

(2014) 12 DEL CK 0178

In the Delhi High Court

Case No : Regular First Appeal (OS) 5/1982

Radhey Shyam Bagla

APPELLANT

Vs

Ratni Devi Kahnani

RESPONDENT

Date of Decision : 12-12-2014

Acts Referred:

Hindu Succession Act, 1956 — Section 8

Citation : (2014) 12 DEL CK 0178

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Suryakant Singla, Advocate for the Appellant; Rajeev Sharma and Harmeet Singh, Advocate for the Respondent

Judgement

S. Ravindra Bhat, J.—This appeal is directed against the judgment of the learned Single Judge in Suit No. 446 of 1967, dated 10.12.1981, i.e., by which the learned Single Judge had granted a preliminary decree of partition.

2. At the outset, it is essential to trace the relationships between the various parties involved. The core issue in the judgment of the Single Judge turned upon the reading of the will of one Seth Ram Lal Khemka. Seth Ram Lal Khemka had a sister, Smt. Godavari Devi. The appellant, Shri Radhey Shyam Bagla (first defendant in Suit No. 446/1967, since deceased and hereafter called "Radhey Shyam") , was the adopted son of Godavari Devi. The respondent/plaintiff, Smt. Ratni Devi Kahnani (since deceased and hereafter called "Ratni") , was the daughter of Godavari Devi; the latter was married to one Shri Hoti Lal Bagla.

3. Shri Ram Lal Khemka owned House No. 743, Municipal Ward No. 1, Chhota Bazaar, Kashmere Gate, Delhi. The house had an inner portion and an outer portion. By a Will dated 17th December, 1958, Shri Khemka acknowledged that Smt. Godavari Devi and her children were in occupation of the ground floor and mezzanine floor of the outer portion, and accordingly bequeathed it to them in equal portions. Shri Khemka died on 24th December, 1958, and the Will was proved in Probate Case No. 5/1959, decided on March 20, 1959. The Will inter

alia, stated that:

"the above said legatees of this house will not rent it out to any outsider, neither they will mortgage or sell the same during their lives time. If at any time it becomes necessary for any of the legatees to let out any portion in his share, it shall be incumbent on him or her to consult the other legatees and to give first right of refusal to the other legatees."

4. Through a registered gift deed (dated 19th October, 1963) , Godavari Devi gifted her 1/3 portion in the house to the Krishan Jas Rai Education Society (second defendant in Suit No. 446/1967 and hereafter called "the Society") . Following this, in 1964, Radhey Shyam filed a suit against Godavari Devi, and Ratni and others, for a decree of permanent injunction, restraining the Society from occupying the premises i.e., House No. 743, and from running a school there. He contended that under Ram Lal Khemka's Will (i.e., the portion excerpted above) , Godavari Devi had only limited rights, and was not competent to gift away a part of the property. By an order dated December 10, 1964, the learned Subordinate Judge, First Class, dismissed the suit as not maintainable. Radhey Shyam filed an appeal, which was eventually transferred to this Court as Suit No. 32 of 1969.

5. Meanwhile, on November 25, 1960, Godavari Devi made a Will bequeathing her immoveable and movable properties to Ratni (the plaintiff) , which was registered the next day. She died on December 28, 1966, and her Will was proved in probate case No. 4/1967. Following this, on January 9, 1967, Radhey Shyam filed another suit against Ratni, claiming a decree for permanent injunction restraining her from alienating, gifting, mortgaging or otherwise dealing with the property, and from disposing/depriving him of his possession and enjoyment of the property, on the ground that under the terms of the Will of Shri Khemka, the rights of the legatees were restricted. This suit was registered as Suit No. 31/1969, before this Court.

6. It was after the above event that on 15th July, 1967, Suit No. 446/1967, was filed by Ratni Devi claiming partition against Radhey Shyam and the Society, claiming delivery of possession of her exclusive 1/3rd share in the property. This suit was resisted by Radhey Shyam, who argued that the suit was not maintainable since all the joint family properties had not been included; the suit was, therefore, for a partial partition. In any event, on merits, the Will of Shri Ram Lal Khemka did not allow the Legatees to sell, mortgage, lease or otherwise bequeath the property.

7. By an order of this court, dated March 22, 1967, the three suits were consolidated. To recapitulate:

(1) In Suit No. 446/1967, the plaintiff, Ratni Devi, claimed partition and delivery of her exclusive share of the suit property. The Society was a non-contesting defendant, and Radhey Shyam contested the litigation, resisting the partition.

(2) In Suit No. 32/1969, Radhey Shyam, the plaintiff, sought permanent injunction against the Society from occupying the premises.

(3) In Suit No. 31/1969 Radhey Shyam claimed a decree of permanent injunction against Ratni, to restrain her from alienating, gifting, mortgaging or otherwise dealing with the property, and from disposing/depriving him of his possession and enjoyment of the property, on the ground that under the terms of the Will of Shri Khemka, the rights of the legatees were restricted. This suit was registered as Suit No. 31/1969, before this Court.

8. The learned Single Judge, who decided Suit No. 446/1967 as well as the other two suits, framed thirteen issues, and decided the case in favour of Ratni Devi. Radhey Shyam's contention that the partition suit was not maintainable because it was in the nature of a partial partition was rejected. The learned Single Judge held that

"[An examination of] Godavari Devi's Will reveals that she bequeathed her entire property, movable and immovable, to her daughter Smt. Ratni Devi. No share in the property of Smt. Godavari Devi, therefore, devolved on Radhey Shyam Bagla and consequently the other property left behind by Smt. Godavari Devi, movable or immovable, could not be considered as joint property of plaintiff and defendant No.1."

9. The learned Single Judge also held that the gift was valid.

10. On the issue of the interpretation of the Will of Shri Khemka, the learned Single Judge held that it created an absolute interest in the property, in favour of Godavari Devi:

"there is nothing in the circumstances or in the context to indicate that it was the testator's intention to limit the estate of Smt. Godavari Devi or her children, i.e. Ratni Devi and Radhey Shyam to a life estate."

Consequently,

"the restrictions placed on their rights to sell, mortgage or lease were repugnant to such absolute estate and cannot cut down the estate and they must be held to be invalid."

11. On the basis of the above findings, it was held that Godavari Devi validly gifted her one-third share to the Society, and that Ratni Devi (the plaintiff) , Radhey Shyam (first defendant) and the Society (second defendant) had a one-third share each in the property of the suit. Smt. Ratni Devi was also found competent to alienate her share in the property in dispute, and was granted a preliminary decree for partition.

12. The findings of the learned Single Judge were assailed by the appellant, Radhey Shyam Bagla in RFA (OS) No.5/1982. The appeal was primarily based on two grounds: first, that the will of Shri Ram Lal Khemka, whereby only a limited estate was intended to be conferred upon Godavari Devi and, consequently, upon

Radhey Shyam and Ratni Devi, was misinterpreted, and that Godavari Devi was, therefore, not competent to alienate her share, through any form -gift or otherwise; and second, the learned Single Judge erred in holding that the partition was not invalid for being a partial partition, since the evidence on record clearly showed that numerous ornaments, that were part of the ancestral property, were in the possession of Ratni Devi, through Shri Hoti Lal Bagla.

Intervening developments

13. This Court notes that between the original filing of the appeal and the present day, a number of changes have occurred. The appellant (Radhey Shyam Bagla, since deceased and now represented by his legal heirs) has settled the dispute against the Society, the original second defendant, and withdrawn the appeal insofar as it pertained to that party. This was confirmed by the Court in an order dated November 4, 2008.

14. Therefore, the question of whether or not Smt. Godavari Devi was competent to alienate her share by a gift no longer arises for consideration before this Court. This was further confirmed by an order of a Division Bench of this Court dated 17th April, 2009, wherein the Court noted:

"During the pendency of the appeal, Radhey Shyam, as appellant, has purchased the rights from the society and thus the lis between the parties does not survive and the appeal has become infructuous. We may also add that in terms of the order dated 4.11.2008 the appellant, Radhey Shyam had already withdrawn the appeal qua respondent No.2, the society.

The second suit was again filed by Radhey Shyam in the year 1967 which was re-numbered as suit No.31/1969. In this suit, Radhey Shyam claimed injunction against Ratni Devi from alienating or dealing with the suit property and from depriving Radhey Shyam from enjoyment of the suit property. This suit was decreed partially and Radhey Shyam, once again, filed an appeal.

The third suit was filed by Ratni Devi, being suit No.446/1967, claiming partition of both movable and immovable properties of Shrimati Godavari Devi and for division of the properties which were joint. In this suit, preliminary decree has been passed. Radhey Shyam has preferred an appeal.

Despite our best endeavour to persuade the parties to put an end to the litigation, no successful solution has been possible. It is, however, agreed that the appeals filed against the judgement in suit Nos.32/1969 and 31/1969 really do not survive. It is further agreed that insofar as the immovable property is concerned, heirs of Radhey Shyam are owners to the extent of 2/3 share while heirs of Ratni Devi are owners to the extent of 1/3rd share. The mode and manner of division of this property or in the alternative for sale is a question to be examined by the learned Single Judge.

The only aspect urged by learned counsel for the appellants/heirs of Radhey Shyam is relating to the rejection of the claim about there being some jewellery

and movables of late Shri Ram Lal Khemka. The plea taken by Radhey Shyam was that the suit filed by Shrimati Ratni Devi was for partial partition. It is, thus, submitted that only this aspect needs to be adjudicated in the appeal.

Learned counsels for the parties state that there is some confusion about the fact as to which appeal arose from which suit as the judgement is common and the appeals are identical. Thus, the paper books are same even though the grievances arise from different suits claiming different reliefs. The suit records are not available and have not been traced out despite directions.

It is, thus, agreed that RFA (OS) No.5/1982 be treated as the appeal from suit No.446/1967 and needs to be adjudicated to the limited extent as mentioned aforesaid. RFA (OS) No.16/1982 & RFA (OS) No.17/1982 be treated as appeals from suit Nos.31/1969 & 32/1969 respectively and the same do not survive for consideration and are disposed of."

15. Further, the appellant, in its arguments/Synopsis, dated 9th May 2013, has itself abandoned the first claim, and restricted itself to arguing that "when Smt. Ratni Devi Kahnani came to Delhi on the death of Smt. Godavari Devi, she removed ornaments worth Rs.60,000/- and other valuable share scrips and cash. These properties, it was stated, have to be thrown in common pool, if partition was to be ordered." Thus, the lone issue that survives for consideration is whether the suit was not maintainable as it claimed a partial partition, specifically with respect to the said ornaments and cash.

16. This Court also notes that, separately, because of various sales and purchases made between the appellants and respondents, 7/9th of the property came to vest with the appellants and 2/9th with the respondents. In an order dated 2.7.2010, this Court confirmed:

"Learned counsel for the parties state that the dispute only survives between the appellants on the one hand and LR's (b) to (e) of R-1 on the other hand. It is also not in dispute that the appellants have purchased shares of various parties - 7/9th share now vests in the appellants and 2/9th share vests in LR's (b) to (e) of R-1. The property is a residential house, but it is stated that there are two shops in existence. It is not disputed before us that there are only three possibilities, which are as follows:

- I) A partition is found feasible, segregating the property in the aforesaid shares;
- II) Inter se bids take place between the parties;
- III) The property is put to sale by auction with parties being permitted to bid to the exclusion of their shares."

17. Later, by an order dated 3.12.2010, a Local Commissioner was appointed to suggest the mode of partition by metes and bounds. In a report dated 23.02.2011, the Local Commissioner stated that the suit property could not be partitioned by metes and bounds. This report was accepted by the Court in an

order dated 6.5.2011, and the Court held:

"We consider it appropriate to adopt the option of putting the property to sale by public auction, which would be transparent and get the market value of the property.

While the necessary formalities were being carried out, however, the sale was stayed by the Supreme Court in SLP(Civil) No.23548-34549/2011 by an order dated 02.09.2011. The stay was made absolute in an order dated 9.4.2012.

18. In the last relevant order, dated 9.11.2012, this Court noted:

"Learned counsel for the appellant states that they would like to address submissions on the issue relating to jewellery and movables of late Sh.Ram Lal Khemka as stated on the last date of hearing. However, learned counsel for the respondent states that the submissions have to be made qua the plea of partial partition List for hearing on 22.02.2013 when learned counsel for the parties shall keep ready a short synopsis running into not more than two pages each."

19. Thus, the only issue that this Court must examine is relating to the jewellery and movables and their exclusion from the claim in the suit for partition, in the context of the plea for partial partition made on behalf of the original defendant/Appellant, Radhey Shyam.

20. The appellant argues that certain ornaments and thalis, in the possession of the respondent, were ancestral property, and not brought into the hotchpot at the time the respondent made the claim for partition. Consequently, the partition suit was bad, since it was an instance of partial partition.

21. It is urged on behalf of Radhey Shyam by Mr. Suryakant Singla that the learned Single Judge, in the impugned judgment, ignored the material facts and circumstances. These clearly reveal that Ratni Devi's father, Hotilal Bagla, husband of Godavari Devi, had left behind substantial movable properties in the form of silver utensils and gold ornaments. Counsel highlighted the deposition of the plaintiff's (Ratni Devi's) husband, B.P. Kanhani (PW-2) . That statement established that a list of movables was written by Hotilal Bagla (Ex.R-10/1) and the silver utensils mentioned in Ex.R-10/6 were with PW-2. Though the witness claimed to be owner of those movables, his deposition could not inspire confidence since he had no recollection how he owned them, or when he bought them. He could also not say why the list was written by his father in law. Learned counsel argued that on the other hand, the testimonies of DIW-8, DIW-9, DIW-10 and DIW-11 were categorical that Hotilal Bagla owned these properties.

22. Learned counsel submitted that the appellant/defendant's (Radhey Shyam's) written statement contained clear averments that Ratni Devi's suit excluded movables - being ornaments and valuables worth Rs. 60,000/- and shares worth Rs. 56,000/-. Upon Hotilal's death, those devolved equally upon his widow Godavari Devi, daughter, Ratni Devi and Radhey Shyam, the adoptive son.

23. Learned counsel relied upon the judgment reported as Kenchegowda (Since Deceased) by Legal representatives Vs. Siddegowda alias Motegowda, and submitted that the general rule against the maintainability of a suit which sought only partial partition applied in the circumstances of the case, and that the learned Single Judge fell into error in ignoring the material and relevant circumstances which clearly pointed to Ratni Devi's suit, CS 446/1967 being one for partial partition. He also relied upon the subsequent judgment reported as R. Mahalakshmi Vs. A.V. Anantharaman and Others, .

24. Learned counsel for the plaintiff Ratni Devi i.e., the respondent contends that the appeal is bereft of merit. It is urged that the contentions urged in these proceedings were considered in the light of the materials brought on record during the trial, by the learned Single Judge. It was emphasized that whilst ordinarily, the rule against entertaining a claim for partial partition applies, if there is, on the other hand, material to substantiate a litigant's argument as to the identity and status of the excluded property, the Court can, having regard to the overall circumstances in a given case, and the other materials adduced before it, make a decree as warranted. In support of this submission, it was argued that in case Radhey Shyam had really established that the disputed movable properties were partible and to be treated as joint family assets, the Court had ample power to direct its division. In this regard, learned counsel relied upon the judgment of the Supreme Court in S. Satnam Singh and Others Vs. Surrender Kaur and Another, , where it was observed that having regard to the special nature of a partition suit, where all litigants stand in the position of plaintiffs, the Court has the flexibility in framing a decree in the larger interest of the family as the justice of the case required, if evidence was forthcoming about the identity of property not made subject to the proceedings, and if its status as partible joint family property was proved.

25. Learned counsel argued that at best, the deposition of PW- 2 had to be taken in totality; even while confirming that the list of movables was written by Hoti Lal Bagla, he formally asserted that he was owner of those ornaments. The evidence relied upon by the defendant Radhey Shyam, was of oral testimony and it could not, therefore, be said that the identity of the ornaments and silver utensils and other movables were part of HUF property, since there was a genuine dispute as to whether it was owned by a third party, i.e. PW-2, Ratni Devi was justified in not including it in the partition suit. So long as the appellant/defendant/Radhey Shyam could not establish that it was brought from the nucleus of the joint family, it could not be made subject to partition.

26. The short point for consideration is whether the learned Single Judge fell into error, in decreeing the suit for partition in the light of the circumstances. The appellant urges that such a decree could not have been made because the suit did not encompass the whole of the joint HUF assets as such.

27. The rule against maintainability of suits for partial partition was expressed most succinctly in Kenchegowda (supra) as follows:

"Even otherwise a suit for partial partition in the absence of inclusion of other joint family properties and the impleadment of the other co-sharers was not warranted in law."

This Court notes that there is no quarrel over the proposition that, subject to exceptional circumstances, a suit instituted for partition should include all the joint family properties. The rule against suits claiming only partial partition had been enforced in other cases too. In *Tukaram Vs. Sambhaji and Others*, , the Karnataka High Court noted that:

"It has been held that normally a suit instituted for partition should be one for partition of the entire joint family properties and all the interested co-sharers should be impleaded. The suit for partition of specified items can only be an exception. The inclusion of all the joint family properties in the instant suit for partition was necessary and without bringing all the joint family properties into the hotchpot, the suit for partition of the shares of the members of the joint family in one property which amounts to partial partition is not maintainable. This contention in the circumstances of the case, has force and the same has to be upheld."

(emphasis added)

28. The Calcutta High Court likewise held, in *Satchidananda Samanta Vs. Ranjan Kumar Basu and others*, :

"We are of the view that the general principle is that a co-sharer filing a suit for partition against the other co- sharers have to bring all the joint properties into the hotchpot, failing which a suit may be dismissed on the ground of partial partition ... proper equity in a suit for partition in that case will not be possible if all joint properties are not brought into the hotchpot."

(emphasis added)

29. The normal rule governing suits for partition is that it has to incorporate all partible coparcenary property, and should implead all those entitled to a share. However, this rule is not a rigid and an inflexible one, as noticed by the Supreme Court in *Mst. Hateshar Kuer v. Sakaldeo Singh* 1969 (2) SCWR 414 in the following terms:

"The rule requiring inclusion of the entire joint estate in a suit for partition is not a rigid and in elastic rule which can admit of no exception. This rule aims at preventing multiplicity of legal proceedings which must result if separate suits were to be instituted in respect of fragments of joint estates. Normally speaking, it is more convenient to institute one suit for partition of all the joint properties and implead all the interested co- sharers so that all questions relating to the share of the various co-owners and the equitable distribution and adjustment of accounts can be finally determined. But, this being a rule dictated by consideration of practical convenience and equity may justifiably be ignored when, in a given case there are cogent grounds for departing from it."

30. The above formulation was applied by the Kerala High Court in the decision of V.R. Krishna Iyer, J in Paramesara Menon v. Sachidananda Menon, 1970 KLT 1031.

31. Long ago, in Sitaram Vinayak Hasabnis Vs. Narayan Shankarrao Hasabnis, , the exception as to the maintainability of the suits for partition which do not include all the properties was stated in the following terms:

".....The ordinary rule applicable to suits for coparcenary property is that when a suit for partition is between coparceners it should embrace the whole family property, and a member of a joint family suing his coparceners for the partition of joint family property is bound to bring into hotchpot all the property that may be in his own possession in order that there may be a complete and final partition : see Mulla's Hindu Law, 9th edn., page 409. The rule is subject to exceptions arising out of convenience and from other causes. But it applies primarily to coparcenary property. The parties in this case are not coparceners but tenants-in-common; and in our view that may well make a substantial difference in the applicability of the rule. In theory no coparcener has a share in any particular property, because (each coparcener; is an owner of all the family property; and this is the real basis for the rule as to the partition of coparcenary property. But there is no such basis for the application of the rule to property which is held in common....."

32. The view expressed by the Bombay High Court in Hasabnis (supra) was rooted in an earlier judgment of the Madras High Court i.e., Pakkiri Kanni Vs. Haji Mohammad Manjoor Saheb by Agent Habibulla Saheb, . The Madras High Court, on that occasion, made a distinction between jointly or commonly held property and coparcenary property. The High Court, on that occasion, held as follows:

"We have not been shown any direct authority, that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the joint property in respect of which might have been brought, has not been included. Shortly, we have not been shown that the objection, founded on what is usually described as the plea of partial partition is available when a suit for division of common property, not joint property is in question."

33. It is evident from preceding discussion that though the Courts have normally insisted upon inclusion of all the properties in the suit which seeks partition of Hindu Joint Family assets, as a necessary precondition, for full adjudication of the party's rights and apportionment of their shares, the rule is not as inflexible as it is thought out to be. The Supreme Court in Kenchegowda (supra) stated that such rule is "not inelastic". The judgments of the Madras and Bombay High Courts highlight that if the properties are not established to be joint i.e., HUF or coparcenary assets, but are either disputed or otherwise held commonly, their exclusion would not be vital to the maintainability of the proceedings.

34. The question that this Court must consider, therefore, is whether the ornaments, thalis and other properties alleged by the appellant to be part of the

ancestral property were proved to be so. This Court notes that, as the Madras High Court correctly held in *Sivagnana Thevar Vs. Udayar Thevar*, :

"the character of the property, in the absence of direct evidence, is a matter of inference to be drawn from proved circumstances, without reference to presumption one way or the other."

35. This Court notes that the appellant has adduced Shri Hoti Lal Bagla's diary as evidence, and argued that:

"On the demise of Hotilal Bagla, these ornaments/utensils devolved on his wife Godavari Devi, Smt. Ratni Devi daughter and Shri Radhey Shyam Bagla adopted son as per section 8 of the Hindu Succession Act, 1956. All three of them were entitled to equal share in ornaments/utensils. When Smt. Ratni Devi filed the suit she had the ornaments/utensils belonging to Sh. Hoti Lal Bagla and as detailed in Ex R 10/1 to 6, with her. She ought to have put those ornaments and utensils in common hotch potch and sought partition thereof as well."

36. On a perusal of the relevant exhibits of the diary, the Court finds that it contains an inventory of various moveable properties. The first of these entries, dated Monday, 25 January, 1926, lists a golden tagri of two circles, a golden mala containing 108 units, four golden bangles, and other such items. The next entry, dated Wednesday, 27th January, 1926, lists a number of silver items. There follow a number of statements of account, dating from February, 1926, and another list of silver utensils, dated Sunday, 10th January, 1926.

37. At no place in the diary entries is the ownership of the ornaments and other items, or their nature (ancestral or separate/self-acquired) mentioned. In his cross-examination, Shri B.P. Kahnani, PW-2, husband of the respondent, testified that ornaments and silver utensils written in Shri Hoti Lal Bagla's handwriting, and in his diary, were his (i.e., Shri Kahnani's) personal property, and did not belong either to Shri Hoti Lal Bagla or Smt. Godavari Devi. Shri Kahnani also testified that since he prepared the list in the presence of his father-in-law, Shri Hoti Lal Bagla, the latter also entered the items in his diary.

38. This Court notes that in the absence of any indicator in the diary pointing to the ownership of the ornaments, and in the face of Shri Kahnani's contrary testimony, the claim that the ornaments were part of the ancestral property is highly tenuous. The appellant's contention that Ratni Devi did not examine herself, and that, therefore, an adverse inference should be drawn against her, is not sufficient "without any corroborating evidence" to lead this Court to find that the ornaments in question were part of joint family property. As outlined above, the Court is obliged to infer the character of the property from the "proved circumstances". Since the only proved circumstances here pertain to Shri Hoti Lal Bagla's diary, there is not enough material before the Court for it to sustain the plea of the appellants, i.e. that the jewellery and other valuable moveables were part of joint family property.

39. The appellant also adverted to the statements of D1W8- 11. D1W8 is V.P. Bagla, the collateral nephew of Radhey Shyam Bagla. He states:

"My father used to tell me that his father had acquired rupees one lac in cash and three or four seers of gold ornaments during a family partition which took place in the year 1922 or 1923. Every coparcener got the same share, including Hoti Lal Bagla."

In his cross-examination, V.P. Bagla further stated:

"I have no personal knowledge about the acquisition of a sum of rupees one lac and three or four seers of gold which I have referred to earlier. My father used to tell me about this. I have not seen any document wherein the acquisition of this cash amount and gold ornaments had been mentioned."

40. D1W9 is Shri Nathmal Poddar, the father-in-law of Radhey Shyam Bagla. In his examination, he has stated:

"Hoti Lal used to tell me that he had acquired four seers of gold which his father had received in a family partition. He had shown a diary to me. He had mentioned the details of the ornaments in that diary. I have seen the diary shown to me. It is the same taken diary which I have stated above."

41. In his cross-examination, he stated:

"No notes were made in the said diary in my presence I saw this diary only once in 1957. I do not know the details of the items mentioned in this diary. Hoti Lal had shown me a Tagri and one or two rings."

42. D1W10 is Shiv Kumar Gaur, who claims to have been well-known to the family. In his examination, he stated:

"At the time of Diwali Puja. some gold ornaments, silver coins and silver utensils used to be kept there by Hoti Lal Bagla. He used to tell me that there ornaments had come to his share at the time of partition. The gold ornaments weighed about 3/4 seers during the life time of Godavari Devi, the number of ornaments was considerably minimized."

43. D1W11 is the appellant, Shri Radhey Shyam Bagla himself, who stated:

"After the death of Shri Hoti Lal Bagla the key of the tijori in which the gold and silver ornaments or utensils were put, remained with Godavari Devi. The properties mentioned used to be taken on the day of Dewali and I used to see them. After Godavari Devi's death, Ratni Devi my sister took away the ornaments."

44. The Court finds that apart from the statement of Radhey Shyam, who was himself the original defendant/present appellant, the statements of the witnesses (a majority of whom are related to the appellant) were largely based on hearsay. Furthermore, on cross-examination, none of the witnesses were able to personally verify that the gold and silver ornaments or utensils, that they allege,

belonged to Shri Hoti Lal Bagla, were the same as the objects specified in the diary. Therefore, without substantial proof of the same, the Court cannot conclude, on the basis of these statements, that there is enough evidence for a finding that the diary lists properties that are part of the joint family hotchpot.

45. The well recognized rule in Hindu law of succession, in the case of joint family properties, as to its status, was explained in *Mst. Rukhmabai Vs. Lala Laxminarayan and Others*, in the following terms:

"there is no presumption that any property, whether movable or immovable, held by a member of, a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property."

46. In the present case, Radhey Shyam could not establish that the movables alleged to be part of Hoti Lal's estate indeed belonged to him, or to the Joint Family in question. For these reasons, there is no reason to interfere with the judgment of the learned Single Judge. The appeal fails and is accordingly dismissed, with costs throughout in favour of the plaintiff.