

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**FIRST APPEAL No.667 of 1978**

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- 1.1. Umesh Singh Son of Mathura Singh Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
- 1.2. Nalani Ranjan Son of Umesh Singh, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
- 1.3. Shambhu Kumar Son of Umesh Singh, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
- 1.4. Punam Kumari D/o of Umesh Singh, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
- 1.5. Birendra Kumar Son of Late Pithu Singh, Resident of Village Maldah, P.S. 1. Barbigha, pergana Maldah, District Monghyr.
- 1.5. Shashi Prakash Son of Birendra Kumar, Resident of Village Maldah, P.S. 2. Barbigha, pergana Maldah, District Monghyr.
- 1.5. Anjali Devi Resident of Village Maldah, P.S. Barbigha, pergana Maldah, 3. District Monghyr.
- 1.5. Mamta Devi Resident of Village Maldah, P.S. Barbigha, pergana Maldah, 4. District Monghyr.
- 1.5. Nitu Kumari Resident of Village Maldah, P.S. Barbigha, pergana Maldah, 5. District Monghyr.
- 1.5. Chhoti Kumari Resident of Village Maldah, P.S. Barbigha, pergana Maldah, 6. District Monghyr.
- 1.6. Smt. Kamla Devi W/o Hare Krishna Sharma, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
- 1.7. Ram Kumar Husband of Parmila Devi, Village Pakariya, P.S. Nawada, Dist. 1. Nawada.
- 1.7. Chandan Kumar Son of Parmila Devi, Village Pakariya, P.S. Nawada, 2. District Nawada.
2. Srimati Desho Devi Wife of Mathura Singh, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
3. Srimati Sunita Devi Wife of Umesh Singh, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.

... ... Appellants

Versus

2. Kapildeo Singh Son of Saryug Singh, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
3. Arjun Pd. Singh Son of Saryug Singh, Resident of Village Maldah, P.S. Barbigha, pergana Maldah, District Monghyr.
- 4.1. Durgesh Devi Wife of Late Sukhdeo Singh, Village and Post Maldah, P. S - Barbigha, District Sheikhpura.
- 4.2. Kaushlendra Prasad Son of Late Sukhdeo Singh, Village, Post and P.S. Lakhimpur District - Jamui



- 4.3. Pankaj Kumar Son of Late Sukhdeo Singh, Village, Post and P.S. Lakhimpur District - Jamui
- 4.4. Gautam Kumar Son of Late Sukhdeo Singh, Village, Post and P.S. Lakhimpur District - Jamui
- 4.5. Khusbu Kumari D/o of Late Sukhdeo Singh, Village, Post and P.S. Lakhimpur District - Jamui
- 5.1. Basudeo Prasad Son of Late Harihar Singh, Resident of Village Bhadokhra, P.S. Nawadah, District Nawadah.
- 5.2. Indu Kumari D/o of Smt. Chanda Kumari Resident of Village Bhadokhra, P.S. Nawadah, District Nawadah.
- 5.3. Bindu Kumari D/o Chanda Kumari, Resident of Village Bhadokhra, P.S. Nawadah, District Nawadah.
- 5.4. Lalit Kumar S/o Late Basudeo Prasad Resident of Village Bhadokhra, P.S. Nawadah, District Nawadah.
- 5.5. Sharda Ranjan S/o Late Basudeo Prasad, Resident of Village Bhadokhra, P.S. Nawadah, District Nawadah.
6. Sidheshwar Mahton Son of Bishun Mahton, Resident of Village Maldah Tola Nardih, P.S. Barbigha, Pergana Maldah, District Monghyr.

... ... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. K. N. Choubey, Sr. Advocate  
Mr. Sumit Kumar, Advocate  
For the Respondent/s : Mr. Rana Ishwar Chandra, Advocate

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**CORAM: HONOURABLE MR. JUSTICE RUDRA PRAKASH  
MISHRA**

**C.A.V. JUDGMENT**

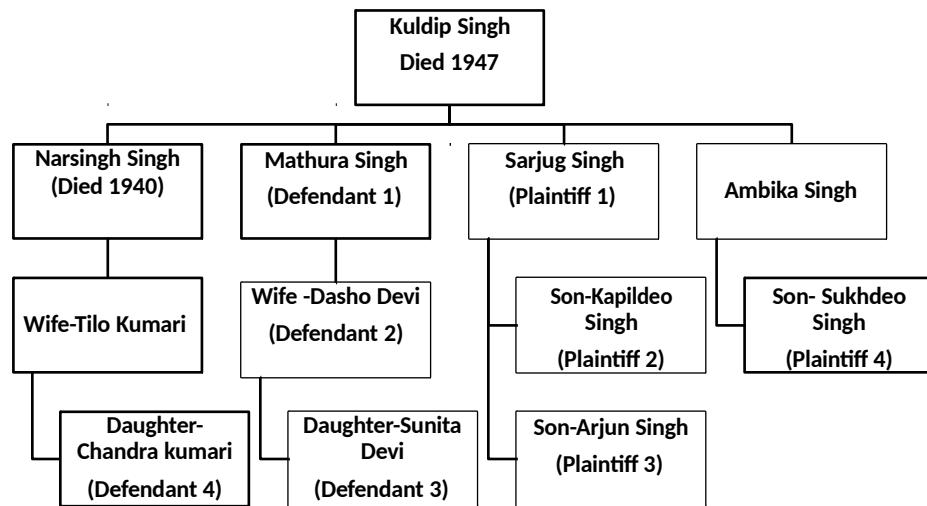
**Date : 29-10-2024**

The present appeal has been filed against the judgment dated 24.06.1978 and decree dated 04.07.1978 passed by 2<sup>nd</sup> Additional Sub Judge, Monghyr in Title Suit No. 116 of 1973/3 of 1977 by which the learned Court below has been decreed the suit in favour of the plaintiffs.

2. For better appreciation of case, the parties shall be referred according to their status before the lower Court.
3. The case of the plaintiffs (respondents herein) is that



the plaintiffs and defendants 1st parties are joint family governed by the Mitakshara School of Hindu Law and are related to each others as Shown in the Genealogical Table given below:-



The common ancestor Kuldip Singh (father) owned and possessed landed properties mentioned in Schedule "A" of the plaint. In the life time of Kuldip Singh, the eldest son Narsingh Singh died in the year 1940 leaving behind his widow Tilo Kumari and a minor daughter Chanda Kumari. After death of Narsingh Singh, Kuldip Singh along with his three surviving sons, namely, Ambika Singh, Mathura Singh (Defendant No. 1) and Saryug Singh (plaintiff No. 1) came in joint possession of the properties and the widow Tilo Kumari relinquished her right in the joint property in lieu of maintenance as also maintenance of her daughter and was allowed 25 maunds of grains annually for her maintenance and for the maintenance of her minor



daughter, namely, Chanda Kumari (defendant No. 4). Kuldip Singh died in the year 1948 and after death of Kuldip Singh, Mathura Singh became the Karta of the joint family of plaintiffs and defendants and thereafter, Chanda Kumari, daughter of Narsingh Singh and Tilo Kumari was married in the year 1949 with the joint family fund. Tilo Kumari never came in possession of any portion of the joint family property. It is further case of the plaintiffs that Tilo Kumari, without any legal necessity, sold away portions of joint family property through three registered sale deeds in favour of Mathura Singh (defendant no.-1), Desho Devi (defendant no.-2, wife of Mathura Singh) and Sunita Devi, (defendant no.-3, Daughter-in-Law of Mathura Singh) which are described in Schedules (B, C and D' to the plaint, being, sale deed dated 26.02.1969 and 11.09.1972, respectively and thereafter, Tilo Kumari died in the year, 1972 (on 25.10.1972). It is further case of the plaintiffs that the Defendant No. 1 to 3 and defendant No. 4 never came in possession of the properties specified in Schedule B, C and D of the plaint. Due to dishonest intention and misconduct of Mathura Singh (Defendant no.-1) were causing difficulties in the joint management of the suit properties, hence the plaintiffs filed a suit bearing Title Suit No.116 of 1973 in the learned



Court of Sub Judge-II, Munger for partition of 2/3rd share of the plaintiffs in suit property described in schedule -A to the plaint and for declaration that the sale deeds dated 26.02.1969 and 11.09.1972 executed by Tilo Kumari, respectively in favour of Mathura Singh (Defendant No.-1), Desho Kumari (Defendant no.-2) and Sunita Devi (Defendant no.-3) in respect of landed properties described in Schedules 'B, and D' respectively, to the plaint are not binding on the plaintiffs. Further in the year 1978, the plaintiffs withdrew the challenge on the validity of the three sale deeds in favour of the appellants and the converted the suit into a suit for partition.

4. The case of defendants-appellants that Mathura Singh, defendant no.1, Desho Devi, defendant no.2 and Sunita Devi, Defendant no.3, have appeared and contested the suit. A joint written statement has been filed on their behalf denying the claims of plaintiffs and pleaded that there was private partition of the joint family properties amongst Narsingh Singh, Ambika Singh, Mathura Singh and Sarjug Singh in the year 1942 by metes and bounds in the life time of Kuldip Singh (their father) by which each branch was allotted 3.33 acres of land to its exclusive share, which is described in schedule-1 to the written statement. It was further pleaded that Tilo Kumari acquired full



right and title over the properties belonging to her husband. Chandra Kumari (Defendant no.-4) pleaded in her additional written statement that her mother, Tilo Kumari executed Sale Deeds dated 25.02.1969 and 11.09.1972 in favour of defendants no.-1 and 3 are valid and genuine which were executed for her legal necessity. After the partition each branch dealt with the properties separately and independently which has fallen to its exclusive share. Sarjug Singh, plaintiff no.1, gave his own share of land in usufructuary mortgage to Awdhesh Kumar Singh under registered usufructuary mortgage deed dated 19.4.1949, where as Ambika Singh exchanged his own land appertaining to plot no. 699 with Secretary of Maldeh High School. It is false to say that Tilo Kumari, the widow of Narsingh Singh, had relinquished her right to the properties exclusively belonging to her husband or that she allotted 25 maunds of grains annually by family settlement for her maintenance and the maintenance of her minor daughter Chandra Kumari. Tilo Kumari acquired full right and title to the properties belonging to her husband. She came in actual possession of the lands which exclusively belonged to Narsingh Singh, her husband, Subsequently, she conveyed these landed properties to these defendants under registered sale deeds and



for consideration. The sale deeds executed by Tilo Kumari in favour of these defendants are genuine and valid documents. These defendants are coming in possession of the properties purchase by them from Tilo Kumari. It is incorrect to say that the properties described in Schedule A to the plaint continued to be joint family properties of the plaintiffs and Mathura Singh defendant no.1, after the death of Narsingh Singh or Kuldip Singh. It is true that Chandra Kumari, defendant no. 4 was married in the year 1949. But it is false to say that her marriage expenses were met with the joint family fund. The defendants have further pleaded that the suit, as framed is not maintainable, that the suit is bad for defect of parties and that the plaintiffs have got no cause of action or right to sue.

5. Defendant nos. 1 to 3 filed additional written statement in the suit in which they contended, *inter alia*, that Narsingh Singh did not join in the execution of the sale deed dated 21/22.5.1943 which was executed by Kuldip Singh, Ambika Singh, Sarjug Singh and Mathura Singh in favour of Uma Mahton which would show that Narsingh Singh was separate from his father and brothers and that the sale deed was not executed for the maintenance of the joint family, that Baijnath had obtained decree in S.C.C. suit no. 467 of 1953 on the basis



of hand note against Ambika Singh that for the satisfaction of the decreetal dues Ambika Singh had sold his exclusive land in the year 1957, that for the satisfaction of the purchaser Sarjug Singh, Plaintiff no.1, and Mathura Singh, defendant no.1, jointed Ambika Singh in the execution of such sale deed which was never executed for the benefit of the joint family and Sarjug Singh, Plaintiff no.1, and his sons Kapildeo Singh and Arjun Singh, gave their own land appertaining to Plot no. 5944 in usufructuary mortgage to Baiju Rabi Das under registered Rehan deed dated 10.6.1965.

6. Defendant No.-4, namely, Chanda Kumari also filed written statement but she did not contest the suit at the time of hearing the case on merit and also the defendant no.-5 (2nd party namely), Sidheshwar Mahto neither appeared in suit nor contested the suit.

7. The learned Court below after going through the pleadings as well as after hearing the parties, framed the following issues:

*I. Is the suit, as framed, maintainable?*

*II. Have the plaintiffs got cause of action or right to sue?*

*III. Whether the suit is bad for defect of parties?*

*IV. Whether there was previous partition of the joint family*



*property by metes and bounds, as alleged by the defendants, amongst Narsingh Singh and his brothers?*

*V. Whether Tilo Kumari relinquished her right title or interest in the joint family property in lieu of maintenance?*

*VI. Whether there is unity of title and possession between the plaintiffs and defendants in respect of the disputed lands?*

*VII. Whether Tilo Kumari had right or title to execute sale deeds in favour of defendant nos. 1 to 3 in respect of lands described in Schedule B, C. and D to the plaint.*

*VIII. Whether the plaintiffs are entitled to a preliminary decree for partition of their share, if any, in the suit property described in Schedule A to the plaint?*

*IX. To what relief or reliefs, if any, are the plaintiffs entitled to ?*

8. In this case, 13 witnesses viz. Ragho Mahton (Witness No.1), Kali Mahton (Witness No.2), Jagdish Singh (Witness No.3), Rajendra Pd. Singh (Witness No.4), Sanichar Mahton (Witness No.5), Nand Kishor Pd. Singh (Witness No.6), Sukhdeo Singh (Witness No.7), Siya Sharan Singh (Witness No.8), Satrughan Pd. Singh (Witness No.9), Bhagwan Singh (Witness No.10), Sukhdeo Singh (Witness No.11), Saryug Singh



(Witness No.12) and Kapildeo Singh (Witness No.13) were also examined on behalf of the plaintiffs. On behalf of defendants also, 13 witnesses viz. Sidheshwer Mahto (Witness No.1), Basudeo Singh (Witness No.2), Janardan Singh (Witness No.3), Naresh Pd. Singh (Witness No.4), Brijnandan Singh (Witness No.5), Jadunandan Pd. (Witness No.6), Suraj Deo Prasad (Witness No.7), Sheodani Singh (Witness No.8), Haran Singh (Witness No.9), Nilkanth Rawani (Witness No.10), Alakh Rup Lal (Witness No.11), Sita Ram Singh (Witness No.12) and Mathura Singh (Witness No.13) were got examined. Oral evidence was led and documents were also exhibited on behalf of the parties. After analyzing the aforesaid issues, the learned Court below decreed the suit in favour of the plaintiffs and hence the defendants (appellants herein) have preferred the present appeal.

9. Heard Mr. Kamal Nayan Choubey learned Senior counsel assisted by Mr. Sumit Kumar on behalf of the appellants-defendants and Mr. Rana Ishwar Chandra for the respondents-plaintiffs.

10. Learned senior counsel for appellants submits that there was no pleading that Mathura Singh (defendant No. 1) acquired the land from Tilo Kumari on behalf of joint family



property and there was no issue raised and no evidence in the Court below. By virtue of Section 14 of the Hindu Succession Act, if any interest was acquired by Tilo Kumari which became absolute owner as per Section 14 of the Hindu Succession Act, 1956. Learned Senior Counsel further submitted that in pursuance of the above sale deeds executed by Tilo Kumari is valid and genuine, it cannot be subjected to other scrutiny. Later on, Court below held that still there was unity of possession and upheld the sale deed and Tilo Kumari did not relinquish her right. In this regard, learned senior counsel by way of citing an excerpt of Epic **Ramcharitmanas** submits 'दुई कि होहि एक समय भुआला | हँसब ठठाई फुलाइब गाला" (is it possible O King ! *To roar with laughter and pout at same time?* ) [It means that both the findings regarding validity of sale deeds and the other regarding its character of joint family will not go together]. Learned counsel for the appellant also submits that all the four branches of Kuldeep Singh should have got 1/4<sup>th</sup> share each of the suit property. The plaintiffs withdrew the challenge on the validity of the three sale deeds in favour of the appellants executed by the widow of Narsingh Singh and converted the suit into a suit for partition. The Court below affirmatively held that the sale deeds are genuine and after deletion of the prayer



regarding validity or otherwise of the three sale deeds, there was no jurisdiction to go into that and record a finding that despite the sale deeds, the property is joint property and even those property which are covered and the finding is wrong. Secondly, there are cogent material and reliable oral evidence to show that there was previous partition and, hence the suit for partition is not maintainable but the Court below while deciding issue No. 4 held that the defendants have failed to prove that there was previous partition. Learned senior counsel further submits that if the property covered by the three sale deeds are taken to be joint family property, it is bound to be divided into four shares, i.e., for the branches of four sons of Kuldeep Singh. The decree of 2/3rd in favour of the plaintiffs comprising of the branches of Sarjug Singh and Ambika Singh and one third for the branch of Mathura Singh has legated the share to the branch of Narsingh Singh whose daughter at least is available as defendant no.4. It is well settled that an individual member of the family can acquire property while remaining a member of the joint family. In the present case, the appellants pleaded and proved their case of previous partition and have also proved that Narsingh Singh had already separated during the life time of Kuldeep Singh as he was not a co-transferor with Ambika Singh, Mathura Singh



and Sarjug Singh in 1943. In any event, there was no fetter on the rights of Defendant No. 1 to 3 to acquire their separate and exclusive property from Tilo Kumari in 1969 and 1972, who had absolute and conclusive right to transfer. Further, the plaintiffs by amending their plaint have accepted the genuineness of the sale deeds in favour of the defendants and they are now estopped from challenging the same in any manner whatsoever. The proposition that the widow had absolute right to alienate and the defendants have untrammelled right to hold are covered by the principles laid down in, inter-alia, the following judgments i.e. **AIR 2003 SC 3800, (2008) 1 SCC 465 and 1999 (2) PLJR 258**

11. Learned senior counsel next submitted that there was previous partition in the family and, as such, the present suit for partition is not maintainable. It is lamentable but a hard fact that the old reality of Hindu joint family has undergone a sea-change during the last century caused by the special learning and the social upheavals. Partition/separation has become the rule and jointness merely an exception. This social truth can be taken judicial notice of by the Court. Partition does not always mean partition by metes and bound. Mere attention to severe may also constitute partition and thus the Trial Court has wrongly



held that the defendants have failed to prove that there was previous partition as alleged by them of the joint family properties by metes and bounds amongst Narsingh and his brothers. It is a matter of common practice in rural area that illiterate or even semi-literate purchaser insists on all the raiyats/co-parceners/land holders to join as vendors despite partition just to instill confidence in the Vendee. This hard fact of life has been ignored by the Learned court below. Learned senior counsel further argued that the defendants have pleaded and proved that Narsingh Singh died in 1949. Admittedly there was a registered sale deed executed in respect of the family land in 1943. As Narsingh Singh was separate from the family since 1942, he did not join his brothers Ambika, Mathura and Sarjug as co-transferor. Learned senior counsel further submits that by holding that besides one third as already allotted by the Court below, the appellants are also entitled to the lands. The land transferred by Tilo Kumari and in any view of the matter the grant of two-third share to the plaintiff in the joint family property is unwarranted and untenable. Learned senior counsel lastly prays that the appeal be allowed by holding that besides one third share as already allotted by learned Court below, the appellants are also entitled to the lands. The land



transferred by Tilo Kumari and in any view of the matter, the grant of 2/3<sup>rd</sup> share to the plaintiffs in the joint family property is unwarranted and untenable.

12. Learned counsel for the respondents-plaintiffs submits that there was no partition was metes and bounds and there was unity of title and possession and existence of the joint family property. Learned counsel next submits that the Trial Court after due consideration and discussion upon the evidence on record orally as well as documentary found and held that there was no previous partition of joint family properties by metes and bounds amongst the plaintiffs and defendants was made and as such decided Issue no.-4 decided in favour of plaintiffs. Further with respect to Issue no.-5, it is stated that in view of the amendment in plaint, there is no relevancy of said issue, as after death of Narsingh Singh, his widow, namely, Tilo Kumari got right and title over the share of her husband in joint family properties. Learned counsel for the respondents further submitted that with respect to issues no. 6 and 7, it is stated that the defendant no.-4, namely, Mathura Singh was the Karta of the Joint family who used to manage the affairs of the joint family and used to look after the work of Tilo Kumari. The defendant no.-4 stated that Mathura Singh purchased the land covered



under Ext.-A/2 to A/4, i.e., Ext. 'B, C and D' from Tilo Kumari in his name and his wife and daughter -in -law names from his own separate funds, whereas he had himself admitted in his examination (para-26 of his deposition) that he had no other source of income and as such, the Court below found and held that said Tilo Kumari was right to execute the sale deed (Ext. A/2, to A/4) and on said land, there is unity of title and possession of both parties of both plaintiffs and defendants no.-1 to 3) as the defendant no.-4 not claimed over the joint family property). Further, with regard to issue no.-3, the learned court below has rightly found and hold that all the three branches of plaintiffs no.-1, 3 and defendant no.- 1, who are the head and representative of their branch have represented the suit on behalf of junior members of their branch and hence the suit does not suffer from defect of parties. Learned counsel for the respondents-plaintiffs submitted that issue nos.-2,8 and 9 had taken up together and after discussion on said issues the learned court below had found and hold that the plaintiffs have got cause of action to sue for partition of their share in the joint family properties described in Schedule 'A' to the plaint. It has further held that the plaintiffs together have got two-third share in the joint family properties described in Schedule 'A' to the



plaint. whereas, defendant no.-1 ( Mathura Singh) has got one-third share in said properties. Thus, the decree passed by the learned Trial Court does not require any interference by this Hon'ble Court.

13. After hearing both the appellants and the respondents, the main points for consideration is that:

1. Whether the judgment and decree of the Court below is sustainable in the eyes of law ? and
2. Whether the plaintiffs/respondents are entitled for  $2/3^{\text{rd}}$  share in suit property or  $1/2^{\text{nd}}$  share in the suit property?

14. Before coming to the finding, it is important to have some legal mandate which are required to be seen. **Chapter-XII of the Mulla Hindu Law 25<sup>th</sup> Edition deals with Joint Hindu Family Coparceners and Coparcenary Property-Mitakshara Law.** Article 210 speaks about Joint Hindu Family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. It speaks about the constitution and for that, recognizes lineal descendants from a common ancestor and includes their wives and unmarried daughters. Article 211 signifies a Hindu coparcenary is a much narrower body than the joint family and



it includes only those persons who acquire by birth an interest in the joint or coparcenary property. After the amendment of the Hindu Succession Act in 2005, a daughter of a coparcener has been included as a coparcener along with sons of the coparcener. Article 212 speaks about conception of a joint Hindu family constituting a coparcenary is that of a common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive of such ancestor (or three degrees exclusive of the ancestor) A coparcenary is purely a creature of law. No female can be a coparcener, although a female can be a member of a joint Hindu family prior to amendment in Hindu Succession Act in 2005. By virtue of the Amendment Act, 2005, the daughters of a coparcener are included as coparceners along with his sons and are recognised as coparceners in their own right. However, Article 213 speaks about coparcenary not limited to four degrees from common ancestor. The rule is that partition can be demanded by any member of a joint family who is not removed more than four degrees from the last holder, however, remote he may be from the common ancestor or original holder of the property.

15. Article 214 identifies undivided coparcenary interest and essence thereof, is unity of ownership. According to the true



notion of an undivided family governed by Mitakshara law, no individual member of the family, whilst it remains undivided, can predicate, of the joint and undivided property that he, that particular member, has a definite share, one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family.

16. Article 218 deals with classification of property bifurcating in two parts (1) joint family property (2) separate property. The joint family property consists of (1) ancestral property, (2) separate property of coparceners thrown into common coparcenary stock. Property jointly acquired by the members of joint family with the aid of ancestral fund would also be joint family property. The main ingredient thereof, is having joint interest/possession of every coparcener, habitable by survivorship (before amendment) having right of male by birth (before amendment) while separate or self acquired property is acquisition by an individual from his independent source, even remaining coparcener.

17. Article 219 speaks about incidents of Joint Family or Coparcenary Property in which every coparcener has a joint interest and a joint possession. The incidents of a coparcenary



were summarized in the undermentioned decision of the Supreme Court. The following are the main incidents of joint family or coparcenary property. It:

(a) devolves by survivorship, not by succession (227)

This proposition must now be read in the context of sections 6 to 30 of the Hindu Succession Act, 1956, in cases where those sections are applicable;

(b) is the property in which the male and female issue (daughters) after the amendment to the Hindu Succession Act, 2005) issue of the coparceners acquire an interest by birth.

18. Article 220 speaks about incidents of separate or self-acquired property. A Hindu, even if he be joint, may possess separate property. It is not liable to partition and on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners.

19. Article 221 deals with (a) nature of the ancestral property coming from paternal ancestral, (b) property inherited from maternal grandfather, (c) property inherited from collaterals- property inherited from females (d) share allotted on partition (e) property obtained by a gift or will from paternal ancestor, (f) accretions and (g) repatriated property.



20. What kind of property could be classified as separate property is found duly categorized under Article 228. For better appreciation the same is enumerated hereinafter:-

“228. **Separate property.** Property acquired in any of the following ways is the separate property of the acquirer; it is called ‘self-acquired’ property, and is subject to the incidents mentioned in 222.

- (1) *obstructed heritage.*- Property inherited as obstructed heritage (saparati-bandhya daya) i.e, property inherited by a Hindu from a person other than his father, father's father or father's father's father.
- (2) *Gift-* A gift of a small portion of ancestral movable property made through affection by a father to his male issue, is his separate property.
- (3) *Government grant.*- Property granted by government to a member of a joint family is the separate property of the donee, unless it appears from the grant that it was intended for the benefit of the family.
- (4) *Property lost to family.*- Ancestral property



lost to the family, and recovered by a member without the assistance of joint family property. Property acquired by a father by adverse possession is his separate property and not ancestral property.

(5) *Income of separate property*.- The income of separate property and purchases made with such income.

(6) *Share on partition* - Property obtained as his share on partition by a coparcener who has no male issue (see Section 221(4)). This position is now materially altered with the inclusion of daughters of a coparcener as coparceners in their own right by the amendment in the Hindu Succession Act 2005. If therefore, even if a coparcener who has obtained a share on partition has no male issue but has a female issue, the property allotted to him on partition will partake the nature of coparcenary property. The above proposition will therefore have to be read as a coparcener having been allotted



a share on partition, takes it as his separate property when he has no issue. This is since, by virtue of the amendment, as the distinction between male and female children of a coparcener stands abrogated and abolished, both having been given equality of status as coparceners.

(7) *Property held by sole surviving coparcener.*- Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt.

(8) *Separate earnings.*- Separate earnings of a member of a joint family.

(9) *Gains of learning.*- All acquisition made by means of learning are declared by the Hindu Gains of Learning Act, 1930, to be the separate property of the acquirer."

21. Article 231 speaks about presumption as to Coparcenary and self-acquired property. It is needless to say that constitution of Hindu Family is always presumed to be joint. Whenever there happens to be dispute over status of the family, the party who pleads contrary to the presumption is



under obligation to substantiate the same and that is the spirit of Article 231 wherein it has been laid down that in normal state of every Hindu Family would be joint. In other words, ' given a joint Hindu Family, the presumption is, until the contrary is proved, the family continues joint. The presumption of union is the greatest in the case of father and sons. When coparceners have separated, there can be no presumption as to jointness. Presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family, the presumption becomes weaker and weaker.

## **22. Chapter-XVI of Mulla Hindu Law 25<sup>th</sup> Edition**

**deals with Partition and Reunion- Mitakshara Law.**

Partition, according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before, but not



the tenure of the property. The Hon'ble Supreme Court in ***Kalyani versus Narayanan reported in A.I.R. 1980 SC 1173*** held that partition in one sense is a severance of joint status and a coparcener in coparcenary is entitled to claim it as a matter of volition. Once there is a disruption, then there is disruption in the joint family status and the rights are crystallized although not immediately followed by a defcto actual division of the property.

23. Article 322 deals with the extraordinary status of the father who has been empowered to effect partition amongst him with his sons irrespective of non-inclination of son. Article 324 prescribes the methodology as to how the partition could be effected, (a) partition by institution of a suit, (b) partition by agreement, (c) partition by arbitration.

24. Article 326 speaks about evidence over the factum of partition as well as burden of proof. It has been elaborated in the following manner:-

- (i) The clearest case is where the members of a joint family divide the joint property by metes and bounds, and each member is in separate possession and enjoyment of the share allotted to him on partition. Permanency is an essential feature, though not the sole test, of and arrangement of outright partition.



(ii) The next case is of the kind dealt with by the Privy Council in *Approvier v. Rama Subba Aiyan*, where the coparceners, with a view to partition executed a writing, whereby they agreed to hold the joint property in defined shares as separate owners. Such writing operates in law as a partition, though the property is not physically divided. This is a case where the agreement declares on the fact of it, the intention of the parties to hold the joint property as separate owners, and no evidence is admissible of the subsequent acts of the parties to control or alter the effects of the document.

(iii) The third case is of the kind dealt with by the Privy Council in *Doorga Pershad v. Kundun*, where the agreement was in writing, but the document did not declare on the face of it, the intention of the parties to hold the joint property as separate owners. In such a case, when the question arises as to whether the document operates as a partition, the intention of the parties is to be inferred from: (1) the document; and from (2) their subsequent acts. Where an instrument of partition, after giving one member his share, provided that the rest of the property was to be divided in a particular manner and that the remaining members should live like an ordinary undivided family subject to survivorship, it



was held by the Privy Council that there was no partition between the other members.

(iv) The last case is of the kind dealt with by the Privy Council in *Ganesh Dutt v. Jewach*, a case where there was no writing at all. In such a case, when the question arises as to whether there has been a partition or not, then intention of the parties as to separation can only be inferred from their acts. The question is one of fact to be decided with due regard to the cumulative effect of all the facts and circumstances, and primarily the burden of showing that there has been a partition is on the person setting it up.

In case of old transactions, when no contemporaneous document are maintained and when most of the active participants in the transaction have passed away, though the burden still remains on the person who asserts that there was partition, it is permissible to fill up gaps in the evidence more readily by reasonable inferences from the evidence on record, than in a case where the evidence is not obliterated or lost by passage of time.

In *Ganesh Dutt's* case, a Hindu widow alleging that her husband *B* has separated from his three brothers in Fasli 1295, brought a suit against them to recover her husband's share in the family as his heir. The defence was that *B* died joint and undivided. The Privy Council



held that there was a partition as evidenced by the following five facts: (1) payment of revenue of certain villages elonging to the family, one-fourth in the name of *B* and three-fourths in the names of his thee brothers; (2) crediting to *B* in Fasli 1295, one-fourth of a share of Rs. 35,000 recovered by the family under a decree and three-fourths to the three brothers; (3) payment of rent by a lessee of a factory belonging to the family as to one-fourth to *B* and as to three-fourths to the three brothers; (4) purchase in Fasli 1295, by the four brothers of an estate in their names in equal shares; and (5) a suit instituted after *B*'s death by one as the adopted son and heir of *B* to recover a debt due to the family; as to this last fact, it is to be observed that if *B* had died undivided, the suit would have been brought by the surviving brothers and the adopted son as coparceners. In the above case, it was also contended on behalf of *B*'s widow that *B* had become separate from his brother in food and worship in Fasli 1295, and that fact was of itself conclusive proof of partition. As to this contention their Lordships said: "*Cesser of commonality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive. It is therefore, necessary to consider whether*



*the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word.”* Cesser of Commonality, it is stated above, is not a conclusive proof of partition, the reason is that a member may become separate in food and residence merely for his convenience. Separate residence of the members of the joint family in different places where they are in service does not show separation. Similarly, other acts, though standing by themselves; are not conclusive proof of partition, yet may lead to that conclusion in conjunction with other facts. They are separate occupation of portions of the joint property, division of the income of the joint property, refinement of shares in the joint property in the revenue of the land registration records, mutual transactions etc. The mere facts that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be.

(v) Admission of severance made in legal proceedings, if not explained, can be very cogent evidence of partition.

25. Since, both the points are deeply intermingled



whereupon are conjointly decided. The plaintiffs have filed the suit initially for declaring that the three sale deeds executed by Tilo Kumari in favour of the defendant Nos. 1 to 3 were not binding on the plaintiffs but later in the year 1978 an amendment was brought in the suit and whereafter the suit was converted into a suit for partition. The plaintiffs claimed that there was no partition in the joint family property by metes and bounds amongst Narsingh Singh and his brothers. The plaintiffs also claimed about unity of title and possession between the plaintiffs and defendants in respect of the disputed lands. The plaintiffs further claimed that Tilo Kumari (mother of defendant No. 4) relinquished her right, title and interest in the joint family property in lieu of her maintenance as also maintenance of her daughter (daughter No. 4). On the other hand, the defendants pleaded that there was previous partition in the joint family property by metes and bounds amongst Narsingh Singh and his brothers and this was the reason that Narsingh Singh had not joined in the execution of the sale deeds and this clearly indicates that he had become separate from other members of the family prior to 1943. The plaintiffs/respondents had no title to the lands thereby and those lands were not available for partition in the present suit. The



defendants also claimed that the land executed in favour of defendant Nos. 1 to 3 were within her rights and that Tilo Kumari (mother of defendant No. 4) did not relinquish her rights in lieu of maintenance. The Trial Court while deciding Issue No. 4 has held that the defendants have failed to prove that there was previous partition in the joint family properties by metes and bounds and decided the issue in favour of the plaintiffs whereas while deciding Issue No. 5 has held that the Tilo Kumari had not relinquished her right, title and interest in the joint family property in lieu of maintenance. Further while deciding issue No. 6, the Trial Court has held that there is unity of title and possession between the plaintiffs in respect of the suit properties and while deciding Issue No. 7 has further held that the Tilo Kumari had right to execute the sale deeds in respect of her share in the joint family property. The Trial Court lastly decreed the suit in favour of the plaintiffs granting 2/3<sup>rd</sup> share in the suit property. Thus, the judgment and decree passed by the Trial Court is full of contradictions. It is the settled law that the limited right of Tilo Kumari before Hindu Succession Act, 1956 Act became absolute after operation of Section 14 of the Hindu Succession Act, 1956. Further, after the plaintiffs conceded that the original relief for declaration



that the impugned sale deeds executed by Tilo Kumari in favour of defendant Nos. 1 to 3 is not binding on the plaintiffs has become redundant in as much after amendment, the suit has been changed into one for simple partition. Further, the findings regarding the validity of sale deeds and unity of title, interest and possession cannot go together.

26. After hearing the learned counsels for the parties and perusing the findings given by the Court below, it appears that although the Court below stated that it was a pleading of the defendants that there was a partition by metes and bounds but finding was given that there was unity of title and possession and that there was existence of joint family and no partition took place. So far as share of the deceased co-parcener Narsingh is concerned, as per the submission of the appellants' counsel that mother of defendant No. 4 along with her minor daughter acquired the interest of her husband's interest by virtue of Section 14 of the Hindu Succession Act as absolute owner and any sale deed executed by Tilo Kumari in favour of defendant Nos. 1 to 3 is valid and even her daughter (defendant No. 4) who appeared in the Court below and decided to support the pleadings of the appellants and despite this, the Court below has given a finding that Tilo Kumari (mother of defendant No.



4) did not relinquish her property in lieu of maintenance and it was also upheld by the Court below that the sale deeds executed were valid. Court below also gave a finding that there was unity of title and possession and there was no previous partition by metes and bounds. Submission of the appellants' counsel is that with regard to the partition, general rule is that there are certain females who have no any right to claim partition but if the actual partition takes place then there are certain females entitled to share in partition.

27. Under the Mitakshara law, there are certain persons entitled to claim partition and so far as female is concerned, there are certain females who has no right to seek partition but if the actual partition takes place in the joint family property then certain female is entitled to share in partition. The Smritikaras were aware of the rights of females in the family, so some females who do not have a right to claim partition but if a partition takes place, they are entitled to share on such partition. There are three females- wife or widow, mother and grandmother, who take a share if a partition of joint family takes place.

28. With respect to rights of the female, the following principles are relevant:



- (i) *Before coming into force of Hindu Succession Act, the share allotted to a female was not her absolute interest or stridhana but reverted back and becomes part of the share out of which it came except where it was given to her by way of an absolute gift. But now by virtue of Section 14(1) of the Hindu Succession Act, it is her absolute property.*
- (ii) *Before partition by metes and bounds is made and property is de facto divided on severance of status the interest of female does not become absolute owner under Section 14 of the Hindu Succession Act. Their right arises only when partition is actually effected.*
- (iii) *Similarly, under Section 6 of the Hindu Succession Act, the mother and widow take a share as Class-I heirs of the deceased Hindu dying intestate and leaving undivided coparcenary interest. Both these provisions have not affected their right to have a share in the coparcenary property on partition.*

## 29. Chapter-XVI of Mulla Hindu Law 25<sup>th</sup> Edition

### deals with Partition and Reunion- Mitakshara Law.

Article 315 deals with **Widow mother**. A mother cannot compel a partition so long as the sons remain united, however, if a partition takes place between the sons, she is entitled to a share equal to that of a son in the coparcenary property. She is also entitled to similar share on a partition between the sons and the purchaser of the interest of one or more of them. Under Mitakshara law when a partition takes place after the father's death amongst the sons, the mother as well as step mother are



entitled to a share equal to that of son.

30. **Smiriti Chandrika, II, 268** says: “द्विभागे क्रियमाणे पुत्राशं सममेवाशं हरे दित्यार्थ” (It means wherever there is partition amongst the sons, the widow-mother would get a share equal to that of a son in the co-parcenary property).

31. In **Vineeta Sharma versus Rakesh Sharma and Others** reported in **(2020) 9 SCC 1**, the Hon’ble Supreme Court held that by virtue of 2005 amendment in Hindu Succession Act, a daughter has now become entitled to claim partition of coparcenary w.e.f. 9.9.2005 while the right of the wife of a coparcener to claim her right in property is in no way taken away. The Hon’ble Supreme Court held as under in paragraph 85 of the judgment:

*“85. The right to claim partition is a significant basic feature of the coparcenary, and a coparcener is one who can claim partition.” The daughter has now become entitled to claim partition of coparcenary w.e.f. 9-9-2005, which is a vital change brought about by the statute. A coparcener enjoys the right to seek severance of status. Under Sections 6(1) and 6(2), the rights of a daughter are pari passu with a son. In the eventually of a partition, apart from sons and daughters, the wife of the coparcener is also entitled to an equal share. The right of the wife of a coparcener to claim her right in property is in no way taken away.”*

32. Later on, very recently, Hon’ble Apex Court reiterated the above view taken in **Vineeta Sharma (supra)** in



the case of ***Prasanta Kumar Sahoo and Others versus Charulata Sahu and Others*** since reported in (2023) 9 SCC 641 and quoted paragraph 85 of ***Vineeta Sharma (supra)*** the judgment in paragraph 74.1 of its judgment and held that if there is a partition of co-parcenary property between father and sons (and now also daughters) then wife of father as well as widowed mother of the father would get one share equal share to that of a son (or a daughter).

33. In the present case, from perusal of the findings of the Court below, it appears with regard to pleading of the appellants-defendants that there was previous partition by metes and bounds, the Court below decided Issue No. 4 in favour of plaintiffs-respondents and held that the defendants have failed to prove that there was previous partition by metes and bounds. Further while deciding Issue No. 5, the Court below held that Tilo Kumari did not relinquish her right, title or interest in joint family property in lieu of maintenance and upheld the sale deeds executed by Tilo Kumari (while deciding Issue No. 7) and at the same time while deciding Issue No. 6 held that there was unity of title and possession and existence of joint family between the plaintiffs and Mathura Singh (defendant No.



1) in respect of suit properties. However, even if it can be presumed that there was no partition by metes and bounds, under these circumstances, I agree with the submissions of learned senior counsel that both the findings cannot go together and if actual partition takes place as per law between the sons of Kuldip Singh and widow mother of defendant No. 4, each would be entitled for 1/4th share as there was a partition suit filed by the plaintiffs. The Court below has committed error by allotting 2/3<sup>rd</sup> share to plaintiffs and 1/3<sup>rd</sup> share to defendants-appellants and consequent thereupon finding recorded by the Court below is not found in accordance with law. Thus, both the points are decided in favour of the defendants-appellants.

34. In view of the discussions made hereinabove, this Court sets aside the judgment dated 24.06.1978 and decree dated 04.07.1978 passed by 2<sup>nd</sup> Additional Sub Judge, Monghyr in Title Suit No. 116 of 1973/3 of 1977. This Court upholds that the original plaintiffs-respondents are not entitled for 2/3<sup>rd</sup> share in the suit property but the original plaintiffs-respondents are entitled to 1/2 share only in the suit property.

35. Accordingly, the appeal is allowed. However, in the facts and circumstances of the case, both the parties will bear



their own costs.

**(Rudra Prakash Mishra, J)**

Pankaj/-

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