

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 494 – 495 OF 2016

RAKESH BHUSHAN PRASAD ALIAS
RAKESH PRASAD AND OTHERS APPELLANT(S)

VERSUS

RADHA DEVI (D) BY LRS. AND OTHERS RESPONDENT(S)

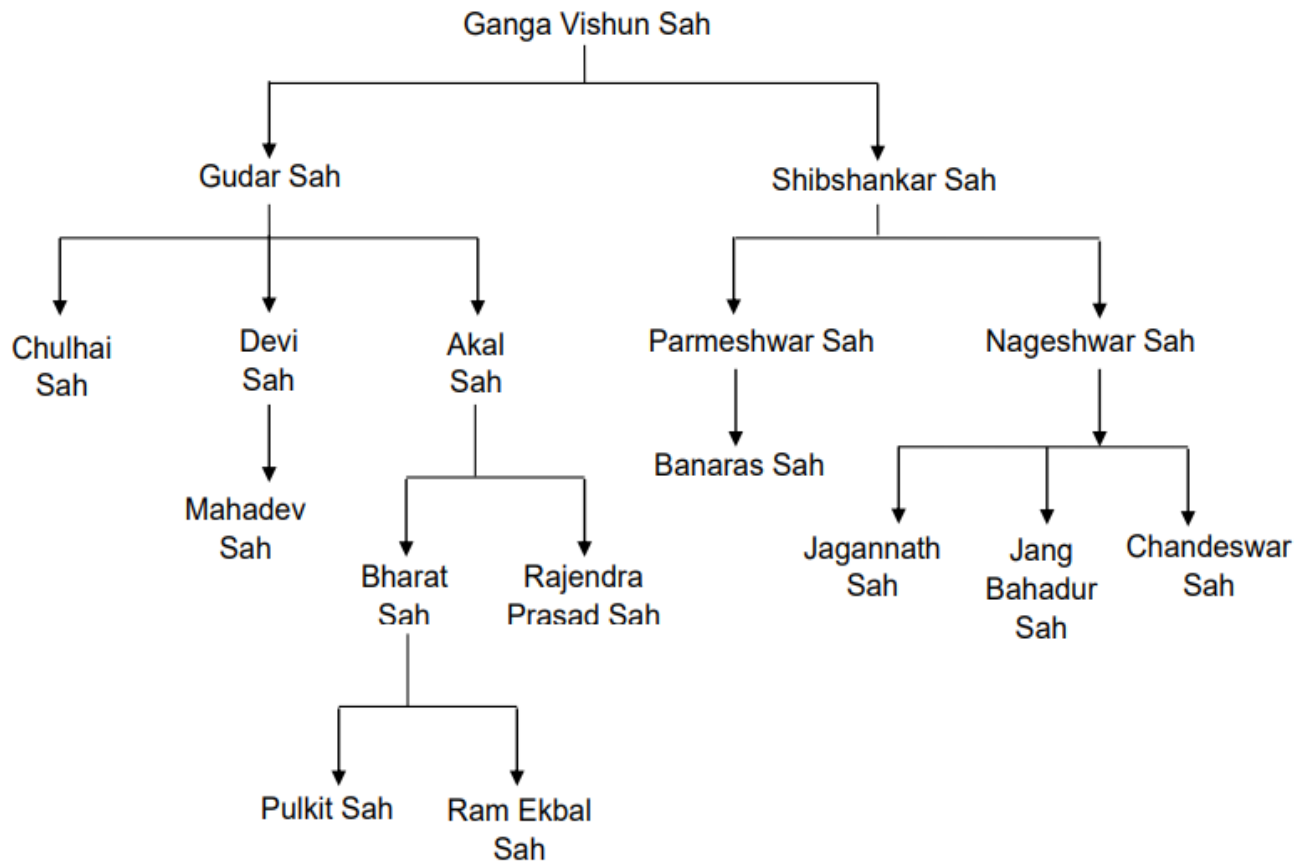
J U D G M E N T

SANJIV KHANNA, J.

On or about 5th August, 1967, Shri Banaras Sah (since deceased and now represented by his legal representatives), son of late Shri Parmeshwar Sah, acting for himself and as legal guardian of his six minor sons, had instituted Title Suit No. 73 of 1967 claiming ownership of 6 kathas in land bearing CSP No. 2353 (corresponding to RSP No. 4861) of village and police station Parihar, District Sitamarhi, Bihar, against Shri Krishna Kant Prasad. The plaintiffs had also inter alia prayed for a decree of delivery of possession in their favour by dispossessing Shri Krishna Kant Prasad and conversion of the disputed land in original state after

removal of any new construction over it. The appellants before us are legal representatives of since deceased Shri Krishna Kant Prasad, the first defendant before the trial court.

2. The plaint was amended from time to time. By a subsequent amendment, the second set of defendants, being the legal representatives/heirs of Devi Sah, Akal Sah and Nageshwar Sah, kin of the first plaintiff's father Parmeshwar Sah, were impleaded.
3. It will be apposite to mention the family structure of the Sah family for a better understanding of the facts in the present civil appeal. The Sah family headed by Ganga Vishun Sah had two sons: Gudar Sah and Shibshankar Sah. Gudar Sah had two sons, Devi Sah and Akal Sah, while Shibshankar Sah also had two sons, Parmeshwar Sah and Nageshwar Sah. Mahadev Sah was the son of Devi Sah and Bharat Sah and Rajendra Prasad Sah were sons of Akal Sah. Banaras Sah was the son of Parmeshwar Sah, and Nageshwar Sah had three sons: Jagannath Sah, Jag Bahadur Sah and Chandeshwar Sah. The genealogical table below is instructive and describes the relationship inter-se the plaintiffs and the second set of defendants:



4. For clarity, we would refer to the parties in the present appeal as per their description before the trial court. Accordingly, the appellants before this Court, i.e. legal representatives of late Shri Krishna Kant Prasad, have been referred to as defendant No.1; legal representatives of late Shri Banaras Sah, have been referred to as the plaintiffs. However, second set of defendants who were impleaded later, i.e. legal representatives/heirs of Devi Sah and Akal Sah (sons of Late Gudar Sah), have been referred to as Gudar Sah group and legal representatives of Nageshwar Sah (son of Shibshankar Sah) have been referred to as Nageshwar Sah group. It would be appropriate to recall that late Parmeshwar Sah and late

Nageshwar Sah were brothers, their father being late Shibshankar Sah. Late Gudar Sah and late Shibshankar Sah were also brothers, their father being late Ganga Vishun Sah.

5. The Sah family owned two sets of properties under Sirsia Gaddi and Sursand Gaddi.
6. We would begin by referring to both undisputed as well as disputed (to be resolved and adjudicated) facts. They are –

Late Krishna Kant Prasad was a doctor or a medical officer of Darbangah Raj Hospital. After resigning from the service, he had started his private practice at Parihar. The plaintiffs state that in 1950¹ they had permitted and allowed late Krishna Kant Prasad to occupy the suit land, free from all charges, including rent or licence fee. It is the case of late Krishna Kant Prasad that thereupon he had constructed a tile shed on the suit land for his family's abode. Late Krishna Kant Prasad also claimed that the original documents of the title were given to him. In return, late Krishna Kant Prasad had given medical treatment to the Sah family and others at Parihar. The plaintiffs, however, dispute this position and state that a *phoos* hut was already in existence when late Krishna Kant

¹ However, Late Krishna Kant Prasad claims that they had occupied the suit land in 1948.

Prasad was allowed to occupy the suit land and late Krishna Kant Prasad made no construction. The plaintiffs state that the *phoos* hut/house was earlier used by Sukhdeo Sah, son-in-law of Parmeshwar Sah (Shibsankar Sah's son), and he utilised it for running a *kirana* shop. The plaintiff's case is that Krishna Kant Prasad was permitted to use the suit land with the *phoos* hut without payment of rent or licence fee with a clear understanding that he would vacate the suit land when demanded and required by the plaintiffs.

7. Another set of facts may also be noticed –

Parmeshwar Sah, father of Banaras Sah (the first plaintiff), had expired in 1960. In 1960-61, Krishna Kant Prasad had started construction of the suit property. He had earlier on 3rd September, 1960 moved an application for mutation before Settlement Officer recording that he had acquired the rights in the suit land from Parmeshwar Sah, co-sharer of Akal Sah, and that he had been residing for more than twelve years after constructing his house on the suit land which he had received as a gift. This mutation application of Krishna Kant Prasad was allowed and we would be subsequently referring to these proceedings in some detail as they

are of relevance. Krishna Kant Prasad had also applied for a loan for construction in the suit property. It appears that the construction was substantially undertaken and completed on or before filing the suit, which was instituted on 5th of August 1967.

8. In 1967, the first plaintiff i.e., Banaras Sah instituted the title suit no. 73 in the court of Subordinate Judge, Sitamarhi. The trial court vide judgment and decree dated 31st May, 1986 dismissed the title suit of the plaintiffs primarily for the reason that the plaintiffs have failed to establish their title to the suit land and hence they were not entitled to evict Krishna Kant Prasad. The trial court observed that Bharat Sah, son of Akal Sah, belonging to the Gudar Sah group, was not impleaded as a plaintiff in the present suit. In fact, the trial court held that Gudar Sah group had the title over the suit land and hence, only they were entitled to evict Krishna Kant Prasad. Further, the trial court found the plaint was instituted beyond the limitation period.
9. The plaintiffs appealed against the trial court's decision before the Additional District Judge, Sitamarhi, who vide judgment and decree dated 7th December, 1988, allowed the appeal preferred and decreed the suit *inter alia* holding that the plaintiffs had subsisting right, title, interest over the suit land and, therefore, were entitled to

evict Krishna Kant Prasad. Summarily, the Additional District Judge relied upon the depositions of PWs, the written statement of Bharat Sah son of late Akal Sah in partition proceedings relating to the properties of Sah family in Partition Suit No. 35/1941, the order dated 11th November 1962 in proceedings under S. 103A of the Bihar Tenancy Act, 1885, preliminary decree and the final judgment in the Partition Suit No. 35/1941. These documents are revelatory in the present appeal and we would be referring to them as they were the basis for determination of title in favour of the plaintiffs, not only in Additional District Judge's court but later in the impugned order of the High Court as well.

10. The second appeal preferred by the legal heirs of Krishna Kant Prasad was dismissed by a single Judge of the High Court on 25th May, 1989, by a short order recording that the findings of facts observed by the first appellate court were final finding of facts and no substantial question of law arose. The legal heirs/representatives of Shri Krishna Kant Prasad thereupon preferred special leave to appeal before this court, which was granted, and allowed vide order dated 23rd February, 2000 observing that the High Court was not correct in dismissing the appeal *in limine* as there was a serious dispute concerning title of the land. Further, it observed that the trial court had dismissed the

suit and the High Court was hearing the second appeal against the judgment of reversal passed by the Additional District Judge. The case involved interpretation of various documents that had been tendered in evidence and hence, the question of law did arise for consideration. Thus, the case was remanded for de novo consideration by the High Court.

11. By the first impugned order dated 20th March, 2009, the single Judge of the High Court of Judicature at Patna, recording several findings and relying upon the mutation application dated 3rd September, 1960 and other similar evidence as the Additional District Judge, held that no substantial question of law arose and, therefore, the appeal should be dismissed under Order XLI Rule 11 of the Code of Civil Procedure, 1908 ('Code', for short). By the second impugned order dated 19th August, 2009, the application for review was dismissed by a single judge at the High Court of Judicature at Patna in Civil Review 115/2009.
12. The first appellate court and the High Court, on the question of title of the first plaintiffs, have held that in the year 1921 (1328 fasli) there was an oral partition between Gudar Sah group and Shibshankar Sah group in respect of Sirsia Gaddi properties and thereupon the suit land was allotted to the branch of late

Parmeshwar Sah, father of late Banaras Sah, the plaintiff who had instituted the suit on behalf of himself and his six minor sons against Krishna Kant Prasad. Further, the plaintiffs' ownership was accepted by late Krishna Kant Prasad himself in his application for mutation (Exhibit D/4) dated 3rd September, 1960 wherein he had stated that he had received the suit land from late Parmeshwar Sah. Bharat Sah, son of Akal Sah, belonging to Gudar Sah group, in his written statement filed in another Partition Suit No. 35 of 1941 before the Subordinate Judge, Darbahangah, had accepted that the suit land belonged to late Parmeshwar Sah. Support was garnered from the judgment and preliminary decree (Exhibit P-7 and P-6 respectively) dated 31st May, in Partition Suit No. 35 of 1941. The first appellate court and the High Court in the impugned orders have also referred to depositions of some witnesses produced by the plaintiffs. On these basis, the first appellate court and the High Court reasoned that the plaintiffs had title over the suit land.

13. The primary question that arises for consideration before us is whether the plaintiffs have established their title over the suit land and hence were entitled to a decree of possession against Krishna Kant Prasad since deceased and now represented by his legal representatives.

14. To avoid prolixity and to curtail the length of this judgment, we would avoid referring in detail to the arguments raised by the learned counsels for the parties before us. We would, however, not hesitate in observing that the plaintiffs in their arguments and the written submissions, before this court, have substantially accepted the case and the facts set up by the legal representatives/heirs of Krishna Kant Prasad.
15. There are two partitions between the two groups of the Sah family: one oral partition of 1921 and one decreed partition in Partition Suit No. 35 of 1941 before the Court of the 2nd Additional Subordinate Judge, Darbhanga. The private partition of 1921 (1328 fasli) pertains to only Sirsia properties and is an accepted and undisputed position. The 1921 partition resulted in the 2/3rd share of Sirsia Gaddi being allotted to the Gudar Shah group and the remaining 1/3rd share being allotted to the Shibsankar Sah group. However, the Sursand Gaddi properties were not the subject matter of the partition of 1921. The findings recorded by the first appellate court and the High Court do not dispute this position. Legal representatives/heirs of Krishna Kant Prasad has in support of the factual position rightly drawn our attention to the second partition in suit No. 35 of 1941 in which both the Gudar Sah and Shibshankar Sah groups had not challenged this earlier partition of 1921. The

partition suit No. 35 of 1941 was filed by Mahadev Sah, son of Devi Sah and grandson of Gudar Sah against other members of the Gudar Sah group seeking his personal share in Sirsia Gaddi properties allocated to Gudar Sah group in the partition in 1921 and against both Gudar Sah and Shibshankar Sah groups in respect of the Sursand Gaddi properties. Bharat Sah and Rajendra Prasad Sah, son of Akal Sah and grandson of Gudar Sah, were defendants Nos. 1 and 4 to the suit. Pulkit Sah and Ram Iqbal Sah, sons of Bharat Sah and grandson of Akal Sah, were defendant Nos. 2 and 3 to the suit. Parmeshwar Sah and Nageshwar Sah, belonging to the Shibshankar Sah group were defendants 5 and 7. Banaras Sah, son of Parmeshwar Sah, was defendant No.6. Jagannath Sah and Jang Bahadur Sah and Chandra Sah, sons of Nageshwar Sah were defendants 8, 9 and 10.

16. Therefore, the subject matter of this partition suit for Sirsia Gaddi properties was *inter se* Gudar Sah group and for Sursand Gaddi between Gudar Sah and Shibshankar Sah group as Sursand Gaddi properties were till then joint between the two groups.
17. The properties of Sirsia Gaddi which fell in the 2/3rd share of Gudar Sah group on partition in 1921(1328 Fs.) and in respect of which Mahadev Sah, son of Devi Sah, had sought partition from Gudar

Sah group in Suit No.35/1941 were specifically and categorically mentioned in the Schedule to the plaint. The relevant portion of Schedule-Ga detailing Sirsia Gaddi properties belonging to Gudar Sah group as attached to the plaint reads:

“Schedule (Ga)
Tafsil Jaedad ijmal badarmean mudai and Modaiah
Nos. 1 to 4 (Details of properties joint between Plaintiff
and Defendant Nos. 1 to 4)
Details of properties under item nos. 1 to 3 of schedule
'Ga'...

No.4	Jagarnath Sahu	
	Kumar Sahu	Sons of Ramdayal Sahu decd.
	Mawaji 4B: 14 K. 8 dh. Eraji – kast of Village Pariharpur Manas, Munsifi Sitamarhi	
	Kharidgi – bazaria – kebala – dated 3.12.17	
Khesar	486-501- 2353 -555-504-2537-2523-2630-2675	

Details of properties under item nos. 5 to 8 of
schedule 'Ga' ... and properties under schedule 'Ga/1'

....

Signed/- illegible
Muharrir

Sd/- illegible
Sheristedar”

18. As already stated above, the plaintiff in Suit no. 35/1941 (Mahadev Sah) and defendant No. 1 to 4 in the said suit belonged to Gudar Sah group: Mahadev Sah, son of Devi Sah being the plaintiff and the descendants of Akal Sah, namely, Bharat Sah, his two children, and Rajinder Prasad Sah, brother of Bharat Sah being defendant Nos. 1 to 4. A preliminary decree of partition in Suit No. 35 of 1941 passed on 31st May, 1948 referring to Schedule-Ga states that the acquisitions in it were made by Sirsia Gaddi. In his separate joint written statement, the Defendant No. 5, namely, Parmeshwar Sah,

son of Shibshankar Sah had supported and affirmed the partition/division in 1921(1328 Fs.) as pleaded in the plaint. He had subsequently not appeared to contest the proceedings at the time of the hearing and in his defence he did not raise any dispute as to the extent of shares of different co-sharers. Similarly, Nageshwar Sah, brother of Parmeshwar Sah and son of Shibshankar Sah, had too not contested the suit at the time of the hearing. Thereupon, the trial court while passing the preliminary decree had proceeded to record as under:

“Although there was a previous partition of the Sirsia properties between the descendants of Shibshankar Sah, on the one hand, and the descendants of Gudar Sah, on the other, in the year 1328 Fs. is the admitted case between the contesting parties, yet it is rather admitted that the descendants of Gudar Sah remained joint after that partition with respect to the remaining two-third share in these properties. The legal presumption of jointness, therefore, is not displaced as between the descendants of Gudar Sah. The defendant No.1, who pleads subsequent partition in the year 1329 Fs., therefore, will have to establish the alleged previous partition by adducing sufficient and satisfactory evidence, before he can not (sic) suit the plaintiff in this action for partition. The evidence, the circumstances and the probabilities all strongly lean against him and when their cumulative effect is concerned, which I will presently do, one would come to an irresistible conclusion that the plea of previous partition set up on behalf of the defendant No.1 is completely false.”

19. The trial court in partition suit No. 35 of 1941 had accepted the plea of oral partition in 1921 (1328 Fs.). A plea regarding another

partition after 1328 Fs. i.e., 1329 Fs. was taken by Bharat Sah, son of Akal Sah and brother of Mahadev Sah. However, the trial court in partition suit No. 35 of 1941 rejected the oral partition plea in 1329 Fs. stating that the parties had not adduce sufficient and satisfactory evidence to non-suit the plaintiff therein.

20. The final decree of partition in Suit No. 35/1941 subsequently passed on 11th September, 1971 has affirmed without any change and without accepting rights of the plaintiffs herein on the suit land contained in item No. 4 of Schedule-Ga.
21. Therefore, the plaintiffs were not owners of the property on the date they had filed the present suit for title and possession on 5th August, 1967.
22. Other documents relied on by the Appellate court and the High Court is the mutation application by Krishna Kant Prasad and the proceedings therein. In mutation proceedings before Settlement Officer in the year 1960, Krishna Kant Prasad had moved an application stating that his name be recorded in the revenue records in respect of the suit property. The settlement officer had recorded his statement that the house on the suit property was his, having received it from Parmeshwar Sah co-sharer of Akal Sah and was in his possession. Bharat Sah, belonging to the Gudar Sah group, had objected to the mutation stating that he had given the

house on rent to Krishna Kant Prasad. However, the claim of Bharat Sah was rejected recording that Bharat Sah was deliberately absenting himself and on examination of papers his claim had no merit. No doubt, that this order records that there was an oral partition and CSP No. 2353 came into possession of Shibshankar Sah, the father of Parmeshwar Sah and Nageshwar Sah, but this as noticed above is contrary to the findings recording by the trial court in the suit for partition No. 35 of 1941 vide preliminary decree of partition passed on 31st May, 1948 and the final decree of partition dated 11th September, 1971. When we have the primary undisputed documents on record, the content thereof would matter and should be accepted, and the wrong and mistaken observations in the secondary proceedings should be discarded. What is also of importance is the statement made by Sukhdeo Prasad, son in law of Parmeshwar Sah, who in the course of the mutation proceedings had stated that they had no claim whatsoever on the suit land. The order sheet also records that Krishna Kant Prasad had recorded statements of villagers who had affirmed the construction of house by Krishna Kant Prasad and that the construction had existed for about twelve years. The construction in the nature of the house, it was observed, would have been with the owner's consent, as no objection was received to it.

23. Reference at this stage must be made to another document relied upon by the two appellate courts i.e., Exhibit D/5 which is a record of proceeding instituted by Parmeshwar Sah against Krishna Kant Prasad under Section 103A of the Bihar Tenancy Act, 1885 in 1962. Notice on this application was issued and thereupon, appearance was entered on behalf of Krishna Kant Prasad. The application/case was dismissed because of the absence of Parmeshwar Sah on 24th October, 1962. However, subsequently the case was restored. Thereafter, Parmeshwar Sah again absented himself and on 11th November, 1962 his objections/case was dismissed. Thus, the mutation proceedings and the above discussed Exhibit D/5 do not help the plaintiffs' case in establishing their title on the suit land.
24. Interestingly, during the course of title suit proceedings before the trial court, Bharat Sah son of Late Akal Sah (Gudar Sah group) had filed an affidavit dated 17th January, 1968 accepting the case of Krishna Kant Prasad. Further, Rajinder Prasad, second son of Late Akal Sah, filed affidavit and deed of relinquishment (*Ladavi*) dated 19.9.1967 accepting/stating that the suit land was gifted to Krishna Kant Prasad. It is correct that these documents were post the institution of the suit by the plaintiffs and, therefore, may not be read as evidence for lack of the plaintiffs' title, *albeit* it indicates that

Gudar Sah group did not want eviction and dispossession of Krishna Kant Prasad.

25. Faced with the aforesaid situation, the plaintiffs had urged and argued that item No. 4 of Schedule-Ga is being misread and in fact gives the title to Jagannath Sah, son of Nageshwar Sah (of Shibshankar Sah group), defendant No. 8 in partition suit No. 35 of 1941. The contention is not only fallacious but misleading. The suit property became part of Sirsia Gaddi for the first time in 1917 when it was vended in the name of one Ramdayal Sahu, son of Ram Bhaju Sahu. This document marked Exhibit M records that the sale deed in the name of Ramdayal Sahu is executed in view of the amounts due and payable by the executant to Akal Sah, son of Gudar Sah. The position was also accepted by Jagannath Sahu, son of late Ram Dayal Sahu, who had appeared as PW-14. In his deposition, he had affirmed that the land in question was purchased in his father's name as he was *muneem* to Parmeshwar Sah. He had also deposed that the land belonged to Parmeshwar Sah, but as noticed above, the position was that the land was part of Sirsia Gaddi properties and not the personal land of Parmeshwar Sah. On oral partition in 1921(1328 Fs.) the suit land as per the Schedule-Ga had fallen in the share of Gudar Sah group. This is the admitted and accepted position of the Shibshankar Sah group.

26. Ram Dayal Sahu had two sons, Jagannath Sahu and Kumar Sahu, and this is clearly reflected and stated in the preliminary decree dated 31st May, 1948. Thus, the plaintiffs' contention that item No. 4 in Schedule-Ga actually refers to Jagannath Sah, son of Nageshwar Sah (Shibshankar Sah group), as the owner of the suit land is clearly a misstatement.
27. This brings us to the statement of witnesses recorded before the trial court. PWs 13, 14, 15, 16, 20, 22, 23, 24, 25, 26, 27 and 33 had supported the plaintiff's version that Parmeshwar Sah had constructed the *phoos* hut whereas DWs 6, 9, 10, 11, 12, 13, 14, 15 and 16 had testified that Krishna Kant Prasad constructed the tile shed. Referring in detail to the deposition of these witnesses would not help us determine and decide this controversy in light of the direct documentary evidence and admission by the parties in the suit for partition No. 35 of 1941 and in the course of mutation proceedings. We are not, therefore, referring to these testimonies in detail.
28. In view of the aforesaid discussion, we would allow the present appeals and set aside the judgment of the first appellate court affirmed by the High Court decreeing the plaintiffs' suit. We find that the judgment of the trial court dismissing the suit is correct.

Accordingly, we allow the present appeals and dismiss the Title Suit No. 73 of 1967. However, there would be no order as to costs.

.....J.
(A.M. KHANWILKAR)

.....J.
(SANJIV KHANNA)

**NEW DELHI;
SEPTEMBER 07, 2021.**