

(2020) 08 PAT CK 0003
In the Patna High Court
Case No : First Appeal No. 219 Of 1999

Sri Krishna Pandey And Anr		APPELLANT
	Vs	
Ram Nagina Pandey And Ors		RESPONDENT

Date of Decision : 07-08-2020

Acts Referred:

Evidence Act, 1872 — Section 34, 91, 92, 164
Registration Act 1908 — Section 17, 49
Hindu Succession Act, 1956 — Section 8

Citation : (2020) 08 PAT CK 0003

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Shakti Nath Mishra, Kashi Nath Choubey

Final Decision : Allowed

Judgement

1. Against the judgment dated 22.03.1999 and decree dated 31.03.1999 passed by the Subordinate Judge-2nd, Kaimur at Bhabhua in Title (Partition)

Suit No. 65/1992 dismissing the suit on contest but without cost, is the subject matter of instant appeal at the behest of plaintiffs/appellants.

2. For better appreciation, the status of the parties is being recognized according to their status having before the lower court.

3. Plaintiffs/Appellants filed a suit for partition asking for 1/3rd share in a property left by his mother and 1/4 th share in remaining duly furnished

under scheduled Ka, Kha, Ga respectively, furnishing a genealogical table showing the common ancestor, Jagannath Pandey (since deceased)

having a son, Ram Nagina Pandey (defendant no.1) who has got three sons, Krishna Pandey (plaintiff no.1), Parshuram Pandey and Sudarshan

Pandey (defendants). Krishna Pandey has got a son, Ashok Pandey, plaintiff no.2, while Parshuram Pandey has got four sons, namely, Pappu Pandey,

Manoj Pandey, Akhileshwar Pandey and Sunil Pandey. Sudarshan Pandey has four sons, Guddu Pandey, Santosh Pandey, Saheb Pandey and Arun

Kumar Pandey (defendants). Malti Devi, wife of Parshuram Pandey and Chandrakala Devi, wife of Sudarshan Pandey (Defendant Nos. 12 and 13)

have also been impleaded on account of deed of gift executed by Ram Nagina Pandey (Defendant No.1) in their favour relating to joint Hindu Family.

Certain properties so detailed stood purchased also in their name. Furthermore, it has also been pleaded that though for the convenience sake, they are

separate in mess and business but, no partition has been effected by metes and bounds and that being so, majority of the properties are being conjointly

managed. Also disclosed that acquisition of Schedule 'Kha' property (moveable) has been out of savings of the joint fund. Then averring the legal

requirements relating to cause of action, payment of court fee and further, whispering relating to execution of deed of gift in favour of Malti Devi and

Chandrakala Devi by Ram Nagina Pandey with regard to the properties belonging to the joint family whereupon, could not be binding upon the plaintiff

as being fraudulent one and further never been followed up, hence, asked for identification of his 1/4th share in Schedule 'ka', 'kha' while

1/3rd share relating to Schedule 'Ga' followed with appointment of pleader commissioner, carving out separate Patti to that extent, delivery of

possession, cost of the suit.

4. There has been separate WS on behalf of defendants. It has specifically been pleaded at the end of defendant no.1 (father) that the story so

propounded at the end of the plaintiff that for convenience sake they became separate in mess and business is palpably false rather, much before

1981, there has been disruption of joint family followed with partition by metes and bounds, orally and carrying the same for years together, the same

was duly acknowledged by way of registered memorandum of partition dated 01.04.1991 properly identifying the schedule containing the description

of the properties having allotted to the different share-holders including the plaintiff. In likewise manner, the claim of the plaintiff relating to Schedule

'kha' (movable one) has also been controverted by way of stating that the female who got the ornaments at the time of marriage remained with

them as their 'Stridhan'. It has also been submitted that at the time of purchase of tractor certain lands were hypothecated belonging to other

two sons namely, Parshuram Pandey and Sudarshan Pandey and, during course thereof, probability of land belonging to the plaintiff given under

hypothecation could not be ruled out but, the same happens to be mere a mistake, a bona fide mistake caused on account of non verification. It has

then been pleaded that out of affection and love as well as service rendered by his daughter-in-law, namely, Malti Devi wife of Parshuram and

Chandrabaso Devi wife of Sudarshan Pandey, he had gifted the property belonging to him (allotted to him), which they acknowledged and on account

thereof, they are exclusively over the land.

5. In the aforesaid background, in sum and substance, it has been pleaded that on account of disruption of joint family since long, the parties are over

their respective area, independently, exclusively, there has not been purchase of tractor from the joint family fund, deed of gift executed by him in

favour of Malti Devi and Chandrabaso Devi was not a farzi and sham transaction and so, the plaintiff is not at all entitled to ask for partition. In

likewise manner, it has also been pleaded that tractor has not been purchased from the joint family fund by the joint family, for the joint family. So,

there happens to be no occasion to furnish the details of the earnings. It has also been pleaded that the construction having been over Khata No. 37,

Khesra No. 182 at village, Lauhribari is the personal property of Parshuram and his sons. In likewise manner, pleaded relating to Khata No. 37,

Khesra No. 94, Khata No. 35, Khesra no. 267 of village-Machchanhatta, plot no. 24 of village Barughat. So, pleaded for dismissal of the suit more

particularly in the background of the fact that no cogent legal ground has been flashed to justify re-opening.

6. Remaining defendants filed joint WS whereunder they have shown complete genealogy of the family. It has been asserted at their end that plaintiff

knowingly and intentionally withheld the major part, which begins from late Tahlu Pandey (common ancestor) who died leaving behind two sons,

Jagannath Pandey and Baidyanath Pandey. Ram Nagina Pandey is the only son of Jagannath Pandey. Baidyanath Pandey was married to Dhaneshra

Kuer. In due course of time, Baidyanath Pandey died issueless leaving behind his widow, Dhaneshra Kuer. During course of revisional survey,

Khatian was prepared in jointness of Ram Nagina Pandey and Dhaneshra Kuer. On 26.08.1974, Dhaneshra Kuer executed deed of gift in favour of

Ram Nagina Pandey which he accepted and came over the land, got mutated and since thereafter, treated the property as his exclusive one. It has further been asserted that the claim of the plaintiff that the family still consists of status of joint Hindu Family and, only for convenience sake there has been separation in mess and business is completely absurd, false and developed with ulterior motive. There has been partition in the family since before by metes and bounds and in token thereof, the registered memorandum of partition was effected on 01.04.1991. All the parties were/are independently dealing with their affairs without having other's concern. Then it has been pleaded that father, Ram Nagina Pandey after having been satisfied with the service rendered by Malti Devi and Chandrabaso Devi, gifted the property through registered deed of gift and which they accepted and since thereafter, they are over the land without any hitch and hindrance. It has also been pleaded that the original document relating to the withdrawal of memorandum of partition was endorsed to the plaintiff by them which he withdrew and then thereafter, when these defendants developed their property, began to construct houses, shops thereupon, with mala fide intention got this case filed. Then it has been submitted that certain lands so detailed under Schedule 'A' falling under Khata No. 50, plot no. 109, area 17 decimals, Khata No.16, Khesra No. 215 of village-Katra have been purchased by Malti Devi as well as Chandrabaso Devi having their self acquired property. Then, it has been pleaded that tractor was purchased through bank (Bank of Baroda), Dadar Branch after hypothecating land but mistakenly, some properties of Khata No. 15, Plot No. 19 relating to share of plaintiff, was also hypothecated, however, plaintiff could not be allowed to take undue benefit thereof, hence, asked for dismissal of the suit. Detailed the property under different head allotted to the parties on partition.

7. Malti and Chandrabaso Devi on being pleaded, appeared and filed joint WS wherein basically followed the pleading of their husband by way of stating that on account of partition affected, long long ago, there happens to be complete disruption of joint family. In the aforesaid background recognition of Ram Nagina Pandey as Karta of the joint family does not arise.

8. It has further been pleaded that the land lying at village Kahuwa Wari bearing Khata No. 50, Khesra No. 109, area-17 decimal is their self acquired

property which they purchased after partition in the year 1984, and the land is under their exclusive possession. In likewise manner, Survey Plot No.

215 corresponding to Khata No. 16, Area-8 Decimal lying at village, Mohania is also their self acquired property, which they purchased

in the year 1990.

9. It has further been pleaded that at an earlier occasion oral partition took place causing so many hurdles in due discharge of independent activities,

hence registered memorandum of partition was effected in the year 1991 (01.04.1991) acknowledging the same. Subsequently thereof, Ram Nagina

Pandey gifted the property on 06.05.1992 in their favour whereupon, they have exclusive possession. Mutation has also been effected. They are

paying rent and are in receipt of rent receipt. The plaintiff has got no ground to ask for partition, hence suit is liable to be dismissed with costs.

10. The learned lower court after going through the pleadings as well as after hearing the parties, framed the following issues:-

1. whether the suit as framed is maintainable?
2. whether the suit is barred by law of limitation?
3. whether the suit has been properly valued & the court fees paid is sufficient?
4. whether the properties purchased by Malti & Chandrabaso Devi are liable to be partitioned?
5. whether the partition has already taken place between the parties?
6. whether the gift executed by Ram Nagina Pandey in favour of Malti Devi & Chandrabaso Devi is legal and valid?
7. whether the lands gifted by Dhaneshara Kuer to defendant no.1, Ram Nagina Pandey is personal property of Ram Nagina Pandey?
8. whether the plaintiffs are entitled for partition?
9. whether the plaintiffs are entitled to any relief or reliefs, if so, what?

11. The aforesaid issues have been decided adverse to the plaintiff, thus the suit has been dismissed, hence this appeal.

12. Three fold arguments have been raised on behalf of the appellants while assailing the judgment and decree impugned. It has been submitted that

the learned lower court has dismissed the suit in mechanical manner. In order to buttress such plea, it has been submitted that genealogical table is

admitted. That means to say, partition has been asked for by a son against

father and brothers, that is to say, amongst the first generation and, in the aforesaid background, there could be strong presumption of jointness. The adversary claiming contrary thereto is under obligation to rebut the same. In its continuity, it has also been submitted that under the Hindu Law, if partition by metes and bounds is found properly surfaced, then in that circumstance, reopening of partition is forbidden save and except the grounds so enumerated. Separation only for convenience's sake has got no legal recognition and, that being so, neither there happens to be any kind of impediment nor immanence in entertaining a relief relating to partition.

13. It has also been submitted that so many modes of partition, apart from, through process of the court has been recognized under Hindu Law. That means to say, oral partition is also one of the forms of partition but, if a plea of oral partition is taken up, the same has to be properly, legally, sincerely substantiated. It has also been submitted that partition by registration is other legal source. While preparation of memorandum of partition affirming the event of earlier oral partition, is also duly recognizable in the eye of law, however, it has conclusively been held that as by the aforesaid document title did not pass, hence registration is not attracted. Once the party adopts the different path, then in that circumstance, conduct of the party becomes suspicious moreover, where the whole event is under challenge, then, it should be proved beyond all suspicion. It has further been submitted that from the facts of instant case, it is apparent that Ram Nagina Pandey father (Defendant No. 1) Karta of the family has been completely mesmerised by the remaining defendants who after manufacturing forged and fictitious document illegally attempted to encroach over property wherein appellant has share.

14. Elaborating this issue, it has been submitted that when the document, allegedly memorandum of partition is gone through, it is manifest that the same was not at all memorandum of partition and that was reason behind for its registration. That means to say, as per document, the partition took place on 01.04.1991. Further, it has also been pleaded that it is the saying of all the defendants that signature of appellant, Sri Krishna Pandey stood over the aforesaid memorandum of partition, he was the person who was entrusted to take out the original document from the Registry Office, who took out the original document but, mischievously, retained the same, in the

aforesaid background, certified copy of the document has been made exhibit, could be scrutinized in order to trace out its reliability, authenticity, genuineness in the background of the fact that (A) even after alleged memorandum of partition, there is an admission at the end of respondents that certain lands allotted to the share of appellants, was also given under hypothecation to the bank at the end of respondents while purchasing tractor, (B) in spite of specific denial at the end of the appellants that his signature was not on the memorandum of partition, he was not entrusted by his father to withdraw the original document, his signature was not at all over the receipt, relevant registers kept at the Registry Office, then in that circumstance, as the defendants/respondents pleaded adverse to presumption of jointness, would have prayed before the court directing the plaintiff/appellant to deposit the document (original memorandum of partition) as non-deposit would have led to adverse inference under Section 164 of the Evidence Act, would have called for the relevant registers, receipt (Chirkut) and would have prayed for examining, comparing the signature of plaintiff-appellant by a hand-writing expert (C) just after alleged document dated 01.04.1991, the respondents began to create inter se document, the father executed deed of gift in favour of wife of Parshuram Pandey, Sudarshan Pandey, respectively. That means to say, introduction of event of oral partition, was purposely, malafidely and dishonestly introduced in the year 1980 but neither it got supported from the alleged memorandum of partition on 01.04.1991 nor from the oral evidence. In the aforesaid background creation of deed of gift in favour of wives of defendants/respondents is also found exposed from the document itself as, both the Gotni are full sisters and the witnesses stood over the aforesaid document of memorandum of partition as well as deed of gift is none other than father-in-law of Parshuram Pandey and Sudharshan Pandey. So, when the totality of the event is considered in its right perspective, it is evident that the forged document has been created in order to grab the property illegally, side by side, to oust the plaintiffs/appellants from getting the land in consonance with their share. It has also been submitted that the properties in name of Malti and Chandrabaso are not their self acquisition as they failed to substantiate. Hence, the presumption spool by way of recognizing the same as acquisition by joint family fund.

15. It has further been pleaded that after going through the judgment impugned, it is evident that learned lower court had completely ignored the

aforesaid eventuality which was sufficient to cast doubt over version of the defendants/respondents and so, is fit to be set aside.

16. Learned counsel for the defendants/respondents had strongly refuted the plea having been advanced at the end of learned counsel for the

appellants and submitted that registered document has got presumption and so, the person who intends to controvert the same, is under obligation to

challenge by way of drawing properly framed suit. Then, it has been submitted that once partition is found duly substantiated by oral as well as

documentary evidence, more particularly, the registered memorandum of partition which depicts the event of earlier oral partition having been effected

amongst the family by metes and bounds, whereupon, no option was found left to challenge the partition and, in likewise manner, the properties having

so gifted at the end of father to the wife of respective defendants would have also been subject to adjudication only after payment of ad valorem court

fee relating thereto with a relief, to declare the document null and void, inoperative. Having failed on that very score, would be serious legal deficiency

in the plea of the plaintiff whereupon, the suit as framed would not be maintainable. Then, it has been submitted that mere putting the land under

hypothecation without having any kind of hindrance in the peaceful physical possession could not be considered a defect or deficiency over the event

of partition. In likewise manner, it has also been submitted that father-in-law of Sudarshan as well as Parshuram stood witness and another person at

his source would not make the document inadmissible in the eye of law as there happens to be no barrier and so, once there happens to be presence

of registered document acknowledging the earlier oral partition, duly recognizable in the eye of law which has properly been considered, explained by

the learned lower court and that being so, the judgment impugned needs no interference. In likewise manner, it has also been submitted that Malti and

Chandrabaso could not be considered as coparceners so the land having been purchased by them would not be the coparcenary property. In its

totality, the judgment impugned does not attract interference.

17. Altogether four PWs have been examined on behalf of plaintiffs/appellants who are PW-1, Sankata Pandey, PW-2, Ram Bahawan Pandey, PW-

3, Mangal Pasi and PW-4, Sri Krishana Pandey, plaintiff no.1, himself.

18. In likewise manner, altogether 17 DWs have been examined on behalf of respondent/defendant who are DW-1, Hemchandra Prasad, DW-2,

Fakir Ahmad, DW-3, Vijay Kumar Verma, DW-4, Pramod Kumar Singh, DW-5, Baleshwar Pandey, DW-6, Ganesh Prasad, DW-7, Ram Pravesh

Pandey, DW-8, Ram Nagina Pandey, DW-9, Dashrath Prasad, DW-10, Mithai Sharma, DW-11, Sihnath Pandey, DW-12, Ghulet Tiwari, DW-13, Sri

Kant Pandey, DW-14, Shivpuran Chaubey, DW-15, Umesh Kumar Srivastava, DW-16, Malti Devi and DW-17, Parshuram Pandey. Exhibits are also

on their behalf as follows:-

Ext-A, Affidavit, Ext-B, petition dated 20.12.97, Ext-C to C/7, Rent receipts, Ext-C/8 to C/9, Rent receipts, Ext- D, C.C. to Sale deed, Ext-E, Sale

deed, Ext-F-1, Hibbanama, Ext-G, Signature of Ram Nagina on Ext-F, Ext-E/1 to E/2, Sale- deed, Ext-F/1, Hibbanama, Ext-I, Pass-book.

19. After hearing the rival parties as well as going through the pleadings, the following points are found relevant for just decision of this appeal.

(a) whether the plaintiff has got right to sue?

(b) whether plaintiff has got valid cause of action?

(c) whether the partition took place by metes and bounds around the year 1980 followed with preparation of registered memorandum of partition dated

01.04.1991?

(d) if not, then to what extent the share of plaintiff is to be properly identifiable?

(e) what properties would be subject to partition?

(f) what relief or reliefs plaintiff is entitled for?

20. Because of the fact that genealogical table is admitted one with regard to status of plaintiff as well as defendants and so, needs no reference save

and except presence of Baidyanath Pandey and his wife Dhaneshar Kuer who after death of Baidyanath Pandey and being issueless, gifted her share

in favour of Ramnagina Pandey by registered deed of gift dated 26.08.1974. It is further evident that the deed of gift dated 06.05.1992 executed by

Ram Nagina Pandey in favour of Malti Devi and Chandrabaso Devi is also admitted. In likewise manner, presence of father of aforesaid Malti Devi

and Chandrabaso Devi and his henchman as a witness over the registered deed of memorandum of partition dated 01.04.1991 as well as deed of gift

is also admitted. It is evident from the WS of Ram Nagina Pandey, he has not asserted the plea that he got gift in his favour by Dhanshwar Kuer, and retained it as his self acquired property. Even during course of evidence as DW-8, he did not claim the same, though the other defendants have had pleaded, but during course of evidence, given a go-by.

21. The only controversy is whether there was an oral partition in the year 1980 followed with execution of memorandum of partition dated

01.04.1991, the next is what was the occasion for its registration/or it was a fictitious document created only to shadow over the share of

plaintiff/appellants, the crux of the controversy.

22. Before coming to factual aspect, legal mandates governing the issue are to be seen. Chapter-XII of the â??Mulla Hindu Lawâ? deals with status

of the coparceners concerning Joint Hindu Family guided by Mitakshra Law and Article 210 speaks about the constitution of Joint Hindu Family

having so many eventualities. It speaks about the constitution and for that, recognizes lineal descendants from a common ancestor and includes their

wives and unmarried daughters. Article 211 signifies Hindu coparcenary and for that, the only criteria has been laid down as those person who

acquires an interest in the joint or coparcenary property by birth. Article 212 speaks about constitution of coparcenary which should be lineal

descendant in the main line within four degrees counting from a common male ancestor and, the aforesaid event is purely a creature of law. It

dercognizes female to be conparcener (Before 2005 Amendment) though could be a member of joint family. However, Article 213 speaks about

exception of Article 212 identifying may be, may not be. The only test is whether remaining under joint family, he is entitled to demand partition.

Article 214 identifies undivided coparcenary interest and essence thereof, is unity of ownership. That means to say, till survival of undivided family no

individual could predicate of the joint and undivided property that he has a definite share as, the same appears to be fluctuating one on account of

death/birth in the family. Article 218 deals with classification of property bifurcating in two parts (1) joint family property (2) separate property. The

joint family property consists of (1) ancestral property, (2) separate property of coparceners thrown into common coparcenary stock. Property jointly

acquired by the members of joint family with the aid of ancestral fund would also

be joint family property. The main ingredient thereof, is having joint interest/possession of every coparcener, habitable by survivor ship (before amendment) having right of male by birth (before amendment) while separate or self acquired property is acquisition by an individual from his independent source, even remaining coparcener.

23. Article 220 speaks about the same suggesting a Hindu even if he be joint, may possess separate property. Such property exclusively belongs to him. No other member of the coparcenary, not even his male issue acquires any interest in it by birth. It is not liable to partition and, on his death intestate, it passes by succession to his heirs, and not by survivor ship to surviving coparceners.

24. Article 221 deals with (a) nature of the ancestral property coming from paternal ancestral, (b) property inherited from maternal side, (c) property inherited from collateral, property obtained by gift or Will from maternal ancestor agnate, cognate would be his self acquired property. Share allotted on partition will bear the status of a son on birth equal to his father. Article 222 recognizes ancestral property whether it be movable or immovable.

Article 223 gives relaxation in favour of father acknowledging the power of making gift within reasonable limits regarding ancestral movable property without the consent of his sons for the purpose of performing â??indispensable acts of duty,â?? Article 224 in similar way gives relaxation to the father as Karta to gift within reasonable limits of ancestral immovable property for pious purpose only and not in routine manner which has specifically been laid down under Article 256 which reads as follows:-

â??256. Gift of undivided interest.-- According to Mitakshara law as applied in all the states, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether, there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of other coparceners.â??

25. It is further evident that by applying doctrine of blending, even the self acquisition could be treated/accepted/admitted as joint property.

26. What kind of property could be classified as separate property is found duly categorized under article 228. For better appreciation the same is enumerated hereinafter:-

228. Separate property. Property acquired in any of the following ways is the separate property of the acquirer; it is called 'self-acquired' property, and is subject to the incidents mentioned in 222 above.

(1) obstructed heritage.- property inherited as obstructed heritage (saparati-bandhya daya) ie, property inherited by a Hindu from a person other than

his father, father's father or father's father's father.

(2) Gift- A gift of a small portion of ancestral movable property made through affection by a father to his male issue, is his separate property.

(3) Government grant. Property granted by government to a member of a joint family is the separate property of the donee, unless it appears from the grant that it was intended for the benefit of the family.

(4) Property lost to family. Ancestral property lost to the family, and recovered by a member without the assistance of joint family property. Property acquired by a father by adverse possession is his separate property and not ancestral property.

(5) Income of separate property.-- The income of separate property and purchases made with such income.

(6) Share on partition - Property obtained as his share on partition by a coparcener who has no male issue (see Section 221(4)). This position is now materially altered with the inclusion of daughters of a coparcener as coparceners in their own right by the amendment in the Hindu Succession Act

2005. If therefore, even if a coparcener who has obtained a share on partition has no male issue but has a female issue, the property allotted to him on partition will partake the nature of coparcenary property. The above proposition will therefore have to be read as a coparcener having been allotted a

share on partition, takes it as his separate property when he has no issue. This is since, by virtue of the amendment, as the distinction between male

and female children of a coparcener stands abrogated and abolished, both having been given equality of status as coparceners.

(7) Property held by sole surviving coparcener. Property held by a sole surviving coparcener, when there is no widow in existence who has power to adopt.

(8) Separate earnings. Separate earnings of a member of a joint family.

(9) Gains of learning. All acquisition made by means of learning are declared by the Hindu Gains of Learning Act, 1930, to be the separate property of

the acquirer.â??

27. In its continuity one has also to be synthesist in having proper identification of separate earnings and one could not do better than to refer Article

229 which reads as follows:-

â??229. Separate earningsâ?"gains of science.-- The income of a member of a joint family is his separate property, if it has been obtained:

(a) by his own exertions; and

(b) without â??any detriment to the fatherâ??s estateâ??, ie. without the aid of joint family property.

28. It is needless to say that constitution of Hindu Family is always presumed to be joint. Whenever there happens to be dispute over status of the

family, the party who pleads contrary to the presumption is under obligation to substantiate the same and that is the spirit of Article 231 wherein it has

been laid down that in normal state of every Hindu Family would be joint. In other words, â?? given a joint Hindu Family, the presumption is, until the

contrary is proved, the family continues joint. The presumption of union is the greatest in the case of father and sons. When coparceners have

separated, there can be no presumption as to jointness. Presumption is stronger in the case of brothers than in the case of cousins, and the further one

goes from the founder of the family, the presumption becomes weaker and weaker. Article 233(5) speaks about activity of adult coparceners who is

entitled to enforce the partition of the coparcenary property.

29. Chapter-XVI deals with partition. Severance of coparceners property identifying share is the basic character of partition. Article 322 deals with

the extraordinary status of the father who has been empowered to effect partition amongst him with his sons irrespective of non-inclination of son.

Article 324 prescribes the methodology as to how the partition could be effected, (a) partition by institution of a suit, (b) partition by agreement, (c)

partition by arbitration.

30. Article 326 speaks about evidence over the factum of partition as well as burden of proof. It has been elaborated in the following manner:-

1. The clearest case is where the members of a joint family divide the joint property by metes and bounds, and each member is in separate possession

and enjoyment of the share allotted to him on partition. Permanency is an essential feature, though not the sole test, of and arrangement of outright

partition.

2. The next case is of the kind dealt with by the Privy Council in *Approvier v. Rama Subba Aiyan*, where the coparceners, with a view to partition

executed a writing, whereby they agreed to hold the joint property in defined shares as separate owners. Such writing operates in law as a partition,

though the property is not physically divided. This is a case where the agreement declares on the fact of it, the intention of the parties to hold the joint

property as separate owners, and no evidence is admissible of the subsequent acts of the parties to control or alter the effects of the document.

3. The third case is of the kind dealt with by the Privy Council in *Doorga Pershad v. Kundun*, where the agreement was in writing, but the document

did not declare on the face of it, the intention of the parties to hold the joint property as separate owners. In such a case, when the question arises as

to whether the document operates as a partition, the intention of the parties is to be inferred from: (1) the document; and from (2) their subsequent

acts.

Where an instrument of partition, after giving one member his share, provided that the rest of the property was to be divided in a particular manner

and that the remaining members should live like an ordinary undivided family subject to survivorship, it was held by the Privy Council that there was no

partition between the other members.

4. The last case is of the kind dealt with by the Privy Council in *Ganesh Dutt v. Jewach*, a case where there was no writing at all. In such a case,

when the question arises as to whether there has been a partition or not, then intention of the parties as to separation can only be inferred from their

acts. The question is one of fact to be decided with due regard to the cumulative effect of all the facts and circumstances, and primarily the burden of

showing that there has been a partition is on the person setting it up.

In case of old transactions, when no contemporaneous document are maintained and when most of the active participants in the transaction have

passed away, though the burden still remains on the person who asserts that there was partition, it is permissible to fill up gaps in the evidence more

readily by reasonable inferences from the evidence on record, than in a case where the evidence is not obliterated or lost by passage of time.

In *Ganesh Dutt*'s case, a Hindu widow alleging that her husband B has

separated from his three brothers in Fasli 1295, brought a suit against them to recover her husband's share in the family as his heir. The defence was that B died joint and undivided. The Privy Council held that there was a partition as evidenced by the following five facts: (1) payment of revenue of certain villages belonging to the family, one-fourth in the name of B and three-fourths in the names of his three brothers; (2) crediting to B in Fasli 1295, one-fourth of a share of Rs. 35,000 recovered by the family under a decree and three-fourths to the three brothers; (3) payment of rent by a lessee of a factory belonging to the family as to one-fourth to B and as to three-fourths to the three brothers; (4) purchase in Fasli 1295, by the four brothers of an estate in their names in equal shares; and (5) a suit instituted after B's death by one as the adopted son and heir of B to recover a debt due to the family; as to this last fact, it is to be observed that if B had died undivided, the suit would have been brought by the surviving brothers and the adopted son as coparceners. In the above case, it was also contended on behalf of B's widow that B had become separate from his brother in food and worship in Fasli 1295, and that fact was of itself conclusive proof of partition. As to this contention their Lordships said:

Cesser of commonality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive. It is therefore, necessary to consider whether the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word.

Cesser of Commonality, it is stated above, is not a conclusive proof of partition, the reason is that a member may become separate in food and residence merely for his convenience. Separate residence of the members of the joint family in different places where they are in service does not show separation. Similarly, other acts, though standing by themselves; are not conclusive proof of partition, yet may lead to that conclusion in conjunction with other facts. They are separate occupation of portions of the joint property, division of the income of the joint property, definement of shares in the joint property in the revenue of the land registration records, mutual transactions etc.

The mere facts that the shares of the coparceners have been ascertained does

not by itself necessarily lead to an interference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be.

(5) Admission of severance made in legal proceedings, if not explained, can be very cogent evidence of partition.

31. Whenever dispute arose relating to the property claimed to be joint family property/self acquisition, the court should be cautious in dealing with the same. Article 231 lays down the criteria whereupon one could identify the nature of property. As such Article 231 needs to be incorporated which reads as follows:-

231. Presumption as to coparcenary and self-acquired property.-- Where a suit is brought by a Hindu to recover property, alleging that it is his self-acquired property, and the defendant contends that it is joint family property, or where a suit is brought by a Hindu on partition of property, alleging that it is joint family property and the defendant contends that it is his self-acquired property, the question arises upon whom the burden of proof lies.

The following are the leading rules on the subject:

(1) Presumption that a joint family continues joint.- Generally speaking, the normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption. However, in other words, given a joint Hindu family, the presumption is, until the contrary is proved, the family continues joint. The presumption of union is the greatest in the case of father and sons. When coparceners have separated, there can be no presumption as to jointness. This more particularly so when separate enterprise has been set up and there is lack of evidence of source of funds for such venture. The presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family, the presumption becomes weaker and weaker. The reason is that brothers are for the most part undivided; second cousins are generally separated; and third cousins are for the most part separated.

(2) No presumption that a joint family possesses joint property-There is no presumption that a family, because it is joint, possesses joint property or any

property. When in a suit for partition, a party claims that any particular item of the property is joint family property, or when in a suit for a mortgage, a

party contends that the property mortgaged is joint family property, the burden of proving it rests on the party asserting it.

32. Article 335 to 338A deal with reopening of partition. These articles suggest that partition could be reopened at the instance of after born son (335),

fraud (336), mistake where the property allotted to any of coparcener does not belong to family (337), some property is found left out during course of

earlier partition (335), at the instance of minor (338A), in case, his right is found prejudiced. That means to say, partition having affected at an earlier

occasion could not be reopened unless one of the criteria so specified hereinabove is being pleaded.

33. Hindu Law (Mitakshra) even acknowledging by way of legal fiction the family to be joint, even then recognizes self-acquisition. That means to

say, acquisition of personal property is found properly dabbled even remaining/ constituting the joint Hindu family. That means to say, the joint family

may possess two kinds of property, (a) ancestral/coparcenary property, (b) separate property/self acquired property.

34. As, in the facts and circumstances of this appeal, other modes of acquisition is not in issue, hence, during course of consideration, one would also

see the source, as claimed by Malti and Chandrabaso, sufficient thereto, apart from gift having in their favour.

35. In Shankarrao Dejisaheb Shinde (Since Deceased) by Heirs vs. Vithalrao Ganpatrao Shinde and Ors. Reported in AIR 1989 SC 87, 9it has been

held:-

“11. Mr. Lalit is right in pointing out that there is presumption of jointness in a family governed by Hindu Mitakshara law and the initial burden lies

on the party claiming disruption in the joint status.”

36. In Shyam Narayan Prasad vs. Krishna Prasad and Ors. Reported in (2018) 7 SCC 646, it has been held:-

“12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The

essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it,

acquire an interest and the rights attached to such property at the moment of

their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.

13. In *C. Krishna Prasad v. C.I.T., Bangalore*, 1975 (1) SCC 160, this Court was considering a similar question. In the said case, C. Krishna Prasad, the Appellant along with his father Krishnaswami Naidu and brother C. Krishna Kumar formed Hindu undivided family up to October 30, 1958, when there was a partition between Krishnaswami Naidu and his two sons. A question arose as to whether an unmarried male Hindu on partition of a joint Hindu family can be assessed in the status of undivided family even though no other person besides him is a member of the family. It was held that the share which a coparcener obtains on partition is ancestral property as regards male issue. It was held as under:

The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see p. 272 of Mulla's Principles of Hindu Law, 14th Ed.). A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten.

14. In *M. Yogendra and Ors. v. Leelamma N. and Ors.* : 2009 (15) SCC 184, it was held as under:

It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is

absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid.

15. In Rohit Chauhan v. Surinder Singh and Ors. : 2013 (9) SCC 419, a contention was raised by the Defendant No. 1 that after partition of the joint

Hindu family property, the land allotted to the share of Defendant No. 2 became his self acquired property and he was competent to transfer the

property in the manner he desired. It was held that the property which Defendant No. 2 got by virtue of partition decree amongst his father and

brothers was although separate property qua other relations but it attained the characteristics of coparcenary property the moment a son was born to

Defendant No. 2. It was held thus:

A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the Plaintiff, was entitled

to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of Plaintiff Rohit Chauhan, was competent to sell,

mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of Plaintiff, Rohit Chauhan, he was not

competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the

property which Defendant 2 got on partition was an ancestral property and till the birth of the Plaintiff he was the sole surviving coparcener but the

moment Plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position,

the property in the hands of Defendant 2 allotted to him in partition was a separate property till the birth of the Plaintiff and, therefore, after his birth

Defendant 2 could have alienated the property only as karta for legal necessity. It is nobody's case that Defendant 2 executed the sale deeds and

release deed as karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary

property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of

sale deeds and release deed, the parties can work out their remedies in appropriate proceeding.

37. In *S. Shanmugam Pillai and Ors. vs. K. Shanmugam Pillai and Ors.* Reported in (1973) 2 SCC 312, it has been observed as under:-

13. Equitable principles such as estoppel, election, family settlement etc. are not mere technical rules of evidence. They have an important

purpose to serve in the administration of justice. The ultimate aim of the law is to secure justice. In recent times in order to render justice between the

parties, courts have been liberally relying on those principles. We would hesitate to narrow down their scope.

14. ****

15. ****

16. ****

17. ****

18. ****

19. ****

20. ****

21. ****

22. As observed by this Court in *T.V.R. Subbu Chetty's Family Chanties' Case* ([1961]3SCR624) that if a person having full knowledge of his right as

a possible reversioner enters into a transaction which settles his claim as well as the claim of the opponents at the relevant time, he cannot be

permitted to go back on that agreement when reversion actually falls open.15.

38. Same view has been reiterated in *Kale v. Director Consolidation* reported in (1976) 3 SCC 119 by way of immunating that a family settlement

though not registered, would operate as a complete estoppel against the parties to such a family settlement.

39. Furthermore, in *Subraya M.N. vs. Vittala M.N. and Ors.* reported in (2016) 8 SCC 705, it has been held:-

15. Considering the plea of relinquishment of their right by Plaintiffs No. 3 and 4 in items No. 1 and 2, after referring to Ex. D22 resolution and the

oral evidence, trial court as well as the High Court held that in the absence of any conveyance deed Exs. D14, D23 and D22, it cannot be established

that Plaintiffs No. 3 and 4 have forfeited their rights in respect of items No. 1 and 2 of the suit scheduled property. Courts below have recorded

findings that even though Ex. D14 bears signature of Plaintiff No. 3, Ex. D23

does not bear the signature of Plaintiff No. 4. It was further held that those two receipts do not indicate that the amount has been received by Plaintiffs No. 3 and 4 in lieu of their shares in items No. 1 and 2 of the suit scheduled property and mere production of Ex. D14 and Ex. D23 receipts are not helpful to the Appellant-Defendant to contend that Plaintiffs No. 3 and 4 have forfeited their rights in respect of their shares in items No. 1 and 2. Even though Exs. D14 and D23 do not contain the survey number, as noticed earlier, Ex. D22 panchayat resolution refers to suit scheduled property items No. 1 and 2 in S. No. 69/69 measuring 1.00 acre and S. No. 69/70 measuring 0.25 acre and that amount of Rs. 20,000/- has already been paid by the Defendant to Plaintiffs No. 3 and 4. As pointed out earlier, Ex. D22 resolution is signed by the Plaintiffs No. 3 and 4 and also by the panchayatdars. In our considered view, the trial court as well as the High Court was not right in brushing aside the oral and documentary evidence adduced by the Defendant to prove that Plaintiffs No. 3 and 4 have relinquished their right in items No. 1 and 2 of suit scheduled property.

16. Under Section 17 of the Registration Act, the documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, are to be registered. Under Section 49 of the Registration Act no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting an immovable property. As provided by Section 49 of the Registration Act, any document, which is not registered as required under the law would be inadmissible in evidence and cannot therefore be produced and proved Under Section 91 of the Evidence Act.

40. In Arshnoor Singh vs. Harpal Kaur and Ors reported in AIR 2019 SC 8098, it has been held:-

â??7.1. Mulla in his commentary on Hindu Law (22nd Edition) has stated the position with respect to succession under Mitakshara law as follows:

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A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to

the separate or self-acquired property of the deceased with rights of survivorship.

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All property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of

ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and

the rights attached to such property at the moment of their birth.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's

son's sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property.

(emphasis supplied)

7.2. In *Shyam Narayan Prasad v. Krishna Prasad and Ors.*, : (2018) 7 SCC 646 this Court has recently held that:

12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The

essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great-grandsons of the person who inherits it,

acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of

ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral

property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.

(emphasis supplied)

7.3. Under Mitakshara law, whenever a male ancestor inherits any property from any of his paternal ancestors upto three degrees above him, then his

male legal heirs upto three degrees below him, would get an equal right as coparceners in that property.

7.4. In *Yudhishter v. Ashok Kumar*, : (1987) 1 SCC 204 this Court held that:

11. This question has been considered by this Court in *Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors.* : [1986] 161 ITR 370

(SC) where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and

become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his

birth. Normally, therefore whenever the father gets a property from whatever

source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity.

(emphasis supplied)

7.5. After the Hindu Succession Act, 1956 came into force, this position has undergone a change. Post - 1956, if a person inherits a self-acquired property from his paternal ancestors, the said property becomes his self-acquired property, and does not remain coparcenary property.

7.6. If succession opened under the old Hindu law, i.e. prior to the commencement of the Hindu Succession Act, 1956, the parties would be governed

by Mitakshara law. The property inherited by a male Hindu from his paternal male ancestor shall be coparcenary property in his hands vis-à-vis his male descendants upto three degrees below him. The nature of property will remain as coparcenary property even after the commencement of the Hindu Succession Act, 1956.

xxxxxx

xxxxxx

7.10. With respect to the devolution of a share acquired on partition, Mulla on Hindu Law (22nd Edition) states the following:

Â§ 339. Devolution of share acquired on partition. - The effect of a partition is to dissolve the coparcenary, with the result, that the separating

members thenceforth hold their respective shares as their separate property, and the share of each member will pass on his death to his heirs.

However, if a member while separating from his other coparceners continues joint with his own male issue, the share allotted to him on partition, will

in his hands, retain the character of a coparcenary property as regards the male issue [Â§ 221, sub-Â§ (4)].

(emphasis supplied)

7.11. This Court in Valliammai Achi v. Nagappa Chettiar and Ors., : AIR 1967 SC 1153 held that:

10. ... It is well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regards his male issues.

They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently: [see Hindu Law by Mulla, Thirteenth

Edition p. 249, para 223 (2)(4)]. If that is so and the character of the ancestral property does not change so far as sons are concerned even after

partition, we fail to see how that character can change merely because the father makes a will by which he gives the residue of the joint family

property (after making certain bequests) to the son.

(emphasis supplied)

41. In the background of the aforesaid legal proposition, now the controversy is to be sorted out and during course thereof, finding the Point No. C, D

and E are deeply intermingled whereupon are conjointly decided.

42. As per version of the appellant/plaintiff partition had not taken place at any earlier time while at the end of respondent/defendant there happens to

be consistent version with regard to partition having effected in the family long ago. To substantiate the same, it has also been pleaded that as earlier

partition was oral one, therefore, in order to affirm the earlier oral partition, the parties got it through registered deed of memorandum dated

01.04.1991. There also happens to be consistent version of the respondent/defendant that after oral partition, all the branches managed their affairs

independently, acquisition was made independently.

43. By an amendment in the plaint, the plaintiff denied his presence over the alleged registered deed of memorandum of partition dated 01.04.1991

while the respondents/defendants affirmed his presence over the document so much so that for withdrawal of the document, the receipt was endorsed

in his name by the father, Ram Nagina Pandey (Respondent No.1) which the plaintiff took out and the document is in his possession is being retained

by him with an ulterior motive. The evidence on this score has to be properly scrutinized gone through PW-4, the appellant /plaintiff, DW-8 is Ram

Nagina Pandey, father and DW-17 is Parshuram Pandey, brother. The registered deed of memorandum of partition is also made an exhibit of the

record along with rent receipt and the sale deed having in favour of Sudarshan

Pandey as well as Malti Devi, wife of Parshuram Pandey, Malti Devi and Chandrabaso Devi. Side by side, the conduct of the parties have also to be perceived.

44. During the aforesaid eventualities, one should not lose sight of execution of deed of gift by Ram Nagina Pandey in favour of Malti Devi as well as

Chandrabaso Devi, wife of Sudarshan Pandey and fortunately, it is also an admitted fact that both are full sisters and, their father, Shiv Pujan Pandey

along with his henchman stood as a witness over the deed of partition as well as deed of gift. It is further evident that the suit was filed on 30.06.1992.

It is also evident from the certified copy of the document, the same was taken out on 23.10.1992 (receipt) as well as 22.12.1992 (deed of

memorandum of partition). From exhibit C-series, rent receipt, it is crystal clear that all happen to be right from 1993 to onward. That means to say, no

document is available on the record to justify contention of the respondent/defendant that partition took place much earlier. Even in the memorandum

of partition, it has not been ascribed in which year partition took place. There happens to be simple narration with regard to previous partition.

However, from column-3 of the deed (Ext-E), it is crystal clear that the document is partition deed. When the document has been relied upon by the

Respondent/defendant, then in that circumstance they would not escape or challenge the nature of the document. Moreover, no evidence contrary

thereto will be admissible as per Section 92 of the Evidence Act. Coming to oral evidence, it is clear that PW-4, plaintiff during course of his

examination-in-chief had denied the averment over oral partition as well as subsequent partition by way of registered deed of partition, para-9 and 10

of his cross-examination is mere suggestion. It is evident from the lower court records that no effort was taken on behalf of respondents/defendant to

call for the original document either from the appellants/plaintiffs or from the registry office though, certified copy had already been taken out at an

earliest. Had there been, then in that circumstance, non compliance at the end of appellant/plaintiff would have led adverse inference in accordance

with Section 164 of the Evidence Act. No effort was taken at the end of the respondent/defendant to call for the original registers which are being

kept at registry office in accordance with law, whereupon, LTI of parties are being taken, got it compared with an expert to nullify the claim of the

appellant/plaintiff regarding his absence over deed of partition dated 01.04.1991, nor PW-4 was cross-examined on that very score.

45. Apart from this, as indicated hereinabove, coupled with Section 17 of the Registration Act, the document by which, right is being transferred,

vested, created with regard to immovable property having valuation more than 100, requires registration. As per consistent judicial pronouncement,

some of which, has been referred hereinabove, now conclusively been held that memorandum of partition needs no registration. Had there been oral

partition, then the memorandum of partition would have been prepared having signature of all the coparceners and not the registered deed of partition.

No explanation is on behalf of respondent.

46. It is further evident from Ext-D, the certified copy of receipt, the same was endorsed in favour of appellant/plaintiff and from perusal of the first

page thereof, it is evident that aforesaid receipt was to be kept for two years. That means to say, the receipt was to be kept in custody up to

01.04.1993. The suit was filed on 30.06.1992. Ext-D was taken out on 22.12.1992. Then, in that circumstance, an effort should have been at the end

of respondent/defendant to preserve those documents, more particularly, when the document has been withdrawn allegedly, by the appellant/plaintiff

on 23.10.1992 and before that appearance was already there in the instant suit.

47. The suspicious conduct of the respondent/defendant is further exposed from Ext-E, certified copy of registered deed of partition. From perusal of

the same, it is evident that it was taken out on 28.03.1992 that means to say much prior to receipt of the original documents. That means to say, much

prior to filing of partition suit. Obtaining of certified copy of the aforesaid documents much prior to the aforesaid eventualities speaks otherwise and

when Ext-F, the alleged deed of gift executed by Ram Nagina Pandey in favour of Malti Devi and Chandrabaso Devi, is gone through, it is evident

that same was executed on 06.05.1992 and its certified copy was obtained on 11.05.1992, that means to say, before filing of the partition suit.

48. This position be tackled through different angle. In the plaint, there happens to be no disclosure how tractor was purchased though the same

happens to be the subject matter of partition. When the respondent/defendant filed WS, they became very much apprehensive and that happens to be

reason behind that in para-9 of the WS filed on behalf of Ram Nagina Pandey

(Defendent No.1) (father), he had admitted that certain lands belonging to plaintiff have also been subject to mortgage while purchasing the tractor under hypothecation through Bank of Baroda. In likewise manner, the remaining respondent/defendant have also admitted under para-8 of the WS that plot no. 19 of Khata No. 15 of village, Bardehri, share of plaintiff has also been mortgaged. On this score, Ext-G, Pass-book relating to the aforesaid loan has been filed. On the first page, it is found to be in the name of Sudharshan Pandey but, other details as was to be filled up, such as the signature/LTI of the borrower, photograph of the borrower are found completely absent. The different deposits have not been properly exhibited in order to justify its relevancy, more particularly, it was the original pass-book containing signature of the Branch Manager or any Bank official or the pass-book was prepared in accordance with Section 34 of the Evidence Act. The owner-book, changed owner book after release from hypothecation, tax token, insurance policy have not been brought up on record in order to substantiate the plea. And the most surprising feature is non examination of Sudarshan Pandey. Although, rent receipt is not evidence of title but, in the facts and circumstances of the case, where the lis is with regard to partition, it would have been at least to justify the oral partition. Furthermore, Ext-H, Khatian divulges about having been recorded in the name of Ram Nagina Pandey as well as Most. Dhaneshra Devi and when the pleading of the respondents/defendants are seen on this very score, at para-17, have admitted that Chak has been prepared during course of consolidation proceeding, they felt difficulty in paying rent and getting rent receipt which has not been substantiated during course of evidence.

49. DW-10 is the father who during course of examination-in-chief had substantiated his case. He had disclosed the year of oral partition as 1981. He further stated that properties were partitioned in three parts, one to plaintiff, another to him and then to Sudarshan and Parshuram conjointly. Registered partition was also effected in the year 1991 in pursuance thereof. Then thereafter, he had executed the deed of gift in favour of his two daughters-in-law. He had further stated that tractor was purchased by Sudarshan and Parshuram after partition. He had further stated that he had entrusted the plaintiff to withdraw the registered partition deed which was withdrawn by him and got it concealed. Then he had disclosed the event

whereunder his aunt, Dhaneshra Kuer gifted her share in his favour (out of consideration as the same has not been pleaded by him as personal

property and further, from the evidence it is evident that respondent/defendant have admitted its status, joint property and partitioned) and then denied

that no partition had taken place either oral or through registered deed. During cross-examination at para-8, he had divulged that he had purchased 30

Bighas of land. He remained as Karta of the family. In para-9, he had stated that Parshuram is his eldest son who was employed in Irrigation

Department right from 1973-74. In para-10, he had stated that while he was in service, Sri Krishna Pandey (plaintiff) remained at his house and was

doing cultivation and was karta of the family. In para-11, he was suggested that there was no signature of plaintiff over the alleged registered partition.

He had further stated that no document was prepared with regard to oral partition of the year 1981. In para-12, he had stated that rent receipt and

Khatian are joint since before institution of the suit. At Paragraph- 13, 14, 15, 16, there happens to be cross-examination with regard to other

eventualities as well as admission at his end over absence of his co-villager to be the witness over registered deed of partition, registered deed of gift,

admission with regard to attesting witness. Then at para-18, 19, there happens to be cross-examination relating to tractor. In para-21, 22, he had stated

that he is not remembering whether plots are in accordance with partition. In para-23, he had further admitted that he had not taken permission from

the consolidation officer before execution of deed of gift. Then at para-25, he had denied the suggestion.

50. DW-16 is Malti Devi, one of the beneficiaries as well as wife of Parshuram, DW-17. Though DW-16 had claimed to have deposed on behalf of

her sister also and claimed to have purchased the property from their saving. Also stated that out of love and affection, their father-in-law had gifted

property over which they are in possession exclusively, and in likewise manner, DW-17 had also claimed that he is deposing on behalf of his brother

also but, the fact remains that Sudarshan has not come, more particularly, in the background of the facts that Ext-G, pass-book stood in his name and

as per DW-10, para-18 there happens to be an admission at the end of Ram Nagina Pandey that tractor was taken on hypothecation by Sudarshan

and Parshuram.

51. DW-16, Malti Devi was cross-examined on that very score and at para-7, she said that amount was managed after sale of ornaments as well as

borrowing the same from her Naihar. In para-9, she has stated that she is unable to disclose the boundary of the plot. She had not seen the plot though

she had negotiated the same. She did so after consulting her Gotni (sister) as well as family members. In para-12, she had stated that she happens to

be the eldest Gotni, her Saas was guardian of the house till her life time and after her death, she happens to be.

52. From the evidence of DW-17, it is evident that he had shown year of oral partition as 1980. Then substantiated the pleadings. He had further

stated that wife of Sudarshan had purchased land from her own savings. In para-7, he has also stated that he along with his brother, Sudarshan had

purchased tractor. In para-8, he had also stated that he along with his brother had constructed pucca house. During cross-examination, it is evident at

para-10 that he happens to be eldest brother. All the documents relating to land having in his possession. He had purchased tractor in the year 1992. In

para-11, he had stated that in the year 1980, there was oral partition. AT that very time consolidation proceeding was going on. At para-12, he had

admitted that during course of consolidation, none had raised grievances over recording of the Khata on the basis of oral partition. In para-13, he had

stated that cash payment relating to purchase of tractor was given by him which he saved from service. But, he has got no document to substantiate

the same. In para-14, he had admitted that he is unable to disclose the area survey plot number having been allotted to his share on partition. In para-

16, he had stated that he is unable to disclose at how many places he had put his signature during course of execution of deed of partition. They have

put their signature over registered deed. Again said that whether others have signed or not, he is unable to say. On the day of execution of registered

deed of partition, Sri Krishna Pandey was present, could be supported by his signature over the document. Then he denied the suggestion on that very

score. In para-17, he had admitted that all the witnesses over the respective documents are from his Sasural. In para-18, he had stated that his father

had executed the document in favour of his wife as well as wife of Sudarshan. Then had stated that he has got no document to substantiate that after

partition building was constructed. In para-19, he had further admitted that he is unable to disclose survey plot number over which he has constructed

the house. Then had stated at para-21 that income and expenditure of his family as well as that of his brother, Sudarshan are jointly borne out by them.

Some properties have been purchased by their wives after partition. Before that they have not purchased any property. Then had denied the

suggestion that properties were purchased from the joint family fund.

53. Ext-E/1 and E/2 are two sale deeds executed by Haridwar Sah in favour of Sudarshan Pandey and Malti Devi wife of Parshuram Pandey and

those two documents were executed on the same day i.e. on 26.05.1984 relating to Survey Plot No.109, Area- 9 Decimal respectively. Ext-E/3 is the

sale-deed executed by Ram Naresh Pandey in favour of Malti Devi wife of Parshuram and Smt. Chandrabaso Devi wife of Sudarshan Pandey and

the aforesaid document happens to be dated 06.03.1990 relating to 8 Decimal of land of Survey Plot No. 215.

54. From the oral as well as documentary evidence as discussed hereinabove, (othersâ?? evidence have not been taken into consideration in view of

nature of litigation), it is abundantly clear that though respondents/defendants have taken all necessary precautions but the circumstances go against

them. Their swiftness in creating the documents and collecting the certified copy thereof, before filing of the partition suit, their conduct whereby

allowed the certain document to destroy knowingly, intentionally, so that, the actual affair should not be known, failed to call for original from

possession of the appellants/plaintiff, the relevant registers from the Registry Office and got the LTI compared in order to show presence of

appellants/plaintiffs before the court as one of the executants. That being so, the story of oral partition as well as registered partition did not find

favour.

55. Let it be considered through another way. As discussed hereinabove, the law permits purchase by the coparcener, the property in name of any of

the person while consisting Joint Hindu Family. In likewise manner, any coparcener can acquire his personal property also remaining member of Joint

Hindu Family. Because of the fact that theory of oral partition as well as registered partition has been negated on account thereof, the constitution of

family remains joint and so, acquisition in the name of Malti Devi as well as Chandrabaso, irrespective of the fact that they could not be identified as

coparceners but purchase having in their name under Ext-E/3 and in the name of

Malti Devi as well as Sudarshan under Ext-E/1 and E/2 suggest

otherwise, more particularly, in the background of their inter se relationship not only Gotni rather full sisters coupled with their deficiency in proving purchase by their own saving.

56. In likewise manner, irrespective of admission at the end of respondent/defendant that during course of hypothecation, landed property having been allotted to the share of appellant/plaintiff was also mortgaged and no step was taken by them to release therefrom till loan was repayed is another circumstance, goes against them. It is further evident that DW-17 claimed to have purchased jointly with Sudarshan Pandey but, Ext-G suggests solely in name of Sudarshan and as observed hereinabove, is not at all supported by the owner book, subsequent owner book after full and final payment of loan amount, insurance paper, tax token, as well as non examination of Sudarshan Pandey further gives jolt over the plea.

57. During course of cross-examination, DW-10 had disclosed that he had purchased 30 Bighas of land, while From Ext-E, the deed of partition, contains total area 14-37 Decimal and the difference is found duly wrapped. Save and except the gift deed executed by Dhaneshar Kuer, the three sale-deeds, no other document has been on behalf of defendant, even though DW-17 admitting that all the documents relating to land are in his custody. The Khatiyan Ext-H contains total area of 5-51 Decimal. That means to say, save and except the aforesaid area Ext(H) remaining are subsequent acquisition. It is further evident that appellants/plaintiffs remained constant at his house doing agriculture while DW-10, father and Sudarshan Pandey (not examined) remained in service. So, it is found conclusively that only to put safeguard upon their clandestine affair, story of oral partition as well as subsequent, though the document did not co-relate memorandum of partition in the year 1991 has been prepared.

58. In Prem Singh and Ors. vs. Birbal and Ors. reported in 2006 (5) SCC 353, it has been held:-

“16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non-est in the eye of law, as it would be a nullity”.

59. Consequent thereupon, the findings recorded by the learned lower court is

not at all found in accordance with law and so, are set aside. Appeal is allowed. Coming to the evidence and pleadings, it is evident that appellants/plaintiffs are entitled for $\frac{1}{4}$ th share in the Schedule- $\hat{K}A$, $\hat{G}A$ coupled with tractor of Schedule- $\hat{K}HA$.

60. However, in the facts and circumstances of the case, both the parties will bear their own costs.