties, which by themselves no doubt, not conclusive but the cumulative effect of such

fact may show that there has been a partition between the brothers during their life time.

41. In view of the above discussed facts, I find that the plaintiffs failed to prove that the properties, which are standing in the name of Shital Upadhyay or his sons are the joint family property. I also find that the plaintiffs failed to prove that the family had joint money lending family business and out of the income of the joint family business, the properties were purchased by Shital Upadhyay in his own name or in the name of his sons. The plaintiffs also failed to prove that Shital Upadhyay was Karta. I further find that the defendants have been able to prove that there had already been partition between the brothers and to the contrary the plaintiffs failed to prove that in fact there was only separation in the year 1947.

42. The learned Senior Counsel Mr. Dwivedi, for the appellant submitted that the plaintiffs are entitled to partition only the properties which were acquired by the three brothers jointly, as the properties have been acquired after partition. We have seen above that the property measuring 17 bighas of land has been acquired by the three brothers by the registered sale deed dated 18.03.1939 and 5 bighas land has been acquired by Exhibit-6/C, equal to Exhibit-L-1/4 i.e. the registered sale deeds dated 27.07.1943 wherein shares have been defined. It is not the case of the defendant that on particular year

or date, there had been partition between the three brothers with respect to these lands. In view of the above admitted position that there is neither pleading nor any evidence regarding the partition of these properties adduced by the defendant, I find that the plaintiffs are entitled to 1/3rd share in the property covered under Exhibit-6/B, whereas they are entitled to 1/4th share in the property covered under Exhibit 6/C, if the properties are available and not sold by the parties. So far the other properties are concerned, which are standing in the name of Shital Upadhyay or in the name of his sons are not available for partition.

43. Thus this point No.(i) is answered in favour of the appellant and against the respondent.

44. **Point No. (ii)**- Now let us consider the interlocutory applications filed by the plaintiff-respondent. One interlocutory application is Interlocutory Application No. 8483 of 2015, wherein the plaintiff prayed for amendment in the plaint. At the time of hearing of the appeal, the learned counsel for the plaintiff-respondent submitted that in fact, there was joint family mahajni business from the life time of their father Rambaran Upadhyay and there was sufficient nucleus. Chandrika Upadhyay was looking after mahajni business on the direction of Shital Upadhyay, who was Karta and the income from that mahajni business was thrown to common

hotchpotch. The second fact, which is sought to be introduced by amendment, is that Shital Upadhyay during his kartaship purchased Mirganj Bazar property in the name of Surajdeo Pandey, out of the joint family income, therefore, the said property is the joint family property. There was good relation between Shital Upadhyay and Surajdeo Pandey and Shital Upadhyay concealing the fact he had purchased the property in the name of Surajdeo Pandey. The third fact, which is tried to be introduced is for declaration that the registered sale deed dated 10.08.1942, executed by Guljari Ram in the name of Surajdeo Pandey was purchased by out of the joint family income. So far this amendment application filed by the plaintiff is concerned, it may be mentioned here that the suit was filed for partition only. No case was made in the pleading that Surajdeo Pandey is benamidar of Shital Upadhyay. But the court below found that Surajdeo Pandey was benamidar of Shital Upadhyay. It will not be out of place to mention here that Surajdeo Pandey was not a party to the suit. In such circumstances, this finding recorded by the trial Court is not binding on Surajdeo Pandey. Since he was not party, he had no opportunity to rebut the case and contest the case of the plaintiff and moreover the sale deed is of the year 1942 and now the relief is claimed with regard to the said sale deed which Surajdeo Pandey himself produced before the Court, who was examined as

D.W.9. It is not the case of the plaintiff that he had no knowledge about this deed. D.W.9 Surajdeo Pandey clearly stated before the court that he is the owner of the property at Mirganj. Now whether the finding of the Court below, which is illegal can be legalized by amending the pleading. The answer will be no. The relief claimed with regard to sale deed is barred by law of limitation and now if this relief regarding the declaration with respect to the sale deed in the name of Surajdeo Pandey is allowed, the plaintiff will not get any relief because of limitation as provided under Article 59 of the Limitation Act.

45. The Supreme Court in **(2014) 4 SCC 516 (Voltas Limited Vs. Rolta India Limited)** at paragraph- 28 to 30 has held that **"if the relief which is claimed by the plaintiff by amendment is barred by law of limitation, the same should not be allowed by way of amendment."**

46. So far the other two amendments mentioned in the amendment application are concerned, we have discussed the evidences above and recorded the finding that there was no joint family mahajni business. Even if the amendment application is allowed, then also it will not effect the evidences, which are available on record. These facts, which are sought to be introduced by amendment are nothing but only mere statement of fact without there

being any evidence on record. Therefore, merely on the basis of pleading, no finding can be recorded as it is settled law that pleading is not the proof of the fact.

47. The other interlocutory application is Interlocutory Application No. 8476 of 2015. This application has been filed under Order 1 Rule 10 (2) C.P.C. praying for adding Harihar Pandey and Rajkishore Pandey sons of Surajdeo Pandey as defendants in the suit. So far this application is concerned, no doubt the discretion is of the Court and if the Court finding that the presence of persons is necessary for just decision of the controversy between the parties, the Court may add the person. Here the controversy between the parties i.e. the plaintiff and defendant is regarding partition as to whether there was partition alleged by the defendant or there was only separation alleged by the plaintiff. Since there was no relief claimed against Surajdeo Pandey, now by adding sons of Surajdeo Pandey, can it be said that the finding recorded by the Court below with regard to benamidarship of Surajdeo Pandey will be binding on the sons. The answer will be no. Here the Court has made a third case. The plaintiff is now seeking the relief of declaration after more than half century with respect to the sale deed. It is settled principles of law that the Court is required to decide the controversy between the parties i.e. one set of by the plaintiff and the other set of by the defendant and not

the question which is related to third party, who is not a party. The Court cannot make third case. But here the Court has made out a third case, although there was no pleading or evidence. The question is now that third case made by the Court can be legalized by adding the sons of Surajdeo Pandey. The answer will be no. The illegal order or the judgment can not be legalized subsequently, particularly when in this present case neither Surajdeo Pandey was party nor he filed written statement. Now, if sons are added then naturally for that purpose, there will be a denovo trial regarding as to whether the sale deed in the name of Surajdeo Pandey is the sale deed, which was got executed by Shital Upadhyay out of the joint family property or not. In view of the above facts, in my opinion, at this stage this foreign allegation to this partition suit can not be allowed to be agitated as I have stated that any declaration with respect to 1942 sale deed will be barred, if separate suit is filed.

48. The third interlocutory application is Interlocutory Application No. 8477 of 2015. This interlocutory application has been filed under Order 41 Rule 27 C.P.C by the appellant seeking permission to adduce additional evidence in support of the fact that the daughter of defendant No.1 is married with son of Surajdeo Pandey and therefore, property was purchased by Shital Upadhyay in the name of Surajdeo Pandey. Again this application relates to the

declaration of the nature of sale deed or that for declaration that Surajdeo Pandey was benamidar of Shital Upadhyay. As stated and discussed above, this question regarding benamidar or regarding nature of the sale deed can not be decided here in this appeal. Admittedly, neither Surajdeo Pandey nor his sons are party to the suit. There is no pleading on their behalf. At this stage, if they are added as party then they have to be given opportunity for filing written statement and also for adducing evidence and for that purpose there will be a *de-novo* trial. As I have stated above, now after such a long period the claim made by the plaintiff is time barred. Therefore, the same cannot be allowed to be agitated here in this first appeal.

49. The other aspect of the matter is that Shital Upadhyay/his descendants are saying that the property belonged to Surajdeo Pandey. Surajdeo Pandey is saying as D.W.9 that he is the owner of the property. Now, therefore, the plaintiff is third person with regard to the sale deed, which admittedly stands in the name of Surajdeo Pandey. The question will be whether Surajdeo Pandey is benamidar of Shital Upadhyay or Surajdeo Pandey is the owner, is a question between Shital Upadhyay and Surajdeo Pandey and the plaintiff has got no role to play particularly when I have already recorded the finding that the defendants have been able to prove that there had already been partition between the three brothers as alleged

by them.

50. In view of my above discussion, I find no merit in all three interlocutory applications, therefore, these three interlocutory applications are hereby rejected. The point no.(ii) is answered against the respondent and it is held that the finding recorded by the Court below contrary to pleading and evidence can not be legalized by subsequent amendment or addition of the party. Further this Court has also after appreciation of the evidences recorded clear finding in point no.(i).

51. In the result, this First Appeal is allowed. The impugned judgment and decree are modified and it is held that the properties, which are in the name of three brothers, are available for partition according to their share as stated above while deciding point No.(i). The other properties which are standing in the name of Shital Upadhyay and or his sons or in the name of Surajdeo Pandey are not available for partition. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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