

(1990) 02 PAT CK 0012

In the Patna High Court

Case No : Appeal from Original Decree No. 79 of 1982 (R)

Abdul Manan Khan

APPELLANT

Vs

Mirtuza Khan and Others

RESPONDENT

Date of Decision : 08-02-1990

Acts Referred:

Citation : AIR 1991 Patna 154

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Debi Prasad, S.P. Bhartuhar and L.K. Kal, for the Appellant; N.K. Prasad and M. Sahu, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This first appeal, at the instance of the plaintiff, arises out of a judgment and decree dated 17-2-1982, passed by Sri Haricharan Mittal, 12th Additional Subordinate Judge, Ranchi in Partition Suit No. 146/5 of 1980-81, whereby and where-under the said learned court dismissed the plaintiff-appellant's suit.

2. The facts of the case lie in a very narrow compass.

3. The plaintiff filed the aforementioned suit for partition without mentioning in the plaint the extent of his share in the properties in suit.

4. The relationship of the parties appear from the genealogical table as has been set out in the plaint, which is as follows :--

Gulab	Bibi												
								Abdula	Shadula	Abas			
Khan	Sahbaj	Khan	Wajdan	Bibi	Khan	Khan					___		
				___							Abdul	Kanan	
Bano	Bibi	Julekha				Khan,	P. 1	P. 2	Khatoon.	P. 3			
												Farid	

Sahida Hamida Halima | | Khatoon Khatoon | | (died) | _____ | | | |
_____| | | | | | | | Muslim, Murtaza, Sajad, Sogra Bibi, Mehrun,
Hasbun, Mahmuda | _____
_____| | | | | | | Idris, Suleman, Irshad, Iltaf,
Geyas, Ibrahim, Sahrin Bibi

5. The ancestor of the properties, Gulab Bibi was wife of one Mohiuddin Khan.
 6. However, according to the defendants the said genealogical table was not complete inasmuch as admittedly some properties have been recorded in the name of Gulab Bibi Whereas some properties have been recorded in the name of Gulab Bibi and Mehtab Bibi jointly and some others have been recorded in the name of Mehtab Bibi alone.
 7. Mehtab Bibi was the wife of Md. Kasim, she left behind a son Abdul Rahman Khan and three daughters, namely Dulhan Bibi, Noor Bibi and Man Bibi.
 8. It is further alleged that Abdul Rahman Khan transferred the said properties in the name of his wife Wajdan Bibi in lieu of "Dein Mohar".
 9. The plaintiff claimed a share in the properties belonging to Gulab Bibi as the heirs and legal representatives of Wajdan Bibi. One of the daughters of Gulab Bibi claimed the right, title and interest exclusively in the properties pf the aforementioned Mehtab Bibi.
 10. So far as the properties in suit are concerned, they are situated in four different villages namely, Goya, Salsood, Birdih and Bariatu.
- Schedules A, B and C appended to the plaint contain the details of the properties situate in village Bariatu, Schedule C/I contains the details of the properties situate in village Goya, whereas Schedule D of the plaint contains the details of the properties situate in village Salsood and Schedule D/1 contains the details of the properties situate in village Birdih.
11. After filing of the plaint, the plaintiff amended the plaint thrice which was allowed by orders dated 18-6-1981, 21-8-1981 and 20-11-1981.
 12. By reason of the aforementioned amendment of the plaint, the plaintiff not only made amended the rules in the body of the plaint but also made alterations in the schedule of the properties mentioned at the foot of the plaint as also added various persons as defendants therein being defendants Nos. 10 to 27.
 13. The defendants filed written statement in various sets, one set of written statement has been filed by the defendants Nos. 1 to 7, another written statement has been filed by the defendants Nos. 8 and 9, Md. Farid Khan and Halima Khatoon, yet another written statement has been filed on behalf of the defendants Nos. 11 to 25. .
 14. Bereft of all unnecessary details in the written statement, it was, inter alia,

contended that Gulab Bibi and Mehtab Bibi were sisters. The said Gulab Bibi and Mehtab Bibi got equal share in the properties belonging to their father-in-laws, Kasim Khan and Mohiuddin Khan.

15. It has further been alleged that so far as the village Bariatu is concerned, the properties belonging to Khata No. 114 were recorded exclusively in the name of Gulab Bibi; whereas the properties appertaining to Khata No. 116 were recorded jointly in the name of Gulab Bibi and Mehtab Bibi and the properties appertaining to Khata No. 115 were recorded in the name of Mehtab Bibi alone.

16. It was further alleged that Gulab Bibi executed a Panchnama Will in the year 1948 during her lifetime in presence of her sons and daughters and also in presence of some other respectable persons of the village, whereby and whereunder the arrangement for enjoyment of the properties was made.

17. According to the defendants, by reason of the aforementioned deeds, the properties have been divided in the following manner as stated hereinbelow:--

As per Panchnama

Khata No. Plot No. Name of the land & Description Area

Abdullah Khan 116 502 Dabar Don 0.24 acres.

Sahdullah Khan 116 502 " 0.29 acres.

Abbas Khan 114 444 Chitabagicha Don 0.14 "

Wajadan Bibi 114 763 Dugdugia Tanr 0.33 "

Jointly in the names of four brothers 114 763 Dugdugia Tanr acquired by Govt. for Medical College 0.66 acres Trees etc.

Jointly in the names of four brothers Sinduar Tanr acquired by Govt. for Medical College

All brothers are in possession accordingly 114 37 Ghar Bari all are in possession according to Panchnama 0.11 acres

2 47 " 0.10 acres

Village : Goya

Sahbaj Khan 130 407 More or less 0.24 acres

408 .74 acres 0.29 "

331 492 Half share of land 0.49 "

404 in the name of 0.20 "

493 Shahbaj Khan 0.25 "

1.47 "

18. According the defendants, the aforementioned Panchnama Will was given effect to by all concerned and they have been possessing in accordance with the properties allotted respectively to them according to their share.

19. It has further come on record that the parties have transferred the properties allotted to their share in terms of the aforementioned Panchnama Will executed by Gulab Bibi in the year 1948 and the respective purchasers are also in possession of the said properties.

20. For the purpose of disposal of this appeal, the other allegations made in the written statements, need not be stated in details as they have been discussed by the learned court below in his impugned judgment.

21. It has further been alleged that the plaintiff has also sold many lands to various persons including plot Nos. 502 and 503 to Saiyad M. Haque, Mukhtar Ahmad, M, Huda and Md. Salamuddin.

22. Upon the aforementioned pleadings of the parties, the learned trial court framed the following issues:--

"1. Is the suit, as framed, maintainable?

2. Have the plaintiffs got any valid cause of action for the suit?

3. Is the suit had for non-joinder of necessary parties?

4. Is there any unity of title and possession amongst the parties with respect to the lands in suit?

5. Are the plaintiffs entitled to a decree of partition as claimed for?

6. To what other relief, if any, are the plaintiffs entitled?"

23. The learned court below dismissed the plaintiffs suit, inter alia, on the ground that the vendees of the parties have not been impleaded as parties to the suit and as the said vendees were necessary parties, the suit could not have been adjudicated in their absence.

24. The learned trial court, further, held that from various deeds of sale executed by the parties, it appears that they came in possession of the lands allotted to them by Gulab Bibi in the aforementioned Panchnama Will and in this view of the matter, the plaintiffs are not entitled to any decree for partition as there had been no unity of title or unity of possession.

25. The learned trial court while arriving at the aforementioned findings, took into consideration that the parties were having separate mess, separate residence and there had been independent transactions in relation to the specific properties including inter se transactions amongst the parties.

26. Mr. Debi Prasa the learned counsel appearing on behalf of the plaintiff-appellant, firstly, submitted that from a bare perusal of the purported Panchnama

Will executed by Gulab Bibi, it will appear that thereby a partition by metes and bounds had been effected amongst the sons and daughters of Gulab Bibi and in that view of the matter, the said instrument must be construed as a deed of partition.

27. According to the learned counsel the aforementioned document (Ext. C) being an unregistered one, the same was not admissible in evidence for the purpose of proving the partition as also for the purpose as to the extent of the properties allotted to the sons and daughters of Gulab Bibi respectively by her.

In this connection, the learned counsel has placed strong reliance upon a decision of the Supreme Court in Roshan Singh and Others Vs. Zile Singh and Others, .

28. The learned counsel further submitted that even if it be held that the said instrument is a deed of gift, the same was required to be registered as thereby the properties were sought to be gifted by virtue of an instrument in writing and not orally.

29. The learned counsel further submitted that even assuming that the said instrument was a deed of will executed by Gulab Bibi, as there is nothing to show that the parties affected thereby, have consented to the execution of the said will by the aforementioned Gulab Bibi after her death inasmuch as thereby she purported to make a testamentary disposition in respect of her entire properties and not in respect of 1/3rd of her properties after deducting the funeral expenses etc.

30. In this connection, the learned counsel has drawn my attention to Section 118 of Mulla's Principles of Mohomedan Law, which reads as follows :--

"Limit of testamentary power :-- A Mohomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."

31. The learned counsel further submitted that in any event, the entire suit could not have been dismissed by the learned court below on the ground that all the properties have been partitioned inasmuch as from a bare perusal of the Ext. C, it would appear that some properties of village Dugdugia Tanr have been kept joint.

32. On the other hand, Mr. N. K. Prasad, the learned counsel appearing on behalf of the defendants-respondents submitted that the word "Batbara" has loosely been used in the aforementioned Panchnama Will dated 12-9-1948 executed by Gulab Bibi and her sons and daughters.

33. According to the learned counsel, if the said document is read as a whole, there cannot be any doubt that the executant intended to have allotted the properties belonging to her by dividing the same, in such a manner, so that a

trouble in future may be avoided and in that sense the word "Batwara" has been mentioned.

34. The learned counsel further submitted that the sons and daughters of the aforementioned Gulab Bibi are also executant of the aforementioned deed and they have been made parties thereto so that they become bound thereby.

35. According to the learned counsel, in the facts and circumstances of this case, the question of Gulab Bibi's sons and daughters executing a deed of partition and/or execution of deed of gift by Gulab Bibi in favour of her sons and daughters by reason of the aforementioned instrument dated 12-9-1948, does not arise.

36. The learned counsel submitted that on a proper construction of the said document and upon reading the same as a whole, the same has to be construed as a will, as it was to come into effect after the death of Gulab Bibi which took place in the year 1956. It was further submitted that from a perusal of the said deed, it will be evident that arrangements for proper cultivation have also been made during the lifetime of the testator.

37. The learned counsel next submitted that in this case the provisions of Section 118 of the Mulla's Principles of Mohammadan law is not applicable in as much as imposition of such a limit on the right of a Mohammadan to make testamentary disposition in excess of 1/3rd of his properties was prescribed in religious scriptures so that the heirs of the testator do not become destitutes. According to Sri Prasad as in this case all the heirs of Mosammat Gulab Bibi became beneficiaries under the said will, she could execute a will in respect of her entire property.

38. The learned counsel further submitted that in order to give consent to the disposition of the testator after her death by the persons whose interests have been affected thereby, the same need not be express but an implied consent would also serve the purpose.

39. According to Mr. Prasad, such an implied consent, on the part of the plaintiff; is evident from the fact that they had all along been possessing the properties in question in terms of the aforementioned deed and had in fact sold specific properties to different persons which were allotted to their shares and further they have accepted the compensation amount received by the parties with regard to the lands of Bariatu acquired under the provisions of Land Acquisition Act, 1894.

40. The learned counsel, in this connection, has drawn my attention to a deed of sale dated 4-10-1967, marked as Ext. A, which was executed by Mostt. Wajidan Bibi in favour of Abbas Khan.

41. The learned counsel further drew my attention to the deed of gift dated 27-3-1957 made by Sahdula Khan in favour of Mukhtar Ahmed and Nessar Ahmad which was marked as Ext. B and a deed of gift dated 18-3-1957 made by

Idrish Khan in favour of Mukhtar Khan which was marked as Ext. B/l.

42. It further appears that after the death of Abbas Khan, Reshma Bibi executed a registered deed of will dated 24-5-1958 in favour of defendant No. 1. Reshma Bibi, after the death of Abbas Khan, also executed a deed of gift dated 17-9-1970 with respect to her Dokhtari and Saduhari interest in favour of defendant No. 1.

43. In view of the contentions made hereinbefore, in my opinion, the following questions arise for consideration in this appeal :--

(a) Whether Ext. C is a deed of partition or a will?

(b) If the said deed is construed to be a will, whether consent will be deemed to have been granted by the parties to the suit after the death of Gulab Bibi?

(c) Whether in the event Ext. C is held to be a deed of will, any consent was required to be taken by Gulab Bibi in view of the fact that thereby she had bequeathed the properties to all of her heirs?

(d) Whether there had been a previous partition amongst the parties to the suit and/or their predecessor-in-interest?

(e) Whether in the facts and circumstances of the case, the plaintiff was entitled to any decree for partition?

(f) Whether the suit was maintainable in absence of the vendees of the plaintiff and the defendants as parties to the suit?

Re : Question-a:

44. It is now well known that a deed has to be read as a whole.

45. From a perusal of the aforementioned Ext. C, it appears that on the face of it, the same appears to be a will combined with a deed of partition.

46. Under the Mahometan Law, the plaintiffs and the defendants did not have any share in the properties of Gulab Bibi during her lifetime. They became entitled to inherit the properties of Gulab Bibi only upon her death.

47. From a perusal of the said deed, therefore, it appears that Gulab Bibi intended to get the disputes and differences amongst her sons and daughters settled once for all and as such she executed the aforementioned deed (Ext. C) in such a manner that the arrangement with regard to the cultivation of the properties may be made during her lifetime and further after her death, her sons and daughters divided the properties in terms thereof.

48. It is evident that with that end in view, the signatures of all the prospective heirs and legal representative of the aforementioned Mostt. Gulab Bibi were obtained in the aforementioned deed.

49. It appears from Ext. C that the document in question has been termed as

"Panch-nama Will". In effect and substance, therefore, a deed was sought to be executed by Gulab Bibi which was in two parts, namely; (a) arrangement of cultivation during her lifetime, and (b) devolution of interest upon her heirs after her death.

50. She further intended to lay emphasis on the fact that after her death, no disputes and differences should occur amongst the beneficiaries of the said will and as such signatures of the beneficiaries were obtained thereupon.

51. A will, as such, is a confirmation of a right of property in a specific thing, the property or a gratuity to take effect on the death of the testator.

52. Any Mahomedan having a sound mind and not a minor, may make a valid will to dispose of the property.

53. So far as a deed of will is concerned, no formality or a particular form is required in law for the purpose of creating a valid will. An unequivocal expression by the testator serves the purpose.

54. In view of the fact that in Ext. C, Gulab Bibi clearly expressed herself that after her death, the properties will devolve upon her heirs in the manner as has been described in details therein, in law, the same constituted a will.

55. Further, it is well known that in case of any ambiguity in construing a document, a construction which favours the validity of the said document should be preferred.

56. Thus, as noticed hereinbefore, it is not possible for this court to construe the aforementioned Ext, C as a deed of partition inasmuch as, in law, the parties thereto except Gulab Bibi had no interest in the properties in question.

57. In such a situation, the validity of the said document can be upheld only if it is construed to be a will after reading the same down to some extent.

Re : Question (b) and (c):

58. As both the points are inter-connected, they are being taken up together for consideration.

59. Mr. N. K. Prasad submitted that in the event, if it is construed to be a will, in view of the fact that all the co-sharers were beneficiaries of the said will, it was possible for the testatrix to bequeath more than 1/3rd of her properties.

60. The learned counsel submitted that "Koran" prohibits making a testamentary disposition in excess of 1/3rd of interest of the testator so that the heirs of the testator do not become destitute.

61. The learned counsel submitted that the said rule, therefore, does not apply to a case where all the heirs are beneficiaries under the will.

The submission of the learned counsel, although, is attractive at the first flush, in

my opinion, does not stand a detailed scrutiny.

62. According to "Fitzgerald", Mahomedan Sentiment is opposed to the disposition of the properties by will. But the other authors are of opinion that "will" or "wasiyat" is a divine institution.

63. A bequest in favour of an heir is invalid unless the other heirs consent to it after the testator's death.

In this connection, reference may be made to Section 117 of Mulla's Principles of Mahomedan Law, which is in the following terms :--

"Bequests to heirs.-- A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.

Explanation.-- In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of the testator's death."

64. At the foot of the said Section, certain illustrations have been given. Illustration (e), reads as follows :--

"A Mahomedan leaves him surviving a son and a daughter. To the son he bequeaths three-fourths of his property, and to the daughter one-fourth. If the daughter does not consent to the disposition, she is entitled to claim a third of the property as her share of the inheritance: see *Fatima Bibee v. Ariff Ismailjee* (1881) 9 CLR 66."

65. From a perusal of Sections 117 and 118 of the Mulla's Mahomedan Law operate in different fields, but in a given case, both the provisions may have to be read together.

66. Under the Mahomedan Law, the sons and daughters do not get equal share.

67. In such a situation, it cannot be said, that even if a fraction of property is given in bequest to one of the co-sharers, although, he, in law, would be entitled to inherit much more than bequeathed to him by reason of the will of the testator, still then the same would be valid only because the said co-sharer is also one of the beneficiaries under the said will.

68. If the argument of Mr. N. K. Prasad is accepted, it will be possible to get rid of the limitation of right of a testator as prescribed by the religious scriptures providing for limitation of a Muslim not to dispose of more than 1/3rd of the property by will to a stranger or bequeathing the property to some of his heirs along with the strangers.

69. With that end of view, in my opinion, a provision has been made for obtaining consent/co-sharers after the death of the testator, if a "will" is made by a testator to a stranger in excess of 1/3rd of his properties to his heirs or some of them.

70. Amir AH, in his Principles of Mahomedan Law clearly laid down that for the purpose of giving effect to a will whereby a testator has bequeathed more than 1/3rd interest either to a testator or to a heir, consent is required in relation thereto of the heirs only after the death of the testator. Thus even a consent by the heirs of the testator during his lifetime in such a case does not sub-serve the requirement of law.

71. The reason for making such a rule is obvious; inasmuch as before the death of the testator, it is not known as to who would be the heirs of the testator and to what extent. The testator, thus, could not have obtained consent during his lifetime from such person who had the testator died at that time would have been his heirs and successors.

72. For these reasons only, in my opinion, a provision has been made to obtain consent of the heirs after the death of the testator; if by reason of a will more than 1/3rd of the properties is sought to be bequeathed to an outsider, and to any extent to a heir.

73. If, some of the heirs give their consent to the said after the death of the testator only those consenting parties would be bound and the legatee in excess is payable out of their share.

74. However, in this case, it is evident from the conduct of the parties that consent had been given by all the beneficiaries under the will after the death of Gulab Bibi.

75. It is now well known that the consent need not be express and it may be signified by conduct showing a fixed and unequivocal intention.

76. Attestation to the will and acquiescence in the legatee taking possession of the property be queathed and the acts of collecting rent etc. are held to be sufficient for proving such consent.

77. In the instant case, the parties had been disposing of the property after the death of Gulab Bibi.

78. By reason of a deed of sale dated 11-3-1976 (Ext. 4/1), the plaintiff No. I Abdul Manan transferred his right, title and interest in the properties, which fell in his share in favour of Abdul Qaiyum, who was put in possession of the said land.

79. Qaiyum Khan is defendant No. 10 and he examined himself as D. W. 9. The said witness in paragraph 4 of his evidence categorically stated that the lands which were given to Sahbaj Khan under Ext. C, were bequeathed in his favour by a registered sale dated 24-5-1958. The said registered deed of sale dated 24-5-1958 was marked as Ext. C/1 and therein Abdul Manan and Abdullah Khan are witnesses thereto.

80. By reason of a registered sale deed dated 4-10-1967, Wajidan Bibi, the daughter of Gulab Bibi together with Abdul Manan Khan sold the lands of village

Birdih and Salsood to Abbas Khan. By another deed of sale dated 27-3-1957, Sadullah Khan transferred his right, title and interest in a land known as Daberdon of village Bariatu in favour of Mukhtar Ahmad and Nesar Ahmad who are defendants Nos. 26 and 27.

81. The said Sabhullah Khan is one of the sons of late Gulab Bibi. Similarly, Abdulla Khan also executed a registered deed of sale dated 10-2-1941 which was marked as Ext. B/2 in favour of Abbas Khan, his own brother in respect of his share of land situate in village Salsood and Birdih.

82. Reference in this connection may also be made to a registered deed of sale dated 18-3-1957 executed by Idris Khan and others sons of late Abdullah Khan in favour of Mukhtar Ahmad and Nesar Ahmad, the said land is also covered by Ext. C.

83. From the aforementioned document, it is evident that there had been transactions and some of them are inter se between the parties, as a result whereof, the properties which fell in their share by reason of Ext. C had been transferred by the beneficiaries of the said document in favour of others.

84. Abdul Manan, the plaintiff No. 1 examined himself as P. W. I, He, in paragraphs 6 and 7 of his deposition, categorically admitted that all the sons of Gulab Bibi had been living separately by constructing their respective houses.

85. He further admitted that the lands appertaining to khata No. 116 of village Bariatu were acquired for Ranchi Medical College and Hospital and the persons in possession of the lands so acquired received the amount of compensation paid by the State for the said purpose.

86. D. W. 1, Anwar Khan, in paragraph 1 of his evidence, D.W. 2, Abdul Rauf Khan in paragraphs 25, 10 and; D. W. 6 Md. Islam Khan in paragraphs 1 to 5 in his evidence; and D.W. 7, Abdul Sambad Khan in paragraph 9 of his evidence consistently testified that consent had been given by all the heirs of Gulab Bibi with regard to the bequest made in terms of Ext. C.

87. For the reasons noted hereinbefore, in my opinion, there is no doubt that the consent was given by all the heirs of Gulab Bibi after her death and as such, the properties must be deemed to have been bequeathed to the co-sharers and in terms thereof the beneficiaries had come in possession of their respective properties and had been dealing with the same.

Re : Questions (d) and (e):

88. As indicated in the earlier part of the judgment so far as the lands of village Salsood and Birdih are concerned, from a perusal of the records of rights which have been marked as Ext. 5/D and 5/E respectively, it appears that khata No. 257 of village Salsood and khata No. 31 of village Birdih were recorded in the name of Abdullah Khan, Abbas Khan and Sahbaj Khan, but by reason of the deed of sale dated 10-2-1941, Abdullah Khan, Sahdullah Khan and Sahbaj Khan

transferred their right, title and interest in favour of Abbas Khan (Ext. B/2).

89. In the recital of the said document, it has been mentioned that by reason of a family partition, they live separate possession of the lands in question.

90. Further, from a sale deed dated 4-10-1967 executed by Wajidan Bibi and the plaintiff No. 1 Abdul Manan, it appears that they had transferred their shares of land in village Birdih and Salsood.

91. It is, therefore, clear that in respect of the aforementioned lands, there had been a partition amongst the co-sharers.

92. So far as the lands described in Schedules D and D/1 of the plaint are concerned, the same are recorded only in the name of the sons of late Mohiuddin Khan and the plaintiff cannot claim any share therein.

93. Further, as indicated hereinbefore, the lands under one of the khatas namely khata No. 115 had been recorded in the name of Mehtab Bibi alone. The plaintiffs in the plaint itself claimed an exclusive right in relation to the said properties.

94. In this view of the matter, the question of there being an aggregate ownership in relation to the particular property which is capable of being transferred into separate ownership does not arise.

95. So far as the joint properties of Gulab Bibi and Mehtab Bibi, which are recorded in khata No. 116 of village Bariatu are concerned, it is evident that (there had been a partition by and between the parties much prior to 12-9-1948 on which date, Gulab Bibi executed the aforementioned Panchnama Will(Ext. C).

96. At this juncture, the submission of Mr. Debi Prasad to the effect that the lands known as Dugdugia Tanr except one Bigha thereof were kept joint even in terms of Ext. C, may be noticed.

97. P.W. 1, in his evidence, categorically admitted that most of the lands of village Bariatu have been acquired under the Land Acquisition Act for construction of Ranchi Medical College and Hospital.

98. It has further been admitted by P.W. 1 that the parties, who were in separate possession of the lands had obtained separate compensations from the State of Bihar. The concerned parties have, thus, accepted the amount of compensation treating the lands, so acquired, as having exclusive title in themselves.

99. It is, therefore, clear that the lands which are acquired under the aforementioned land acquisition proceedings are not available for partition.

100. The plaintiff claimed that the parties are in joint possession of plots Nos. 337, 47,444 and 442 appertaining to khata No. 116 of village Bariatu.

101. However, the aforementioned properties are also covered by Ext. C.

From the Chart as mentioned in paragraph 17 of the judgment hereinbefore, it

would appear the extent of the lands given to the parties under the aforementioned Panchnama Will had been given to the parties to the suit and/or their predecessors in interest.

102. As the lands in question were the subject matter of the aforementioned "Ext. C" in my opinion, there is no scope for granting a decree of partition in respect of the aforementioned properties.

103. It further appears from Exts. B and B/I that thereby properties with specific boundaries have been sold by the parties and as such, there cannot be any doubt that even the Daberdon lands had been partitioned.

104. Further, the plaintiffs themselves had filed the alleged deed of Denmohar dated 2-9-1946 executed by Abdul Rahman Khan in favour of Wajidan Bibi, whereby half of the lands in plots Nos. 502 and 503 were given to Wajidan Bibi. Further, Wajidan Bibi herself sold her lands to Vaizennisha, wife of the plaintiff No. 1.

105. These documents coupled with Exts. B, B/1 and 6, are pointers to the fact that all the lands of khata No. 115 were also partitioned.

106. So far as the plot No. 37 measuring an area of 11 decimals and plot No. 47 measuring an area of 10 decimals are concerned, it appears that houses have been constructed upon it.

107. According to P.W. 1, these houses were constructed during the lifetime of Gulab Bibi by her sons and they have been living in them.

108. In this view of the matter, the question of partition of these houses do not arise.

109. Abdul Rauf Khan, D. W. 2 stated that Gulab Bibi had residential house in the land of khata No. 114, which have also been partitioned and separate houses had been constructed by extending the portion allotted to them respectively in the said partition.

110. From the evidence, it becomes clear that all the co-sharers are paying separate Municipal Taxes and have separate holdings numbers of their respective houses. The plaintiffs have not challenged the statements of D.W. 2, in this regard, in the cross examination and as such, the said statements would be deemed to have been admitted. The said statements have also been corroborated by Abdul Sambad Khan.

111. So far as the plots Nos. 442 and 444 are concerned, they are known as Chitoo Bagicha, by reason of Ext. C, the same was allotted to Abbas Khan.

112. D.W. 2 has stated in his evidence that the heirs of Abbas Khan are in possession of the said land.

113. The learned trial court has discussed the oral evidence adduced on behalf of the parties in details and came to the conclusion that Ext. C had been given

effect to. Nothing has been pointed out before me by the learned counsel for the appellant that the statements of the said witnesses are incorrect, or the finding of facts arrived at by the learned trial court is in any way contradictory to the terms of Ext. C.

114. In view of my findings aforementioned, it must be held that the suit for partition filed by the plaintiff was not maintainable.

Re : Question (f) :

115. It is an admitted fact that apart from the parties who are later on impleaded in the suit, namely, defendants Nos. 11 to 25, various other persons are in possession of the lands purchased by them. Some of the lands have also been acquired by Rajendra Medical College.

116. It is, thus, clear that unless the said land acquisition proceedings themselves were challenged, such lands are not capable of being partitioned. The plaintiffs have further not stated in the plaint as to what was the compensation received by the parties respectively from the State of Bihar in relation to the aforementioned land acquisition proceedings.

117. Only in the event, it was found that there had been inequitable payment of compensation amount, even in a suit for partition, it was possible for a court to grant a decree with regard to the quantum of compensation. The plaintiffs, however, have not given details either of the lands covered under the land acquisition proceedings nor have they given any details of the amount of compensation paid to the co-sharers.

118. All the parties to the suit and/or predecessor in interest have transferred their properties in favour of various other persons apparently in their own right and not as co-sharers. The respective vendees are also in possession of their respective purchased lands.

119. In this view of the matter, in my opinion, a simple suit for partition was not maintainable in the absence of the State of Bihar and other vendees.

120. However, I must hasten to add that in this case a peculiar situation has arisen as otherwise normally in a suit for partition, the vendees of defendants may not be held to be a necessary party although, they may be proper parties but there cannot be any doubt that even under the Hindu Law, the vendees of the plaintiffs are necessary parties to the suit.

121. In this view of the matter, taking thus into consideration the facts and circumstances of this case, I am of the view that there is no merit in this appeal which is dismissed. However, in the facts and circumstances of this case, there will be no order as to costs.