

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.84 of 2016

Ganga Bishun Singh son of Late Sri Bihari Singh, resident of Mohalla-Shahjadpur Anderkila at and District-Hajipur (defendant No. 2).

... .. Appellant/s

Versus

1. Suresh Prasad Singh son of Late Ram Prasad Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
2. Singheshwar Prasad Singh son of Late Ram Prasad Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
3. Mosmatt Gulabo Devi wife of Late Ram Prasad Singh resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
4. Dilip Kumar Singh son of Harihar Singh, resident of Mohalla-Shahjadpur Anderkila, at and District-Hajipur.
5. Anup Kumar Singh, son of Harihar Singh, resident of Mohalla-Shahjadpur Anderkila, at and District-Hajipur.
6. Mostt. Usha Devi wife of Late Ashok Kumar Singh, resident of Mohalla-Shahjadpur Anderkila, at and District-Hajipur.
7. Kishore Kumar son of Late Ashok Kumar Singh, resident of Mohalla-Shahjadpur Anderkila, at and District-Hajipur.
8. Krishna Kumar, son of Late Ashok Kumar Singh, resident of Mohalla-Shahjadpur Anderkila, at and District-Hajipur.
9. Sarita Devi daughter of Late Harihar Singh and Wife of Late Baccha Singh Sauhari, resident of Village-Harkhauli, P.O. and P.S.-Meerganj, Distirct-Gopalganj.
10. Munni Devi daughter of Late Harihar Singh and Wife of Ram Bahadur Singh Sauhari, resident of Village-Harkhauli, Kushwaha More, P.O. and P.S.-Meerganj, Distirct-Gopalganj.
11. Meera Devi Wife of Late Sheo Nath Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
12. Sanjay Singh son of Late Sheo Nath Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
13. Sudhir Kumar son of Late Sheo Nath Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
14. Smt. Rani Devi, daughter of Late Sheo Nath Singh and Wife of Raj Kumar Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
15. Subhas Singh minor son of Late Sheo Nath Singh, under guardianship of their mother Meera Devi wife of Late Sheo Nath Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
16. Bikram Singh minor son of Late Sheo Nath Singh, under guardianship of their mother Meera Devi wife of Late Sheo Nath Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.



17. Puja Kumari, minor daughter of Late Sheo Nath Singh, under guardianship of their mother Meera Devi wife of Late Sheo Nath Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S.-Hajipur, District-Vaishali.
18. Sita Devi wife of Saryug Prasad Singh and daughter of Late Bihari Singh, resident of Village-Karauna, P.S.-Lalganj at present Mohalla-Shahjadpur Anderkila, Hajipur and District-Vaishali.
20. Meena Devi daughter of Jai Narayan Singh and Wife of Bijli Singh alias Kundan Singh, resident of Village-Lalwari, P.O. Majhauri, Distt. Purnea.
21. Munni Devi, Daughter of Jai Narayan Singh and wife of Devendra Singh, resident of Village-Maharajpur, P.O. Manjhaul, Distt. Purnea.
22. Raj Kumar Singh son of Jai Narayan Singh, resident of Village-Kajri Rahika Biswaspur, P.O. Dagarua Hat, Distt. Purnea.
23. Pappu Singh, son of Jai Narayan Singh, resident of Village-Kajri Rahika Biswaspur, P.O. Dagarua Hat, Distt. Purnea.
24. Jitendra Singh son of Jai Narayan Singh, resident of Village-Kajri Rahika Biswaspur, P.O. Dagarua Hat, Distt. Purnea.
25. Sanjay Singh, son of Jai Narayan Singh, resident of Village-Kajri Rahika Biswaspur, P.O. Dagarua Hat, Distt. Purnea.
26. Vijay Kumar son of Jai Narayan Singh, resident of Village-Kajri Rahika Biswaspur, P.O. Dagarua Hat, Distt. Purnea.
27. Rajeshwar Prasad Singh alias Rajeshwar Singh, son of Late Devi Prasad Singh, resident of Village-Bagmusa, P.S. Hajipur, District Vaishali, at present resident of Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
28. Pankaj Kumar son of Late Devi Prasad Singh, resident of Village-Bagmusa, P.S. Hajipur, District Vaishali, at present resident of Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
29. Pawan Kumar, son of Late Devi Prasad Singh, resident of Village-Bagmusa, P.S. Hajipur, District Vaishali, at present resident of Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
30. Munni Sinha, wife of Bisheswar Prasad Singh and daughter of Rajeshwar Prasad Singh, resident of Village-Makkanpur, P.S. Jandaha, District-Vaishali.
31. Archana Sinha wife of Ashok Kumar Singh and daughter of Rajeshwar Prasad Singh, resident of Village-Dumri Sui, P.S. and P.O. Rajapakar, District-Vaishali.
32. Sumitra Devi, Wife of Mahendra Singh and daughter of Late Bihari Singh, resident of Village-Chechar, P.S. Desri, District Vaishali.
33. Geeta Devi W/o Late Raj Deo Singh, resident of Village-Bingi (Burgaon),
1. P.S. Vyawar, District-Katihar.
33. Baby Devi wife of Ram Nath Singh, resident of Village-Bingi (Burgaon),
2. P.S. Vyawar, District-Katihar.
33. Kabutari Devi Wife of Basisth Narayan Singh, resident of Village-Lodhipur
3. Milk, Ward No. 7, P.S. Jandaha, District-Vaishali.
34. Mulia Devi Wife of Nageshwar Singh and daughter of Thakur Singh,



- resident of Village-Chaksikandar, P.S. Jandaha, District-Vaishali, at present residing at Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
35. Sharda Devi wife of Braj Kishore Singh and daughter of Thakur Singh, resident of Mohalla-Bagmali at and P.S. Hajipur, District-Vaishali, at present residing at Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
 36. Sheela Devi wife of Rameshwar Singh, resident of Village-Bedaulia, P.S. Jandaha, District-Vaishali, and at present residing at Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
 37. Sarswati Devi daughter of Ram Prasad Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
 38. Yashodha Devi daughter of Ram Prasad Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
 39. Vitaiya Devi daughter of Ram Prasad Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.
 40. Rajo Devi daughter of Ram Prasad Singh, resident of Mohalla-Shahjadpur Anderkila, at and P.S. Hajipur, District-Vaishali.

... .. Respondent/s

with

FIRST APPEAL No. 326 of 1986

Ganga Bishun Singh Son of Late Sri Bihari Singh, Resident of Mohalla - Shajadpur, Ander Kila, Town and Police Station - Hajipur, District- Vaishali.

... .. Appellant/s

Versus

1. Suresh Prasad Singh Son of Late Sri Ram Prasad Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
2. Sidheshwar Prasad Singh Son of Late Sri Ram Prasad Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
3. Mostt. Gulabo Devi Wife of Late Sri Ram Prasad Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
4. Saraswati Devi Daughter of Late Sri Ram Prasad Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
5. Jasodia Devi Daughter of Late Sri Ram Prasad Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
6. Bitain Devi Daughter of Late Sri Ram Prasad Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.



7. Rajo Devi Daughter of Late Sri Ram Prasad Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
- 8.1. Meera Devi Wife of Late Sheo Nath Singh, Resident of Mohalla Shahjadpur Anderkila, at and P.S. Hajipur, District- Vaishali.
- 8.2. Sanjay Singh Son of Late Sheo Nath Singh, Resident of Mohalla Shahjadpur Anderkila, at and P.S. Hajipur, District- Vaishali.
- 8.3. Sudhir Singh Son of Late Sheo Nath Singh, Resident of Mohalla Shahjadpur Anderkila, at and P.S. Hajipur, District- Vaishali.
- 8.4. Bikram Singh Son of Late Sheo Nath Singh, Resident of Mohalla Shahjadpur Anderkila, at and P.S. Hajipur, District- Vaishali.
- 8.5. Subhas Singh Son of Late Sheo Nath Singh, Resident of Mohalla Shahjadpur Anderkila, at and P.S. Hajipur, District- Vaishali.
- 8.6. Rani Devi Wife of Raj Kumar Singh, Resident of Mohalla Shahjadpur Anderkila, at and P.S. Hajipur, District- Vaishali.
- 8.7. Gunja Kumari Daughter of Late Shivnath Singh Resident of Mohalla Shahjadpur Anderkila, at and P.S. Hajipur, District- Vaishali.
- 9.1. Geeta Devi W/o Late Raj Deo Singh, resident of Village-Bingi (Burgaon), P.S. Vyawar, District- Katihar.
- 9.2. Baby Devi W/o Ram Nath Singh, Resident of Village-Bingi (Burgaon), P.S. Vyawar, District- Katihar.
- 9.3. Kabutari Devi W/o Basisht Narayan Singh, Resident of Village Lodipur Milk, Ward no. 07, P.S. Jandaha, District- Vaishali.
10. Phulia Devi Wife of Nageshwar Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
11. Sharda Devi Wife of Braj Kishore Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
12. Shila Devi Wife of Rameshwar Singh, Daughter of Late Sri Thakur Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
13. Usha Devi Wife of Late Ashok Kumar Singh, Resident of Mohalla - 1. Shahjadpur Andar Kila, at and P.S. Hajipur Distt. Vaishali
13. Kishore Kumar Singh Resident of Mohalla - Shahjadpur Andar Kila, at and 2. P.S. Hajipur Distt. Vaishali
13. Krishna Kumar Singh Resident of Mohalla - Shahjadpur Andar Kila, at and 3. P.S. Hajipur Distt. Vaishali
13. Dilip Kumar Singh Son of Late Ashok Kumar Singh, Resident of Mohalla - 4. Shahjadpur Andar Kila, at and P.S. Hajipur Distt. Vaishali
13. Anup Kumar Singh Son of Late Ashok Kumar Singh, Resident of Mohalla - 5. Shahjadpur Andar Kila, at and P.S. Hajipur Distt. Vaishali
13. Sarita Devi Wife of Sri Baccha Singh, Daughter of Late Harihar Singh, 6. Resident of Village - Mirganj, P.S. Mirganj, District- Gopalganj.
13. Munni Devi Wife of Sri Raj Bahadur Singh, Daughter of Late Harihar Singh, 7. Resident of Village - Mirganj, P.S. Mirganj, District- Gopalganj.



14. Nagina Singh Son of Late Sri Bihari Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
15. Mostt. Janki Devi Wife of Late Sri Bihari Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
16. Shila Devi Wife of Sarjug Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
17. Shanti Devi Wife of Jainarayan Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
18. Shakuntala Devi Wife of Rajeshwar Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.
19. Sumitra Devi Wife of Mahendra Singh, Daughter of Late Sri Bihari Singh, Resident of Village Shahjadpur, Mohalla - Anderkila, At and Police Station - Hajipur, Distt. - Vaishali.

... .. Respondent/s

Appearance :

(In FIRST APPEAL No. 84 of 2016)

For the Appellant/s : Mr. Bhola Kumar, Advocate

For the Respondent/s : Mr. Naresh Chandra Verma, Advocate

(In FIRST APPEAL No. 326 of 1986)

For the Appellant/s : Mr. Alok Kr. Sinha, Advocate

For the Respondent/s : Mr. Naresh Chandra Verma, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

C.A.V. JUDGMENT

Date : 20-11-2024

1. First Appeal No.326 of 1986 has been filed against the preliminary decree dated 08.04.1986 passed by learned Subordinate Judge-III, Vaishali at Hajipur in Partition Suit No. 26 of 1981 whereby the learned trial Court decreed the plaintiffs' suit for partition on contest without cost against defendant nos.1 and 2 and *ex-parte* as against other defendants. It was held that the plaintiffs (sons and widow of deceased Ram Prasad Singh) and defendant nos. 14 to 17 (daughters of deceased Ram Prasad Singh) have got 1/3rd share in the suit



properties and the two branches comprising the defendants, branches of Bihari Singh and Thakur Singh have 1/3rd share each in the suit properties. Accordingly, it was directed to draw preliminary decree.

2. First Appeal No.84 of 2016 has been preferred against the final judgment and decree dated 01.08.2016 passed by learned Subordinate Judge III, Vaishali at Hajipur in Partition Suit (F.D.) Case No.26 of 1981. The learned trial Court confirmed the Pleader Commissioner's Report dated 29.09.2004 carving out a separate *patti* for the plaintiffs out of the lands mentioned in the preliminary decree dated 08.04.1986.

3. Both the aforesaid appeals have arisen from preliminary decree and final decree respectively in the same Partition Suit No. 26 of 1981, accordingly, on consent of the parties, the same have been heard together and are being disposed of by this common Judgment.

4. For the sake of convenience, the parties shall be referred to in terms of their status before the trial Court.

5. The plaintiffs filed the aforesaid suit claiming that one Nathuni Singh had three sons, namely, Bihari Singh, Thakur Singh and Ram Prasad Singh. Nathuni Singh died in jointness with his three sons long ago. Thereafter Bihari Singh became



karta of the family who died in 1976 and after his death, Thakur Singh (defendant no.5) became *karta* of the joint family. Ram Prasad Singh died leaving behind plaintiff nos. 1 and 2 as sons and plaintiff no.3 as his widow. The defendants are the members of the branches of Bihari Singh and Thakur Singh (brothers of Ram Prasad Singh). Defendant nos.1, 2 and 3 are sons and defendant no.4 is wife of Late Bihari Singh. Thakur Singh is defendant no.5. His son Sheo Nath Singh is defendant no.6 and all the papers relating to joint family properties are in his possession. Ram Prasad Singh died about 15 to 16 years back (from the date of judgment) in jointness with others. All the family properties are joint. Some properties have been acquired in the names of individual members of the family. The suit lands are being cultivated separately according to the conveniences of the parties but there has been no partition by metes and bounds. This causes inconvenience in the cultivation of the suit lands and has frequently led to dispute between the parties. The plaintiffs, therefore, requested the defendants that they should agree to execute a registered deed of partition. The defendants, however, did not agree to the said request and hence the suit. The plaintiffs have claimed $1/3^{\text{rd}}$ share in the suit properties and have prayed for demarcation of the same. On petition filed on



behalf of plaintiffs, defendant nos.14 to 17 (daughter of Ram Prasad Singh) were made party (vide order dated 26.08.1985) and prayer to add purchaser of some part of suit property was rejected as not being necessary parties in a partition suit by the learned trial Court.

6. Three separate written statements on behalf of defendant nos.1 and 2, defendant no.3 and defendant nos.14 to 17 respectively have been filed in the suit. Defendant no.3 Nagina Singh who is brother of appellant/defendant no.2 in his written statement dated 31.08.1982 has supported the case of the plaintiffs that no partition with metes and bounds has been taken place between the parties and they are cultivating separately and maintaining separate mess according to their convenience. It is further stated that talks for partition had taken place but due to connivance of some *panches*, the partition had not been taken place.

7. Defendant nos.14 to 17, who are the daughters of deceased Ram Prasad Singh, in their joint written statement dated 28.08.1985 have supported the case of the plaintiffs and have demanded partition of the suit properties but they have denied the claim of plaintiffs in amendment petition that they have relinquished their share in favour of the plaintiffs. These



defendants have denied that the suit lands were partitioned by means of any *Panchnama* as claimed by defendant nos.1 and 2. It is stated that the said *Panchnama* dated 28.07.1972 is invalid, inoperative and forged as at that time, the plaintiffs Suresh Prasad Singh and Singheshwar Prasad Singh were minor. Plaintiff no.3 Gulabo Devi was not guardian of defendant nos.14 to 17 as they were married daughters and Gulabo Devi had no authority to represent them in Case No.298 of 1974 and any compromise in the said case is not binding on them.

8. Defendant nos.1 and 2 have contested the suit by filing written statement dated 20.03.1982 and stated that the suit as framed is not maintainable. The plaintiffs have got no cause of action. The suit is barred by law of limitation, estoppel and acquiescence. The plaintiffs have no unity of title and possession with the defendants. Some of the lands have been omitted from the suit property. It is denied that Bihari Singh or Thakur Singh was the *karta* (manager) of the joint family. It is stated that after the death of Ram Prasad Singh, his sons and wife being plaintiffs and his four daughters (defendant nos.14 to 17) came in possession over the properties left behind by Ram Prasad Singh.

9. It is further stated that all the three branches were



separated from each other in the year 1972 through a *Panchnama* dated 28.07.1972. They partitioned their properties and came in possession over their respective shares. The mother of the plaintiff nos.1 and 2 i.e. plaintiff no.3 admitted this fact in Objection Case No.298 of 1974 in the Municipal Survey Proceeding. The parties have also been dealing with the lands of their shares separately. The lands allotted to the parties have been given in the three schedules of the written statement. Schedule 1 was given to the plaintiffs, Schedule 2 was given to Bihari Singh and Schedule 3 was given to Thakur Singh. Some lands, which includes one latrine and the orchard were not partitioned amongst the three branches, have been given in Schedule 4 of the written statement. After partition, all the parties sold certain lands but the purchasers have not been made parties to the suit. Therefore, the suit is bad for non-joinder of the necessary parties. The revisional survey entry has been correctly prepared. As the suit lands have already been partitioned, the present suit cannot be maintained.

10. On the basis of pleadings as well as after hearing the parties, the learned trial Court framed the following issues:-

- (i) *Is the suit as framed maintainable?*
- (ii) *Have the plaintiffs got any cause of action or right to sue?*
- (iii) *Is there unity of title and possession between the*



- parties?*
- (iv) *Is the story of previous partition as set up by defendant nos. 1 and 2 correct?*
- (v) *Are the plaintiffs entitled to a decree as claimed?*

11. The learned trial Court after hearing the parties and considering the evidence decided the issues in favour of the plaintiffs. Issue no.(i) has not been pressed and Issue nos.(iii) and (iv) which are main issues and interlinked were taken up together for consideration and the same were decided in favour of plaintiffs. It was held that the defendants failed to prove the previous partition. Issue nos.(ii) and (v) were also decided in favour of plaintiffs and it was held that the plaintiffs have got cause of action to bring the suit and they are entitled to a decree for partition, accordingly, decreed the plaintiffs' suit without cost against defendant nos.1 and 2 and *ex-parte* against other defendants. It was held as stated above that the plaintiffs and defendant nos.14 to 17 have got 1/3rd share in the suit properties and the two branches comprising of defendants of Bihari Singh and Thakur Singh have got 1/3rd share each in the suit properties and a direction was given for drawing up a preliminary decree, accordingly.

12. Aggrieved by and dissatisfied with the said preliminary decree, the appellant challenged the same in First Appeal No. 326 of 1986.



13. The partition suit is decided at two stages i.e. at first stage, preliminary decree is passed and at second stage, a final decree is passed. Passing of the preliminary decree does not decide the suit finally. Preparation of final decree is continuation of the same suit. Preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject matter of the suit. In a suit for partition by coparcener or co-sharer, the Court should not give a decree only for the plaintiff's share, it should consider the shares of all the heirs after making them parties and then pass a preliminary decree. After passing of the preliminary decree, the suit continues until the final decree is passed. The final decree should specify the division by metes and bounds. The preliminary decree followed with proper demarcation of the suit properties by way of appointment of Survey Knowing Pleader Commissioner under Order XXVI Rule 14 of the CPC as well as acceptance of report and that happens to be the reason behind the partition of two independent stages governed by aforesaid event whereupon the appeal is to be filed respectively.

14. As per the preliminary decree dated 08.04.1986 respective shares of the parties were allotted. The learned trial



Court appointed a Survey Knowing Pleader Commissioner, who prepared and submitted his report dated 29.09.2004. Objections were raised against the report by defendant which was rejected and the learned trial Court confirmed the report of Pleader Commissioner vide order dated 03.10.2015 and ordered to prepare final decree. Accordingly, final decree was prepared on 28.07.2016 on required non-judicial stamp paper and the same was notified on which no objection was filed by anyone. Hence, the final decree was passed by the learned trial Court which was sealed and signed on 01.08.2016. Against the judgment and final decree, the defendant/appellant filed First Appeal No. 84 of 2016.

15. Learned counsel for the defendant no.2/appellant has submitted that the learned trial Court failed to appreciate that the plaintiffs had no cause of action for the suit because the partition by metes and bounds had already been taken place between the parties by a deed of agreement dated 28.07.1972 (*Panchnama*) and in accordance with the said agreement, the parties came in exclusive possession over the allotted properties. It is further submitted that the learned trial Court ought to have considered in accordance with law that a compromise petition was filed by the plaintiffs in Objection Case No.298 of 1974 before the



Assistant Superintendent of Survey, Hajipur in which the parties had admitted that they have already partitioned their properties by metes and bounds, hence, there was no question of fresh partition. The learned trial Court failed to consider that the parties had executed a number of sale deeds, deed of *Bharna* etc. time to time after partition and the state of affair of the parties itself shows that they have already been partitioned. The learned trial Court failed to consider that the appellant is coming in peaceful possession over his allocated properties and he is paying rent to the Government of Bihar and municipality. The learned trial Court misdirected himself in accepting the partial claim of partition made by plaintiffs without any legal basis. It is further contended that the learned trial Court has wrongly decided that Suresh Singh was minor at the time of execution of the *Panchnama* and not considered that the signatures and L.T.I. were also given by the guardian of the plaintiff Suresh Singh, so, his right, title and interest over suit properties were never ignored. Lastly, it is submitted that the learned trial Court has completely ignored the evidence adduced by the appellant and accepted the versions of the plaintiffs. It is further submitted that the learned trial Court ought not to have confirmed the Pleader Commissioner's Report in view of the valid objection



raised by the appellant. It is lastly submitted that the final decree is not executable as the same is vague and boundaries of the land are not mentioned in schedule of the suit land prepared by the learned trial Court.

16. On the other hand, learned counsel for the respondents has submitted that all the family properties are joint and the suit lands are being cultivated separately according to convenience of the parties but there is no partition by metes and bounds. The deed of *Panchnama* dated 28.07.1972 executed by the parties to the suit is an unregistered document and all the plaintiffs were not parties to the *Panchnama*/Award. Plaintiff no.1 Suresh Prasad Singh who signed on the *Panchnama* was minor on 28.07.1972 and plaintiff no.2 Singheshwar Prasad Singh never signed on the *Panchnama*. The said document is hit by the provisions of Section 17(b) of Indian Registration Act and is not admissible in evidence and also not binding on plaintiffs. Learned counsel for respondents has further submitted that the contesting defendants failed to prove the actual partition of suit properties and learned trial Court after considering the material on record, rightly decreed the suit which requires no interference by this Court and the appeals have no merit.

17. In view of the above rival contentions and



submissions made on behalf of the parties, the point arises for consideration in the First Appeal No.326 of 1986 is that “*whether there is any unity of title and possession between the parties over the suit properties?*”

18. With regard to their respective cases, the parties have adduced oral as well as documentary evidence. It appears from the record that learned trial Court vide letter dated 09.08.2008 informed that several depositions of witnesses and exhibits were missing so that Ext.-4 and depositions of PWs 1, 2, 3, 8, 9, 10 & DWs- 1, 2, 3, 5, 9, 10 & 11 were reconstructed but Ext. Nos.- 3, 5, 6, 7 & depositions of PWs- 4, 5, 6, 7, 11, 12 & DWs – 4, 6, 7, 8 & 12 could not be reconstructed. On the basis of the impugned judgment and available materials on record, the appeals were heard on the consent of both the parties.

19. It is well settled principle of law that a joint Hindu family continues to be joint unless contrary is proved. It is well settled that in a Hindu family governed by *Mitakshara* School of Law, there is normal presumption of jointness, joint in food, worship and estate. The presumption of jointness is stronger in a case of brothers than in case of cousins and further one goes from founder of family, the presumption becomes weaker due to the remoteness of relationship with the common ancestor due to



lapse of time. Partition is only adjustment of shares between or among persons who are entitled to share in the property. A share, which was undefined and indistinct, becomes definite when partition takes place. As a general rule, once a partition is made, it cannot be reopened because a share can be divided only once. The separation can be proved by the conduct of the family and attending circumstances. The separate dealings with property, separate messing and residence may not by themselves prove partition but their cumulative effect may show that there was partition between the parties.

20. The separation between the parties in mess and residence is admitted. The only difference is according to the plaintiffs, there had not been partition by metes and bounds whereas according to the appellant (defendant no.2), there had been partition by metes and bounds on 28.07.1972. The main controversy is whether the separation was only with respect to mess, residence and cultivation or it was complete partition.

21. Now, I have to see whether, on evidence in this case, the factum of prior partition has been established.

22. The plaintiffs have examined PW.1 Dasrath Singh, PW.2 Bacchan Singh, PW.3 Chandradev Singh, PW.8 Ram Dayal Singh and PW.9 Suresh Prasad Singh (plaintiff no.1) and



PW.10 Ram Pukar Singh, in support of their case, who in their evidence stated that the parties hold some of the suit lands jointly.

23. PW-11 Sh. Baleshwar Prasad is a formal witness. PW.9 Suresh Prasad Singh, who is plaintiff no.1, in his evidence stated that some lands are separate in possession of the parties according to their convenience, while other lands are jointly held by the parties. He has denied that the partition had taken place between the parties vide *Panchnama* dated 28.07.1972 and also denied that his mother had filed Objection Case No.298 of 1974 as *karta* of the family and had accepted the old partition. He also stated that Thakur Singh and Sheo Nath Singh had filed Partition Suit No.100 of 1975.

24. When defendants raised the plea that there had already been partition of the suit property, the burden is on the defendants to prove previous partition, therefore, they had adduced the evidence in support of the fact of the previous partition.

25. The defendants have examined DW.1 Ganga Bishun Singh (defendant no.2), DW.5 Hiranman Pandit, DW.9 Sitaram Chaudhary and DW.10 Anandi Singh, who in their evidence supported the defendant's case that the parties to the suit are in



possession over some of the plots separately. DW-2 Braj Bhushan Prasad is formal witness who proved *chaukidari* receipts (Exts.A to A/2). DW-11 Sh. Raghubans Narayan Singh deposed that he and other *panches* had done partition which was stated in *Panchnama*. DW-3 Sarswati Devi (defendant no.17) in her deposition stated that no partition had taken place between the parties. She and her sisters have not got any share.

26. DW.1 Ganga Bishun Singh in his evidence stated that the parties partitioned that properties according to *Panchnama* dated 28.07.1972 which was executed at the time of partition and, thereafter, the parties have been coming in separate possession over the suit lands and after that they had sold some part of the land separately on which purchasers have their possession. During the survey in Hajipur Town and in Survey Case, a compromise petition was filed.

27. When the witnesses, examined by the plaintiffs and defendants, have supported the respective cases of the parties, in such circumstances, the documentary evidences have got much importance in the present case.

28. The defendants in support of previous partition relied on deed of *Panchnama* dated 28.07.1972 (Ext.H) executed at the time of partition. The contesting defendant has produced



chaukidari receipts (Ext.A series), three registered sale deeds (Exts. B to B/2) executed by sons of Bihari Singh in favour of different persons to show that parties dealt with their lands separately. Ext. B/3 is a registered sale deed dated 24.06.1975 executed by Most. Gulabiya as self and guardian of her two sons in favour of Kamla Devi in respect of 14 *dhurs* of land. Ext.-C is mortgage-bond executed by Thakur Singh in favour of Chuli Devi. Ext. D is C.C. of compromise petition arrived at in Objection Case No. 298 of 1974 before the Assistant Superintendent of Survey, Hajipur. Ext. E is C.C. of an objection petition filed by plaintiffs in Case No. 298 of 1974. In paragraph 3 of this petition, it has been mentioned that the parties have partitioned all the properties and they are in possession over their 1/3rd share. Ext. F is C.C. of order passed in Objection Case No. 298 of 1974. Ext. G is C.C. of extract of continuous *khatiyani* of Khata No. 212 of Hajipur Municipality which shows that two plots have been recorded in the name of Bihari Singh. Exts. J & J/1 are C.C. of two depositions. Ext. K. is C.C. of mutation order regarding flour mill.

29. The learned trial Court after appreciating the facts and evidences available on record and after hearing the parties decided the issue involved in the suit giving reasons while



recording the impugned judgment, which are summarised as follows:-

- (i) Deed of *Panchnama* (Ext.-H) is an unregistered document and is hit by the provision of Section 17(b) of Indian Registration Act and is not admissible in evidence.
- (ii) The compromise (Ext.-D) in Case No.298 of 1974 did not effect the partition at all the properties of the parties. Under it, a flour mill, its side land and one piece of land measuring 1 ½ *kathas* were given exclusively to Bihari Singh and the shares of all the three parties will be equal in remaining lands. Suresh Prasad Singh was minor in 1976 who signed on the compromise petition, thus, it is invalid document. Thakur Prasad (defendant no.5) and father of defendant no.6, Sheo Nath Singh, who was co-sharer to the extent of 1/3rd share of the suit properties, had not signed on the said compromise petition and, therefore, the compromise petition did not partition the suit properties. It appears that only the partition of the residential house was done through this deed, though not in a very intelligible way.
- (iii) All the plaintiffs in suit were not parties to the said *Panchnama*. Suresh Prasad Singh was minor on 28.07.1972 and plaintiff no.2 had not signed on *Panchnama* and the same does not bind on plaintiffs. Defendant nos. 14 to 17, who were daughters of Ram Prasad Singh, were not parties to the said *Panchnama*/Award.
- (iv) Ext. 3 is an entry in the Admission Register which shows the date of birth of Sri Suresh Prasad Singh as 08.01.1959. Ext. 4 is C.C. of registered sale deed dated 21.10.1976 executed by Bihari Singh, Thakur Singh and Most. Gulabiya Devi as self and guardian of Suresh Prasad Singh and Singheshwar Singh, who were described as minors in 1976.
- (v) A party is not bound by an admission in his



pleadings except for the purposes of the suit in which pleadings are delivered.

30. In a document of partition, specific portion of properties are allotted to each of the sharers by metes and bounds which requires registration under Section 17(b) of the Registration Act, 1908 being non-testamentary instrument which purports or operates to create or declare right, title or interest in immovable property of the value of Rs. 100/- and upward. The effect of non-registration of such a document is enacted in Section 49 of the Registration Act. Section 49(c) of the Registration Act excludes the unregistered documents to be taken as evidence. The law is well-settled that notwithstanding the rejection of partition deed as inadmissible, other evidence may be admissible to prove the details of partition.

31. If the memorandum itself does not create or extinguish any right in immovable property, the said memorandum of partition does not require registration. The law is well settled that if the member of the family descending from a common ancestor or near relation seeks to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring complete harmony and goodwill in the family and document is prepared by way of memorandum after family



arrangement has already been made for the purpose of record and future use, the said document does not require registration.

32. The Hon'ble Supreme Court in the case of **Kale & Ors. Vs. Deputy Director of Consolidation & Ors.** reported in (1976) 3 SCC 119 held that family arrangement in nature of compromise which was considered in that case did not require registration. In **Ravinder Kaur Grewal & Ors. Vs. Manjit Kaur & Ors.** reported in (2020) 9 SCC 706 the Hon'ble Supreme Court held that when a family settlement arrived at between the parties has been acted upon then it is not open to resile from the same and parties are estopped from contending to the contrary.

33. The Hon'ble Supreme Court in **K. Arumuga Velaiah Vs. P.R. Ramasamy and Another** reported in (2022) 3 SCC 757 has held:

“45. Having regard to the aforesaid provisions of law it can be safely concluded that the said award was a mere arrangement to divide the properties in future by metes and bounds as distinguished from an actual deed of partition under which there is not only a severance of status but also division of joint family properties by metes and bounds in specific properties. Hence it was exempted from registration under Section 17(2)(v) of the Act. A document of partition which provides for effectuating a division of properties in future would be exempt from registration under Section 17(2)(v). The test in such a case is whether the document itself creates an interest in a specific immovable



property or merely creates a right to obtain another document of title. If a document does not by itself create a right or interest in immovable property, but merely creates a right to obtain another document, which will, when executed create a right in the person claiming relief, the former document does not require registration and is accordingly admissible in evidence vide Rajangam Ayyar v. Rajangam Ayyar [Rajangam Ayyar v. Rajangam Ayyar, 1922 SCC OnLine PC 52 : AIR 1922 PC 266].”

34. In the deed of partition, the joint family properties cannot be relied upon unless signed by all co-sharers. In the instant case, admittedly, defendant nos.14 to 17 who are daughters of Late Ram Prasad Singh, were not signatories to the *Panchnama* and the same has not been acted upon by them. The said document (deed of *Panchnama*) is not a memorandum of partition or a compromise deed and the learned trial Court has rightly held that being unregistered document it is hit by the provision of Section 17(b) of the Indian Registration Act.

35. This Court in decision reported in **1999 (1) PLJR 199 (Deoki Mallah Vs. Surji Mallahain & Ors.)** has held that the presumption is that unless a division is there, the property of the Hindu family remains joint. Separate in mess and separate cultivation among co-sharer do not mean that there was partition by metes and bounds. Even if separate *kabzadhari* is recorded in revenue record, it does not prove separation or partition rather it



gives an analogy that there was separate cultivation or possession by the persons in favour of whom *kabzadhari* has been recorded. The rent receipts should be taken on the same light.

36. The general rule is that the appellate Court should permit the finding of fact rendered by the trial Court to prevail unless the trial Court fails to consider the evidence and material on record to reach on the said finding and the same is improbable. The Hon'ble Supreme Court in **Madhusudan Das Vs. Narayanibai (deceased) through LRs. and Ors.** reported in **(1983) 1 SCC 35** has held that:

“8.In an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. The principle is one of practice and governs the weight to be



given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact.”

37. Thus, the above analysis of the evidence and the law, establishes that there is unity of title and possession between the parties with respect to the suit properties and accordingly, the plaintiffs are entitled to a decree for partition. The appellant/defendant no.2 failed to prove the partition by metes and bounds. Hence, the point for determination in First Appeal No.326 of 1986 i.e. with respect to unity of title and possession between the parties over the suit properties is decided against the appellant/defendant no.2 and in favour of respondents/plaintiffs.

38. In view of the above settled principles of law, this Court is not inclined to reverse the findings of the fact that there had been no partition between the parties arrived at by the learned trial Court after discussing the oral and documentary evidence. The learned counsel for appellant has not succeeded to convince this Court that impugned judgment and decree passed by the learned trial Court is not sustainable in the eye of Law.



The learned trial Court has rightly decided the issues and the findings so given are quite correct and proper which require no interference by this Court. It is, accordingly, held that the impugned judgment and decree passed by the learned trial Court are fit to be affirmed. The findings of the learned trial Court in the impugned judgment and preliminary decree is hereby **confirmed**.

39. Since the preliminary judgment and decree has been confirmed, it is now required to be considered the merit of the First Appeal No.84 of 2016 against the judgment and decree dated 01.08.2016 which is based on preliminary decree.

40. The learned Pleader Commissioner submitted the report along with *barbada* and partition maps. The objection dated 06.05.2005 and supplementary objection dated 09.06.2010 were filed on behalf of the appellant (defendant no.2) and vide order dated 03.01.2015 it was held that on perusal of report and objection petition there is no valid basis in objection petition and the said report was confirmed.

41. Learned counsel for the appellant has submitted that the appellant is in possession of some plots of land for long and learned Pleader Commissioner failed to apply the well known principle of equity that where partition is inconvenient, the



property must be left in possession of the parties in occupation and that compensation should be paid to the others not in occupation. He has further submitted that the Pleader Commissioner allotted the costly and good size plots in favour of the plaintiffs in connivance with the plaintiff. The partition has not been done plot-wise causing injustice to the appellant. A proper identification of the land is possible with reference to the appropriate survey plot number.

42. On the other hand, learned counsel for the respondents submits that partition is done with respect to the share out of total land considering the plots sold by the parties, the possession containing their residential house. Plot-wise partition is against the principle of partition and *patibandi* which was made considering the compactness of block, convenience of parties as well as the convenience of purchasers of the party. The Pleader Commissioner has partitioned the land under partition between the parties considering the quality of the land under partition which is apparent on perusal of *barwada* (a rough estimate of the area of lands in a *mauza*) and *batwara* (partition) map prepared by the Pleader Commissioner.

43. In the First Appeal No.84 of 2016 the point for consideration is that *whether the learned trial Court has*



committed error in accepting the report of Survey Knowing Pleader Commissioner.

44. Regarding acceptance of the report of the Pleader Commissioner, the oft quoted decision of Privy Council in the case of **Chandan Mull Indra Kumar Vs. Chimanlal Girdhardas** reported in **AIR 1940 PC 3** relying upon earlier decision of the **Judicial Committee** reported at **13 M.I.A. 607** may be recalled.

“It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report, and who had not blindly adopted the assertions of either party.”

45. The above decision of Privy Council still holds the field and same has been relied by the Courts in India.

46. In the case of **Jugeshwar Singh Vs. Rijhan Singh**, **AIR 1938 Patna 104**, a Division Bench of this Court has held as follows:

“... The Subordinate Judge when he makes the final decree considers, first, the report of the Commissioner; the Commissioner has been to the spot, has heard the contentions of the parties and the evidence which the parties produced before him and then to the best of his ability directed the partition by metes and



bounds, taking into consideration the element of compactness, the element of equality, the nature of the land to be divided and many other circumstances which he must take into account and then submits his report to the Subordinate Judge. It is then open to any party, who is dissatisfied with the takhta allotted, to ask the Subordinate Judge to disregard the report of the Commissioner; and the Subordinate Judge again reviews the facts and corrects the award of the Commissioner.

Therefore a first appeal to this Court from the order of the Subordinate Judge is really in the nature of a second appeal in which only questions of law and principle can be considered. It is quite impossible for the Court to go down to the area in question, inspect the land, hear the various objectors and in fact review the decision of the Commissioner on fact. The power to review the decision of the Commissioner on the facts is a matter for the Subordinate Judge, and his view of the facts ought to be final as a first appellate decision on fact. The High Court should only interfere when it is shown that the Judge in his decision has gone wrong on some question of principle in making the final allotment and in drawing up the decree...”.

47. It may be mentioned here that another Division Bench of this court in the case of **Ambika Bhawani Devi Vs. Gouri Kumari Devi** reported in **AIR (34) 1947 Patna 271** held that where a Commissioner is appointed to effect partition, the power to review his decision on the facts is a matter for the Subordinate Judge who passed the final decree, and his view of



the facts ought to be final, unless some question of principle in making the final allotment and drawing up the decree is involved.

48. Coming now to the present case, the Survey Knowing Pleader Commissioner was appointed and there has been no allegation against him regarding his integrity or carefulness. He was one from the approved list maintained by the learned District Judge and the Survey Knowing Pleader Commissioner in presence of the parties made the local investigation and has submitted the detailed report along with *barbada* and partition maps.

49. It appears from the said report that the Pleader Commissioner was appointed for carving out a separate *patti* for the plaintiffs out of the land mentioned in the decree dated 08.04.1986. The Pleader Commissioner filed his report dated 05.03.1988 against which defendant no.2/appellant filed objection and after hearing the objection on the report, the Pleader Commissioner was directed to file a fresh report after correct and scientific measurement and also after giving the information to the parties. The notice was served to the parties and their lawyers. The local inspection and necessary measurement was done in presence of the parties and their



lawyers as per the report dated 29.09.2004. The partition work has been done keeping in view the balance of convenience of the parties and their purchaser and the compactness of the block of the parties as far as practicability. The *barwada* was prepared for the plaintiffs along with D-15 to D-18 to the extent of 1/3rd share and *barwada* for defendants excluding D-15 to D-18 to the extent of 2/3rd share i.e. residuary share.

50. Mere disputing the report of Survey Knowing Pleader Commissioner by filing objection cannot be sustained. The learned trial Court has committed no error in accepting the report of Survey Knowing Pleader Commissioner and rejecting the objection raised by the appellant. Hence, the point for determination in First Appeal No.84 of 2016 is decided against the appellant/defendant no.2 and in favour of respondents/plaintiffs.

51. Thus, I find no infirmity in the impugned judgments and decrees (preliminary and final) which require no interference with the findings of the learned trial Court. Therefore, the finding of the learned trial Court is hereby confirmed.

52. In the result, I find no merit in both appeals. Accordingly, both appeals being First Appeal No.326 of 1986



and First Appeal No.84 of 2016 fail and are **dismissed**. In the facts and circumstances of the case, the parties shall bear their own costs.

53. Let the Trial Court Records be sent back to the concerned Court forthwith.

(Sunil Dutta Mishra, J)

Harish/-

AFR/NAFR	AFR
CAV DATE	08.07.2024
Uploading Date	20.11.2024
Transmission Date	

