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**(1994) 01 SC CK 0092**

**Supreme Court of India**

**Case No:** Civil Appeal No. 2275 Of 1987

Rajendra Prasad and  
Another

APPELLANT

Vs

Khirodhar Mahto and  
Others

RESPONDENT

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**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

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### **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 Tapeshari have not been brought on the record. In their absence it is not possible to give a finding that Mst Tapeshari 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 Tapeshari 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 Tapeshari Kuer is entitled to half share therein. Pending appeal when Tapeshari 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 Tapeshari 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 Tapeshari 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.