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**(2011) 09 PAT CK 0143**

**Patna High Court**

**Case No:** First Appeal No. 260 of 1997

Smt. Surti Devi and Others

APPELLANT

Vs

Manoj Kumar Singh and Others

RESPONDENT

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**Date of Decision:** Sept. 12, 2011

**Hon'ble Judges:** Mungeshwar Sahoo, J

**Bench:** Single Bench

**Final Decision:** Allowed

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### **Judgement**

Mungeshwar Sahoo, J.

The Plaintiffs have filed this appeal against the judgment and decree dated 26.4.1997 passed by Sri Rama Nand Sharma learned Subordinate Judge-Ist, Samastipur in Partition Suit No. 56 of 1995 dismissing the Plaintiffs' suit for partition.

2. The Plaintiffs filed the aforesaid Partition Suit No. 56 of 1995 claiming half share in Schedule 2 property of the plaint. The Plaintiffs further prayed for declaration that the deed of gift dated 5.6.1989 executed by Most. Machhiya Devi is void and not binding on the Plaintiffs. The Plaintiffs claimed the aforesaid relief on the ground that Nirsu Mahto was the common ancestor of the parties who died leaving behind two sons namely Bal Narayan Singh and Devan Singh. Bal Narain Singh had a son Heman Singh. Heman Singh had two sons Yogendra Singh, who is Defendant No. 1 and Mahendra Singh. This second son Mahendra Singh died leaving behind the widow Plaintiff No. 1 and sons Plaintiff Nos. 2 to 5. The Defendant Nos. 2 to 4 are the sons of Defendant No. 1 and Defendant No. 5 is the wife of Defendant No. 1. The second son of Nirsu Singh i.e. Devan Singh died issueless leaving behind his widow Machhiya Devi who also died in jointness with the Defendants and Plaintiffs. Heman Singh, Mahendra Singh, Devan Singh and Machhiya Devi all died in state of jointness with the Plaintiffs and, therefore, the Plaintiffs and the Defendants inherited the entire property jointly and the Plaintiffs have got half share in the property.

3. In the year 1989 Machhiya Devi was seriously ill and because of illness she had lost her sense and power of understanding and at that time Yogendra Singh, Defendant No. 1 taking advantage of illness and critical condition of Machhiya Devi got a deed of gift executed by Machhiya Devi on 5.6.1989 in favour of his wife Janki Devi, Defendant No. 5 with respect to the Schedule 3 lands of the plaint. According to the Plaintiffs Machhiya Devi being a member of joint Hindu Mitakchara family had no right to execute a gift with regard to her undivided share in the joint family properties. The witnesses scribe and identifier of the deed of gift were henchmen of Defendant No. 1 and they helped him to get the gift deed executed and registered. Machhiya Devi had lost her sense due to illness and was not capable of understanding because of old age therefore, the deed of gift is not a legal document and is void deed. By this deed of gift the Defendant No. 5 did not acquire any right, title and interest on schedule 3 properties. Machhiya Devi was so much so ill that unconscious and she was unable to admit the execution of deed and in order to get the deed registered, the Defendant No. 1 got a Commissioner appointed from district sub registry for this purpose and Defendant No. 1 got all the formalities completed in the village in haste as such the deed of gift is created by fraud. The Plaintiffs came to know about the deed of gift on 17.5.1995. The Plaintiffs demanded for partition but the Defendants refused to partition the properties. Hence the Plaintiffs filed the suit for partition.

4. All the Defendants have filed contesting written statements. The Defendant Nos. 1 to 3 filed joint written statement. Defendant No. 5 filed separate written statement. Their defence is common. In the written statement besides taking various legal and ornamental pleas mainly the Defendants contended that after the death of Bal Narain Singh there was partition in the family between Heman Singh and Devan Singh and in that partition Devan Singh got Schedule 1 property mentioned in the written statement. Schedule 2 property of the written statement was allotted to Heman Singh. Devan Singh died in state of separation from Heman Singh leaving behind his widow Machhiya Devi. After death of Devan Singh his widow Machhiya Devi became the absolute owner of the properties allotted to Devan Singh. Since she was an old lady and had no issue the Defendant No. 5 used to look after and render service to Machhiya Devi. On being pleased by the service of Defendant No. 5 Machhiya Devi expressed her willingness to gift her properties in favour of Defendant No. 5 who accepted the offer and thereafter Machhiya Devi applied for permission to execute the deed of gift before the consolidation officer and after obtaining permission she executed and registered the deed of gift in favour of Janki Devi with regard to Schedule 2 properties of the plaint.

5. The further defence is that there had been partition between Yogendra Singh and Mahendra Singh and after that partition Mahendra Singh died. In that partition Mahendra Singh was allotted Schedule 3 properties of the written statement of the Defendant Nos. 1 to 3. At the time of execution and registration of gift deed Machhiya Devi was hale and hearty and she was also mentally alert and in that

condition she executed and registered a gift deed. The Defendants denied that she was critically ill and was not capable of executing and registering the deed of gift. They also denied that the witnesses and identifier were henchmen of Defendant No. 1. The Plaintiffs have got knowledge about the execution of deed from the very beginning. Plaintiff No. 1 Smt. Surti Devi had filed a case before Sarpanch and during inquiry by Sarpanch Machhiya Devi admitted to have executed a deed of gift in her sound mind and hearty. On the death of Machhiya Devi the other properties which remained after gift was inherited by Yogendra Singh as he was sole surviving grand son of Machhiya Devi and Plaintiffs do not acquire any interest in any of the lands of Machhiya Devi.

6. On the basis of the above pleadings of the parties, the learned Counsel below framed following issues:

(1) Is the suit, as framed, maintainable ?

(2) Have the Plaintiffs got any cause of action for the suit ?

(3) Is the suit barred by law of limitation ?

(4) Whether there is unity of title and possession in between the parties in respect of the suit lands and if so, are the Plaintiffs entitled to a decree of partition as prayed for ?

(5) Whether the Defendants have succeeded in proving previous partition as alleged in the written statement ?

(6) Whether the deed of gift deed dated 5.6.89 executed by Machhiya Devi is illegal, void and not binding on the Plaintiffs ?

(7) To what other relief or reliefs, if any, are the Plaintiffs entitled to ?

7. After trail the learned Counsel below found that there had been partition between Heman Singh and Devan Singh. The learned court below also found that the gift deed is valid and legal. The learned court also found that there had been partition between the parties and, therefore, dismissed the Plaintiffs? suit.

8. The learned senior counsel Mr. Ram Shankar Pradhan appearing on behalf of the Appellants submitted that it is the specific case of the Plaintiffs that Defendant No. 1 who was Karta of the family got created the gift deed. He also obtained the permission from the consolidation officer by playing fraud and got the gift deed registered by getting a Commissioner appointed because Machhiya Devi was so much so ill and was ailing that she was unable to move and even was not understanding the affairs. The contents of the gift deed was never read over and explained to her. Machhiya Devi did not appear before the Commissioner who had gone for registering the gift deed and L.T.I. was obtained from Parda on the ground that she is a Pardanashin lady. The friend of Defendant No. 1 Ganaur Singh identified the lady as Machhiya Devi but in the evidence he has clearly denied to

have either written the gift deed and signed the gift deed on all pages but the learned court below held that the gift deed was executed in sound mind by Machhiya Devi. The learned Counsel further submitted that even the Commissioner did not ask any question to Machhiya Devi and at the instance of the Defendant No. 1 he made the endorsement in the gift deed but the learned court below has not considered these matters and held that the gift deed is valid. The witnesses examined on behalf of the Plaintiffs have stated that Machhiya Devi was ill, ailing and not capable of understanding the affairs but the learned court below did not consider these evidences. The learned Counsel next submitted that the Defendants in the written statement also admitted the fact that the Machhiya Devi was very old and needed service of Defendant No. 5. This appears also that on the ground of Pardanashin she was not brought in front of the Commissioner who had gone to her house and her L.T.I. was obtained from behind Parda and Ganaur Singh identified her to be Machhiya Devi.

9. The learned Counsel next submitted that In view of the above admitted facts, the onus was on the Defendants to prove satisfactorily that the contents of the deed was read over and explained to Machhiya Devi and thereafter understanding the contents and implication thereof Machhiya Devi put her L.T.I. in presence of the Commissioner but the Defendants failed to prove this fact, even then the learned court below held that the gift deed is illegal and binding on the Plaintiffs. The learned Counsel further submitted that in the grant of permission to sell the Defendant No. 1 played an important role by certifying that the Raiyat died issueless and he has got no objection if permission is granted. This indicates that he obtained the permission from the consolidation officer in haste. An application for permission was filed on 27.5.1989 and the report of the Amin was obtained on 1.6.1989. On that very date permission was granted and thereafter on 5.6.1989 the so called gift deed was executed but on the next date on the ground that Machhiya Devi is ill a Commissioner was appointed who came to her house and thereafter the deed was registered. According to the learned Counsel these circumstances clearly proves that the Defendant No. 1 by playing fraud obtained the gift deed which has been marked as Ext.-C. Identifier Ganur Singh has been examined on behalf of the Plaintiffs as PW 15 who has clearly denied that any gift deed was executed and he signed on every page. According to the learned Counsel there was no partition between the husband of Machhiya Devi and Heman Singh and the properties were joint and, therefore, Machhiya Devi had no right to execute the deed of gift. On these grounds, the learned Counsel submitted that the impugned judgment and decree are liable to be set aside.

10. As stated above nobody appears on behalf of the Respondents.

11. In view of the above facts and circumstances and the contention of the learned Counsel for the Appellants and in view of the judgment and decree and pleadings of the parties the points arise for consideration in this appeal are:

(1) As to whether the Plaintiffs have been able to prove their unity of title and possession over the suit properties and whether there had been partition between Heman Singh and Devan Singh ?

(2) As to whether the gift deed Ext.-C is valid, genuine or is obtained by playing fraud by Defendant No. 1 as such is void document as claimed by the Plaintiffs and whether it is binding on the Plaintiffs or not and whether the impugned judgment and decree are sustainable in the eye of law ?

12. Point No. 1. According to the Plaintiffs the family is joint and the suit property mentioned as detail in Schedule 2 is joint family properties which belong to Heman Singh who died in the state of jointness with the Plaintiffs and Defendants. On the contrary, according to the Defendants case there had been partition between Devan Singh and Heman Singh. The Schedule 1 property of the written statement was allotted to Devan Singh which was inherited by her widow Machhiya Devi and Machhiya Devi gifted the properties mentioned in Schedule 3 of the plaint to the Defendant No. 5.

13. The parties have adduced oral as well as documentary evidences in support of their respective case. PW 3, 6, 8, 9 and 10 have stated that the Plaintiffs and Defendants are joint and there had been no partition between them. According to PW 20 the parties are separate since two years only. PW 19 is the Plaintiff No. 1 Surti Devi who has fully supported her case as made out in the plaint and PW 21 is her son. The Plaintiffs have also produced rent receipts, which are in the name of Devan Singh. Ext.-1/B is the rent receipt in the name of Devan Singh for an area of 10 bigha 8 kattha 25/2 dhur and this rent receipt is of the year 1988 Ext.-1/A is another rent receipt of the year 1994 -95 for an area of 6 bigha 5 kattha 12/2 dhur and which indicates that the area of land covered by gift was deducted. Ext.- and Ext.-8 are revisional survey parcha which are in the name of Devan Singh and Heman Singh.

14. On the contrary, the Defendants have also examined witnesses who have stated that there had already been partition between Devan Singh and Heman Singh. DW 3 has stated that there had been partition between the parties also. DW 13 is the Defendant No. 5 and DW 14 is the Defendant No. 1 Yogendra Singh. It may be mentioned here that Yogendra Singh died during the pendency of this appeal and his name has been deleted. Ext.-B is rent receipt in the name of Devan Singh of the year 1994-95. Ext.-B/1 is rent receipt in the name of Janki Devi for the gifted property for the year 1994-95. Ext.-B/2 is the rent receipt in the name of Janki Devi for the year 1996-97.

15. From the pleadings it is clear that the Plaintiffs' case is jointness whereas the Defendants' case is that there had been partition between Heman Singh and Devan Singh. According to Hindu Law the presumption of jointness is in favour of the Plaintiffs. Under the Hindu Law the Hindu family is presumed to be joint unless the contrary is proved. Therefore, here the onus lies on the Defendants to prove that

there had been partition between Heman Singh and Devan Singh.

16. In view of the above facts, now let us consider the evidences produced by the Defendants to prove the partition alleged by them in the written statement.

17. The Defendants have adduced 15 witnesses. DW 3 Kamal Singh has stated that Nirsu Singh had two sons namely Bal Narayan Singh and Devan Singh. Both were joint. Bal Narain had a son Heman Singh. There had been partition between Heman Singh and Devan Singh. At paragraph 4 in his cross-examination he has specifically stated that there had been no partition between Bal Narain Singh and Devan Singh. DW 6 has only stated that Devan Singh had 5, 6 bigha land and after his death Machhiya Devi came in possession of the said land. DW 12 has also stated the same thing as that of DW 6. DW 13 is Defendant No. 5 in this case. DW 14 is the Defendant No. 1 himself. Both of them i.e. DW 13 and DW 14 have stated that Devan Singh and Bal Narain Singh were joint. Their specific case is that there was partition between Heman Singh and Devan Singh. This is the pleading also in the written statement. So far oral evidences are concerned this is the evidences regarding partition. None of the witnesses have stated that in which year partition took place.

18. The Defendants have adduced documentary evidences also. Ext.-B is the rent receipt of the year 1994-95. Ext.-B/1 is rent receipt in the name of Janki Devi with regard to gifted property for the year 1995. Ext.-B/2 is rent receipt for the year 1996-97 in the name of Janki Devi, Defendant No. 5. These rent receipts show only the mutation of Janki Devi and Devan Singh that too at the time of or during the pendency of the suit. Therefore, by these rent receipts it cannot be conclusively arrived at that there had been partition between Devan Singh and Heman Singh.

19. Ext.-C is the alleged deed of gift dated 5.6.1989. From perusal of this Ext.-C said to have been executed by Machhiya Devi it appears that it is clearly recited in the deed that there had been partition between Devan Singh and Bal Narain Singh. This document is contrary to the case pleaded by the Defendants in the written statement. Therefore, the case of the Defendants as made out in the written statement and the oral evidences discussed above clearly contradicts each other. The registered document recites that there had been partition between Devan Singh and Bal Narain Singh whereas the witnesses have stated that both of them were joint. Therefore, this document also does not support the Defendants' case.

20. Ext.-E is information application given by Defendant No. 1 to the S.D.O. being Information Case No. 371 of 1996 wherein also the Defendant No. 1 admitted that Bal Narain Singh and Devan Singh were joint. However, this Ext.-"E" has been filed during the pendency of the suit itself and moreover any statement made in this exhibit is nothing but self serving statements. In other words, the document is self serving and therefore, it cannot be used against the Plaintiffs. Ext.-H series are the voter list. These documents have been filed to show that the parties were living separately in separate house. In my opinion, these documents i.e. voter list also do

not prove that there had been partition between Heman Singh and Devan Singh. At best it can be said that the parties were living in separate house.

21. From perusal of the impugned judgment it appears that the learned court below relied on these Ext.-H series and gave much emphasis and presumed that there had been partition between the parties otherwise the parties would not have been living in separate house. This approach of the learned court below is not tenable. Ext.-F series are the order sheet of Sarpanch, Gram Panchayat. The order sheet dated 14.6.1989 was passed by the Sarpanch saying that since the property relates to more than 6 bigha land the Gram Panchayat court has got no jurisdiction. It appears that these documents have been filed by the Defendants regarding the validity of the gift deed. These are the documentary evidences produced by the Defendants. From the above discussions that except the oral statement of the Defendant No. 1 and Defendant No. 5 and one or two witnesses that Devan Singh was separate. There is no evidence in support of the said facts. In the pleadings also except the bald statement as has been stated by the witnesses appears to be only bald statement. Moreover, the registered deed Ext.-C on the basis of which the Defendants are claiming title regarding the property of Devan Singh is also not supporting the case of the Defendants.

22. Now let us consider the evidences adduced by the Plaintiffs.

23. PW 3, 6, 8, 9, 10 and the Plaintiff No. 1 herself as PW 19 have stated that the family is joint and the properties is also joint. Ext.-2 and Ex.-8 are revisional survey parcha which stands jointly in the name of Devan Singh and Heman Singh. Ext.-4 is the order sheet of consolidation authority from which it appears that the Defendant No. 1 certified that Khata Raiyat died issueless. Therefore, he played an important role in the grant of permission. Ext.-5 is the application for permission. From perusal of which it appears that the application was filed for permission to transfer half portion of the suit property and not specified land. From perusal of the schedule it appears that 50% of each plot has been mentioned without giving boundary and as to which side of the plot. Ext.-6 is the Amin Report. From perusal of the Amin report it appears that he has clearly given report that Machhiya Devi the applicant has got half share in the property and, therefore, permission may be granted. In the report it is not mentioned that Machhiya Devi was in separate portion rather it is stated that Machhiya Devi had half share. This again indicates that there was jointness between the husband of Machhiya Devi and Heman Singh. Ext.-7 is the permission. In the schedule of the said permission also 50% of each and every plot has been mentioned without specifying the boundary and also without specifying as to which side of the plot. It again support jointness of the property. It is not the principles of partition that each and every plot should be divided half and half. From the schedule of the application and the Amin reports coupled with Ext.-7 it appears that some of the plots which measures only 2 decimal, 4 decimal, 5 decimal, 6 decimal have also been divided half and half. In my opinion, it appears to be not believable and smack

some foul play. All these documents clearly prove the jointness of the property. As stated above the learned trial court swayed away by Ext.-H series i.e. the voter list. The learned court below also while discussing the evidences of Plaintiffs observed that the witnesses and the Plaintiff herself (PW 19) admitted that they are cultivating the lands separately. It may be mentioned here that since the claim of the Plaintiffs for partition was refused the suit has been filed. The witnesses have stated that the Plaintiffs are cultivating the lands separately since 1995. That does not mean that there had been conclusive partition by meets and bounds between the parties. At paragraph 16 it appears that the learned court below given much emphasis to the admission of the Plaintiffs and her witnesses who have stated that they are cultivating the lands separately and came to the finding that the Defendants have succeeded in proving the previous partition. It may be mentioned here that the specific case of the Defendants was that there had been partition between Devan Singh and Heman Singh. We have seen above that there is no reliable evidence either oral or documentary produced by the Defendants. The witnesses which have been referred to by the trial court have only stated that the Plaintiffs are cultivating the lands separately from the year 1995. It is not the admission of the witnesses of the Plaintiffs regarding previous partition. Further from the admission itself it appears that there is unequal area of lands in possession of the parties which is striking to the conscience of the court. Had there been partition the members would have been allotted equally. The learned court below further gave much emphasis on Ext.-C, the alleged gift deed which is under challenged. As stated above there is much contradiction between the pleadings and the statement made in the Ext.-C regarding previous partition therefore, the reasoning of the learned court below is not tenable. So far partition between Yogendra Singh and Mahendra Singh is concerned also except the statements and the self serving documents, there is nothing on record in support of the said claim. The rent receipts or mutation are of the year 1995 and thereafter the suit has been filed in the year 1995.

24. The learned Counsel below while giving finding regarding previous partition has not considered all the statements made in Ext.- C that there had been partition between Devan Singh and Heman Singh and also Ext.-5 - 6 - 7 which speaks that Machhiya Devi had half share and that the schedule properties given in these exhibits were unspecified and no boundary or side of plot was mentioned. Even very very small area of land has been alleged to have been divided. Therefore, the finding of the learned court below is based on evidences which are not the evidences regarding previous partition as such it is vitiated.

25. In view of my above discussion, I find that Defendants have failed to prove previous partition between Heman Singh and Devan Singh. The finding of the learned court below on this point is therefore hereby reversed and it is held that the suit property is joint property. Thus, the point No. 1 is answered in favour of the Plaintiffs Appellants.



26. Point No. 2- According to the Plaintiffs the property was joint and Machhiya Devi died in jointness. At the time of the execution of gift deed Ext.-C she was old infirm and not capable of understanding the affairs and the Defendant No. 1 by playing fraud got the gift deed executed and registered in the name of his wife Janki Devi from Machhiya Devi. The contents of Ext.-C was never read over and explained to her and without knowing the contents and its implication L.T.I. was obtained and, therefore, Ext.-C is void document. On the contrary, according to the Defendants the said gift deed is valid and genuine and Mahchiya Devi executed the same after understanding its implication and she was not ill at the time of execution of the gift deed. In support of their respective cases the parties have adduced oral evidences and documentary evidences.

27. PW 3 has stated that Machhiya Devi died after one and half years long illness. This witness was going to visit her during that illness period. Six months prior to her death she had lost her mental balance and she was not even able to hear and understand the affairs. Machhiya Devi died on 6th August 1989. PW 4 has stated that Machhiya Devi died after long illness about 1 1/2 years. He was also going to visit her during illness. Two days prior to her death also this witness had visited her but she could not identify this witness. PW 12 has stated that Machhiya Devi had not executed any gift deed in favour of Janki Devi and the gift deed if any is forged and fabricated. Six month prior to her death Machhiya Devi had lost her sense. This witness was also visiting her regularly. PW 13 has also stated that Machhiya Devi was senseless. PW 15 Ganaur Singh is said to be witness on the gift deed. He has clearly denied his signature in each pages of the gift deed except page one. He has stated that he is friend of Defendant No. 1. In 1989 Yogendra Singh called him and gave a piece of paper and asked him to writ down in another paper and thereafter he took away the said written paper and obtained signature of this witness. He has further stated that he had gone to see Machhiya Devi on that day. Machhiya Devi did not talk to him. When this witness loudly spoke she open her eyes and then again closed. Prior to that day and also after that day this witness was visiting Machhiya Devi and during that period Machhiya Devi had no sense. In the cross examination he has admitted his signature on the first page which has been marked as Ext.-A. He denied the signature of other pages. He also denied his signature on the back page of gift deed Ext.-C. At paragraph 4 of his cross-examination he has stated that Machhiya Devi was residing in joint house in one room. Suggestion has been given to this witness that he had identified Machhiya Devi and signed on Ext.-C to which he had denied. PW 18 has also stated that gift deed is forged and Janki Devi never came in possession on the basis of gift deed. PW 19 is the Plaintiff No. 1 herself. She has also stated that prior to her death Machhiya Devi was ill since 1 1/2 year. Six months prior to her death she was senseless.

28. It is the case of the Plaintiffs that Machhiya Devi was senseless prior to her death and she was not understanding the affairs. The onus is upon them to prove this fact.

29. Now let us consider the Defendants' witnesses.

30. DW 2 has stated that in 1989 Machhiya Devi told Janki Devi that she is desiring to gift her land because she was pleased with Janki Devi seeing her service. Janki Devi accepted the offer and Machhiya Devi executed the gift. She was never ill and she executed the will in her good health and mind. Such is the evidence of DW 3, 5 and 6. It appears that the evidences of these witnesses are just like parrot statements. DW 7 has stated that on 5.6.1989 Machhiya Devi along with Suresh Prasad Mishra and Ganaur Singh had gone to him. At the instance of Machhiya Devi he scribed gift deed and read it over to Machhiya Devi. Machhiya Devi in his presence put her thumb impression and Ganaur Singh identified her. Suresh Prasad Mishra also put his signature as witness. On that day gift deed was not presented for registration. Machhiya Devi took the gift deed with her. On the second day Janki Devi came to this witness with the said gift deed and told him that Machhiya Devi is suffering from stomach ach and this witness produced gift in the registry office. The Commissioner was appointed and the deed was registered on the said very day in the house of Machhiya Devi. In the cross examination he has stated that he was not knowing either Machhiya Devi or Janki Devi. He was also not knowing any witness or identifier. He told the name of witness and identifier on seeing the gift deed. From the evidences of this witness it is clear that he was not knowing either Machhiya Devi or Janki Devi or even the name of witness and the name of identifier. On the basis of gift deed he deposed before the court.

31. DW 8 has stated that on 1.6.1989 Machhiya Devi and Janki Devi had gone to consolidation office for obtaining permission. DW 9 is Suresh Prasad Mishra the witness on Ext.-C. DW 10 has stated that Ext.-C was registered on 6.6.1989 which was produced before the registry office by Janki Devi. It appears that this witness was appointed as Commissioner who had visited the house of Machhiya Devi. It may be mentioned here that he is clerk in the registry office. He has stated that the thumb impression of Machhiya Devi was obtained by Ganaur Singh from behind Parda. In the cross-examination he has admitted that Machhiya Devi was behind the Parda and he had not seen Machhiya Devi. When he told that she should come out from Parda he was told that because Machhiya Devi is Pardanashin she is not coming out of Parda. This witness has also stated that he did not ask any question to Machhiya Devi nor he can say physical feature of Machhiya Devi or her age.

32. We have discussed the evidences of other witnesses of the Defendants who have stated that Machhiya Devi had gone to scribe herself. Machhiya Devi had gone to consolidation office herself and applied for permission. If Machhiya Devi was Pardanashin she would not have appeared publicly and would not have gone personally before the scribe or before the consolidation office. The witnesses have admitted that Machhiya Devi had gone to them and they had talked with them. PW 7 admitted that he was not knowing Machhiya Devi but then he stated that Machhiya Devi told him to scribe the gift deed and at the instance of Machhiya Devi the other

witnesses signed. All these evidences clearly indicate that Machhiya Devi was not Pardanashin. In such circumstances the question arises as to how she became Pardanashin on the date when Commissioner went to her house for obtaining her L.T.I. on Ext.-C. She did not even come out of her Parda and appear before Commissioner in presence of others i.e. Ganaur Singh and her other family members. This appears to be suspicious. PW 15 Ganaur Singh had clearly denied this fact to have identified Machhiya Devi. In the back of Page 2 of Ext.-C the Commissioner has clearly stated that he obtained L.T.I. of Machhiya Devi from behind Parda.

33. On 5.6.1989 Machhiya Devi herself went to the scribe and got the gift deed executed and got the signature of the witnesses but on the next very day the gift deed was presented by Defendant No. 5 before the registry office. When the commissioner went to her house she did not appear before him. L.T.I. was given from behind Parda on the ground that she is Pardanashin. It is stated that Ganaur Singh identified her but Ganuar Singh denied this fact in his evidence. Admittedly, the witnesses have stated that Machhiya Devi was 85 - 90 years old. The Commissioner is not able to say about physical feature of Machhiya Devi and also unable to say her age. In my opinion, therefore, the gift deed appears to be doubtful. The Defendants were to prove the gift deed by removing all suspicious circumstances. Although the Defendants admitted that she was aged about 85-90 years but then they have stated that she was not ill. We have discussed the circumstances in which this gift deed was presented and it was registered. So far this suspicious circumstances is concerned it has not been explained by the Defendants.

34. Ext.-3 series are the medical prescription of Machhiya Devi ranging from 1977 to 1988. From perusal of Ext.-3-b dated 25.5.1987 it appears that the doctor found Machhiya Devi senseless and the disease was found lungs conjection and severe weakness was there. Treatment continued up to 20.6.1987 by that prescription. Ext.-3/A is another medical prescription which is dated 12.7.1988 wherein again she was found senseless and severe weakness. No diet was being given to her. The doctor prescribed liquid diet. On 20.7.1988 the doctor directed to repeat the said treatment which was prescribed earlier on 12.7.1988. These medical prescriptions were never challenged by the Defendants. In the evidence only the witnesses including the Defendant No. 1 and Defendant No. 5 have stated that Machhiya Devi was hale and hearty and she was never ill. This evidence is totally demolished by these medical evidences. Further these medical evidences are clearly supported by the oral evidences adduced by the Plaintiffs.

35. From perusal of the impugned judgment it appears that the learned court below has not at all considered the case in the light of above evidences. The learned court below approached the case in wrong angle. He relied upon the evidences of the Commissioner without considering the fact that he is only a clerk and he never

talked Machhiya Devi.

36. So far the order of Gram Panchayat Kachahari is concerned also it cannot be looked into because the Sarpanch has found that the case filed by Surti Devi Plaintiff No. 1 before Gram Kachahari is not within the jurisdiction of Gram Kachahari. Therefore, any finding or observation given by Gram Kachahari in the order sheet Ext.-F series is not binding and conclusive. Moreover, the Sarpanch or so called other villagers has not been examined on behalf of the Defendants. The learned court below has not considered this aspect also. In my opinion therefore, the reasoning assigned by the court below is not acceptable.

37. In view of my above discussion, I find that the Defendants have failed to prove that Ext.-C is valid and genuine document. The Defendants have failed to explain the circumstances discussed above. It appears that on the ground of Pardanashin some body else put L.T.I. It is not the case of the Defendants that Machhiya Devi was a Pardanashin. I therefore, find that the Ext.-C gift deed is obtained by the Defendants fraudulently and, therefore, it is void document. No title passed on the Defendant No. 5 on the basis of Ext.-C. The finding of the learned court below on this point is therefore, reversed.

38. In the result, this first appeal is allowed. The impugned judgment and decree are set aside and the Plaintiffs' suit for partition to the extent of half share is decreed. The parties shall bear their own cost.