
(2025) 06 JH CK 0882
In the Jharkhand High Court
Case No : S. A. No. 02 Of 2016

Saralabala Gorai

APPELLANT

Vs

Chhabi Gorai, wife of Ajit Gorai

RESPONDENT

Date of Decision : 09-06-2025

Acts Referred:

Citation : (2025) 06 JH CK 0882

Hon'ble Judges : Anubha Rawat Choudhary, J

Bench : Single Bench

Advocate : Swati Shalini, Rahul Kr. Gupta, P.A.S. Pati

Final Decision : Disposed Of

Judgement

Anubha Rawat Choudhary, J

1. This second appeal has been filed against the judgment dated 09th October 2015 (decree dated 24th November 2015) passed by the learned District Judge-V, East Singhbhum, Jamshedpur in Title (Partition) Appeal No. 02 of 2010 whereby the appeal has been allowed. The trial Court judgment is dated 24th November 2009 (decree signed on 04.12.2009) passed by the learned Sub-Judge-VI, East Singhbhum, Jamshedpur in Title (Partition) Suit No. 46 of 2007 whereby the suit was dismissed. Some of the defendants are the appellants before this Court.

2. Out of 6 defendants in the suit, only defendant nos. 1 to 3 filed the present appeal. Out of them, the appellant no.1 was Smt. Saralabala Gorai, wife of Hem Chandra Gorai, and on account of her death, her name has been deleted vide order dated 16.12.2021. Her two sons are the other two appellants in this second appeal. Plaintiff and other defendants are the daughters of Smt. Saralabala Gorai and Hem Chandra Gorai.

3. This appeal was admitted for final hearing vide order dated 31.07.2018 wherein following substantial questions of law were framed:

"I. Whether in view of the fact that major portion of the suit property was sold far back during the period 1986-2000 and the plaintiff never objected to the said sale or handing over the possession to the purchasers, the suit is barred by principles of waiver, acquiescence and estoppels?

II. Whether in view of the fact that all the other co-sharers of the property have affirmed the previous partition amongst the co-sharers and also distribution of the share of the consideration amongst all the co-sharers including the plaintiff, the present suit for partition is maintainable?

III. Whether in absence of any separate source of income, admission of the plaintiff of purchasing a new house and also having an old house over the part of the suit property proves previous partition amongst the co-sharers and also sharing of the consideration amount received against the sale of part of the suit property which has been specifically affirmed by all other co-sharers in their evidence?"

4. The suit was filed for partition of the properties morefully described in Schedule-B of the plaint by metes and bounds. The prayer of the plaintiff before the learned trial court was as under: -

(a) For a decree for preliminary decree with respect to the suit properties declaring 1/7th share of the plaint in the Schedule 'B' properties.

(b) For a decree for appointment of the Survey Knowing Pleader Commissioner to demarcate the plaintiff share and report.

(c) For a decree for a final decree on the basis of the report of the Pleader Commissioner.

(d) For a decree for cost of the suit.

5. Case of the plaintiff

(a) The plaintiffs and the defendants are Hindu and they are governed by Mitakshara School of Hindu Law. Genealogy has been given in Schedule-A showing the relationship of the parties. The common ancestor of the parties is Hem Chandra Gorai, who died in the year 1976. The plaintiff is the daughter of late Hem Chandra Gorai; defendant No. 1 is his wife; defendant Nos. 2 & 3 are the sons and defendant Nos. 4, 5 & 6 are daughters of late Hem Chandra Gorai. The plaintiff claimed 1/7th share in Schedule 'B' property which belonged to Hem Chandra Gorai.

(b) It is the case of the plaintiff that the lands which were in possession of late Hem Chandra Gorai are now being looked after by the sister of the plaintiff, namely, Mina Gorai on behalf of the plaintiff and she is giving yearly share of the usufructs of the land to the plaintiff and there has been no partition by metes and bounds. The parties are the members of Hindu Joint Family and the daughters of Hem Chandra Gorai though have been married are also entitled to their share equally with their brothers as per the Hindu Succession Act.

(c) It is further case of the plaintiff that on 14th January, 2007, the plaintiff had gone to the house of the defendant Nos. 1, 2 and 3 and asked them for dividing the ancestral land amicably, but they rebuked the plaintiff and drove her away from the house of her parents and therefore it became necessary to file the present suit for partition of the properties of late Hem Chandra Gorai by metes and bounds which have been fully described in Schedule 'B' of the plaint.

6. Case of the defendant Nos. 1, 2 and 3

(i) The defendant Nos. 1, 2 and 3 have filed their written statement jointly and as per their written statement, the suit was not maintainable in its present form and for the reliefs claimed and the suit was bad for mis-joinder of parties and barred by limitation. The defendants admitted that Hem Chandra Gorai was the father of plaintiff and defendant Nos. 2 to 6 and defendant No. 1 was the wife of late Hem Chandra Gorai, who died in or about 1976. The defendant Nos. 1, 2 and 3 denied about any share of the plaintiff with respect to Schedule 'B' properties as entire property did not belong to late Hem Chandra Gorai. The defendants also denied the fact of joint possession of the suit properties.

(ii) It was asserted that the plaintiff had filed a simple partition suit, but the properties in question were recorded as Anabad Bihar Sarkar and TISCO is the lessee from 01.01.1956 for forty years and name of Hem Chandra Gorai has been shown as Abaidh Dhakalkar. It was their case that unless and until, the title of Hem Chandra Gorai is declared from a competent court of law, the court cannot go for partition.

(iii) It was further stated that the land under khata No. 1217, Plot Nos. 70, 72, 109, 110, 2043 and 2044 belongs to Sagar Gorai (defendant No. 2) being his self-acquired property and therefore, there is no question of jointness of title or possession with respect to the aforementioned properties. It has been further stated that the land under Khata No. 930, Plot Nos. 2089 and Khata No. 929, Plot No. 26 belongs to Saralabala Gorai (defendant No. 1) and it is her self-acquired property from her own fund and streedhan, so it can also not be partitioned.

(iv) It has further been stated by the defendants that after the death of Hem Chandra Gorai in the year 1976, the entire responsibilities came on the shoulder of Sagar Gorai and at that point of time, the plaintiff was aged about 10 years; defendant No. 3 was aged about 15 years and defendant No. 6 was at the age of 13 years. Sagar Gorai maintained all the family members and got his brother and sisters married beyond his capacity. Sagar Gorai also treated his father making huge expenditure as his father was suffering from blood cancer.

(v) It is their further case that the land recorded under Khata No. 930, Plot No. 2089 and Khata No. 929, Plot No. 26 in the name of Hem Chandra Gorai has already been sold with the consent of all the family members in between 1985 to 2000 and consideration amount has been distributed amongst all the brothers and sisters and the plaintiff. The plaintiff has received Rs.18 lakhs including the

lands and house which has been constructed by Sagar Gorai from the said fund. Except that, Hem Chandra Gorai has got no land and house, hence, the plaintiff has no right to claim his brother's and mother's self-acquired properties and there was no occasion for the plaintiff to ask for partition from defendant Nos. 1, 2 and 3. It is also false to say that the plaintiff has been driven out from the house without giving her due share. It is asserted that the plaintiff, being the youngest member of the family, was always demanding money from the defendant Nos. 1, 2 and 3 and due to endless demand, she lost the faith of the family members and out of grudge, the plaintiff has filed this suit for harassing the family members unnecessarily. It has also been asserted that the partition of the land which belonged to Hem Chandra Gorai has already been done and all the members have taken their respective shares by getting land and consideration amount in between 1986 to 2000. Land of plot No. 106 and Rs.2 Lakhs cash for construction of house has been given to the plaintiff and apart from that the plaintiff has taken Rs. 8.50 lakhs for purchasing another house property; the plaintiff has taken Rs. 18 lakhs from defendant Nos. 1, 2 and 3 for her share and apart from that, she has also taken Rs. 2,50,000/- for paying chit fund dues.

(vi) There is no cause of action in the suit because the plaintiff never asked for partition neither she served the legal notice for the same. It is well within the knowledge of the plaintiff that landed property which belonged to Hem Chandra Gorai has already been sold out with the consent of all the family members and she has taken the consideration amount as per her share, but by suppressing the matter before this Court, she has filed the case stating that the suit property is a joint family property.

7. Case of defendant Nos. 4, 5 and 6

A. The defendant Nos. 4, 5 and 6 also filed their written statement, which was similar to that of written statement filed by the defendant Nos. 1, 2 and 3.

B. It has been stated by the defendant Nos. 4, 5 and 6 that the land which belonged to Hem Chandra Gorai has already been sold; consideration amount has been divided among all the co-shares; they have also got some portion of land in their respective shares and house has been constructed over the same by the fund of Sagar Gorai which is in possession of the plaintiff. The land acquired by Sagar Gorai and their mother Saralabala Gorai are their self-acquired property and the plaintiff has got no share in these properties. These defendants also stated that the suit was fit to be dismissed.

Additional written statements

The defendant Nos. 1, 2 and 3 have filed their additional written statement on 28.08.2008, wherein it was stated that the land of Khata No. 1217, Plot No. 2045 is the land of Sagar Gorai and it is a self-acquired property and it has not been mentioned by the plaintiff that when she came to know that the aforesaid land has been wrongly recorded in the name of Sagar Gorai and also that the suit is

barred by limitation.

Further, in the light of the amendment dated 30.10.2009, another additional written statement has been filed by the defendant Nos. 1 to 6 jointly stating therein that the land of Khata No. 1108 recorded in the name of Hem Chandra Gorai has already been sold to Vijaya Heritage with the consent of all the legal heirs and successors of late Hem Chandra Gorai and consideration amount has already been equally distributed among all the successors at the time of sale. It has further been stated that the land included in the plaint which relates to Khata No. 1217, Plot No. 2090 is the self-acquired property of Saralabala Gorai as Abaidh Dhakhalkar and on the said land, her khaparpouse makan is also made and therefore, it is not a joint family property and the plaintiff is not entitled for partition of the same.

8. The learned trial court has framed the following issue for consideration: -

- (i) Is the suit as framed maintainable and has the plaintiff valid cause of action for it?
- (ii) Was there any previous partition with respect to suit property and payment of consideration money to the plaintiff by the defendants have been made after the sale of the property recorded in the name of father of the plaintiff or not?
- (iii) Are the land recorded in the name of individual members, their self-acquired property?
- (iv) Is the plaintiff entitled to a decree of her 1/7th share in the suit property?
- (v) To what other relief or reliefs, plaintiff is entitled to?

9. The plaintiff examined two witnesses; they are PW-1, the plaintiff herself and PW-2, namely, Kamal Mahto. The plaintiff has also exhibited some documents in support of her case. they are Ext.-1 to Ext.-1/C, the certified copies of four khatiyans. The defendants also examined five witnesses in support of their case. DW-1 is Sagar Chandra Gorai (defendant No. 2); DW-2 is Satya Narayan Gorai; DW-3 is Dhiren Chandra Gorai (defendant No. 4); DW-4 is Mr. Shrawan Kumar Jha and DW-5 is Sandeep Gorai. The main issues before the learned trial court were issue Nos. (ii), (iii) and (iv), which were inter-connected to each other and these issues and also the other issues were decided against the plaintiff and in favour of the defendants. The learned trial court held that there was previous partition and plaintiff has received her due share in her paternal property and so far as the property which were recorded showing possession in the name of defendant no. 1/defendant no. 1 and 2, it was held that the same were their self-acquired properties and the suit was dismissed. The operative portion of the findings recorded by the learned trial court in connection with issue Nos. (ii), (iii) and (iv) is quoted as under: -

"8.....

.....

...

From the side of defendants, it has been said by their witnesses that property recorded in her mother's name is her self-acquired property purchased from her 'Streedhan'. Nothing has been brought on the record from the side of plaintiff to deny this fact strongly. Defendants have also stated that plaintiff has got her due share in her father's property time to time and she has also got one house on his paternal land. So, from the trend of evidence available on the record, it transpires that plaintiff has received her due share in her father's property and she had knowledge in the year 1989 that land recorded in the name of her father has already been sold and flats of Vijaya Homes have been constructed on the same. She has also admitted that she has got an old house situated on her paternal property. So, from these evidences, the court comes to a conclusion that partition has already been taken place and plaintiff has received her due share in the sale proceed of the suit property recorded in her father's name. So, result of Issue No. (ii) goes against the plaintiff with a finding that plaintiff has received her due share in her paternal property. Ruling filed by the plaintiff is not relevant in the present suit.

So far as the land recorded in the name of her mother with respect to Khata No. 929 & 930 is concerned, the evidence has been brought by the defendants that these lands have been purchased by her mother from 'Streedhan' and no contrary evidence is available on the record from the side of plaintiff on this issue. So far as land shown in illegal possession of defendant no. 1 & 2 is concerned, ownership with respect to land of khata no. 1217 rests with Anabad Bihar Sarkar and only illegal possession of Sarla Bala Gorai and Sagar Chand Gorai have been shown with respect to some plots of land of Khata No. 1217. So, it cannot be treated as joint family property and plaintiff is not entitled to get share in the self acquired property of her mother and in the property which has been illegally being possessed by defendant no. 1 & 2. As such, result of issue no. (iii) also goes against the plaintiff.

So, in view of the discussions made above, the court comes to a conclusion that plaintiff has got no share in the Schedule-B property and her claim is denied. Thus, in result answer of issue no. (iv) also goes against the plaintiff and plaintiff is not entitled to get any share in the suit property as claimed by her."

10. The learned 1st appellate court framed the following points for determination: -

I) Whether all the Suit property mentioned in the Schedule B of the plaint is joint property of the plaintiff/appellant and defendant/respondent.

II) Whether the land mentioned in the schedule-B of the plaint are in the name of individual members from their self acquired property.

III) Is the plaintiff entitled to a decree for 1/7th share in the suit property mentioned in Schedule B of the plaint.

IV) Is the suit as framed maintainable and has the plaintiff valid cause of action for it.

11. The learned 1st appellate Court took up the point of determination no. I to III together and findings have been recorded from paragraph 18 to 27. In paragraph 27 it has been ultimately held that the land shown in possession of defendant no. 1 namely, Saralabala Gorai and defendant no. 2 were acquired by earning of joint property. The learned Court held that the source of nucleus of income is the income of joint property but with respect to plot no. 1230 and 1232 of Khata No. 1217 which was shown in possession of Tata Iron and Steel Company, none of the parties were entitled to claim any share and consequently, in paragraph 38 of the judgment, it has been held that the plaintiff was entitled to 1/7th share in the suit property mentioned in schedule – B of the plaint except plot no. 1230 and 1232 of Khata No. 1217 and the plaintiff was held to be entitled to get only 1/7th share of possessory right over the land which was recorded in the name of the government and was shown in illegal possession of Hem Chandra Gorai with a further observation that this would not be binding upon the State government.

12. The learned 1st appellate Court after considering the materials, both oral and documentary evidences, has rejected the claim of previous partition particularly in the light of the evidence of D.W. 1, who was the defendant no. 2 himself, who could not disclose as to what was the actual date of partition and in his cross-examination he also stated that there was no name of his sisters in the sale-deed which was executed by him. Further, it was also recorded that D.W. 1 admitted that he had no independent source of his income at that time. The learned court recorded that the schedule B property except plot no. 1230 and 1232 of Khata No. 1217 was joint family property.

13. The learned court considered the evidence of other witnesses, some of whom were parties in the suit, and held that the suit property except plot no. 1230 and 1232 of Khata No. 1217 is joint property and it had not been partitioned nor the defendants filed any receipt to show that plaintiff had received any amount arising out of the sale-deeds of the land standing in the name of their common ancestor, namely, Hem Chandra Gorai. The learned Court also held that from the evidence of the defence witnesses itself, it was clear that the suit property was not partitioned by metes and bounds. The learned 1st appellate court also took notice of the fact that defendant no. 1 namely Saralabala Gorai, wife of the common ancestor did not come to depose before the Court to corroborate that she had purchased certain land from her Streedhan and in the evidence of D.W.-1 it had come that his mother had no business and she was only housewife and it was admitted that the defendant no. 3 was child at the time of death of his father and had no income. The learned 1st appellate court held that the land shown in possession of Saralabala Gorai [defendant no. 1] and in the possession of the son [defendant no. 2] was acquired by the earning of the joint property but the land of plot no. 1230 and 1232 of the khata no. 1217 which was shown

in the possession of Tata Iron and steel company (TISCO) could not be subject matter of partition.

14. The findings recorded in paragraphs 26, 27 and 38 of the appellate court's judgment are as under:

"26. From the statement of D.W.1 who is himself the defendant no. 2 has not come that on what date actual partition was taken place and in his cross-examination he has stated clearly that there is no name of his sisters in the sale deed which shows clearly the plaintiff has not sold the land of Hem Chandra Gorai. D.W.1 has stated in the cross-examination that he cannot say what number of land has been sold by him and he admits in the cross-examination that at the time of death of his father there is any business of him which shows clearly that at the time of death of father he has no any independent source of income. From the statement of D.W.2 and D.W.3, as stated in the cross-examination, it has come clearly that the suit property is joint property and it has not been partitioned and defendant has not filed any receipt to show that plaintiff has received such a huge amount as alleged by the defendant and also defendant has not filed any sale deed to corroborate that all the lands has been sold. So from the statement of the defendant witnesses it has come clearly that suit property has not been partitioned metes and bound. From the statement of both the parties it has been clearly come that plaintiff is the daughter of the common ancestor Hemchandra Gorai and defendant no. 1 is his wife, defendant no. 2 and 3, his son and other defendants are his daughters. So it is clear that plaintiff is entitled to 1/7th share of her father Hemchandra Gorai. Defendant no. 1 Sarla Bala devi has not come to depose in the case to corroborate that she has purchased some of the land from her Streedhan. So without corroboration from the Sarla Bala Gorai it has not been proved that some of the lands have been purchased by her from Streedhan and in the cross-examination of the D.W.1 it has come that mother of this defendant has no business and she is the only housewife and it is admitted fact that defendant no. 3 was child at the time of death of his father Hem Chandra Gorai so also he has not income at the time of death of his father.

27. Hence from the above facts and circumstances it has come clear that the land shown in possession of Sarla Bala Gorai defendant no. 1 and defendant no. 2 has been acquired by the earning of the joint property. So the source of nucleus of income is the income of joint property but from the perusal of the Ext. 1/a it has been clearly shown the land of plot no. 1230 and 1232 of the khata no. 1217 is shown in the possession of Tata Iron and steel company. So in these two plots neither all the parties are entitled to get share.

38. It is therefore ordered, that the plaintiff has 1/7th share in the suit property mentioned in Schedule B of the plaint except the plot no. 1230 and 1232 of Khata no. 1217 and plaintiff is entitled to get 1/7th share only possessory right to the land which is recorded in the name of government of Bihar now Jharkhand it shown in illegal possession of Hemchandra Gorai and the defendant but this

shall not be binding upon the state government.”

Arguments of the appellants

15. Learned counsel for the appellants has submitted that it is not in dispute that Hem Chandra Gorai was the common ancestor who died sometimes in the year 1976. It is further not in dispute that he left behind his widow namely Saralabala Gorai, who was defendant no.1, two sons who were defendant nos. 2 and 3, and plaintiff who was one of the daughters. Other three daughters of late Hem Chandra Gorai were defendant nos. 4, 5 and 6. The Plaintiff as well as Defendant Nos. 4, 5, and 6 are all married daughters of Hem Chandra Gorai and Defendant No. 1.

16. The learned counsel for the appellants has further submitted that suit for partition was filed in connection with properties of four Khatiyans, whose certified copies were filed before the learned trial Court and were exhibited as Exhibit 1 to 1/C. The exhibits were relating to Khata Nos. 1217, 929, 930 and 1108 respectively. She submits that so far as the property involved in Khata No. 1217 is concerned, it was recorded in the name of Anabad Bihar Sarkar and certain plots particularly plot nos. 2343, 2345, 2337, 2338, 31 and 2191 in the Khata No. 1217 were shown in the illegal possession of common ancestor namely Hem Chandra Gorai. So far as plot nos. 1230 and 1232 of Khata No. 1217 are concerned, the same were shown in the possession of TISCO. She has further submitted that so far as Khata No. 929 and 930 are concerned, the same were shown to be in exclusive possession of defendant no. 1, wife of common ancestor namely Hem Chandra Gorai and mother of the plaintiff. She has further submitted that Khata No. 1108 stood in the name of common ancestor namely Hem Chandra Gorai and the entire khata no. 1108 was sold out to third party and formed a part of Vijaya Heritage which was in possession of the purchasers. She has further stated that the property in Khata No. 1108 was sold out by the two brothers and mother of the plaintiff by virtue of the registered sale-deeds executed during the period from 1985 to 2000.

17. Learned counsel for the appellants has also submitted that a portion of Khata No. 1217 was recorded in the name of the eldest son in the family namely Sagar Chandra Gorai and those properties were relating to plot nos. 70, 72, 109, 110, 2043 and 2044, all in Khata No. 1217 which was in relation to Exhibit No. 1.

18. Learned counsel for the appellants has submitted that the defendants filed two sets of written statement wherein a specific stand was taken that the properties involved in the case could not be subject matter of partition and the entire property belonging to Hem Chandra Gorai was already sold out. It was their further stand that the plaintiff had got an amount of Rs. 18 lakhs from the defendants which was proceeds of the sale-deeds executed by the mother and two brothers of the plaintiff. It was further case of the defendants that the plaintiff had also received land and house and was in possession of the same and she also acquired a new house. It was further case of the defendant no. 2 that

he was the eldest son of the family and Hem Chandra Gorai died due to blood cancer and defendant no. 2 maintained all the family members and he got his brothers and sisters married beyond his capacity and had spent huge amount. It was also their case that an amount of Rs. 8,50,000/- was given to the plaintiff for purchasing another house property which was included in the aforesaid amount of Rs. 18 lakhs and an amount of Rs. 2,50,000/- was given for paying chit fund dues.

19. Learned counsel for the appellants has referred to the issues framed by the learned trial Court and has submitted that issue nos. (ii), (iii) and (iv) which were taken up and decided together by the learned trial Court were the main issues. She has submitted that by a detailed judgment, the learned trial Court dismissed the partition suit by observing that partition had already taken place and the plaintiff had received her due share in the sale proceeds of the suit property which stood recorded in the name of her father.

20. The learned counsel for the appellants has thereafter submitted that the learned trial Court had also recorded that so far as illegal possession of defendant nos. 1 and 2 is concerned, the ownership was of that of Anabad Bihar Sarkar and it cannot be treated to be a joint family property. The learned trial Court also recorded that the plaintiff was not entitled to get a share with respect to the self-acquired property of the mother i.e. defendant no. 1, which she had purchased from her Streedhan.

21. The learned counsel for the appellants has further submitted that the appeal was filed by the plaintiff and point of determination was framed by the learned appellate Court in paragraph 17 of its judgment. The learned counsel has submitted that the learned appellate Court has wrongly reversed the decree passed by the learned trial Court and upon consideration of the substantial questions of law framed by this Court, all the substantial questions of law are fit to be answered in favour of the appellants and the judgment and decree passed by the learned 1st appellate Court is fit to be set-aside.

22. With respect to the substantial question of law no. I, the learned counsel has submitted that so far as sale of major portion of the suit property which was sold during the period from 1985 to 2000 is concerned, the plaintiff had never objected to the same while handing over the possession to the purchasers and the plaintiff had taken money out of the sale proceeds and therefore, the suit was barred by principle of waiver, acquiescence and estoppel. She has submitted that the sale of the properties has already attained finality and there was no scope for the learned appellate Court to put the entire suit property subject to partition. She has relied upon the judgment passed by the Hon'ble Supreme Court reported in (2020) 6 SCC 387 (Bhagwat Sharan Vs. Purushottam) (paragraphs 10, 12 and 21) to submit that the law is well-settled that burden is on the person who alleges that the property is a joint property of an HUF to prove the same.

23. With respect to the substantial question of law no. II, the learned counsel for the appellants has submitted that the very fact that the sale proceeds of the sale-deeds were distributed amongst the co-sharers itself indicated that there was previous partition and therefore, the suit seeking partition was itself not maintainable, but this aspect of the matter has not been properly considered by the learned 1st appellate Court.

24. By referring to the written statement, the learned counsel has submitted that a specific plea was taken by the defendants that partition had taken place during the period from 1985 to 2000 during which the property was sold to third party and the sale proceeds was distributed amongst all the co-sharers and the share of land was also given to each of the co-sharers of the property.

25. With respect to the substantial question of law no. III, the learned counsel for the appellants has submitted that there is no evidence that the plaintiff had any separate source of income to purchase a new house. The plaintiff was already having an old house over part of the suit property and therefore, such conduct of the plaintiff read with the specific case of the defendants that an amount of Rs. 8,50,000/- was given to the plaintiff for the purpose of purchase of new house itself indicates that there was previous partition amongst the co-sharers and therefore, the suit seeking partition itself was not maintainable.

26. During the course of arguments, it also transpired that the plaintiff was essentially seeking partial partition as she had excluded certain properties which were situated outside the jurisdiction of the concerned Court.

27. The learned counsel for the appellants has relied upon the judgment passed by the Hon'ble Supreme Court reported in (2020) 6 SCC 387 (Supra) (paragraphs 10, 12 and 21) to submit that the law is well-settled that the burden is on the person who alleges that the property is a joint property of a Hindu Undivided Family and in the facts and circumstances of this case, the plaintiffs have failed to prove that the property which was subject matter of partition was belonging to a Hindu Undivided Family.

Arguments of the respondent No. 1 (plaintiff)

28. Learned counsel for the respondent no.1 (plaintiff), on the other hand, has submitted that the learned 1st appellate Court has reversed the judgment and decree of the learned trial Court by a detailed discussion of the materials on record and the finding of facts which has been arrived at by the learned appellate Court is final. He submits that no substantial question of law as such has been framed in order to disturb the findings arrived at by the learned 1st Appellate Court.

29. With respect to the substantial question of law no. I, the learned counsel for the respondent no.1 has submitted that there is no bar in transferring the portion of joint family property by a co-sharer. He has submitted that a judgment of this Court reported in 2004 (3) JLR 205 was relied upon by the plaintiff before the

learned trial Court, but the said judgment has not been considered. He submits that even if some portion of the joint family property is transferred, there is no legal bar and mere transfer of a portion of joint family property cannot be challenged by another co-sharer. He submits that at the time of partition, the property so sold by one or the other co-sharer has to be taken into consideration while allocation of share. He has submitted that by the impugned judgment passed by the learned 1st appellate Court, only 1/7th share in the property has been earmarked for the plaintiff and the sale of portion of the property will be taken care of once there is final partition. He has submitted that if the property is sold by a co-sharer, there is no question of any waiver, acquiescence or estoppel.

30. With respect to substantial question of law no. II, the learned counsel for the respondent no.1 has submitted that it was never the case of the defendants that there was any previous partition much less previous partition by metes and bounds. He has also submitted that no specific date of previous partition has been mentioned in the written statement, rather the arguments of the appellants that the partition took place during the period from 1985 to 2000 itself cannot be said to contain an element of previous partition. For the purposes of previous partition, there has to be a particular date and the share is required to be earmarked.

31. The learned counsel has submitted that merely because the defendants had taken a stand that there was distribution of share of consideration amount amongst all the co-sharers of the property, the same cannot amount to previous partition. He has also submitted that the learned 1st appellate Court has recorded a clear finding that there was no evidence on record to show that the consideration amount of the sale proceeds was distributed amongst the co-sharers of the property and the plaintiff had received any such amount. The learned counsel has also submitted that the property was sold jointly by the mother and two brothers of the plaintiff as stated by the defendants themselves, although the sale-deeds were not brought on record and exhibited and admittedly, the plaintiff was not a party to the sale-deeds.

32. The learned counsel has submitted that the aforesaid findings of facts which have been recorded by the learned 1st appellate Court while reversing the judgment of the learned trial Court, is final and cannot be interfered with in this appeal while answering the substantial question of law as no substantial question of law with regard to any perversity in the finding has been framed.

33. With regard to the substantial question of law no. III, the learned counsel for the respondent no.1 has submitted that the plaintiff had appeared before the Court and there has been no cross-examination of the plaintiff with regard to her source of income to buy the new house. No suggestion was even put to her that she had no independent source of income. He has also submitted that merely because she was possessing the old house, the same by itself does not lead to any conclusion that there was any previous partition. He has submitted that if any old house is situated in the scheduled property for partition, the same would

also be subject matter of partition. He has submitted that since there is no evidence that the consideration amount was shared amongst all the co-sharers, therefore, the same by itself cannot be evidence of partition. The learned counsel has submitted that there is no evidence on record that any portion of the consideration amount of the sale proceeds was ever paid or received by the plaintiff and there is a finding to that effect by the learned 1st appellate Court which cannot be said to be perverse.

34. The learned counsel for the respondent no.1 has further submitted that the records of this case reveal that the mother has already expired and this aspect of the matter cannot be overlooked as now there can be no impediment with respect to the division of property which stood in the name of the mother i.e. defendant no. 1, although there is a clear finding that there was no proof that she had purchased the property from her Streedhan, rather she being alive at the relevant point of time, did not even depose before the learned trial Court and adverse inference has been drawn by the learned appellate Court on account of non-appearance of the defendant no. 1 to testify that she had purchased the property from her own source of income.

35. Learned counsel for the respondent no.1 has relied upon the judgment passed by the Hon'ble Supreme Court reported in (2020) 9 SCC 1 (Vineeta Sharma v. Rakesh Sharma) and has referred to paragraph 107 of the said judgment to submit that if any subsequent event takes place during the pendency of the suit, the same can be taken care of and in the instant case, the mother has expired during the pendency of the second appeal. He has also submitted that once the second appeal has been admitted for final hearing, it has to be taken as a continuation of the original proceedings. He has submitted that the lis continues between the parties till the final decree is ultimately drawn. He has submitted that in the present case it is only a preliminary decree of 1/7th share and the proceedings has not been concluded.

Findings of this Court

36. After hearing the learned counsel for the parties, this Court finds that it is not in dispute that the common ancestor of the parties is Hem Chandra Gorai, who died in the year 1976. The plaintiff is the daughter; defendant Nos. 2 & 3 are the sons and defendant Nos. 4, 5 & 6 are daughters of Hem Chandra Gorai and defendant No. 1 was his wife and her name has been deleted on account of her death during the pendency of this second appeal. The plaintiff claimed 1/7th share in Schedule 'B' property which according to the plaintiff belonged to Hem Chandra Gorai.

37. It was the claim of the plaintiff that all the properties of schedule-B of the plaint belonged to Hem Chandra Gorai who died in the year 1976 and admittedly the parties were the legal heirs and successors of Hem Chandra Gorai. The plaintiff being the daughter of Hem Chandra Gorai was seeking partition. It was stated that some of the properties mentioned in Schedule- B were recorded in

the possession of Sagar Chandra Gorai and irrespective of entries made in the record-of-rights, the parties were in joint possession of the suit properties.

38. The defendants in their written statement admitted the genealogy and the date of death of Hem Chandra Gorai, but denied that the entire schedule-B property belonged to Hem Chandra Gorai and also denied joint possession. It was asserted that Plot Nos. 70, 72, 109, 110, 2043 and 2044 under Khata No. 1217 belonged to Sagar Gorai (defendant No. 2) which was acquired by him from his own status and there was no jointness of title or joint possession with respect to this property. It was claimed that Hem Chandra Gorai was suffering from cancer and after death of Hem Chandra Gorai in the year 1976, the defendant no.2 took up the responsibility of the entire family as his other siblings were minor and also spent huge amount for marriage of his siblings. It was also the case of the defendants that defendant no.2 spent huge amount for treatment of his father who suffered from cancer and took him to different places for treatment and side by side controlled the milk business but could not save his father.

39. It was further case of the defendants that Khata No. 929, plot no. 26 and Khata No. 930, plot no. 2089 were recorded in the name of Hem Chandra Gorai which were already sold with the consent of the entire family members in the year 1985 to 2000 and consideration was distributed amongst all the members including the plaintiff and money was given to the plaintiff from time to time from which she acquired properties totalling of Rs.18 lakhs and further 2.5 lakhs was given to her for playing chit fund and she was also given plot no. 106 where she has constructed a house. It was the specific case of the defendants that partition of land belonging to Hem Chandra Gorai was already done, and all the members of the family had taken their respective shares and consideration money during the year 1986 to 2000 and the aforesaid facts were suppressed by the plaintiff and it was mentioned before the Court that the lands are joint family properties. In the additional written statement filed by the defendants, a specific stand was taken that the land under plot nos. 2334 and 2344 of Khata No. 1108 were recorded in the name of Hem Chandra Gorai and the same was already sold to Vijaya Heritage with the consent of all the legal heirs and successors of Hem Chandra Gorai and the money was equally distributed to all.

40. The learned trial Court recorded that the plaintiff had received her due share in the sale proceeds of the suit property recorded in her father's name and consequently, she had received due share in paternal property; Khata Nos. 929 and 930 were declared to be the property of defendant no. 1 and therefore could not be subjected to partition; so far as other lands are concerned, it was held that the same could not be subject matter of partition as the said lands were in the name of Anabad Bihar Sarkar and the property was illegally possessed.

41. The learned 1st appellate court scrutinised the materials on record and held that the possessory rights over the suit lands which were in illegal possession of the parties could be subject to partition but it will not be binding on the

government; there was no evidence to show that the plaintiff was given any amount by the defendants as a part of the consideration amount of sale of the properties recorded in the name of their common ancestor, Hem Chandra Gorai; the defendant nos. 1, 2 and 3 did not have independent source of income and the properties acquired by the defendant nos. 1 and 2 were acquired from the income of joint property; the suit property was never partitioned by metes and bounds and the defendants had also not filed any sale deed to corroborate that the properties in the name of Hem Chandra Gorai were sold. The learned 1st appellate court recorded a specific finding based on materials on record that the suit properties [except plot nos. 1230 and 1232 of Khata No. 1217 in possession of TISCO] were joint family properties and they were never partitioned by metes and bounds and held that the plaintiff would be entitled to 1/7th share of the said property.

42. Properties involved in this case belong to Khata No. 1217 having numerous plot numbers; Khata No. 930 Plot No. 2089; Khata No. 929 Plot No. 26 and Khata No. 1108 having numerous plot numbers. Out of the numerous plots in Khata No. 1217, the defendant no. 2 claimed that property of Plot Nos. 70, 72, 109, 110, 2043 and 2044 under Khata No. 1217 was his self-acquired property by virtue of his status. Defendant no. 1 claimed property under Khata Nos. 929 and 930 as mentioned in schedule B to be her exclusive property acquired from her Streedhan. The schedule of the property reveals as under:-

Khata No.

Plot No.

1217

70, 72, 2343, 2345, 2337, 2338, 31, 2191, 1230, 1232, 109, 110, 2043, 2044, 2090

1108

25, 27, 28, 32, 46, 47, 56, 48, 2274, 2298, 2342, 102, 103, 108 and also 76, 83, 2334, 2335, 2344

930

2089

929

26

43. It is important to note that plot no. 106 under Khata No. 1108 as shown in the Khatiyan in the name of Hem Chandra Gorai – the common ancestor is not a part of the schedule B property and in fact plot no. 106 does not find mention under any Khata in the schedule B property. As per the case of the defendants, plot no. 106 has been given to the plaintiff and she is in possession of the same in which there is a house.

44. The individual claim of defendant no.1 has no relevance as she has expired during the pendency of this case and now her property would naturally devolve upon the surviving legal heirs and successors who are already party in the suit as fully discussed above. So far as properties under Khata No. 1108 are concerned, admittedly they were recorded in the name of Hem Chandra Gorai – the common ancestor and the defendants claimed in the written statement that entire property covered under khata no. 1108 was sold and on recall defendant no. 2 (D.W-1) stated that plot nos. 76, 83, 2334 and 2344 in Khata no. 1108 were sold to Vijaya heritage with the consent of all the legal heirs of Hem Chandra Gorai – the common ancestor and the consideration amount was equally distributed amongst all, but no details of sale have been mentioned nor the sale deeds have been brought on record.

45. The case of the plaintiff was that the entire schedule- B property actually belonged to the common ancestor namely, Hem Chandra Gorai irrespective of entries made in the record of rights.

46. The learned 1st appellate court upon scrutiny of the materials on record has held that the entire schedule- B properties except plot nos. 1230 and 1232 of khata no. 1217 were joint family property and this finding has attained finality as no substantial question of law has been framed on this point. The 1st substantial question of law relates to point of waiver, acquiescence and estoppel on the part of the plaintiff which essential relates to sale of properties under Khata No. 1108 which admittedly stood recorded in the name of Hem Chandra Gorai –the common ancestor on the ground that the plaintiff never objected to sale or handing over the possession with respect to the said properties. The 2nd substantial question of law relates to previous partition and distribution of consideration of the sale proceeds amongst the co-sharers as claimed by the defendants arising out of sale of properties under Khata No. 1108 which admittedly stood recorded in the name of Hem Chandra Gorai – the common ancestor. The 3rd substantial question of law relates to source of income of the plaintiff to purchase a new house and also having an old house over part of the suit property and this has been taken as the ground to prove previous partition and sharing of consideration amount out of sale proceeds of the properties sold under Khata No. 1108.

Plot no. 1230 and 1232 of Khata No. 1217 (part of schedule B property)

47. It has been held in the impugned judgment based on materials on record that the property covered by plot nos. 1230 and 1232 of Khata No. 1217 and included in schedule B of the plaint was in possession of TISCO and was recorded in the name of the government and the same was excluded from partition vide paragraph 27 of the 1st appellate court's judgement. The parties are not aggrieved by such exclusion and therefore plot nos. 1230 and 1232 of Khata No. 1217 are not subject matter of consideration in this appeal.

Khata no. 930 Plot No. 2089 and Khata No. 929 Plot No. 26 (part of schedule B

property)

48. It was claimed by the plaintiff that Khata No. 930 Plot No. 2089 and Khata No. 929 Plot No. 26 which was included in schedule-B property was belonging to Saralabala Gorai and was a part of joint family property. On the other hand, it was the case of the defendants that the said property was self-acquired property of Saralabala Gorai purchased from her Streedhan.

49. This Court finds that the learned trial court found that the said property was the self-acquired property of the defendant no. 1 (mother of the plaintiff) and therefore, it could not be treated as joint family property as the plaintiff was not entitled to get share in the self-acquired property of her mother. The learned trial court recorded that with respect to the land recorded in the name of the mother, evidence was brought by the defendants that these lands were purchased from the Streedhan and there was no contrary evidence available on record from the side of the plaintiff on this issue and consequently, the property was declared to be the self-acquired property of the mother-Saralabala Gorai. So far as learned 1st appellate court is concerned, it took exception to the fact that Saralabala Gorai (defendant no. 1) herself did not depose before the court to claim that the property was her self-acquired property and consequently, she did not depose in the case to corroborate that she had purchased some of the suit land from her Streedhan. The learned 1st appellate court also recorded that it was not true that property was purchased from her Streedhan and referred to the evidence of D.W. 1 who deposed that the mother was only a housewife and D.W. 3 was only a child at the time of death of his father and had no income. The learned 1st appellate court held that it was clear that the property shown in possession of Saralabala Gorai (defendant no.1) was acquired by the earnings of joint family property.

50. The fact remains that during the pendency of this case, the name of Saralabala Gorai (defendant no. 1) has been deleted on account of her death and consequently, there can be no doubt that her property would devolve upon the surviving legal heirs and successors i.e. the plaintiff and the other defendants in accordance with law.

51. The law is well settled in the judgment passed in the case of "Vineeta Sharma Vs. Rakesh Sharma and others" reported in (2020) 9 SCC 1 that once the constitution of coparcenary changes by birth or death, shares have to be worked out at the time of actual partition and till the date of the final decree, change in law, and changes due to the subsequent event can be taken into consideration. Paragraph 107 of the said judgement is quoted as under: -

"107. Once the constitution of coparcenary changes by birth or death, shares have to be worked out at the time of actual partition. The shares will have to be determined in changed scenario. The severance of status cannot come in the way to give effect to statutory provision and change by subsequent event. The statutory fiction of partition is far short of actual partition, it does not bring about

the disruption of the joint family or that of coparcenary is a settled proposition of law. For the reasons mentioned above, we are also of the opinion that mere severance of status by way of filing a suit does not bring about the partition and till the date of the final decree, change in law, and changes due to the subsequent event can be taken into consideration.”

52. In view of the aforesaid facts and circumstances, no further discussion is required with respect to the said property standing in the name of Saralabala Gorai and it would be futile to discuss as to whether she had purchased the property from her Streedhan or she had purchased the same from the income of joint family property.

Dispute survives only with respect to the remaining schedule-B properties.

53. As already observed above, the learned 1st appellate court upon scrutiny of the materials on record has held that the entire schedule B property except plot no. 1230 and 1232 of khata no. 1217 was joint family property and this finding has attained finality as no substantial question of law has been framed on this point. In this background the substantial questions of law are required to be answered.

54. With respect to the 1st substantial question of law, this Court finds that although the defendants claimed previous partition but no specific date of partition has been either pleaded or proved. The defendants tried to make out a case that major portion of the suit property standing in the possession of Hem Chandra Gorai – the common ancestor, were sold during the period from 1985 to 2000 but the plaintiff never objected to the sale or handing over of possession to the purchaser and therefore, it has been argued before this court that the suit was barred by principles of waiver, acquiescence and estoppel.

55. This court finds that no plea of waiver, acquiescence and estoppel were raised through the written statement and the specific case of the defendants was that the sale proceeds received out of the property sold during the period from 1985 to 2000 were equally divided amongst the family members including the plaintiff during the period from 1986 to 2000 from which she purchased a new house and further that the plaintiff was also in possession of plot no. 106 on which one old house was standing. The claim of the defendants is that most of the property standing in the name of Hem Chandra Gorai –the common ancestor, was sold and the sale proceeds were equally divided amongst the co-sharers, who were also parties to the partition suit and therefore the defendants claimed that there was partition during the period from 1985 to 2000.

56. This Court also finds that in the absence of any foundational pleadings, no issue with regard to waiver, acquiescence and estoppel was framed by the learned trial court nor any such point of determination was framed by the learned 1st appellate court.

57. This Court also finds that in the trial court judgment it has come in the

evidence of D.W. 1 that since 1985 the defendant no. 2 started selling the land for money, but in the sale-deeds the names of sisters were not shown as owners and it was not mentioned that sisters had also agreed to the sale of the land. This Court finds that neither the sale-deeds were exhibited nor there was any deposition in connection with the contents of the sale-deeds nor exact date of sale has been brought on record and in absence of exact date of sale-deed and the nature and content of the sale-deed, it cannot be said that the suit was barred by the principles of waiver, acquiescence and estoppel on the ground that the property was already sold and the plaintiff did not object at any point of time. Neither the sales have been proved nor it has been proved that the property was handed over pursuant to such sales which as per the written statement was spread over from 1985 to 2000. This is over and above the fact that the plea of waiver, acquiescence and estoppel are essentially questions of fact which are required to be pleaded and proved. In absence of any foundational pleading from the side of the defendants, much less supported by evidence, it cannot be said that the suit was barred by the principles of waiver, acquiescence and estoppel and merely because one or the other person is said to be in possession of a portion of the suit property, the suit cannot be said to be barred by the principles of waiver, acquiescence and estoppel. Thus the 1st substantial question of law is decided against the appellants and in favour of the respondent no.1 (plaintiff).

58. So far as the 2nd substantial question of law is concerned , this Court finds that it is not the case of the defendants that there has ever been any partition by metes and bounds and it is not in dispute even from the side of the defendants that the family constituted a joint Hindu family having common ancestor as Hem Chandra Gorai and upon his death his properties devolved upon the parties to the suit. This court also finds that the defendants claimed that the property standing in the name of Hem Chandra Gorai – the common ancestor was sold during the period from 1985 to 2000 but no further details have been mentioned. Neither the details of sale deeds, consideration amount etc. have been mentioned or proved to determine the date of sale and actual consideration amount and its equitable distribution nor the sale deeds have been exhibited before the court to even prove that the properties were sold. The defendants have also failed to prove handing over of any amount to the plaintiff out of the sale proceeds, if any. The sale was said to have been made from 1985 to 2000 but no details have been furnished. Thus, the defendants have failed to prove that the properties standing in the name of Hem Chandra Gorai – the common ancestor, were sold and any amount whatsoever, was given to the plaintiff out of the sale proceeds much less any proportionate amount of sale proceeds was paid to her. This court also finds that D.W-1 (defendant no.2) in his cross examination at paragraph 45 has also stated that the plaintiff has filed the suit for partition as there has been no partition of the suit property.

59. This Court finds that the defendants in their written statements had claimed that there was a previous partition amongst the co-sharers and also distribution

of share of consideration amount to all the co-sharers including the plaintiff, but the finding of fact reveals that this assertion made by the defendants could not be proved. This Court is also of the considered view that there was no material on record to suggest that there was previous partition amongst the family members with respect to the property involved in this case, much less partition by metes and bounds. This court is of the considered view that merely because all the defendants had admitted previous partition and distribution of share of consideration amount arising out of sale of properties during the period from 1985 to 2000, that by itself is not binding on the plaintiff. It is important to note that defendants other than defendant nos. 2 and 3 have not been examined before the court and they have not come to depose that how and to what extent they received the portion of consideration of the sale deeds to substantiate their claim of previous partition by consenting to sale and distribution of sale proceeds with respect to sale spread over the period from 1985 to 2000, though even the sale was not proved.

60. In view of the aforesaid findings, this court is of the considered view that stand taken by the other co-sharers of the property about previous partition amongst the co-sharers and also distribution of the share of the consideration amongst all the co-sharers including the plaintiff is not binding on the plaintiff as the defendants have miserably failed to prove previous partition and distribution of sale proceeds arising out of sale of properties during the period from 1985 to 2000, much less equitable distribution of sale proceeds. In fact, the defendants have failed to prove sale of the properties as claimed as even the sale deeds were not produced.

61. Accordingly, the suit has been rightly held to be maintainable by the learned 1st appellate court. Thus the 2nd substantial question of law is decided against the appellants and in favour of the respondent no.1 (plaintiff).

62. So far as substantial question of law no. III is concerned, this Court is of the considered view that no material was brought on record before the learned courts to show that the plaintiff had purchased a new house from the fund received from the joint family. The deed of purchase of the new house has also not been brought on record.

63. It was the specific case of the defendants that there was previous partition amongst the co-sharers and the consideration amount received against sale of portion of the suit properties standing in the name of Hem Chandra Gorai – the common ancestor was shared amongst the co-sharers, but the defendants miserably failed to prove previous partition by bringing on record evidence relating to sale and also sharing of the consideration amount much less equitable sharing of the consideration amount. The defendants claimed partition and distribution of sale proceeds and the onus was upon them to prove the same which they miserably failed to prove. In such circumstances, there was no obligation on the part of the plaintiff to disclose the source of income for purchasing the new house. Further, merely because the plaintiff was in

possession of plot no. 106 having an old house, the same has no bearing in the matter in view of the fact that even in absence of partition, one or the other person can certainly be in physical possession of one or the other joint family property. Mere physical possession does not lead to a conclusion that there was previous partition. This is over and above the fact that plot no. 106, on which the old house in possession of the plaintiff is said to be situated is not a part of the schedule-B properties and the Khatiyani as exhibited reveals that plot no. 106 was under Khata No. 1108 and was recorded in the name of common ancestor namely, Hem Chandra Gorai.

64. In view of the aforesaid facts and circumstances, the purchase of new house by the plaintiff and possession of plot no. 106 and old house standing thereon, does not prove partition amongst the co-sharers much less partition by metes and bounds and the fact remains that sharing of consideration amount arising out of sale proceeds has not been proved nor the sale of the properties has been proved by the defendants by producing the sale-deeds.

65. This Court also finds that merely because the plaintiff was in possession of one house over the part of the suit property by itself does not suggest that there was any previous partition amongst the co-sharers. So far as the sharing of consideration amount received against sale of property is concerned, as per the finding recorded by the learned court, this aspect of the matter has not been proved. The oral evidences led by the parties in connection with sharing of consideration amount has been rejected by the learned court by citing reasons and no perversity as such has been pointed out by the learned counsel for the appellants with respect to such a finding. There is nothing on record to show that the plaintiff was in exclusive possession of the old house over the suit property and merely because the property was being occupied by the plaintiff, the same does not conclude that the plaintiff was the exclusive owner of the property. No document relating to separation has been produced. No date of partition has been mentioned in the written statement nor any specific date of partition has come in the evidence.

66. In the aforesaid circumstances, the 3rd substantial question of law is also decided against the appellants and in favour of the respondent no. 1 (plaintiff).

67. All the substantial questions of law have been answered against the appellants and in favour of the respondent no. 1 (plaintiff). However, on account of death of defendant no.1 (mother), the distribution of properties would be to the extent of 1/6th share, as the surviving co-sharers are only 6 in number.

68. This second appeal is accordingly disposed of.

69. Pending interlocutory application, if any, is closed.