

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 215 OF 2002
WITH
CIVIL APPLICATION NO. 1645 OF 2005
WITH
CIVIL APPLICATION NO. 4549 OF 2016

Madanlal Nandlal Zawar - Deceased
through his legal heirs.

- A] Smt. Shriranga Madanlal Zawar,
Age 74 years, Occu. Household,
- B] Sau. Rajkamal Shrikant Kakani,
Age 54 years, Occu. Household,
- C] Shri. Sharadkumar Madanlal Zawar,
Age 51 years, Occu. Business,
- D] Shri. Gyankumar Madanlal Zawar,
Age 48 years, Occu. Business,
- E] Sau. Shamlata Prvinkumar Rathi,
Age 45 years, Occu. Household,

R/o. Rasoolpura, Secundrabad [A.P.]

**....Appellants.
(Ori. Defendants)**

Versus

- 1. Premsukh Ramdayal Zawar,
[Since deceased] through his
heirs and legal representatives
- 1A] Ramvilas Premsukh Zawar,
Age 75 years, Occu. Business,
R/o. Adate Bazar, Ahmednagar.
- 1B] Bhagirathibai Premsukh Zawar,
Deceased - through legal heir
respondent No. 1A.

2. Sharadkumar Madanlal Zawar,
Age 55 years, Occu. Trade,
3. Gyankumar Madanlal Zawar,
Age 50 years, Occu. Trade,

Both R/o. Adat Bazar, Ahmednagar.
4. Subhash Lalchand Jaju,
Age 55 years, Occu. Business,
R/o. Bhavani Peth, Satara.
5. Lalchand Asaram Jaju,
Deceased - Legal heirs.
- 5A] Dr. Kishor Lalchand Jaju,
Age 49 years, Occu. Doctor,
- 5B] Chandrakant Lalchand Jaju,
Age 45 years, Occu. Business,

Both R/o. Munot Bhavan, Near
Juna Post Office, Panvel,
Dist. Raigad.
- 5C] Sau. Vijaya Ramesh Bhambal,
Age 39 years, Occu. Household,
R/o. B/19, Priyadarshani Society,
Panchavati, Pashau Road,
Opp. Mantri Awanue, [NCL],
Pune.

**....Respondents.
(Ori. plaintiffs)**

Mr. A.S. Bajaj, Advocate for appellants.

Mr. R.R. Mantri h/f. Mr. R.B. Deshpande, Advocate for respondent
No. 1A.

CORAM : T.V. NALAWADE, J.
DATED : 3rd May, 2016.

JUDGMENT :

- 1) The appeal is filed against judgment and decree of

Special Civil Suit No. 130/1974, which was pending in the Court of Civil Judge, Senior Division, Ahmednagar and also against the judgment and decree of Regular Civil Appeal No. 35/2001, which was pending in the District Court, Ahmednagar. The suit filed by Premsukh for relief of partition and separate possession of his share from Joint Hindu Family properties is decreed in his favour. Both the sides are heard.

2) The facts, leading to the institution of the appeal, can be stated in brief as follows :-

One Ramdayal was the father of plaintiff. Nandlal was also son of Ramdayal and he was the father of defendant No. 1 - Madanlal. Defendant Nos. 2 and 3 are sons of defendant No. 1.

3) It is the case of plaintiff Premsukh that he and defendant No. 1 were doing business under the name and style as 'M/s. Ramdayal Nandlal' at Ahmednagar and this was the business of Joint Hindu Family consisting of plaintiff and Nandlal. It is contended that only for convenience, the partnership was formed, but from prior to the formation of this partnership they were doing the business though under different name. The particulars of the properties which were

owned by Ramdayal and which was subsequently acquired by these two brothers are given in the plaint. The properties include two godowns situated at Panjarapol and Idgah Maidan, one plot situated at market yard, Ahmednagar, Survey No. 128/B situated at Shevgaon, Survey No. 128/A situated at Shevgaon, House properties bearing House Nos. 1285, 1286 and 1287 situated at Ahmednagar, other movable properties of the firm and gold and cash amount. It was contended that plaintiff has 1/2 share in all the properties. As the partnership was formed, relief was claimed for dissolution of the firm and for its account. Except the relief of share claimed in 'Sharad Fertilizer', which was said to be branch of Ramdayal Nandlal Firm, the reliefs are given in respect of all the other properties by the Trial Court and this decision is confirmed by the First Appellate Court. The decision of dismissal of suit in respect of the property 'Sharad Fertilizer' was not challenged by Premsookh or his successors and so, that property is not involved in the present proceeding.

4) The plaintiff had given the particulars of previous business in the plaint by contending that in the past, the business was done in the name and style as 'Kanhaiyalal Ramchandra Shop', which was started during the lifetime of Ramdayal. It is the case of plaintiff that 1/3rd portion of Ginning

Mill property from Shevgaon was purchased in the name of Kanhaiyalal Ramchandra Shop and afterwards remaining 2/3rd portion was also purchased. Cause of action was given that the defendants were trying to grab the properties and they had withdrawn the amounts of the firm and they had opened separate accounts to deposit the amounts received for the firm. It was contended that after the death of Nandlal, defendant No. 1 was made partner in aforesaid firm on 16.4.1957 and this business was continued and the cause of action took place due to aforesaid conduct of defendant Nos. 1 and 2 in the year 1974.

5) Defendant No.1 filed written statement and he contested the suit. His son also contested the suit. Defendant No. 1 admitted his relationship with plaintiff, but he denied that the plaintiff has share in the suit properties. He contended that the suit was not within limitation.

6) The defendant admitted that partnership was formed by plaintiff and Nandlal under the name and style as 'Ramdayal Nandlal Firm', but he denied that it was Joint Hindu Family business and only for convenience, the partnership firm was created. He admits that in this partnership, the plaintiff has 1/2 share. He also admits that the property of Ginning Factory from

Shevgaon was property of Ramchandra Nandlal Firm. However, he has contended that 1/3rd portion of Survey No. 128 from Shevgaon was self-acquired property of his father Nandlal and so, plaintiff is not entitled to get share in that property. He contended that 2/3rd part of Survey No. 128/B with building and movables on it was the property of Ramdayal Nandlal Firm. Defendant No. 1 contended that 1/3rd portion of entire Survey No. 128 was purchased by Nandlal and remaining 2/3rd portion was purchased for Ramdayal Nandlal Firm.

7) Defendant No. 1 contended that house property No. 1285 was purchased by him from his separate income and it has nothing to do with the aforesaid partnership. However, he admits that in the past, this house was owned by the Joint Family of Ramdayal, Nandlal and Premsookh. He contended that the property was sold for making payments of debts taken for business by Joint Hindu Family and he purchased this property from his separate income. Defendant No. 1, however, admitted that house property 1286-87 is jointly owned by defendant No. 1 and plaintiff, but he contended that this property was purchased after separation and it was purchased by Ramdayal Nandlal Firm. He admitted that the plot from market yard belongs to the firm and two godowns from Panjarapol are taken on rent for running

business of this firm. He denied the allegation that withdrawal of the amounts was made from firm account to grab the properties by him.

8) Defendant No. 1 came with specific case that plaintiff and Nandlal had separated from each other from prior to year 1944. He contended that in the year 1944, some writing was done by plaintiff in favour of Nandlal to show that there was separation. He contended that due to partition and writing, the joint status had come to an end. He made allegation against plaintiff that plaintiff had withdrawn huge amount from the account of the firm and when his explanation was sought, he raised dispute and he filed the suit. He contended that the business of the firm was stopped long back. Alternatively, defendant No. 1 had contended that he had become owner due to adverse possession of 1/3rd portion of Survey No. 128-B, 1/3rd portion of 128/A-2 situated at Shevgaon and entire house property bearing House No. 1285.

9) On the basis of aforesaid pleadings, issues were framed by the Trial Court. Issue Nos. 10, 11 and 13 show that burden was cast on plaintiff to prove that (i) there was Joint Hindu Family of plaintiff and defendants, (ii) Municipal House No.

1285 was purchased from the income of Joint Hindu Family and (iii) House No. 1285 was thrown in the common hotch pot or blended with ancestral property. One issue was framed to show that the burden was on defendants to prove that the partition had taken place between Nandlal and plaintiff prior to 1944.

10) Both sides examined witnesses and they placed reliance on the documentary evidence. Much was argued in the Courts below and before this Court also for defendants on the basis of one document at Exh. 363 dated 25.10.1944. The Courts below have not read this document in evidence and it is observed that this document was marked as Exh. 363 only for the purpose of identification and the execution of this document and contents of this document were not duly proved. On the basis of this document, the defendants want to prove that there was a severance of status between plaintiff and Nandlal prior to 1944 and whatever property was purchased by them in their names subsequent to that year was self-acquired property. By making such contention, the defendants wanted to prove that the other properties belong to Ramdayal Nandlal Firm and it was strictly partnership business and it was not the business of Joint Hindu Family.

11) On the basis of oral and documentary evidence, the Courts below have held that the partition has not taken place. It is further held that except the property, 'Sharad Fertilizers', all the properties are Joint Hindu Family properties. So, the relief as claimed in respect of these properties is given by the Courts below. This Court admitted the appeal on 19.12.2002 by formulating following substantial questions of law.

(i) Whether the first appellate Court is justified in treating the document Exh. 363 as a document of partition which requires registration.

(ii) Whether the first appellate Court misconstrued the document Exh. 363 as a deed of relinquishment.

(iii) Whether the first appellate Court is justified in propounding a theory of relinquishment of share in the joint family properties on its own when, in fact, the document Exh. 363 does not at all spell out relinquishment of share in the joint family properties.

(iv) Whether the document Exh. 363 being more than 30 years old can be admitted in evidence and can be read in evidence.

(v) Whether the first appellate court is justified in discarding the document Exh. 363 even for collateral purpose.

(vi) Whether the first appellate Court is justified in rejecting the theory of previous partition by misinterpreting the statements of the witnesses with regard to joint residence and messing as admissions of the witnesses with regard to joint status.

(vii) Whether the findings recorded by the courts below suffer from perversity.

(viii) Whether the suit of partition is maintainable without joining branch of Ramkisan.

12) In the written statement, it was contended by defendant No. 1 that many years prior to 1944 partition had taken place between plaintiff and Nandlal. The rival pleadings do not show that the other sons of Ramdayal like Ramkishan were living in joint family with Nandlal and Ramdayal for relevant period. On the other hand, in the written statement, it is specifically admitted that plaintiff and Nandlal, only two brothers continued to live in Joint Hindu Family. Due to absence of specific pleading that other sons of Ramdayal were living in joint family at the relevant period and they are necessary parties to the suit, it cannot be said that the suit is bad for non joinder of the said issues of Ramdayal. The record is available of the property made by Ramdayal prior to year 1927 which is not disputed and on the

basis of that record, it can be said that only Ramdayal, Nandlal and Premsukh continued to live in Joint Hindu Family. Further, the oral evidence on record shows that Ramkishan, one son of Ramdayal died in the year 1924. In view of these circumstances, the said point need not be considered in the present matter and the substantial question of law formulated in this regard was not necessary.

13) In addition to aforesaid substantial questions of law formulated by this Court, the learned counsel for appellants argued on one more point. He submitted that plaintiff - Premsukh did not make available himself for cross examination when his evidence of examination in chief was recorded and due to this circumstance, adverse inference needs to be drawn against the plaintiff in respect of document at Exh. 363 and also the other defences raised by the defendants. The record shows that Ramvilas, son of plaintiff, gave evidence by contending that Premsukh had become aged and he was not fit to give evidence. It appears that examination in chief was recorded and after that, no progress was made in the case for about five years. It can be said that the defence wanted to confront Exh. 363 to Premsukh and so, defence wanted to cross examine Premsukh. Sufficient discussion about the admissibility of Exh. 363 in evidence is

made at proper place. At this place, for the present purpose, this Court observes that even the adverse inference which could have been drawn in respect of Exh. 363 could not have made change in the decision of the matter. There are many circumstances which are not consistent with the contents of Exh. 363. However, the contents are also not proved. On this point, some reported cases were cited by the learned counsel for appellants like **AIR 1968 SUPREME COURT 1413 [Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif and Ors.]** and **(2010) 10 Supreme Court Cases 512 [Man Kaur (Dead) by L.Rs. Vs. Hartar Singh Sangha]**. These cases are in respect of the provision of sections 103 and 114 (g) of the Evidence Act. There is no dispute over the propositions made in the two reported cases, but the facts and circumstances of each and every case are always different.

14) On merits, it can be said that there is voluminous oral and documentary evidence to prove that plaintiff - Premsukh and Nandlal were living in joint family with Ramdayal and even after the death of Ramdayal, they continued to live in Joint Hindu Family. The oral evidence from the side of plaintiff is given to show that there was a joint family and joint family was doing the business firstly in the name of Kanhaiyalal

Ramchandra Shop and then in partnership. The evidence is given as follows :-

(i) Ramvilas, son of Premsukh was aged about 45 years when he gave evidence in 1979. He has given evidence on the basis of some personal knowledge and on the basis of information which was collected from his father Premsukh. His evidence that Ramdayal, father of Premsukh and Nandlal died in the year 1944 is not disputed. His evidence that Nandlal was elder brother of plaintiff and Nandlal died in the year 1957 is also not disputed. Nandlal never contended before anybody that plaintiff had separated from him and the Joint Hindu Family had come to an end.

(ii) Ramvilas has given evidence that Ramdayal and his two sons were living together in Joint Hindu Family in house No. 1285. He has given evidence that this house was purchased by Ramdayal for use of Joint Hindu Family prior to 1927 and in this house, the Joint Hindu Family was doing business in the name and style as Kanhaiyalal Ramchandra Shop. This evidence given by Ramvilas is not disputed.

(iii) Ramvilas has given evidence that for payment of loan taken for the business of Kanhaiyalal Ramchandra Shop, a sham sale deed was executed in respect of house No. 1285 and it was a conditional sale transaction. He has given evidence that though the document was executed, the possession remained with the family. He has given evidence that the market value was around Rs. 30,000/-, but it was shown to be sold for Rs. 20,000/- and actual amount of only Rs. 15,000/- was paid by the purchaser. He has deposed that the purchaser had agreed to pay Rs. 5,000/- to a third party, to whom the vendor was indebted. Such amount was not paid by the purchaser to said third party. The fact that the possession was not given to the purchaser is not disputed and that can be seen in the title of the document and also other document like lease deed executed in favour of Ramdayal, Premsukh, Nandlal and others. Ramvilas has given evidence that though the lease document was executed, rent was never paid to purchaser as it was not real transaction. Defendants have not disputed that the amount of Rs. 15,000/- was only paid by the purchaser and to the third party, nothing was paid by the purchaser.

(v) Ramvilas has deposed that initially business was done by Joint Hindu Family in the name of Kanhaiyalal Ramchandra Shop and this business was continued till the year 1945. He has deposed that after the death of Ramdayal, the business was started by Premsukh and Nandlal in the name of Firm Ramdayal Nandlal and the business was started even before the registration of partnership firm. It is not disputed that this partnership started business in the house viz. house No. 1285.

(vi) Ramvilas has given evidence that the families of Nandlal and Premsukh were joint in residence, food, worship and business. He has deposed that they continued to live in the same house during the lifetime of Nandlal and also for some more time till the dispute started. He has given evidence that after the death of Nandlal, in the year 1957 defendant No. 1, son of Nandlal was made partner in Ramdayal Nandlal Firm and they continued this business of Joint Hindu Family. He has given evidence that they were living together in house No. 1285 till 1972 and only from

1972, Premsukh started living separate in house No. 1286-87. There is admission of defendant No. 1 in the evidence that family of Premsukh was living with his family in house No. 1285 though he has tried to contend that after separation, Premsukh had again returned to Nandlal and then he started living there.

(vii) Ramvilas has given evidence that the expenses of the Joint Hindu Family were born by Ramdayal Nandlal Firm and the payments were made for the expenditure from the account of this firm. There is the record in support of this oral evidence which is being discussed at proper place. Defendant No. 1 has not specifically rebutted this part of evidence.

(viii) Ramvilas has given evidence that the joint family was doing the business of Insurance also and they had work of Insurance Companies like New Asiatic Insurance Company, Nubi General Insurance Company, Kaiser Hinga Insurance Company and Skandia Insurance Company. He has deposed that he had worked for Skandia Insurance Company and he had insured the assets of Ginning Mill from Shevgaon by

purchasing policy of this Insurance Company. He has given evidence that the persons, who were working for the different Insurance Companies, were working for Joint Hindu Family and the income was spent for the Joint Hindu Family.

(ix) Ramvilas has given evidence that house No. 1285 was repurchased by Joint Hindu Family in the year 1924 though the transaction was made in the name of defendant No. 1. He has given evidence that the property was not purchased in the name of shop as they were indebted. He has given evidence that the market value of this house in the year 1944 was more than Rs. 50,000/-. He has deposed that the consideration of Rs. 18,500/- was shown, as the amount of Rs. 15,000/- was given by the vendor to the joint family in the past and the interest of Rs. 3500/- was to be paid on this amount. He has given evidence that to make payment of Rs. 15,000/-, there was the amount with joint family like the amount of Rs. 3,000/- given by firm Ramnath Giridharlal Rathi, Rs. 7,000/- given by Trilokchand Hukumchand and Rs. 8,000/- received from agriculturists and there was some

amount collected by selling joint family gold ornaments.

(x) Ramvilas has given evidence that house tax in respect of house Nos. 1285, 1286-87 was paid by Ramdayal Nandlal Firm and the cheques were also issued from the account opened by this firm in Sangli Bank for making payment of the tax. Defendant No. 1 has admitted that on few occasions, the tax was paid by the firm by giving cheques, but he has tried to contend that from his share in the profit, the amount was paid as per his direction.

(xi) Ramvilas has deposed that Ramdayal Nandlal Firm had taken loan from a Bank of Ahmednagar by giving security of house Nos. 1285, 1286-87 and also the property Balaji Ginning Factory. This fact is not disputed.

(xii) Ramvilas has deposed that suits were filed for recovery of dues and for enforcing the rights of previous shop Kanhaiyalal Ramchandra by plaintiff and Nandlal even after the year 1940. The record in this

regard is produced.

(xiii) Ramvilas has deposed that house No. 1286-87 was purchased from the funds of shop Kanhaiyalal Ramchandra though the possession was given to joint family in the year 1948. He has given evidence that the joint family made construction of two storied building on house No. 1286-87 during the year 1950-1952. He has given evidence that joint family had connected the two buildings present on house No. 1286 (one building) and 1286-1287 (one building) by connecting galleries and by opening the entrances in the walls of the two houses. He has given evidence that some portion of house No. 1285 was given on rent to Sangli Bank, but the rent was deposited in the account of Ramdayal Nandlal Firm.

(xiv) Ramvilas has deposed that in the year 1928, 1/3rd portion of Ginning Factory from Shevgaon was purchased by Kanhaiyalal Ramchandra Shop and along with this share in the factory, share in the land Survey No. 128 was purchased for the joint family and one Bansilal remained as owner of remaining 2/3rd

portion. Evidence is given that though the name of Nandlal was given for running the business of the said Ginning Mill, it was the business of Joint Hindu Family. He has given evidence that subsequently, the remaining portion, 2/3rd share of Bansilal was also purchased by Joint Hindu Family. He has given evidence that some portion of land was given to Bhudan Movement and some portion was converted to non agricultural use and so, Survey No. 128 was divided in to Pot-Hissas.

(xv) Ramvilas has given evidence that one Kanhaiyalal Mundada (witness examined by plaintiff) was Clerk of Ramdayal Nandlal Firm and he had written some accounts of the firm. This fact is not disputed by defendants.

(xvi) Ramvilas has given evidence that as Nandlal was elder, he was supervising the business till his death and after that Premsukh started acting as a Karta of Joint Hindu Family.

(xvii) Ramvilas has deposed that in the year

1931, the aforesaid 2/3rd portion, share in the Ginning Mill was mortgaged to raise the loan for the business of Kanhaiyalal Ramchandra Shop. He has deposed that this mortgage was redeemed in the year 1946 by making payment of the loan from the business of Ramdayal Nandlal Firm.

(xviii) Ramvilas has deposed that after the death of Nandlal, information was given to banks for operating account by all the members of Joint Hindu Family and it was informed that they were coparceners and Premsukh was their Karta.

15) In support of the case, plaintiff has examined one witness Harikishan Dhut (PW 3). This witness has given evidence that he was doing business with Kanhaiyalal Ramchandra Shop and then he did business with Ramdayal Nandlal Firm. He has deposed that he was selling the goods like agricultural produce to the Adat Firm of plaintiff and defendants and he had seen that Premsukh, Nandlal and defendant No. 1 - Madanlal were doing the business for Joint Hindu Family. He has given evidence that they were joint in food, residence, worship and business. Though this witness has no record in respect of aforesaid transactions,

his evidence and the tenor of cross examination show that defendants are not disputing that this person had contact with this family. He was aged about 68 years on the date of deposition, in the year 1981. Another witness Nemichand, examined by plaintiff, is also businessman and dealing in grains and cotton. He has deposed that he had seen that plaintiff and defendants were doing the business of Joint Hindu Family from 1954 to 1969. Witness Babulal, examined by plaintiff, has given similar evidence. He has given evidence that initially the business was run in the house No. 1285 and then it was run in the house No. 1286-87. He has given evidence that initially name of business was Kanhaiyalal Ramchandra Shop and then the name was changed to make it as Ramdayal Nandlal Firm. These witnesses are believed by the Courts below.

16) Witness Lalchand, examined by plaintiff, is brother in law of defendant No. 1. He has supported the case of plaintiff. His evidence shows that he had married with daughter of Nandlal in the year 1939. He has deposed that he had seen that plaintiff and Nandlal were living in Joint Hindu Family and they were doing the business of Joint Hindu Family together. He has denied that his relation with defendant No. 1 is not good and so, he is deposing falsely. This witness is also believed by the Courts

below.

17) The other important witness of plaintiff is Kanhaiyalal, Clerk of Ramdayal Nandlal Firm. He has deposed that he joined this business in the year 1955 as an employee and he had seen that plaintiff and defendants were living in Joint Hindu Family. He has given evidence that they were joint in food and business. Some record of firm Ramdayal Nandlal is proved in his evidence as Exh. 244. The evidence of defendant does not show that he is disputing that this witness was working atleast for some time for Firm Ramdayal Nandlal.

18) In rebuttal, defendant No. 1 - Madanlal has given evidence as follows :-

(i) In Diwali of 1937, three sons of Ramdayal viz. Laxminarayan, Tarachand and Premsukh separated from Joint Hindu Family and they shifted to Jalna. There is no such specific pleading in the written statement. Nothing is said even in the evidence by Madanlal as to whether and what property was given to them by Ramdayal. However, his evidence shows that the business of Kanhaiyalal Ramchandra Shop was still continued at Ahmednagar. No record is produced in

respect of separation of these three brothers from the joint family and when witnesses from other branch could have been examined, they are not examined in defence. Nandlal was alive in the year 1937 and no explanation is given as to why writing was obtained only from Premsukh and that too in the year 1944. Thus, there is no consistency in the pleading and in the evidence.

(ii) Madanlal has given evidence that he was freedom fighter and he was kept in jail in freedom struggle on many occasions. He has given evidence that he worked as organizer with New Asiatic Insurance Company and he was getting handsome salary from the said job. No record of income or payments made for any reason by this company is produced though appointment letter is produced.

(iii) Madanlal has given evidence that he purchased house No. 1285 for consideration of Rs. 18,500/-, but actual amount paid to the vendor was Rs. 10,000/-. He has given evidence that the remaining amount of Rs. 8,500/- was to be paid to one

Vyankatraman Eknath, who had charge on the property. His evidence shows that he has no record to show that he had made the payments of remaining amount to anybody. He has given evidence that he had done some savings from the income of aforesaid job and from that income, he had paid consideration to vendor. It is already observed that there is no record whatsoever with the defendant No. 1 in respect of his separate income. No explanation is given as to why the property was only sold for Rs. 10,000/- when in the year 1927 the said property was sold for consideration of Rs. 20,000/-. Thus, the case of the plaintiff appears to be more probable in this regard. Further, there was litigation between the vendor and the members of the Joint Hindu Family which was filed for recovery of arrears of rent and recovery of possession. This circumstance speaks loud about the defence taken in the present matter. There is no rent receipt with the defendant No. 1. On one hand, he tried to say that he could not pay the rent for many months and on the other hand, he tried to prove that from his separate income, he paid the consideration of Rs. 10,000/-.

(iv) Defendant No. 1 has deposed that he had given some portion of house No. 1285 on rent basis to Sangli Bank and to Sarvodaya Industries. Suggestion was given that wife of defendant No. 1 was involved in Sarvodaya Industries. No record of Sarvodaya Industries is produced even like payment of rent. Similarly, defendant No. 1 admitted that he had no separate account in any bank and there was only one account in the name of Ramdayal Nandlal Firm and it was used by all of them. There is no record to show that the rent from Sangli Bank was paid only to defendant No. 1 and he had used that amount for himself.

(v) Defendant No. 1 has deposed that he had shown house No. 1285 as separate property when he applied for security for Hundi to District Urban Central Cooperative Bank, Ahmednagar. This contention has no support of record. On the contrary, if he had no separate business, there was no question of seeking such cash credit for Hundi from the bank. The record shows that the cash credit was obtained for the business and it was the business of Ramdayal Nandlal

Firm.

19) Defendant No. 1 has admitted following facts :-

(i) Ramdayal, father of plaintiff and Nandlal died in the year 1944.

(ii) Ramdayal was living in joint family with Premsukh and Nandlal in house No. 1285 and there, they were running the business of Kanhaiyalal Ramchandra Shop.

(iii) It is Ramdayal, who had purchased the house No. 1285 for the business of Joint Hindu Family and the business, which they were doing at other place, was shifted to this house after purchasing the house.

(iv) For repayment of loan of Kanhaiyalal Ramchandra Shop, house No. 1285 was sold to one Ramnarayan by all the members of family, but the possession was kept with Ramdayal and his sons though separate lease document was prepared.

(v) In some portion of house No. 1285 the business of Ramdayal Nandlal Firm was started. No rent was taken from Ramdayal Nandlal Firm and no separate charge in respect of anything like electricity connection or telephonic connection were taken from this firm. Telephone connection standing in the name of defendant No. 1 was used by this firm.

(vi) There was the litigation in respect of house property No. 1286-87 and in that litigation, even in the year 1945, plaintiff - Premsukh was party. This circumstance is not consistent with the case that Premsukh had given up everything and he had separated from the joint family.

(vii) Nandlal and Premsukh had made construction over the house No. 1286-87, which was two storied building and this building was connected to building standing on house No. 1285 by connecting galleries and by opening doors in the walls of two buildings.

(viii) Premsukh and Nandlal had started business

in partnership in the year 1947 though the partnership document was written in 1948-49. Thus, he admits that even prior to the registration of the firm, they were doing business in the said name. There is the record produced in this regard which is pre-1947.

(ix) Defendant No. 1 has admitted in his evidence that he had signed on the application given to Central Bank after the death of Nandlal. Though he has contended that his signatures were obtained on blank forms and papers by Premsukh, signatures are made not only by him, but others also and this form shows that it was informed that they were living in Joint Hindu Family and they were coparceners.

(x) Defendant No. 1 has admitted in his evidence that Ramvilas, son of plaintiff was receiving education in a school from Ahmednagar from the year 1940 onwards. First he tried to say that Ramvilas stayed in the house of his grandmother and then in one hostel of which defendant No. 1 was Secretary, but he could not produce relevant record in that regard. There is clear probability that son of Premsukh was living in

house No. 1285 itself when he was attending school during all these years starting from 1940.

(xi) Defendant No. 1 has admitted that the lease document in respect of house No. 1285 was signed by all the members of joint family when the property was sold. He also admits that the suit was filed by the vendor for recovery of possession and arrears of rent against all these members.

(xii) Defendant No. 1 has admitted in his evidence that Ramdayal had filed a suit for Kanhaiyalal Ramchandra Shop in the year 1943. He avoided to admit that the litigation was prosecuted by Premsukh and Nandlal after the death of Ramdayal, but the copies of that record are produced.

(xiii) Defendant No. 1 has admitted that 1/3rd share of Ginning Factory from Shevgaon, share in the agricultural land was purchased in the name of Nandlal, but it was the property of Kanhaiyalal Ramchandra Shop.

(xiv) Defendant No. 1 has admitted that Ramvilas was working for one Insurance Company and even Sharad was working for one Insurance Company. He avoided to admit that even Nandlal was working for one Insurance Company. This evidence came only after the evidence of Ramvilas that all the members were doing such work for joint family.

(xv) Defendant No. 1 has admitted that from the year 1957, they were joint in mess etc. with Premsukh, though he has tried to deny that prior to that they were members of Joint Hindu Family. He has given all evasive answers even in respect of hand writing of Nandlal, hand writing of employees of the Firm Ramdayal Nandlal.

(xvi) Defendant No. 1 admitted that 1/3rd share of Ginning Factory from Shevgaon was purchased for Joint Hindu Family, but he tried to say that this property fell to the share of Nandlal in the family partition which took place in 1937. There is no such record and even Exh. 363 does not make any mention about any property.

(xvii) Defendant No. 1 has admitted that house tax of houses were paid by Ramdayal Nandlal Firm.

19) Witness Rupchand, examined by defendant has given evidence that defendant No. 1 was doing the Insurance business. It is already observed that there is no record available to show that any amount was paid by the Insurance Company to defendant No. 1. Such record could have been produced and atleast the account from bank of defendant No. 1 could have been produced to show that the amounts received from the Insurance Company by cheque were deposited in the bank account. This witness has replied that he has no idea of income which defendant No. 1 was making from that business. On the other hand, this witness has given vital admission in his cross examination by saying that the defendants and plaintiff were joint in meals from the year 1939 to 1969 to his knowledge.

20) Witness Kanhaiyalal examined by defendant has given evidence that he saw plaintiff first time in the year 1947 and at that time, plaintiff had returned from Marathwada. He has tried to say that from the year 1947, plaintiff started living with the family and Nandlal. This evidence is not sufficient to prove

that prior to that there was separation between plaintiff and Nandlal. His evidence in cross examination shows that he had never seen Ramvilas and he saw Ramvilas first time in the Court in 1947. If he was regularly visiting house No. 1285, the house of family, he could have easily noticed Ramvilas in this family. This circumstance shows that he has no personal knowledge about this family.

21) Defendant No. 2 is also examined in defence. He was aged about 39 years in the year 1984. He has given evidence that he had seen that since his childhood plaintiff and defendant No.1 were living separate. This evidence is not consistent with the other evidence already discussed. Even defendant No. 1 has admitted that plaintiff was living with him since the year 1947 in house No. 1285.

22) In support of the case of plaintiff, there are many documents which falsify the defence taken by defendant No. 1. At Exh. 214, there is document of purchase of 1/3rd share in Ginning Mill property of Shevgaon in the year 1929 and it shows that it was purchased for Kanhaiyalal Ramchandra Shop. At Exhs. 216, 218 and 219, there is the record of correspondence made with Central Bank and there are also forms. They show

that after the death of Nandlal, it was informed to bank by all the adult coparceners of this family like Premsukh, Madanlal, Ramvilas that Premsukh was acting as a Karta of the coparcenery. These forms were signed on 15.7.1957. They had given information that they were doing the business of Ramdayal Nandlal Firm and it was informed that it was business of coparcenery.

23) At Exh. 268, there is a copy of plaint of suit filed on 2.11.1930 against Premsukh, Ramdayal and Nandlal for recovery of possession of house No. 1285 and for recovery of arrears of rent. Premsukh, plaintiff had appeared in the suit and that can be seen from the decree. At Exh. 370 and 371, there is the record of two suits and appeals filed against the decision of two suits. In Suit No. 553/1943, Kanhaiyalal Ramchandra Shop was the plaintiff and for it, the suit was filed by Nandlal and Premsukh. It was filed in respect of property No. 1286-87. The suit was decreed in favour of this shop and Appeal bearing R.C.A.No. 136/1946 was dismissed on 8.11.1946. R.C.S. No. 333/1943 was filed against Kanhaiyalal Ramchandra Shop and the shop was represented by Nandlal and Premsukh. This was again in respect of share in the house No. 1286-87. Thus, Premsukh, plaintiff was still there and these circumstances are

against the contents of document at Exh. 363.

24) At Exhs. 169 to 179, there is record of ration cards. This record shows that after the death of Nandlal, the name of Premsukh, plaintiff was informed to the authority that he was Karta of Joint Hindu Family and each adult member of the Joint Hindu Family had signed the form in that regard. At Exhs. 181 to 187, there are bills of electricity meter bearing customer No.20-2-1957. The bills were in respect of house No. 1286-87 and customer's name was shown as 'Nandlal Ramdayal'. Thus, the elder member of their family viz. Nandlal was shown as customer and after Nandlal, name of Premsukh was given by the family as Karta.

25) After considering the aforesaid oral and documentary evidence, it can be said that not much remains in the case of defendant No. 1 that document at Exh. 363 is sufficient to prove that there was severance of status. This document and the contentions can be considered from other angles also. The document, Exh. 363, is bearing the date and it is admitted that it was produced in the Court by defendant No. 1 after the expiry of 30 years from the date of the document. Only defendant No. 1 has given evidence for proving of execution of this document

and it is as follows :-

"I see Exh. 84/A.13. It is the hand writing of plaintiff and made signature which I know."

Aforesaid document was purportedly made in favour of Nandlal and not in favour of defendant No. 1. Thus, there was no question of getting personal knowledge by defendant No. 1 in respect of this document unless there was something concrete in that regard. In view of the aforesaid nature of evidence, the Trial court did not give exhibit to the document even after giving the aforesaid evidence by defendant No. 1. This approach of the Court shows that Court was not accepting that due execution of document was proved. In view of these circumstances, there was no question of admitting this document or reading the contents of the document in evidence. In the evidence, defendant No. 1 has tried to say that the attesting witnesses signed on this document in his presence. No evidence is given that plaintiff had signed on this document in his presence and so, there was no question of proving of execution of the document on the basis of aforesaid evidence. No attempt was made to call the attesting witnesses to prove the execution.

26) The learned counsel for appellants tried to use section 90 of the Evidence Act in support of his submissions.

Section 90 of the Evidence Act runs as under :-

"90. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This Explanation applies also to section 81"

The aforesaid provision shows that discretion is given to the Court by using words 'may presume' to presume due execution or due attesting of such document. If there are suspicious circumstances, Court can refuse to raise presumption available under section 90. In the present matter, the Trial Court refused

to raise such presumption by giving reasons that this document was never used by Nandlal or even by defendant No. 1 for any purpose prior to its production in the Court. The Courts below have observed that there is convincing record to rebut the presumption which could have been raised in view of section 90 in respect of Exh. 363. This Court has already quoted the material showing that the family continued to remain joint in all respects and this record is considered by the Courts below also. When the finding of the Court is about proof of execution and section 90 needs to be used for the proof of execution, it becomes purely matter of discretion and the Appellate Court is not expected to interfere lightly in finding given by the Trial Court in such circumstances. The scope of this Court in Second Appeal is further reduced. For this reason, this Court is not expected to interfere in the findings given by the Courts below in respect of proof of execution and admissibility of Exh. 363 in evidence.

27) The proof of execution cannot lead to inference that the contents are correct. Whether such document could have been considered for proof of execution is other question. The proof of execution of Exh. 363 could not have been allowed in the Court for other reasons also. The contents of this document

purport relinquishment of right in coparcenary property, which is immovable property. Though there was admittedly some charge on the property like house No. 1285 or even on the share in the property from Shevgaon, there was the other property like share in house No. 1286-87 purchased under the registered document. There was big agricultural land at Shevgaon. As per the provisions of Transfer of Property Act and the provisions of Indian Registration Act, such document ought to have been registered. It was necessary to pay the stamp duty also, if due to this document plaintiff was to relinquish his rights in immovable property. For this reason even for collateral purpose the document could not have been used and proof of execution could not have been allowed. The provisions of not only Indian Registration Act, but also the other Act like Stamp Act would have proved to be obstacle.

28) The learned counsel for respondent placed reliance on the reported cases to challenge the admissibility of Exh. 363 in evidence. They are as follows :-

(i) 2015 ALL SCR 3388 [Yellapu Uma Mahesgwari & Ors. Vs. Budda Jagadheeswararao & Ors.],

(ii) 2015 (5) ALL MR 656 [Jagannath s/o. Balaji Zagare & Ors. Vs. Kisan Balaji Zagare (D) thr. L.Rs. & Ors.].

The Apex Court has laid down that document showing relinquishment of right in respect of immovable property is compulsory registrable and if not registered, it cannot be relied upon to prove the factum of partition. It is observed that it cannot be relied upon even for collateral purpose unless the same is impounded. The provisions of sections 17 (i) (b) and section 49 of Indian Registration Act, 1908 and the relevant provisions of Stamp Act are considered and discussed by the Apex Court for making such observations. Similar observations are made by the Bombay High Court.

29) The learned counsel for appellants, on the other hand, placed reliance on the case reported as **AIR 1968 SUPREME COURT 1299 [Siromani Vs. Hemkumar and Ors.]**. The Apex Court referred the provision of section 17 (1) of Registration Act and held that even if the document of partition cannot be used for proof of partition if it is not registered it can be used for proving that there was intention of coparcenery to become divided in status. There is no dispute over this proposition. The facts of the present matter are altogether different. One more case reported as **AIR 1968 SUPREME COURT 1018 [Puttangamma and ors. Vs. Ranganna and**

ors.] was cited on this point. This case is also of no help to the appellants. The facts of the present matter are totally different.

30) The learned counsel for appellants submitted that if there was severance of status, the burden was on plaintiff to prove that there was reunion. On this point, he placed reliance on the case of **Puttangamma** cited supra and **AIR 1952 SUPREME COURT 72 [Bhagwati Prasad Sah and Ors. Vs. Dulhin Rameshwari Kuer and Anr.]**. There is no dispute over the proposition made by the Apex Court in these cases. The facts of the present matter are totally different and there is sufficient material to infer that the joint family continued to remain joint and only in the year 1972 plaintiff started living separate from the family of defendants. The learned counsel for appellants placed reliance on some more cases which are as under :-

(i) **AIR 1980 SUPREME COURT 1173 (1) [Kalyani (dead) by L.Rs. Vs. narayanan and Ors.]**,

(ii) **AIR 1960 BOMBAY 159 (V 47 C 48) [Gulabrao Fakirrao Vs. Baburao Fakirrao and Anr.]**,

(iii) **AIR 2003 SUPREME COURT 3800 (1) [D.S. Lakshmaiah and Anr. Vs. L. Balsubramanyam and Anr.]**,

(iv) **2013 (7) ALL MR 419 [Ku. Suman Vishnu**

Pathak & Ors. Vs. Smt. Usha w/o. Prabhakar Rao Koparkar & Ors.],

(v) AIR 1962 SUPREME COURT 287 (1) [Bhagwan Dayal (D) L.Rs. and Anr. Vs. Mst. Reoti Devi (D) L.Rs.],

(vi) AIR 1963 SUPREME COURT 1601 [Lakkireddi Chinna Venkata Reddi and Ors. Vs. Lakkireddi Lakshmama],

(vii) AIR 2014 BOMBAY 124 [Maharu s/o. Gaindhal Bhoi Vs. Hemraj s/o. Waman Patil (D) Thr. L.Rs.],

(viii) AIR 1976 SUPREME COURT 807 [Kale and Ors. Vs. Deputy Consolidation and Ors.],

(ix) AIR 2003 MADHYA PRADESH 128 [Purushottam and Ors. Vs. Bhagwat Sharan and ors.],

(x) AIR 1975 ORISSA 214 [Raghunath Panda Vs. Radhakrishna Panda and Ors.],

(xi) AIR 1964 ORISSA 75 (Vol. 51, C. 32) [Jagat Krishna Das and Anr. Vs. Ajit Kumar Das and Ors.].

The facts of these reported cases were also different.

31) The learned counsel for appellants placed reliance on the case reported as **AIR 2001 SC 1273 [Kulwant Kaur Vs. Gurdial Singh Mann]**. The learned counsel submitted that in view of the scope of provision of section 100 of Civil Procedure Code, this Court has the power to consider other points raised which are purely legal and more substantial questions of law can

be considered than the formulated for admission of the appeal. There is no dispute over the proposition made in the aforesaid case. This Court has considered all the arguments advanced. Though the aforesaid substantial questions of law were formulated, this Court holds that they are not really involved in the matter and they are answered against the appellants, defendants.

32) In the result, the appeal is dismissed. Civil Applications are disposed of.

33) The learned counsel for appellants submits that there has been stay to the execution of decree from beginning. He seeks further time as he wants to challenge the decision of this Court.

34) There shall be stay till 15.7.2016. Both sides are not to create third party interest in the suit properties during this period.

[T.V. NALAWADE, J.]

ssc/