
(2004) 02 JH CK 0059
In the Jharkhand High Court
Case No : AFAD No. 447 of 1989

(Smt.) Yamuna Mandal and Others

APPELLANT

Vs

Kameshwar Mandal and Others

RESPONDENT

Date of Decision : 13-02-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2004) 2 JCR 165

Hon'ble Judges : Vishnudeo Narayan, J

Bench : Single Bench

Advocate : V. Shivrath, A. Sinha, R. Shankar, B. Kumar, S. Topno and A. Kumar, for the Appellant; Prakash Kishore Prasad and Kailash Pd. Deo, for the Respondent

Final Decision : Dismissed

Judgement

Vishnudeo Narayan, J.—This appeal at the instance of the defendant Nos. 1 to 4 (hereinafter called as appellants) is directed against the impugned Judgment and decree dated 30.8.1989 and 8.9.1989 respectively passed in Title Appeal No. 11 of 1976 by Shri Om Prakash Sinha, 1st Additional District Judge, Deoghar whereby and whereunder the appeal was allowed and the judgment and decree dated 23.12.1975 and 19.1.1976 respectively passed in Title (Partition) Suit No. 112 of 1970/23 of 1975 of 2nd Additional Subordinate Judge, Deoghar were set aside and the said Title (Partition) Suit was decreed.

2. Plaintiff Dukhi Mandal, the predecessor in interest of present respondent 1st set had filed the aforementioned suit for metes and bounds partition of the ancestral joint family properties situate at village Bhanuarkola, Gulaldih, Dumarkola and Fatehpur situate in the District of Deoghar, Bihar (Now Jharkhand) claiming 1/4th share therein fully detailed in Schedule A (a, b, c, d) and Schedule B at the foot of the plaint. Said Dukhi Mandal died during the pendency of the appeal before the appellate Court below and the present respondent 1st set were substituted in his place.

3. The case of the plaintiff respondent 1st set is that all the parties to the suit are the members of Joint Hindu Mitakshara Family being the descendants of their common ancestor Dhanwari Mandal and the joint family continued for some years after his death. Said Dhanwari Mandal had four sons, namely, Tulsi Mandal, the father of the appellants, Darogi Mandal, the father of respondents Nos. 6 and 7, Munsu Mandal, the father of respondent Nos, 8 and 9 and Dukhi Mandal, the father of respondent 1st set. It is alleged that after the death of Dhanwari Mandal aforesaid inconvenience was felt because of the growing family and his descendants separated in mess and started possessing and enjoying the family properties as per their convenience and choice without actual partition by metes and bounds according to their legal share and descendants of Mun-shi Mandal and Darogi Mandal shifted to Bhandarkola after the death of Dhanwari Mandal and started living there for the proper management of the properties situate there and due to the quarrel one year prior to the institution of the suit the descendants of Darogi Mandal shifted back to Gulaldih in the ancestral house of the parties. The further case of the plaintiff respondent 1st set is that Dukhi Mandal the original plaintiff constructed a pucca house of bricks tiles with partly cemented roof contiguous to the old ancestral house in village Gulaldih after the death of his father Dhanwari Mandal. Their further case is that the descendants of Dhanwari Mandal are not in good terms inter se and bad feelings are gradually taking roots and the original plaintiff Dukhi Mandal asked the appellants and defendant respondent 2nd set to partition the suit properties amicably by metes and bounds for allotting a separate Takhata to each of the branches of the four sons of Dhanwari Mandal for which the appellants and defendant respondent 2nd set did not agree and hence the necessity of the filing of the said partition suit. The plaintiff respondent has claimed 1/4th share in the suit property.

4. Three sets of written statements were filed in this suit. One by the appellants, the other by defendant respondent Nos. 6 and 7 and 3rd by defendant respondent No. 8 but the said Title Suit has been contested only by the appellants.

5. The case of the appellant is that his father Dhanwari Mandal was a man of - meager means and he has even to work as labourer to maintain his family but fortunately his eldest son Tulsi Mandal was very enterprising and industrious and he started earning by various laborious means such as cultivating the land of others on Batati and doing business and thereby he earned some wealth from which he has purchased Schedule A (a) land at Bhandarkola but out of sentiment for his father he got the sale deed in respect thereof executed in the name of his father Dhanwari Mandal. It is alleged that at the time of the acquisition, Schedule A(a) land was mostly barren Bari lands except plot No. 578 and by dint of his hard labour Tulsi Mandal had also Improved the condition and assets of his joint family at Gulaldih and he also started Mahajani business and in view of the improved condition of the joint family and assets at Gulaldih and Dumarkola none of the members of the joint family agreed to give up the said comfortable life and to shift to Bhandarkola for living there and the developing the land of

Bhandarkola was a hard task involving tremendous labour and also risk and in such a situation Tulsi Mandal settled at Bhandarkola with his family and by dint of his hard labour and personal earning he developed the Bhandarkola land described in Schedule A(a) of the plaint and planted several trees described in Schedule A(d) of the plaint. It is alleged that after his settling at Bhandarkola his three brothers began to misappropriate the assets of the joint family at Gulaldih with dishonest intent and selfish approach which led to discontent and discord in the family leading to the dissolution of the joint family in the year 1943 and on the Basant Panchami day in the year 1943 with the consent of his family members effected an amicable partition among the four branches of his sons. It is further alleged that even at the time of the amicable partition none except Tulsi Mandal the ancestor of the appellant was prepared to take Schedule A(a) land situate at Bhandarkola as at that time it was still mostly undeveloped yielding little profit whereas the assets at Gulaldih and Dumarkola were most attracting and thus the Bhandarkola land described in Schedule A(a) and trees described in Schedule A(d) except the bricks which are imaginary fall to the share of Tulsi Mandal aforesaid while the remaining properties at Gulaldih and Dumarkola including vast assets in the form of moveable such as business and cash fall to the share of remaining three branches which was partitioned among them and, thereafter, all the respondents had no concern whatsoever with Bhandarkola properties which remained in exclusive possession of the appellant who paid rent in respect thereof and similarly the appellants had no concern whatsoever with Gulaldih and Dumarkola properties and the separate possession and partition is equally evident also from the facts that the parties have got separate houses, cultivation and business dealings and transactions and even partition ridges at the spot which will also confirm the factum of metes and bounds partition. The further case of the appellant is that Tulsi Mandal, the father of the appellants was engaged in developing the Bhandarkola land but he had a pre-mature death in the year 1948 and he left behind him his widow, Kalawati and three minor sons and none of the members of the other branches of the respondents ever cared to look after them but all the three sons of Tulsi Mandal were meritorious students getting scholarship and they also started earning and appellant No. 1 started doing service after graduation since 1957 and appellant No. 2 became a lecturer in Nepal and appellant No. 3 was engaged in service at Bokaro and appellant No. 1 was keenly interested in cultivation and he improved the Bhandarkola land investing his entire earning and also from the savings of the other appellants and re-claimed the Bhandarkola land and plot No. 75 having an area of 12 acres which was a Bari land and it was reclaimed into Dhani land and plot No. 577 which was a Garia was also developed into a good tank to provide the irrigation and the appellant No. 1 did scientific cultivation in the Bhandarkola land which made the respondents jealous and they hatched plans harassing the appellants and started creating trouble since April, 1969 setting up Most Dakho Mandalin, widow of late Darogi Mandal aforesaid and respondent No. 8 Dulab Mandal laying false claim of possession over Bhandarkola land under the instigation of the respondent 1st which led to Criminal Case No. 223 of 1969,

Criminal Miscellaneous No, 544 of 1969 under Sections 144 and 145 of the Criminal Procedure Code which terminated in favour of the appellants. It is also alleged that respondent No. 7, Khageshwar Mandal was driven out by his brother Kisto Mandal and the appellants were also in search of a suitable person to look after their cultivation and they employed respondent No. 7 Khageshwar Mandal for looking after his cultivation for short time but he left his employment under the appellants long back and taking advantage of the said fact the respondents had tried to give out a false claim in the said criminal proceedings on that basis. It is also alleged that Tulsi Mandal and after his death the appellants on the basis of the partition of the year 1943 have continued in actual exclusive possession of the Bhandarkola land to the exclusion of all the respondents for the last forty years and have acquired valid and indefeasible title also by adverse possession since 1943 but the respondents with the help of the hired local criminals had attempted to come in possession of the Bhandarkola land but their attempt fizzled out and they began to initiate criminal proceedings against the appellants. Lastly it has been alleged that the pucca house was by the side of the ancestral house constructed by the respondent 1st set belongs to them and the said house was constructed by respondent 1st set during the life time of Dhanwari Mandal after partition. The further case of the appellant is that the respondent 1st set has deliberately left out the properties like Mahajani business, houses in possession of the branches of the Darogi Mandal and Munsu Mandal and the shopping business run by respondents 6 and 7.

6. The case of respondent Nos. 5 and 6, inter alia, is that Dhanwari Mandal died in the year 1956 and he was the karta of the joint family of the parties to this suit during his life time and the said Dhanwari Mandal died leaving behind his two sons, namely Munsu Mandal and Dukhi Mandal and descendants of his predeceased sons Tulsi Mandal and Darogi Mandal. It is alleged that Munsu Mandal was a school teacher and retired in the year 1966 and two years, thereafter, he died in the year 1968. It is alleged that respondent No. 7 Khageshwar Mandal lived at Bhandarkola with his family jointly with the appellants for proper cultivation of the Bhandarkola land but since cordial atmosphere was very much vitiated by the sons of Munsu Mandal respondent No. 7 has to return to his ancestral house in Mauza Gulaldih with his family. The further case of these respondents is that the parties to the suit separated in mess and started separate cultivation in the year 1966 and prior to that they were members of the joint family and some of the members of the said joint family were residing at Bhandarkola and some at Gulaldih. Lastly it has been contended that these respondents have no objection in partition of the suit properties by metes and bounds.

7. The case of respondent No. 8 Gulab Mandal, inter alia, is that there had been separation between Dhanwari Mandal and his sons in mess and residence and they used to divide the usufruct of the ancestral land and the separation in status has taken place as far back as in the year 1934 and after the death of Dhanwari Mandal the parties are possessing the suit land without partition by metes and

bounds. It is further alleged that his father Munsu Mandal was a teacher from 1926 from which he has retired in the year 1966 and in the state of separation from his father and brothers he took settlement of Fateh-pur land described in Schedule B of the plaint out of his self earning in Eviction Case vide order dated 31.3.1938 passed in PE Case No. 362/36-37 of the Court of Sub-Divisional Officer Deoghar and he got delivery of possession over the same and the said Munsu Mandal remained in separate possession of the Fatehpur land till his death and, thereafter, this respondent along with his brother respondent No. 9 Muneshwar Mandal are in possession over the same and they also stands mutated in respect thereof and the appellant and the other respondents have no concern whatsoever with the said Fatehpur land. It is further alleged that Munsu Mandal had reclaimed plot No. 2 of village Dumarkola in the year 1955 and after his death the said plot is in exclusive possession of the said respondent and his brother and in case of partition the said plot be allotted into their Takhta in lieu of other Bari lands. It has also been alleged that pucca house of brick by the side of the ancestral house in village Gulaldih have been constructed by Dhanwari Mandal out of the produce of the joint family property more than 25 years back and the said house is in joint possession of the parties to this suit. Lastly it has been contended that this respondent has no objection in partition of the suit properties by metes and bounds.

8. In view of the pleadings of the parties the trial Court framed the following issues for adjudication in this case.

- (i) Whether the suit is maintainable in its present form?
- (ii) Whether the plaintiff has got the valid cause of action for this suit?
- (iii) Whether the suit is barred by the law of limitation?
- (iv) Whether the suit is bad for nonjoinder of necessary parties?
- (v) Whether the plaintiff is entitled to get 1/4th share as claimed and whether the properties in suit are subject to partition?
- (vi) Whether, the story of previous partition in 1943 as alleged by the defendants 1 to 4 is correct and acceptable?
- (vii) Whether the plea of complete ouster as advanced by the defendants 1, 2 and 4 is sustainable and if so, whether the defendants acquired a valid and indefeasible title on this plea?
- (viii) To what relief or reliefs if any, is the plaintiff entitled?

9. In view of the evidence oral and documentary on the record the learned trial Court while deciding issue Nos. (v) (vi) and (vii) has held that the evidence adduced by the contesting defendants (the appellant here) in regard to previous partition is more reliable and superior than the evidence adduced by the, plaintiff (respondent 1st set) and the plaintiff (respondent 1st set) cannot succeed merely on basis of a presumption which stands rebutted and the plaintiff

(respondent 1st set) has miserably failed to support his stand whereas the story of previous partition advanced by the contesting defendant (appellant) is correct and acceptable. It has also been held that there is ample evidence on the record to show exclusive possession enjoyment and utilization of profits of the Bhandarkola land by the contested defendants (appellants) with hostile title and animus to the knowledge of all and specially to the parties to this suit place which is also evident from the proceedings under Sections 144 and 145 of the Cr PC and the open assertion of hostile title coupled with exclusive possession and enjoyment of the contesting defendants (appellants) does establish ouster of the non possessing heirs. It has further been held that the suit of the plaintiff (respondent 1st set) is barred by law of limitation as they have not been able to show their possession within 12 years and the plea of ouster as advanced by the contesting defendants (appellants) has got substance. In view of the findings aforesaid the suit filed by the plaintiff (respondent 1st set) was dismissed.

10. Aggrieved by the judgment and decree of the trial Court the plaintiff (respondent 1st set) preferred Title Appeal No. 112 of 1970. The lower appellate Court on reappraisal and re-appreciation of the evidence oral and documentary on the record reversed the Judgment and decree of the trial Court and allowed the appeal as per impugned judgment and has decreed the suit. The appellate Court below came to the finding of fact that the learned trial Court has committed an error in allowing the contesting defendant (appellant) to adduce evidence on the point that partition was affected through a Panchayati when there was no such case pleaded in his written statement. The learned appellate Court below further held that on resume of the evidence on the record the facts and circumstances of this case and the ratio of the case laws quoted above no partition as alleged by the contesting defendant (appellant) as ever effected, rather, it is clear that the parties were in possession of the suit land according to their convenience and all the four branches of Dhanwari Mandal are entitled to 1/4th share in the entire suit properties. It has further been held that the story of dispossession and ouster as set up by the contesting defendants (appellants) is not sustainable in view of the settled principle of law that non-user or not being in possession of the land of village Bhandarkola by the plaintiff (respondent 1st set) is not barred by law of limitation. Lastly it has been held that in view of absence of any legal evidence the claim over the land of village Fatehpur as the self acquisition of Munsii Mandal as claimed by defendants 8 and 9 (respondent Nos. 8 and 9 here) cannot be accepted and the said Fatehpur property is liable to be partitioned in equal shares between the four branches of Dhanwari Mandal.

11. The Court while admitting the appeal for hearing formulated substantial question which runs thus :--

"Whether the finding of the lower appellate Court on the point of partition is vitiated due to the rejection of the defendants evidence of partition by Panchayati on the ground of non-mention of this fact in written statement without appreciating that the pleading need not contain the details of evidence?"

12. Assailing the impugned judgment it has been submitted by the learned counsel for the appellants that the learned appellate Court below has committed a manifest error in discarding the evidence of DW 12, Hukum Mandal in whose presence Dhanwari Mandal had effected the metes and bounds partition on the Basant Panchami day in the year 1943 in respect of the joint family properties with the consent of all his descendants and DW 12 has deposed that he was called by Dhanwari Mandal to participate in the said partition and to act in the capacity of a Panch in respect thereof. It has further been submitted that consent of all the descendants of Dhanwari Mandal includes the consent of partition by intervention of the Panches and hence it was not incumbent upon the appellants to plead specifically in respect thereof in his written statement. Elucidating further it has been submitted that the Panches have not partitioned the Joint family properties between the parties by metes and bounds rather it was Dhanwart Mandal the common ancestor of the parties have effected the partition, and therefore, discarding the evidence of DW 12 by the learned appellate Court below is not at all sustainable in the facts and circumstances of this case. It has also been submitted that the reasons assigned by the learned appellate Court below In para 13 of the impugned judgment that the appellants in their written statement have not averred that the partition was effected by a Panchayati and in absence of the pleading to that effect the learned trial Court has allowed the appellants to adduce evidence on this point whereas it is well settled law that the parties cannot raise a plea which was not taken by him in his pleadings. It has also been submitted that pleadings are prepared in a concised form and every detail is not required to be given in it. It has further been submitted that the finding of the learned Court below regarding the existence of jointness between the parties stands vitiated due to the non-acceptance of the evidence of DW 12. Referring Order VI, Rule 2 of the CPC it has been contained that the pleading shall contain and contain only a statement in a concised form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved and in this view of the matter the rejection of evidence of DW 12 which establishes the fact of metes of bounds partition on the Basant Panchami day in the year 1943 ought to have been relied upon by the learned appellate Court below for coming to the finding that there had already been a previous partition by metes and bounds and the judgment of the trial Court ought to have been affirmed by him. As such the impugned judgment of the appellate Court below is unsustainable.

13. Refuting the contention aforesaid it has been submitted by the learned counsel for the respondents that the appellant in his written statement has made out a case in para 6 of his written statement that on Basant Panchami day in the year 1943 Dhanwari Mandal with the consent of all the family members effected an amicable partition among the four branches of his sons and at the time of amicable partition none excepting Tulsi Mandal was prepared to take Schedule 1-A i.e., Bhandarkola land as they were still mostly undeveloped yielding little profit while the assets in Gulaldih and Dumarkola were numerous and most

attractive and thus the Bhandarkola land and properties described in Schedule 1-A and D except bricks which are imaginary fell to the share of Tulsi Mandal while the remaining property at Gulaldih and Dumarkola including a vast assets in the form of moveable such as business and cash fell to the share of remaining three branches and were partitioned among them. It has also been contended that there is no whisper in the said averment regarding effecting metes and bounds partition by a Panchayati and DW 12 has effected partition as a Panch and the learned trial Court has admitted the evidence of DW 12 effecting the alleged partition by metes and bounds by Panchayati which was against the pleadings of the appellants and the learned appellate Court has rightly rejected the evidence in view of the settled law that no amount of evidence can be looked into upon a plea which was never put forward in the written statement of the appellants and a party cannot be allowed to lead evidence in contradiction what has not been specifically pleaded in his pleading. It has also been submitted that ordinary rule of law is that evidence is to be given only on a plea properly raised and not in contradiction of the plea and the said rule is based mainly on the principle that no parties should be prejudiced by the change in the case introduced and evidence has to be tailored strictly in accordance to the pleadings and cannot be a probing adventure in the dark giving surprise to the opposite party. Relying upon the ratio of the case of Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, , it has been submitted that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Reliance has also been placed upon the ratio of the case of Raruha Singh v. Achal Singh and Ors. AIR 1961 SC 1097 , and Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and Others, . It has also been submitted that it is well settled that the High Court while considering the matter in exercise of its jurisdiction in second appeal would not reverse the finding of fact as recorded by the appellate Court below. But it is not an absolute proposition and in a case where the finding is recorded without any legal evidence on the record, or on misreading of evidence or suffers from any legal infirmity, which materially prejudices the case of one of the parties or the finding is perverse, it would be open for the High Court to set aside such as a finding and to take a different view and here in the case at hand the finding of the appellate Court below is based on proper appreciation of the evidence on the record and it cannot be said that the finding of the learned appellate Court is erroneous being contrary to the mandatory provisions of law applicable in the facts of this case or based upon inadmissible evidence or misreading of the evidence on the record and, therefore, it is not within the domain of this Court exercising its jurisdiction in second appeal to investigate the grounds on which the findings were arrived at by the last Court of fact being the 1st appellate Court and this Court cannot substitute its opinion for the opinion of the 1st appellate Court. In support of the said contention reliance has been placed upon the ratio of the case of Neelakantan and Others Vs. Mallika Begum, and Subran and Others Vs. State of Kerala, .

14. It is an admitted fact that Dhan-wari Mandal is the common ancestor of the parties to the suit and he had four sons, namely. Tulsi Mandal and Darogi Mandal, Munshi Mandal and Dukhi Manda. His two sons, namely, Tulsi Mandal and Darogi Mandal had predeceased him. The appellants are the descendants of Tulsi Mandal and they figured as defendant Nos. 1 to 3 and Kalawati Mandal is the widow of Tulsi Mandal aforesaid. The plaintiff-respondent 1st set are the descendants of Dukhi Mandal aforesaid. Other respondents are the descendants of Munshi Mandal and Darogi Mandal. Dhanwari Mandal was possessed of joint family property situate at Gulaldih. Dumarkola, Bhandarkola and Fatehpur. The plaintiff-respondent 1st set had made out a case in para 3 of the plaint which runs thus :--

"That till the life time of Dhanwari Mandal, the parties were members of a joint family, which continued for some years after the death of the said Dhanwari Mandal. Therefore, since inconvenience was felt because of growing family, in joint mess the parties separated in mess and also started possessing and enjoying the properties according to choice and convenience, without actual partition by metes and bounds according to the legal share."

The contesting defendant-appellants i.e., descendants of Tulsi Mandal has made out a case in the written statement that there had been an amicable partition by metes and bounds on the Basant Panchami day in 1943 effected by Dhanwari Mandal among all the branches of his sons with their consent. For proper appreciation the case of the appellants as averred in para 6 of their written statement is quoted below :--

"That on the shifting of Tulsi Mandal to village Bhandarkola his brothers began to misappropriate the assets left by him at Gulaldih as they were developing selfish and dishonest intention. Under the above circumstances there were mutual murmurings and discontent leading to dissolution of joint family in 1943 when on the Basant Panchami day Dhanwari Mandal with the consent of the family members effected an amicable partition among all the four branches of his sons. Even at the time of amicable partition none excepting Tulsi Mandal was prepared to take Schedule A(a) properties i.e., Bhandarkola lands as they were still mostly undeveloped yielding little profit while the assets in Gulaldih and Dumarkola were numerous and most attractive. Thus the Bhandarkola lands and properties described in Schedule A(a) and (d) (except bricks which are imaginary) fell to the share to Tulsi Mandal while the remaining properties at Gulaldih and Dumarkola including vast assets in the form of moveable such as business and cash fell to the share of the remaining three branches and were partitioned among them."

It therefore, appears from the averments made by the appellants quoted above that a definite mode of metes and bounds partition has been averred by the appellants. Appellant Harihar Singh who has taken oath as DW 55 has deposed in para 8 of his evidence that he was born in the year 1935 meaning thereby he was about eight years old at the time of alleged partition. In para 3 of his evidence he has deposed that Dhanwari Mandal partitioned the entire joint family

property in the year 1943 in presence of all his descendants and the said partition was effected by five persons who were the Panches and their names are DW 12. Hukum Mandal, Pochan Mandal, Mithu Mandal. Bihari Mandal and Shyam Lal Mandal. DW 10 in para 5 has deposed that partition was effected in presence of the Panches, DW 12, Hukum Mandal has deposed that Dhanwari Mandal partitioned the joint family property among his descendants and he was one of the Panches in the said partition and other Panches were Pochan Mandal. Mithu Mandal. Bihari Mandal and Shyam Lal Manda land all the Panches except him are dead. In para 5 of his cross-examination he has deposed that Khatiyani and map were not perused at the time of the said batwara and Memorandum of Partition was also not prepared and everything was written on a slate and the Panches had not gone to village Bhandarkola, Dumarkola and Fatehpur. However, DW 11 in para 6 of his cross-examination has deposed that the alleged partition has not been effected by Panchayati. The learned appellate Court below had discarded the aforesaid evidence on the ground that the defendants-appellant have not set up a case of metes and bounds in the year 1943 by Panchayati. The learned appellate Court below in the impugned judgment has stated that the contesting defendants has nowhere stated in the written statement that partition was effected through Panchayati but even then he has been allowed to adduce evidence on that point and this was very important point which ought to have been mentioned in the pleadings of the defendants as it discloses the manner of partition. It has also been stated in the impugned judgment that in view of the fact that since the defendant did not mention this fact in the written statement, they could not be allowed to adduce evidence on this point. The learned appellate Court below held that the learned trial Court committed an error in allowing the defendants to adduce evidence on the point that the partition was effected through a Panchayati. The learned appellate Court below in coming to the said finding has placed reliance upon the ratio of the case of Siddu Venkappa Devadiga (supra), Messrs Trojan and Co., (supra) and Raruha Singh (supra). Order VI, Rule 2 is relevant in this connection which envisages that every pleading shall contain, and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. The whole object of the system is to narrow the parties to definite issues and thereby diminish expense and detail as regard the amount of testimony required on each side at the hearing and each party may be fully alive to the question that are about to be argued in order that they may have an opportunity for bringing forward such evidence as may be appropriate to issue. The object of a pleading is to bring the parties to a trial by concentrating their attention on the matters in dispute so as to narrow the controversy to precise issues and to give notice to parties of the nature of testimony required on either side in support of respective cases. The material facts in controversy in the case at hand is whether there had been a metes and bounds partition of the joint family properties of the parties effected by Dhanwari Mandal, the common ancestor of the parties on the Basant Panchami day in the year 1943 with the consent of the family members. The

appellant in his written statement has specifically averred the mode of partition having been effected by Dhanwari Mandal aforesaid. The appellants have not averred that the said partition has been effected by the Panches. In the case of Messrs Trojan and Co., (supra) the Apex Court has observed that It is well settled that decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. In the case of Raruha Singh, (supra) it has been held by the Apex Court that the appellate Court should not make out new case which was not pleaded by party. It has further been observed which runs thus :--

"Where the parties had proceeded to trial on the definite understanding that the channel through which the water flowed right up from the start up to the end was allowed to be an artificial channel it is too late for the respondents in appeal to suggest that the plaint should be strictly read and the provisions of Section 17(c) of the Easements Act should be invoked. High Court should not make out in Second Appeal an entirely new case for the respondents."

Following the ratio of the cases mentioned above it has been reiterated by the Apex Court in the case of Siddu Venkappa Devadiga (supra) that it is well settled that the decision of a case cannot be based on grounds outside the plea of the parties and that it is the case pleaded which has to be found. In the case of Ramchandra Das v. Hiralal Modi AIR 1978 Ori 172, it has been observed that :--

"the well known principle of pleadings is that no evidence should be allowed contrary to it. Thus where the pleading was that the plaintiff was suing as a trustee for P. and not in his individual capacity, that he was suing in his individual capacity and a decree should not be passed in favour of plaintiff in his individual capacity, on basis of such evidence."

It is evident from the averments made in the written statement of the appellant quoted above and the evidence adduced on behalf of the appellant regarding effecting of partition by Panchayati it is patent that case of the appellant has undergone a change. The case of the appellant is that the metes and bounds partition was effected by Dhanwari Mandal with the consent of all his descendants and later on in course of the evidence the appellant gave up this stand and took the stand that the said metes and bounds partition was effected by Panchayati. The trial Court considered the evidence of effecting partition by metes and bounds by Panchayati and had dismissed the suit of the plaintiff-respondent 1st set. The First Appellate Court had discarded the evidence of effecting partition by the Panches and had decreed the suit. In case of variance between pleadings and proof it is the settled law that finding should not go beyond pleadings and no amount of evidence can be looked into upon a plea which was never put forward. In the absence of any plea or issue no evidence can be considered to be relevant and cannot be taken into consideration and a party cannot be allowed to lead evidence in contradiction of what has not been pleaded in the pleading. Evidence has to be tailored strictly according to the pleadings and cannot be a probing adventure in the dark giving surprise to the

opposite party. The mode of effecting partition is a material fact and in this case that mode of effecting partition has been specifically averred by the appellant and any evidence which is not according the mode of effecting partition as averred in the pleading of the appellant cannot be looked into for deciding the matter in controversy. Therefore, the learned appellate Court below has rightly discarded the evidence brought on the record by the appellants regarding the effecting of the metes and bounds partition by the Panches which is in contradiction of their case as averred in their written statement in respect thereof. In the case of Kondiba Dagadu Kadain, (supra) it has been observed by the Apex Court that it is not within the domain of the High Court to investigate the grounds in which the findings were arrived at by the last Court of fact, being the 1st Appellate Court. It is true that the lower appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility but even where it has rejected the witnesses accepted by the trial Court, the same is no ground for interference in Second Appeal when it is found that the appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in Second Appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the 1st Appellate Court unless it is found that the conclusion drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court or based upon inadmissible evidence or arrived at without evidence. The Appellate Court while reversing the finding of the trial Court and holding that no metes and bounds partition of the joint family properties has been effected as contended by the appellants has assigned satisfactory reasons for doing so and there is no legality in the finding of fact arrived at by the appellate Court below and the impugned judgment, therefore, does not suffer with any illegality.

15. Therefore, there is no merit in this appeal and it fails. The impugned judgment of the learned appellate Court below is hereby affirmed. The appeal is hereby dismissed. However, there shall be no order as to costs.