

**Gopal Lal Vs. Kishan Lal**

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**Court :** Rajasthan Jodhpur

**Decided On :** Feb-13-2014

**Appellant :** Gopal Lal

**Respondent :** Kishan Lal

**Judgement :**

1 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR :

JUDGMENT

: S.B. CIVIL FIRST APPEAL NO.52/1982 Gopal Lal & Ors. vs. Kishan Lal & Ors.

Date of Judgment ::

13. h February,2014 PRESENT HON'BLE MR. JUSTICE ARUN BHANSALI Mr. R.K. Thanvi Senior Advocate assisted by Mr. Narendra Thanvi, for the appellants. Mr. Arvind Samdariya, for the respondents. ---- BY THE COURT: This appeal under Section 96 CPC is directed against judgment and decree dated 16.04.1982 passed by District Judge, Merta, whereby, the suit filed by the appellants for declaration and partition has been rejected. The suit was filed on 10.11.1966 by plaintiffs Gopal Lal and Om Prakash, both sons of Birdhi Chand against Kishan Lal, Joravar Mal - their uncles, Birdhi Chand - their father, Hem Chand - their minor brother through father Birdhi Chand and against Bhanwar Lal S/o Kishan Lal, who was impleaded as party on 07.09.1967 with the averments that the plaintiff Gopal Lal was born on 13.11.1945 and Om Prakash was born on 20.06.1947 and both attained majority on 13.11.1963 and 20.06.1965 respectively;

plaintiffs' grand-father Dhanna Lal son of Sukhram died on 20.06.1965 and their grand-mother Ganga Devi died on 25.04.1965; Sukhram died in or about Samwat year 1952 (1895-96), who was Karta and manager of the coparcenery consisting of himself, his son Dhanna Lal and Kishan 2 Lal, Joravar Mal and Birdhi Chand and left considerable properties both movable and immovable at Merta; it was alleged that during the minority of the plaintiffs on or about 09.10.1958, Kishan Lal, Joravar Mal and Dhanna Lal obtained a release deed from their father Birdhi Chand, which is unfair and prejudicial to the interests of plaintiffs, as Kishan Lal, Joravar Mal and Dhanna Lal suppressed the facts of properties described in Schedule-B being joint family properties and gave false and wrong valuation of the properties described in Schedule-C; the release deed dated 09.10.1958 was described as void, illegal and of no effect for the reasons indicated in para 8 of the plaint; the properties described in Schedule-B and C were reproduced in Schedule-A and it was claimed that the plaintiffs being members of the joint Hindu family continued to be in joint possession of properties and the properties were in actual possession of plaintiffs and defendants Birdhi Chand and Hem Chand; cause of action accrued on 09.10.1958 and on 13.11.1963 and 20.06.1965, the date on which the plaintiffs attained majority and prayed for reliefs of declaration of release deed dated 09.10.1958 as void and partition of Schedule-A properties by metes and bounds. The suit was resisted by Kishan Lal, Joravar Mal and Bhanwar Lal, who filed joint written statement; the dates of birth of the plaintiffs were not admitted; it was alleged that the family of the plaintiffs Gopal Lal and Om Prakash and defendants Birdhi Chand and Hem Chand was joint family and whose Karta was Birdhi Chand; at the time of death of Sukhram, father of Dhanna Lal, he had four sons, from which, one had gone in adoption and besides Dhanna Lal one Choth Mal and Shiv Lal were also there; 3 Sukhram died leaving behind few house hold utensils as movable property and one Kaccha house as immovable property; the said house was later brought down and at the said place Dhanna Lal and Choth Mal constructed a Pakka house from their personal income; on 23.02.1924 there was partition between Dhanna Lal and Choth Mal by registered document, by which, the said property, which was indicated at Item No.1 in Schedule-A, came to the share of Dhanna Lal; another property indicated in the partition deed was acquired by Dhanna Lal and Chauth Mal after death of Sukhram, their father, from

their personal income; at the time of death of Sukhram, all his sons were unmarried and, therefore, Kishan Lal, Joravar Mal and Birdhi Chand were not born, therefore, Dhanna Lal inherited the property from his father as absolute owner; Birdhi Chand left Merta from before August, 1943 and joined service at Ajmer and was continuing in service there and is settled with his family and has separated from Dhanna Lal, Kishan Lal and Joravar Mal from 1943 in food, worship and income and has got a separate income and he never shared any part of his income with his father and with Kishan Lal and Joravar Mal and neither made any effort or contributed any money in acquiring the properties indicated in Schedule; it was then stated in the written statement that Birdhi Chand executed registered release deed on 09.10.1958 in favour of Dhanna Lal, Kishan Lal and Joravar Mal and received Rs.9,000/-, Rs.7,500/- was received cash and a shop costing Rs.1,500/-, which is indicated at Item No.3 in Schedule-A was also given to him; the release deed was executed by Birdhi Chand as natural guardian of his minor sons Gopal Lal, Om Prakash and Hem Chand in his 4 capacity as Karta and for the benefit of the minors; the allegations about the release deed being prejudicial to the interests of the plaintiffs and being unfair were denied; it was stated that Birdhi Chand was not entitled to receive Rs.9,000/-, but as he had difficulty regarding residential accommodation at Ajmer, he requested Dhanna Lal and Dhanna Lal being father, out of love and affection, gave huge sum and property by way of said release deed, which was accepted by Kishan Lal and Joravar Mal in terms of their father's wish; the Schedule-B properties are not ancestral joint family properties as the same were not acquired with the effort and contribution by Birdhi Chand; the allegations about suppressing properties were denied; except for Item No.1 in Schedule-A property, the entire property belong to Kishan Lal, Joravar Mal and Dhanna Lal; the plaintiffs were properly represented by their father at the time of execution of release deed and he was physically and mentally fit and had executed the said deed in his full sense; ultimately, it was contended that except for Item No.1 in Schedule-A, the entire property was acquired by Dhanna Lal, Kishan Lal and Joravar Mal and Birdhi Chand having executed the release deed, the plaintiffs Birdhi Chand and Hem Chand had no right in the Schedule properties; in additional pleas it was stated that Suit No.22/59 was filed by Birdhi Chand challenging the release deed dated 09.10.1958 and

seeking partition, which was withdrawn vide application dated 01.09.1961 without permission to file a fresh suit and the said suit was dismissed as withdrawn on 05.09.1961; as the suit was filed by Birdhi Chand, who was guardian of plaintiffs and Hem Chand, who were represented by 5 their father in the said suit and he was manager of the family and, therefore, the present suit was barred on account of doctrine of constructive res judicata; the suit was barred under Order XXIII CPC; it was indicated that the said suit was withdrawn on payment of Rs.2,000/-, which was paid to Birdhi Chand by cheque amounting to Rs.1,065/- and the balance sum alongwith interest amounting to Rs.1,246.25 P. was paid before Civil Judge, Merta on 08.09.1964 and till such time that the said agreement, which led to withdrawal of the suit is also questioned, the suit was not maintainable; several other pleas were also raised including a plea that certain loans were also outstanding. Birdhi Chand and Hem Chand filed their written statement and claimed that from 29.09.1958 to 10.10.1958 Birdhi Chand was not well and was admitted at Government Hospital, Merta; in additional pleas, three more properties were enumerated, which were claimed as joint and not included in the Schedule and admitted the averments contained in the plaint. The plaintiffs filed their replication and stated that the outstanding indicated were not their liability, denied that Rs.9,000/- was paid to Birdhi Chand out of affection; admitted that suit was filed by Birdhi Chand, but the same does not affect their case; after the death of Sukhram, other properties acquired were blended with the joint properties; Birdhi Chand joined service at Ajmer in the year 1943. The trial court framed the following 14 issues:

1. Whether the dates of birth of plaintiffs No.1 and 2 is 13-11-45 and 20-6-47 respectively?. P.
2. Whether the release deed dated 9-10-58 is 6 unfair and prejudicial to the interests of the plaintiffs as alleged in paras No.7 and 8 of the plaint?. P.
3. Whether the properties sought to be partitioned by the plaintiffs shows in the Schedules A, B & C is joint family property and liable to be partitioned?. P.
4. If issue No.3 is decided against the defendants, whether the properties mentioned at items No.3 and 4 in Schedule B are exclusively acquired by the

defendants No.2 and 5?. D.2 and D-5.

5. Whether the property which late Shri Dhannalal inherited from his father Sukhram is owned by him exclusively?. If so to what effect?.

6. Whether the suit is barred by the principles of constructive res judicata, res judicata or O.23 R.1(3) C.P.C. as alleged in paras No.1 to 3 of the additional pleas in written statement of the defendants No.1 and 2?.

7. Whether the allegations in para No.4 additional pleas in written statement of defendants No.1 and 2 are correct?. If so, whether the suit is not maintainable, misconceived, unless withdrawal agreement is got cancelled?. If so what effect?.

D.1 and D-2 8. Whether the defendant No.3 acted upon and gave effect to the release deed dated 9-10-58 and hence the plaintiffs are estopped from challenging this release deed as alleged in para 5 - additional pleas in written statement of defendants No.1 and 2?. D-1 and D-2 9. Whether the defendant No.2 and 5 spent the sums mentioned in para No.18 of the additional pleas in written statement of defendants No.1 and 2?. If so to what effect?. D-1 and D-2.

10. Whether the Court fees paid is insufficient?.

11. Whether the suit is barred by limitation?.

12. what reliefs are the plaintiffs entitled?.

13. If the partition is re-opened by cancelling the release deed was the joint Hindu family of the parties indebted to the extent of Rs.37,775.66 paise to third parties on 7-2-60 which constituted a joint liability and before the defendants No.1 and 2 are entitled to have this amount adjudged in the final account taking at the time of partition as pleaded in para No.17 additional pleas of written statement?. D-1 and D-2

14. Whether the property as detailed in para No.11 of the additional pleas of written statement of defendants No.3 is joint family property and is liable to be partitioned?. On behalf of the plaintiffs, statements of PW-1 Om Prakash, PW-2 Jugal Kishore, PW-3 Sunder Lal, PW-4 Munna Lal, 7 PW-5 Onkar Lal, PW-6 Laxmi Narayan, PW-7 Hari Kishan, PW-8 Shiv Lal, PW-9 Gopal Lal and PW-10 Shanker Lal were recorded and on behalf of defendants, DW-1 Joravar Mal, DW-2

Mishri Lal, DW-3 Bal Mukund, DW-4 Chand Mal, DW-5 Chauth Mal, DW-6 Poonam Chand, DW-7 Tulsi Ram, DW-8 Mishri Lal, DW-9 Ram Krishan Verma, DW-10 Chandan Mal, DW-11 Suraj Karan, DW- 12 Bhanwar Lal and DW-13 Tulsi Ram were recorded. The trial court after hearing the parties, came to the conclusion that the property sought to be partitioned was acquired by Dhanna Lal and his son Kishan Lal and Joravar Mal and that Birdhi Chand had not contributed to the same; Birdhi Chand resided at Ajmer since 1943, none of his money was invested in the said properties, therefore, the plaintiffs have failed to prove the property as ancestral and joint; it cannot be said that the release deed dated 09.10.1958 is unfair and prejudicial to the interests of the plaintiffs; the suit was barred by principles of constructive res judicata on account of withdrawal of earlier suit filed by Birdhi Chand; the suit was barred by limitation; the claim of Birdhi Chand that properties were joint was baseless and dismissed the suit. It may be noticed that during pendency of the suit, plaintiff No.2 - Om Prakash died and during pendency of this appeal defendant No.1 - Kishan Lal, his son Laxmi Narayan, defendant No.3 - Birdhi Chand and defendant No.5 - Bhanswar Lal died and their legal representatives were brought on record. Learned counsel for the appellants contended that the finding recorded by the trial court regarding the nature of properties that the suit properties were not ancestral/joint 8 properties of plaintiffs and respondents Birdhi Chand, Kishan Lal and Joravar Mal, is not based on the evidence available on record; the evidence has not been properly considered by the trial court; it was further submitted that the finding on issue relating to validity of the release deed dated 09.10.1958 is also erroneous as Birdhi Chand was not mentally fit at the time of execution of the said document; further questions were raised regarding validity of Will executed by Dhanna Lal and the finding of the trial court on the issue relating to res judicata on account of withdrawal of earlier suit filed by Birdhi Chand was also questioned; it was submitted that the findings deserve to be set aside and the suit filed by the plaintiffs deserves acceptance. Per contra, learned counsel for the respondents supported the judgment and decree impugned and submitted that there is no substance in the appeal; the trial court has meticulously and thoroughly examined the evidence available on record and has recorded findings, which do not call for any interference. I have considered the rival submissions and have gone through

the judgment passed by the trial court alongwith record of the case. The principal issue, which arose for determination before the trial court was the nature of properties, which were indicated in Schedule-A alongwith the suit, which were further bifurcated in Schedule-B and C claiming that properties indicated in Schedule-B were suppressed and properties contained in Schedule-C were wrongly valued. There is no dispute between the parties regarding the fact that the common ancestor of the parties was one Sukhram, who had four sons and on his death, 9 Dhanna Lal and Chauth Mal succeeded to certain properties, which included one immovable property, which is indicated at Item No.1 in Schedule-A. Dhanna Lal and Chauth Mal executed a registered partition deed dated 23.02.1924, wherein, the property indicated at Item No.1 Schedule-A came to the share of Dhanna Lal, wherein, he had already constructed a house. The issue arises as to whether the rest of the properties, which were acquired subsequent thereto can be termed as joint family properties and/or ancestral properties so as to create a right in Birdhi Chand, plaintiffs and minor Hem Chand?. While the claim of the plaintiffs is that the property succeeded by Dhanna Lal from Sukhram was nucleus around which rest of the properties were acquired/blended. The case of Kishan Lal and Joravar Mal is that the property succeeded by Dhanna Lal was a house and the same did not generate anything so as to become a nucleus, whereby, other properties could be acquired and the rest of the properties were all acquired by Dhanna Lal, Kishan Lal and Joravar Mal and there was absolutely no contribution of Birdhi Chand as he was in service and had left Merta and was settled at Ajmer since the year 1943. PW-1 plaintiff Om Prakash merely stated that the properties were joint as the same were created by his grand- father Dhanna Lal. His father used to send money to Dhanna Lal, however, he expressed ignorance about when and how much money was sent and also expressed ignorance about his grand-father receiving only a house on partition in the year 1924. The said statement is not material as admittedly he was minor and could not say much on the nature of the properties as 10 acquired by his grand-father, father and uncles. In cross-examination, he admitted that he was living at Ajmer since birth. His father was living at Ajmer since 1943. PW-4 Munna Lal is son of Dhanna Lal's brother and has given statement about the valuation of certain properties, however, he did not say anything as to how the properties were joint and/or

ancestral. In cross-examination, he admitted that Birdhi Chand stayed at Ajmer from the very inception and the properties at Merta were purchased by Dhanna Lal and Kishan Lal and he was not aware as to whether Birdhi Chand contributed to the same or not. Important witness is PW-8 Shiv Lal, who is father of Hari Kishan and brother of Dhanna Lal. He stated that Dhanna Lal and all his brothers had only one house in Merta, wherein, they all used to live together and besides the said house, their father Sukhram did not leave any property. Birdhi Chand did not contribute anything to the properties situated at Merta. The property situated at Merta has been acquired by Dhanna Lal and his two sons Kishan Lal and Joravar Mal. The said statement of Shiv Lal, who is brother of Dhanna Lal is most material as he has personal knowledge of the facts and as he was produced by the plaintiffs themselves. His statement that Sukhram, father of Dhanna Lal only owned one Kachha house at Merta as immovable property, which was ultimately succeeded by Dhanna Lal clearly establishes the fact that the said Kachha house was the only property inherited by Dhanna Lal and the nature of property was such that the same cannot act as a nucleus so as 11 to generate rest of the properties owned by Dhanna Lal and/or by the so called family and, therefore, the entire foundation of the suit is non-existent. PW-9 Gopal Lal plaintiff stated that as his father told him that the property is joint, he was claiming the same to be joint property. It would also be important to notice that the plaintiffs did not produce Birdhi Chand, who was the most material witness on the said aspect and either could have thrown light on the claim made by the plaintiffs or plaintiffs' claim could have been demolished by his cross-examination by the defendants. Besides the oral evidence, the documentary evidence produced by the plaintiffs equally did not lead to any conclusion regarding the properties being ancestral/joint. The exchange of letters Exhibits-2 to 39 between Birdhi Chand and Dhanna Lal do not prove anything as it is not the case of the parties that Birdhi Chand and Dhanna Lal were not on talking terms. So far as reliance placed on income tax documents Exhibits-50 to 55 are concerned, the same by themselves cannot prove the existence of joint family property. Besides the fact that the said documents pertain to the year 1956-57 i.e. before the release deed was executed by Birdhi Chand. This Court in Govind Narayan Mathur v. Smt. Mohani Devi :

1960. RLW582 has held that mere filing of the return for the purpose of getting some advantages under the Income Tax Law cannot be an evidence of any intention or part of the parties to deal with the property as indicated in the return. On behalf of the defendants, Joravar Mal DW-1 appeared 12 and produced documentary evidence in support of the contention that the property was not joint as claimed. It was deposed that their grand-father Sukhram had only one Kachha house, which was succeeded by Dhanna Lal and their uncle Chauth Mal, wherein, a house was constructed. Rest of the property was acquired by Dhanna Lal, Kishan Lal and Joravar Mal. The property left by Sukhram did not generate any income which could lead to purchase and/or creation of rest of the properties. The registered partition deed between Dhanna Lal and Chauth Mal dated 23.02.1924 was exhibited, the said document clearly proves existence of only one house as succeeded by Dhanna Lal from Sukhram and the Patta of the said house was dated 31.05.1902. The part of the land, which went to the share of Ram Lal was sold by his son Munna Lal on 21.02.1956 to Dhanna Lal, Kishan Lal and Joravar Mal vide Exhibit-A/10. The documentary evidence regarding rest of the properties were also produced, which indicated the same having been acquired by Dhanna Lal and/or Dhanna Lal, Kishan Lal and Joravar Mal. Regarding the properties of Bharat Oil Mill, document Exhibits- A/27 to A/36 were produced indicating the purchase of goods by Joravar Mal and Bhanwar Lal. In the cross-examination of Joravar Mal also nothing material could be brought on record by the plaintiffs as most of the documents relating to purchase and creation of properties stood in the name of either Dhanna Lal and/or Dhanna Lal, Kishan Lal and Joravar Mal. From the above discussion, it is evident that the plaintiffs miserably failed to prove that the suit properties were joint. 13 Once the properties are held to be belonging to Dhanna Lal, Kishan Lal and Joravar Mal, then the issue arises regarding the property of Dhanna Lal. Dhanna Lal had executed a Will dated 31.05.1959 (Exhibit-A/7) in favour of Kishan Lal and Joravar Mal. DW-3 Bal Mukund scribe, DW-8 Mishri Lal and DW-10 Chandan Mal, the attesting witnesses were examined. Both the attesting witnesses gave statements that the Will was executed by Dhanna Lal and they had put their signatures as attesting witnesses. It was submitted by learned counsel for the appellants that the Will has not been validly executed as both the attesting witnesses have not signed together and

have not stated that Dhanna Lal put his signatures on the Will in their presence. The said submission is not borne out from the statements of DW-8 Mishri Lal and DW-10 Chandan Mal. DW-8 Mishri Lal specifically stated in the cross-examination that the signatures were put by Dhanna Lal in his presence and at the time of his witnessing the said Will whether somebody else also signed as witness, he did not remember. DW-10 Chandan Mal stated that Dhanna Lal signed in his presence and he did not remember as to who else signed as witness. Section 63 of the Indian Succession Act, 1925, which deals with execution of unprivileged Wills reads as under:-

63. Execution of unprivileged Wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,], or a mariner at sea, shall execute his Will according to the following rules:- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction. (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

. Clause (c) of Section 63 deals with the attestation and provides that the Will should be attested by two or more witnesses, each of whom has seen the testator sign or affix his marks to the Will or receive from the testator a personal acknowledgment of his signature and each of the witnesses should sign the Will in the presence of the testator but it is not necessary that more than one witness be present at the same time. The said provision clearly envisage not only that it is not necessary that Will should be signed in the presence of the attesting witness, but mere personal acknowledgment of signatures by the testator to the attesting

witness is sufficient. Further, it is also not necessary that more than one witness must sign simultaneously and they can sign at different times on receiving acknowledgment from the testator regarding his signatures on the Will. In view of express language of Section 63 there is no substance in the submissions made by learned counsel for the 15 appellants. Besides the above, no suspicious circumstance was brought on record so as to doubt the execution of Will by Dhanna Lal. In view thereof, there is no substance in the challenge to the Will as well. It would also be relevant to notice that in the Will (Exhibit- A/7), Dhanna Lal had indicated that in his family, he alongwith his sons Kishan Lal and Joravar Mal live jointly, entire business is joint and the property is owned by him alongwith his sons Kishan Lal and Joravar Mal. He also indicated that only one plot came to his share from his ancestors, on which, house was constructed from own income and no one has any right on the properties. In view of the above, there is no substance in the contention raised by the plaintiffs-appellants regarding claim of the suit properties Schedule-A as joint family property as they have miserably failed to prove the same and, consequently, the trial court was justified in coming to the conclusion that the suit property was not joint. The release deed executed by Birdhi Chand Exhibit-A/4 dated 09.10.1958 was questioned by the plaintiffs on four counts; (i) it was unfair and prejudicial to the interests of the plaintiffs, (ii) some properties were suppressed or misrepresented, (iii) valuation was fraudulently and wrongly assessed and (iv) plaintiffs were minor, were not properly represented, Birdhi Chand was not mentally in a fit condition to form rational idea about his rights and interests in the ancestor and joint family properties. The document Exhibit-A/4 is a registered release deed executed by Birdhi Chand on 09.10.1958, wherein, he has 16 executed the said document in his own capacity and as guardian of his minor sons Gopal Lal, Om Prakash and Hem Chand in favour of his father Dhanna Lal and brothers Kishan Lal and Joravar Mal. It was indicated that he had received jewellery earlier and from the entire movable and immovable properties, he was receiving Rs.7,500/- cash and a shop of the value of Rs.1,500/- and rest of the entire property would belong to the father and the brothers and he and his heirs would have no relation with the same. He also indicated that he has no relation with the firm, Dhanna Lal and Kishan Lal and they alone were responsible and if any other business has been done. It was further indicated that

though he only had 1/5th share, the father has shown kindness and granted him 1/3rd share and was executing the said document. The document was signed by two witnesses Chandan Mal DW-10 and Udai Raj and was signed by Dhanna Lal, Kishan Lal and Joravar Mal as well. In the oral evidence led by the plaintiffs, statements were made indicating that Birdhi Chand was not in fit mental condition so as to execute the said release deed dated 09.10.1958 and, therefore, the same was void. Besides making vague allegations regarding the mental state of Birdhi Chand, no material was placed on record to support the said contention. A prescription (Exhibit-40) was produced, which pertained to the date 07.01.1959 and did not indicate anything, which could indicate any mental illness. Besides the above, it would be important to notice that the said Birdhi Chand had admittedly filed the suit (Exhibit-56) seeking cancellation of the document (Exhibit-A/4) 17 on 21.10.1959, he put in appearance as defendant No.3 by executing a Vakalatnama in the present suit, wherein, the plaintiffs themselves impleaded him party in his individual capacity and not only this, they impleaded their brother Hem Chand (minor) through Birdhi Lal, their father as defendant No.4. If case of the plaintiffs had any substance that Birdhi Chand was of unstable mind or was not mentally fit, they should have impleaded Birdhi Chand himself through next friend and/or their brother Hem Chand through next friend and not through Birdhi Chand. In the present appeal also Birdhi Chand has been impleaded in the same manner and has appeared by filing Vakalatnama and has also preferred cross-objections, which clearly goes to show that the plea raised regarding the unfit mental state of Birdhi Chand is absolutely bogus and baseless. As to whether the said release deed (Exhibit-A/4) executed by Birdhi Chand can be said to be unfair and prejudicial to the interests of the plaintiffs, as noticed hereinbefore. The only joint/ancestral property was the property succeeded by Dhanna Lal from Sukhram after execution of partition deed in the year 1924 between Dhanna Lal and Chauth Mal and house thereon was constructed by Dhanna Lal, as share thereof Birdhi Chand was given sum of Rs.9,000/- i.e. Rs.7,500/- cash and Rs.1,500/- by way of a shop, there is no specific evidence as to the valuation of the said property succeeded by Dhanna Lal, the plaintiffs have failed to lead any evidence in this regard and, therefore, it cannot be said that the release deed executed by Birdhi Chand was unfair and prejudicial to the interests of the minors. The allegations

regarding suppression of certain 18 properties and suppressing the true valuation of properties are equally baseless and without any substance. Besides the above fact, it was Birdhi Chand, who could have thrown light on the entire aspect, he has chosen not to appear in the witness box either as plaintiffs, witness or as defendant No.3. His non-appearance cast a shadow on the manner and entire purport of the litigation. The appearance of Birdhi Chand would have either proved or proved false, the contentions regarding his mental state and several other aspects relating to the jointness claimed by the plaintiffs as they were essentially claiming through Birdhi Chand, no reason was indicated for his non-appearance and, therefore, the entire filing of the suit by the sons of Birdhi Chand questioning the execution of the release deed dated 09.10.1958 and claiming the properties as joint appears to be not bona-fide. The third important aspect relates to the filing of suit by Birdhi Chand himself and its subsequent withdrawal and as to whether the plaintiffs would be bound by the said suit and/or the present suit would be barred by Order XXIII, Rule 1(3) CPC. It would be seen that after execution of the registered release deed (Exhibit-A/4), Birdhi Chand issued notice dated 22.08.1959 (Exhibit-A/131) and filed suit on 21.10.1959 (Exhibit-A/56) seeking cancellation of the release deed dated 09.10.1958 (Exhibit-A/4) and seeking partition of the properties, a Schedule whereof was annexed to the plaint. The said suit was withdrawn by Birdhi Chand vide Exhibit-A/6, which is an application filed by Birdhi Chand and other parties to the suit and was duly signed by Birdhi Chand, Joravar Mal, Dhanna Lal and 19 their counsel indicating that the parties do not want to continue with the suit and the same be dismissed as withdrawn. The application was filed on 01.09.1961 and the trial court vide Exhibit-A/26 dated 05.09.1961 dismissed the suit as withdrawn. So far as Birdhi Chand is concerned, he definitely could not bring another suit. In the suit filed by Birdhi Chand an objection was of course raised by the defendants therein that the sons were not impleaded as party, but admittedly the said children were minors at that point of time and the suit seeking to get away from the release deed and get a larger share by way of partition cannot be said to be merely for the individual benefit of the plaintiff Birdhi Chand. It would be seen that in a case of the present nature filed by Birdhi Chand, where the claim raised is regarding partition of the joint family property where if the property was joint, the plaintiffs herein also had share and,

therefore, it would be impossible to allow each member of the family to litigate same point over and over again and if each minor was to bring a suit after he becomes major and continue to litigate despite the fact that his father had filed the suit for partition, wherein, he either succeeded/failed/withdrew the suit, the same would result in a never ending process. If the father had succeeded in the suit filed in the year 1959, the same would have ensured for the benefit of the children and as he has failed/withdrew the suit for any reason, the minor should also take the consequence. In that view of the matter, the withdrawal of suit would not only bind Birdhi Chand, but the same would bind the appellants, who were minors at the relevant time and defendant No.4 Hem 20 Chand as well, who was also minor even at the time of filing of the present suit and the suit was, therefore, barred by principles of res judicata under Explanation-VI to Section 11 CPC and/or constructive res judicata, therefore, the trial court was justified in coming to the conclusion that the suit filed by the plaintiffs was barred. The rest of the issues in the suit were based on the three major aspects, which have been considered hereinbefore and as this Court has come to the conclusion that the properties were not joint, the released deed dated 09.10.1958 executed by Birdhi Chand was valid and not open to challenge and the suit was barred by res judicata on account of withdrawal of suit filed by Birdhi Chand unconditionally, the rest of the issues go into oblivion. So far as the decision on the issue of limitation is concerned, the finding of the trial court does not appear to be correct, as if the plea raised by the plaintiffs had been upheld that Birdhi Chand was not mentally fit while executing the release deed dated 09.10.1958, the filing of the suit by the plaintiffs on attaining majority could not be said to be barred by limitation. But then, having held on merits against the plaintiffs, the decision on the said issue loses its significance. Respondent No.3 Birdhi Chand and respondent No.4 Hem Chand have preferred cross-objections in the present appeal seeking setting aside of decree passed by the trial court and a decree in favour of the plaintiffs and have sought that the properties be partitioned among the parties including defendant Nos.3 and 4 or the case may be remanded for fresh inquiry and decision after affording defendant Nos.3 and 4 opportunity of leading evidence. It is interesting to notice that even in the cross-objection it has been claimed that Birdhi Chand was of unsound mind during the course of trial of the suit and, therefore, he could not

watch his interest in the suit and could not produce any evidence in the suit and as no guardian was appointed by the Court for said Birdhi Chand, all the proceedings were vitiated and were not binding. However, in this appeal as well, the said Birdhi Chand has duly executed Vakalatnama and his presence and filing of cross-objection has not been shown through next friend. The cross-objections and the plea raised therein give further credence to the entire concoction on part of the plaintiffs and Birdhi Chand regarding mental state of Birdhi Chand. As it has been found that the properties in the hands of Dhanna Lal, Kishan Lal and Joravar Mal were not joint, the cross-objections also have no substance. Besides the above, as noticed earlier, during pendency of this appeal, cross-objector - Birdhi Chand himself and parties Kishan Lal, his son Laxmi Narayan and Bhanwar Lal have died. However, legal representatives of none of the above have been brought on the record of cross-objection and, therefore, even otherwise they have abated. In view of what has been discussed above, there is no substance in the appeal and the cross-objections supporting the appellants, the same are, therefore, dismissed with costs. (ARUN BHANSALI), J.

A.K. Chouhan/

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