

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.849 of 1999

Order reserved on: 31-1-2019

Order delivered on: 6-2-2019

1. Laxmidevi (died and deleted)
2. Ashok Kumar, S/o Ram Bahorik Jaiswal, aged about 40 years.
3. Vijay Kumar, S/o Ram Bahorik Jaiswal, aged about 36 years.
4. Dhaniram, S/o Ram Bahorik Jaiswal, aged about 30 years.

All cultivators and residents of Village, Post and Tahsil Kota, District Bilaspur (M.P.) (now C.G.)

5. Sahodarabai, D/o Ram Bahorik Jaiswal, aged about 41 years, R/o Sarehapara, Domanpur, Tahsil Lormi, Distt. Bilaspur (M.P.) (now C.G.)

(Defendants)
---- Appellants

Versus

1. Santosh Kumar, S/o Pusau Ram Jaiswal, aged about 37 years.
2. Santlal, S/o Pusau Ram Jaiswal, aged about 55 years.
3. Ram Pratap, S/o Pusau Ram Jaiswal, aged about 31 years.

All residents of Village Sutarra, Tahsil Katghora, Distt. Bilaspur.

4. Smt. Sushilabai, D/o Pusau Ram Jaiswal, W/o of Sukhiram Jaiswal, aged about 42 years, R/o Mungeli, Distt. Bilaspur.
5. Smt. Kaushalyabai, D/o Pusau Ram Jaiswal, W/o Shri Ram Ji Jaiswal, aged about 33 years, R/o Village Pali, Tahsil Katghora, Distt. Bilaspur.

(Plaintiffs)

6. Baisakhu (dead) through his LRs

(Defendant No.2)

(a) Ghanshyam Prasad Jaiswal, aged 36 years.

(b) Jagdish Jaiswal, aged 34 years,

(c) Bithnu Jaiswal, aged 31 years,

(d) Shyamu Jaiswal, aged 29 years,

(e) Ranu Jaiswal, aged 26 years,

(f) Ramnath Jaiswal, aged 24 years,

All are sons of late Baishakhu, S/o Jethu Kalar,

All are residents of Pjirgipara, Main Road, Naka Chowk, Kota, Tehsil and P.S. Kota, Distt. Bilaspur (C.G.)

7. State of M.P. (now State of C.G.), through Collector, Bilaspur (M.P.) (now C.G.)

8. Gurmeet Singh Bhatia, S/o Harwansh Singh Bhatia, aged about 42 years, R/o Near State Bank Agriculture Branch, Dayal Bandh, Bilaspur (C.G.)

---- Respondents

For Appellants: Mr. B.D. Guru, Advocate.

For Respondents No.1 to 5: -

Mr. Prafull N. Bharat & Mr. Waquar Naiyer, Advocates.

For Respondent No.7 / State: -

Mr. Vimlesh Bajpai, Govt. Advocate.

For Respondent No.8: -

Mr. B.P. Sharma and Mr. Hari Agrawal, Advocates.

AND

Second Appeal No.1070 of 1999

(a) Santosh Kumar, aged 25 years;

(b) Santlal, aged 23 years;

(c) Ram Pratap, aged 19 years;

All sons of Pusau Ram Jaiswal, and R/o Village Surtara, Tahsil Katghora, District Bilaspur, M.P. (now C.G.)

(d) Smt. Sushilabai, aged 30 years, D/o Pusau Ram, R/o Mungeli, Distt. Bilaspur, M.P. (now C.G.)

(e) Smt. Kaushilya, aged 21 years, D/o Pusau Ram Jaiwal, W/o Ramji Jaiswal, R/o Village Pali, Tahsil Katghora, Distt. Bilaspur, M.P. ((now C.G.)

(Plaintiffs)
---- Appellants

Versus

1. (a) Laxmi Devi (died and deleted)

(b) Ashok Kumar, aged 32 years;

(c) Vijay Kumar, aged 28 years;

(d) Dhaniram, aged 22 years;

Nos. (b) to (d) all sons of Rambahorik Jaiswal and all residents of Village Kota, Tahsil Kota, District. Bilaspur, M.P. (now C.G.)

(e) Sahodrabai, aged 35 years, D/o Rambahorik Jaiswal, R/o Sarihapara, Domanpur, Tahsil Lormi, District Bilaspur, M.P. (now C.G.)

2. Baisakhu (dead) through his LRs

(a) Ghanshyam Jaiswal

(b) Jagdish Jaiswal

(c) Bithun Jaiswal

(d) Shyamu Jaiswal

(e) Ramu Jaiswal (deleted)

(f) Ramnath Jaiswal (deleted)

All are S/o late Baisakhu

All are residents of Phirgipara, Main Road, Naka Chowk, Kota, Police Station and Tahsil Kota, District Bilaspur (C.G.)

3. State of M.P. (now State of C.G.), through Collector, Bilaspur, M.P. (now C.G.)

(Defendants)
---- Respondents

For Appellants: Mr. Prafull N. Bharat & Mr. Waquar Naiyer, Advocates.

For Respondents No.1(b) to 1(e): -

Mr. B.D. Guru, Advocate.

For Respondent No.3 / State: -

Mr. Vimlesh Bajpai, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. Original plaintiff Pusauram filed a suit for declaration of title and permanent injunction and also for possession and in alternative, partition and possession of the suit land bearing Khasra Nos.406 &

407, area 8.90 acres, situate at Mouza Kota, Tahsil & District Bilaspur and a house situate at Achanakmar Tigadda and 25 decimals of land situate at Canal Road, Kota. That suit was dismissed by the trial Court and in appeal filed by the plaintiffs, the first appellate Court partly decreed the suit with regard to land bearing Khasra Nos.406 & 407, area 8.90 acres, but declined to grant decree for the house situate at Achanakmar Tigadda and for the land of 25 decimals situate at Canal Road, Kota, by the impugned judgment. The defendants have preferred S.A. No.849/1999 questioning the judgment & decree delivered by the first appellate Court granting decree of declaration of title and recovery of possession against them, whereas, the plaintiffs have preferred S.A.No.1070/1999 against the said judgment & decree partly declining the decree for the house situate at Achanakmar Tigadda and for the land situate at Canal Road, Kota. This is how both the appeals have been clubbed and heard together and are being decided analogously by the common judgment.

2. In the second appeal preferred by the defendants, the following substantial questions of law were formulated for determination: -

“(i) Whether Ex.P-7 is required registration or it could be treated as a memorandum of partition?

(ii) Whether looking to the fact that Ex.P-7 is not signed by any of the parties, it could be used by any of the parties for the purpose of proving partition?

(iii) Whether the finding recorded by the lower appellate Court is perverse as it is based on evidence which could not have been foundation for reversing the judgment of the trial Court?”

3. The following substantial question of law was formulated for

determination in the second appeal preferred by the plaintiffs: -

“Whether on the basis of findings arrived at by the learned first appellate Court, the plaintiffs are also entitled to a decree for possession of Tigadda house and land measuring 0.25 acres adjoining canal of Kota, Achanakmar?

(Parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.)

4. Essential facts necessary for adjudication of these appeals are as under: -

4.1) Original plaintiff Pusauram, original defendant No.1 Ram Bahorik and defendant No.2 Baisakhu were brothers being sons of one Jethu. Original plaintiff Pusauram filed suit for declaration of title, possession and injunction in respect of the suit property mentioned in the plaint particularly, Khasra Nos.406 & 407, area 8.90 acres, as well as the house situate at Achanakmar Tigadda and 25 decimals of land situate at Canal Road, Kota stating inter alia that said Jethu owned 3.5 acres of land at Village Changori, 13.5 acres and a pukka house at Village Kota, and three kaccha houses at Achanakmar Road. It was further pleaded that during his lifetime, Jethu used to own a kirana shop, cloth shop and tobacco business in which all the three brothers i.e. the original plaintiff, original defendant No.1 and defendant No.2 were jointly involved and used to participate in the said business. It was also pleaded that three brothers owned a house and 19-20 acres of land in Village Kota and also owned 4.50 acres of land at Village Changori and house at Bilaspur. It was also pleaded that partition took place among the three brothers and the plaintiff got agricultural land i.e.

the suit land as mentioned in the earlier paragraph and the same was recorded in his name by the order dated 28-1-1985 passed by the Naib Tahsildar which was set aside ultimately by the order of the Sub Divisional Officer dated 12-8-1986 and the said order was confirmed by the Commissioner on 27-6-1988, as such the order of mutation was ultimately, set aside and affirmed. It was further pleaded that defendant No.1 has filed Civil Suit No.2-A/1982 against one Carolina before the Court of 5th Civil Judge, Class-II, Bilaspur in which he has specifically admitted about the partition entered and executed between the three brothers. It was finally pleaded that during the lifetime of their father Jethu, in the joint business, defendant No.2 used to maintain the accounts of business, original plaintiff used to do the field cultivation work and defendant No.1, being the eldest son, used to keep all the money earned from the business and also used to purchase immovable properties from the said income and the suit property has also been purchased by said defendant No.1 from the income earned from the joint business. In the year 1981-82, due to change in behaviour and nature of elder brother defendant No.1, differences arose among three brothers and they started to live separately and after some time, oral partition was effected among three brothers and defendant No.1 has himself divided all the properties equally in three parts and executed list of properties in three different slips and thereafter, each of the brothers was handed-over one such slip. Thereafter, in the year 1985, the defendants interfered with the peaceful possession of the plaintiff necessitating the filing of instant

suit for declaration of title and injunction and in alternative, it was also prayed that the plaintiff may be granted $\frac{1}{3}$ rd share in the suit property, if the suit property is found to be the joint family property.

4.2) Original defendant No.1 filed his written statement denying the plaint allegations stating inter alia that the suit property bearing Khasra Nos. 406 & 407 is the self-acquired property of defendant No.1 and remaining two brothers i.e. the plaintiff and defendant No.2 had no right, title and interest over the suit property. It was also averred that the plaintiff got his name mutated in the revenue records using a fraudulent partition deed that was set aside by the order of the Sub-Divisional Officer dated 12-8-1986 which was affirmed by the Commissioner on 27-6-1988 and prayer was made for dismissal of suit.

4.3) On the basis of pleadings raised by the parties, the trial Court framed as many as twelve issues and vide the judgment & decree dated 18-11-1996 answered all the issues in favour of the plaintiffs, except issues No. 8 and 11. While recording finding on issues No.4, 6 & 7, the trial Court held that the suit property is not the self-acquired property of defendant No.1 and further held that it has been purchased from the income of the joint family and the fact of partition has been found to be proved, however, it has been held that it has not been proved by the plaintiff that the suit property fell into his share and dismissed the suit.

4.4) On appeal being preferred by the plaintiffs, the first appellate Court partly allowed the suit and decreed the suit to the extent of land bearing Khasra Nos.406 & 407, area 8.90 acres, and

dismissed the suit with regard to the house situate at Achanakmar Tigadda and 25 decimals of land situate at Canal Road, Kota and no decree was granted. In these second appeals preferred by the plaintiffs and the defendants, substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

5. Mr. B.D. Guru, learned counsel appearing for the defendants, would vehemently submit that Ex.P-7 is inadmissible in evidence for want of registration. He would further submit that Ex.P-7 bears the signature of none of the parties, particularly, the plaintiff and defendants No.1 & 2, therefore, it cannot be used for the purpose of proving partition and the finding recorded by the lower appellate Court is perverse, as the first appellate Court has relied upon the fact of mutation in favour of the plaintiff which has already been set aside by the order of the Sub-Divisional Officer and further affirmed by the Commissioner. He would also submit that in the civil suit (Ex.P-6) filed by defendant No.1, there is no admission of partition of the entire suit land and it only talks of partition relating to the house and as the said alleged admission is unambiguous and leads to two interpretations, therefore, it cannot be acted upon. He would also submit that in order to give the effect of partition, there must be division of status followed by the findings of shares of the co-sharers. In the instant case, the plaintiff has failed to prove the division of status between the parties and could not demonstrate that the shares of the plaintiff and defendants No.1 & 2 have been defined by the alleged partition. Therefore, the first appellate Court

is absolutely unjustified in granting decree in favour of the plaintiff.

6. Mr. Prafull N. Bharat and Mr. Waquar Naiyer, learned counsel appearing for the plaintiffs, would submit that the first appellate Court is apparently justified in granting decree in favour of the plaintiff, as the existence of partition has candidly been admitted by defendant No.1 in Ex.P-6 and further, Ex.P-7 has been proved by the plaintiff which is apparent from the cross-examination made by defendant No.1 to the plaintiff's witness – Santosh Kumar Jaiswal (PW-1). Ex.P-7 is only list of properties which have fallen in the share of the plaintiff and which does not require registration and the fact of partition having been proved, the finding recorded by the lower appellate Court is in accordance with law and decree of house and land be granted in favour of the plaintiff.
7. Mr. B.P. Sharma and Mr. Hari Agrawal, learned counsel appearing for the purchaser from the plaintiff, would support the judgment & decree of the first appellate Court.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
9. The suit was filed by original plaintiff Pusauram Jaiswal initially only for permanent injunction and later-on, the relief of declaration of title and possession was sought for the suit land bearing Khasra Nos.406 & 407, total area 8.90 acres, and subsequently, by way of amendment, the suit house situated at Kota Achanakmar Tigadda and 25 decimals of land beside Canal was also inserted. It is the case of the original plaintiff that the suit property was partitioned

between the original plaintiff and his two brothers original defendants No.1 & 2 and the suit land and the suit house fell in his share which was evidenced by Ex.P-7 i.e. the list of properties which fell in the share of original plaintiff Pusauram and which he is entitled for declaration of title and permanent injunction. Defendant No.1 contested the claim that the suit property is the separate property. The trial Court recorded a finding that partition had already taken place between the parties, but the plaintiff has failed to prove that the suit land fell in his share and disbelieved Ex.P-7 and in appeal preferred by the defendants, the first appellate Court held that the suit land fell in the share of the plaintiff and therefore he is entitled for declaration of title and possession of land bearing Khasra Nos.406 & 407, area 8.90 acres. Second appeal has been preferred by the plaintiff for decree of possession of Tigadda house situate at Kota Achanakmar and for 25 decimals of land situate at Canal Road, Kota, whereas the defendants questioned the decree of the first appellate Court directing delivery of possession of Khasra Nos.406 & 407, area 8.90 acres. The main dispute relates to, whether the partition has taken place between the plaintiff and defendants No.1 & 2 and whether the suit property has fallen in the share of the plaintiff.

10. Partition is a right incident to the ownership of property and once the parties are held as co-owner, their right to partition cannot be resisted. In a Hindu undivided family governed by the Mitakshara law, no individual member of that family, while it remains undivided, can predicate that he has a certain definite share in the property of

the family. The rights of the coparceners are defined when there is partition. Partition consists in defining the shares of the coparceners in the joint property, actual division of the property by metes and bounds is not necessary to constitute partition. Once the shares are defined, whether by agreement between the parties or otherwise, partition is complete. The parties may thereafter choose to divide the property by metes and bounds, or may continue to live together and enjoy the property in common as before. If they live together, the mode of enjoyment alone remains joint, but not the tenure of the property. Partition may ordinarily be effected by institution of a suit, by submitting the dispute as to division of the properties to arbitrators, by a demand for a share in the properties, or by conduct which evinces an intention to sever the joint family : it may also be effected by agreement to divide the property. But in each case the conduct must evidence unequivocally intention to sever the joint family status. Merely because one member of a family severs his relation, there is no presumption that there is severance between the other members. (See Girijanandini Devi and others v. Bijendra Narain Choudhary¹.)

11. The Supreme Court in the matter of Shub Karan Bubna alias Shub Karan Prasad Bubna v. Sita Saran Bubna and others² defined the word “partition” by holding that “partition” is a redistribution or adjustment of pre-existing rights, among co-owners / coparceners, resulting in a division of lands or other properties

1 AIR 1967 SC 1124

2 (2009) 9 SCC 689

jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. The Supreme Court observed as under: -

“6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. “Separation of share” is a species of “partition”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?”

12. Though partition amongst the Hindus may be effected orally but if the parties reduce it in writing to a formal document which is intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted in partition and thus the document would be required to be compulsorily registered under Section 17(1)(b) of the Registration Act, 1908. However, if the document did not evidence any partition by metes and bounds, it would be outside the purview of Section 17(1)(b) of the Registration Act. (See K.G.

Shivalingappa (Dead) by LRs. and others v. G.S. Eswarappa and others³.

13. The question for consideration, in the instant case, would be, whether partition has taken place between the plaintiff and defendants No.1 & 2 and whether the first appellate Court is justified in holding that partition has taken place and the plaintiff was given the property mentioned in Ex.P-7?
14. It is the case of the plaintiff that defendant No.1 had filed a suit for ejectment of their joint property owned by them at Bilaspur on 5-3-1979 vide Ex.P-6 in which during the pendency of suit, he amended the plaint and stated that after filing of suit, partition has taken place between the plaintiff and his two brothers in para 3 of the plaint. Relevant portion of para 3a of the plaint (Ex.P-6) states as under: -

3 अ/- यह कि इस वाद को पेश करने के बाद वादी एवं उसके अन्य 2 भाइयों के बीच में आपसी बटवारा हो गया है एवं वाद मकान के पश्चिम दिशा वाला भाग बैसाखू को एवं वाद मकान के पूर्व दिशा वाला भाग पुतऊ को मिला है ।

15. The trial Court while answering issue No.7 has accepted the above-stated plea of the plaintiff that vide Ex.P-6, partition has taken place between the plaintiff and defendants No.1 & 2 in the year 1982-83 which was not challenged by the plaintiff by filing cross-objection or cross-appeal in the first appeal preferred by the plaintiff, as such, the fact of partition having been taken place between the plaintiff and defendants No.1 & 2 was final, though it has been contended on behalf of the defendants that it relates to the suit house at Bilaspur only, but a careful perusal of paragraph 3a of the plaint

³ (2004) 12 SCC 189

(Ex.P-6) would show that defendant No.1 has admitted the fact of partition between the parties, as the shares defined by partition with regard to the suit house in that suit was mentioned therein, though the shares which are allotted relating to agricultural land was not indicated in the plaint, as the agricultural lands were not in dispute at that time before that court for which defendant No.1 instituted suit for possession against the defendants therein.

16. Apart from this, there is sufficient evidence to hold that there is severance of status of the suit property between the parties. Ashok Kumar (DW-1), who is son of original defendant No.1 Rambahorik, though in his examination-in-chief has initially denied the fact of partition having been taken place between his father and his uncles – original plaintiff and defendant No.2, but in para 12, he has candidly admitted that during the lifetime of his grand-father Jethu, original partition took place between his father and his uncles – original plaintiff and defendant No.2, and partition parchi has been marked and exhibited at his instance as Ex.P-7. Likewise, Santosh Kumar Jaiswal (PW-1), son of original plaintiff Pusauram Jaiswal, was examined as PW-1 from whom in the cross-examination at the instance of defendant No.1 it has been asked by the counsel for defendant No.1 and on being asked it has clearly been stated by him in para 20 of his cross-examination that partition has taken place between the plaintiff and defendants No.1 & 2 and partition parchi was prepared without mentioning the area allotted to the plaintiff and defendants No.1 & 2. Therefore, the finding of the trial Court that partition has taken place between the parties and the

fact of partition having been taken place between the parties is a finding of fact which is based on the evidence on record which has rightly been affirmed by the first appellate Court including the admission made by defendant No.1 in Ex.P-6, particularly in absence of challenge to that finding by the defendants by filing cross-objection or cross-appeal before the first appellate Court it cannot be concluded that the finding of partition recorded by the trial Court as affirmed by the first appellate Court is in any way perverse or contrary to the records requiring interference by this Court in jurisdiction under Section 100 of the CPC. This finding of partition between the parties is a finding based on the evidence available on record.

17. Now, I have to consider as to whether Ex.P-7 has rightly been relied upon by the first appellate Court and it is inadmissible in evidence for want of registration and signing by the parties.

18. A careful perusal of Ex.P-7 would show that it is only a list of property of a share allotted to one brother (plaintiff) so far as the suit land is concerned and house at Bilaspur to three brothers. It is not a deed of partition, it only enlists the list of the property i.e. land which is given to the plaintiff and house to the plaintiff and defendants No.1 & 2. It was document of the plaintiff exhibited by defendant No.1 (Ashok Kumar) without any protest or demur. On behalf of defendant No.1 it was cross-examined to the plaintiff's witness Santosh Kumar Jaiswal (PW-1) and in para 20 of the cross-examination, the plaintiff's witness has clearly stated that in the *parchi*, only the extent of share which was given to the brothers

(plaintiff and defendants No.1 & 2) was mentioned and *batwara parchi* was relating to all the three brothers – the plaintiff and defendants No.1 & 2. On being asked, it has also been stated that it is defendant No.1 being the eldest among three who had given 8-9 acres of land to each of them. Thus, it is only a list of properties given to the plaintiff and defendants No.1 & 2.

19. In the matter of **Uddab Nath v. Gokul Chandra**⁴, it has been held by the Calcutta High Court that a butwara chittha is a mere list of the shares which each of the parties has in the property concerned and which is signed by the parties but it is not in itself a deed of partition but is merely a note upon which the parties have to proceed at the partition. As such it does not require registration for being admissible in evidence.

20. Likewise, in the matter of **Kshetra Mohan v. Tufani Talukdar**⁵, the Calcutta High Court has held that a mere partition list containing a list of properties is a memorandum and does not require registration. Whether such a document is or is not a deed of partition must be decided on perusal of the document itself.

21. Thus, from the aforesaid analysis, it is quite vivid that the question of admissibility of the partition parchi has to be decided with reference to the nature and contents of the document and the surrounding circumstances in each particular case. In the instant case, as noticed herein-above, Ex.P-7 is only a list of share which the plaintiff has been allotted so far as the suit land is concerned and it also enlists the shares which the plaintiff and defendants

4 AIR 1936 Cal 700

5 AIR 1933 Cal 474

No.1 & 2 have received so far as the house at Bilaspur is concerned and on instructions from defendant No.1, his counsel has cross-examined Santosh Kumar Jaiswal (PW-1) and in para 20, he has stated that partition parchi vide Ex.P-7 is only to the extent of share which all the three brothers i.e. the plaintiff and defendants No.1 & 2 have received without mentioning the naksha and it was not signed by the brothers and other particulars are also not mentioned. As such, it only enlists the properties which were given to the plaintiff and house to the three brothers. Therefore, it is not a document of partition making severance of status of the suit property and as such it does not require registration and which has not been used to hold by the two Courts below to prove the fact of partition, as the fact of partition has already been proved taking into account the admission made by defendant No.1 vide Ex.P-6 and other oral evidences. Santosh Kumar Jaiswal (PW-1) in his evidence stated that partition has already taken place between the plaintiff and defendants No.1 & 2 during the lifetime of their father Jethu. As such, Ex.P-7 is admissible in evidence and has rightly been relied upon by the first appellate Court.

22. Ex.P-7 states about the land at Gaushala Khar. The plaintiff in the plaint as well as in the statement before the Court as Santosh Kumar Jaiswal (PW-1) in paragraph 12 has clearly stated that the suit land is called as Gaushala Khar land and he got the suit land in partition, but no such cross-examination has been made on behalf of the defendants with regard to the contents of paragraph 12 of his evidence which goes to show that there is no dispute with regard to

identity of that land as suit land. Gaushala Khar land is the suit land which was claimed to be received by the plaintiff on partition. The first appellate Court took into account that immediately after partition, land was given to the plaintiff vide Ex.P-7 and his name was recorded by the Tahsildar, but it was set aside by the SDO and upheld by the Commissioner. Though the order of mutation in the name of the plaintiff was set aside by the SDO and upheld by the Commissioner, yet, since the land in question fell into the share of the plaintiff, therefore, even if order of mutation is set aside, title remains with the original plaintiff and he was entitled to file suit for declaration of title and possession which is supported by the statement of not only Santosh Kumar Jaiswal (PW-1), but also Rajababu Gupta (PW-2) and Feru Das (PW-3) in which I do not find any perversity or illegality.

23. Therefore, in my considered opinion, the first appellate Court is absolutely justified in holding that the suit land fell into the share of the plaintiff vide Ex.P-7 and he is entitled for declaration of title and possession of the suit land. The second appeal filed by the defendants (S.A.No.849/1999) deserves to be and is accordingly dismissed holding that Ex.P-7 does not require registration and it is only a list of properties partly given to the plaintiff and partly to defendants No.1 & 2 with regard to the suit house at Bilaspur and the finding recorded by the first appellate Court is neither perverse nor contrary to record. The substantial questions of law are answered accordingly.

S.A.No.1070/1999

24. The plaintiff has also preferred second appeal that he is also entitled for decree of house situate at Achanakmar Tigadda and 25 decimals of land situate at Canal Road, Kota, which the first appellate Court has not granted. It appears from the order sheet that the plaintiff did not raise such a plea before the first appellate Court that he is entitled for decree for the house at Achanakmar Tigadda and 25 decimals of land at Canal Road, Kota and has raised the claim before this Court by filing appeal. Even the original claim relates only to the suit land situate at Tahsil Kota, District Bilaspur and for the said Tigadda house and land at Canal Road, Kota, the claim was inserted by way of amendment on 9-10-1996. The plaintiff's witness Santosh Kumar Jaiswal (PW-1) in para 21 (first) of his evidence has clearly stated that two-room house at Achanakmar Tigadda was given to defendant No.2 Baisakhu, whereas in para 22, he states that it was given to his father Ram Bahorik – original defendant No.1. Rajababu Gupta (PW-2) has also stated that the suit relates only to 8.90 acres of land of which decree has already been granted. Likewise, Feru Das (PW-3) also states that the suit property relates to 8.90 acres of land. This is the reason why the plaintiff did not make any claim at the outset while filing the suit and did not press it before the first appellate Court. Even no specific claim was raised by raising the plea in the memo of appeal preferred before the first appellate Court on behalf of the plaintiff. This is the reason why the first appellate Court also did not take-up the issue qua decree for possession with regard to the house situate at Achanakmar Tigadda and 25 decimals of land

situate at Canal Road, Kota. I do not find any merit so far as this part of property is concerned. The second appeal preferred by the plaintiff also deserves to be and is accordingly dismissed. The substantial question of law is answered accordingly.

25. Finally, the second appeals preferred by the defendants as well as the plaintiff, both, are dismissed leaving the parties to bear their own cost(s).

26. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge