

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**FIRST APPEAL No.254 of 1987**

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1. Kauleshwar Pd. Singh Son of Shri Gulab Pd. Singh alias Mohit Narain Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
2. Shambhu Nath Pd. Singh Son of Shri Kauleshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
3. Satish Pd. Singh Son of Shri Kauleshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.

... .. Appellant/s

Versus

- 1.1. Smt. Pamila Devi D/o Late Baleshwar Prasad Singh, W/o Sri Shambhu Singh, R/o Village Ayiyara, P.S. Imamganj, Dist. - Jehanabad.
2. Manoj Kuamr Pd. Singh Son of Shri Baleshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
3. Smt. Bachani Devi Wife of Baleshwar Pd. Singh (Sole Legal heir of her deceased Son Vijay Kumar Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
- 5.1. Shail Devi Wife of Late Kameshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
- 5.2. Chanu Prasad Singh S/o Late Kameshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
- 5.3. Dolly Devi D/o Late Kameshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
6. Rajeshwar Pd. Singh Son of Shri Gulab Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
7. Vinod Pd. Singh Son of Shri Gulab Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
8. Nandan Pd. Singh Son of Shri Gulab Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
9. Gopal Pd. Singh Son of Gulab Pd. Singh @ Mohit Narain Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
10. Nepal Pd. Singh Son of Shri Gulab Pd. Singh @ Mohit Narain Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
11. Raju Pd. Singh Son of Shri Kameshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.
13. Braj Kishore Pd. Singh Son of Shri Bhuneshwar Pd. Singh, Resident of Village Neemora, Police Station and Block Dhanarua, District- Patna.

... .. Respondent/s



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**Appearance :**

For the Appellant/s : Mr. K.N. Choubey, Sr. Advocate  
Mr. Raj Ballabh Singh, Advocate  
For the Respondent/s : Ms. Shilpi Keshri, Advocate  
Mr. Suryajit Prakash, Advocate  
Ms. Akanksha Verma, Advocate

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**CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA**

**C.A.V. JUDGMENT**

**Date : 21-03-2025**

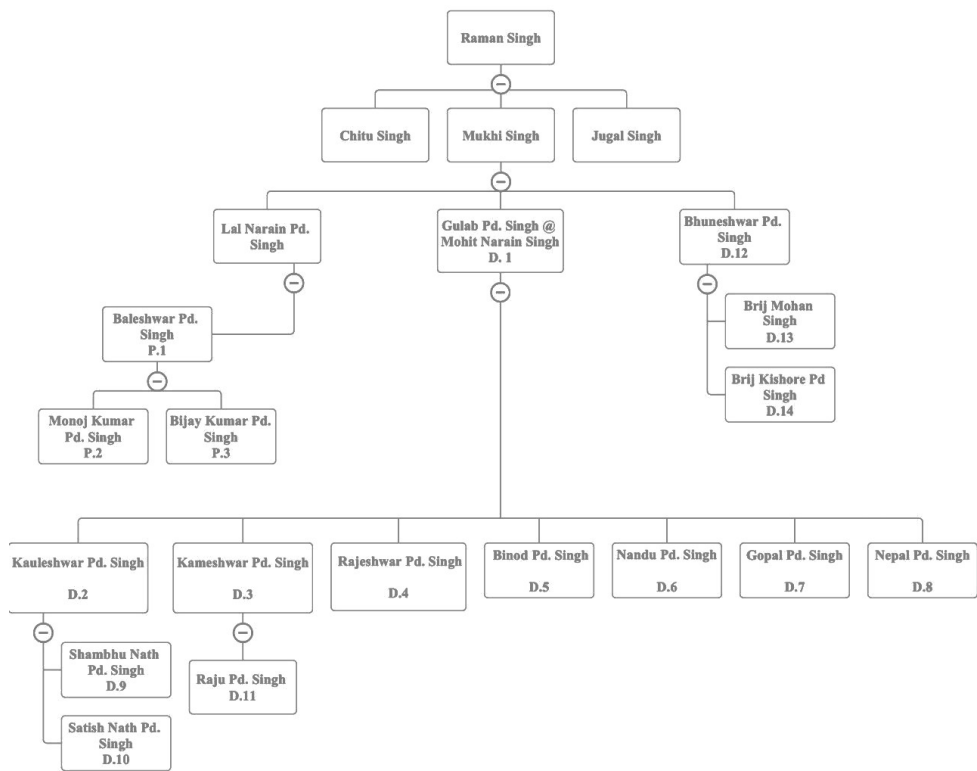
This First Appeal has been filed by the appellants herein (defendant no.2 and his sons defendant nos.9 and 10 in the suit) against the preliminary decree dated 31.03.1987 passed by the learned Sub Judge VI, Patna in Title (Partition) Suit No.218 of 1974/46 of 1986 decreeing the suit on contest with cost against defendant nos.1 to 11 wherein a preliminary decree was passed for 1/3<sup>rd</sup> share of the plaintiffs and 1/3<sup>rd</sup> share of co-plaintiff nos.4 to 6 and also 1/3<sup>rd</sup> share of the defendant nos.1 to 11. It was further held that after preparation of preliminary decree, on separate petition of the plaintiffs, a Survey Knowing Pleader Commissioner will be appointed to carve out separate *takhta* of 1/3<sup>rd</sup> share each of the parties as per the terms of the preliminary decree.

2. For the sake of convenience, the parties where required shall be referred to in terms of their status before the learned trial Court.

3. The facts, in brief, are that the plaintiffs filed suit for



partition being Title (Partition) Suit No.218 of 1974 (46 of 1986) seeking 1/3<sup>rd</sup> share in the joint family property as the parties to the suit are Joint Hindu Family governed by the *Mitakshara* School of Hindu Law and are related to each other as shown in the Genealogical Table given below:



4. Raman Singh was the common ancestor of the parties who had three sons namely Chitu Singh, Mukhi Singh and Jugal Singh out of which Chitu Singh and Jugal Singh died either issueless or unmarried. Mukhi Singh died leaving behind him his three sons namely Lal Narain Pd. Singh, Gulab Pd. Singh alias Mohit Narain Singh (D-1) and Bhuneshwar Pd. Singh (D-12). Lal Narain Pd. Singh also died leaving behind his son Baleshwar Pd. Singh (P-1) and two grand sons Monoj Kumar



Pd. Singh (P-2) and Bijay Kumar Pd. Singh (P-3). Gulab Pd. Singh alias Mohit Narain Singh has got seven sons Kauleshwar Pd. Singh (D-2), Kameshwar Pd. Singh (D-3), Rajeshwar Pd. Singh (D-4), Binod Pd. Singh (D-5), Nandu Pd. Singh (D-6), Gopal Pd. Singh (D-7) and Nepal Pd. Singh (D-8). Kauleshwar Pd. Singh has got two sons namely Shambhu Nath Pd. Singh (D-9) and Satish Pd. Singh (D-10). Kameshwar Pd. Singh has one son namely Raju Pd. Singh (D-11). Bhuneshwar Pd. Singh (D-12) has got two sons namely Brij Mohan Pd. Singh (D-13) and Braj Kishore Pd. Singh (D-14). After the death of both Jugal Singh and Chitu Singh, who were issueless, sons of Mukhi Singh being the nearest heir came in possession of the entire property by rule of survivorship. In last Survey Record of Right the names of Chitu Singh, Mukhi Singh and Jugal Singh were recorded. Gulab Pd. Singh alias Mohit Pd. Singh (defendant no. 1) being the eldest member of the family became *karta* of the joint family of plaintiffs and defendants. The plaintiffs have given description of their ancestral lands and also the acquired properties in Schedule I of their plaint in detail. Schedule II of the plaint describes the details of movable properties including cattle and ornaments. Some lands were acquired by purchase by Mukhi Singh and other family members from the joint family



fund in the name of different family members. Though, different rent receipts in the name of individual family members were issued, the properties were not separate properties. The properties described in Schedule I and II have never been partitioned by metes and bounds among the plaintiffs and defendants and they are still in jointness. Further, Bhuneshwar Pd. Singh (defendant no.12) separated in mess only but the properties remained in jointness. The share of plaintiffs in the entire suit properties is  $\frac{1}{3}^{\text{rd}}$ , share of defendant nos. 1 to 11 and from defendant nos. 12 to 14 is  $\frac{1}{3}^{\text{rd}}$  respectively. The documents related to properties mentioned in Schedule I and the properties in Schedule II are in possession of the defendant no. 1 and the same are being concealed by defendant no. 1 with dishonest intention as such the plaintiffs felt hard to remain joint in the family with defendants. It is also the case of the plaintiffs that defendant no. 1 has kept about Rs.25,000/- in his custody which is income from the joint family property and the same is liable to be partitioned between the parties.

5. The plaintiffs have prayed that a preliminary decree for partition with respect to the properties described in Schedule I and II of the plaint for  $\frac{1}{3}^{\text{rd}}$  share of the plaintiffs be passed and after passing of the preliminary decree, a Survey Knowing



Pleader Commissioner be appointed for carving out separate *takhta* of 1/3<sup>rd</sup> share of plaintiffs in the property described in Schedule I and II of the plaint, and after submission of the report, final decree may be passed accordingly and the plaintiffs be put in separate and exclusive possession of the property so allotted.

6. Defendant no.1 and his sons (defendant nos.3 to 8) have contested the suit. Defendant no.1 along with his sons (defendant nos.3 to 8) have filed joint written statement whereas defendant no.2 (son of defendant no.1) along with his sons (defendant nos.9 and 10) filed separate written statement and have fully supported the written statement of defendant no.1 and taken similar pleading in their written statement as have been taken by defendant no.1 and defendant nos.3 to 8 in their joint written statement.

7. Defendant nos. 1 and his sons defendant nos.3 to 8 filed a joint written statement stating that there is no unity of title and possession between the parties with respect to the properties in suit which is also barred by estoppel, acquiescence and waiver. Therefore, no cause of action lies with the plaintiffs for this suit and as such the suit is not maintainable. So far as raiyati lands under *touzi* no. 16257 are concerned, an area of 9



*bigha* 16 *katha* of land purchased from Syed Md. Kadri vide registered sale deed dated 29.06.1956 on payment of Rs.5,000/- out of which Rs.2,500/- was paid from the *tilak* money of defendant no. 2 and the other half amount was paid out of the joint family fund. The sale deed was executed in the name of defendant no.2 and plaintiff no. 1 as the family members used to love him as his father died before. Moreover, 1½ *bigha* of the purchased land and 5 *katha* of other land were sold vide sale deed dated 30.12.1956 to raise a sum of Rs.900/- to make out the necessities of the families. Defendant no. 2 did not join in the execution of the sale deed as his half share in the aforesaid purchased land was the self acquired property. He further revolted and wanted partition in the joint family property and also half share in the aforesaid purchased land due to which separation took place in *Jeth* 1957 where defendant no.2 agreed upon taking half share of the aforesaid purchased land and only one decimal of land in the house over Survey Plot No. 484 of khata no.105 southern side and to renounce his claim over other family properties. The remaining lands purchased by sale deed dated 29.06.1956 remained with the joint family with which defendant no. 2 ceased to have any concern and since then defendant no. 2 and his sons have been coming in exclusive



possession of the lands described in Schedule I of their written statement as the absolute owner thereof with which others have no concern. The portion of the house allotted to defendant no.2 was very small so he purchased adjoining home-stead land in Plot No. 478 by sale deed dated 12.11.1959 from one Kapildeo Singh out of his own fund and thereafter he reconstructed a new house over the same amalgamating one decimal of the land allotted to him and defendant no. 2, his sons and wife occupied the same exclusively. In the partition of the *Jeth* 1957 the movable properties were also partitioned and defendant no. 2 has got his share in the same.

8. It is further stated that after separation of defendant no.2, in *Baisakh* 1959, the remaining joint family by mutual agreement, separated in mess and *karobar* but the land remained joint and jointly cultivated. Further, in *Jeth* 1969, the said other co-sharers partitioned the joint lands by metes and bounds. At the foot of W.S. schedule of lands given to defendant no.1 and other share holder are described. Since then all the parties are having separate cultivation possession, separate khatian and enjoyment in all respects and, therefore, plaintiffs have no unity of title and possession in respect of the land in suit. Defendant no.1 denied that he has been karta of the family.





9. Defendant nos. 12 to 14 (co-plaintiff nos.4 to 6) filed joint written statement supporting the case of the plaintiffs and claiming their 1/3<sup>rd</sup> share in the entire suit property. It has been stated that defendant no. 1 is *karta* and manager of the joint family and he used to look after the joint family affairs including relevant papers of the joint family properties which were prepared at his instance. Defendant no. 1 was reluctant for amicable partition after being asked for several times by the plaintiffs. It is further stated that defendant no.1 (along with his sons defendant nos.3 to 8) and defendant no. 2 Kauleshwar Pd. Singh and his sons (appellants herein) have filed separate written statement with some dishonest intention claiming false and baseless allegations of previous partitions and claiming almost half of the entire family properties as shown in their written statements alleged to have been separately allotted to them when they are entitled to only 1/3<sup>rd</sup> share on partition. Further, the specific case of the defendant nos. 1 to 11 in their written statement is that half of the share of purchased land which is *touzi* no. 16257, an area of 9 *bigha* 16 *katha* of land purchased from Syed Md. Kadri vide sale deed dated 29.06.1956, belongs to defendant no.2, as half amount of the consideration money was paid out of the *tilak* money of



defendant no. 2, have falsely been stated by defendant nos. 1 to 11.

**10.** Defendant nos. 2 Kauleshwar Prasad Singh and his sons defendant nos.9 and 10 (appellants herein) by filing a joint written statement dated taking common plea of defendant no.1 stated that the plaintiffs have no unity of title and possession with the defendants. Moreover, it has been denied therein that defendant no.1 was the *karta* of the joint family. It has been further stated that defendant no.2 could not pull on well with his step-mother and father, so he wanted partition. It was therefore, settled at the intervention of friends and relations. Defendant no.2, in *Jeth* 1957, agreed on to half of the share in the land acquired by purchase bearing *touzi* no. 16257, being self acquired property, and one decimal of share in Plot No.484, and he also agreed on renouncing his rights in other joint family property. It is further stated that since then the defendant no.2 has been coming in exclusive possession of the same as an absolute owner and has paid rent and *chaukidari* taxes separately. In *Jeth* 1969 there was partition by metes and bounds of all the joint movable and immovable properties among both the parties and accordingly, the plaintiffs along with the other defendants got separate lands. It has been stated that the



plaintiffs, defendant no.1 and defendant nos.12 to 14 appointed one man each for settling the matter and preparation of list of land in accordance with previous partition and accordingly, the said persons on admission of partition and proper ascertainment prepared lists as *yadast* dated 14.07.1973 to which each of the parties agreed and accepted the same but the plaintiffs filed the suit. Even during the present suit well-wishers of the parties persuaded the parties to settle the matter according to previous partition and on their instance they prepared list and punches and parties signed on the list on 15.03.1975. There is nothing joint among parties for partition. Plaintiffs and defendant nos.12 to 14 are in collusion with one another and the suit is liable to be dismissed. The details of lands belonging to defendant nos.2, 9 and 10 are given in Schedule I with the written statement of defendant nos.2, 9 and 10

**11.** On the basis of pleadings as well as after hearing the parties, the learned trial Court framed/recasted the following issues:

- (i) *Is the suit, as framed, maintainable?*
- (ii) *Have the plaintiffs got cause of action for the suit?*
- (iii) *Is the suit barred by estoppel, waiver and acquiescence?*
- (iv) *Whether there has been previous partial partition*



*between the defendant no.2 on the one hand and other members of the family on the other hand, in Jeth, 1957?*

- (v) Whether there has been separation in mess, residence and affairs between the three branches of the family in 1959 and subsequent complete partition by metes and bounds in 1969 between them?*
- (vi) Whether the lands purchased from Syed Md. Kadri by registered sale deed dated 29.06.1956 was joint family properties or half of the lands out of the purchased land was separate acquisition of the defendant no.2 and only the remaining half was joint family proportion?*
- (vii) Have the plaintiffs unity of title and unity of possession over the land in suit?*
- (viii) Are the plaintiffs entitled to the decree of partition, as alleged, if so, in respect of what properties and how much share?*
- (ix) To what other relief or reliefs, are the plaintiffs entitled to?*

**12.** In support of their respective cases, the parties have adduced oral as well as documentary evidence. The plaintiffs have examined five witnesses namely, PW-1 Harihar Paswan, PW-2 Ram Ashish Singh, PW-3 Baleshwar Prasad Singh (plaintiff no.1), PW-4 Lal Bahadur Singh and PW-5 Ram Bali Singh. PWs-1, 2 and 3 are material witnesses whereas PWs-4 and 5 are formal witnesses who have proved two sale deeds Ext.1 and Ext.1/A. On behalf of co-plaintiffs, two witnesses namely Ram Lakhan Singh (PW-1) and Bhuneshwar Pd. Singh



(PW-2) (co-plaintiff no.4) have been examined. Ext.1 is a sale deed dated 03.12.1956 executed by Baleshwar Singh and others in favour of Babu Bulaki Singh and Ext.1/A is a sale deed dated 04.02.1960 executed by Gulab Prasad Singh and others in favour of Lal Bahadur Singh. Ext.1/B is a certified copy of the sale deed dated 29.06.1956 which shows that 09 bigha 16 kathas of land was purchased from one Syed Md. Kadri on payment of consideration money of Rs.5,000/- in the name of Baleshwar Prasad Singh and Kauleshwar Prasad Singh.

13. On behalf of defendant no.1 altogether nine witnesses have been examined. DW-1 Rajdeo Singh, DW-2 Rajeshwar Singh, DW-3 Bachchu Narayan Lal, DW-4 Deep Narayan Singh, DW-5 Tapeswar Singh, DW-6 Gulab Singh alias Mohit Singh (defendant no.1), DW-7 Dev Niranjana Lal. DWs-1, 2, 5, 6 and 9 are material witnesses and DWs-3, 4 7 and 8 are formal witnesses on behalf of defendant no.1 who have proved *chaukidari* receipts and rent receipts and other several documents (Exts.A to I) filed on behalf of defendant no.1.

Ext.A is the signature of witness Rajeshwar Singh on Panchnama.

Exts.D to D/2 are signature and thumb impressions of Baleshwar Prasad Singh, Mohit Narain Singh and Bhuneshwar Prasad Singh on Panchnama.

Ext.D/3 is signature of Tapeswar Singh on Schedule



(Ext.I).

Ext.B is Panch Appointment.

Ext.C is Panchnama with Schedule.

Exts.E to E/4 are chaukidari tax receipts.

Ext.F is Endorsement over Ext.C.

Ext.G is compromise petition dated 08.04.1997 on behalf of plaintiff and defendant nos.1 to 11.

Ext.H is rent receipt.

Ext.I is land schedule of Mohit Narain Singh with compromise petition.

14. On behalf of defendant no.2 altogether seven witnesses have been examined. DW-1 Kauleshwar Prasad Singh (defendant no.2), DW-2 Nityanand Sharma, DW-3 Vijay Prasad, DW-4 Chandra Deo Sharma, DW-5 Mathura Prasad, DW-6 Rajeshwar Tiwary, DW-7 Ram Chandra Prasad, DWs-1, 2, 3 and 4 are material witnesses and DWs-5 to 7 are formal witnesses. Documentary evidences were also filed on behalf of defendant no.2. Sale deed dated 12.11.1959 (Ext.A) shows that Kapildeo Singh executed a sale deed of 4 decimals of land on consideration money of Rs.500/- on 12.11.1959 in favour of Kauleshwar Pd. Singh, two *chaukidari* receipts (Exts.C and C/1) shows that defendant no.2 paid *chaukidari* tax of a house of Neemora village and list of documents regarding filing of



one rent receipt (Ext.B) shows rent receipt for the year 1968-69 which stands in the name of Kauleshwar Prasad Singh.

**15.** The learned trial Court after hearing the parties and considering the evidences and materials on record decided the issues in favour of the plaintiffs holding that there was unity of title and unity of possession of both the parties over the suit land and the contesting defendants want to get more than their share, thus, the plaintiffs have got valid cause of action and the suit is maintainable thereof. Further, it was held that the suit was not barred by estoppel, waiver and acquiescence. The learned trial Court also held that the defendants have failed to prove separate acquisition of defendant no.2 over half of the land acquired by purchase vide sale deed dated 29.06.1956. Therefore, the aforesaid land was joint family acquisition from joint family fund. The learned trial Court, in conclusion, held that there has been no previous partial partition between the defendant no.2 and other members of the family and, thus, preliminary decree be prepared for  $\frac{1}{3}^{\text{rd}}$  share of the plaintiffs,  $\frac{1}{3}^{\text{rd}}$  share of the co-plaintiffs nos.4 to 6 (defendant nos.12 to 14) and  $\frac{1}{3}^{\text{rd}}$  share of the defendant nos.1 to 11.

**16.** Aggrieved by and dissatisfied with the said preliminary decree, the appellants (defendant nos.2, 9 and 10)



challenged the same in this First Appeal.

**17.** Heard Mr. Kamal Nayan Choubey, learned senior counsel assisted by Mr. Raj Ballabh Singh, advocate on behalf of appellants and Ms. Shilpi Keshri, advocate for the contesting respondents.

**18.** Learned senior counsel for the appellants has submitted that the learned trial Court failed to appreciate that the plaintiffs had no cause of action for the suit because appellants were separated from the respondents (plaintiffs and other defendants) in 1957 and the partition by metes and bounds had already taken place between the parties.

**19.** Learned senior counsel for the appellants further submitted that the name of appellant no.1 stands with respect to the half of the lands concerned by Ext.1/B (sale deed dated 29.06.1956) with respect to 9 bigha 16 katha of lands and consideration money of Rs.2,500/- out of Rs.5,000/- was paid from the Tilak money of appellant no.1 and half share and area are separate property of the appellants. The learned trial Court has gone against the evidences that it was acquired from the joint family fund.

**20.** It is further submitted that the trial court is not justified in disbelieving the previous partition on the ground that





some differences in area of the lands allotted to their respective *Takhta* specially when plaintiffs have led no evidence on quality of the land whereas the defendants have proved by evidence that difference in area is due to quality of lands. It is submitted that the learned trial Court failed to consider the exhibited documentary evidences i.e., Ext. A to Ext.I which shows that the parties were separate in all respect and partition was effected by metes and bounds. It is further contended that the learned trial Court has completely ignored the admission of P.W. 3, Baleshwar Pd. Singh (plaintiff no.1) that he signed the compromise petition in Court. Moreover, the learned trial Court failed to appreciate the consistent evidence given by D.Ws. 1, 2, 3, 4 and 6, who were common relatives of both the parties and have proved the partition and separate mess, residence, business, transaction and cultivation. P.W. 1, Harihar Paswan in para 8 of his deposition has stated that both the parties used to stay separately. P.W. 3 in his deposition stated that defendant no.2 separated from his father due to differences. The learned trial Court has also erred in not considering the rent-receipts and *chaukidari* receipts in the name of defendant no.2. It is further submitted that the learned trial Court has completely ignored the evidences adduced by the appellants and accepted the version of



the plaintiffs.

**21.** On the other hand, the learned counsel for the respondents has submitted that all the suit properties are joint but the same are being cultivated separately in accordance with the convenience of the parties. There is no partition by metes and bounds between the parties. The appellants have failed to prove the previous partial partition and have not submitted any reliable documentary as well as oral evidence to the matter thereof. It is contented that properties described in Schedule I of the plaint are joint family properties and the said properties comprise of lands recorded in the survey records of right in the name of Chitu Singh, Mukhi Singh and Jugal Singh. It is next submitted that the findings of the learned trial Court cannot be interfered with and thus, this First Appeal is liable to be dismissed with cost.

**22.** In view of the above rival contentions and submissions made on behalf of the parties, the point arises for consideration in this First Appeal is that:

*(i) Whether half of the land purchased through sale deed dated 29.06.1956 can be considered as self acquired property of defendant no.2/appellant?*

*(ii) Whether there was any separation/partial partition between defendant no.2 and other family members in the year 1957 and complete partition between the remaining parties by metes and bounds*



*in 1969?*

*(iii) Whether there is any unity of title and possession between the parties over the suit properties?*

*(iv) Whether the judgment and decree of the learned trial court is sustainable in law?*

**Point No.(i)**

**23.** The law is well settled that only those acquisition would be self-acquisitions which are acquired “without detrimental” to the joint family property. As a corollary, all acquisitions made by a coparcener with the aid of the joint family property or funds are part of the family property. The initial burden is on the plaintiff to show that there was a sufficient nucleus which yielded very large income and it was from and out of the said surplus, the properties that stand in the name of members of the family were acquired. The Hon’ble Supreme Court in **D.S. Lakshmaiah & Anr. vs. L. Balasubramanyam & Anr.** reported in **2003 (10) SCC 310** set out the legal position in para 18 as follows:

*“18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and onus would shift on the person who*



*claims it to be self acquired property to prove that he purchased the property with his own fund and not out of joint family nucleus that was available.”*

**24.** It is the case of defendant no.2 that purchase of 9 bigha 16 katha land from Syed Md. Kadri vide registered sale deed dated 29.06.1956 in the name of defendant no.2 and plaintiff no.1 was on payment of Rs.5,000/- out of which Rs.2,500/- was paid from Tilak money of defendant no.2 and other half amount of the joint family fund. He had not joined in the execution of the sale deed dated 30.12.1956 with respect to 1 ½ bigha of purchased land and 5 katha of other land as his half share in the aforesaid purchased land was his self acquired property.

**25.** As the plaintiffs have come up with the case that the said property is joint family property even though it stands in the name of defendant no.1 and plaintiff no.1 as the same was purchased through the joint family fund, the onus is on plaintiffs that the ancestral properties were available, ancestral properties derived income and from the income so derived, there was surplus, sufficient enough to purchase the property. Unless these foundational facts are established and the plaintiffs discharges the burden, the onus will not shift on the defendants to prove the contrary.



**26.** The admitted fact in this case is that in the year 1956 the entire family of the parties including defendant no.2 were members of joint family and defendant no.1 was the karta of the family. In the entire family of the parties, in 1956 there were about 40-50 bighas of land. When it is admitted or proved that at the time of acquisition, family was joint and joint family possessed some properties (nucleus) with the aid of which the properties could have been purchased, the presumption is that all the properties held by or in the hand of any individual member or members is joint family properties. In the present case the foundational facts are admitted. Accordingly, the burden lies upon the defendants to prove the fact that half of the lands out of 9 bigha 16 kathas is self acquired properties of defendant no.2.

**27.** In para 8 of the written statement of defendant no.1, it has been stated that Rs.2,500/- out of Tilak money of Kauleshwar Singh had remained in the hands of Kauleshwar Singh which was paid towards consideration money but defendant no.1 (as DW-6) in para 14 of his deposition has stated that his uncle Jugal Singh had joint family fund in his hand at the time of acquisition of land from Syed Kadari and money of Kauleshwar Prasad Singh was also given by Jugal Singh who



was karta at that time. In para 16 he further deposed that he has no proof of Tilak money and Jugal Singh had knowledge about the same.

**28.** Plaintiff no.1 himself and on behalf of co-plaintiff Bhuneshwar Prasad Singh, defendant no.1 Gulab Prasad Singh alias Mohit Singh and defendant no.2 Kauleshwar Prasad Singh are witnesses on the point of acquisition of 9 bigha 16 katha of land. Plaintiffs as well as co-plaintiffs in their evidence have deposed that defendant no.1 has been karta of the joint family and he purchased 9 bigha 16 kathas of land from income of joint family fund. On the point of Tilak of Kauleshwar Prasad Singh (defendant no.2) it is stated that only about Rs.1,000/- was given in Tilak of Kauleshwar Prasad Singh and expenses in marriage was more than that amount. So the plea of defendants regarding purchase of half land in above said purchased land from Tilak money of defendant no.2 is false and imaginary story.

**29.** On the other hand, defendant nos.1 and 2 in their evidence have deposed that Rs.5,000/- was given in Tilak of defendant no.2 and out of the same, surplus money of Rs.2,500/- was given in consideration money in the sale deed dated 29.06.1956 and thus half of the said land is separate and self acquired properties of the defendant no.2.



**30.** Defendant no.1 (DW-6) in his evidence in para 14 has admitted that some of the joint family money was deposited in the bank in the name of Baleshwar Singh and rent receipts of some lands have been issued separately in the name of Kauleshwar Singh and Baleshwar Prasad Singh.

**31.** Defendant no.2 in his evidence deposed that marriage was solemnized in 1956 in which cash Rs.4,500/- was received at the time of Tilak and Rs.2,500/- was spent on marriage. He further stated that total consideration amount of sale deed dated 29.06.1956 was Rs.5,000/- out of which Rs.2,500/- was paid from his Tilak money and Rs.2,500/- from joint family fund. The said fact was disclosed to him by Jugal Singh who has died. He does not know when the consideration amount was paid.

**32.** When the property in question was self acquired property, then question of giving the same in partial partition does not arise. Partition of the property itself gives inference that the property purchased in the name of plaintiff no.1 and defendant no.2 (younger member of the joint Hindu family) was joint family property. Plaintiff no.1 and defendant no.2 had no source of income at that stage and there is no material on record to show that the half share of land was purchased in name of defendant no.2 out of his Tilak money. On one hand, defendant



no.2 is claiming that half of the land purchased through sale deed dated 29.06.1956 as his self acquired property on the other hand it is also claimed that when he revolted and demanded partition, the said half portion of purchased land was given to him as his share at the time of partial partition in Jeth 1957. It is not in dispute that when the said land was purchased, there was joint Hindu family having sufficient nucleus.

**33.** From the analysis of evidence and circumstances of the case, this court finds that defendants/appellants have failed to prove that half of the purchased land through sale deed dated 29.06.1956 was separate acquisition of defendant no.2. Hence, the point for determination no.(i) is decided against the appellants and in favour of plaintiffs.

**Point Nos.(ii) & (iii)**

**34.** Since both the points are deeply intermingled and are conjointly decided. The plaintiffs claimed that there was no partition in the joint family property by metes and bounds and claimed about unity of title and possession between the parties in respect of suit property. On the other hand, appellants' case is that there was partial partition between the defendant no.2 and other family members in 1957 and subsequently there has been separation in mess, residence and affairs between remaining





family members of three branches in 1959 and subsequently there was complete partition by metes and bounds in 1969 between them. Plaintiffs, defendant no.1 and his other sons had got separate lands and they have been enjoying their respective land separately according to partition. Thus, there is no unity of title and possession in respect of the lands in suit among the parties in view of the partition by metes and bounds. There is no longer joint family or joint movable or immovable properties among them. The further case of appellants is that there was no written document of partition. The *punches* prepared list of partitioned lands of each party as *yadast* on 14.07.1973 and all the parties agreed and accepted the same. It is further claimed by appellants that during the proceeding of this suit, well-wishers of the parties persuaded the parties to settle the matter according to previous partition and they prepared list on 15.03.1975 on which *punches* and parties signed on the same.

**35.** Learned counsel for the appellants has submitted that the learned trial court failed to appreciate that there was sufficient material on record to prove that there was partial partition between defendant no.2 and other family members in 1957 and subsequently in 1969 there was complete partition between plaintiffs, defendant no.1 and his other sons and co-



plaintiffs. The parties came in exclusive possession over the allotted properties and there was no unity of title and possession between the parties over the suit properties. He has further submitted that the learned trial court completely ignored the evidence adduced by the appellants and accepted the versions of plaintiffs.

**36.** On the other hand, learned counsel for the plaintiffs submitted that all the family properties are joint and the suit lands are cultivated separately according to convenience of the parties but there is no partition by metes and bounds. Learned counsel for the plaintiffs/respondents submitted that appellants 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.

**37.** Now, it is relevant to analyze the evidence adduced by the parties on the point whether there is unity of title and possession of suit property between the parties or whether there was previous partition between the parties.

**38.** Both the parties in support of their respective cases have adduced oral and documentary evidence. PW-1 Harihar Paswan, PW-2 Ram Ashish Singh, Baleshwar Prasad Singh (plaintiff no.1), PW-1 of co-plaintiff Sri Ram Lakahn Singh and



also Bhuneshwar Singh (defendant no.12) in their evidence deposed that entire family of the parties have been coming joint but only in mess and residence they have began to live separately during the pendency of the suit in compliance of the order of the court. PW-1 is villager of the parties and labour who stated that for last 4 to 5 years parties are living separately. PW-2 who is also a villager deposed that parties of the suit are living separately on the basis of court's order and prior to that they were cultivating lands jointly. PW-3 is plaintiff himself who stated the facts as stated in plaint. PW-1 examined on behalf of co-plaintiffs is a co-villager who deposed that during the pendency of the suit, by the order of the court the parties are cultivating the lands separately but prior to that they were cultivating the lands jointly. PW-2 of co-plaintiffs Bhuneshwar Prasad Singh has reproduced the facts mentioned in W.S.

**39.** In this case, it is admitted position that any paper regarding the partition of the year 1957 has not been filed. In written statement of appellants, name of any person is not mentioned who intervened and was present at the time of partition of 1957.

**40.** DW-1 in his evidence deposed that he was not present at the time of partition in the year 1957, DW-2 in his evidence



admitted that he and Kauleshwar Pd. Singh are co-parties in a proceeding under Section 145 Cr.P.C. DW-2 examined on behalf of defendant no. 2 has deposed that Kauleshwar Pd. Singh was not separate from other members of the family in his presence. DW-3 of defendant no. 2 deposed that the partition related to Kauleshwar Pd. Singh was done before his sense. Defendant no. 2 in his evidence deposed that any written paper of the partition was not prepared. On the other hand, defendant no. 1 (DW-6) in his evidence deposed that at the time of partition of 1957, paper was prepared regarding partition and the same was given to Kauleshwar Pd. Singh which are contradictory to each other. Defendant nos. 1 and 2 in their evidences before the Court have given contradictory statement regarding presence of persons of alleged partition of 1957. The sale deed, the rent receipt, *chaukidari* tax report cannot prove that Kauleshwar Pd. Singh was separated from other family members in 1957.

**41.** Defendant no.1 as DW-6 has deposed that in year 1969 when there was a dispute with respect to payment of rent, *panchayati* was held and written agreement on *sada* paper was prepared but no such paper has been filed in the Court by the defendant. Defendant no.1 in his evidence admitted that *jamabandi* of entire lands is still joint and he never filed any



petition for the mutation in the Anchal Office to get his partitioned land in the office of Anchal Officer.

**42.** Ext.-1 filed by the plaintiff goes to prove that in year 1960 defendant no.1, plaintiff no.1 and co-plaintiff no.4 executed a sale deed jointly for necessity of house affairs which shows that on 04.02.1960 when Ext.-1 was executed, entire family was joint.

**43.** From the evidence of DWs.1, 2 & 5 and Exts.-B, C & G prove that in year 1973 and also during pendency of the suit, the common relatives tried to settle the dispute between the parties but the disputes were not settled. The *panchayaties* were held for completing the partition among the parties and inference can be taken that there was no partition between the parties regarding their properties by metes and bounds.

**44.** DW-1 and DW-2 in their evidence deposed that on request of parties of the suit they assembled at the house of the parties and some other common relatives and co-villagers also participated in *panchayati* and all shares were partitioned by metes and bounds and schedules were also prepared for the lands of the parties. DW-1 admitted that he is relative of defendants. DW-2 admitted in his cross-examination that he was not present at the time of both partition of the year 1959 and



1969. DW-5 supported the case of defendant but in his cross-examination, he has admitted that he filed a case under Section 145 of Cr.P.C. jointly with family members of Mohit Singh. DW-9 Girija Nandan Prasad deposed that he prepared the schedule on the request of parties but in his cross-examination he admitted that he was not known to the parties and documents prepared by him was not signed by the parties nor by *punches* nor by himself also. DW-6 is defendant no.1 himself. DW-1 of defendant no.2 is the party himself. DW-2 of defendant no.2 is alleged common relative of party who deposed that only Kauleshwar Pd. Singh was separated but he was not present at that time and he does not know whether the other family members are partitioned or not. DW-3 of defendant no.2 in his evidence deposed that after institution of present suit Bhuneshwar Prasad Singh, Mohit Singh and Baleshwar Prasad Singh have started to live separately.

**45.** The separate rent receipts for the purchased land in the name of Kauleshwar Singh and Baleshwar Singh is due to the reason that the said land was purchased in their names. Only on the basis of separate rent receipts and *choukidari* receipts, it cannot prove the fact that Kauleshwar Singh (defendant no.2) was separated from other family members.



46. 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.

47. 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.

48. In the case of **Shub Karan Bubna alias Shub Karan Prasad Bubna Vs. Sita Saran Bubna and Others** reported in (2009) 9 SCC 689, the Hon'ble Supreme Court held that



“partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. “Separation of share” is a species of “partition”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners are separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds.

**49.** 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.

**50.** 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 appellants failed to prove the partition by metes and bounds. Hence, the point for determination nos.(ii) & (iii) are decided against the appellants and in favour of contesting respondents/plaintiffs.

**Point No.(iv)**

**51.** 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.”*

**52.** 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. The judgment and decree of learned trial court is sustainable in law. Hence, the point for determination no.(iv) is decided against the appellants and in favour of contesting respondents/plaintiffs.

53. 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**.

54. In the result, I find no merit in the present appeal. Accordingly, the appeal being First Appeal No.254 of 1987 fails and is dismissed on contest. In the facts and circumstances of the case, the parties shall bear their own costs.

55. The Interlocutory Application(s), if any, stand disposed of.

56. Let the trial court records be sent back to the concerned court forthwith.

(Sunil Dutta Mishra, J)

Harish/-

AFR/NAFR	NAFR
CAV DATE	25.11.2024
Uploading Date	21.03.2025
Transmission Date	

