

**NAFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**SA No. 499 of 2004**

Chandrika Prasad Tiwari (Died) Through LRS Smt. Raj Kumari And  
Others

**---- Appellants/Plaintiffs**

**Versus**

Bharat Prasad Sharma And Others

**---- Respondents/Defendants**

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|---------------------------------|---|------------------------------|
| For Appellants/Plaintiffs       | : | Ms. Deepali Pandey, Advocate |
| For Respondents No.5,7,8,9 & 12 | : | Mr. Ajit Singh, Advocate     |
| For other respondents           | : | None appears                 |

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**S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava**

**Order On Board**

**28/11/2016**

Heard.

1. This appeal is admitted on the following substantial question of law :

“Whether both the Courts below are justified in dismissing the suit of the plaintiffs holding partition to be taken place on 23.04.1953 vide Ex.D-2 which is an unregistered document holding the same to be memorandum of the partition ?”

2. The facts giving rise to instant appeal are that the appellant filed a suit seeking a declaration that the land in dispute are the joint family property and that the appellant/plaintiff is entitled to half of share. Further declaration was sought that the entries made in the revenue record, recording the name of defendant, is not binding and that the sale deeds executed by late Laxmidutt defendant No.1 in favour of defendants No.2 & 3 on 20.04.1973 and 30.05.1983 as also sale deed dated 19.06.1979 executed in favour of defendant No.4 to defendant No.6 is not binding on the plaintiff. The appellant/plaintiff further prayed that after dispossession of defendant No.2 to 8 from the property in dispute, it be partitioned and half of the share of the

appellant be delivered.

3. The appellant/plaintiff pleaded that the land in dispute were the ancestral property of the plaintiff Chandrika and his brother Laxmidutta. According to the plaintiff, the land were originally recorded in the name of Plaintiff's father Keshav Prasad and the plaintiff and defendant jointly. In course of time, after Keshav Prasad died, the plaintiff's name was wrongly and without notice deleted from the revenue records, which he did not know because he was doing job in other station and his brother Laxmidutt, taking undue advantage that he was engaged in agriculture activity, got his name recorded in the revenue records and when his claim was denied, suit was filed.

4. The defendants filed written statement. The stand taken in the written statement by Laxmidutta was that the joint family property was already partitioned in the past. A dwelling house which is situated at Raipur was given to the share of the plaintiff whereas the agriculture land situated at Bitkuli was given to the defendant Laxmidutt and a part of it was given to mother also. According to defendant, in this manner, the partition had already taken place, therefore, the plaintiff was not entitled to any further share in the disputed property and the suit was liable to be dismissed.

5. Learned trial Court after framing issues, allowing parties to lead oral and documentary evidence and recording a finding that partition had already taken place between the parties in the past, dismissed the suit. On appeal being filed, appeal was also dismissed by the learned Lower Appellate Court, concurred with the finding of the trial Court on all issues including the issue of partition.

6. Learned counsel for the appellant argues that the Courts below, in order to come to the conclusion that there had been a partition between the parties, have relied upon the "Ikrarnama (agreement)" Ex.D/2 filed by respondent/defendant which has been wrongly construed as a memorandum of partition whereas the said document purports and effects partition and is an instrument by which the respective parties said to have acquired their right over their respective share on the basis of this document. The recital of the document nowhere recorded that oral partition had already taken place amongst the share holder and the document only records the past event of partition, therefore, this document cannot be said to be memorandum of partition but is sought to be used as an instrument or document of partition,

therefore, it was required to be compulsorily registered under the provision of Section 17 (1)(b) of the Registration Act. As the document has not been registered, it is not admissible in evidence.

7. In support of her submission, learned counsel for the appellant relied upon the judgments of the Supreme Court and Madras High Court's judgment in cases of **Shiromani and Others vs. Hem Kumar and Others**<sup>1</sup>, **Roshan Singh and Others vs. Zile Singh and Others**<sup>2</sup>, **A.C. Lakshmipathy and another vs. A.M. Chakrapani Reddiar and Five Others**<sup>3</sup>, **Yellapu Uma Maheswari and others vs. Buddha Jagadheeswararao and others**<sup>4</sup>.

8. On the other hand, learned counsel for the respondents submits that the document Ex.D/2 produced by the defendants is in substance, only a memorandum of partition because it only records a family arrangement having already taken in the past. This family arrangement cannot be said to be an instrument of partition so as to say that by this document, the parties had effected partition of a joint family property. He submits that the contents of the document are required to be read in the context of other oral and documentary evidence led by the parties which shows that the dwelling house at Raipur had already been given by the father Keshav Prasad to plaintiff Chandrika under sale deed without any consideration. The plaintiff never objected to separation of *Khata* and recording of name of defendant Laxmidutt in the revenue records ever since 1953 until the suit was filed in the year 1983. It is submitted that in the meantime, the property which fell to the share of the mother, was also agreed to be divided amongst the brother. This taken together with the Ikrarnama (agreement) Ex.D/2 proves that partition had already taken place and what was recorded in Ex.D/2 was merely an agreement between the parties with regard to family arrangement. Reliance has been placed on the decision of the Supreme Court and Madhya Pradesh High Court in cases of **Tek Bahadur Bhujil vs. Debi Singh Bhujil and Others**<sup>5</sup>, **Roshan Singh and Others Vs. Zile Singh and others**<sup>6</sup>, **Smt. Krishna Bai and Others Vs. Shivnath Singh and Others**<sup>7</sup>.

Ex.D/2 has been produced by the defendant Laxmidutt, the title of

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1 AIR 1968 SC 1299

2 AIR 1988 SC 881

3 AIR 2001 Mad 135

4 2015(13) SCALE 615

5 AIR 1966 SC 292

6 AIR 1988 SC 881

7 AIR 1993 MP 65

which records "Ikrarnana (agreement)". The recital of the document is very important to decide the nature of document. Therefore, the same is required to be examined carefully and closely. In this said document Ex.D/2, the recital records that the plaintiff Chandrika and defendant Laxmidutt are presently resident of Rikhiyapara, Raipur and out of total 9 ½ acres of land situated in Village Chachedi, Tahsil Kavardha, District Durg, 1 acre irrigated land has been left in the name of their mother Umabai and land of Mauja Chachedi is given to Laxmidutt and room of house of Rikhiyapara, Raipur is given to the mother and rest is given to Chandrika who would be under obligation to perform last rituals upon death of the mother.

9. The second paragraph of the aforesaid agreement recites that the agreement has been entered into and written in presence of witnesses and the brothers are agreeable to the terms of the agreement. The agreement has been signed by plaintiff Chandrika and defendant Laxmidutt. It also contains signature of one Premlal Sharma, the Document Writer. The aforesaid contents of the document under the title 'agreement' nowhere recites that any partition had already been effected amongst the share holder in the past and the document is only in the nature of memorandum of any past agreement or settlement of partition amongst the parties. In order that the document partakes the nature of a memorandum, the recital of the document must necessarily indicate any transaction or settlement having taken place between the parties prior to the date of execution of the document. The legal position in this regard is too well settled in cases of *Shiromani and Others (supra)*, *Roshan Singh and Others (supra)*, *A.C. Lakshmipathy and another (supra)*, *Yellapu Uma Maheswari and others (supra)*.

The judgment which have been relied upon by learned counsel for the respondents also laid down the same principal as has been laid down in the decision cited above. In fact both the parties have relied upon the decision of the Supreme Court in the case of **Roshan Singh (supra)**. Therefore, there is no quarrel with the settled legal position as to when is to be considered as a memorandum of partition and when an instrument of partition. The crucial fact would be whether the document by itself effects partition so as to become an instrument partition or whether it merely records any oral partition having taken into place and effected by the parties in the past and the parties having already acted upon it. If this test is applied in the present case, the document cannot be said to be a memorandum of partition but is in the

nature of an instrument of partition. If that is the conclusion, the result is foregone that the document was required to be compulsorily registered as required under Section 17(1)(b) of the Registration Act.

10. Therefore, the substantial question of law is answered in the manner that Ex.D/1 is not a memorandum of settlement but in effect an instrument of partition therefore, it was compulsorily required to be registered and in the absence of such registration, which was not admissible in evidence.

11. The Courts below have heavily relied upon the aforesaid document as the main evidence to support the finding of partition against the parties. Without this document, the case of partition does not stand even though there are some other kind of evidence produced before the Court below. Therefore, in these circumstances, the finding of partition has to go and as the burden was on the defendant to prove that the family property was already partitioned, and if the defendants have failed to discharge, it has to be held that the plaintiffs would be entitled to decree of partition as also decree of declaration that all the sale deeds executed by Laxmidutt in favour of other defendant are not binding on the plaintiff. Let an appropriate decree in favour of the plaintiff and against the defendant in the manner as described above be drawn.

12. The appeal is allowed.

**Sd/-**  
**(Manindra Mohan Shrivastava)**  
Judge