

Form No. J(1)

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present :

**The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Rai Chattopadyay**

**F.A. 378 of 1997
With
CAN 9 of 2024
With
CAN 10 of 2024
With
CAN 13 of 2025**

**Laxmi Narayan Gope
v.
Sushil Gope**

For the Appellants : Mr. Rabindranath Mahato
Mr. Amit Bikram Mahato

For the Respondents : Mr. Probal Mukherjee, Senior Advocate
Mr. Falguni Bandyopadhyay
Ms. Sreetama Neogi

Judgment reserved on : March 11, 2026

Judgment pronounced on : March 16, 2026

Rajasekhar Mantha, J.:

1. The subject appeal is directed against the judgment and preliminary decree dated 19th December, 1994, passed by the learned Additional Sessions Judge, Purulia in Title Suit No. 89 of 1990.

2. The suit for partition was filed in respect of the properties standing in the name of the common ancestor/predecessor-in-interest of the parties, one Dhanu Gope. The schedule to the plaint, inter alia, has set out the properties in CS Khatian No. 21 comprising 5.24 acres of land and in CS Khatian No. 23 comprising about 70 acres of land in the district of Purulia under PS Purulia Mufassil.

3. The question involved in the subject appeal is whether the properties comprising in CS No. 21 having not been made the subject matter of a prior suit for partition, can at all be made subject matter of the present/subsequent partition suit. A further issue would arise, i.e. whether there is evidence on record to suggest that the properties in CS Plot no. 21 are the joint properties of the the common ancestor Dhanu Gope.

FACTS OF THE CASE

4. The predecessor-in-interest of the present plaintiffs and defendants filed the partition suit being TS No. 184 of 1926 (first partition suit). The subject matter of the said suit were the properties standing in the name of Dhanu Gope in CS Khatian No. 23.

5. The first partition suit resulted in a compromise decree dated 4th June, 1929. The said compromise decree set out the shares of 8 predecessors of the present plaintiffs and defendants qua the properties comprised in CS Khaitan no. 23. There was, however no mention of any property under CS Khatian No. 21 in the said suit or the compromise

decree. Admittedly apart from appointment of a commissioner for partition the properties no final decree was passed and the formal subdivision of properties did not occur.

6. The present suit, Title Suit No. 89 of 1990(second partition suit), filed by the present plaintiffs and defendants, who are the descendants of the parties of the first partition suit, seeks partition the properties of Dhanu Gope, allegedly comprised in CS Khaitan. 21 and CS Khatian No.23. Admittedly CS Khaitan no. 21 was left out from the ambit of the first partition suit. The properties in CS no. 21 however were very much in existence at the time of the filing of the first partition suit. The second partition suit therefore has to be considered in light of principle of constructive res judicata as well.

7. The plaint of present suit mentions the earlier TS No. 184 of 1926, and the compromise decree dated 4th June 1929. A report of the Commissioner of partition dividing the properties comprised in CS. No. 23 filed in the earlier suit was also referred to in the said plaint. There is, however, no explanation in the plaint as to why CS Khatian No. 21 was not made the subject matter of the first partition suit.

8. In the written statement filed in the present suit, the appellants, inter alia, pleaded as follows:

- a. The suit is barred by the principles of res judicata and bad for non-joinder of parties.
- b. Section 11 of the CPC was invoked by the appellants, inter alia, on the ground that all properties that stood in the name of the original predecessor of the parties, Dhanu Gope were already partitioned by the reason of the earlier compromise decree dated 4th June, 1929 passed in TS No. 184 of 1926 and the report of the Commissioner of the partition. It was also contended that since thereafter, the successor in interest of Dhanu Gope are holding their respective properties.

9. Across the bar, Mr. Mahato, learned Counsel for the appellant/defendants in the suit has admitted that two portions of Khatian No. 23 namely Bakshi Bandh Tarn and Tilai Bandh Tarn must be deemed ejmali properties without partition. As per report of the Commissioner or partition in the earlier suit, the usufruct thereof namely the standing trees were to be sold and the proceeds thereof were to be equally distributed between the plaintiffs and/or their successor in interest, of the said first partition suit being TS No. 184 of 1926.

10. Mr. Mahato has argued that CS Khatian No. 21 was the self-acquired property of one of the son of Dhanu Gope namely Bholu Gope. The same therefore could not form part of the properties within the hotchpot of the properties of Dhanu Gope and hence could not be the subject matter of partition of the instant suit.

11. The plea of non-joinder and mis-joinder of parties was advanced in respect of certain defendants who are either stated to have transferred their share in the properties of the predecessor-in-interest. The transferees have not been made parties to the suit.

12. The Trial Court, based on the pleadings on record, framed the following issues:-

- i. Have the plaintiffs any cause of action for the suit?*
- ii. Is the suit barred by limitation?*
- iii. Is the suit bad for non-joinder and misjoinder of parties.*
- iv. Is the genealogy given in the bottom of the plaint is incomplete?*
- v. Is the suit bad for partial partition?*
- vi. Is the suit barred by principle of res judicata?*
- vii. Have the plaintiffs the share in schedule 2 of the suit property, as alleged in the paragraph 9 of the suit plaint?*
- viii. Are the plaintiffs entitled to get decree for partition as prayed in the suit plaint?*
- ix. To what other reliefs or relief are the plaintiffs entitled to get?*

THE EVIDENCE ON RECORD.

13. The plaintiff and defendant examined one witness each. **PW 1 was Raghu Gope.**

14. The compromise decree dated 4th June, 1929 in TS No. 184 of 1926 and the Commissioner's report were exhibited and taken on record. Copies of the RSROR of Khatian No. 46 under Mouza Belkuri, CS Khatian No. 23 of Mouza Belkuri, RSROR of Khatian No. 23 and purported RSROR of Khatian No. 21 were exhibited and taken on record.

15. It must be mentioned at this stage that the decree dated 4th June, 1929 in TS No. 184 of 1926 was passed before the cadastral survey of revenue records was undertaken. Subsequent thereto CS Khatian No. 23 came to be divided into two separate RS Khatian numbers under the RS operation in the State. The same resulted in RS Khatian No. 298 and RS Khatian No. 48. There is no mention of the change of CS Khatian No. 21 into any other RS Khatian numbers in the impugned judgment or the plaint.

16. In the cross-examination, PW 1 Raghu Gope has admitted that the property of 5.25 acres in CS Khatian No. 21 originally stood in the name of Bholu Gope but also in the same breath stated that the property did not belong to Bholu Gope in its entirety.

17. He further admitted that the properties in Khatian No. 23 were inherited by the sons of Dhanu Gope after his death. There is no explanation from the evidence of PW 1 as to why CS Khatian No. 21 did not form subject matter of the earlier TS No. 184 of 2025.

18. **Shripati Gope was DW 1.** He was defendant no. 43 in the suit. He deposed in his examination in chief that CS Khatian No. 21 stood recorded exclusively in the name of Bholu Gope. He further deposed about the compromise decree dated 4th June, 1929 in TS No. 184 of 1926 in respect of Khatian No. 23 and the compromise decree obtained from the Court of the learned Munshif at Purulia.

19. He also deposed that in the compromise decree, the properties namely Bakshi Bandh Tarn and Talai Tarn were left undivided and ejmali amongst the legal heirs of Dhanu Gope. He further deposed that the properties in CS Khatian No. 23 were equally divided amongst the legal heirs of Dhanu Gope and came in the RS record of rights. The ROR and certified copy of the decree dated 4th June, 1929 were marked as exhibits.

20. He denied that any sale proceeds of the aforesaid Bakshi Tarn and Telai Tarn were received by any of the parties to the said TS No. 184 of 1926.

21. Based on the evidence, the Trial Judge decreed the suit in preliminary form. The Trial Court answered issue nos. 1 to 4 in favour of the plaintiff. Issue nos. 5 to 8 being the moot issues as regards the maintainability of the suit in the Trial Court were also answered in favour

of the plaintiff. The Trial Judge was of the view that the compromise decree in TS No. 184 of 1926 and the partition Commissioner's report was not given effect to by the parties.

THE JUDGEMENT OF THE TRIAL COURT

22. The Trial Judge by placing reliance on the decision of a coordinate bench of this Court in **(Ramprasad Mondal vs. Smt. Snehalata Ghosh) reported in 1966 SCC OnLine Cal 167** held that the second partition suit is maintainable.

23. Bholu Gope according to the Trial Judge did not acquire CS Khatian No. 21 or portions of CS Khatian No. 23 from his own sources but has inherited the same from Dhanu Gope. The Trial Judge was of the view that it was not clear from the evidence on record as to what exactly was the subject matter of the partition suit being TS No. 184 of 1926.

24. The Trial Judge held that since Bakshi Bandh Tarn and Telai Tarn were admittedly left as ejmali property. Hence a major portion of the suit land in TS No. 184 of 1926 remained un-partitioned. The Trial Judge applied the decision of another coordinate Bench of this Court in the case of **Sasi Mohan Saha and ORS v. Hari Nath Saha** reported in **(1928) AIR (Calcutta) 459** to hold that the instant suit was maintainable.

25. The Trial Judge further found that the appellants herein could not prove that Bholu Gope acquired property of 5.25 acres in CS Khatian No. 21. According to the Trial Judge, DW 1 could not indicate the extent of an area of Bakshi and Telai Tarn.

26. Based on the above, the Trial Court went on to hold that the plaintiffs respondents have a lawful share in CS Khatian No. 21 along with CS Khatian No. 23. According to the Trial Court both the properties were originally owned by Dhanu Gope and hence liable to partition in subject suit.

ANALYSIS OF THIS COURT

27. This Court has carefully heard the arguments of Mr. Mahato, learned Counsel for the appellants/defendants and Mr. Prabal Mukherjee, learned Senior Counsel for the plaintiffs/respondents.

28. The Trial Court has called upon the appellants/defendants to prove that the properties in CS no. 21 are self-acquired. The said approach of the Trial Court is incorrect, in view of the fact that the plaintiffs/respondents have not proved that the said properties are joint properties. The burden to prove that the properties in CS no. 21 are self-acquired cannot be shifted to the appellants unless the plaintiffs/respondents have discharged the initial burden of proving that the said properties are joint properties.

29. There is no presumption that a property is a joint family property. The plaintiff has to prove that a property is a joint family property. The said presumption however arises when the plaintiff proves that there is a joint family fund. The joint family fund gives rise to the presumption that the property at issue may have been purchased from the joint family

funds. The presumption will arise when the plaintiff links the acquisition of the property with the joint family fund.

30. The aforesaid presumption is rebuttal in nature. It calls upon the defendant objecting to the partition to prove that the said property is self-acquired. In ***Angadi Chandranna V. Shankar & Ors. reported in 2025 INSC 532***, it was held as follows:-

13. Further, it is a settled principle of law that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, then there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available. That apart, while considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. This Court in *R.Deivanai Ammal (Died) v. G. Meenakshi Ammal*¹², dealt with the concept of Hindu Law, ancestral property and the nucleus existing therein

Emphasis applied

31. In the present case, the plaintiff has not been able to prove that the properties comprising in CS no. 21 is a joint family property. The plaintiff was further unable to prove that there was a joint family fund. Therefore there is no presumption that of CS no. 21 is a joint family property. The trial court in the impugned judgment therefore has erroneously called upon the defendants/appellants to prove that the said properties are self-acquired properties of Bholu Gope.

32. The impugned judgment of the trial Court declaring that the properties comprising in CS no. 21 are joint family properties, is ex facie erroneous and needs to be set aside on this score alone.
33. As regards whether the properties in CS no. 21 at all could have formed subject matter of second partition suit, we find that the Trial Court has erroneously interpreted and applied the decision in **Sasi Mohan Saha** (supra).
34. In **Sasi Mohan Saha (supra)** the court has alluded to three situations when a second partition suit would lie in respect of properties subject matter of an earlier suit, can be sought. The first situation is when the first partition suit has either intentionally or by mistake excluded certain joint properties and no objection was raised to such exclusion, then a second partition suit would be maintainable as regards the said excluded properties. The said excluded properties must, however, remain in the joint possession of the parties to maintain a second partition suit.
35. In the present case, the first partition suit did not even mention the properties in CS no. 21. Thus, the predecessor in interest of the defendants/appellants had no occasion to point out that the said properties in CS no. 21 are self-acquired. No objection therefore was raised against the claim that the properties in CS no. 21 are joint properties. The said claim has been raised for the first time by way of the second partition suit. The present suit thus falls outside the scope

of the said first situation. No evidence was led by the parties that CS-21 was consciously or mistakenly left out of the scope of the first suit.

36. The second situation is that when certain joint properties forming subject matter of the first partition suit have been excluded from its purview with the consent of the parties and the parties agree to remain in joint possession thereof, a second partition suit would be maintainable.

37. The present suit equally falls outside the scope of the said second exception in view of the fact that CS no. 21 was never made the subject matter of the first partition suit. The parties thus had no occasion to jointly agree to exclude the properties comprised in CS no. 21.

38. The third situation is when the Court has refused to partition certain joint properties, a subsequent suit seeking partition of the same properties will not be maintainable. A suit however seeking implementation of the decree passed in the first suit will be maintainable.

39. The third situation covers the present suit. The said Bakshi Tarn and Telai Tarn have not been partitioned in the first suit. The benefits arising therefrom were directed to be divided between the parties. The present partition suit to the extent it seeks implementation of the distribution of the usufructs arising from Bakshi Tarn and Telai Tarn and the ascertainment of the shares of the persons, who have become

entitled thereto due to inheritance or transfer thereof, is maintainable. It is also alleged that since no final decree was passed in the earlier suit, no formal partition was effected in respect of CS 23. The present suit would also be maintainable in respect of the unpartitioned portions of CS 23

40. Applying the dicta in the **Sashi Mohan decision (supra)**, the plaintiff was required to firstly plead in the plaint that the properties under CS Khatian No. 21 were either by consent or deliberately left out from the scope of TS No. 184 of 1926. In addition to the said pleading, the plaintiff/respondent was required to lead evidence indicating that the parties either jointly agreed to leave out the said properties out of the scope of TS No. 184 of 1926 or had done so erroneously. The plaint in the present suit contains no such averment. There is no oral or documentary evidence led by the plaintiff to the aforesaid effect.

41. It would therefore follow that the predecessor-in-interest of the parties to the instant suit in TS No. 184 of 1926 had proceeded on the basis that CS Khatian No. 23 comprising about over 70 acres of land was the only property of Dhanu Gope and hence only sought partition of the said CS Khatian No. 23 in the first suit. The descendants are bound by the previous conduct of their predecessor in interest. Section 11 of the CPC needs to be appreciated in this regard:-

Section 11 Res judicata.

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or **between parties under**

whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation IV.-- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Emphasis applied

42. A claim by a descendant to the property of his/her deceased ancestor is indeed a claim raised under the head and title of the latter. Therefore, any previous omission or concession made by the ancestor in a judicial proceeding would bind his descendant. The conduct of the parties to the first partition suit in leaving out the properties in CS no. 21 thereby prevents the parties to the second partition suit to raise the claim that said properties are joint properties.

43. In addition to above, it could also be inferred that the properties under CS Khatian No. 21 were understood and accepted as properties acquired by Bholu Gope exclusively and hence were not made part of the subject matter of TS No. 184 of 1926.

44. The decision of ***Koley & Ors. vs. Deputy Director of Consolidation & Ors. reported in (1976) 3 SCC 119 particularly paragraph nos. 9,3,5,36 and 46*** thereof and the decision of ***Ranganayekamma & Anr. Vs. KS Pravash reported in (2008) 16 SCC particularly para 29 and 46*** thereof relied upon by Mr. Mahato to argue that consent decrees amongst family members and family settlements

ought not to be lightly distributed by Courts does have some manner of application in the facts of the case.

45. Having regard to the aforesaid discussions, this Court is of the view that the impugned preliminary decree dated 19th December, 1994 to that extent that it include 5.25 acres under CS Khatian No. 21 is erroneous and must be set aside and is hereby set aside.

46. The Trial Judge shall proceed to decide the actual successor in interest of Late Dhanu Gope who are entitled to any part or portion of the aforesaid Bakshi Tarn and Telai Tarn, and the unpartitioned portions comprised in CS Khaitan no. 23, which has been subsequently divided into RS Khatian No. 298 and RS Khatian No. 48.

47. For the aforesaid purpose, the parties shall at liberty to adduce evidence or take steps to bring on record the actual beneficiaries and shareholders and/or successors in interest amongst the plaintiff and defendant or third party transferees.

48. For that purpose, the Trial Court shall proceed to pronounce upon the shares of such persons afresh. Further steps will be taken by the Trial Court after determination of the actual co-sharers in the aforesaid two properties under original CS Khatian No. 23 only to the extent of the aforesaid Bakshi Bandh Tarn and Telai Tarn.

49. The impugned judgment and decree is therefore set aside. All connected applications shall stand disposed off in terms of this judgement.

50. There shall be no order as to costs.

51. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

I agree.

(Rai Chattopadyay, J.)