

(2003) 07 PAT CK 0072

In the Patna High Court

Case No : A.F.A.D. No's. 60 of 1979, 101, 102 and 269 of 1983

Jaleshwari Devi and Others

APPELLANT

Vs

Deorani Devi and Others, Harihar Sharma and Others and
Sarjug Sharma and Others

RESPONDENT

Date of Decision : 28-07-2003

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : (2003) 3 BLJR 1720

Hon'ble Judges : P.K. Deb, J

Bench : Single Bench

Advocate : S.K. Mazumdar and Madhav Roy, for the Appellant; Devendra Pd. Sharma, Kamala Pd. Roy, Baban Sharma, Gajanand Arun and Anandmayee, for the Respondent

Judgement

P.K. Deb, J.—All the appeals have been heard analogous as they arise out of the same Judgment and between the same parties.

2. First Appeal No. 60/79 has been preferred by Defendant No. 1 of Partition Suit No. 7/74 while First Appeal Nos. 101/83 and 102/83 arise out of the Eviction suit filed by the same Defendant No. 1 Laxman Sharma against plaintiffs of Partition Suit No. 7/74 and against Sarjug Sharma who was also a defendant being Defendant No. 4 in Partition Suit No. 7/74 and a son of Laxman Sharma by his first wife. First Appeal No. 269/83 has been preferred by the same Laxman Sharma against the Final Decree being passed in Partition Suit No. 7/74. First Appeal Nos. 101/83 and 102/83 were practically filed before the District Judge corresponding to the valuation of the appeals but as they relate to same dispute between the parties of First Appeal No. 60/79 and that of First Appeal No. 269/83 and also covered by the same Judgment, those two appeals have also been called for from the Court of District Judge, Muzaffarpur, and were heard analogous. It should be mentioned here that in Partition Suit No. 7/74 decree has been granted for partition specifying the shares of the parties, although, to some

extent in a confusing manner and in Title Suit No. 195/73 and Title Suit No. 196/73 which were pure and simple eviction suits had been dismissed by the same Judgment which was passed on 30th September, 1978 holding that no relationship of landlord and tenant existed between the plaintiffs and the defendants.

3. The facts of the case run as follows. One Rangu Sharma and his brother Lalji Sharma were the recorded tenants in respect of some properties including that of the Schedule-B properties situated in village Mahoi, Sahabad in the district of Arrah. Lalji Sharma and Rangu Sharma were separate and we are not concerned about the geneology or the properties of Lalji Sharma. According to the plaintiffs and the defendants, Rangu Sharma was the owner of house properties situated at village as mentioned above. He had three sons, namely, Harlok Sharma, Shyam Sharma and Nathuni Sharma. All the three brothers had also separated themselves and partitioned their joint family property long before and Harlok Sharma got middle portion in the house property. Harlok Sharma had gone to Assam to earn by serving in the Railways and he came back on retirement in the early thirties of the 20th Century with some money received as benefits from the service. On coming to village he earned some more properties also and blended to the joint family of him and his sons doing carpentry work and also by doing agricultural labour as Bataidar. Thus, the property mentioned in Schedule-B remains as the property of coparcenery of Harlok Sharma who had three sons, namely, Ram Bahadur Sharma (Defendant No. 7), Laxman Sharma (Defendant No. 1 in the Partition Suit and plaintiff and appellant in the Eviction Suits) and Bharat Sharma who happens to be the Predecessor-in-interest of the plaintiffs in the Partition Suit and Defendants in Title Eviction Suit No. 195/73. On death of the parties during the pendency of the suit there was substitution of the heirs which are not required to be laborated in the case. Geneological table has been given in Paragraph-3 of the impugned judgment.

4. Partition Suit No. 7/74 has been filed in respect of Holding No. 106(Old), Ward No. 9(Old), B.P. No. 2372 and area eighteen and half dhurs situated in Motijhil area of Muzaffarpur town which has been mentioned in details at Schedule-A of the plaint of the Partition Suit whereas Title (Eviction) Suit Nos. 195/73 and 196/73 have been filed in respect of portions of that Holding described respectively in Schedules in those suits which were included in Schedule-A of the Partition Suit. The Eviction suits were filed earlier than the Partition Suit. The heirs of Bharat Sharma, the third son of Harlok Sharma had filed the Partition Suit for getting 1/3rd share in the Schedule-B properties and half share in the Schedule-A property.

5. The case of the plaintiffs in Partition Suit No. 7/74 was that the parties were related to each other as shown in the Geneological table and also mentioned above. Rangu Sharma died long ago in the state of jointness leaving Harlok Sharma, Shyam Sharma and Nathuni Sharma. On his death the properties have been devolved on his three sons. The family had an ancestral caste business of

carepentry, wood work etc. There was partition by metes and bounds among the three brothers on or about 1920 and of the ancestral property each got 1/3rd share. The plaintiffs and the defendants were in the branch of Harlok Sharma who constituted the joint family consisting of himself and his three sons, namely, Ram Bahadur Sharma, Laxman Sharma and Bharat Sharma and Harlok Sharma was the Karta of the family. He was given share in the middle of the ancestral house at village Mahoi and also 1/3rd share in the property of Rangu Sharma. Harlok Sharma came back on retirement on or about 1932-33. He had savings from his earnings also and he acquired fertile landed property in the village home in his own name and also in the name of his wife, mother of the three brothers. From the very beginning the earlier brother Ram Bahadur Sharma (Defendant No. 7) did not indulge in the home works of carpentry etc. and as soon as he attained majority after his marriage he joined private service and he remained totally unconcerned with the joint family property or in respect of the other members of the joint family, He is in Military service for last 15 years in M.E.S. Division and is posted at Patiala in the State of Punjab. Practically, two sons, Laxman Sharma and Bharat Sharma remained joint with Harlok Sharma and his wife in the ancestral home and joined the ancestral property and also taking part in the ancestral business. When Harlok Sharma came down after retirement from Railway service with sufficient fund which he got from the Railway out of Provident Fund and Gratuity, he wanted to set up a business and, as such, being influenced and helped by his friend Ram Prasad Babu who was manual training teacher in Zila School at Muzaffarpur, with the fund given by Harlok Sharma, a carpentry business was set up in the land and the Jhopri situated originally in the Schedule-A area and the Defendant No. 1 i.e. Laxman Sharma was sent with sufficient fund to manage the carpentry business there. Practically, the business was set up by Harlok Sharma with the help and active participation of his friend Ram Prasad Babu but then Ram Prasad Babu had severed all connections in the business. The business of carpentry in the name and style of "Modern Furniture" was started in a house at Schedule-A belonging to one Bhola Prasad Chowdhury on a monthly rental. When Defendant No. 1 felt difficulties in running the business alone then Harlok Sharma sent the plaintiff also to help in the management of the business. Thus, Bharat Sharma came to Muzaffarpur and started staying in the business house and prosecute his studies and also started helping the Defendant No. 1 in the business. Ultimately, the plaintiff was seriously involved with the work of business and then he gave up his studies. Technical studies could be continued by the plaintiff for three years but as the business became lucrative and was gaining much then the plaintiff had to give up his studies and since 1943 he started looking after the shop. It is also the case of the plaintiff that Harlok Sharma and his wife used to visit Muzaffarpur and after staying there used to give necessary instructions. The accounts of the business was also being looked into by Harlok Sharma, Modern Furniture House used to give considerable profits at the joint labour and effort of the two brothers. Then there was a proposal of purchasing the land and house where Modern Furniture House was situated and there was negotiation with the owner Bhola Prasad

Chowdhury. Agreement was arrived at to purchase the property for a sum of Rs. 6,500/- and an advance of Rs. 500/- was given out of which Rs. 400/- was given by Harlok Sharma and the rest Rs. 100/- by the Defendant No. 1 from the earning of "Modern Furniture". As Defendant No. 1 was elder and from the beginning he was managing the properties, the Mahadanama was executed in favour of Defendant No. 1 alone because soon after payment of part money of the Mahadanama, Harlok Sharma died at his village home. Defendant No. 1 had married twice. Sarjug Sharma, the Defendant No. 2 had been born through his first wife. But soon after the death of first wife the Defendant No. 1 married Jaleshwari Devi and he got three sons who had been arrayed as Defendant Nos. 3 to 5. After the death of Harlok Sharma and when Ram Bahadur Sharma had no concern with the family, Defendant No. 1 was working as a Karta of the family and for that reason Mahadanama was also executed in the name of Defendant No. 1. Defendant Nos. 1 and 2 all along resided together having joint mess. As eldest son of Defendant No. 1 Sarjug Sharma was also joint with them and was residing at Muzaffarpur and also in the village home. Ultimately, when mother of the parties died then dispute being crept among the brothers including the Defendant No. 2 Sarjug Sharma and they were separated. Sarjug Sharma started a photo framing shop in the portion of the house at Muzaffarpur in the name and style of "Sharma Pictures Framing House". While the predecessor of the plaintiffs also started picture framing shop in the name and style of "Chitralaya". It should be mentioned here that plaintiff No. 1 is the wife of Bharat Sharma while his sons and daughters are the other plaintiffs and in the above portion wherever the plaintiff is written it should be construed as Predecessor of the plaintiffs i.e. Bharat Sharma. Besides those business as mentioned above except Defendant No. 7 others have also started living at Muzaffarpur in the same house itself, although, separately. As there was no partition in the property of Muzaffarpur and village home Mahoi between the plaintiff and the defendant, hence necessity arose regarding filing of the suit for partition of Muzaffarpur and also that of the ancestral property of village Mahoi which was mentioned in Schedule-B of the plaint. In respect of Mahoi property as it was the ancestral property which had been added on some properties on purchase by Harlok Sharma and blended in the joint family property the same became the joint family property of three brothers including the Defendant No. 7 Ram Bahadur Sharma on the death of Harlok Sharma and of his wife, and, as such, claim has been made regarding that property of Mahoi as 1/3 share between the branches of the plaintiff, Defendant No. 1 and that of the Defendant No. 7. But in respect of Muzaffarpur property, the plaintiffs have claimed half and half share with the Defendant No. 1 as, according to the plaintiffs, in that property Defendant No. 7 has got no contribution whatsoever.

6. The main contesting defendants are Defendant No. 1, Laxman Sharma, Defendant No. 2 the eldest son Sarjug Sharma and Defendant No. 7, Ram Bahadur Sharma, the eldest son of Harlok Sharma. They have filed separate written statements in the suit. Practically, Defendant Nos. 2 and 7 supported the

plaintiffs" case but Defendant No. 7 has claimed that he has also 1/3rd share in the property of Muzaffarpur and Defendant No. 2 claimed that he had also share in that property to the extent of 1/5th share as he claimed that he had also given his service in setting up of the property at Muzaffarpur through business of "Modern Furniture".

7. Defendant No. 1, Laxman Sharma, is the main contestant and he has preferred all the present appeals also. Besides taking all other formal objections, such as, non-maintainability of the suit, suit being barred by the principle of acquiescence, waiver and estoppel and hit by misjoinder etc. etc. his submission is that Defendant Nos. 7 to 11 have been unnecessarily impleaded in this case as they have no interest in the suit property either at Muzaffarpur or at village Mahoi as they have been ousted from the property and, as such, they have lost all their interest of perfecting title by adverse possession by the other co-sharers. His further case is that the present suit i.e. the Partition Suit is nothing but a counter-blast for the suits being filed by him against the plaintiffs and Defendant No. 2 for eviction and for realisation of arrears of rent. He has denied the entire story of the plaintiffs and contended that the ancestors of the parties were very poor. They had very limited property to support their livelihood and, as such, they were serving elsewhere. In that way, Harlok Sharma got only three kathas of land including the house which he had got from partition from his brothers in the year 1930. Harlok Sharma was dismissed from Railway service on account of defective eye sight and negligence in duty and he got a salary of Rs. 42/- at the time of his dismissal. Harlok Sharma had to maintain a large family and he never used to contribute to the Provident Fund and, as such, at the time of dismissal from service he did not get a single farthing from the Government. He had also no savings at that time. It has further been contended that Harlok Sharma could be able to acquire only seven kathas of land during his life time in village Mahoi in his own name and only one katha in the name of his wife and they were really unproductive. As Harlok Sharma was of defective eye sight he neither could be able to do cultivation work what to speak of carpenter's work and the financial condition of the family was very poor. So, Defendant No. 7, Ram Bahadur Sharma had no alternative but to join some service. Harlok Sharma had no income from the rented property. On account of financial difficulties in the family Defendant No. 1 on attaining majority began to do petty contract at Bihta and other family members had no concern with the contract work of Defendant No. 1. As Harlok Sharma had no fund of his own then no question of giving fund to support the business at Muzaffarpur does arise at all. It has already been stated that Ram Bahadur Sharma, Defendant No. 7 had never any concern with the business of Muzaffarpur. According to this defendant, he himself had set up the business at Muzaffarpur by taking the house on rental from Bhola Chowdhury and he had developed the business. His further case is that he has not received any movable or immovable properties from Harlok Sharma because in the ancestral home there was no property at all. It is his further case that the predecessor of the plaintiffs had separated his mess during the life time of

Harlok Sharma and the Defendant No. 2 had ill habits from his young age and he has also been separated shortly after his marriage. The property of Muzaffarpur was acquired solely by Defendant No. 1 by purchase from Bhola Chowdhury. The consideration of Mahadanama was paid by Defendant No. 1 alone. Rs. 400/- out of Rs. 500/- was to be adjusted towards the goods supplied to Bhola Chowdhury and Rs. 100/- cash was paid by Defendant No. 1 and Mahadanama was executed in favour of Defendant No. 1 alone. When Bhola Chowdhury had deviated from Mahadanama and sold it to a third party Chulai Mahto, then Defendant No. 1 as plaintiff filed the suit for Specific Performance on the basis of Mahadanama being Title Suit No. 127/57. The purchasers also had contested the suit upto the Hon'ble High Court but the suit remained decree in favour of Laxman Sharma alone and he paid up the balance consideration money of Rs. 6500/- and then the document of sale was executed by the Court in favour of Defendant No. 1. His further case is that he had set up/inducted the predecessor of the plaintiffs and Defendant No. 2 for running business in the premises of Motijhil at Muzaffarpur to run their business on monthly rental. But when they failed to pay rent and started denying the title of the Defendant No. 1 then he had to file Eviction suit being Title Suit No. 195/73 and Title Suit No. 196/73 for eviction of both the plaintiffs and Defendant No. 2 and then as a counter-blast the present suit has been filed. His case is that at any point of time Defendant No. 2 or other defendants or the plaintiffs had ever paid a single farthing in acquisition of Muzaffarpur property which has been described in Schedule-A of the plaint and, as such, according to him, there is no scope of any partition of this property. Regarding the village property, he had not much denied about the plaintiffs' case. These are the pleadings of the parties in the Partition Suit. For and on behalf of the minor defendants GAL. was appointed. She had also filed a written statement denying the plaintiffs' case.

8. In the Eviction Suit Defendant No. 1 who happened to be the plaintiff had asserted that he had inducted both the plaintiffs and Defendant No. 2 separately as monthly tenants on monthly rental but as they failed to pay rent and denied landlord's title, he had filed the suits for eviction and in those eviction suits the defendants have categorically denied all the averments and their cases in the Partition Suit had been set up as defence in those eviction suits.

9. On the basis of the pleadings of the parties the following issues were framed in the three suits conjointly.

(i) Are the suits as framed maintainable ?

(ii) Has the plaintiff of the suits got cause of action for their respective suit/suits?

(iii) Is the suit property described in Schedule-A of Title Suit (Partition) No. 7/74 corresponding to suit property of Schedule-1 of Title Suit No. 195/73 and Title Suit No. 196/73 being the joint acquisition of Harlok Sharma, Laxman Sharma and Bharat Sharma or the self acquisition of Laxman Sharma ?

(iv) Are the properties of Schedule-A and B of Title (Partition) Suit No. 7/74

being the properties of joint family ?

(v) Are the defendants of Title Suit No. 195/73 and defendants of Title Suit No. 196/73 tenants of the plaintiffs of those two suits in respect of Schedule-II premise of their plaint ?

(vi) Are the defendants of Title Suit No. 195/73 defaulters within the meaning of Bihar Building (Lease, Rent and Eviction) Central Act ?

(vii) Is the plaintiff of Title Suit No. 195/73 and Title Suit No. 196/73 required the Schedule-II premises on bona fide reasons and good cause ?

(viii) Did the plaintiff of Title Suit Nos. 195/73 and 196/73 served notices under Sections 106 of the T.P. Act upon the defendants thereof ?

(ix) Are the plaintiffs of Title Suit No. 7/74 and the plaintiffs of Title Suit No. 195/73 and Title Suit No. 196/73 entitled to a decree, if so, in what item or items of the property and to what extent and on what terms ?

10. For and on behalf of the plaintiffs 29 witnesses have been examined and the defendants have examined 19 witnesses. For and on behalf of the plaintiffs several documents have been exhibited. Ext. 1 is the letter dated 15-7-1976 by Laxman Sharma to Bharat Sharma. Ext. 2 is a letter dated 23-1-1972 from Laxman Sharma to Bharat Sharma. Ext. 1/2 is the Admission Register of Zila School, Muzaffarpur, of 1930. Exts. 3 and 3/a are the receipts showing payment by Laxman Sharma and by Bharat Sharma on 5-2-1950. Ext. 4 is the letter of Laxman Sharma dated 30-5-1966. Ext. 4/a is the similar letter dated 5-1-1957. Ext. 4/b is the similar letter dated 10-10-1957. Ext. 4/c is the letter from Laxman Sharma dated 17-5-1957. Ext. 4/d is the letter by Laxman Sharma dated 30-6-1959. Ext. 4/e is the letter by Laxman Sharma dated 13-10-1964. Ext. 5 is the Rehan deed through Muklal Sharma in favour of Harlok Sharma dated 19-6-1946. Ext. 6 is the sale deed dated 21-3-1934 by Devi Hazam in favour of Harlok Sharma. Ext. 7 is the sale deed by Devi Hazam in favour of Harlok Sharma dated 24-3-1931 and Ext. 8 is the L.I.C. premium receipts dated 9-4-1957.

11. The following documents have been exhibited from the side of the defendants. Ext. A is the accounts of construction of house dated 18-3-1946. Ext. B is the letter by Bharat Sharma to Laxman Sharma dated 13-2-1946. Ext. C series are the income tax assessment. Ext. D/1 is the Judgment of Title Suit No. 127/57. Ext. D/2 is the record of rights dated 3-1-1971. Ext. D/3 is the Judgment of Title Appeal No. 446/55. Ext. H is the Acknowledgment receipt dated 2-3-1977. Ext. H/1 is the Acknowledgement receipt dated 7-8-1973. Ext. I is the Pleader's notice dated 3-8-1973. Ext. J series are the rent receipts issued by Laxman Sharma to Bharat Sharma and Sarjug Sharma. Ext. K series are the rent receipts issued by A.K. Mukherjee, landlord to Laxman Sharma. Ext. L series are the Municipal receipts in the name of Laxman Sharma. Ext. M is the Pleader's notice dated 15-6-1950. Ext. N is the Treasury Chalan dated

5-10-1955. Ext. O is the sale deed dated 17-9-1960 executed by the Court in favour of Laxman Sharma. Ext. R/1 is the acknowledgement receipt. Ext. V is the deposition of Nandji Bhai in Title Suit No. 10/57. Ext. W is the Order Book of "Modern Furniture". Ext. Z is the T.M.O. acknowledgement

12. On consideration of the oral and documentary evidence adduced by the parties, the trial Court held that Muzaffarpur properties have been acquired jointly by Harlok Sharma, Laxman Sharma and Bharat Sharma. He had given 1/3rd share each to the plaintiffs i.e. Bharat Sharma and his sons and daughters, 1/3rd share to Laxman Sharma including Sarjug Sharma and other sons and daughters of Laxman Sharma by second wife and 1/3rd share to Defendant No. 7 Ram Bahadur Sharma and his sons and daughters and the ancestral property in Schedule-B properties should be divided as 1/3rd share each to the sons of Harlok Sharma and their coparceners within their shares. The Eviction suits had been dismissed holding that no relationship of landlord and tenant existed, rather the property is a joint property and hence both the Eviction suits have been dismissed.

13. On the basis of Preliminary Decree being granted in Title Partition Suit No. 7/74 a Pleader Commissioner was appointed and, although, objections have been raised on the report submitted but the same had been accepted and then Final Decree was passed against which First Appeal No. 269/83 had been filed by Laxman Sharma and all the appeals filed by Laxman Sharma have been heard analogously as has been mentioned above. In the Final Decree it appears that there was some confusion in the Decree being passed in the Preliminary Decree and share allotments have been made in a very peculiar manner and it is not known how half share could be allotted to Sarjug Sharma. Moreover, it appears that some of the defendants have totally not given any share in Muzaffarpur property. On various grounds the present appeals have been filed but it should be mentioned here that during the course of argument, Mr. Mazumdar, learned Senior counsel for the appellants has not pressed First Appeal Nos. 101/83, 102/83 arising out of the Eviction suits. Practically, the appellants have conceded to the dismissal of these Eviction Suits.

14. The main contest is with regard to First Appeal No. 60/79 arising out of the Judgment and Preliminary Decree passed in the Partition Suit. The allotment of shares have been challenged as has been done by the trial Court. The Defendant-appellant's contention is that he whole of the property at Muzaffarpur in Motijhil area wherein "Modern Furniture" business initially situated and which has now been described in Schedule-A of the plaint belonged exclusively to the Defendant No. 1-appellant Laxman Sharma. There is no much contest regarding the Schedule-B property which includes both the ancestral partitioned share of Harlok Sharma, the predecessor-in-interest of the parties to the suit and being acquired by him during his life time by his own income by doing agricultural work as Bataidari and also by doing carpentry work and it has also not been denied that out of the properties which have been acquired by Harlok Sharma had also

been blended to the joint family property with the legacy of Harlok Sharma after partition amongst his three brothers. In that way, definitely, the property at village Mahoi as described in Schedule-B property would devolve on the brothers or branches of the three brothers or more specifically on the branches of the three sons of Harlok Sharma, namely, Ram Bahadur Sharma, Defendant No. 7, Laxman Sharma, Defendant No. 1 and Bharat Sharma, Predecessor-in-interest of the plaintiffs. So, each would get 1/3rd share in the ancestral village property described in Schedule-B property of the plaint and the sons or daughters including Sarjug Sharma of Laxman Sharma would get their shares if they want their allotment separately of shares from their father alone. Thus, the Decree granted by holding the Schedule-B property to be a joint family property of the parties to the suit having 1/3rd share to each sons of Harlok Sharma is admitted and has not been challenged. In that way, the Judgment and Decree passed by the Court below in the impugned Judgment in respect of the Schedule-B property is hereby affirmed.

15. Mr. Mazumdar, learned Senior counsel appearing for and on behalf of the appellant Laxman Sharma has argued strenuously with two alternative approaches. His first submission is that the learned trial Court committed error in not holding that the Muzaffarpur property as described in Schedule-A of the plaint did not belong exclusively to the Defendant No. 1-appellant Laxman Sharma and then his alternate submission is that if it is held and as being held by the learned trial Court that the Muzaffarpur property as described in Schedule-A of the plaint is the acquired property of Harlok Sharma, Laxman Sharma and Bharat Sharma, then there is no scope to blend it with that of the joint family property of village Mahoi as described in Schedule-B property of the plaint and in that way there is no scope of holding that each brother on death of Harlok Sharma would get 1/3rd share each and practically on that basis itself the Final Decree has also been prepared. So, there is contradiction on the face of it. In that way, as per the submissions made by the learned counsel for the parties, the points for decision in this appeal are:

(i) whether the learned trial Court committed error in not holding the Schedule-A property to the exclusive property of Laxman Sharma, alternately.

(ii) whether the learned Court below committed error in holding the shares of three brothers as 1/3rd on death of Harlok Sharma in Schedule-A property, although, it was held that the property was acquired by Harlok Sharma together with his two sons, Laxman Sharma and Bharat Sharma, predecessor-in-interest of the plaintiffs ?

16. On the first point very much reliance has been put on the factum of purchase of Muzaffarpur properties in the name of Laxman Sharma alone. It is the submission of Mr. Mazumdar, learned Senior counsel appearing for the appellant that when Mahadanama was in the name of Laxman Sharma exclusively and that the suit for Specific Performance was filed by his alone and fought upto High Court in Second Appeal and when during those periods on claim was there by

anybody in this suit claiming title, then there is no scope to hold that the property is not the exclusive property of Laxman Sharma. He has referred to the evidence of Laxman Sharma in this respect.

17. The whole of evidence including individual witnesses had been discussed very elaborately by the learned Court below in the impugned Judgment which is not being reiterated for the purpose of brevity. The story of acquisition of Muzaffarpur property can not be started from the execution of Mahadanama or title deed being executed by the Court in favour of Laxman Sharma alone. The admitted position is that in the late thirties the business "Modern Furniture" had been started at Muzaffarpur and it is the case of the plaintiffs that all other defendants excepts Defendant No. 1 admitted that such business was initiated by Harlok Sharma in collaboration with his friend Ram Babu Prasad and when Ram Babu Prasad left the business and Harlok Sharma also had to remain in the village home then Laxman Sharma had to manage the property at Muzaffarpur. Sometimes after the predecessor-in-interest of the plaintiffs i.e. Bharat Sharma had also shifted to Muzaffarpur from village home and started helping in business staying there and also pursuing his studies and afterwards whole-heartedly entered into the business giving up studies. So, the business was set up as was rightly held by the learned Court below by Harlok Sharma with the joint effort of Laxman Sharma and Bharat Sharma.

18. Then the question of acquisition of the property came in. The Mahadanama was executed in the name of Laxman Sharma on payment of Rs. 500 wherein it was mentioned that the property shall be sold at the consideration of Rs. 6500. According to Defendant No. 1-appellant, out of the consideration amount of Rs. 500 in the Mahadanama Rs. 400 was adjusted towards the goods supplied from M/s Modern Furniture and Rs. 100 was paid by him from his own pocket. On the other hand, the case of the plaintiffs being supported by other defendants is that the deal of purchase of the property was made during the life time of Harlok Sharma between Bhola Prasad, owner of the property and Harlok Sharma and Harlok Sharma then paid Rs. 400 and went to village home for bringing the rest of the amount. But there he died and as such Laxman Sharma being the elder at Muzaffarpur at that time had paid Rs. 100 from the joint business and the Mahadanama was executed in his name. It is also the case of the plaintiffs that, although, the case was fought by Laxman Sharma alone but it was fought for and on behalf of the plaintiffs also and it was not possible for any other members of the family to intervene in the suit as the suit was under the Specific Relief Act for Specific Performance of Contract. In that way, although, the ultimate title deed was executed by the Court in favour of Laxman Sharma but it remained the property of the persons who acquired the business at Muzaffarpur.

19. From the side of the appellant reliance has been put on payment of rents of the land after purchase and also the Municipal Taxes by him. When the business of the furniture was started at a rented house of Bhola Prasad, it appeared that sometimes rent was paid by the appellant Laxman sharma and sometimes it was

paid by Bharat Sharma. So, those payments of rents or the payment of Municipal Taxes, did not create any title in favour of either of the parties, rather on construing all materials available it is to be decided whether this Muzaffarpur property is the exclusive property of Laxman Sharma or not. That the major part of the consideration money of Mahadanama was paid by Harlok Sharma had not only been supported by the interested parties but also by the witness Nandji Bhai of Mahadanama itself. He was confronted with his earlier statement in the suit for Specific Performance. Such payment being made by Harlok Sharma had not been stated therein specifically. But this does not mean that he is contradicting his earlier statement by saying that Rs. 400 had been paid by Harlok Sharma when this fact has been supported by other interested witnesses also. That Rs. 400 had been adjusted towards the goods being taken by Bholu Prasad could not be supported by any evidence from the side of Laxman Sharma. Even if it is being adjusted from the business money then also until and unless it could be found that the business belonged to Laxman Sharma alone, the property cannot be held to be acquired by Laxman Sharma alone. It is also the case of the appellant Laxman Sharma that the consideration money of the sale deed was also paid from the business of "Modern Furniture."

20. Acquisition of property at Schedule-A as has already been stated can not be conveyed to the title of Mahadanama deed in the name of Laxman Sharma alone. But it must be carried from the history of setting up of business at Muzaffarpur itself. It is the case of the plaintiffs being supported by other defendants except Defendant No. 1 that Harlok Sharma had served in the Railways in Assam and it is also the admitted fact that amongst the three brothers of Harlok Sharma there was separation and partition and Harlok Sharma got the house in the middle portion. Then in the early thirties Harlok Sharma retired from service and came back having sufficient amount with him to the tune of Rs. 6000 and odd and then he started doing carpentry business and also doing agricultural work as Bataidar and by that way he could be able to earn more properties at village and by some amount he had also set up the Muzaffarpur business alongwith his friend, a School teacher Ram Babu Prasad and when Ram Babu Prasad had left the business then Laxman Sharma was set up there as Manager. The eldest son Ram Bahadur Sharma had also joined the Defence service by that time. Then Bharat Sharma, predecessor of the plaintiffs had also gone there at Muzaffarpur to take part in the business. Modern Furniture business is now not there and some other shop houses have been set up by Sarjug Sharma and from the side of the plaintiffs. But the position remains that it was at the initiation of Harlok Sharma the business at Muzaffarpur started and the same was set up with the help of Bharat Sharma and Laxman Sharma.

21. From the side of the Defendant-appellant it was claimed that Harlok Sharma was having bad eye sight and as such within two years of his service he was sacked by the Railways and practically he came back home without a farthing and condition of family was very poor at that time. Then, Laxman Sharma started petty business at Bihta and from the earnings of that petty business he

alone had set up the business at Muzaffarpur. In support of it, the Defendant No. 1 -appellant could not adduce any evidence regarding his petty business at Bihta and it is very peculiar to note that at one point of time a plea was taken that Defendant No. 1 had gone to Rangoon to earn his livelihood and from there he brought money and then set up the business of Modern Furniture at Muzaffarpur. All these suggestions were being given to the witnesses of the plaintiffs. This was the variable case of the Defendant No. 1.

22. On the other hand, there is not only the evidence of the plaintiffs and the other defendants who had supported the case of the plaintiffs but also there is evidence of independent witnesses to the effect that Harlok Sharma had come on retirement from Railways with considerable amount towards the Gratuity amount as stated by P.W. 8 Ram Chandrika Prasad who happens to be of another branch and being grandson of Rangu Sharma. It was also his evidence that at that time Laxman Sharma had no source of income. So, there could not be any cogent evidence adduced from the side of the Defendant No. 1 to the effect that before starting of "Modern Furniture" Laxman Sharma had separate business or income. It could not also been shown that besides the income of "Modern Furniture" there was any other separate business or income of Laxman Sharma.

23. Now, regarding acquisition of the property from the real title owner of the property Bhola Prasad there is evidence from himself that the agreement was made with Harlok Sharma and on Harlok Sharma's death the agreement was made with Laxman Sharma. Payment by Harlok Sharma towards the consideration of Mahadanama has also been claimed from the side of the original owner of the property i.e. Bhola Prasad, The same has been supported by the witness of the Mahadanama as I have stated earlier. Now, this could be found on scanning of the evidence of both the parties oral and documentary which were filed that at the time of creation of the Mahadanama Rs. 400 towards the consideration was paid by Harlok Sharma. The other story regarding the adjustment etc. as introduced by the Defendant No. 1-appellant Laxman Sharma could not be proved. Rs. 100 the balance amount has been paid by Laxman Sharma but that has been paid admittedly from the income of business of M/s. Modern Furniture. In that way, when the business was set up by Harlok Sharma together with Laxman Sharma and Bharat Sharma, then any acquisition of property from that business could be construed to be the property of the joint owners of the business itself. Only because the document is in the name of the Defendant No. 1, he could not claim his exclusive title over the Schedule-A property. The learned Court below has rightly held that the property of Schedule-A have been jointly acquired by Harlok Sharma, Laxman Sharma and Bharat Sharma. Although, Ram Bahadur Sharma, Defendant No. 7 has also claimed his share over this property and in support of it some evidence has been adduced to the effect that occasionally Ram Bahadur Sharma used to come from service on leave and he use to check the accounts of the business, but this much alone can not create a right over the business of acquisition over the property itself. In that way, definitely the property of Schedule-A is not a joint family property but

jointly acquired property by three persons, namely, Harlok Sharma and his two sons, Laxman Sharma and Bharat Sharma. The first point for consideration is decided in the negative against the defendant-appellant.

24. Now, coming to the alternative submission of the learned Senior counsel for the appellant Mr. Mazumdar, I find much force in it. When the Schedule-A property is held to be acquired by three persons, namely, Harlok Sharma, Laxman Sharma and Bharat Sharma, then each would get 1/3rd share on it. It cannot be held to be a joint family property or to be linked with Schedule-B property which is ancestral property and blended with the properties situated at village Mahoi. When there is joint acquisition, then the three persons become joint owners having 1/3rd share each on it. On death of Harlok Sharma his 1/3rd share shall devolve on Laxman Sharma, Ram Bahadur Sharma and the plaintiffs each getting 1/9th share. Thus, the plaintiffs and the Defendant No. 1 Laxman Sharma would get $1/3 + 1/9$ shares each. Sarjug Sharma, Defendant No. 2 would get from the share of his father Defendant No. 1 to be divided alongwith his brothers and sisters through Step-mother and Ram Bahadur Sharma shall get 1/9th share of his own. Thus, from the discussions above, I hereby upheld the decision of the learned trial Court as passed in Title Suit No. 7/74 but with a modification in the shares as there was apparent error in the order portion of the impugned Judgment.

25. Thus, First Appeal No. 60/79 is dismissed with a modification in the shares of the parties in respect of Schedule-A property but in respect of Schedule-B property the Judgment and Decree of the learned Court below is hereby upheld.

26. Regarding First Appeal No. 269/83 arising out of Final Decree passed in title Suit No. 7/74, as the shares are now being varied in this Appellate Judgment then automatically the allotments of shares made in the Final Decree can not stand as it is and hence the same is set aside. Final Decree should be prepared on the basis of this Appellate Judgment.

27. First Appeal Nos. 101/83 and 102/83 having been not pressed as I have stated earlier and practically those cannot be pressed also when no relationship of landlord and tenant is there and the tenants are also share-holders in the properties.

28. Thus, First Appeal No. 60/79 is dismissed with modification as mentioned above. F.A. No. 269/83 is allowed and the impugned Final Decree prepared is hereby set aside but no order as to costs. F.A. Nos. 101/83 and 102/83 are dismissed as not pressed but without costs.