

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.433 of 1978

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Banarsi Kuer @ Maya Devi (since deceased) replaced by SRI
MADHUSUDAN SINGH Resident of Village, Madhubani, Tola Parsauna,
PS-Gobindganj, Distt- East Champaran, (Defendant 2nd Party)

... .. Appellant/s

Versus

1. Smt. GITA DEVI wife of Rabinandan Singh, daughter of Awadhesh Singh,
resident of village-Madhubani Tola, Parsauna, PS-Gobindganj, at present,
Bariarpur PS, Motihari, Muffassil, District, East Champaran (Plaintiff) & Ors
as detailed in petition.

2. Udaibhan Singh,

3. Chandrabhan Singh, sons of Shyamlal Singh (deceased)

4. Smt. Ram Saneshi Devi wife of Udaibhan Singh,

5. Smt. Godawari Devi wife of Chhandrabhan Singh,

6. Madhusudan Singh,

7. Ripusudan Singh, both minor sons of Udaibhan Singh under the
guardianship of father and natural guardian.

8. Manoj Kumar minor son of Chandrabhan Singh, under the guardianship of
father and natural Guardian.

9. Mostt. Asharfi Kuer (deceased) replaced by Smt. Jean Devi, wife of Vidya
Nand Singh, R/O Village-Semraha, PS-Harshidih, Dist-East Champaran, and
sons of her are already on record as Respondent Nos. 2 and 3 vide order no.6
dated 09.02.1983.

10. Balbhadra Singh,

11. Satrugan Singh, both sons of Narsingh Singh (Defendant 2nd Set)

... .. Respondent/s

12. Narendra Singh,

13. Harishankar Singh, both sons of Ramayodhya Singh,

14. Shankar Singh

15 Haribansh Singh sons of Gorakh Singh

16. Ramadhar Singh,

17. Chaturbhuj Singh,

18. Ramdeni Singh,

19 Sant Singh sons of Harihar Singh, all residents of Village Madhubani Tola
Parsauna, PS. Gobindganj, Distt-East Champaran (Defendants 3rd Set), further
as detailed in the memo of appeal.

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Appearance :

For the Appellant/s : Mr. Mritunjay Pd. Singh, Adv.

Mr. P.N. Roy, Adv.

For the Respondent No.1: Mr. Madhurendra Kumar, Adv,

Mr. Avinash, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

14-02-2020

Appellant/Intervenor/defendant 2nd Party, (since

deceased) being aggrieved by and dissatisfied with the

judgment dated 10.04.1978, preliminary decree dated

24.04.1978 passed by the Subordinate Judge, East Champaran,

Motihari in Partition Suit No. 250/1976 decreeing the suit in



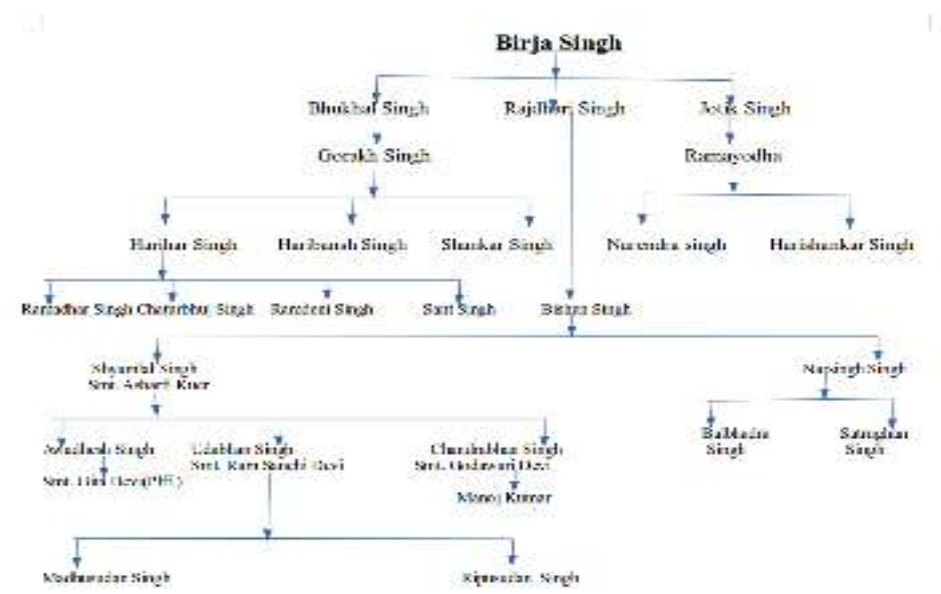
part on contest with cost against the contesting defendant and without cost against the rest identifying the 1/4th share of the plaintiff in the property so detailed under schedule by way of acknowledging her right directing to get her share separated, properly demarcated through a pleader-commissioner on depositing due remuneration, filed this appeal.

2. It is further to be taken note of the fact that original appellant Banarsi Kuer @ Maya Devi died on 25.09.1989 and as per admission of Banarsi Kuer @ Maya Devi, she was second wife of father of Gita Devi, (plaintiff/Respondent No.1), hence she (Gita Devi, plaintiff/Respondent No.1) would have been her legal heir, who could have inherit her, but as is evident Respondent No.6, (one of the sons of uncle of Gita Devi, plaintiff/respondent) filed petition under Order-I Rule 10 on the pretext that some lands have already been sold in their favour by the aforesaid Banarsi Kuer, hence he be substituted in a way to protect their right as Banarsi Kuer left for heavenly abode leaving no legal heir which vide order dated 22.04.2015 has been allowed without condoning the delay as well as recalling the abatement. Contrary to Order XXII Rule 4(5) of the CPC on the premises that it happens to be partition suit.



3. For better appreciation, the parties are being identified by their original status, henceforth.

4. Respondent No.1/plaintiff filed a Partition Suit asking for her 1/4th share in the ancestral property so detailed under different annexures (by way of amendment) belonging to the family consisting of Shyamlal Singh and his sons. In order to properly appreciate the inter se relationship, the genealogical table having been furnished at the foot of the plaint and admitted at the end of respondents (save and except to the extent of status of appellant/defendant 2nd Party/intervenor), is furnished below:-



5. It has been pleaded that Birja Singh (common ancestor) of village-Madhubani died leaving behind three sons, namely, Bhukhal Singh, Rajdhari Singh and Jotik Singh. All the



three brothers got separated by metes and bounds in due course of time having their independent identity corresponding to their share. Rajdhari had a son, Bishun Singh. Bishun Singh had two sons, namely, Shyamlal Singh and Narsingh Singh. After death of Bishun Singh, his sons, Shyamlal Singh and Narsingh Singh also separated by metes and bounds. It is the property having allotted to the share of, as well as acquisition of Shyamlal Singh being under partition. In order to avoid future complication, all the family members, descendants of Bhukhlal Singh, Rajdhari Singh, Jotik Singh have been made party, but their status are that of party perform as the property belonging to Shyamlal Singh is only the subject matter of instant partition suit. It has further been asserted that Shyamlal Singh till his death was Karta, Karobari of the family, and after whose death, father of the plaintiff, namely, Awadhesh Singh became Karta and Karobari and after death of Awadhesh Singh, Udaibhan Singh (uncle) became Karta and Karobari which he is continuing even today. Shyamlal died in the year 1964 leaving behind his widow, Mostt. Asharfi Kuer, defendant no.8 and three sons, namely, Awadhesh Singh, Udaibhan Singh and Chandrabhan Singh. Udaibhan Singh and Chandrabhan Singh are defendants no. 1 and 2 respectively. Awadhesh Singh died in the year 1967



leaving behind the plaintiff, the sole surviving heir. Defendant No. 3 and 4 are the wives of defendant no. 1 and 2 respectively. Defendant No. 5 and 6 are the sons of Defendant No.1, Udaibhan Singh. Then it has been submitted that after death of Awadhesh Singh, plaintiff substituted him.

6. It has then been pleaded that after death of Rajdhari Singh, his share has been inherited by his son, Bishun Singh and after death of Bishun Singh, his share has been jointly inherited by his sons, Shyamlal and Narsingh Singh by way of survival-ship as well as, having their individual status being coparcener. During course of jointness, they also acquired immovable property. Then it has been averred that Shyamlal and Narsingh got separated in the year 1940-41 having half and half share in the entire property. Defendant-2nd Party being lineal descendant of Narsingh Singh got the same having no concern with regard thereto, and in likewise manner, plaintiff has got no concern with them, however, their impleadment is also only to put safeguard upon the future prospect of the suit. Shyamlal Singh became *Karta* and Manager of his family consisting of his sons Awadhesh Singh, Udaibhan Singh and Chandrabhan Singh. He died in the year 1964 leaving behind his wife and sons as disclosed above. After his death, Udaibhan



(defendant No.1) became Karta and Karobari of the joint family which is continuing even today.

7. Then it has been pleaded that Shyamlal was a money-lender having sumptuous income therefrom as well as from agriculture and from the saving thereof, acquired immovable property in the names of his family members, in likewise manner also accumulated movable property, so detailed under the Schedule-1, 1-(Ka). It has then been pleaded that father of the plaintiff, namely, Awadhesh died in the year 1967 and since thereafter, her uncle began to ill treat her as, did not like the plaintiff, (a daughter) to inherit the property and, considering the same, plaintiff requested to partition the property which they refused and on account thereof, necessitates for filing of instant partition suit claiming her share to the extent of 1/4th acknowledging remaining 3/4th share to the defendant first party.

8. Other Defendants appeared and filed their WS separately. More or less, all have accepted partition affected amongst three brothers, Bhukhlal, Rajdhari, Jotik. At that very moment, Banarsi Kuer @ Maya Devi filed an intervenor petition claiming herself to be second wife of Awadhesh Singh (step-mother of Gita Devi,) which was allowed and thereafter,



WS at the end of Defendant-1st Party, was filed wherein they have shown Mostt. Banarsi Kuer @ Maya Devi to be the sole wife of Awadhesh Singh, (father of the plaintiff) as well as , mother of the plaintiff. This fact has knowingly, purposely and intentionally been suppressed by the plaintiff with an ulterior motive. Furthermore, proper identification of Mostt. Banarsi Kuer @ Maya Devi has been flashed as daughter of Bhukhlal Singh of Bahuara, PS-Kesaria, Distt- East Champaran. In likewise manner, the death of Shyamlal in the year of 1964 has been admitted with a further disclosure that after death of Shyamlal, Awadhesh became Karta, Karobari of the family and after his death in the year 1967, Udaibhan, (defendant no.1) became Karta, Karobari of the family which he is still continuing. However, any kind of acquisition by Shyamlal from income of money-lending as well as agriculture has been denied by way of stating that Shyamlal never indulged in money lending. Furthermore, some of the lands shown in Schedule-1 has also been controverted to be the property of the joint family and in likewise manner, the properties having detailed under Schedule-1(Kha) has completely been disowned to belonging to the joint family. On the other hand, details of movable and immovable property which has been left out, been detailed



under Schedule of the WS.

9. It has also been submitted that after death of Awadhesh Singh, Mostt. Banarsi Kuer @ Maya Devi, his wife became desirous to separate whereupon, there was oral partition effected by the Panches in the month of December 1969 and, the plaintiff along with Mostt. Banarsi Kuer @ Maya Devi got 6 Acres 25 Decimals over which, they are coming in possession. In support thereof, the memorandum of partition was prepared by the Panches. Once partition had already been effected by metes and bounds, then in that event, now the plaintiff is precluded to raise the plea. It has also been pleaded that aforesaid Mostt. Banarsi Kuer @ Maya Devi had transferred some land from her share. It has also been submitted that Defendant no.8, Ashrafi Kuer (wife of Shyamalal Singh) gifted her entire interest in favour of Defendant No. 1 which has been detailed under Schedule-4 of the WS and since thereafter, the aforesaid land are coming under exclusive possession of Defendant No. 1 and 2. Then it has been submitted that this case has been filed at the instance of one Haribansh Singh, irrespective of the fact that plaintiff after marriage is residing at her Sasural while, her mother Banarsi Kuer @ Maya Devi is exclusively enjoying her property. Furthermore, the details of



immovable property given under Schedule-1(Ka) of the plaint having in possession of Udaibhan Singh (Defendant No.1) has also been controverted.

10. Banarsi Kuer @ Maya Devi filed separate WS whereunder she claimed herself to be second wife of Awadhesh Singh and further, supporting the basic feature of the WS filed on behalf of the defendant no. 1 to 8, has pleaded that there was private partition at her instance after death of her husband Awadhesh Singh whereupon, she and plaintiff got 6 Acres 25 Decimals of land and, are over the land since the day of partition, exclusively.

11. Defendant No.9 and 10 have separately filed their WS admitting separation amongst three brothers namely, Bhukhal Singh, Rajdhari Singh and Jotik by metes and bounds long long ago and since thereafter, they are looking after their affair independently, exclusively. Awadhesh Singh, father of the plaintiff had married twice. Plaintiff is the daughter begotten from the first wife while Banarsi Kuer @ Maya Devi is his second wife. It has also been pleaded that certain property having under exclusive share and possession of family of Narsingh Singh has wrongly been included and so, asked for exclusion from the suit.



12. Separate WS has also been filed on behalf of the defendant no.13, Shankar Singh whereunder, mainly, he has shown concern with regard to the property belonging to his family (Jotik Singh) having been wrongly shown under Schedule-1 of the plaint and so has prayed for exclusion of the same.

13. The learned lower court on the basis of the rival pleading had framed the following issues:-

1. Whether there was any partition between Smt. Maya Devi @ Banarsi Kuer, defendant no.10 (ka) on one side and Udaibhan Singh defendant no. 1, Chandrabhan Singh, defendant no. 2 and Mostt. Asharfi Kuer, deft. no. 8 on the other side?
2. What properties are liable to be partitioned?
3. Whether Mostt. Maya Davi alias Banarsi Kuer, deft. No.10(Ka) is the widow of Awadhesh Singh?
4. What is the share of the plaintiff?
5. Whether the plaintiff is entitled to a decree for partition?

and decided the same in favour of the plaintiff against the defendant 1st Set as well as discarded presence of Banarsi Kuer @ Maya Devi to be second wife of Awadhesh Singh, hence this appeal.

14. Learned counsel for the appellant while assailing the judgment impugned along with preliminary decree, has submitted that the learned lower court misconstrued the



evidence available on the record whereupon, is fit to be set aside. Furthermore, it has been submitted that the learned court failed to consider that the Respondent No.1/plaintiff played hot and cold at the same breath which could not be allowed in the background of the fact that apart from giving genealogical table, apart from pleading that all the coparceners got themselves partitioned by metes and bounds save and except that of the branches of Shyamlal Singh, grand-father of the Respondent, plaintiff, then in that circumstance, there was no occasion left for to implead other family members of remaining branches. That being so, the suit suffers from misjoinder of the party. It has also been submitted that once all the branches of Late Birja Singh (common ancestor) then, in that circumstance, all the properties belonging to the family would have been brought to the subject matter of the suit, and in the aforesaid eventualities, the share of the Respondent/Plaintiff would have varied. On the other hand, it has been urged that non mentioning of the same, allowed the suit to suffer from embryoctony.

15. Then it has been urged that although, the plea of the status of the original appellant/defendant 2nd Party/intervenor (since deceased) has been de-recognized under the judgment impugned but, while allowing the appellant to be



impleaded as defendant 2nd Party, the learned lower court dealt with each and every aspect which the learned lower court should have taken into consideration while delivering the judgment impugned, in consonance with the oral as well as documentary evidence having been so adduced. It has also been submitted that a large number of witnesses have been examined including that of respective defendants who have accepted status of the appellant to be 2nd wife of Awadhesh Singh (deceased) (father of the plaintiff) who, with an expectation to have a son and was also at a young age married with the appellant and, is found duly substantiated. Not only this, the sale-deed having been executed at the end of the appellant, in favour of Udaibhan Singh to be an ancillary event recognizing the status of the appellant (since deceased) to be wife of late Awadhesh Singh, otherwise, the Udaibhan Singh would not have inclined to purchase the property. So, it has been submitted that the judgment impugned suffers from conjectures and surmises whereupon is fit to be set aside.

16. At the present moment, only respondent/plaintiff is being represented who contested the submission having been made at the end of the appellant. It has been submitted at the end of learned counsel for the



respondent/plaintiff that from the materials available on the record, it is crystal clear that being the plaintiff, a daughter, frustrated the family members who did not yield to allow the daughter to inherit the property whereupon, thrust the appellant (since deceased), who happened to be closely related to Udaibhan Singh, as 2nd wife of Late Awadhesh Singh and for that, they stood behind her. It has also been submitted that transaction whatsoever been made by the appellant (since deceased) was only in favour of uncle of the Respondent-plaintiff that too during midst of the suit and so, is hit by the principle of *lis pendens*. Also submitted that even during trial, they were more concerned with the interest of the appellant/defendant than their own. It has also been submitted that actually uncle of the respondent/plaintiff is the person who procured attendance of the witnesses, got them examined but, as they stood as tutored witness, on account thereof, there happens to be inconsistency amongst them on each and every material point which, the learned lower court, as is evident from the judgment impugned, properly appreciated whereafter concluded by way of negativating the plea of the appellant/defendant 2nd Party. Consequent thereupon, the appeal is fit to be dismissed.

17. After hearing both the parties as well as



going through the lower court records, following points have been perceived to be relevant one for just decision of this appeal:-

- (1) whether Banarsi Kuer @ Maya Devi happens to be 2nd wife of Late Awadhesh Singh,
- (2) whether after death of Awadhesh Singh, there was partition in the family at the instance of Banarsi Kuer @ Maya Devi along with Udaibhan Singh and Chandrabhan Singh, Ashrafi Kuer by metes and bounds,
- (3) whether the respondent/plaintiff is entitled for of partition,
- (4) If so, to what extent and relating to which property.
- (5) what other relief or reliefs the Respondent/Plaintiff is entitled for.

18. In order to substantiate its case, Respondent 1st Party/plaintiff has examined altogether nineteen PWs who are PW-1, Harishankar Tiwari, PW-2, Kameshwar Singh, PW-3, Bangar Mahto, PW-4, Ram Narain Singh, PW-5, Thakur Tiwari, PW-6, Asheshwar Tiwari, PW-7, Awadh Kishore Singh, PW-8, Fulena Tiwari, PW-9, Chandradoe Mahto, PW-10, Bibhun Nath Das, PW-11, Yamuna Singh, PW-12, Madan Mohan Singh, PW-13, Chandrika Singh, PW-14, Awadh Bihari Singh, PW-15, Latif Mian, PW-16, Harbans Narain Singh, PW-17, Prem Shankar



Singh, PW-18, Satya Narain Prasad and PW-19, Asharfi Thakur. Side by side has also exhibited Ext-1, Return under Ceiling Act Form LC-2, Ext-2, Sale-deed executed by Ramanand Rai in favour of Shamlal Singh dated 11.07.45. Ext-X, C.C. of return, Ext-A-1, Sale-deed executed by Brichna Gir in favour of Awadhesh Singh, Ext-A/1, Sale-deed executed by Surya Tiwary in favour of Balbhadra Singh, Ext-A/2, Sale-deed executed by Gokhul Singh in favour of Balbhadra Singh, Ext-A/3, Sale-deed executed by Raj Banshi Singh in favour of Balbhadra Singh, Ext-A/4, Sale-deed executed by Bhuar Singh in favour of Balbhadra Singh, Ext-A-2, Khesta Batwara.

19. Defence has also examined DW-1, Anant Sao, DW-2, Dahaur Thakur, DW-3, Ramadhar Singh, DW-4, Julfi Singh, DW-5, Kishori Dubey, DW-6, Anirudh Singh, DW-7, Bacha Singh, DW-8, Mukhlal Singh, DW-9, Mehi Sao, DW-10, Satya Narain Singh, DW-11, Bharat Singh, DW-12, Bidyanand Singh, DW-13, Udaibhan Singh, DW-14, Kailash Singh, DW-15, Nawal Kishore Singh, DW-16, Ambika Singh, DW-17, Maya Devi, DW-18, Satyadeo Singh, DW-19, Ram Agya Singh, DW-20, Lalit Prasad, DW-21, Makhan Singh, DW-22, Jiun Singh, DW-23, Ram Tahal Ram, DW-24, Chhathu Singh, DW-25, Jai Kishore Singh, DW-26, Moti Thakur, DW-



27, Bijuli Singh, DW-28, Ram Naresh Singh, DW-29, Shankar Singh, DW-30, Ganesh Ram, DW-31, Gagan Deo Singh, DW-32, Narendra Singh and DW-33, Parmeshwar Dayal.

20. Before coming to the points so formulated hereinabove, after going through the lower court records, it is crystal clear that there is no controversy over genealogy of the family and in likewise manner, separation have been effected amongst the three brothers, namely, Bhukhal Singh, Rajdhari Singh and Jotik Singh. It is also admitted that Rajdhari Singh had one son, Bishun Singh who died leaving behind two sons, namely, Shyamlal Singh as well as Narsing Singh. It is also admitted that Shyamlal Singh and Narsing Singh also got separated by metes and bounds. It is also admitted that the Respondent 1st /Plaintiff/Defendant No. 1 to 8 are descendants of Shyamlal Singh. The only controversy as is evident remains with identity of the appellant/defendant 2nd Party/intervenor, Banarsi Kuer @ Maya Devi (since deceased) as second wife of Awadhesh Singh and further, partition having effected in the family of Shyamlal consisting of Banarsi Kuer, Udaibhan Singh and Chandrabhan Singh. It is evident that appellant/defendant 2nd Party/intervenor, Banarsi Kuer @ Maya Devi,(since deceased) Udaibhan and Chandrabhan, their lineal descendants



have fought conjointly, though, at the earliest, there was independent WS but, supported each other. It is further evident that during pendency of the suit, Udaibhan got the sale-deed at the end of Banarsi Kuer @ Maya Devi. It is further evident from the WS at the end of appellant/defendant 2nd Party/intervenor, Banarsi Kuer @ Maya Devi that she claimed herself to be the second wife of late Awadhesh Singh while at the end of Udaibhan and Chandrabhan along with their lineal descendants (Defendant No.1 to 9) they shown Banarsi Kuer @ Maya Devi to the sole wife and plaintiff/respondent-1st Party to be begotten from the womb of Banarsi Kuer @ Maya Devi out of marriage with Awadhesh Singh (since deceased). It is further evident from the evidence available on the record that Udaibhan Singh is somehow or the other, related with the father of Banarsi Kuer. All these themes have been highlighted being admitted one and so, the evidences are to be seen in the aforesaid backdrop.

21. **Point No.(1).** Point No.1 is taken on priority basis as the finding relates to Banarsi Kuer @ Maya Devi will play pivotal role in deciding instant appeal. In case, her status is duly acknowledged as second wife of Awadhesh Singh, then in that event, the theme of earlier partition by metes and bounds



will have to be accepted, having an adverse impact over fate of the suit. Contrary to the same, will give extra strength to the finding recorded by the lower court. It is needless to say that Banarsi Kuer @ Maya Devi was not impleaded nor any kind of averment in the plaint has been made relating to her. She, by filing petition in accordance with Order-I Rule-10 CPC shown herself to be necessary party supported by other defendants/respondents claiming herself to be second wife of late Awadhesh Singh and in that pretext advanced plea of earlier partition supported by other Respondents/Defendants, hence, the burden lies upon her (Banarsi Kuer) to substantiate her status to be second wife of Awadhesh Singh as status of plaintiff is not under dispute. Apart from this, under Section 104 of the Evidence Act, it is Banarsi Kuer @ Maya Devi who carries the burden to substantiate her plea. In order to appreciate the evidence having on this very score, evidences of DW-8, allegedly father of Banarsi Kuer @ Maya Devi, DW-12, Phupha of Gita Devi, DW-13, Udaibhan Singh (uncle of Gita Devi), DW-15, Nawal Kishore and DW-17, Banarsi Kuer @ Maya Devi are of great importance whereupon, need careful scrutiny in consonance with the evidence of Gita Devi who was examined on commission along with PW-14 who has been



examined to explain identity of Banarsi Kuer @ Maya Devi.

22. Gita Devi, during her examination-in-chief has stated that her marriage was solemnized at the instance of his uncle Udaibhan Singh as, her parents were dead by that time. She has further stated that Banarsi Kuer @ Maya Devi is not her step-mother. She has further stated that Banarsi Kuer @ Maya Devi has been engaged by her uncle Udaibhan Singh as a cook for the last 6-7 years. They are in relationship (objected to). She has further deposed that sister of her grand-father has been married to Brahamdeo Singh and Banarsi Kuer @ Maya Devi is the daughter of said Brahamdeo Singh. Then there happens to be evidence relating to filing of the partition suit and lastly, she has stated that she used to call Banarsi Kuer @ Maya Devi as Phua. During cross-examination as is evident she has not been properly cross-examined over the identity of Banarsi Kuer @ Maya Devi. She has stated that Maya Devi resides in a house having western front. Her bed is over cot. She knew Brahamdeo Singh. She has not seen him. She does not know father's name of Brahamdeo Singh. She had not filed petition for impleading Banarsi Kuer @ Maya Devi as a party. She had not filed rejoinder against intervenor petition. Banarsi Kuer @ Maya Devi is a widow on account of death of her husband. Then



she has stated that one female belonging to *Bhumihar* caste is engaged as maid-servant in her Sasural while at her *Naihar* also Banarsi Kuer @ Maya Devi is engaged. At the place of Narendra Singh, one female of Siswa- Patna, is engaged for the last 7-8 years. Before Banarsi Kuer @ Maya Devi, one Gheghahi was working as maid-servant by caste Kurmi. She is unable to disclose in which year Banarsi Kuer @ Maya Devi came at her Maika, but after 2-3 years of her arrival, her marriage was solemnized. She is not knowing how much amount was being paid to her as monthly emolument. She has further stated that she had got no dispute with Banarsi Kuer @ Maya Devi as she is not at all related to her. Then, she denied the suggestion that Banarsi Kuer @ Maya Devi happens to be her step-mother. She had stated that her father was married only once that too with her mother. She also denied the suggestion that Brahamdeo Singh was not married with sister of Shyamlal Singh. She has also denied the suggestion that after death of her father, there was partition in the family at the instance of her step-mother, Banarsi Kuer @ Maya Devi.

23. PW-14 has come up to depose that Brahamdeo Singh was his grand-father. He has further stated that Brahamdeo Singh was Phupha of Udaibhan Singh. His



grand-father, Brahamdeo Singh was married twice. The first marriage was with the sister of Udaibhan Singh and the second marriage was at village-Parsa. From the second marriage, Brahamdeo had six sons and two daughters. Banarsi Kuer @ Maya Devi is one of them while other is Chandrama Devi. He has further stated that Maya Devi was married with Babunandan Singh of village, Jitpur. Babunandan Singh died about 13 years ago. Then Banarsi Kuer @ Maya Devi came back to her Naihar where she stayed for six years and thereafter, Udaibhan took her away to his place at village-Parsauna. He has further stated that Narayan Singh along with Ramraj Singh are the only alive sons of Brahamdeo Singh out of whom Ramraj became hermit. Narayan Singh is suffering from asthma on account of old age. His father is also dead. There was no issue from the first wife. Banarsi Kuer @ Maya Devi used to visit his place. During cross-examination at para-3, he has stated that he had not seen Brahamdeo Singh. About 10 years ago, second wife of Brahamdeo Singh died. He had gone to village-Parsauna on the eve of marriage of niece of Udaibhan Singh. In para-4, he has stated that his grand-father was married twice. Banarsi Kuer @ Maya Devi is younger than Chandrama Devi. At para-5 of cross-examination is related to Babunand Singh (husband of



Banarsi Kuer @ Maya Devi). At para-6, he stated that female members of his family used to work as maid-servant. In para-7, he has said that Banarsi Kuer @ Maya Devi became widow at the age of 15 years. Banarsi Kuer @ Maya Devi had gone to village-Jitpur after death of her husband. He is not remembering the exact year on which Udaibhan Singh took her away. No salary was being paid to Banarsi Kuer @ Maya Devi. At para-8, he has stated that Banarsi Kuer @ Maya Devi remained at her Sasural, Jitpur for one and a half years after death of her husband and then thereafter, she came to his place. She was not at all engaged in any kind of work. Then he denied the suggestion that it is not a fact that Brahamdeo Singh was married twice. He denied the suggestion that it is not a fact that Banarsi Kuer @ Maya Devi is not his Phua. Then he denied the suggestion that his evidence is wrong and incorrect.

24. DW-17 is Banarsi Kuer @ Maya Devi herself. She during her examination-in-chief has stated that her name is Maya Devi but, she is also known as Banarsi Kuer. Her father's name is Mukhlal Singh. Her Naihar is at village-Rajpur Bahora under Kesaria Police Station. Her husband Awadhesh had two marriages. She happens to be his second wife. Second marriage of her husband was solemnized after death of first



wife. Her husband is dead. Her husband died three years after marriage with her. She subsequently separated herself from her Devars. Defendant Udaibhan Singh, Chander Bhan Singh and mother-in-law, Asharfi Kuer remained joint while she alone got separated. Lands have already been partitioned. She came over the property exclusively as per partition. Memorandum of partition was prepared after partition over which, she as well as her Devars put their signatures and tendered the same. She has further deposed that she facilitated marriage of plaintiff-Gita Devi after separation. She had sold away 16 Katthas of land to defendant-Udaibhan Singh on a consideration. She gave possession over the land. During course of partition, she got she-buffalo (movable property) which she gifted to plaintiff-Gita Devi at the time of her marriage. Then she controverted the case of the plaintiff that she happens to be daughter of Brahamdeo Singh. She controverted Bauharwa to be her Naihar. She denied her status to be made-servant of Udaibhan Singh and Chandrabhan Singh. During cross-examination at para-6, she has stated that Harihar Singh happens to be her father-in-law who has four sons but, she is unable to disclose their names. At para-7, she has stated that Shiv Shankar Singh also happens to be her father-in-law but she is unable to disclose name of his



sons. In para-8, she has stated that her mother-in-law is alive. She is very affectionate towards her. She used to provide hospitality to her. Her kitchen is separate. For the last eight years, her kitchen is separate. Then she stated that as she did not find favour with the wives of Chander Bhan Singh as well as Udaibhan so, got separated. Paragraphs-10, 11, 12 happen to be cross-examination over partition whereunder, she has stated that two copies of memorandum of partition were prepared, one for 24 Bighas relating to Chandrabhan Singh while 5 Bighas 10 Katthas relating to her. She has further stated that she used to give rent to Udaibhan. She has further stated that for the repairing of the house as well as to meet cost of litigation, she had sold away 16 Katthas of land. She has further stated that Udaibhan Singh bears litigation expense on her behalf and, later on, took it from her. In para-17, she has stated that Awadhesh Singh was suffering from cancer. All the prescriptions were along with Awadhesh Singh. She is unable to say where those prescriptions have been kept. She has further stated that Udaibhan used to accompany her husband during course of treatment. Her husband died at Patna. At the time of death, she was not present near her husband. It was Udaibhan who performed all the rituals. Then she has stated that she is on



strained relationship with Gita Devi after institution of this case. Before institution of this case, they were on cordial relationship. The dispute arose when she turned down the demand of Gita Devi regarding her share. She has further stated that she used to give 30 mounds of cereals to Gita Devi. She has further stated that at the time of death of her husband, he was aged about 30 years. At that very time, Gita was aged about 8 years. At the marriage of Gita, she had spent Rs. 10,000/- which she managed after sale of grains and two pieces of ornaments. Then she stated that she does not know name of mother of the Gita Devi. Then she denied the suggestion that her husband had not married twice. She was not the second wife of her husband. It is not a fact that her father's name was Brahamdeo Singh.

25. DW-8 has claimed to be the father of Banarsi Kuer @ Maya Devi. During his examination-in-chief, has stated that Banarsi Kuer @ Maya Devi is his daughter who was married with Awadhesh Singh of village-Parsauni who died about 13 years ago. Awadhesh Singh had married twice. He married with his daughter. His daughter is his second wife. After death of Awadhesh Singh, his daughter became separate from Udaibhan and Chandrabhan. All the properties have been partitioned. Land has also been partitioned. It is not a fact that



his daughter Banarsi Kuer @ Maya Devi was/is a maid-servant of Udaibhan Singh. During cross-examination at the end of other defendants, he has stated at para-3 that Banarsi Kuer has got an alias name as Maya Devi. About 14 years ago, his daughter was married with Awadhesh Singh. At the end of plaintiff, during course of cross-examination, he at para-4, has stated that at the time of marriage, his daughter was aged about 11-12 years. Awadhesh Singh was aged about 17-18 years. Then has stated that marriage was solemnized in *Jeth (Shukla-Paksha)*. *Tilak* was performed in the month of *Fagun*. Dahau Thakur was *Hajam* and Bhola Tiwari was *Pandit*. At para-5, he has stated that at the time of marriage, father of Awadhesh, namely, Shyamlal Singh was alive. Shyamlal died about 10-11 years ago. In para-6, he has stated that at the time of marriage of his daughter, defendant Udaibhan and Chandrabhan were already married. About 4-5 years prior to marriage of his daughter, Awadhesh was married at village, Mangalpur Patni but he is not knowing with whom. Gita is the daughter from the first wife. Gita has been married but he is not knowing her husband's name. In para-7, he has stated that his wife died one year after the marriage of Banarsi Kuer @ Maya Devi. In para-8, he has stated that Gita has not gone to her place. He has further stated



that marriage of Gita was performed by Udaibhan and Chandrabhan. He had not participated at that very occasion. At para-9, he has stated that he had not met with Gita recently. He had gone to the place of Udaibhan and Chandrabhan last year. In para-10, he has stated that Awadhesh died in the month of *Ashwin* or *Kartik*. He had not gone in *Shradha*. In para-11, he has stated that family has got 35-36 Bighas of land. No land is under possession of Gita. All the lands are being managed by Udaibhan, Chandrabhan and Banarsi Kuer @ Maya Devi. For the last 7-8 years, Banarsi Kuer @ Maya Devi is managing 5-6 Bighas of land. Partition had not affected in his presence. He had not seen any document relating to partition. In para-12, he has admitted that Banarsi Kuer @ Maya Devi had sold away some of her land in favour of other defendant. In para-13, he has stated that there happens to be dispute in between Gita and Banarsi Kuer @ Maya Devi over her share. Then he denied the suggestion that at the instance of Udaibhan, he falsely deposed.

26. DW-15 is, allegedly, cousin (Mamera Bhai) of Banarsi Kuer @ Maya Devi. Fortunately, he happens to be co-villager of the plaintiff as well as defendant no. 1 to 9. He during his examination-in-chief has stated that he knew his co-villager, Awadhesh Singh. His second marriage was solemnized



with daughter of Mukhlal Singh. Mukhlal Singh is his Mamu. Banarsi Kuer @ Maya Devi is his Mameri sister. Banarsi Kuer @ Maya Devi is separate from Udaibhan and Chandrabhan for the last 7-8 years. During cross-examination at the end of other defendant, he has stated that about 13 years ago, Awadhesh Singh died. At para-5, he has stated that Mukhlal Singh has one daughter and three sons. Name of sons are Lakshman Singh, Satyanarain Singh and Gannu Singh. Gannu is unmarried. He is unable to say where marriage of remaining two have been performed and with whose daughters. At para-6, he has stated that at the time of second marriage of Awadhesh with Banarsi Kuer @ Maya Devi, his father, Shyamlal Singh was alive. Shyamlal died 3-4 months after second marriage of Awadhesh Singh. In para-8, he has stated that partition was not effected in his presence. He has further stated that Banarsi Kuer @ Maya Devi is separately paying rent and is in possession of rent receipt independently. At para-9, he has stated that he is unable to say as to how many area is in possession of Banarsi Kuer @ Maya Devi.

27. Second set of evidence on this very score is that of other defendants and in the centre point, Udaibhan, (DW-13) uncle of Gita stood. He during his examination-in-chief has



stated that he happens to be defendant no. 1. There had been partition amongst his father and uncle. At para-2, he has stated that his brother Awadhesh had two marriages. The first marriage was solemnized at village, Mangalpur Patni. His first wife died leaving behind a daughter who is plaintiff, Gita Devi. After death of first wife, Awadhesh was re-married at village-Rampur Bauharwa under Kesaria PS with Banarsi Kuer @ Maya Devi. Then he denied the suggestion that Banarsi Kuer @ Maya Devi is his maid-servant. He also denied the suggestion that she happens to be daughter of Brahamdeo Singh of village, Bauharwa under Manjhaulia Police Station rather she happens to be daughter of Mukhlal of Bauharwa under Kesaria PS. Then has stated that after death of his father, Awadhesh became Karta of the family and after death of Awadhesh, he succeeded as Karta and Karobari of the family. After one years of death of Awadhesh, Banarsi Kuer @ Maya Devi got separated from them whereupon, partition took place. Subsequently thereof, memorandum of partition was ascribed. Then has stated that there happens to be no movable property. It has also been disclosed that schedule of movable property given under plaint is wrong and in likewise manner, the details of the immovable property given under the plaint is also wrong. He at the foot of



the WS has given the correct figure of immovable property. In para-5, he has stated that Gita used to call Banarsi Devi mother (Maa) while Banarsi Devi as Babuni. Then he stated that they are not money-lenders. Then has admitted that he had purchased 16 Katthas of land from Banarsi Kuer @ Maya Devi. During cross-examination at para-6, there happens to be cross-examination relating to genealogical table of his family followed with partition. At para-7, he has admitted that plaintiff has got share in his ancestral property. At para-8, he has admitted that he possesses list relating to land of his family but has not filed the same. It has also been stated that no land is in possession of the plaintiff. Plaintiff-Gita Devi's share co-relates with the share of Banarsi Kuer @ Maya Devi. Five Bighas and 10 Katthas is in possession of Banarsi Kuer @ Maya Devi. Then has detailed the area having in possession of Banarsi Kuer @ Maya Devi lying at different village. He has further stated that Gita Devi has got half share. Then has stated that Banarsi Kuer @ Maya Devi gives due respect to Gita. Gita was living along with Banarsi Kuer @ Maya Devi before her marriage. In para-10, he has stated that he got gift from his mother relating to the land possessed by them. He has further stated that for the last 7-8 years, he got separated from Banarsi Kuer @ Maya Devi. At



the time of partition, Gita was aged about 10 years. In para-11, he has stated that Banarsi Kuer @ Maya Devi is a quarrelsome lady, whereupon, she separated herself. Partition was effected through Panch who, after visiting the plot, demarcated the same. In para-12, he has stated that all the co-sharers have signed/put LTI over the same. The document was ascribed by Ramadhar Singh. At para-14, he has disclosed with regard to partition of immovable property. At para-15, he has stated that his marriage as well as his brothers' marriage including second marriage of Awadhesh was solemnized during life time of their father. At para-16, he has stated that the first marriage was solemnized at village, Mangalpur, Patna. Just one and half years of death of first wife, Awadhesh remarried. The first wife of Awadhesh died in the year 1963. Awadhesh re-married in the month of Jyeshtha, 1964. In para-18, he has stated that Satyanarayan and Laxman are the brothers of Banarsi Kuer @ Maya Devi. Six years after death of Awadhesh, plaintiff-Gita Devi was married. In para-19, he has stated that at the time of marriage of Gita, Satyanarayan had come. Then has denied the suggestion that the father's name of Banarsi Kuer happens to be Brahamdeo having her Naihar at Bahuarwa under Manjhaulia PS. He has further stated that he had purchased land from Banarsi Kuer @ Maya Devi and at that



very time, he had not taken consent of Gita Devi. Then he denied the suggestion that Banarsi Kuer is his maid-servant and only to encroach upon the share of Gita, false document has been created by him flashing the story of second marriage of Awadhesh and, Banarsi Kuer to be his second wife. Then he denied the suggestion that no partition had ever taken place. After amendment of the plaintiff only over details of immovable property, he again came up to depose having no substantial substance.

28. DW-12 is Phupha of plaintiff-Gita Devi. During examination-in-chief, he has stated that he happens to be son-in-law of Shyamlal (grand-father of plaintiff, Gita Devi). His wife is alive. Awadhesh had married twice. The first marriage was solemnized at village-Mangalpuri, Patni and the second marriage at village-Bahuara under Kesaria PS. His first wife is dead. After death of first wife, he remarried. His second wife is alive. After death of Awadhesh, his second wife separated herself from her Devar. Properties have been partitioned. During cross-examination, has stated that Shyamlal and his brother Narsingh Singh were separate since before. At the end of plaintiff, he stated at para-5, that his wife is at his house. His wife is the elder sister of Awadhesh. In para-6, he has



stated that Awadhesh was married after his marriage. Awadhesh was re-married 10-12 years after first marriage. First wife of Awadhesh died one year earlier to second marriage. Awadhesh died about 10 years ago. Then at para-7 has stated that his wife had not come at the time of Shradha of the first wife of Awadhesh as well as at the time of Shradha of Awadhesh but, at the time of second marriage, his wife had come. In para-8, he has stated that he had participated during re-marriage of Awadhesh. He was at that very time 20-25 years old. Then has stated at para-9, that Banarsi Kuer @ Maya Devi is the name of second wife of Awadhesh and she happens to be quarrelsome lady. He does not know Asharfi Keur. In para-11, he has stated that he had heard name of Gita Devi. Banarsi Kuer @ Maya Devi performed marriage of Gita Devi. In para-12, he has stated that partition was not affected in his presence. In para-13, he has stated that 4-5 Bighas of land is under possession of Banarsi Kuer @ Maya Devi. No land is in possession of Gita Devi. In para-14, he has stated that Gita Devi and Banarsi Kuer @ Maya Devi are on strained relationship. Then has denied the suggestion that Maya Devi is the daughter is Brahamdeo of village-Bahuarwa under Manjhauliya Police Station.

29. From the remaining evidence having been



adduced on behalf of defendants no. 1 to 10, it is crystal clear that none of them had spoken with regard to inter se relationship in between Gita Devi and Banarsi Kuer @ Maya Devi, more particularly, whether they have heard Gita Devi calling Banarsi Kuer @ Maya Devi as mother and Banarsi Kuer @ Maya Devi a daughter at any stretch of time. They have not spoken Gita Devi, Banarsi Kuer @ Maya Devi ever occupied common house away from Defendant No. 1 to 9 or all were conjointly living. Only defendant no. 13 who under para-5 has stated that Banarsi Kuer @ Maya Devi called plaintiff as Babuni while plaintiff-Gita Devi as mother but failed to say with regard to place of residence. Others have simply deposed over the fact that Awadhesh was re-married and, name of second wife of Awadhesh (deceased) happens to be Banarsi Kuer @ Maya Devi. None of them including Banarsi Kuer even uttered to the effect that she resided in the house along with other family members, even after partition she remained in the same house or has separate accommodation.

30. Even on proper scrutiny of evidence of the DWs, as referred above including that of Appellant/Defendant/Intervenor, Banarsi Kuer @ Maya Devi, the same is found shaky. The reason is, Fufa of Gita



Devi(Plaintiff) has said that his wife never visited at her Maika at the time of death/Shradh of mother of Gita Devi as well as Awadhesh Singh. Awadhesh Singh remarried ten years after death of first wife. In likewise manner, father of Banarsi Kuer @ Maya Devi deposed that he had not participated at the time of Shradh of husband of Banarsi Kuer @ Maya Devi who at that very time, even being only daughter below 18 years of age. Really, it could be believed. None of the DWs has stated that Awadhesh Singh was suffering from cancer save and except Banarsi Kuer @ Maya Devi. Udaibhan Singh (DW-13) never claimed that the deceased was suffering from cancer and he used to accompany Awadhesh to doctor, he died at Patna, funeral was done at Patna by him. Banarsi Kuer @ Maya Devi was not present. They have not claimed that they used to call Banarsi Kuer as Bhabhi. On the other hand, the evidence of Banarsi Kuer @ Maya Devi is she never accompanied Awadhesh to doctor. She is not aware where prescriptions of doctor relating to her husband Awadhesh were kept. All the aforesaid events really justify the genuine conduct

31. At one occasion, Defendant Nos 1 to 9 coloured Banarsi Kuer to be quarrelsome lady who just after death of Awadhesh insisted for partition, got partition, on the



other hand, they supported her, contested conjointly, bore expenses and lastly, got a sale deed during midst of trial, that too without taking permission from the court.

32. Whenever identity of an individual comes under controversy being a member of the family, the evidence relating thereto has to be tendered complying mandate of Section 50 of the Evidence Act. For better appreciation, the same is quoted below:-

“Section 50. Opinion on relationship, when relevant.- When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any persons who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869), or in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).

33. In *Dolgobinda Paricha v. Nimai Chanran*

Mishra reported in *AIR 1959 SC 914*, it has been held:-

6. We proceed to consider the second question first. The Evidence Act states that the expression "facts in issue" means and includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows; "evidence" means and includes (1) all statements which the Court permits or requires to be made before it by witnesses



in relation to matters of fact under enquiry; and (2) all documents produced for the inspection of the Court. It further states that one fact is said to be relevant to another when the one is connected with the other in any one of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts. Section [5](#) of the Evidence Act lays down that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant and of no others. It is in the context of these provisions of the Evidence Act that we have to consider s. [50](#) which occurs in Chapter II, headed "Of the Relevancy of Facts". Section [50](#), in so far as it is relevant for our purpose, is in these terms :-

"S. [50](#). When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact".

On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are - (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the



person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the "belief" or conviction may manifest itself in conduct or behavior which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behavior as evidence of the opinion held is relevant and may, therefore, be proved. We are of the view that the true scope and effect of section [50](#) of the Evidence Act has been correctly and succinctly put in the following observations made in Chandu Lal Agarwala v. Khalilar Rahman :-

"It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision : its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'.

When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, the opinion of a person. It still remains for the Court to weigh such evidence and come to its own opinion as to the factum probandum - as to the relationship in question."

We also accept as correct the view that s. [50](#) does not make evidence of mere general reputation (without conduct) admissible as proof of relationship : Lakshmi Reddi v. Venkata Reddi [MANU/PR/0061/1937](#).



7. It is necessary to state here that how the conduct or external behavior which expresses the opinion of a person coming within the meaning of s. [50](#) is to be proved is not stated in the section. The section merely says that such opinion is a relevant fact on the subject of relationship of one person to another in a case where the court has to form an opinion as to that relationship. Part II of the Evidence Act is headed "On Proof". Chapter III thereof contains a fascicule of sections relating to facts which need not be proved. Then there is Chapter IV dealing with oral evidence and in it occurs s. [60](#) which says inter alia :-

"S. [60](#). Oral evidence must, in all cases whatever, be direct; that is to say -
if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense in that manner;
if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds."

If we remember that the offered item of evidence under s. [50](#) is conduct in the sense explained above, then there is no difficulty in holding that such conduct or outward behavior must be proved in the manner laid down in s. [60](#); if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of s. [50](#), and it must be proved in the manner laid down in the provisions



relating to proof. It appears to us that portion of s. [60](#) which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of s. [50](#) in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under s. [50](#) or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of s. [60](#). This, in our opinion, is the true inter-relation between s. [50](#) and s. [60](#) of the Evidence Act. In *Queen Empress v. Subbarayan Hutchins*, J., said :-

"That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge."

While we agree that s. [50](#) affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special means of knowledge, we do not agree with Hutchins, J., when he says that the section seems to imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. We do not think that s. [50](#) puts any such limitation.

34. That means to say, when the court has to



form an opinion as to the identification of a person to other, on account being inter-related, what is relevant as reasoned under Section 50 of the Evidence Act is the opinion as to the existence of such relationship, which must be an opinion of a person as a member of the family or otherwise, has special means of knowledge on the subject and which opinion must be expressed by conduct of the witness towards that person whose relationship was in dispute. In other words, Section 50 of the Evidence Act makes the opinion of a witness relevant only if the same was expressed by conduct. It is the witness opinion based on his conduct-his outward or external behaviour towards the person whose relationship was to be established, that would be relevant. The conduct must be of such a type that must show to the court that the witness himself was convinced about the said relationship. In gist, the nature of evidence as required to be placed in terms of Section 50 of the Evidence Act is (A) The witness should have special means of knowledge about the relationship either as a member of the family or otherwise (B) That witness must expose to his own conduct towards the person whose relationship is in dispute and on the basis thereof, he had formed an opinion about the relationship. It is not the conduct of those two persons inter se whose relationship was in



dispute but the conduct of the witness himself towards them.

35. Not only this, the other segment relating to the issue in hand could be seen through Section 32(5), 32(6) & 32(7) of the Evidence Act, which reads as follows:-

32(5) or relates to existence of relationship.- When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

32(6) or is made in Will or deed relating to family affairs.- When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons deceased, and is made in any Will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

32(7) or in document relating to transaction mentioned in section 13, clause (a).- When the statement is contained in any deed, Will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

36. So, as per Section 32(5) of the Evidence Act, declaration of deceased family member is admissible. That means to say, in order to fulfil the requirement, one has to bring on record properly that deceased was calling a person (disputed) by such name, or deceased had introduced the person (anglo) to



be (relation). Simultaneously, the declarant must appear to have had fair knowledge, or fair opportunity for acquiring knowledge on the subject testified to. That means to say, in order to properly appreciate the same, there should be fulfillment of two major ingredients (A) he had special means of knowledge (B) It was made ante litem motam (means before the case began)

37. From the evidence as discussed hereinabove, it is crystal clear that what to talk about others, even Banarsi Kuer @ Maya Devi had not deposed that Gita Devi used to call her mother (Maa) and she used to address her daughter. Save and except Udaibhan Singh, none had corroborated the same, nor any of them had stated that they have seen/heard Shyam Lal Singh calling Banarsi Kuer as Dulhin, Awadhesh calling her or introducing her as his wife. In likewise manner, no one had said that Asharfi Kuer had even called her Dulhin nor any of the respondent/defendant including Udaibhan had disclosed that they used to call Banarsi Kuer as Bhabhi. For want of aforesaid material, it could safely be inferred that no evidence has been laid at the end of appellant in accordance with Section 50 of the Act, nor the witnesses deposed in accordance with Section 32(5), (6) of the Evidence Act.

38. Now, other circumstances could be seen. As



noticed above, Banarsi Kuer @ Maya Devi is dead. As admitted, there is no controversy over status of Plaintiff/Respondent to be the step daughter of Banarsi Kuer. Then in that circumstance, after the death of Banarsi Kuer, Gita Devi should have been substituted which neither been prayed for at the end of Gita Devi nor on behalf of others. A petition was filed on behalf of Gita Devi to the effect that appeal has abated. On the other hand, one of the sons of Udaibhan (who was also one of the respondents) filed petition under Order-I Rule 10 of the CPC on the pretext that a sale-deed has been executed by the aforesaid Banarsi Kuer @ Maya Devi though during pendency of the suit, although, without obtaining permission from the Court to defend the same, he be allowed to be impleaded as an appellant, and the same has been allowed.

39. Admittedly, the transaction is hit by law of lis pendens as laid down under Section 52 of the Transfer of Property Act. How it will govern the issue, could be seen in the background of settled principle of law.

“As per Section 52 of the Transfer of Property Act, deals with the issue of lis pendens.

Lis pendens is based upon the doctrine of maxim:
“*ut lite pendente nihil innovetur*”.



It imposes a prohibition on transfer or otherwise dealing of any property during pendency of a suit provided the conditions laid down in the sections are satisfied”.

40. Section 52 does not make the transaction void. It merely makes any right so created by it inoperative against the party of the suit. Make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. The effect of Section 52 is not to wipe such sale out altogether, but to subordinate it to the rights based on the decree on the suit.

41. It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly, the language of the courts often so describes its operation. It affects him not because it amounts to notice but because any law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as prejudice the opposite party.

42. In *Sahib Chandra & Anr v. Lachmi Narain & Ors* reported in *AIR 1929 PC 243*, it has been held as follows:- (page 254 (right side, 1st para)

“....Their Lordships are of opinion that the view of the High Court on this last mentioned point is correct, and in fact Mr. Dunne, for the appellants, did not seriously contest it. Their



Lordships are, however, of opinion that the purchasers were bound by the decision of the High Court whereby that Court increased the amount awarded by the Subordinate Judge in the original suit by Rs. 3,179. The purchasers can have no higher rights than their vendors, and it appears to their Lordships also that the sale having been made during the active prosecution of the litigation between the mortgagees and the mortgagors, the purchasers must be bound by the result of the litigation: see S.52, T.P. Act, and *Faiyaz Hussain Khan v. Prag Narain* [1907] 29 All. 339.”

43. In *Jayaram Mudaliar v. Ayaswami* as reported in *AIR 1973 SC 569*, It has been held as follows:-

“45. As some argument has been advanced on the supposed inapplicability of the general doctrine of lis pendens to the impugned sales, the nature, the "basis, and the scope of this doctrine may be considered here.

46. It has been pointed out, in Bennet "On lis pendens", that, even before Sir Francis Bacon framed his ordinances in 1816 "for the better and more regular administration of justice in the chancery, to be daily observed" stating the doctrine of lis pendens in the 12th ordinance, the doctrine was already recognized and enforced by Common law Courts. Bacon's ordinance on the subject said :

“No decree bindeth any that commeth in bona fide, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill, nor the order; but, where he comes in pendente lite, and, while the suit is in full prosecution, and without any colour of allowance or privity of the court, there regularly the decree bindeth; but, if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice.

The doctrine, however, as would be evident from Bennet's work mentioned above, is derived from the rules of jus gentium which became embodied in the Roman Law where we find the maxim : "Rem de qua controversia prohibemur in acrum



dedicare" (a thing concerning which there is a controversy is prohibited, during the suit from being alienated).

“It is a general rule which seems to have been recognized in all regular systems of jurisprudence, that during the pendency of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced”.

47. In the Corpus Juris Secundum (Vol. LIV-p. 570), we find the following definition :

“Lis pendens literally means a pending suit; and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in suit, pending the continuance of the action, and until final judgment therein.”

48. Expositions of the doctrine indicate that the need for it arises from the very nature of the jurisdiction of Courts and their control over the subject of litigation so that parties litigating before it may not remove any part of the subject matter outside the power of the court to deal with it and thus make the proceedings infructuous.

49. It is useful to remember this background of Section [52](#) of our Transfer of Property Act which lays down :

“During the pendency in any Court...of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

50. It is evident that the doctrine, as stated in Section [52](#), applies not merely to actual transfers of rights which are subject-matter of litigation but to other dealings with it "by any party to the suit or proceeding, so as to affect the right of any other party thereto". Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax Collecting authorities of the Government, which proceeds



against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.”

44. In *Nagubai Ammal & Ors. v. B. Shama Rao & Ors* as reported in *AIR 1956 SC 593*, it has been held as follows:-

“15. Now, there is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose". (Wharton's Law Lexicon, 14th Edition, page 212). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and



earnest. The allegations in the petition of Abdul Huq set out above show that the suit itself was not attacked as collusive, but that the execution proceedings were impeached as fraudulent. It should be mentioned that on this petition the District Judge passed an order on 30-6-1932 directing the Official Receiver to take the necessary steps and report. But nothing came out of this.

45. *In Gurmit Singh Bhatia v. Kiran Kant*

Robinson & Ors reported in *2019 AIR SC 3577*, it has been

held :

“5.1 At the outset, it is required to be noted that the original Plaintiffs filed the suit against the original owner-vendor-original Defendant No. 1 for specific performance of the agreement to sell with respect to suit property dated 3.5.2005. It is an admitted position that so far as agreement to sell dated 3.5.2005 of which the specific performance is sought, the Appellant is not a party to the said agreement to sell. It appears that during the pendency of the aforesaid suit and though there was an injunction against the original owner-vendor restraining him from transferring and alienating the suit property, the vendor executed the sale deed in favour of the Appellant by sale deed dated 10.07.2008. After a period of approximately four years, the Appellant filed an application before the learned trial Court Under Order 1 Rule [10](#) of the Code of Civil Procedure for his impleadment as a Defendant. The Appellant claimed the right on the basis of the said sale deed as well as the agreement to sell dated 31.3.2003 alleged to have been executed by the original vendor. The said application was opposed by the original Plaintiffs. The learned trial Court despite the opposition by the original Plaintiffs allowed the said application which has been set aside by the High Court by the



impugned judgment and order. Thus, it was an application Under Order 1 Rule [10](#) of the Code of Civil Procedure by a third party to the agreement to sell between the original Plaintiffs and original Defendant No. 1 (vendor) and the said application for impleadment is/was opposed by the original Plaintiffs. Therefore, the short question which is posed for consideration before this Court is, whether the Plaintiffs can be compelled to implead a person in the suit for specific performance, against his wish and more particularly with respect to a person against whom no relief has been claimed by him?

5.2 An identical question came to be considered before this Court in the case of Kasturi (supra) and applying the principle that the Plaintiff is the dominus litis, in the similar facts and circumstances of the case, this Court observed and held that the question of jurisdiction of the court to invoke Order 1 Rule [10](#) Code of Civil Procedure to add a party who is not made a party in the suit by the Plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. It is further observed and held by this Court that two tests are to be satisfied for determining the question who is a necessary party. The tests are-(1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party. It is further observed and held that in a suit for specific performance the first test can be formulated is, to determine whether a party is a necessary party there must be a right to the same relief against the party claiming to be a necessary party, relating to the same subject matter involved in the proceedings for specific performance of contract to sell. It is



further observed and held by this Court that in a suit for specific performance of the contract, a proper party is a party whose presence is necessary to adjudicate the controversy involved in the suit. It is further observed and held that the parties claiming an independent title and possession adverse to the title of the vendor and not on the basis of the contract, are not proper parties and if such party is impleaded in the suit, the scope of the suit for specific performance shall be enlarged to a suit for title and possession, which is impermissible. It is further observed and held that a third party or a stranger cannot be added in a suit for specific performance, merely in order to find out who is in possession of the contracted property or to avoid multiplicity of the suits. It is further observed and held by this Court that a third party or a stranger to a contract cannot be added so as to convert a suit of one character into a suit of different character. In paragraphs 15 and 16, this Court observed and held as under:

15. As discussed hereinafter, whether Respondents 1 and 4 to 11 were proper parties or not, the governing principle for deciding the question would be that the presence of Respondents 1 and 4 to 11 before the court would be necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. As noted hereinafter, in a suit for specific performance of a contract for sale, the issue to be decided is the enforceability of the contract entered into between the Appellant and Respondents 2 and 3 and whether contract was executed by the Appellant and Respondents 2 and 3 for sale of the contracted property, whether the Plaintiffs were ready and willing to perform their part of the contract and whether the Appellant is entitled to a decree for specific performance of a contract



for sale against Respondents 2 and 3. It is an admitted position that Respondents 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed. Admittedly, they based their claim on independent title and possession of the contracted property. It is, therefore, obvious as noted hereinafter that in the event, Respondents 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is not permissible in law. In the case of *Vijay Pratap v. Sambhu Saran Sinha* [[MANU/SC/0698/1996](#) : (1996) 10 SCC 53] this Court had taken the same view which is being taken by us in this judgment as discussed above. This Court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. As discussed above, in the event any decree is passed against Respondents 2 and 3 and in favour of the Appellant for specific performance of the contract for sale in respect of the contracted property, the decree that would be passed in the said suit, obviously, cannot bind Respondents 1 and 4 to 11. It may also be observed that in the event, the Appellant obtains a decree for specific performance of the contracted property against Respondents 2 and 3, then, the Court shall direct execution of deed of sale in favour of the Appellant in the event Respondents 2 and 3 refusing to execute the deed of sale and to obtain possession of the contracted property he has to put the decree in execution. As noted hereinafter, since Respondents 1 and 4 to 11 were not parties in the suit for specific



performance of a contract for sale of the contracted property, a decree passed in such a suit shall not bind them and in that case, Respondents 1 and 4 to 11 would be at liberty either to obstruct execution in order to protect their possession by taking recourse to the relevant provisions of Code of Civil Procedure, if they are available to them, or to file an independent suit for declaration of title and possession against the Appellant or Respondent 3. On the other hand, if the decree is passed in favour of the Appellant and sale deed is executed, the stranger to the contract being Respondents 1 and 4 to 11 have to be sued for taking possession if they are in possession of the decretal property.

16. That apart, from a plain reading of the expression used in Sub-rule (2) Order 1 Rule [10](#) Code of Civil Procedure "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the Plaintiff-Appellant and the Defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the Plaintiff-Appellant on one hand and Respondents 2 and 3 and Respondents 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of Respondents 1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion



made hereinafter, Respondents 1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale.

That thereafter, after observing and holding as above, this Court further observed that in view of the principle that the Plaintiff who has filed a suit for specific performance of the contract to sell is the dominus litis, he cannot be forced to add parties against whom, he does not want to fight unless it is a compulsion of the Rule of law. In the aforesaid decision in the case of Kasturi (supra), it was contended on behalf of the third parties that they are in possession of the suit property on the basis of their independent title to the same and as the Plaintiff had also claimed the relief of possession in the plaint and the issue with regard to possession is common to the parties including the third parties, and therefore, the same can be settled in the suit itself. It was further submitted on behalf of the third parties that to avoid the multiplicity of the suits, it would be appropriate to join them as party Defendants. This Court did not accept the aforesaid submission by observing that merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract to sell because they are not necessary parties as there was no semblance of right to some relief against the party to the contract. It is further observed and held that in a suit for specific performance of the contract to sell the lis between the vendor and the persons in whose favour agreement to sell is executed shall only be gone into and it is also not open to the Court to decide whether any other parties have acquired any title and possession of the contracted property. It is further observed and held by this Court in the aforesaid decision that if the Plaintiff who has filed a suit for specific performance of the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the



suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, it is always done at the risk of the Plaintiff because he cannot be forced to join the third parties as party-Defendants in such suit. The aforesaid observations are made by this Court considering the principle that Plaintiff is the dominus litis and cannot be forced to add parties against whom he does not want to fight unless there is a compulsion of the Rule of law. Therefore, considering the decision of this Court in the case of Kasturi (supra), the Appellant cannot be impleaded as a Defendant in the suit filed by the original Plaintiffs for specific performance of the contract between the original Plaintiffs and original Defendant No. 1 and in a suit for specific performance of the contract to which the Appellant is not a party and that too against the wish of the Plaintiffs. The Plaintiffs cannot be forced to add party against whom he does not want to fight. If he does so, in that case, it will be at the risk of the Plaintiffs.

46. The same view has again been followed in *Madhukar Nivrutti Jagtap & Ors. v. Smt. Pramila Bai Chandulal Parandekar (Dead) Thr. Lrs & Ors.* as reported in *2019 AIR SC 4252*.

47. That being so, appellant/defendant-2nd Party/intervenor, Banarsi Kuer @ Maya Devi (since deceased) failed to substantiate her status to be the second wife of Awadhesh Singh and is answered accordingly. And in likewise manner, Summarizing the principle so laid down as it is based upon the principle of justice, equity and good conscience. It



could be perceived in the backdrop of (i) what right or interest has been transferred (ii) who the affected party is (iii) how and in what manner the transfer is likely to affect any party to the pending proceeding.

48. From the material as is evident from the record, it is abundantly clear that Udaibhan Singh, one of the uncles who is backing Banarsi Kuer throughout in order to have weightage over her status, got the sale-deed in order to suggest that being family member, he had acknowledged status of Banarsi Kuer @ Maya Devi, the status of Madhusudan Singh is found duly eclipsed.

49. In the background of aforesaid finding, all the remaining points have to be recorded adverse to the appellant/defendant-2nd Party/intervenor, Banarsi Kuer @ Maya Devi (since deceased) represented by Madhusudan Singh whereupon, this appeal is found meritless, and is, dismissed.

50. However, in the facts and circumstances of the case, parties will bear their own costs.

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(Aditya Kumar Trivedi, J)

AFR/NAFR	AFR
CAV DATE	07.01.2020
Uploading Date	14.02.2020
Transmission Date	14.02.2020

