

## Rajendra Prasad and Another Vs Khirodhar Mahto and Others

**Court:** Supreme Court of India

**Date of Decision:** Jan. 11, 1994

**Citation:** (1994) 3 SCC 314 Suppl

**Hon'ble Judges:** N. Venkatachala, J; K. Ramaswamy, J

**Bench:** Division Bench

**Final Decision:** Dismissed

### Judgement

@JUDGMENTTAG-ORDER

1. The appellants and Tapeshari Kuer filed Title Suit No. 89 of 1972 renumbered as 22 of 1975 on the file of the court of III Additional

Subordinate Judge, Gopalganj, State of Bihar for partition of plaint/Schedules 4 and 5 properties into two equal shares etc. One Bishni Mahto left

behind him tow sons Sheobaran Mahto and Ramyad Mahto. Tapeshari Kuer is the daughter of Ramyad Mahto. Ramyad Mahto and Sheobaran

Mahto while dividing their ancestral properties, kept/Schedules 4 and 5 properties in joint enjoyment. On the demise of Ramyad Mahto, Tapeshari

Kuer succeeded to the undivided share of Schedules 4 and 5 properties. She executed gift deed in favour of the appellants on 28/06/1965

bequeathing her undivided interest inherited from her father in respect of Schedule 4 properties and it is claimed that the appellants were put in

possession of the same. The trial court by decree dated April 10, 1976 granted a preliminary decree with a declaration thus:

... It is declared that the share of plaintiffs 1 and 2 together is half in the property mentioned in Schedule 4 of the plaint. It is further declared that

the share of plaintiff 3 Mst Tapeshari is half in the property mentioned in Schedule 5 of the plaint. The shares of the plaintiffs will be carved out at

the time of final decree. Let a preliminary decree be prepared accordingly.

2. The respondents carried the matter in appeal. Pending first appeal in the court of Third Additional District Judge being Title Appeal No. 41/10

of 1976- 80. Mst Tapeshari Kuer died leaving behind her four sons by name Gaya Prasad, Chandradeo, Videshi (issueless) and Adalat Prasad.

But unfortunately none have been brought on record. Yet the appellate court gave a finding that Tapeshari Kuer is not the daughter of Ramyad

Mahto and accordingly the appellant did not acquire any interest in the undivided interest of Ramyad Mahto under the gift deed. Accordingly the

suit was dismissed. In Second Appeal No. 51 of 1981 of the appellants, the High court held that:

...The heirs of Mst Tapesari have not been brought on the record. In their absence it is not possible to give a finding that Mst Tapesari died

when the matter was pending in the court below and the decree, therefore, is a nullity.

3. The High court accordingly dismissed the second appeal on 28/10/1986. Thus this appeal by special leave.

4. THOUGH Shri A.K. Srivastava, learned counsel for the appellants sought to contend that the entire decree is a nullity as held by the High court

and the High Court ought to have held that as legal representative of donor was not brought on record the declaration that Tapesari Kuer is not

the daughter of Ramyad Mahto should not have been given and the dismissal of the suit in its entirety by the appellate decree is not warranted and

the appellants are accordingly entitled to the preliminary decree in respect of Schedule 4 properties. It is not necessary to go into that question as

per the findings of the High court itself. It is seen that the preliminary decree for partition consists of two items, namely, Schedule 4 and Schedule 5.

As regards Schedule 4 is concerned, it is declared that the appellants are entitled to half share and preliminary decree in that behalf was granted.

Equally second part relates to Schedule 5 declaring that Tapesari Kuer is entitled to half share therein. Pending appeal when Tapesari Kuer died,

her legal heirs were not brought on record. The appeal abates as against the interest of her in respect of second part of the decree relating to

Schedule 5. As regards Schedule 4 is concerned, the appellants had already acquired interest even prior to the institution of the suit by virtue of gift

over on 28/06/1965 and that they claimed that possession was also delivered and they are in possession of the Schedule 4 properties under the gift

deed. In the appellate court the right of the respondent in regard to 4th Schedule properties depends upon the status of Tapesari Kuer. The

question whether she is the daughter of Ramyad Mahto or not is required to be gone into only when her legal representatives were brought on

record and properly contested but the legal representatives were not brought on record. As rightly pointed out by the High court, the decree as

against the dead person is a nullity. Therefore, the declaration that Tapesari Kuer is not the daughter of Ramyad Mahto also is not valid in law.

Since the High court has held that the decree of the appellate court is a nullity and the respondents did not file any appeal against that part of the

decree. It is not necessary for us to go into that question as the entire appellate decree became a nullity. The result is that the preliminary decree

became final.

5. The appeal is accordingly dismissed with the above clarifications. No costs.