

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.216 of 2013

- 1.1. Sri Raja Ram Singh @ Raja Ram Sharma son of Late Yamuna Prasad Singh, husband of Smt Shanti Devi, Resident of Village- Dhanarua, P.O. and P.S.- Dhanarua, District- Patna.
- 1.2. Kaushlendra Kumar, son of Raja Ram Singh @ Raja Ram Sharma, Resident of Village- Dhanarua, P.O. and P.S.- Dhanarua, District- Patna.
- 1.3. Raghubansh Mani, son of Raja Ram Singh @ Raja Ram Sharma, Resident of Village- Dhanarua, P.O. and P.S.- Dhanarua, District- Patna.
- 1.4. Nagmani, son of Raja Ram Singh @ Raja Ram Sharma, Resident of Village- Dhanarua, P.O. and P.S.- Dhanarua, District- Patna.
- 1.5. Neelam Kumari, daughter of Raja Ram Singh @ Raja Ram Sharma, Resident of Village- Dhanarua, P.O. and P.S.- Dhanarua, District- Patna.

... .. Appellant/s

Versus

- 1.1. Poonam Kumari Daughter of Late Brijnandan Sharma, Wife of Atish Sharma Resident of Village- Amahara, P.O.- Amahara, P.S.- Bihta, District- Patna- 801118.
- 1.2. Punita Kumari Daughter of Late Brijnandan Sharma, Wife of Raju Kumar Resident of Village- Amahara, P.O.- Amahara, P.S.- Bihta, District- Patna- 801118.
- 1.3. Sunita Kumari Daughter of Late Brijnandan Sharma, Wife of Mritunjay Kumar Resident of Village- Mithapur, P.O.- Lai, P.S.- Bihta, District- Patna- 801112.
- 1.4. Smt. Urmila Devi Wife of Late Brij Nandan Sharma Resident of Village- Bajanchak, P.S.- Naubatpur, P.O.- Piplawama, District- Patna, Pin- 801109.
- 2.1. Saroj Devi Wife of Late Surya Nandan Sharma Resident of Village- Bajanchak, P.S.- Naubatpur, District- Patna.
- 2.2. Rupam Kumar Daughter of Late Surya Nandan Sharma, Wife of Raj Kumar Resident of Berhana, P.S.- Barh, District- Patna.
- 2.3. Soni Kumari Daughter of Surya Nandan Sharma, Wife of Binayak Kumar Resident of Bihta, P.S.- Bihta, District- Patna.
3. Deepu Son of Brij Nandan Sharma Resident of Village- Bajan Chak, P.O.- Piplawan, P.S.- Naubatpur, District- Patna.
4. Dinu @ Kaju Son of Brij Nandan Sharma Resident of Village- Bajan Chak, P.O.- Piplawan, P.S.- Naubatpur, District- Patna.
5. Puttu @ Ankit Kumar, S/o Surya Nandan Sharma Resident of Village- Bajan Chak, P.O.- Piplawan, P.S.- Naubatpur, District- Patna.
6. Satish Kumar @ Raju Son of Late Chandrakanti Devi Wife of Hirdaya



- Narayan Singh D/o Net Narayan Prasad Singh Resident of Village- Tineri, P.S.- Masaurhi, District- Patna.
7. Rabi Kumar Son of Late Chandrakanti Devi Wife of Hirdaya Narayan Singh D/o Net Narayan Prasad Singh Resident of Village- Tineri, P.S.- Masaurhi, District- Patna.
 8. Chit Ranjan Kumar Son of Late Chandrakanti Devi Wife of Hirdaya Narayan Singh D/o Net Narayan Prasad Singh Resident of Village- Tineri, P.S.- Masaurhi, District- Patna.
 9. Smt. Surja Kanti Devi Wife of Sheopujan Singh, D/o Late Net Narayan Prasad Singh, Resident of Village- Lari, P.S.- Kurtha, District- Arwal.
 10. Shambhu Kumar Son of Late Mahendra Kumar Village- Dhibri, P.O.- Patiyawan, P.S.- Sakurabad, Distt.- Jehanabad
 11. Sarvesh Kumar Son of Late Mahendra Kumar, Village- Dhibri, P.O.- Patiyawan, P.S.- Sakurabad, Distt.- Jehanabad.
 12. Mala Devi wife of Sri Birendra Sharma, D/o Late Hiramani Devi, resident of Village- Karsan, P.S.- Feshar, District- Aurangabad.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Jitendra Kishore Verma, Advocate Mr. Shreyansh Goyal, Advocate Mr. Neelam Kumari, Advocate
For the Respondent/s	:	Mr. S.N.P. Singh, Sr. Advocate Mr. Gaurav Kumar, Advocate Mr. Pramod Kumar Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
ORAL JUDGMENT

Date : 23-06-2025

Heard Mr. Jitendra Kishore Verma, learned counsel for the appellants and Mr. S.N.P. Singh, learned senior counsel for the respondents.

2. This Second Appeal has been filed against the judgment and decree dated 29.04.2013 passed by the learned Additional District Judge- II, Danapur, Patna in Title Appeal No. 17 of 2009 whereby the learned lower Appellate Court reversed the judgement and decree dated 20.01.2009 passed by the learned Munsif, Danapur, Patna in Title Partition Suit No. 143 of 1989.



3. The plaintiff-appellant filed Partition Suit No. 143 of 1989 for challenging the gift deed dated 24/25-09-1986 executed by her father in favour of his two nephews (brother's sons) alleging it to be fraudulent, fabricated, *void ab initio* and not binding upon her. Accordingly, she prayed for a declaration to that effect and sought partition of her half share in Schedule II property.

4. The case of the plaintiff is that one Basudev Singh was the common ancestor of the parties having three sons namely, Shiv Nandan Singh, Shyam Nandan Singh and Ram Lakhan Singh. Shiv Nandan Singh had two sons namely, Ram Naresh Prasad Singh (father of the plaintiff and donor of the gift deed) and Net Narayan Prasad Singh as well as a daughter, Hiramani Devi (intervenor-defendant).

5. It is further case of the plaintiff that, Shyam Nandan Singh, the second son (whose wife pre-deceased him) died issueless and Ram Lakhan Singh separated from the family in the year 1943 by way of partial partition meaning thereby separating his share from the branch of Shiv Nandan Singh. The said partition was made branch-wise. While Ram Lakhan Singh took his share and the branch of Shiv Nandan Singh as a whole got separated from the branch of Ram Lakhan Singh. However, the two sons and



a daughter of Shiv Nandan Singh remained in jointness and there was no partition between them, as such, the dispute is amongst the branch of Shiv Nandan Singh *inter se*. At the time of partial partition in the year 1943, the remaining joint family consisted of Ram Naresh Prasad Singh and Net Narayan Prasad Singh as coparceners with the latter as *Karta*. Both brothers had half undivided share in the joint family property. It is further contended that these two brothers had also a full sister, Hiramani Devi, who was later impleaded as intervenor-defendant.

6. Further case of the plaintiff is that during the jointness of Ram Naresh Prasad Singh and Net Narayan Prasad Singh, her father Ram Naresh Prasad Singh purportedly executed a gift deed dated 24/25-09-1986 in favour of Brij Nandan Sharma (defendant no. 2) and Surya Nandan Sharma (defendant no. 3) who are sons of Net Narayan Prasad Singh (defendant no. 1). The Schedule II property being joint family property was gifted by claiming it to be the personal share of Ram Naresh Prasad Singh although no partition had taken place between the two brothers. It has been further pleaded in the plaint that there was no partition in the joint family of Ram Naresh Prasad Singh and Net Narayan Prasad Singh. Therefore, the gift deed executed by the father of the plaintiff is *void ab initio* and is also forged and fabricated as at the



time of execution of the gift deed, the donor was suffering from paralysis and also that he was not competent to understand the nature and purport of the gift, on the said account the gift is void.

7. On summons, defendant nos. 1, 2 & 3 filed their written statement. The defendant nos. 2 and 3 are donees of the said gift deed whereas defendant no. 1 is the father of the defendant no. 2 and 3. Apart from ornamental objection with regard to maintainability of the suit, it was further contended that there was no unity of title and possession between the plaintiffs and defendants and that Net Narayan Prasad Singh was not the 'Karta' of the said family rather plaintiff's father Ram Naresh Prasad Singh was the 'karta' of the family till he was alive.

8. It is further pleaded that when the gift was executed, the donor was not suffering from paralysis and was fully competent to execute the gift deed. It has been further contended that gift deed was validly executed and cannot be declared void and that the plaintiff having been completely ousted from the joint family has no share in the property. Defendant nos. 4 to 6 being minor sons of defendant nos. 2 and 3 were being represented by their respective fathers as guardian and they also filed written statement supporting the case of defendant nos. 1, 2 and 3 in their written statements.



9. The intervenor-defendant namely, Hiramani Devi (plaintiff's aunt/Fua) was impleaded in the suit as intervenor-defendant and she also filed separate written statement. The intervenor-defendant pleaded that her father Shiv Nandan Singh died leaving behind his widow, Jhalka Kuar, who died in the year 1990 i.e. after enforcement of Hindu Succession Act, 1956. Thus, her mother was alive when her elder brother Ram Naresh Prasad Singh (father of the plaintiff) made the gift in the year 1986 and he died on 03.05.1989. In such circumstances, her mother also inherited properties and the intervenor-defendant was also entitled to a share along with her two brothers in the estate of her parents separately when her father predeceased her mother limited estate in the property become absolute and accordingly after her death, her property would devolve upon her three children including the intervenor-defendant. It is further contended that the property in the branch of Shiv Nandan Singh was joint and was never partitioned and Ram Naresh Prasad Singh was the *Karta* of the family. The intervenor-defendant made allegation against plaintiffs and defendants of colluding with each other and not making these intervenor-defendant party as she claimed 1/3 share and challenge the claim of half share each by plaintiffs and defendants. It is also



contended that if the properties are divided, she is also entitled to get her share.

10. The learned Trial Court on analyzing the evidences and materials on record has held that Ram Naresh Prasad Singh and Net Narayan Prasad Singh had half share each in the joint family property and till his death Ram Naresh Prasad Singh remained in jointness with his brother and has further held that there is a clear evidence that Ram Naresh Prasad Singh and Net Narayan Prasad Singh were member of a joint family on the date of execution of gift deed as well as on the date of death of Ram Naresh Prasad Singh. The family was joint, therefore, the gift of joint property executed by Ram Naresh Prasad Singh is void in view of the law laid down in the case of **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** reported in **AIR 1987 SC 1775**. This issue is decided in favour of plaintiff and against the defendant and further held that plaintiff has right, title and possession over the disputed property and the plaintiff is the daughter of Ram Naresh Prasad Singh and she belong to Class I heir and has full right in the property. Plaintiff is the sole heir of Ram Naresh Prasad Singh. After the death of Ram Naresh Prasad Singh, she is entitled as per Section 6 of the Hindu Succession Act, 1956, and according to that Ram Naresh Prasad



Singh acquired 4/9 share in the joint family property so the plaintiff will get 4/9th share in the disputed property. Since the property was joint, the intervenor-defendant, who is the full sister of Ram Naresh Prasad Singh and Net Narayan Prasad Singh is also entitled to 1/9th share in the disputed property. Defendant no. 1, Net Narayan Prasad Singh has also 4/9th share in the suit property. Accordingly, the suit was decreed in favour of the plaintiff with regard to 4/9th share in the suit property and further office was directed to prepare preliminary decree.

11. Being aggrieved by the judgement and decree of Trial court, the original defendant nos. 1, 2, 3 and others filed Title Appeal No. 17 of 2009 which was allowed *vide* judgement and decree dated 29.04.2013. The Appellate Court reversed the decision of Trial Court and held that Shanti Devi (plaintiff) was not a coparcener at the time of execution of alleged deed of gift till challenging the same because daughter has been made coparcener in the month of December, 2005 and any transfer made by one of the coparcener can be challenged by coparcener only and plaintiff was not a coparcener in the property so she has no right for declaration of alleged deed of gift as null and void. The issue relates to unity of title and possession and plaintiff Shanti Devi has admitted that defendants are in possession over the disputed



property on the basis of gift deed and their names have been entered in the revenue records and the defendants became legal owner hence there is no unity of title and possession. The plaintiff's witnesses did not disclose that plaintiff's father was suffering from paralysis. Plaintiff has not filed any chit of medical paper to show that her father was actually suffering from paralytic ailment. From the entire evidence of the plaintiff, it is established and proved that Ram Naresh Prasad Singh never suffered from acute paralytic disease rather the entire evidence of defendant shows that Ram Naresh Prasad Singh executed the alleged deed of gift in the year 1986 in sound state of mind and health.

12. The learned Appellate Court further held that on the basis of evidence adduced on behalf of the plaintiff, it could not be proved that any fraud was played by the defendants during execution of the alleged deed of gift. From the whole discussion, it is proved that the alleged Deed of gift was executed by Ram Naresh Prasad Singh in sound state of mind and health in favour of the defendants. It was further held by the learned lower Appellate court that it is an admitted case of the parties that in the year 1943, the son of Basudev Singh, namely Ram Lakhan Singh got separated from the sons of Shiv Nandan Singh. This indicates that the coparcenary in the family of the late Basudev Singh was



broken in the year 1943. After the break in the coparcenary, the sons of Ram Naresh Prasad Singh and the family of Net Narayan Prasad Singh lived jointly, but no coparcenary existed between them. The plaintiff's case is not about reunion. Accordingly, it was held that after the break of coparcenary status in the year 1943, Ram Naresh Prasad Singh and Net Narayan Prasad Singh lived jointly but were not coparceners although they carried out agricultural work jointly.

13. Regarding the consent of the coparcener for making a gift of the share of the plaintiff's father, Ram Naresh Prasad Singh, who executed a gift deed in favour of the sons of Net Narayan Prasad Singh, it appears that Net Narayan Prasad Singh filed written statement stating that Ram Naresh Prasad Singh had executed gift deed and it shows that implied consent was given by Net Narayan Prasad Singh to Ram Naresh Prasad Singh for the execution of the alleged deed of gift in favour of his sons.

14. After above finding, learned Appellate Court further held that sons of Shanti Devi (plaintiff) was not a coparcener at the time of alleged deed of gift till challenging the same hence, she has no right to file the suit for declaration that alleged deed of gift is null and void. Hence, on this score also, the plaintiff is not entitled to get any relief for cancellation of aforesaid deed of gift.



15. It is further observed by the learned lower Appellate Court that the plaintiff has sought the relief of partition after declaring her title over the suit property and also for declaration that alleged deed of gift dated 24/25-09-1986 is forged, fabricated, *void ab initio* and not binding upon the plaintiff. It shows that the plaintiff wants relief for declaration of her title over the suit land and partition of the property and also for declaration that the alleged deed of gift is void. It means that in the garb of partition suit the plaintiff wants declaration of title over the disputed land hence she has to pay *ad valorem* court fees on the market value of the suit property. Accordingly, it was held that the plaintiff is not entitled to get any relief claimed for and consequently, set aside the judgment and decree dated 20.01.2009 passed by the Trial Court and accordingly dismissed the suit of the plaintiff. The appeal of the defendants was allowed with cost.

16. Against the said judgment and decree, original plaintiff (heirs of original plaintiffs were substituted vide order dated 14.02.2023) preferred Second Appeal which was admitted on 30.03.2015 and the following substantial questions of law were framed:-

I. Whether the appellate court below,
while reversing the judgment of the trial court,



has rightly held that the gift by coparcener of his undivided interest in the joint family property would be valid even when the consent of all the coparceners has not been specifically obtained?

II. Whether the appellate court below has rightly interpreted the decision of the Apex Court in the case of Thamma Venkata Subbamma v. Thamma Rattamma (AIR 1987 SC 1775) (wrongly typed as AIR 1997 SC 1775)?

17. Mr. Jitendra Kishore Verma, assisted by Mr. Shreyansh Goyal, learned counsel for the plaintiff-appellants submitted that both the substantial questions of law are inter-related and as such both are being dealt together. It is submitted that the suit property was part of joint family property when the deed of gift was executed by the plaintiff's father in favour of defendant nos. 2 and 3, which is evident and stands admitted from materials available on record especially in paragraph 8 of the written statement of defendant nos. 1, 2 and 3. D.W. 1 (defendant no. 3/ donee) has admitted in his cross examination that the family was joint. Similarly, D.W. 2 (defendant no. 2/donee) has also



admitted in his examination-in-chief that no partition was effected in the family. The evidence of D.W. 7 has admitted that the family of Ram Naresh Prasad Singh and Net Narayan Prasad Singh was joint and continued as such, till death of Ram Naresh Prasad Singh. D.W. 5 also admitted that family was joint till 1994.

18. It is further submitted that defendant nos. 1, 2 and 3 have admitted in their joint written statement that Ram Naresh Prasad Singh was looking after the entire affairs of the family and its properties and he remained *Karta* of the family. This statement is direct admission that family was joint at the time of execution of gift deed. It is also submitted that admission in pleading or judicial admission admissible under Section 58 of the Evidence Act, made by the parties, stand on a higher footing than evidentiary admission. The former class of admission are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. Reliance has been placed in the case of **Nagindas Ramdas V. Dalpatram Iccharam alias Brijram and others** reported in **AIR 1974 SC 471** (para 26). In view of aforesaid settled law, the learned Trial Court has rightly held that it has been proved by evidence that Ram Naresh Prasad Singh and Net Narayan Prasad Singh had half share each in the joint family property and till the



death of Ram Naresh Prasad Singh, he remained in jointness with his brother and has further rightly held that there is a clear evidence that Ram Naresh Prasad Singh and Net Narayan Prasad Singh were members of a joint family at the time of execution of gift deed as well as on the date of death of Ram Naresh Prasad Singh, he was a member of joint family. Therefore, the gift of joint property executed by him is void as per law laid down in the case of **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** (Supra). However, this finding of facts were not reversed by the Appellate Court by reasoned finding in teeth of Order 41 Rule 31 of the Code of Civil Procedure, 1908.

19. Learned counsel for the appellants further submitted that gift of undivided share in joint family property is void in the eyes of law. Section 122 of the Transfer of Property Act defines 'Gift' as transfer of certain existing movable or immovable property made voluntarily and without consideration. The gift deed in the present case is void as it is not a gift deed of certain properties in the sense that undivided share in joint family property is never certain, it is rather fluctuating. The gift of undivided share in the joint family property is also void under Hindu law as per Article 258 of the Mulla's Hindu Law which denotes that no coparcener can dispose of his undivided interest in the coparcenary



property by gift. The coparcener may, however, make a gift of his interest without interest of other coparcener. The said proposition of law that gift of undivided interest in Hindu undivided family is (HUF) void has been recognized in the decisions of **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** (Supra), **Smt. Subhamati Devi & Ors. V. Awadhesh Kumar Singh & Ors.** reported in **2014(1) PLJR 332 (para 12, 13 & 18)** and **Most. Sumitra Devi and another V. Most. Numu Devi and others** reported in **2015 (3) PLJR 579**.

20. Learned counsel for the appellants vehemently submitted that the learned Appellate Court has erroneously made out a third case that the family got partitioned in the year 1943 itself when Ram Naresh Prasad Singh separated from the family which has neither been pleaded by defendants nor has come in evidence. There is no material available on record to suggest that complete partition was effected in the year 1943 whereby Ram Naresh Prasad Singh and Net Narayan Prasad Singh had also got their separate shares by meets and bounds. On the contrary, it has been admitted by the parties that families of Shiv Nandan Singh consisting of Ram Naresh Prasad Singh, Net Narayan Prasad Singh and others continued to remain in jointness and was joint till Ram Naresh Prasad Singh died in the year 1989. It is submitted



that they were joint at the time of execution of gift deed dated 24/25-09-1986 and both the parties admitted that family had a *Karta* in as much as the plaintiff alleged Net Narayan Prasad Singh to be *Karta* whereas defendant alleged Ram Naresh Prasad Singh to be *Karta*. The finding noted in paragraph 22 of the Appellate Court judgment that '*It is admitted case of the parties that in the year 1943, the sons of Basudev Singh namely, Ram Lakhan Singh become separate from the sons of Shiv Nandan Prasad Singh, it means that in the year 1943, coparcenory was broken in the family of Basudev Singh.*' is not only wrong but is also based on an incorrect proposition that both parties have admitted that complete partition was affected in the family in the year 1943. It is further contended that there was complete partition in the year 1943 is absolutely incorrect and error of record and the decision of Trial Court that the family was joint at the time of execution of gift deed is correct.

21. Learned counsel for the appellants further submitted that the partition of joint family cannot be presumed in the manner in which learned lower Appellate Court has presumed it. In this regard, reliance has been placed in the case of **Smt. Subhamati Devi & Ors. V. Awadhesh Kumar Singh & Ors. (supra)** and others, wherein, while hearing challenge to gift deed of joint



family property, it was held that allegation of separation even if, it is accepted to be true cannot be sufficient to disrupt the joint status of family which can be disrupted only on partition by meets and bounds and the different coparcener coming in exclusive possession of their share. In a Hindu undivided family, the partition is complete only when the title over the joint family property which is vested in the coparcenary is transferred to the different titles of the sharers after allotment of their shares and putting them in exclusive possession of the same. In this view of the matter, the learned Appellate Court's finding that joint family status of the family had disrupted is not sustainable and is contrary to the settled law. It is submitted that the prior specific consent of co-sharers is mandatory to validate the gift. The consent of coparcener is looked into in correct perspective in the decision of Hon'ble Apex Court in the case of **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** (supra).

22. Learned Trial Court relied upon the decision in **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** (supra) for the settled principle that gift of undivided share in the joint family property is void whereas learned Appellate Court completely mis-applied the facts of that case to the present case and also misinterpreted that concept of



‘renunciation’ to reach the erroneous conclusion with consent in the present case was impliedly given after the present suit was filed which validates the gift without their being pleading with respect thereto. In the aforesaid case of the Hon’ble Apex Court, an issueless coparcener gifted his undivided share to his brother in a family which consisted only of the donor, his brother (donee) and donee’s sons and daughters. As such the gift enured to the benefit of all and nobody’s share got depleted or prejudiced. It was found that the so-called gift was intact as renunciation and not a gift as it benefited all members of the family equally and as a single body compromising joint family. It is further submitted that renunciation occurs when a person relinquishes his share in a manner as if it was never his share and accordingly, said share becomes part of the common pool and each co-sharer is equally benefited by it. However, learned Appellate Court below failed to consider that in the present case due to the gift, plaintiff has been deprived of her lawful share, as a result whereof, one co-sharer has been prejudiced and others benefited and therefore it cannot be a renunciation. The full brother of the donor namely, Net Narayan Prasad Singh was alive and he was admittedly a coparcener but nowhere it is pleaded in the entire written statement that he consented to the gift. Further, the full sister Hiramani Devi being



the intereviewer-defendant was also a co-sharer but nowhere her consent for the gift was either pleaded or proved.

23. The Appellate Court assumed consent from the subsequent conduct of the parties after the gift and not at the time of gift. Prior consent is required in view of the aforesaid decision. The Appellate Court also accepted the said principle but unsuccessfully tried to assume consent of Net Narayan Prasad Singh and has failed to even consider existence of consent or otherwise of mother of donor and sister of donor, who were alive being Class I heirs and being entitled to succeed in view of Hindu Succession Act, 1956, especially when the family of branch of Shiv Nandan Singh admittedly remained in jointness.

24. Reliance has been placed in the case of **Thimmaiah & Ors. v. Ningamma & Anr** reported in **(2000) 7 SCC 409** in which a gift deed executed by a person gifting undivided family share in property was challenged by sons (only coparcener) who infact had given prior and specific consent to the gift in the gift deed itself, on the ground that prior consent of donor, Class I heirs being the second widow and her 3 daughters as well as a daughter from first pre-deceased wife was not taken before execution of gift deed. The Hon'ble Apex Court held that in view of proviso to Section 6 of the Hindu Succession Act, 1956, interest of deceased



coparcener does not devolve by survivorship rather by succession and therefore, the interest of survivor coparcener in deceased coparcener share no longer survives and his consent to depletion of his interest would not make a gift of coparcenary interest otherwise invalid, valid. Therefore, the requirement of consent in such a case would have to be upon from all persons who can claim a share in the deceased coparcener's share.

25. Further, the consent of the mother of the donor who was alive till 1990 as per the case of the intervenor-defendant was also necessary being Class I heir but the same was not there so also the consent of intervenor-defendant being daughter of Shiv Nandan Prasad Singh and full sister of the donor was also required which was not taken. Mere gift of one of the coparceners does not bring the coparcenary to an end and the remaining properties continue to be joint to be partitioned amongst the coparceners on the date of partition and the Trial Court rightly decreed the suit and ordered for partition.

26. Learned counsel for the appellants further submitted that the learned lower Appellate Court wrongly held the gift to be valid. The question of lack of consent before execution of the gift deed is a pure question of law in view of the law laid down in the case of **Tarini Kamal Pandit and others vs. Prafulla Kumar**



Chatterjee (Dead) by Legal Representatives reported in (1979) 3 SCC 280, **Gurucharan Singh vs. Kamla Singh and others** reported in (1976) 2 SCC 152 and **Yeswant Deorao Deshmukh vs. Walchand Ramchand Kothari** reported in (1950) SCC 766. It is also submitted that the burden of proving that prior and specific consent was obtained before execution of gift deed is on the defendant which they failed to even plead much less proof. Learned lower Appellate Court has made out a third case in favour of the defendants by concluding that Net Narayan Prasad Singh impliedly given his consent to the gift despite there was absolutely no pleading by the defendants that there was prior consent of all the coparceners/co-sharers before the gift including the consent of Net Narayan Prasad Singh. Reliance has been place in the case of **Union of India vs. Ibrahim Uddin and Another** reported in (2012) 8 SCC 148 and **Maqbool Hussain v. State of Bombay** reported in AIR 1953 SC 325.

27. It is further submitted that the question of lack of consent having not been pleaded could not be accepted in the teeth of judgment of Hon'ble Apex Court in the case of **Gurucharan Singh vs. Kamala Singh and others** reported in AIR 1977 SC 5 wherein it was held that a pure question of law going to the root of the case and based on undisputed or proved facts and reason out of



common case of the parties could be raised even at the Court of last resort. In the aforesaid facts and settled principle of law laid down by the Hon'ble Apex court, the judgment and decree of the learned lower Appellate Court is not sustainable and liable to be set aside and the suit is fit to be decreed.

28. Mr. S.N.P. Singh, learned senior counsel appearing on behalf of the respondents answered the question with regard to transaction (deed of gift) without the consent of other members of coparcenary that the deed of gift was executed by Ram Naresh Prasad Singh in favour of defendant nos. 2 and 3 which is under challenge in the present appeal cannot be challenged by anyone other than the coparceners. Obviously, no coparceners, who were in family at the date of gift i.e. 25.09.1986, has challenged the present gift. The plaintiff was not a coparcener at the date of gift or on the date of filing of the suit. Reliance has been placed in the case of **Jagdish Tiwary and others vs. Lalita Kuer** and others reported in **2011(1) BBCJ 633**. The question whether the consent of coparcener was not obtained before the execution of gift deed dated 25.09.1986 has not been specifically pleaded anywhere in the plaint and only raised objection at the time of argument. The learned counsel for the appellants has tried to show that the plea



was taken and the deed of gift under challenge was void as such same was obtained by fraud and impersonation.

29. Learned senior counsel further submitted that the plea has not been taken anywhere in the plaint by the plaintiff that the deed of gift was not executed after obtaining prior consent of the coparcener. It is well settled law that no evidence can be given and considered by the courts with regard to a fact which has not been pleaded in the plaint. This question was decided in AIR 1953 SC 132. It has been settled in the case of **Shivaji Balaram Haibatti vs. Avinash Maruthi Pawar** reported in **2018 (11) SCC 652** by the Hon'ble Apex Court that *'It is a settled principle that the parties to the suit cannot travel beyond the pleadings so also the court cannot record any finding on the issues which are not part of pleadings. In other words, the court has to record the findings only on the issues which are part of the pleadings on which parties are contesting the case. Any finding recorded on an issue dehors the pleadings is without jurisdiction'*.

30. It is further submitted that the coparcenary between the family of Basudev Singh had broken in September, 1943 by way of partition between Ram Lakhan Singh on the one hand (8 aana share) and sons of Shivrindan Singh i.e. Ram Naresh Prasad Singh and Net Narayan Prasad Singh (defendant no. 1) on the



other hand therefore, the share of Ram Naresh Prasad Singh and Net Narayan Prasad Singh was also separated on that very date. Hence, it was a complete partition between Ram Naresh Prasad Singh and Net Narayan Prasad Singh.

31. Learned senior counsel further submitted that Ram Naresh Prasad Singh and Net Narayan Prasad Singh were not members of joint family they were at best tenants in common. Reliance has been placed in the case of **Kalyani (Dead) by LRS. V. Narayanan and others** reported in **1980 Supp SCC 298**. It is further submitted that statements of P.W. 1 and P.W. 2 in their evidence have been relied by the learned counsel for the appellants stating that the family was joint. In fact, they were living jointly as tenants in common.

32. Learned senior counsel for the respondents submitted that the daughter, who got a right of coparcenary by Hindu Succession (Amendment) Act, 2005, cannot challenge deed of gift executed before 20.12.2004. The question of law as framed is not at all applicable in the present case hence, it does not help the appellant in anyway. The learned Appellate Court has rightly interpreted the decision of the Hon'ble Apex court in the case of **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** (supra). Learned senior counsel for the



respondent admitted the genealogical table. Shiv Nandan Prasad Singh died in the year 1930. In any case, before September 1943 which is an admitted date of partition between Ram Lakhan Singh (son of Basudev Singh) on one hand and Ram Naresh Prasad Singh and Net Narayan Prasad Singh (both sons of Shiv Nandan Singh) on the other hand. This fact has been asserted by the plaintiff-appellant in her plaint. It is also stated in paragraph 7 and 8 that 8 Anna share was allotted to Ram Naresh Prasad Singh and Net Narayan Prasad Singh (both sons of Shiv Nandan Singh). It is admitted fact that no share was allotted in the said partition of September, 1943 to Hiramani Devi, daughter of Shiv Nandan Prasad Singh. The plaintiff has never stated in plaint that Hiramani Devi was entitled to get any share in the property. The partition was held in September 1943 and Shiv Nandan Singh, father of Hiramani Devi had died in the year 1930 i.e. long before the enactment of Hindu Succession Act, 1956 therefore she was neither entitled to any share nor she was coparcener of the family. So far the question of consent of Net Narayan Prasad Singh (father of donee) is concerned, the learned Appellate Court has rightly held that Net Narayan Prasad Singh (defendant no. 1) has filed his written statement and has never objected any such gift rather he has admitted the same. Hence, his consent was already there.



33. Learned senior counsel further submitted that plaintiff had no birth right on the said date to gift and she was not a coparcener even on the date of filing of the suit. She has attained the status of coparcener only after enactment of Hindu Succession (Amendment) Act, 2005. According to Section 6 proviso, plaintiff cannot challenge any gift executed in 1986 by her father on the ground that she was a coparcener.

34. According to Section 6(1) proviso of Hindu Succession Act, transaction before 20.12.2004 has no effect. The suit is not maintainable therefore no case of coparcenary arises. At best, both are tenants in common. The first question of law is not at all applicable in the present case. So far the second substantial question of law is concerned, the law has been rightly interpreted by the learned Appellate Court.

35. Considering the submissions made on behalf of the parties and upon perusal of the impugned judgement as well as substantial questions of law having been framed by this Court in this appeal, it appears that it is admitted case of the parties that one son of Basudev Singh namely, Ram Lakhan Singh separated in the year 1943 from two sons and a daughter of Shiv Nandan Singh (full brother of Ram Lakhan Singh). The two sons and a daughter of Shiv Nandan Singh remained joint. There is a general



presumption that a Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. A member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him; and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. This principle has been settled in the case of **Palani Ammal vs. Muthuvenkatachala Moniagar** reported in **AIR 1925 PC 49**. In the present case, one son of Basudev Singh separated in the year 1943 and two grand sons of Basudev Singh remained joint i.e. Ram Naresh Prasad Singh and Net Narayan Prasad Singh (both sons of Shiv Nandan Singh son of Basudev Singh). The stand taken in written statement of defendant nos. 1, 2 & 3 and also D.W. 1 (defendant no. 3/donee) has admitted in his cross-examination that no partition was effected in the family. It is apparent from the evidence of D.W. 7 that he has admitted that the family of Ram Naresh Prasad Singh and Net Narayan Prasad Singh was joint and continued as such, till death of Ram Naresh Prasad Singh. D.W. 5 also admitted that family was joint till 1994.



Defendant nos. 1, 2 and 3 have admitted in para 8 of their joint written statement that Ram Naresh Prasad Singh looked after the entire affairs of the family and its properties and he remained *Karta* of the family. This pleading is an admission that family was joint at the time of execution of gift deed. It is specifically admitted by the defendant that the family had a *Karta* in as much as the plaintiff-appellant alleged that Net Narayan Prasad Singh to be the *Karta* whereas defendant alleged Ram Naresh Prasad Singh to be karta.

36. On a careful consideration of the facts and circumstances and the law discussed hereinabove, this Court finds that Ram Lakhan Singh separated in the year 1943 and two sons and a daughter of Shiv Nandan Singh remained joint till the death of Ram Naresh Prasad Singh. Therefore, after separation of Ram Lakhan Singh, the remaining property of the family remained joint between both the sons of Shiv Nandan Singh and a daughter, Hiramani Devi. There is no material on record to show that both the sons separated, partitioned before execution of alleged deed of gift, which is under challenge.

37. So far question whether a gift by a coparcener of his undivided interest in the joint family property is valid or not, it is settled law that a coparcener can make a gift of his undivided



interest in the coparcenary property to other coparcener or to a stranger with the consent of all other coparceners. Such a gift would be quite legal and valid but in the present case there is no case of the defendants that the prior consent of other coparcener was taken while the learned lower Appellate Court made out a third case that the family got partitioned in the year 1943 itself when Ram Naresh Prasad Singh separated from the family which has neither been pleaded by the defendants nor has come in evidence. The learned Appellate Court has also made out a third case in favour of the defendants by concluding that Net Narayan Prasad Singh filed written statement in the suit and stated therein that Ram Naresh Prasad Singh executed a gift deed in favour of his sons. The learned Appellate Court presumed that implied consent was given by Net Narayan Prasad Singh to Ram Naresh Prasad Singh for execution of alleged deed of gift in favour of his sons. There was absolutely no pleading by the defendants that there was prior consent of all the coparceners/co-sharers before the gift including the consent of Net Narayan Prasad Singh. Consent factor was not pleaded in their written statement. No party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the parties in support of the case set up by it. A decision of a case cannot be passed beside the



pleadings of the parties. This view has been taken in the case of **Union of India vs. Ibrahim Uddin and Another** (supra).

38. In view of the above, this court is of the considered opinion that the lower Appellate Court dealt with the case in an unwarranted manner giving go bye to the settled principle of law. So far question of interpretation of the decision of the Hon'ble Apex Court in the case of **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** (supra) is concerned, the settled principle is that a gift by a coparcener of his undivided interest in the coparcener property is void whereas the learned Appellate Court misapplied the facts of that case to the present case. The fact of the case of **Thamma Venkata Subbamma (Dead) by L.R V. Thamma Rattamma and Others** (supra) is that two brother & sons and daughters of one of them constituted a joint Hindu family governed by Mitakshara School in Hindu law, one of the brothers executed deed of settlement in favour of his brother, conveying his entire undivided interest in the coparcenary but reserving a life interest to himself and also providing that after his death the other coparcener should maintain his wife. In that case the Apex Court has held that although the gift is ostensibly in favour of brother, but really the donor meant to relinquish his interest in the coparcenary in favour of brother and his sons.



Assuming that it is a renunciation in favour of one of the coparceners, namely, brother, such renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener in whose favour the renunciation was made. The gift should be construed as renunciation of his undivided interest in the coparcenary in favour of the brother and his sons who were the remaining coparceners. The gift was, therefore, valid construing the same as renunciation or relinquishment by donor of his interest in the coparcenary and, accordingly, the consent of other coparceners was immaterial. The Appellate Court completely misapplied the facts of that case to the present case.

39. In the aforesaid case, an issueless coparcener gifted his undivided share to his brother in a family which consisted only of the donor, his brother (donee) and donee's sons and daughters, as such, the gift enured to the benefit of all and nobody's share got depleted or prejudice. It was found that the so-called gift was infact a renunciation and not a gift as it benefited all members of the family equally. The learned Appellate Court below failed to consider that in the present case, the plaintiff has been deprived of her lawful share due to the gift. Therefore, one co-sharer has been prejudiced and others benefited. It cannot be said to be a renunciation. At the time of gift, full brother of the donor namely,



Net Narayan Prasad Singh was alive and he was admittedly a coparcener but nowhere it is pleaded in the entire written statement that he consented to the gift. Further, intervenor-defendant was also a co-sharer but nowhere her consent was either pleaded or proved. Therefore, the learned Appellate Court wrongly interpreted or applied the principle whereas the fact of both the cases are different. There is a catena of decision of the Hon'ble Apex Court holding that a gift by coparcener of his undivided interest in the coparcenary property is void.

40. In the light of the narrative and discussion made hereinabove, there can be no doubt that the learned lower Appellate Court erred and was not justified in dismissing the suit of the plaintiff.

41. In the facts and circumstances of the case, the substantial questions of law formulated are answered in favour of the appellants.

42. Thus, this Second Appeal has got merit and accordingly it is being allowed.

43. Consequently, the judgement of the learned lower Appellate Court dated 29.04.2013 passed by the learned Additional District Judge, II, Danapur, Patna in Title Appeal No. 17 of 2009 is set aside and the suit of the plaintiff-appellant is decreed and the



judgement and decree of the Trial Court dated 20.01.2009 passed in Title Partition Suit No 143 of 1989 is hereby affirmed.

44. Pending interlocutory applications, if any, shall stand disposed of.

45. There shall be no order as to costs.

(Khatim Reza, J)

Sankalp/-

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