

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY*****CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 708 OF 2008****ALONGWITH****SECOND APPEAL NO. 38 OF 2009**

**1. Smt.Geeta Kumarchand Shah, )**  
**Age : 60 years, Occ : Household, )**  
**R/at Indapur, Tal. Mangaon, Dist : Raigad)**

**2. Shri Manoj Kumar Shah, )**  
**Age : 36 years, Occ : Business, )**  
**R/at Indapur, Tal. Mangaon, Dist : Raigad)**

**3. Mrs.Nilam Prakash Shah, )**  
**Age : 40 years, Occ : Household, )**  
**R/at Prabhuali, Pen, Tal. Pen, )**  
**District : Raigad )**

**4. Ms.Sadhana Kumarchand Shah, )**  
**Now Mrs.Sadhana Prakash Shah, )**  
**Age : 39 years, Occ : Household, )**  
**R/at Chawadi Naka, At & Post Pen, )**  
**Tal : Pen, Dist : Raigad )**

**5. Smt. Nutan @ Sayali Sudhir Mehta, )**  
**Age : 34 years, Occ : Household, )**  
**R/at : Indapur, Indapur Bazarpeeth, )**  
**Tal : Mangaon, Dist : Raigad )**

**..... Appellants****Versus**

**1. Shri Damodar Hirachand Shah, )**  
**Age : 66 years, Occ : Business, )**  
**R/at : E-4, Saidham Building, )**  
**Saibaba Nagar, Borivali (West), Mumbai )**

**2. Shri Mohan Hirachand Shah, )**  
**Age : 79 years, Occ : Business, )**

**R/at : Mandwa, Po. Dhokwade, )**  
**Tal : Alibag, Dist : Raigad )**

**3. Shri Purushottam Hirachand Shah, )**  
**Dead through legal heirs and representatives)**  
**Age : 72 years, Occ : Retired, )**  
**R/at Pantnagar, Building No.22, )**  
**Room No.638, Ground Floor, )**  
**Ghatkopar (East), Near Technical High )**  
**School, Mumbai – 400 076 )**

**A. Anita Kailas Gandhi (daughter) )**  
**Age 54, R/at Building No.22, Room No.638,) )**  
**Vidyadarshan CHS, Ground Floor, )**  
**Ghatkopar (E), Mumbai – 400 076 )**

**B. Alka Anil Patil (daughter) )**  
**Age 53, R/at 33/1069, Anjali CHS, Tagor )**  
**Nagar, Vikhroli (East), Mumbai – 400 083)**

**C. Sangita Purushottam Shah (daughter)**  
**Age 51, R/at Building No.22, Room No.638)**  
**Vidyadarshan CHS, Ground Floor, )**  
**Ghatkopar (E), Mumbai – 400 076 )**

**D. Hemangi Hemant Sakhale (daughter) )**  
**Age 49, R/at 1106/B, Whispering Heights,) )**  
**Mind Space, Chincholi Bunder, Malad (W)**  
**Mumbai – 400 084 )**

**E. Sarita Santosh Oswal, (daughter) )**  
**Age 47, 105/A, Randhir Vihar CHS, )**  
**Lalasheth Compound, T.P. Road, )**  
**Bhandup (W), Mumbai – 400078 )**

**F. Santosh Purushottam Shah (Son) )**  
**Age 45 R/at Pantnagar, Bldg. No.22, )**  
**Room No.638, Ground Floor, Ghatkopar )**  
**(E), Mumbai – 400 076 )**

4. Smt.Induben Dinesh Shah, )  
Age : 40 years, Occ : Household )
5. Mr.Bipin Ratilal Shah, )  
Age : 46 years, Occ : Business, )  
No.4 & 5 R/at Kapadbazar, Una, Saurashtra)
6. Smt.Devki Hirachand Shah, )  
Deceased through legal heirs and representatives)  
Age : 78 years, Occ : Household, )  
R/at Mandwa, Po. Dhokawade, )  
Tal : Alibaug, Dist. Raigad )
- 6A. Ratesh Shivilal Shah, )  
Age 24 years, Occ. Service, at Mandwa, )  
P.O. Dhokwade, Tal. Alibag, Dist.Raigad )  
and Respondent Nos. 1, 2, 3 and 7 to 11 )  
are also the heirs of Respondent no.6 )
7. Mr.Shivilal Hirachand Shah, )  
Age : 52 years, Occ : Business, )  
R/at Mandwa, Po. Dhokwade, )  
Tal : Alibag, Dist. Raigad )
8. Smt.Kesharben Liladhar Shah, )  
Age : 69 years, Occ : Household, )  
R/at : Ankush Building, )  
Near Gopal Krushna Hall, Tal. Pen, )  
Dist : Raigad )
9. Smt.Lilaben Kishor Shah, )  
Age : 57 years, Occ : Household, )  
R/at Mirchi Galli, Near Laxminarayan )  
Temple, At & Post Tal : Pen, Dist.Raigad )
10. Smt.Pushpaben Tribhuvandas Shah, )  
Age : 50 years, Occ : Household, )  
Near Pen Urban Bank, At Po Tal : Pen, )  
Dist. Raigad )

11. Smt.Laxmi Madhukar Shah, )  
 Age : 34 years, Occ : Household, )  
 R/at Kumbhar Ali, Pen, Tal : Pen, )  
 Dist : Raigad )

12. Mr.Kantilal Ratilal Shah, )  
 Age : 44 years, Occ : Business, )  
 R/at Anand Bazzar, Una, Saurashtra )

..... Respondents

**ALONGWITH  
SECOND APPEAL NO. 386 OF 2009**

Shri Damodar Hirachand Shah, )  
 Age : 66 years, Occ : Business, )  
 R/at : E-4, Saidham Building, )  
 Saibaba Nagar, Borivali (West), Mumbai )

..... Appellant

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**Mind Space, Chincholi Bunder, Malad (W)**  
**Mumbai – 400 084 )**

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**4. Ms.Sadhana Kumarchand Shah, )**  
**Now Mrs.Sadhana Prakash Shah, )**  
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**Tal : Pen, Dist : Raigad )**

**5. Smt. Nutan @ Sayali Sudhir Mehta, )**  
**Age : 34 years, Occ : Household, )**  
**R/at : Indapur, Indapur Bazarpeth, )**  
**Tal : Mangaon, Dist : Raigad )**

**6. Smt.Geeta Kumarchand Shah, )**  
**Age : 60 years, Occ : Household, )**  
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7. Shri Manoj Kumar Shah, )  
Age : 36 years, Occ : Business, )  
R/at Indapur, Tal. Mangaon, Dist : Raigad)

8. Smt.Induben Dinesh Shah, )  
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R/at Mandwa, Po. Dhokawade, )  
Tal : Alibaug, Dist. Raigad )

10A. Ratesh Shivilal Shah, )  
Age 24 years, Occ. Business, R/at Mandwa,) )  
Post : Dhokwade, Tal. Alibag, Dist.Raigad)

11. Mr.Shivilal Hirachand Shah, )  
Age : 52 years, Occ : Business, )  
R/at Mandwa, Po. Dhokwade, )  
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13. Smt.Lilaben Kishor Shah, )  
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R/at Mirchi Galli, Near Laxminarayan )  
Temple, At & Post Tal : Pen, Dist.Raigad )

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Age : 50 years, Occ : Household, )  
Near Pen Urban Bank, At Po Tal : Pen, )

**Dist. Raigad )**

**15. Smt.Laxmi Madhukar Shah, )**  
**Age : 34 years, Occ : Household, )**  
**R/at Kumbhar Ali, Pen, Tal : Pen, )**  
**Dist : Raigad )**

**16. Mr.Kantilal Ratilal Shah, )**  
**Age : 44 years, Occ : Business, )**  
**R/at Anand Bazzar, Una, Saurashtra )**

**..... Respondents**

Mr.A.A.Kumbhakoni, Senior Advocate, a/w. Mr.Akshay Shinde, i/b. Mr.Sagar Talekar for the Appellant in Second Appeal No. 708 of 2008 and Second Appeal No.38 of 2009.

Mr.S.M.Kamble for the Respondent no.1 in Second Appeal No. 708 of 2008 and Second Appeal No.38 of 2009.

Mr.Jay Savla, a/w. Mr.Prantik Majumdar, Mr.Rahul Theckedath, i/b. M.P.Savla & Co. for the Respondent No.2 in Second Appeal No. 708 of 2008 and Second Appeal No.38 of 2009.

Mr.S.M.Kamble for the Appellant in Second Appeal No.386 of 2009.

Mr.Jay Savla, a/w. Mr.Prantik Majumdar and Mr.Rahul Theckedath for the Respondent no.1 in Second Appeal No. 386 of 2009.

**CORAM : R.D. DHANUKA, J.**

**RESERVED ON : 22<sup>nd</sup> DECEMBER, 2016**

**PRONOUNCED ON : 21<sup>st</sup> MARCH, 2017**

**JUDGMENT :**

By these three appeals filed under section 100 of the Code of Civil Procedure, 1908, the appellants have impugned the judgment and decree dated 10<sup>th</sup> July, 2008 passed by the learned District Judge, Ratnagiri at Alibaug allowing the Civil Appeal Nos. 56 of 2006 and 57 of 2006. By consent of parties, all three

appeals were heard together and are being disposed of by a common judgment. Some of the relevant facts for the purpose of deciding these three appeals are as under :-

2. The parties in this judgment are described as per their original status in the Regular Civil Suit No.103 of 1996. Second Appeal No.708 of 2008 and Second Appeal No.38 of 2009 are filed by the original defendant nos. 3 to 7. Second Appeal No.386 of 2009 is filed by the original plaintiff.

3. Mr.Hirachand Shah had two wives Mrs.Motiben was the first wife and Mrs.Devkibai was the second wife. The said Mrs.Devkibai was the original defendant no.10 in the suit. Mrs.Motiben and the said Mr.Hirachand Shah had three sons, viz. (1) Mr.Kumarchand, (2) Mr.Mohan and (3) Mr.Purshottam and one daughter viz. Ms.Sulochana. Mr.Kumarchand died sometime in the year 1990 leaving behind him his widow Mrs.Geeta, one son viz. Mr.Manoj and three daughters viz. Neelam, Sadhana and Nutan. The aforesaid widow, son and three daughters of the said Mr.Kumarchand were the original defendant nos. 3 to 7 in the suit and are the appellants in the Second Appeal No.708 of 2008 and Second Appeal No.38 of 2009. Mr.Mohan who was one of the son of Mrs.Motiben was the original defendant no.1. Mr.Purshottam who was also one of the son of Mrs.Motiben was the original defendant no.2. Mrs.Sulochana who was one of the daughter of the said Mrs.Motiben had three children viz. Ms.Induben, Mr.Bipin and Mr.Kantilal. The said Ms. Induben, Mr.Bipin and Mr.Kantilal were impleaded as defendant nos. 8, 9 and 16 respectively in the suit.

4. Insofar as second wife of the said Mr.Hirachand Shah i.e. Mrs.Devkibai is concerned, she had two sons Mr.Damodar and Mr.Shivlal and four

daughters viz. Ms.Kesar, Ms.Leela, Ms.Pushpa and Ms.Laxmi were impleaded as original plaintiff, defendant no.12, defendant no. 13, defendant no.11, defendant no.14 and defendant no.15 respectively in the suit.

5. On 5<sup>th</sup> November, 1941 Mr.Damodar who was the original plaintiff was born out of the wedlock between Mr.Hirachand Shah and Mrs.Devkibai. It is the case of the defendant no.1 that on 9<sup>th</sup> February, 1939, Mr.Hirachand Shah executed a sale deed and alienated the properties mentioned at serial nos. 1 to 7 and 18 in the plaint to Mr.Chotelal Brajgovind and others.

6. Sometime in the year 1941 those purchasers of the properties mentioned at serial nos. 1 to 7 and 18 filed a civil suit (319 of 1941). On 13<sup>th</sup> March, 1942, the said civil suit (319 of 1941) was decreed in favour of those purchasers. In the year 1952, those purchasers filed a Special Darkhast (10 of 1052) for implementation of the said decree in the Alibaug Court. In the year 1952, the original defendant nos. 1,2 and 3 made a complaint that they were the owners of the said suit property and were accordingly impleaded as party. In the execution proceedings, the compromise took place. It is the case of the defendant no.1 that insofar as properties at serial nos.1 to 7 and 18 of the plaint are concerned, those properties were given to Mr.Mohan (original defendant no.1), Mr.Purshottam (original defendant no.2) and Mr.Kumarchand (original defendant no.3). The purchasers retained rest of the properties.

7. It is the case of the defendant no.1 that an amendment was accordingly carried out in the original suit as well as in the decree and Mr.Mohan, Purshottam and Mr.Kumarchand became absolute owners in respect of those properties i.e. properties at serial nos.1 to 7 and 18 described in the plaint. On 7<sup>th</sup>

June, 1956, those properties were transferred in the name of Mr.Mohan, Mr.Purshottam and Mr.Kumarchand in the revenue record after issue of notices and after following due procedure.

8. Sometime in the year 1967 Mr.Kumarchand married to Ms.Geeta (original defendant no.6). On 21<sup>st</sup> August, 1970 Mr.Hirachand Shah expired. It was the case of the original defendant no.1 that there was an oral partition in respect of the properties bearing Gat No.313 and various properties amongst the legal heirs of the said Mr.Hirachand Shah. It was the case of the defendant nos. 3 to 7 that on 8<sup>th</sup> November, 1957 only in respect of the property at serial no.7, Mr.Mohan and Mr.Purshottam released their rights in favour of Mr.Kumarchand for an amount of Rs.300/- and executed a registered deed. The entry in respect of the said property was made in the 7/12<sup>th</sup> extract in the name of Mr.Kumarchand Shah.

9. It was the case of the defendant nos. 3 to 7 that on 23<sup>rd</sup> November, 1973, the said Mrs.Devkibai, 2<sup>nd</sup> wife of Mr.Hirachand Shah, Mr.Kumarchand, Mr.Purshottam, Mr.Damodar and Mr.Shivlal (original plaintiff, defendant nos. 2, 10, 11) and deceased Mr.Kumarchand executed the said registered lease deed in favour of Mr.Mohan (original defendant no.1) in respect of the property described at serial no.16 of the plaint. The said property was involved in some litigation and defendant no.1 had undertaken to spend the litigation cost.

10. It was the case of the defendant nos. 3 to 7 that the property at serial nos. 19 to 21 were also the subject matter of some litigation. All the legal heirs of the said Mr.Hirachand Shah executed an affidavit sworn before the Chief Metropolitan Magistrate on 12<sup>th</sup> April, 1982 (Ex.162) in respect of those four

properties described at serial nos. 19 to 21. It was the case of the defendant no.1 that by the said affidavit dated 12<sup>th</sup> April, 1982, the legal heirs of Mr.Hirachand Shah had relinquished their ownership rights in those four properties in favour of the defendant no.1 as none of those family members were interested in litigating with the villagers. They also executed a power of attorney in favour of the defendant no.1 (Ex.196) thereby giving full power of alienation and for generally doing all acts, deeds and documents in connection with those four properties. It was the case of the defendant no.1 that on the basis of the said affidavit dated 12<sup>th</sup> April, 1982, those legal heirs had released their rights in respect of those four properties in favour of defendant no.1 exclusively.

11. It is the case of the original defendant no.1 that on the said property bearing Gat No.313 of which he became owner by virtue of release deed dated 23<sup>rd</sup> November, 1973 and had constructed a R.C.C. house and had spent substantial amount thereon.

12. On 9<sup>th</sup> October, 1990 Mr.Kumarchand expired leaving behind him defendant nos. 3 to 7 as his heirs and legal representatives. Sometime in the year 1994, Mr.Shivlal (original defendant no.11) who was one of the son of Mr.Hirachand Shah and real brother of Mr.Damodar (original plaintiff) sold property bearing Survey No.68, Hissa No.3-5-6 and Survey No.85, Hissa No.1 by a registered sale deed and accepted the consideration under the said documents for himself only. It was the case of the original defendant no.1 that those properties were allotted to Mr.Shivlal in oral partition as mentioned in the partition deed of 2001.

13. On or about 6<sup>th</sup> April, 1996, the original plaintiff Mr.Damodar issued

notices to the other legal heirs and representatives of Mr.Hirachand Shah including defendant nos. 2 to 7 for partition. The said notice was replied on 20<sup>th</sup> April, 1996 by the original defendant no.1 Mr.Mohan for himself and as the then constituted attorney of the original defendant nos. 2 to 7 and denied the allegations made in the said notice. In the said notice, it was the case of the original defendant nos. 1 to 7 that the plaintiff was not entitled to demand partition as oral partition had already taken place in respect of the properties in the year 1973 and the plaintiff was allotted the property bearing Gat Nos.540 and 437 in the said oral partition as his share. It was also contended that the defendant nos. 1 to 7 had become owner of the some of the properties i.e. properties bearing serial nos. 1 to 7 and 18 by virtue of order passed in Special Darkhast No.10 of 1952.

14. Sometime in the year 1996, the plaintiff filed a suit ( Regular Civil Suit No.103 of 1996) in the Court of learned Civil Judge, Junior Division, Alibaug against 16 parties. On 19<sup>th</sup> August, 1996, the defendant nos.10 and 11 filed a written statement thereby admitting the claim of the plaintiff. On 23<sup>rd</sup> September, 1996, the defendant no.14 filed a written statement admitting the claim of the plaintiff. On 23<sup>rd</sup> September, 1996, the defendant nos. 12, 13 and 15 filed common written statement admitting the claim of the plaintiff.

15. On 26<sup>th</sup> November, 1996, the defendant no.1 and defendant nos. 2 to 7 filed a common written statement disputing the claim of the plaintiff. The said written statement was filed by the defendant no.1 in his individual capacity and as a constituted attorney of the defendant nos. 2 to 7 in view of the power of attorney executed in his favour by defendant nos. 2 to 7. On 28<sup>th</sup> March, 2000, the defendant no.1 for himself and on behalf of defendant nos. 2 to 7 filed additional written statement since the plaintiff had added one more property i.e. property

bearing Gat No.236 in the plaint.

16. Sometime in the month of July 2001, one Mr.Prakash G.Shah married to Ms.Sadhana who was one of the daughter of Mr.Kumarchand Shah. On 13<sup>th</sup> August, 2001, the defendant no.1 for himself and on behalf of the defendant nos. 2 to 7 filed additional written statement in view of the plaintiff amending the plaint thereby including the property bearing Gat No.355 in the plaint as an ancestral property.

17. Sometime in the year 2001, the power of attorney of the defendant no.1 came to be cancelled by the defendant nos. 2 to 7.

18. It is the case of the defendant no.1 that on 22<sup>nd</sup> November, 2001, all the other legal heirs and representatives of Mr.Hirachand Shah i.e. Mrs.Devkibai, real mother of the plaintiff, Mr.Shivlal, who was real brother of the plaintiff, Mr.Mohan and Mr.Purshottam, Mr.Damodar executed a partition deed recording an acknowledgement that there was a real partition in respect of the properties in April 1973. Defendant nos. 3 to 7 did not sign the said partition deed.

19. On 7<sup>th</sup> February, 2002, four sisters of the plaintiff, viz. Ms.Kesar, Ms.Leela, Ms.Pushpa and Ms.Laxmi (original defendant nos. 12, 13, 14 and 15) executed a registered release deed in favour of defendant nos. 1, 2, 10 and 11 (Ex.198). By the said release deed, the four sisters gave effect to the Wardi which was already filed in the year 1973 and effect thereof was given in the revenue record in the year 1973 itself by M.E.1926 dated 4<sup>th</sup> May, 1973 based on oral partition in the month of April 1973. It is however the case of the defendant nos. 3 to 7 that in the said Wardi alleged to have been signed by the sisters there was no

reference to any oral partition alleged to have been held in the year 1973.

20. On 31<sup>st</sup> October, 2002, Mr.Mohan Shah, original defendant no.1 filed RTS Appeal No. 25 of 2002 against the decision of Circle Officer dated 1<sup>st</sup> April, 2002 before Sub-Divisional Officer, Alibaug. By an order dated 31<sup>st</sup> October, 2002, the said Sub-Divisional Officer allowed the said RTS appeal partly and ordered that the consenting parties to the partition deed could give effect in revenue records in respect of their respective shares. On 10<sup>th</sup> April, 2002 the defendant no.1 for himself and on behalf of defendant nos.2 to 7 filed additional written statement in view of the original plaintiff adding property bearing Gat No.313 as an alleged ancestral property in the plaint.

21. Sometime in the year 2002, the defendant nos. 3 to 7 executed a power of attorney in favour of the said Mr.Prakash Shah after cancelling the power of attorney which was granted in favour of the defendant no.1 earlier. The said Mr.Prakash Shah filed an application before the learned trial judge for seeking permission to file a separate written statement on behalf of the defendant nos. 3 to 7. The learned trial judge allowed the said application *ex-parte*. The said Mr.Prakash Shah thereafter filed a written statement on behalf of the defendant nos. 3 to 7 contrary to the stand taken by the defendant nos. 1 to 7 in the earlier written statements and changed the stand in respect to oral partition.

22. On 7<sup>th</sup> July, 2002 the defendant nos.12 to 15 executed a registered release deed in favour of the defendant nos. 1, 2 and 11.

23. The learned trial judge framed 19 issues. The contesting parties led oral as well as documentary evidence before the learned trial judge. On 30<sup>th</sup>

December, 2005, the learned Joint Civil Judge, Junior Division, Alibaug decreed the said suit (Regular Civil Suit No.103 of 1996) and held that the plaintiff was entitled to partition of the suit properties. It was declared that the plaintiff, defendant nos. 1, 2, 10, 11, 12, 13, 14 and 15 each were having 1/11<sup>th</sup> share in the suit properties. Defendant nos. 3 to 7 collectively and defendant nos. 8, 9 and 16 collectively were having 1/11<sup>th</sup> share. The learned trial judge directed the Collector to partition the suit properties in accordance with section 54 of the Code of Civil Procedure.

24. Being aggrieved by the said judgment and decree dated 30<sup>th</sup> December, 2005 passed by the learned Joint Civil Judge, Junior Division, Alibaug, the original defendant nos. 1 and 2 filed an appeal (Civil Appeal No.56 of 2006) in the Court of learned District Judge, Raigad at Alibaug. The original defendant nos. 3 to 7 filed an appeal (Civil Appeal No.57 of 2006) in the Court of learned District Judge, Raigad at Alibaug. The learned District Judge, Raigad at Alibaug formulated eight points for determination and passed a judgment and decree dated 10<sup>th</sup> July, 2008 thereby allowing the appeals bearing Civil Appeal No. 56 of 2006 filed by the original defendant nos. 1 and 2 and dismissed Civil Appeal No.57 of 2006 filed by the defendant nos. 3 to 7 and set aside the judgment and decree dated 30<sup>th</sup> December, 2005 filed by the learned trial judge and dismissed the Regular Civil Suit No.103 of 1996 filed by the original plaintiff.

25. Being aggrieved by the said judgment and decree dated 10<sup>th</sup> July, 2008 passed by the learned District Judge, Raigad, Alibaug, the original defendant nos. 3 to 7 filed Second Appeal No.708 of 2008 insofar as by the said judgment and decree, the learned District Judge, Raigad, Alibaug had allowed the Civil Appeal No. 56 of 2006 which was filed by the original defendant nos. 1 and 2, the original

defendant nos. 3 to 7 also filed a separate appeal (38 of 2009) in this court insofar as rejection of the Civil Appeal No.57 of 2006 which was filed by the defendant nos. 3 to 7 before the learned District Judge is concerned. The plaintiff also filed a separate second appeal (386 of 2009) in this court inter alia impugning the judgment and decree passed by the learned District Judge, Raigad at Alibaug allowing the appeal filed by the defendant nos. 1 and 2.

26. This court while admitting these three appeals formulated a substantial question of law on 24<sup>th</sup> August, 2010. The said substantial question formulated by this court was subsequently amended as under :-

(a) Whether from interpretation of the documents at Exhibit-160, 162 and 197, a conclusion can be arrived that there was partition between legal heirs of deceased Hirachand in 1973 ?

27. During the course of arguments of these three appeals, the learned counsel appearing for the contesting parties suggested additional substantial questions of law. After hearing the learned counsel for the parties, following additional substantial questions of law are formulated which are as under :-

(b) Whether Exhibit-162 and Exhibit-196 i.e. Affidavit and Power of Attorney, sworn and executed, before the Registrar & Metropolitan Magistrate, Esplanade Court, Bombay respectively, in respect of properties at Sr. Nos. 19 to 21 out of the suit properties, were at all admissible in evidence, in view of provisions of the Registration Act, 1908, more particularly Sec.17 thereof ?

(c) Whether Exhibit-162 and Exhibit-196 i.e. Affidavit and Power of Attorney, in law, have an effect of relinquishment of rights i.e. permanent destruction of admitted co-ownership of the executants thereof, more particularly by the heirs of deceased Hirachand, in favour of the 1<sup>st</sup> Defendant ?

(d) Whether Exhibit-162 and Exhibit-196 i.e. Affidavit and Power of Attorney can operate as estoppel in law to such an extent that the executants thereof, more particularly the heirs of deceased Hirachand, permanently lose their admitted co-ownership of the properties covered by these documents ?

(e) Whether Exh.197 i.e. registered partition deed and/or contents thereof, having been admittedly executed by and between the parties to the said document during the pendency of the suit and the same having been not signed by all the family members, particularly the heirs of deceased Hirachand, can be considered as a proof of alleged oral partition affected in the April, 1973?

(f) Whether the Courts below erred in not passing a decree for partition in respect of the properties at Sr.Nos. 1 to 6 and 18 out of the suit properties by allotting 1/3<sup>rd</sup> share to each of the Defendant Nos. 1,2 and 3 to 7 in the absence of any pleadings much less evidence as to any partition already effected in respect thereof ?

(g) Whether the Courts below could have ignored the legal effect of the undisputed registered release deed (Exh.201) executed by the Defendant nos. 1 and 2 in favour of deceased

Kumarchand thereby relinquishing their rights in Suit property at Sr.No.7 out of the suit properties, that too for a valuable consideration of Rs.300/- ?

(h) Whether the Courts below ought to have passed decree of partition by metes and bounds granting 1/3<sup>rd</sup> share to three branches i.e. plaintiff, defendant no.1 and defendant nos. 3 to 7 in respect of Suit Properties at Sr.Nos. 8 to 17 and 19 to 21?

(i) Whether the learned lower Appellate Court, without setting aside the order passed by the learned trial court permitting the Defendant No. 3 to 7 to file separate Written Statement at Exhibit 84, could have just simplicitor observed that the order passed by the learned trial court permitting such filing of WS was illegal ?

(j) Whether the Defendant Nos. 3 to 7 can resile from the admission made in the written statement and can be permitted to file new Written Statement ?

28. Mr.Kumbhakoni, learned counsel for the defendant nos. 3 to 7, Mr.Kamble, learned counsel for the original plaintiff and Mr.Savla, learned counsel for the original defendant no.1 submitted synopsis, brief note of arguments and also made oral submissions for consideration of this court.

29. Mr.Kumbhakoni, learned senior counsel for the defendant nos. 3 to 7 invited my attention to some of the portion of the averments made in the plaint, original and additional written statements filed by the defendant no.1 for himself and on behalf of defendant nos. 2 to 7, written statement filed by defendant nos. 3

to 7 through their constituted attorney subsequently, some portion of oral and documentary evidence on record and also the findings recorded by the two courts below.

30. It is submitted by the learned senior counsel that though the defendant nos. 3 to 7 and also defendant no.2 had initially given the power of attorney to the defendant no.1 to represent them and to file the written statements in the said Civil Suit No.106 of 1996 filed by the original plaintiff, the defendant nos. 3 to 7 subsequently cancelled the power of attorney executed in favour of the original defendant no.1 and after obtaining permission from the learned trial judge filed separate written statement on 21<sup>st</sup> July, 2003 before the learned trial judge. He submits that there was no oral partition in respect of any of the suit properties to any point of time as canvassed by the defendant no.1 for himself and initially on behalf of defendant nos. 2 to 7 in various written statement filed before the learned trial judge. It is submitted by the learned senior counsel that all the suit properties were ancestral properties of Mr.Hirachand Shah which were received by him in partition effected amongst his parent family on 5<sup>th</sup> January, 1934. He submits that admittedly no partition of the suit properties had taken place during the lifetime of the said Mr.Hirachand Shah who expired on 20<sup>th</sup> October, 1970.

31. Learned senior counsel submits that the original plaintiff had claimed 1/11<sup>th</sup> share in all the suit properties and had issued a notice demanding his alleged 1/11<sup>th</sup> share in all the suit properties on 6<sup>th</sup> April, 1996 from defendant no.1 and claimed partition in respect of various properties. The defendant no.1 had replied to the said notice on 20<sup>th</sup> April, 1996 on behalf of himself and defendant nos. 2 to 7. He submits that in the said reply, it was alleged that the properties at serial nos. 1 to 7 and 18 mentioned in the said notice issued by the original plaintiff were

exclusive properties of defendant nos. 1, 2 and Mr.Kumarchand Shah (predecessor of defendant nos. 3 to 7) and they were in possession of the said properties. Insofar as properties at serial nos. 8 to 16 are concerned, it was alleged in the said reply that release deed was executed by the plaintiff in favour of the defendant no.1 in respect of the land bearing Survey No.61-C (Gat No.313). There was partition in respect of those properties.

32. It is submitted by the learned senior counsel that in the said reply given by the defendant no.1 for himself and on behalf of the defendant nos. 2 to 7, none of the particulars of the alleged oral partition were setout. The said reply was eloquently silent on various crucial aspects of the alleged partition such as day, date, month and year of partition, how was such alleged partition effected, whether the same was notarized or registered, where was it effected, who were present or absent, whether the alleged partition was complete or partial, either property-wise partial or person/branch-wise partial or whether it was by metes and bounds or was only in the nature of a family arrangement, who was allotted which property and whether the said alleged partition was effected in any of the Government records, R/R, CTS, Grampanchayat etc.

33. It is submitted by the learned senior counsel that the original written statement filed by the defendant no.1 for himself and on behalf of defendant nos. 2 to 7 was equally vague on the issue of alleged oral partition in respect of the properties at serial nos. 8 to 16. He submits that in the additional written statement filed by the defendant nos. 1 and 2 on 10<sup>th</sup> April, 2002, a reference was made for the first time to the release deed dated 23<sup>rd</sup> November, 1973 and that an oral partition was alleged to have been effected in April 1973. He submits that the said written statement filed by the defendant no.1 for himself and on behalf of the

defendant nos. 2 to 7 was equally vague and without any evidence in support of such a plea and was without particulars. He submits that the defendant nos. 3 to 7 therefore were required to obtain a permission from the learned trial judge for filing a separate common written statement on behalf of defendant nos. 3 to 7 which permission was duly granted by the learned trial judge in favour of the constituted attorney appointed by defendant nos. 3 to 7 after revoking the power of attorney which was executed in favour of the original defendant no.1. He submits that admittedly the said order passed by the learned trial judge granting permission to the defendant no.3 to file separate written statement through their new constituted attorney has not been challenged by any of the parties to the suit and the said order has attained finality.

34. It is submitted that pursuant to the said liberty granted by the learned trial judge defendant nos. 3 to 7 filed a separate common written statement and placed true and correct facts on record.

35. It is submitted by the learned senior counsel that insofar as properties at serial nos. 1 to 6 and 18 are concerned, it was the case of the defendant nos. 3 to 7 that those properties were exclusive properties of the defendant nos. 1, 2 and deceased Mr.Kumarchand Shah (predecessor of defendant nos. 3 to 7) and that there was no partition effected in respect of those properties between defendant nos. 1, 2 and 3 to 7. He submits that in respect of those properties at serial nos. 1 to 6 and 18, no parties other than the defendant nos. 1, 2 and 3 to 7 have any right, title or interest of any nature whatsoever. He submits that defendant no.1 and defendant no.2 are entitled to  $\frac{1}{3}$ <sup>rd</sup> share each in those properties and the remaining  $\frac{1}{3}$ <sup>rd</sup> share came to the share of the defendant nos. 3 to 7. He submits that these properties at serial nos. 1 to 6 and 18 are in joint possession of the defendant no.1,

defendant no.2 and defendant nos. 3 to 7.

36. Learned senior counsel submits that insofar as properties at serial no.7 is concerned, defendant nos. 1 and 2 had already executed a registered release deed on 8<sup>th</sup> November, 1957 (Ex.201) in favour of the predecessor of defendant nos. 3 to 7 i.e. Mr.Kumarchand and thus none of the other defendants and the plaintiff had any right, title or interest in the said properties of any nature whatsoever.

37. It is submitted by the learned senior counsel that the plaintiff was born in the year 1940. On 9<sup>th</sup> February, 1939, Mr.Hirachand Shah had already executed sale deed in respect of those properties at serial nos. 1 to 6 and 18 in favour of Mr.Vithal, Mr.Bhruj and Mr.Thakker in lieu of legal debt of Rs.8,500/-. He submits that much before the date of birth of the plaintiff, the said properties were already transferred in favour of those three parties by the said Mr.Hirachand Shah. He submits that since possession was not handed over by Mr.Hirachand Shah to those parties, they had filed a civil suit (319 of 1941) which came to be decreed in their favour. In the execution proceedings filed by the said three parties (Special Darkhast No.10 of 1952), defendant nos. 1, 2 and the said deceased Mr.Kumarchand Shah was allowed to intervene.

38. A compromise was arrived at between the defendant nos. 1, 2 and the said Mr.Kumarchand Shah and the said three parties. These properties came to be assigned in favour of defendant nos. 1, 2 and the said Mr.Kumarchand Shah. The compromise decree was passed by the executing court and since then the defendant nos. 1, 2 and the said Mr.Kumarchand Shah became exclusive possessors of those properties. He submits that even in the written statement filed by the defendant nos. 1 and 2, it is admitted that these properties have been in

exclusive possession of the defendant nos. 1, 2 and the deceased Mr.Kumarchand Shah and no partition had taken place between defendant nos. 1, 2 and the said Mr.Kumarchand Shah or with defendant nos. 3 to 7 as successors of the said Mr.Kumarchand Shah.

39. Insofar as the property at serial no.7 is concerned, it is submitted by the learned senior counsel that in his cross-examination before the learned trial judge, defendant no.1 had clearly admitted execution of the documents (Ex.201) which was a registered release deed dated 8<sup>th</sup> November, 1957 which was executed by the defendant nos.1 and 2 in favour of the deceased Mr.Kumarchand Shah. It was also admitted that since then the said deceased Mr.Kumarchand Shah has been in lawful possession of the suit property. He submits that the said property at serial no.7 thus is exclusive property of defendant nos. 3 to 7 only. It is submitted that two courts below thus ought to have passed a decree in respect of the said property at serial no.7 in favour of defendant nos. 3 to 7 and ought to have declared the said property as exclusive property of defendant nos. 3 to 7.

40. Insofar as the property described at serial nos. 8 to 17 and 19 to 21 in the plaint is concerned, it is submitted by the learned senior counsel that in respect of these properties, the defendant no.1 has alleged oral partition in the year 1973 and in support of this plea, the defendant no.1 had placed reliance on three documents which were marked as Ex.160 i.e. the registered release deed dated 23<sup>rd</sup> November,1973 executed by the defendant nos. 2, 10, 11, the plaintiff and the said deceased Mr.Kumarchand Shah in favour of the defendant no.1, Ex.162 i.e. an affidavit sworn before the Registrar and Metropolitan Magistrate, Esplanade Court, Bombay and Ex.196 i.e. the power of attorney executed before the same authority by and between defendant nos. 2, 10, 11 and the plaintiff and the

deceased Mr.Kumarchand Shah and the defendant no.1.

41. Insofar as documents marked as Ex.160 i.e. registered release deed executed on 23<sup>rd</sup> November, 1973 is concerned, it is submitted that the said release deed was only in respect of the property at serial no.16. He submits that in the said release deed, there was a reference to an alleged oral partition done in the year April 1973. He submits that the said document was however totally silent in respect of any of the details/particulars of the alleged partition allegedly affected in April 1973. Learned senior counsel placed reliance on the cross-examination of the defendant no.1 and would submit that he had admitted that the said document was the only document showing proof of oral partition of April 1973. He submits that the defendant no.1 could not explain as to what was the need to execute the said release deed if the said property was already allotted to him by the alleged oral partition.

42. It is submitted that the defendant no.1 did not lead any evidence regarding the alleged oral partition effected in April 1973. He submits that mere recital in the said release deed dated 23<sup>rd</sup> November, 1973 alleging oral partition of April 1973 cannot prove the factum of alleged partition and was independently required to be proved. He submits that at the most the said document was a release deed relinquishing the rights of the executants/releasors in favour of defendant no.1 in respect of the property at serial no.16 alone and not other properties. It is submitted by the learned senior counsel that in case of oral partition, a party who alleges oral partition he has to discharge a heavy burden. He submits that since there was no pleading or what was pleaded was vague, no evidence could be permitted contrary to the pleadings to improve the case in oral evidence. He submits that none of the wives of Mr.Hirachand Shah were examined as witnesses.

The defendant no.1 had examined his constituted attorney who had no personal knowledge in the matter.

43. It is submitted by the learned senior counsel that there was no reference to the affidavit (Ex.162) and the power of attorney (Ex.196) either in the first written statement or in the additional written statement filed by the defendant no.1 before the learned trial judge. He submits that in absence of any pleadings, the learned trial judge could not have permitted the defendant no.1 to rely upon those documents in the oral evidence.

44. Mr.Kumbhakoni, learned senior counsel for the defendant nos. 3 to 7 also invited my attention to the oral evidence of the defendant no.1 and more particularly in paragraphs 10 and 41 and would submit that it was specifically admitted by the defendant no.1 that the properties at serial nos. 19 to 21 were not mutated in their names after death of Mr.Hirachand Shah and that the villagers of Mandva village started claiming rights in those properties. The defendant no.1 admitted that he was told by his mother Mrs.Devkibai and brother that they did not have guts to fight with the villagers and were not in a position to afford to spend time and money in court proceedings and only because of those reasons, the defendant no.1 was asked to defend the court proceedings on their behalf. He admitted that it was agreed that if defendant no.1 would succeed in establishing the title in the said proceedings, they would not claim any right in the said property and defendant no.1 would become the owner of the said property and in those peculiar facts and circumstances, those documents were reduced in writing by the parties.

45. It is submitted that five of the legal heirs were not even aware of the

legal aspect and the record about the lands situated at Mandva Beach i.e. the property at serial nos 19 to 21 and had accordingly requested and authorized the defendant no.1 to pursue the litigation on their behalf. He submits that the defendant no.1 could not therefore take any advantage of the recital that the executant of the said documents had relinquished their rights in the said properties in favour of the defendant no.1 and could not have claimed exclusive ownership thereof based on such writing.

46. It is submitted by the learned senior counsel that the said documents could not be said to be release deeds whereby the executant could have relinquished their rights in those properties in favour of the defendant no.1. He submits that the said documents were required to be registered under the provisions of Registration Act, 1908. It is submitted that under section 17(1)(b) of the Registration Act, 1908, the registration of those documents by which any rights of the executant were alleged to have been taken away in respect of the immoveable property was compulsorily registereable. He submits that since the said documents were admittedly not registered under section 17(b) of the Registration Act, 1908, in view of section 49 of the Registration Act, 1908, such documents were inadmissible in evidence and no right of any nature thus could have been created in favour of the defendant no.1 by those documents. He submits that those documents could not be relied upon even for any collateral purpose since the said documents were not stamped as mandatorily required under the provisions of Stamp Act, 1899.

47. Insofar as document at serial no. 197 is concerned, it is submitted by the learned senior counsel that the said registered partition deed was executed amongst the defendant nos.1, 2, 10 and 11 only. Neither the plaintiff nor the

defendant nos. 3 to 7 were the parties to the said partition deed. He submits that since the said partition deed was not signed by all the co-owners, the same cannot be considered as partition deed and in any event was not binding upon the plaintiff and the defendant nos. 3 to 7 being not signatories thereto. He submits that admittedly the said partition deed was executed during the pendency of the suit and thus could not have been relied upon by the defendant no.1 to prove his case of alleged oral partition of April 1973. He submits that the relinquishment in respect of the immovable properties could be made only by way of registered release deed. It is submitted that this court thus shall pass a decree granting 1/3<sup>rd</sup> share in respect of those properties at serial nos. 8 to 17 and 19 to 21 in favour of the plaintiff, defendant no.1 and defendant nos. 3 to 7.

48. It is submitted by the learned senior counsel that except Ex.160, the defendant no.1 did not produce any other documents in support of his claim of alleged oral partition. He submits that the mutation entry relied upon by the defendant no.1 does not show oral partition. He submits that admittedly the other properties are admittedly not included in the said Ex.160.

49. Insofar as the registered partition deed dated 22<sup>nd</sup> November, 2011 relied upon by the defendant no.1 is concerned, it is submitted by the learned senior counsel that the said document was executed admittedly during the pendency of the suit and admittedly the plaintiff and the defendant nos. 3 to 7 were not parties to the said partition deed dated 22<sup>nd</sup> November, 2011. He submits that till 2001, there was no effect given to the alleged oral partition in any of the Government revenue records. He submits that even deed of release dated 7<sup>th</sup> February, 2002 also was executed during the pendency of the suit and the plaintiff and the defendant nos. 3 to 7 were admittedly not parties to the said release deed

and was thus not binding on the defendant nos. 3 to 7 or the plaintiff.

50. Insofar as properties described at serial nos. 19 to 21 of the plaint are concerned, it is submitted that the executors of the said documents in favour of the defendant no.1 did not relinquish their rights in respect of those three properties in favour of defendant no.1. The defendant no.1 thus could not claim any right, title or interest of any nature whatsoever in those three properties as the owners thereof and the said properties continued to be the properties of the joint family and was never partitioned.

51. It is submitted that since the defendant no.1 did not challenge the order passed by the learned trial judge granting liberty to file additional written statement in favour of the defendant nos. 3 to 7 and in view of the first appellate court not having set aside the order passed by the learned trial judge, the said order cannot be challenged by the defendant no.1 now across the bar.

52. It is submitted by the learned senior counsel that the finding of the first appellate court that many times the mutation entries are not effected though there is partition of the properties between the parties is perverse. Learned senior counsel for the defendant nos. 3 to 7 placed reliance on the judgment of Supreme Court in case of *P.Chandrasekharan and others vs. S.Kanakarajan and others, (2007) 5 SCC 669* and in particular paragraphs 6 and 12 to 16 in support of his submission that since the two courts below have interpreted the documents relied upon by both the parties, such interpretation of a document which goes to the root of the title of a party to the lis would indisputably give rise to a question of law. He also placed reliance on the judgment of Supreme Court in case of *M.B.Ramesh (Dead) By LRs. VS. K.M.Veeraje Urs (Dead) by LRs and others, (2013) 7 SCC*

**490** and in particular paragraph 16 in support of his submission that the construction of a document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law.

53. Learned senior counsel for the defendant nos. 3 to 7 placed reliance on the judgment of Supreme Court in case of **Nani Bai vs. Gita Bai Kom Rama Gunge, AIR 1958 SC 706** and in particular paragraph 11 in support of his submission that since the defendant no.1 had relied upon the affidavit and power of attorney executed by some of the parties in his favour in support of his submission to prove that those parties had relinquished their rights in those properties described at serial nos. 19 to 21, the said document would fall within the meaning of section 17(1)(b) of the Registration Act, 1908.

54. Learned senior counsel for the defendant nos. 3 to 7 also placed reliance on the judgment of Supreme Court in case of **Subraya M.N. vs. Vittala M.N. And others, (2016) 8 SCC 705** and in particular paragraph 16 and in case of **Yellapu Uma Maheswari & Anr. vs. Buddha Jagadheeswararao & Ors., 2015 SCC OnLine SC 925** in support of his submission that since the defendant no.1 had claimed rights under the said affidavit/writing and the power of attorney in respect of the properties described at serial nos. 19 to 21 of the plaint, it required registration and attracted payment of stamp duty and without which it was inadmissible in evidence documents thus could not be relied upon even for collateral purposes and thus could not have been considered by the first appellate court while holding that the signatories to those documents had relinquished their rights in favour of the defendant no.1 under those two writings.

55. Learned senior counsel for the defendant nos. 3 to 7 placed reliance

on the judgment of Supreme Court in case of ***Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148*** and more particularly paragraph 77 in support of his submission that since the defendant no.1 had not given particulars, details and proof of the alleged oral partition, the defendant no.1 could not have been permitted to lead any evidence by the learned trial judge. No cognizance of such evidence could have been taken by the first appellate court. He submits that this court has ample power to frame additional substantial questions of law which have arisen but not framed by this court.

56. Learned senior counsel for the defendant nos. 3 to 7 placed reliance on the commentary of Mulla on ***Principles of Hindu Law, 16<sup>th</sup> Edition*** on the subject “Recovery of ancestral property lost to the family”. He submits that the learned Author has expressed his views that where the members of joint family have been wrongfully dispossessed or adversely kept out of possession of joint property for a long time, and such property is subsequently recovered by an individual member of the family without the assistance of joint funds, then if the properties are recovered by the father, he takes the whole as his separate or self-acquired property, whether it be moveable or immoveable; but if it is recovered by any other member of the family, then, if the property be moveable, he takes the whole as his separate or self-acquired property, but if it be immoveable, he takes one-fourth first as reward for the recovery, and the remainder has to be equally divided among all the coparceners including the recoverer. He submits that even if the defendant no.1 had made efforts exclusively and had spent money on litigation and had recovered the possession in respect of the properties described at serial nos. 19 to 21, which were the properties lost in view of the illegal possession by the villagers, the defendant no.1 cannot exclusively claim ownership of the said properties as his separate or self-acquired properties but at most could be rewarded

by granting 1/4<sup>th</sup> share first out of the said recovery of the property and the balance property has to be divided amongst all the members of the joint family including the defendant no.1. In support of this submission, learned senior counsel also placed reliance on the judgment in case of ***Bajaba alias Bajirao Vishvanath Oke vs. Trimbak Vishvanath Oke and two others, The Indian Law Reports, Volume XXXIV 106*** and more particularly pages 108 to 111 thereof.

57. Mr.Savla, learned counsel for the defendant no.1 tenders brief notes of arguments and also made oral submissions before this court. It is submitted that Mr.Hirachand Shah expired in the year 1970, the said Mr.Kumarchand Shah however neither filed any suit for partition during his lifetime nor defendant nos. 3 to 7 filed any separate suit for partition after the demise of Mr.Kumarchand Shah. It is submitted that the defendant nos. 3 to 7 cannot make any claim in respect of the properties which did not belong to the ancestor Mr.Hirachand Shah. Learned counsel placed reliance on the genealogy of the family of Mr.Hirachand Shah separately tendered before this court for consideration of this court. He submits that the said Mr.Hirachand Shah left behind him 11 legal heirs. A suit however was filed only by one of the son of Mr.Hirachand Shah i.e. Mr.Damodar. He submits that most of the legal heirs of the said Mr.Hirachand Shah supported the case of the defendant no.1 and admitted plea of the oral partition raised by the defendant no.1 which took place as far back as in the year 1973. Neither the plaintiff nor the defendant nos. 3 to 7 could explain as to why an oral partition was referred in the release deed executed in the month of May 1973 i.e. Ex.160 in favour of the defendant no.1 in respect of one of the property.

58. Learned counsel for the defendant no.1 placed reliance on the judgment of Supreme Court in case of ***Kale & Others vs. Deputy Director of***

***Consolidation & Ors., 1976 (3) SCR 202*** and in particular on pages 208 to 213 in support of his submission that the family arrangement can as a matter of law be inferred from long course of dealings between the parties. The family arrangement can be made orally and thus no question of registration thereof arises. He submits that the oral partition had already taken place between the parties. However, the same was recorded in the affidavit and the power of attorney for the purpose of record and thus the same did not fall within the mischief of section 17(2) of the Registration Act. He submits that all the parties have already acted upon the said settlement effected by oral partition and have been enjoying their separate properties allotted to each of them without interference from others for last several decades and such family settlement could not be disturbed on the technical or trivial grounds or on the ground of the documents not being registered even if the same required registration.

59. Learned counsel for the defendant no.1 placed reliance on the reply dated 20<sup>th</sup> April, 1996 given by the defendant no.1 through his advocate to the notice dated 6<sup>th</sup> April, 1996 which was issued by the plaintiff seeking partition. He submits that in the said reply dated 20<sup>th</sup> April, 1996 itself, the defendant no.1 had placed reliance on the oral partition in respect of the land bearing survey nos. 437, 491, 540, 218, 261, 520, 266 and 434 and had also referred to the release deed executed by the plaintiff in respect of the survey no.61 i.e. Gat No.313 in favour of the defendant no.1 where he was independently residing. He submits that the plaintiff however suppressed the said reply given by the defendant no.1 contending oral partition of the properties as far back as in 1973. He submits that initially the plaintiff had filed suit only in respect of 15 properties, however had amended the plaint and included 6 more properties. He submits that the said registered release deed in respect of the properties described at serial no.16 was not even disclosed

by the plaintiff in the plaint though he was a signatory thereto.

60. It is submitted that in the year 1991, defendant nos. 3 to 7 had executed a power of attorney in favour of the defendant no.1 which continued to be in force till 2001. He submits that the defendant no.1 had filed 4 common written statements for himself and on behalf of the defendant nos. 3 to 7 in this suit. He submits that the said written statement was shared with Mr.Manoj who was one of the son of Mr.Kumarchand who was participating on behalf of the defendant nos. 3 to 7 while drafting the said written statement and had agreed to the contents thereof. It is submitted that admittedly in the 4 common written statements filed by the defendant no.1 for himself and on behalf of defendant nos. 3 to 7, the defendant nos. 3 to 7 also had admitted an oral partition in respect of the suit properties and had never disputed the said fact for several years. He submits that the said Mr.Manoj who was participating on behalf of defendant nos. 3 to 7 while drafting the written statement was not examined as the witness by the defendant nos. 3 to 7 nor was there any cross-examination on this deposition of the defendant no.1 before the learned trial judge.

61. It is submitted by the learned counsel for the defendant no.1 that since the family arrangement has been already acted upon by the parties to the oral partition, such family arrangement cannot be challenged by the plaintiff and the defendant nos. 3 to 7 at this belated stage. In support of this submission, learned counsel placed reliance on the judgment of Supreme Court in case of **Narendra Kante vs. Anuradha Kante and others, (2010) 2 SCC 77** and more particularly paragraph 27. He also placed reliance on the judgment of Supreme Court in case of **Hans Raj Agarwal and another vs. Chief Commissioner of Income Tax and others, (2003) 2 SCC 295** and more particularly paragraphs 29 to 31 in support of

his submission that the oral partition which was already acted upon and there was a repeated reference to such an oral partition in various documents, the said oral partition cannot be re-opened or disrupted.

62. Learned counsel for the defendant no.1 placed reliance on the judgment of Supreme Court in case of ***Mandali Ranganna and others vs. T.Ramachandra and others, (2008) 11 SCC 1*** and more particularly paragraphs 18 and 26 in support of his submission that all the parties who were allotted their respective share in the oral partition were in possession and enjoyment of their respective properties which established beyond the reasonable doubt the factum of oral partition and the same could not be disrupted.

63. Learned counsel for the defendant no.1 submits that the factum of oral partition was acknowledged by all the parties in subsequent written documents which also indicated the division of the properties. He submits that this conduct on the part of all the parties who were parties to the oral partition could not have been ignored by the learned trial judge. He submits that the first appellate court has considered the entire evidence in right perspective and has rightly rendered a finding on oral partition between the parties as far back as in the year 1973 itself.

64. Learned counsel placed reliance on the registered release deed of 1973 executed by all the brothers and the mother of Mr.Mohan Shah (Ex.160) and on the mutation entry (Wardi) signed by all the five sisters thereby relinquishing their share in the properties of late Mr.Hirachand Shah. He also placed reliance on the affidavit which was executed in the year 1982 before the learned Magistrate by Mrs.Devkibai who was mother of the plaintiff and also executed by all the brothers regarding distribution of the properties and relinquishing their shares in the

properties described at serial nos. 18 to 21 of the plaint. He also placed reliance on the power of attorney executed on the same date to the same effect.

65. Learned counsel for the defendant no.1 also invited my attention to the affidavit and say of the sisters and heirs of Ms.Sulochana reiterating oral partition and confirming that they were not interested in the shares declared by the trial court. He also placed reliance on the registered partition deed executed in the year 2001 by Mr.Mohan, Mr.Purshottam, Mr.Shivlal and Mrs.Devkibai and also on the registered release deed executed in the year 2002 duly signed by all the sisters confirming partition and releasing their shares in those properties.

66. Learned counsel for the defendant no.1 placed reliance on various portions of the deposition of the plaintiff who was examined as a sole witness by the plaintiff and also various portion of the oral evidence of the defendant no.1 and his witness Mr.Manohar Keni. He also invited my attention to some of the portion of the oral evidence led by Mr.Prakash Shah, constituted power of attorney of the defendant nos. 3 to 7 who was only witness examined by those defendants.

67. It is submitted by the learned counsel for the defendant no.1 that the plaintiff in his cross-examination had admitted that there was a separate financial dealing in respect of the properties. The said Mr.Manohar Keni admitted that he and his father were cultivating the field of Mr.Kumarchand Shah i.e. Gat bearing No.351 which was allotted to Mr.Kumarchand Shah in oral partition. His evidence was not shaken or displaced at all in the cross-examination.

68. It is submitted by the learned counsel that the legal heirs and representatives of Mr.Kumarchand Shah i.e. defendant nos. 3 to 7 had been staying

at Mandva in a rental house from 1990 to 1996 as admitted by the witness examined by them. He submits that Mr.Kamlakar Madhavi was cultivating the property that was allotted to the share of the plaintiff. He submits that the defendant no.1 had constructed RCC house on the land bearing Gat No.313 out of his own fund. He submits that Mr.Shivlal who is real brother of the plaintiff had sold the property which had come to his share in the year 1994 i.e. land bearing Survey No.68, Hissa No.3-5-6 and Survey No.85, Hissa No.1-C. He submits that the said Mr.Shivlal admitted in the registered partition deed that he had sold those properties which came to his share on oral partition of 1973. The joint family house No.279 was given jointly to Mrs.Devkibai and Mr.Shivlal in the oral partition of 1973 which house was not included in the list of joint family properties.

69. It is submitted that the said Mr.Prakash Shah was married to the daughter of defendant no.6 only in the year 2001 and was given power of attorney in the year 2003 and thus he had no personal knowledge of the oral partition of the year 1973 and the subsequent facts between 1973 and the date of execution of such power of attorney in his favour by the defendant nos. 3 to 7 in the year 2003 and could not have deposed in respect of the subject matter of the suit at all. He submits that the oral evidence of the said Mr.Prakash Shah thus could not have been relied upon by the learned trial judge while passing a decree by him.

70. It is submitted by the learned counsel that the five sisters had already given up their rights in the suit properties and had executed a Wardi. He submits that even the document dated 12<sup>th</sup> April, 1982 which was signed before the learned Magistrate by four brothers and mother in favour of the defendant no.1 was not disclosed by the plaintiff in the plaint nor the said document was challenged either

by the plaintiff or by the defendant nos. 3 to 7. He submits that all the expenses in prosecuting the proceedings against the villagers were exclusively borne by the defendant no.1 and those properties were recovered by the defendant no.1 which was in continuous use, occupation and possession of the defendant no.1. Neither the plaintiff nor the defendant nos. 3 to 7 claimed any right, title or interest in the said property rightly which were given to the defendant no.1. Learned counsel placed reliance on the partition deed dated 22<sup>nd</sup> November, 2002 and the release deed dated 7<sup>th</sup> February, 2002.

71. Insofar as properties described at serial nos. 1 to 7 and 18 are concerned, the plaintiff admitted in his cross-examination that those properties are in the names of defendant nos. 1 and 2 and defendant nos. 3 to 7 since 1955 and that the plaintiff had not made any complaint regarding those properties anywhere. He also admitted that as per final decision/decreed in the Civil Suit No.318 of 1941, the properties at serial nos. 1 to 7 and 18 became the properties of defendant nos. 1 and 2 and the deceased Mr.Kumarchand Shah. He admitted that all the brothers had executed the release deed (Ex.160) in favour of defendant no.1 on 23<sup>rd</sup> November, 1973 which was also signed by him. He admitted that since the date of execution of the said release deed till the date of filing of the suit, he did not make any complaint alleging that the contents of the said release deed were false. He admitted that for more than 30 years, each of the brothers were maintaining their separate financial transaction. He also admitted his signature and the signatures of the brothers on the affidavit (Ex.162). He further admitted that as per the said affidavit (Ex.162), the defendant no.1 himself had taken care of the court proceedings.

72. Learned counsel invited my attention to the oral evidence of the

defendant no.1 who deposed that when Mr.Hirachand Shah died, the suit properties at serial nos. 1 to 7 and 18 were not belonging to his father but were already sold by his father in the year 1939 by executing a registered sale deed dated 1<sup>st</sup> March, 1939 in favour of Mr.Chotelal Brajgovind and two others for consideration of Rs.8,500/-. At that time, the plaintiff, his sisters and Mr.Shivlal were not even born. He submits that the defendant no.1, Mr.Kumarchand and Mr.Purshottam had filed an application in the execution proceedings. A compromise decree was passed in the said execution proceedings. The said properties at serial nos. 1 to 7 and 18 had been given to the defendant no.1, Mr.Purshottam and Mr.Kumarchand by way of ownership. He submits that the mutation entry came to be effected in favour of the defendant no.1, Mr.Kumarchand and Mr.Purshottam in respect of those properties based on settlement deed.

73. It is submitted by the learned counsel that various properties were given to various members of the family in oral partition and all of them have always treated those properties as their own properties without claiming any right, title or interest in respect of the properties allotted to others. He submits that in view of the oral partition in the month of April 1973, joint family came to be dissolved. The land allotted to Mr.Purshottam is being cultivated by Mr. Shantaram Gharat since last several years on payment of wages. The defendant no.1 had been cultivating the land by employing the labour on daily wages. It is submitted that after oral partition in the year 1973, a small Survey Nos.61A and 61B bearing new Gat No.313 was given on rental basis to the Police Department for Mandva outpost. He submits that since the said land was allotted to the defendant no.1 on oral partition and in order to get the payment of rent in respect thereof exclusively in the name of the defendant no.1, the defendant no.1 had

asked all the brothers and mother to record the said land in his name and accordingly the said release deed was executed on 23<sup>rd</sup> November, 1973 which was registered with Sub Registrar, Mumbai. All the brothers and mother had signed the said release deed which refers to the said oral partition (Ex.160).

74. It is submitted by the learned counsel that all acts done by the defendant no.1 from the date of execution of the power of attorney by the defendant nos. 3 to 7 in his favour till the same was revoked were binding on them. He submits that various admissions made in the written statement filed by the defendant no.1 for himself and on behalf of the defendant nos. 3 to 7 could not have been resiled or no fresh written statement contradicting the statement already made in those written statements could be permitted by the learned trial judge. He submits that no suggestion was put to the witness examined by the defendant no.1 that the averments including various admissions in those written statements by the defendant nos. 3 to 7 filed by defendant no.1 on their behalf were false. Mr.Prakash Shah, the witness examined by the defendant nos. 3 to 7 also could explain in the oral evidence as to how defendant nos. 3 to 7 had taken a contradictory stand in the additional written statement filed by him and how the admissions made in the earlier four written statements were reconciled.

75. In support of this submission, learned counsel for the defendant no.1 placed reliance on the following judgments of Supreme Court :-

(1) ***Prakash Chand Sharma and others vs. Narendra Nath Sharma, (1976) 3 SCC 215*** (Paragraphs 4 and 6)

(2) ***S.Malla Reddy vs. Future Builders Cooperative Housing Society and others, (2013) 9 SCC 349*** (Paragraphs 21 to 28)

(3) ***Ram Niranjana Kajaria vs. Sheo Prakash Kajaria and others, (2015) 10 SCC 203*** (Paragraphs 20 to 29)

76. Learned counsel for the defendant no.1 invited my attention to the findings rendered by the first appellate court holding that the order passed by the learned trial judge permitting the defendant nos. 3 to 7 to file fresh written statement was illegal. He submits that the first appellate court has thus rightly discarded the contradictions made by the defendant nos. 3 to 7 in the additional written statement filed by the defendant nos. 3 to 7 pursuant to such illegal order passed by the learned trial judge which was ex-parte order without giving an opportunity to the defendant no.1 and the plaintiff. He submits that the admissions already made in the pleadings cannot be withdrawn but can be explained which the defendant nos. 3 to 7 failed before the learned trial judge as well as the first appellate court. In support of the submission that Mr. Prakash Shah who was constituted attorney of defendant nos. 3 to 7 could not have been examined as a witness to depose in respect of the allegations which were not to his personal knowledge and his evidence could not have been relied upon by the learned trial judge, learned counsel for the defendant no.1 placed reliance on the judgment of Supreme Court in case of ***Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd., AIR 2005 SC 439*** and in particular paragraphs 12 to 14 and 22.

77. It is submitted by the learned counsel that the observations made by the first appellate court on the contradictions made in the additional written statement by the defendant nos. 3 to 7 have not been impugned by the defendant nos. 3 to 7 in the second appeal filed by them in this court. It is submitted by the learned counsel that even if the said affidavit and the power of attorney were not registered, the family arrangement was recorded in those documents which took

place in past. It is submitted that the registration and payment of stamp duty thereof was not necessary. Reliance is placed on the judgment of Supreme Court in case of **Kale & Others** (supra).

78. Learned counsel for the defendant no.1 distinguished the judgments relied upon by Mr.Kumbhakoni, learned senior counsel for the defendant nos. 3 to 7 on the ground that the issue before the Supreme Court in those judgments were totally different. Insofar as judgment in case of **Bajaba alias Bajirao Vishvanath Oke** (supra) relied upon by the learned senior counsel for the defendant nos. 3 to 7 is concerned, it is submitted that in the said judgment the joint family property was already lost whereas in this case the litigation was pending. It is submitted that the said judgment has even otherwise is not binding on this court. The distribution has been already completed long back. It is submitted that those properties came in possession of the defendant no.1 as exclusive owner which was neither disputed by the plaintiff or by the defendant nos. 3 to 7.

79. Mr.Kumbhakoni, learned senior counsel for the defendant nos.3 to 7 in rejoinder submits that the defendant nos. 10 to 15 had admitted the claims made by the plaintiff in their respective written statement and were not supporting the case of the defendant no.1. He however does not dispute that those defendants had not filed any separate appeal challenging the judgment and decree passed by the learned trial judge. He also does not dispute that the sisters, the mother and other respondents who are not appearing before this court have not challenged the order of the trial court and the order of the first appellate court except the plaintiff.

80. Insofar as reliance on the Wardi signed by the sisters on 4<sup>th</sup> May, 1973 is concerned, it is submitted that even in the said document, the sisters have not

alleged that the oral partition had taken place in the month of April 1973. He submits that it would thus indicate that atleast till 4<sup>th</sup> May 1973, there was no oral partition.

81. Learned senior counsel for the defendant nos. 3 to 7 invited my attention to the cross-examination of the defendant no.1 and would submit that the defendant no.1 himself had admitted that there was no partition in respect of all the properties of Mr.Hirachand Shah. Insofar as properties at serial nos. 19 to 21 are concerned, there was no partition thereof in the year 1973. The defendant no.1 could not explain as to why no entries were made in the revenue record on the basis of such alleged partition for several decades.

82. It is submitted by the learned senior counsel that since the defendant no.1 had claimed those properties described at serial nos. 19 to 21 in the plaint based on such affidavit and the power of attorney which were given for the purpose of defending litigation and to represent those signatories in the proceedings filed by the villagers and in view of the defendant no.1 claiming title based on those two documents, the same were compulsorily registrable and in absence of registration, the same were inadmissible in evidence. He submits that the said writing could not have been relied upon even for collateral purposes i.e. the purposes other than the purpose for which the documents were executed. He submits that admittedly in those two writings, no oral partition was alleged.

83. Mr.Kamble, learned counsel for the appellant (original plaintiff) in Second Appeal No.386 of 2009 adopted the submissions made by Mr.Kumbhakoni, learned senior counsel for the defendant nos. 3 to 7 insofar as properties described at serial nos. 8 to 17 and 19 to 21 are concerned and submits

that the plaintiff also would be entitled to equal share in those properties. However insofar as properties at serial no. 1 to 7 and 18 are concerned, he submits that those properties were not partitioned by oral partition or otherwise and thus his client would be entitled to share in those properties. Learned counsel for the plaintiff also tendered brief written submissions for consideration of this court. He submits that since defendants other than defendant nos. 1, 2 and 3 to 7 are not claiming any right in the suit properties, his client may be given larger share in the properties.

84. It is submitted by the learned counsel for the plaintiff that Mr.Hirachand Shah had no right to alienate, copartionary properties of the plaintiff and thus the sale transactions in favour of the three purchasers viz. Mr.Chotelal Brajgovind and others and without consent of the male member of the family itself was void. He submits that the properties thus described at serial nos. 1 to 7 and 18 are joint family properties of the plaintiff and defendants and were not partitioned between the parties by metes and bounds. Reliance is placed on the judgment of Supreme Court in case of ***Sher Singh and others vs. Gamdoor Singh, (1997) 2 SCC 485*** and in particular paragraphs 5 and 6 thereof.

### **REASONS AND CONCLUSIONS**

85. The admitted facts are that Hirachand Shah had two wives namely Motiben (first wife) and Devkibai (second wife-defendant no.10) who was the sister of Motiben. The said Hirachand Shah had three sons i.e. Kumarchand (defendant no.3), Mohan (defendant no.1), Purshottam (defendant no.2) and one daughter i.e. Sulochana through first wife and two sons i.e. Damodar (plaintiff) and Shivilal (defendant no.11) and four daughters i.e. Kesar (defendant no.12), Leela (defendant no.13), Pushpa (defendant no.14) and Laxmi (defendant no.15)

through his second wife.

86. Mr.Kumarchand Shah died in the year 1990 leaving behind his legal heirs i.e. his widow Geeta (defendant no.6), son Manoj (defendant no.3) and three daughters namely Neelam (defendant no.4), Sadhana (defendant no.5) and Nutan (defendant no.7). Sulochana who was one of the daughter of Hirachand Shah and Motiben died prior to 1996 and had a daughter i.e. Induben (defendant no.8) and two sons namely Bipin (defendant no.9) and Kantilal (defendant no.16).

87. Second Appeal Nos.708 of 2008 and 38 of 2009 are filed by the defendant nos.3 to 7, legal heirs of late Kumarchand Shah. Second Appeal No.386 of 2009 is filed by the plaintiff. Except the plaintiff, the defendant no.1 and the defendant nos.3 to 7. The other defendants though were served, did not appear before this Court.

88. The plaintiff had applied for partition of various properties described at serial nos.1 to 21 in the plaint. In the original plaint, the plaintiff had applied for partition only in respect of 15 properties and thereafter amended the plaint from time to time and included six other properties. The plaintiff had claimed 1/11<sup>th</sup> share in all properties of late Hirachand Shah being one of the son of Hirachand Shah through Devkibai alleging that all the said alleged properties were ancestral properties of Hirachand Shah and were not partitioned.

89. In so far as the properties at serial nos.1 to 6 and 18 described in the plaint are concerned, it was the case of the defendant no.1 as well as the defendant nos.3 to 7 that on 9<sup>th</sup> February 1939, the said Hirachand Shah had executed sale deed and had alienated those properties to Chotelal Brajgovind and

others. It was the case of the defendant no.1 that even the property at serial no.7 was also sold by the said Hirachand Shah to Chotelal Brajgovind and others. It is not in dispute that in the year 1941, Chotelal Brajgovind and others who claimed to be the purchasers of those properties at serial nos.1 to 7 and 18 had filed a civil suit (318 of 1941) in a Civil Court for appropriate reliefs. On 13<sup>th</sup> March 1942, the said civil suit came to be decreed in favour of those purchasers.

90. It is not in dispute that in the year 1952, an execution application (Special Darkhast No.10 of 1952) was filed by those purchasers in Alibaug Court for seeking implementation of the said decree. In the year 1952, the defendant nos.1, 2 and 3 had applied in the said execution proceedings on the ground that they were the owners of the said properties at serial nos.1 to 7 and 18 and were accordingly impleaded as parties to the said execution proceedings. The parties in the said execution proceedings including the defendant nos.1, 2 and Kumarchand compromised the said suit. In so far as the properties at serial nos.1 to 7 and 18 described in the plaint are concerned, those properties were given to Mohan (defendant no.1), Purshottam (defendant no.2) and Kumarchand. It is established that Chotelal Brajgovind and others retained rest of the properties. As a result, the said compromise decree, in so far as the properties at serial nos.1 to 7 and 21 are concerned, the defendant nos.1, 2 and 3 become absolute owners in respect of those properties. A perusal of the record further indicates that in the year 1956, those properties were transferred in the names of the defendant no.1, defendant no.2 and Kumarchand in the revenue record after following due procedure.

91. It is however the case of the defendant nos.3 to 7 that though the properties at serial nos.1 to 6 and 18 are owned by the defendant no.1, defendant no.2 and the defendant nos.3 to 7 (claiming through Kumarchand Shah), there

was no partition effected in respect of those properties and the same are in joint possession of the defendant nos.1, defendant no.2 and the said Kumarchand Shah. The plaintiff, however, has disputed the claim of the defendant no.1, defendant no.2 and the defendant nos.3 to 7 in respect of the properties at serial nos.1 to 7 and 18.

92. The plaintiff himself entered the witness box and was extensively cross examined by the learned advocate representing the defendant nos. 1 and 2 and defendant nos. 3 to 7. He admitted in the cross-examination that insofar as properties at serial nos. 1 to 6 and 18 are concerned, those properties are in the name of defendant nos. 1 to 7 since 1955. He also admitted that he had not made any complaint regarding the recording of their names in respect of those properties. He deposed that he was not aware that the properties at serial nos. 1 to 7 and 18 had been sold by his father Mr.Hirachand Shah in favour of Mr.Chotelal Brajgovind and others by sale deed dated 9<sup>th</sup> February, 1938. He admitted that he was aware that as per final decision in the said Civil Suit No.318 of 1941, those properties became the properties of defendant nos. 1 and 2 and the deceased Mr.Kumarchand. He admitted that he did not produce any evidence showing that on the date of his birth any property out of the suit properties at serial nos. 1 to 7 and 18 were owned by his father.

93. Insofar as release deed dated 23<sup>rd</sup> November, 1973 is concerned, the plaintiff admitted that he alongwith all the brothers had executed the said document in favour of the defendant no.1. He also identified his signature and signatures of his brothers on the said document. He also admitted that from the date of execution of the said release deed (Ex.160) till filing of the suit, he did not make any complaint alleging that the contents of the said release deed were false.

He also admitted that more than 30 years, each of the brothers were maintaining their separate financial transactions.

94. Insofar as affidavit (Ex.162) is concerned, the plaintiff identified the signature of himself and his brothers on the said affidavit and that as per the said affidavit, the defendant no.1 himself had taken care of the court proceedings.

95. Insofar as defendant no.1 is concerned, he entered the witness box and deposed that on the date of the death of his father Mr.Hirachand Shah, the suit properties described at serial nos. 1 to 7 and 18 did not belong to his father but was already sold by his father by a registered sale deed dated 1<sup>st</sup> March, 1939 to Mr.Chotelal Brajgovind and two others for consideration of Rs.8,500/-. The said suit was decreed against the father of the defendant no.1 and his other brothers. He alongwith Mr.Purshottam and Kumarchand had filed an application raising objection in the said execution application. The parties settled the said dispute which came to be recorded in the Darkhast proceedings. According to the said settlement, the said properties became the ownership properties of the defendant no.1, Mr.Purshottam and the said Mr.Kumarchand and their names were also recorded in the mutation entry.

96. The defendant no.1 also deposed about various writings executed by some of the other respondents in his favour relinquishing their rights in the suit properties and admitting therein the oral partition. The defendant no.1 also in his deposition brought on record the conduct of the parties post oral partition in respect of various properties. In his cross-examination, he maintained his statement that insofar as properties at serial nos. 1 to 7 and 18 are concerned, he himself, Mr.Purshottam and Mr.Kumarchand only were the owners of the said

properties. He admitted that on 8<sup>th</sup> November, 1957 he had executed the release deed in respect of the property at serial no.7 in favour of Mr.Kumarchand.

97. Insofar as the question asked to the defendant no.1 as to why he did not feel it necessary to give effect to the release deed of 1973 in any records, the defendant no.1 replied that till 1990 Mr.Kumarchand was looking after all these transactions. There was no dispute about what was decided amongst the brothers and thus there was no necessity to give effect to the said release deed of 1973 in the record. He deposed that the oral partition was not given effect in the Government record. He admitted that except suit property at serial nos. 1 to 7 and 18, all other properties were ancestral properties of the family. He admitted that there were no signatures of the defendant nos. 3 to 7 on the partition deed executed on 22<sup>nd</sup> November, 2001.

98. Insofar as the release deed dated 8<sup>th</sup> November, 1957 executed by the defendant no.1 and Mr.Purshottam in favour of Mr. Kumarchand in respect of the property at serial no.7 is concerned, defendant no.1 identified his signatures and the signature of Mr.Purshottam however deposed that he was not in agreement with the contents of the said release deed. The witness deposed that Mr.Kumarchand had told him that for his cause, he wanted to take the said land in his name and thus the defendant no.1 signed the said document in favour of Mr.Kumarchand.

99. Defendant nos. 3 to 7 had examined their constituted attorney Mr.Prakash Shah who was son-in-law of defendant no.6. In his examination in chief he deposed that he was giving evidence on behalf of defendant nos. 3 to 7 in his capacity as their constituted attorney. Insofar as property at serial no.7 is

concerned, the said witness deposed in his examination in chief that the defendant nos. 1 and 2 had released their rights in the said property in favour of Mr.Kumarchand by executing the release deed dated 8<sup>th</sup> November, 1957 after accepting the consideration of Rs.300/-. The witness of the defendant nos. 3 to 7 deposed that since the defendant no.1 did not give any information to the defendant nos. 3 to 7, the power of attorney of defendant no.1 was cancelled by defendant nos. 3 to 7. He deposed that the said power of attorney was also cancelled because of the doubt having arisen in the mind of defendant nos. 3 to 7 about their share in the property. He denied that there was any oral partition in the year 1973. He deposed that the defendant no.8, 11, 12, 13 and defendant no.15 were five sisters and deceased Ms.Sulochana had relinquished their rights on 2<sup>nd</sup> May, 1973 and accordingly statements were recorded and mutation entry no.1626 was taken. The names of all these sisters were removed from the mutation entry. He deposed that the written statement filed on behalf of defendant nos. 3 to 7 by the defendant no.1 was not agreeable to them and the written statement filed by them is proper.

100. In cross-examination of the said witness Mr.Prakash Shah by the advocate of the plaintiff, he deposed that since it came to the notice of the defendant nos. 3 to 7 that the defendant no.1 was acting prejudicial to their interest, they had revoked the power of attorney executed in favour of the defendant no.1. In cross-examination of Mr.Prakash Shah by the defendant nos.1 and 2 through their advocate, he admitted that he was married to the daughter of defendant no. 6 in July 2001. He admitted that his mother in law and Manoj, one of the son of Mr.Kumarchand were residing at Indapur, Taluka Mangaon and were doing papad business. He admitted that after death of Mr.Kumarchand his family was residing at Mandva in a house on payment of rental basis. The said witness

admitted in his cross-examination that he had derived knowledge about the suit from the heirs of Mr.Kumarchand after his marriage. The said witness admitted that he had occasion to see the original written statement filed by the defendant no.1 on behalf of defendant nos. 3 to 7 just before 3 to 4 months of filing of written statement by defendant nos. 3 to 7 in July 2003. He admitted that prior thereto, he had hearsay knowledge about the contents of the said written statements which information was given to him by all the family members of Shah which includes heirs of Mr.Kumarchand also. He admitted that after getting hearsay information from Shah family, it came to his notice that the earlier written statements filed by defendant no.1 on behalf of defendant nos. 3 to 7 in the suit were not in their interest. He admitted that with initiation of Mr.Kumarchand, he himself and other brothers had executed a registered release deed in favour of Survey No.61-B (Gat No.313) i.e. property described at serial no.16 in favour of the defendant no.1 and the defendant no.1 had constructed a house on the said land at his own cost.

101. Insofar as properties at serial nos. 1 to 7 and 18 in the plaint are concerned, the learned trial judge held that it was an admitted fact that Mr.Hirachand Shah had executed agreement dated 9<sup>th</sup> February, 1939 in favour of Mr.Chotelal Brajgovind and two others in respect of those properties and some other properties. The suit was decreed in favour of the said three purchasers. The defendant no.1, defendant no.2 and Mr.Kumarchand had appeared in the Darkhast proceedings. It is held that according to the compromise between them on 14<sup>th</sup> June, 1955, the decree passed in the RC Suit No.319 of 1941 was amended and according to the said decree, some of the properties were declared to be owned by those three purchasers and possession thereof was given to them. The remaining properties i.e. properties at serial nos. 1 to 7 and 18 were released by those three

purchasers in favour of the defendant no.1, defendant no.2 and Mr.Kumarchand.

102. The learned trial judge held that those properties had come to the possession of Mr.Hirachand in partition between Mr.Hirachand and his brothers and stood to be copartionary properties of the plaintiff and the defendants. The said Mr.Hirachand had no right to alienate the said properties without consent of the adult male members or female. The learned trial judge accordingly held that those properties at serial nos. 1 to 7 and 18 were joint family properties of the plaintiff and defendants which were not partitioned by metes and bound. It is held that mere separate possession of the properties does not conclude that they were partitioned by metes and bound unless the partition was proved by substantial evidence.

103. Insofar as properties at serial nos. 1 to 7 and 18 of the plaint are concerned, it is held by the first appellate court that from the compromise deed executed before the executing court, it was noticed that those properties were the ownership properties of defendant no.1, defendant no.2 and Mr.Kumarchand and were in administration of the defendant no.1, defendant no.2 and Mr.Kumarchand. It is held that the defendant nos. 1 to 7 had proved that those properties were owned and administered by them.

104. Insofar as findings of the first appellate court in respect of the properties at serial nos. 1 to 7 and 18 are concerned, the defendant no.1 has not impugned the said findings and the conclusion drawn by the first appellate court. It is however the case of the defendant nos. 3 to 7 that insofar as properties at serial nos. 1 to 6 and 18 are concerned, the same are exclusive properties of the defendant nos. 1 to 7 and there was no partition effected between them in respect

of these properties. However it was the case of the defendant nos. 3 to 7 that the property at serial no.7 was released in favour of Mr.Kumarchand by defendant nos. 1 and 2 by executing a registered release deed dated 8<sup>th</sup> November, 1957 and since then Mr.Kumarchand was the exclusive owner thereof.

105. It is the case of the defendant nos. 3 to 7 that the first appellate court was thus not correct in holding the said property at serial no.7 also as ownership property of defendant nos.1 and 2 alongwith defendant nos. 3 to 7 and ought to have dismissed the suit as well as appeal filed by defendant no.1 insofar as that property is concerned. The plaintiff however has challenged the findings of the first appellate court and the conclusion that the properties at serial nos. 1 to 7 and 18 were owned by defendant nos. 1, 2 and Mr.Kumarchand and after demise of Mr.Kumarchand, his 1/3<sup>rd</sup> share would devolve upon the defendant nos. 3 to 7. It is the case of the plaintiff that those properties are joint family properties of the plaintiff and defendant nos. 1 to 7 and thus the plaintiff is entitled to 1/11<sup>th</sup> share in those properties.

106. A perusal of the oral evidence led by the plaintiff in respect of the properties at serial nos.1 to 6 and 18 summarized aforesaid indicates that the plaintiff had admitted that those properties are in the names of the defendant no.1, defendant no.2 and Mr.Kumarchand Shah since 1955 and after demise of Kumarchand Shah, the same are in the names of the defendant nos.3 to 7 jointly with the defendant nos.1 and 2. The plaintiff also admitted that he had not made any complaint regarding recording of names of the defendant nos.1 to 7 in respect of those properties to any authority. He pleaded ignorance of sale of those properties by Hirachand Shah in favour of Chotelal Brajgovind and others by sale deed dated 9<sup>th</sup> February 1938. He, however, admitted that he was aware that as

per final decision in the Civil Suit No.318 of 1941, the properties at serial nos. 1 to 7 and 18 became the properties of defendant nos. 1 and 2 and the deceased Mr.Kumarchand Shah.

107. The plaintiff could not produce any evidence before the trial Court showing that on the date of his birth on 5<sup>th</sup> November 1941, any of the properties out of the properties at serial nos.1 to 7 and 18 were owned by his father. The defendant no.1 also entered the witness box and deposed that when Hirachand Shah died, the properties at serial nos.1 to 7 and 18 were not belonging to his father as the same were already sold by his father Hirachand Shah by executing registered sale deed dated 1<sup>st</sup> March 1939 in favour of Chotelal Brajgovind and others for consideration of Rs.8,500/-. The plaintiff was not born when those properties were sold by Hirachand Shah to the third parties. He deposed that the compromise deed was passed in the suit filed by the defendant nos.1 and 2 and Kumarchand Shah and by virtue of compromise decree in the said execution proceedings between the parties in the original suit filed by Chotelal Brajgovind and others, the defendant nos.1 and 2 and Kumarchand became exclusive owners of the said properties.

108. Insofar as property at serial no.7 is concerned, it was the case of the defendant no.1 that the said property was also subject matter of the suit filed by Mr.Chotelal Brajgovind and others and by virtue of compromise the decree between those plaintiff and defendant nos.1 and 2 and Mr.Kumarchand Shah, the said property at serial no.7 also became the ownership property of defendant nos. 1, 2 and Mr.Kumarchand Shah. However, it was the case of the defendant nos. 3 to 7 that the defendant nos. 1 and 2 had executed a registered release deed on 8<sup>th</sup> November,1957 in respect of the said property in favour of Mr.Kumarchand Shah,

the predecessor of defendant nos. 3 to 7 and since then the said property became the exclusive property of Mr.Kumarchand Shah and upon his demise, became the exclusive properties of the defendant nos. 3 to 7. Insofar as the plaintiff is concerned, the plaintiff applied for partition of the property at serial no.7 also on the premise that the said property was also an ancestral property of Mr.Hirachand Shah and that he was entitled to 1/11<sup>th</sup> share in the said property.

109. A perusal of the oral evidence of the plaintiff indicates that he admitted in the cross-examination that the said property at serial no.7 also was in the name of the defendant nos. 1,2 and Mr.Kumarchand Shah and upon demise of Mr.Kumarchand Shah were in the defendant nos. 3 and 7 insofar as share of Mr.Kumarchand Shah is concerned. Defendant no.1 in his cross-examination identified his signature and signatures of defendant no.2 on the release deed dated 8<sup>th</sup> November,1957 in respect of the said property executed by the defendant no.1 and defendant no.2 in favour of Mr.Kumarchand Shah. He however deposed that he did not agree with the said contents of the said release deeds. The witness examined by defendant nos. 3 to 7 deposed that the defendant nos. 1 and 2 had released their rights in the said property in favour of Mr.Kumarchand Shah by executing the release deed dated 8<sup>th</sup> November,1957 after accepting the consideration of Rs.300/-.

110. A perusal of the above referred summary of the oral evidence led by the plaintiff, defendant no.1 and the witness examined by the defendant nos. 3 to 7 makes it clear that Mr.Hirachand Shah had executed a sale deed in favour of Mr.Chotelal Brajgovind and others in respect of the properties at serial nos. 1 to 7 and 18 on 9<sup>th</sup> February, 1939. The plaintiff was not even born when the said sale deed dated 9<sup>th</sup> February,1939 was executed. A perusal of the record further

indicates that the said Mr.Chotelal Brajgovind and others had filed a suit (319 of 1941) which was decreed on 13<sup>th</sup> March,1942. The plaintiff in that suit had filed Darkhast application for seeking implementation of the said decree before Alibaug Court. The defendant nos. 1, 2 and Mr.Kumarchand Shah had intervened in those proceedings and were joined as parties.

111. The record indicates that in the said execution proceedings compromise took place in respect of the properties at serial nos. 1 to 7 and 18 between the plaintiff therein and defendant nos. 1, 2 and Mr.Kumarchand Shah by virtue of which the said properties at serial nos. 1 to 7 and 18 became ownership properties of defendant nos. 1, 2 and Mr.Kumarchand Shah. The effect of the said compromise decree in respect of those properties was also given in the revenue records. These properties have been transferred in favour of defendant nos. 1, 2 and Mr.Kumarchand Shah in the revenue record as far back as on 7<sup>th</sup> June, 1956. The plaintiff in his evidence had admitted that these properties were standing in the name of defendant nos. 1, 2 and Mr.Kumarchand Shah and after demise of Mr.Kumarchand Shah in the name of defendant nos. 3 to 7. He further admitted that he did not make any complaint or application to any authority to change the revenue record. He also did not apply for setting aside the compromise decree passed prior to 1956. The suit for partition came to be filed for the first time in the year 1996.

112. The plaintiff was fully aware of the decree passed by the executing court. In my view since the said properties at serial nos. 1 to 7 and 18 ceased to be ancestral properties after execution of the sale deed by the father as far back as on 9<sup>th</sup> February,1939, the plaintiff could not make any claim in respect of those properties at serial nos. 1 to 7 and 18. In my view the findings rendered by the

learned trial judge that the father had no right to alienate the said properties at serial nos. 1 to 7 and 18 without consent of the adult members of the family is totally perverse and contrary to law. The said Mr.Hirachand Shah had already entered into a sale deed in favour of Mr.Chotelal Brajgovind and others as far back as on 9<sup>th</sup> February, 1939. The executing court had already passed an order in terms of the compromise pursis filed by the parties to the said suit thereby conferring the ownership of defendant nos. 1, 2 and Mr.Kumarchand Shah in respect of those properties prior to 1956.

113. The said order passed by the executing court has not been impugned by the plaintiff admittedly and thus the learned trial Judge could not have taken a different view by ignoring the said order passed by the executing court which was implemented and acted upon by the parties in those proceedings. In my view, the plaintiff could not establish any right, title or interest of any nature whatsoever in the properties at serial nos. 1 to 7 and 18. The said properties except property at serial no.7 are owned by the defendant nos. 1, 2 and Mr.Kumarchand Shah in view of the compromise pursis filed by the parties to the said suit (319 of 1941) and to the Darkhast application (10 of 1052) and no other parties except defendant nos. 1, 2 and the legal heirs of Mr.Kumarchand Shah are entitled to any share in the said properties.

114. Insofar as properties at serial no. 7 is concerned, defendant no.1 who claimed joint ownership in respect of the said properties alongwith defendant nos. 3 to 7 before the trial court could not dispute the signature on the release deed dated 8<sup>th</sup> November,1957. In view of the defendant no.1 having executed a release deed in respect of the said property at serial no.7 in favour of Mr.Kumarchand Shah which was acted upon, the defendant no.1 ceased to have any right, title or

interest of any nature whatsoever in respect of the said properties. In my view the said property upon execution of the said release deed by defendant no.1 in favour of Mr.Kumarchand Shah became the exclusive property of the said Mr.Kumarchand Shah and upon his demise became the ownership properties of the defendant nos. 3 to 7. Neither the plaintiff nor the defendant no.1 or any other defendants except defendant nos. 3 to 7 could claim any right, title or interest of whatsoever nature in respect of the said property which ceased to be an ancestral property upon sale of the said property by the father as far back as on 9<sup>th</sup> February, 1939 and in view of the order passed by the executing court in the year 1956 in favour of the defendant nos. 1, 2 and Mr.Kumarchand Shah and thereafter upon execution of the release deed by defendant no.1 in favour of Mr.Kumarchand Shah. In my view, the judgment and decree passed by the learned trial judge and also the learned District Judge in respect of this property are totally perverse and contrary to the evidence on record and thus part of the decree thus deserves to be set aside.

115. For the aforesaid reasons, the substantial question of law (f) is answered in affirmative. In my view the two courts below ought to have passed a decree for partition in respect of the properties at serial nos. 1 to 6 and 18 and ought to have allotted 1/3<sup>rd</sup> share to the defendant nos. 1 and 2 each and remaining 1/3<sup>rd</sup> share to defendant nos. 3 to 7. Insofar as substantial question of law (g) is concerned, the same is answered in negative. The defendant no.1 who entered the witness box had admitted the execution of the said registered release deed (Ex.201) in respect of the property at serial no.7 in favour of Mr.Kumarchand Shah for consideration of Rs.300/-.

116. Insofar as property at serial no.16 is concerned, it was the case of the

plaintiff that the said property was also an ancestral property in which the plaintiff was entitled to claim 1/11<sup>th</sup> share. The defendant no.1 however had relied upon a release deed dated 23<sup>rd</sup> November, 1973. It was the case of the defendant no.1 that on oral partition of various ancestral properties, property at serial no.16 bearing Survey Nos.61A and 61B, bearing new Gat No.313 was allotted to the defendant no.1. It was his case that the defendant no.1 had asked all the brothers and mother to record the said land in his name and accordingly all the parties executed a release deed on 23<sup>rd</sup> November, 1973 which was duly registered with the Sub-Registrar, Mumbai in favour of the defendant no.1. All the brothers and mother had signed the said release deed (Ex.160) in which there was a reference to the oral partition.

117. Mr.Prakash Shah who was constituted attorney of defendant nos. 3 to 7 and who was examined as a witness on their behalf admitted in his cross-examination that Mr.Kumarchand Shah, other brothers and the mother had executed a registered release deed in favour of the defendant no.1 in respect of the said property at serial no.16 and that the said defendant no.1 had constructed a house on the said land at his own cost. It is not in dispute that the said registered release deed was not challenged by any of the signatories to the said release deed or by the other members of the family who had not signed the said release deed. A perusal of the record indicates that the said release deed was duly acted upon by all the parties. After execution of the said release deed in favour of the defendant no.1, he had been claiming exclusive right, title and interest as owner in respect thereof all throughout.

118. Neither the plaintiff nor any other defendants other than defendant no.1 who became owner of the said property made any complaint or challenged

the said document at any point of time. In my view the findings of the learned trial judge as well as the learned District Judge in respect of the property at serial no.16 is totally perverse and contrary to the proved evidence on record. The defendant no.1 has rightly claimed ownership in respect of the said property since the date of the execution of the release deed dated 23<sup>rd</sup> November, 1973 in respect of the said property and the said property accordingly ceased to be an ancestral property and thus no other party except defendant no.1 could claim any right, title or interest in the said property. The judgment and decree passed by the learned trial judge as well as by the first appellate court insofar as property at serial no.16 is concerned, thus deserves to be set aside.

119. Insofar as the properties at serial nos.19 to 21 are concerned, it was the case of the plaintiff that these properties were also ancestral properties and thus the plaintiff was also entitled to have 1/11<sup>th</sup> share in those properties. On the other hand, it was the case of the defendant no.1 that there was a litigation in respect of these three properties between the villagers and the parties to these proceedings. None of the parties, except defendant no.1, had agreed to defend those proceedings personally and had executed an affidavit dated 12<sup>th</sup> April, 1982 in favour of the defendant no.1 and had relinquished their ownership rights in those properties in favour of the defendant no.1.

120. It was the case of the defendant no.1 that the legal heirs of Mr.Hirachand Shah had also executed a power of attorney in favour of the defendant no.1 (Exhibit 196) thereby giving a full power of alienation and generally for doing all acts, deeds and execute documents in connection with those properties. It was the case of the defendant no.1 that on the basis of the said affidavit dated 12<sup>th</sup> April, 1982 and a power of attorney, those legal heirs had

relinquished their undivided shares in respect of those properties in favour of the defendant no.1 exclusively. It was his case that in view of the above referred documents and in view of the fact that the defendant no.1 thereafter defended those litigation filed by the villagers exclusively and spent time and money thereon and in view of the other legal heirs of Mr.Hirachand Shah having relinquished their undivided shares in those properties, the defendant no.1 became exclusive owner of the said properties.

121. On the other hand, it was the case of the defendant nos.3 to 7 that the properties at serial nos.19 to 21 were never mutated in the name of any of the parties, including the defendant no.1 after the death of Mr.Hirachand Shah in view of the villagers started claiming rights in those properties and in view of the pending litigation between the villagers and the parties to these proceedings. The defendant nos.3 to 7 have also raised an issue that the documents on which the defendant no.1 has placed reliance in support of his claim of ownership alleging relinquishment of rights by other legal heirs of Mr.Hirachand Shah by virtue of execution of an affidavit and the power of attorney in favour of the defendant no.1 were required to be registered under the provisions of the Registration Act, 1908 and admittedly not having been registered, in view of section 17(1)(b) of the Registration Act, 1908, no right of any nature whatsoever could have conferred upon the defendant no.1 and that such documents were inadmissible in evidence.

122. The defendant nos.3 to 7 also placed reliance on various judgments on this issue and also on the commentary of “Mulla Hindu Law” on the subject “Recovery of ancestral property”. The plaintiff supported the case of the defendant nos.3 to 7 insofar as the properties at serial nos.19 to 21 are concerned and submits that since the defendants, other than defendant nos.1 and 3 to 7 have not come

forward and have not claimed any right, title or interest in these properties, these properties shall be partitioned in favour of the plaintiff (1/3<sup>rd</sup> share), defendant no.1 (1/3<sup>rd</sup> share) and defendant nos.3 to 7 (1/3<sup>rd</sup> share) respectively.

123. Insofar as properties described at serial nos. 19 to 21 is concerned, in his cross-examination, the defendant no.1 admitted that dispute in respect of those properties was going on in the court and he had conducted those matters. He also admitted that he had filed suit, appeal and applications in various courts for himself and on behalf of Mr.Kumarchand, Mr.Damodar, Mr.Shivlal, Mrs.Devkibai and Mr.Purshottam as their constituted attorney. He admitted that Mr.Kumarchand, Mr.Purshottam, Mr.Damodar, Mr.Shivlal and Mrs.Devkibai were having ownership rights in those properties. The defendant no.1 had filed those proceedings in their names and conducted the same. The aforesaid persons were appellants in the proceedings filed before the District Court and also in the revenue proceedings. He admitted that in the District Court proceedings, it had been declared that the aforesaid six persons were the owners of the said properties. He did not file any appeal against the order of the District Court. He admitted that in the proceedings filed by him before the Civil Court and the revenue court, he did not mention that there had been oral partition in the year 1973 in respect of those properties and that the said properties were allotted to his share. He admitted that there was no partition of any nature in respect of those properties described at serial nos. 19 to 21 in the plaint. He admitted that in 1973, there was no partition of all the properties of Mr.Hirachand Shah.

124. A perusal of the deposition of the defendant no.1 indicates that he admitted that when the affidavit dated 12<sup>th</sup> April, 1982 (Exhibit 162) was executed, at that time dispute in respect of those properties at serial nos.19 to 21 was going

on before the Civil Court and Revenue Court. He further admitted that the legal heirs of Mr.Kumarchand Shah i.e. defendant nos.3 to 7 had not executed any affidavit in his favour. He admitted that the dispute in respect of those properties was going on in the Court and he had conducted those matters. He had filed appeals and applications in various Courts in respect of those properties for himself and on behalf of Mr.Kumarchand Shah, Mr.Damodar, Mr.Shivlal, Mrs.Devkibai and Mr.Purushottam as their constituted attorney based on the power of attorney executed by them in his favour. He admitted that Mr.Kumarchand Shah, Mr.Damodar, Mr.Shivlal, Mrs.Devkibai and Mr.Purushottam were having ownership rights in those properties. The defendant no.1 had filed those proceedings in their names and in his name and conducted the same. Those persons were the appellants in the proceedings filed before the District Court and also in the revenue proceedings. He further admitted in the District Court proceedings that the aforesaid six persons were declared as the owners of the said properties described at serial nos.19 to 21. He did not file any appeal against the order of the District Court.

125. The defendant no.1 also admitted in his deposition that in the proceedings filed by him before the Civil Court and Revenue Court, he did not mention that there had been oral partition in the year 1973 in respect of those properties or that the said properties were owned by him or were allotted to his share by the five persons, who had executed the power of attorney in his favour. He also admitted that there was no partition of any nature in respect of those properties described at serial nos.19 to 21 in the plaint and that there was no partition of all the properties of Mr.Hirachand Shah.

126. Learned trial Judge declared the properties at serial nos.19 to 21 also

as ancestral properties and held that the plaintiff was entitled to claim 1/11<sup>th</sup> share in those properties and directed for partition of those properties also by metes and bounds.

127. The learned District Judge held that the affidavit dated 12<sup>th</sup> April, 1982 (Exhibit 162) was signed by all the sons of late Hirachand at Mumbai, in which it was stated that those parties would not raise any objection or create any obstacles or obstructions of whatsoever nature in respect of the said properties. It is held that as per the said affidavit, the other brothers and sisters had relinquished their rights in favour of the defendant no.1 in respect of those three properties. Learned District Judge held that the said properties were not ancestral and thus the other sharers in the properties having executed affidavit and power of attorney in favour of the defendant no.1 and in view of the defendant no.1 having incurred expenditure, those three properties i.e. at serial nos.19 to 21 belonged to the defendant no.1 only and could not be partitioned in favour of all other parties. It is held that since those three properties had been given to the share of the defendant no.1, the plaintiff had no right to ask for share in those properties. Learned District Judge accordingly allowed Civil Appeal No.56 of 2006 filed by the defendant no.1 and dismissed Civil Appeal No.57 of 2006 which was filed by the defendant nos.3 to 7 and was pleased to quash and set aside the judgment and decree dated 30<sup>th</sup> December, 2005.

128. The Supreme Court in case of **Subraya M.N.** (supra) has held that the binding family arrangements dealing with immovable property worth more than Rs.100/- can be made orally and when so made, no question of registration arises. If however, it is reduced to the form of writing with the purpose that the terms should be evidenced by it, it required registration and without registration it is

inadmissible. It is held that the said family arrangement can be used as corroborative piece of evidence for showing or explaining the conduct of the parties. It is not in dispute that the defendant no.1 has claimed exclusive right, title and interest in the properties described at serial nos.19 to 21 not on the basis of the alleged oral partition but has admittedly claimed ownership based on the affidavit dated 12<sup>th</sup> April, 1982 and also on the power of attorney. Admittedly the said affidavit dated 12<sup>th</sup> April, 1982 and the said power of attorney were not registered. The question that arises for consideration of this Court is whether the said affidavit dated 12<sup>th</sup> April, 1982 (Exhibit 162) and the power of attorney (Exhibit 196) purporting to give various rights in favour of the defendant no.1 and recording the alleged relinquishment of right, title and interest of those parties in favour of the defendant no.1 was mandatorily required to be registered in view of section 17(1) (b) read with section 49 of the Indian Registration Act, 1908 and if not registered, the consequence thereof.

129. Mr.Savla, learned counsel appearing for the defendant no.1 placed reliance on the judgment of the Supreme Court in case of **Kale and Ors.** (supra) in support of his submission that the family arrangement can be made orally and question of registration does not arise. The Supreme Court in case of **Kale & Ors.** (supra) has held that even if the family settlement was not registered, it was to operate as a complete estoppel against the parties having executed such family settlement. The ownership rights of Mr.Kumarchand Shah, Mr.Damodar, Mr.Shivlal, Mrs.Devkibai and Mr.Purushottam have been admitted by the defendant no.1 in respect of those properties at serial nos.19 to 21. It is not in dispute that the District Court in those proceedings which were defended by the defendant no.1 against the villagers had declared Mr.Kumarchand Shah, Mr.Damodar, Mr.Shivlal, Mrs.Devkibai and Mr.Purushottam and the defendant

no.1 as the joint owners of the suit properties. It is not in dispute that the defendant no.1 did not challenge the said declaration granted by the District Court in favour of the six parties and the said judgment and decree attained finality. The defendant no.1 himself has admitted in his cross-examination that there was no partition of any nature in respect of those properties described at serial nos.19 to 21.

130. Since the defendant no.1 has claimed the alleged relinquishment of rights of the some of the legal heirs of Mr.Hirachand Shah and more particularly Mr.Kumarchand Shah, Mr.Damodar, Mr.Shivlal, Mrs.Devkibai and Mr.Purushottam in those properties described at serial nos.19 to 21 based on the said affidavit and the power of attorney which are admittedly in writing, those documents were required to be registered compulsorily under section 17(1)(b) of the Registration Act, 1908 and in view of those documents not having been registered, were inadmissible in evidence. Admittedly these properties were not partitioned at any point of time and continued to be in the name of Mr.Hirachand Shah. It is not in dispute that the judgment and decree passed by the learned trial Judge and the learned District Judge insofar as the properties at serial nos.19 to 21 are concerned are not challenged by the other defendants, except defendant nos.3 to 7. The other defendants except defendant nos. 1 to 7, have relinquished their rights by registered documents in all the properties including these properties. The other defendants except defendant nos. 1 to 7 and the plaintiff thus would not be entitled to claim any right in these properties at serial nos. 19 to 21. These properties are thus liable to be distributed amongst plaintiff, defendant no.1 and defendant no.2 in the ratio of  $1/4^{\text{th}}$  each and the defendant nos. 3 to 7 would be entitled to remaining  $1/4^{\text{th}}$  jointly. They would be entitled to partition of these properties by metes and bounds.

131. In my view, claiming ownership based on alleged relinquishment of rights under unregistered affidavit and power of attorney cannot be considered as placing reliance thereon for collateral purposes. The judgment of the Supreme Court in case of **Kale & Ors.** (supra) relied upon by Mr.Savla, learned counsel for the defendant no.1 would not assist the case of the defendant no.1 on this issue in view of the fact that the said power of attorney and the affidavit signed by some of other defendants was relied upon as evidence for the purpose of claiming ownership rights were unregistered. In my view, the said properties described at serial nos.19 to 21 thus would have to be considered as ancestral properties not having been partitioned by metes and bounds and thus all the legal heirs of late Mr.Hirachand Shah will be entitled to equal share in those properties and the same are liable to be partitioned by metes and bounds.

132. Insofar as the judgment of this Court in case of **Bajaba @ Bajirao Vishwanath Oke** (supra) relied by Mr.Kumbhakoni, learned senior counsel for the defendant nos.3 to 7 is concerned, in my view, since this Court is of the view that the said properties described at serial nos.19 to 21 are ancestral properties and those two documents i.e. the power of attorney and the affidavit did not create any right, title or interest whatsoever in favour of the defendant no.1, the said judgment is distinguishable in the facts of this case.

133. For the reasons recorded aforesaid, insofar as substantial question of law (b) is concerned, the same is answered in the negative. Substantial question of law (c) is also answered in the negative. Insofar as substantial question of law (d) is concerned, in my view, the said affidavit (Exhibit 162) and the power of attorney (Exhibit 196) does not operate as an estoppel in law to such an extent that the heirs of the deceased Mr.Hirachand Shah would permanently loose their

admitted co-ownership of the properties covered by those documents. The said question is accordingly answered in the negative.

134. Insofar as the properties described at serial nos.8 to 17 are concerned, it was the case of the plaintiff that there was no partition of those properties either oral or in writing between the legal heirs and the co-parceners of late Mr.Hirachand Shah. The defendant nos.3 to 7 also supported the case of the plaintiff insofar as these properties are concerned. The defendant no.1 however, on the other hand had alleged before the learned trial Judge as well as before the first appellate Court that these properties were partitioned orally between all the legal heirs of late Mr.Hirachand Shah and those partitions were acted upon by the parties. It was also the case of the defendant no.1 that there was a reference to the said oral partition of the properties in various documents brought on record by the defendant no.1 including the release deed dated 23<sup>rd</sup> November, 1973, which was executed by all the legal heirs of late Mr.Hirachand Shah. He also placed reliance on various other documents such as release deed executed by the defendant nos.12 to 15 i.e. four sisters of the plaintiff releasing their share in those properties in favour of the defendant nos.1, 2, 10 and 11.

135. The defendant no.1 was asked a question in cross examination whether the plaintiff and defendant nos. 3 to 7 though had not signed on the partition deed dated 22<sup>nd</sup> November, 2001, whether their shares were given to them, the defendant no.1 replied that there was oral partition in the year 1973. Whatever lands were allotted to the share of each one as per oral partition were being possessed and cultivated by each one since 1973 and in accordance with the same, apportionment of the share was made in the partition deed dated 22<sup>nd</sup> November, 2001. The witness was asked whether the plaintiff and the defendant

nos. 3 to 7 had been given their shares as per partition deed dated 22<sup>nd</sup> November, 2001 to which the defendant no.1 replied in affirmative.

136. The defendant no.1 in his cross-examination by the plaintiff when was asked whether he had any proof to show that the joint family of the father and the parties to the proceedings was dissolved, the defendant no.1 deposed that in the release deed (Ex.160), the oral partition of the joint family was mentioned which is a proof of the dissolution of the joint family. He deposed that after April 1973, there was no joint family.

137. The defendant no.1 also examined Mr.Manohar Narayan Keni who was residing at Bhokwade since his birth and knew the defendants. In his examination in chief he deposed that he himself and his father had been cultivating the land of Mr.Kumarchand from 1974 till 1990. In 1974, the said Mr.Kumarchand had told him that the said agricultural land was allotted to his share by partition and he had asked the said witness and his father to cultivate the same. The said witness and his father were cultivating the said land on 50-50 basis of income. The said witness was cross examined by the plaintiff and by defendant nos. 3 to 7 through their respective advocates. The said witness was given the suggestion by the advocate representing defendant nos. 3 to 7 that he and his father were cultivating the land upon the instructions of defendant no.1 which suggestion was denied by him. He had not taken any receipt from Mr.Kumarchand. He deposed that since he did not know the transaction of the Shah family, he was not aware of the partition being done amongst them.

138. Insofar as the documents i.e. affidavits marked (Exhibits 160 and 162) are concerned, the learned trial Judge held that there was no unequivocal

statement on the part of the members of the family that they would not claim partition in those properties in future and that those documents were to be accepted as Partition Deeds itself. It is held that no right and interest existed in favour of the defendant no.1 by virtue of those two affidavits filed in favour of the defendant no.1 as those properties were copartionary properties.

139. Insofar as the evidence of Mr.Keni, who was examined by the defendant no.1, the learned trial Judge held that his evidence was hearsay and thus could not be accepted to be true insofar as the allegation of oral partition is concerned. Learned trial Judge held that there was no oral partition at all and the properties being copartionary properties, had to be partitioned. It is held that all the suit properties were joint family properties of the plaintiff and the defendants. Learned trial Judge accordingly answered issue nos.1 and 11 in the affirmative and issue nos.5 to 10 and 12 to 15 in the negative.

140. Insofar as the Release Deed dated 7<sup>th</sup> February, 2002 executed by the defendant nos.12 to 15 during the pendency of the suit is concerned, it is held by the learned trial Judge that the defendant nos.12 to 15 did not appear before the trial Court and the defence of the defendant nos.12 and 13 is contrary to the Release Deed dated 7<sup>th</sup> February, 2002. It is held that the defendant nos.12 and 13 had admitted the claim of the plaintiff and had demanded partition of the suit properties by filing the written statement on 23<sup>rd</sup> September, 1996. It is held that the defendant nos.12 to 15 were having right and interest in the suit properties and were entitled to get the suit property is partitioned.

141. Insofar as the issue as to whether the suit was barred by law of estoppel on account of the oral partition in the year 1973 and separate possession

of the members of the family of the suit property is concerned, it is held that the law of estoppel did not come into play in respect of the said properties since the suit properties were not partitioned by metes and bounds. Learned trial Judge accordingly held that all the suit properties were the joint family properties and thus the plaintiff is entitled to partition of the suit properties. It is held that the plaintiff, defendant nos.1, 2, 10 to 15 each are having 1/11<sup>th</sup> share in the suit properties. The defendant nos.3 to 7 collectively and defendant nos.8, 9 and 16 collectively are having 1/11<sup>th</sup> share. Learned trial Judge directed the partition of the suit properties by parties or by any gazetted officer sub-ordinate to the Collector to carry out partition in accordance with section 54 of the Code of Civil Procedure, 1908.

142. Learned District Judge after considering oral and documentary evidence has rendered a finding that in the proceedings before the learned trial Judge, Mr.Shivlal, Mrs.Devki and Mrs.Geeta did not give any evidence. The plaintiff had attained majority in the year 1959 and since then till the year 1996, he did not file any suit for partition. He also did not challenge the entries in the revenue records. It is held that there was oral partition in the year 1973 between the plaintiff and the defendants. Learned District Judge placed reliance on the Release Deed (Exhibit 160) and also affidavit dated 12<sup>th</sup> April, 1982, which was executed by all the brothers and sisters (Exhibit 162) and held that the joint family properties were orally partitioned between them. It is held that in the evidence led by the defendant no.1, it is proved that every brother was allotted properties in the oral partition. Mr.Shivlal had already transferred some of the properties out of the properties that had gone to his share.

143. It is held by the learned District Judge that during the period between

1996 to 2003, the defendant nos.3 to 7 had not complained about the oral partition in the earlier written statements filed by them through the defendant no.1. Learned trial Judge without hearing the defendant nos.1 and 2, granted permission to the defendant nos.3 to 7 to file a fresh written statement. It is held that the learned trial Judge ought to have considered the say of the plaintiff and other defendants on the application filed by the defendant nos.3 to 7 for filing fresh written statement. It is held that the fresh written statement filed by the defendant nos.3 to 7 is contradictory to the written statements earlier filed. Learned District Judge held that the learned trial Judge had granted such permission without considering order 6 Rule 7 of the Code of Civil Procedure, 1908 and had granted such permission wrongly and illegally.

144. Insofar as the Release Deed (Exhibit 160) is concerned, it is held by the learned District Judge that the said document was executed after understanding the contents and was signed by all the brothers and sisters. Some of the properties had gone to the share of one of the brother Mr. Shivilal, who had admittedly sold those properties which had come to his share and had received the entire consideration for himself. One of the heir of Sulochana i.e. Kantilal R. Shah had also filed his say (Exhibit 19) and the affidavit (Exhibit 20) and had admitted that there was oral partition. A similar affidavit was filed by Nilaben and Pushpaben. The defendant no.12 Kesarben had also filed the say admitting all the affidavits, including her presence in the office of the Sub-Registrar, Alibag for execution of the Release Deed (Exhibit 198).

145. After considering the entire oral and documentary evidence, learned District Judge held that the defendant nos.1 and 2 had proved that in the year 1973, there was oral partition of the aforesaid joint family properties.

146. A perusal of the record indicates that it is not in dispute that the parties had executed the release deed in favour of the defendant no.1 on 23<sup>rd</sup> November, 1973 in respect of the property bearing Gat No.313, which is described at serial no.16 of the plaint. There is also no dispute that in the said release deed, there was a reference to an oral partition between the parties. On 6<sup>th</sup> April, 1996, the original plaintiff had issued a notice to the other legal heirs and the representatives of Mr.Hirachand Shah, including the defendant nos.1 to 7. There is no dispute that the defendant nos.3 to 7 had executed a power of attorney in favour of the defendant no.1 in respect of various properties of late Mr.Hirachand Shah, in which the plaintiff and the defendants had claimed right, title and interest. The said notice dated 6<sup>th</sup> April, 1996 was replied by the defendant no.1 for himself and on behalf of the defendant nos.2 to 7.

147. The plaintiff had demanded partitioned of the suit properties in the said notice dated 6<sup>th</sup> April, 1996. It is not in dispute that in the said reply dated 20<sup>th</sup> April, 1996 sent by the defendant no.1 for himself and on behalf of the defendant nos.2 to 7, the allegations made by the plaintiff that all the properties were ancestral properties and sought partition thereof was denied. It was contended by the defendant nos.1 to 7 that the plaintiff was not entitled to demand partition in view of the fact that oral partition had already taken place in respect of those properties in the year 1973 and that the plaintiff was allotted the property bearing Gat Nos.540 and 437 in the said oral partition as his share. The defendant nos.1 to 7 had also contended that they became the owners of the properties described at serial nos.1 to 7 and 18 by virtue of an order passed in Special Darkhast No.10 of 1952.

148. A perusal of the record indicates that pursuant to the power of attorney executed by the defendant nos.2 to 7 in favour of the defendant no.1, the defendant no.1 had filed a written statement in Regular Civil Suit No.103 of 1996 filed by the plaintiff which was *inter-alia* praying for partition in respect of several properties, including the properties at serial nos.8 to 17. Several written statements were filed by the defendant no.1 for himself and on behalf of defendant nos.2 to 7 in the said suit. The defendant nos.3 to 7 did not raise any objection before the trial Court for several years in respect of the contents of the said written statement filed by the defendant no.1 for himself and on their behalf. The defendant nos.1 to 7 in those written statements initially filed before the learned trial Judge had admittedly contended that the aforesaid properties at serial nos.8 to 17 were already partitioned orally and were not ancestral properties in respect of which the plaintiff could claim any right, title and interest of any nature whatsoever or seek partition thereof.

149. It appears that some time in the year 2001, Mr.Prakash Shah was married to a daughter of the defendant no.6. The defendant nos.3 to 7 at that stage cancelled the power of attorney granted in favour of the defendant no.1 and executed another power of attorney in favour of the said Mr.Prakash Shah. The defendant nos.3 to 7 thereafter applied before the learned trial Judge for leave to file additional written statement without issuing any notice to the defendant no.1 or to any other parties, including the plaintiff. The learned trial Judge passed an *ex-parte* order allowing the defendant nos.3 to 7 to file additional written statement. Pursuant to the said liberty granted by the learned trial Judge, the defendant nos.3 to 7 filed additional written statement before the learned trial Court without any order of the learned trial Judge permitting the defendant nos.3 to 7 to withdraw the joint written statement filed by them along with the

defendant no.1.

150. It is not in dispute that in the additional written statement filed by the defendant nos.3 to 7 subsequently, the defendant nos.3 to 7 totally denied the oral partition held between the parties and contended that those properties were ancestral properties and claimed right, title and interest therein. It is the case of the defendant no.1 that the defendant no.1 could not raise any objection when the learned trial Judge granted a liberty to the defendant nos.3 to 7 to file additional written statement since no notice or any opportunity was given to the defendant no.1 to oppose the said application made by the defendant nos.3 to 7 before the learned trial Judge.

151. The Supreme Court in case of ***Ramniranjan Kajaria*** (supra) after adverting to several judgments of the Supreme Court has held that a categorical admission made in the pleadings cannot be permitted to be withdrawn by way of an amendment. It is held that the admission can be attacked in substantive proceedings. It is held that once the written statement contains an admission in favour of the plaintiff, the amendment of such admission of the defendants cannot be allowed to be withdrawn which would totally displace the case of the plaintiff and which would cause him irretrievable prejudice. It is held that law is that no additional written statement should set up a totally new case or state facts at direct variance with the original written statement so as to completely change the issue in the case. The Supreme Court held that it was not the case where the defendants were intending to take alternative pleas or that they were intending to explain vague pleading made by them in their written statement. The Supreme Court considered the identical facts where the defendants had pleaded entirely new case in variance with the admissions made by them in the earlier written statement. It

is held that the petitioners in that case could not be permitted to request the Court to strike down the earlier written statement filed by them or to permit them to substitute a fresh written statement contrary to the admissions made by them in their written statement.

152. It is not in dispute that the earlier written statements filed by the defendant no.1 for himself and on behalf of the defendant nos.2 to 7, the defendant nos.1 to 7 had raised a plea that there was an oral partition of the properties at serial nos.8 to 17 and thus the plaintiff could not seek any decree for partition in respect of those properties. The said stand taken by the defendant nos.1 to 7 in the said suit was not retracted by the defendant nos.3 to 7 for several years nor the defendant nos.3 to 7 applied for deletion of those admissions made in the written statement when filed an application for seeking permission to file the additional written statement. It is not in dispute that the admissions made by the defendant nos.3 to 7 to the effect that the suit properties were already partitioned by an oral partition long back continued to remain on record of the proceedings before the learned trial Judge as well as the first appellate Court.

153. In my view, the defendant nos.3 to 7 thus could not have taken an altogether different stand and resiled from the admissions made in the earlier written statements filed by them before the learned trial Court, though the learned trial Court had granted permission to file additional written statement. It was not the case of the defendant nos.3 to 7 that they wanted to clarify the stand taken by them in the earlier written statement filed through the defendant no.1 on the ground that those statements were vague or that they wanted to explain the admissions made by them. The case pleaded in the additional written statement by the defendant nos. 3 to 7 was in total variance with the plea taken in the earlier

written statements which is not permissible.

154. A perusal of the additional written statement dated 21st July 2013 filed by the defendant nos.3 to 7 clearly indicates that no such case was pleaded by the defendant nos.3 to 7 in the earlier written statements. A perusal of the record further indicates that though the defendant nos.3 to 7 had examined the witness, he did not explain the admissions made by the defendant nos.3 to 7 in the earlier written statements filed before the learned trial Court. In my view, the statement of law declared by the Supreme Court in case of ***Ramniranjan Kajaria*** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment of the Supreme Court.

155. In my view, the defendant nos.3 to 7 could not have withdrawn the admissions made by them in the earlier written statements but could explain those admissions subsequently by proper pleading and proof. The learned trial Judge thus could not have ignored the admissions made by the defendant nos.3 to 7 in the earlier written statements filed before the learned trial Judge. In my view, the learned District Judge was right in holding that the defendant nos.3 to 7 could not have been allowed to resile/retract from the admissions made by them in the earlier written statements. Admittedly there was no order passed by the learned trial Judge for striking of any portions of the written statements filed by the defendant no.1 for himself and for defendant nos.3 to 7 even at the later stage after additional written statement came to be filed by them before the learned trial Judge.

156. A perusal of the oral evidence led by Mr.Prakash Shah on behalf of the defendant nos.3 to 7 indicates that he deposed that the power of attorney of the

defendant no.1 was cancelled because of the doubt having arisen in the mind of the defendant nos.3 to 7 about their share in the property. He deposed that the written statements filed on behalf of the defendant nos.3 to 7 by the defendant no.1 was not agreeable to the defendant nos.3 to 7 and that the written statements filed by him on behalf of the defendant nos.3 to 7 was proper. He admitted that he was married to the daughter of the defendant no.6 in the month of July, 2001 and he derived the knowledge about the suit from the heirs of Kumarchand after his marriage. He admitted that he had occasion to see the original written statement filed by the defendant no.1 for himself and on behalf of the defendant nos.3 to 7 just before three to four months of filing of the written statement by the defendant nos.3 to 7 in the month of July, 2003.

157. The said witness admitted that he had hearsay knowledge about the contents of the said written statements which information was given to him by all the family members of Mr.Shah including the heirs of Kumarchand also. He admitted that after getting the said hearsay information from Shah family, it came to his notice that the earlier written statements filed by the defendant no.1 for himself and on behalf of the defendant nos.3 to 7 in the said suit were not in their interest. It is thus clear that though the defendant nos.3 to 7 had an opportunity to explain the admissions made in the earlier written statements filed by the defendant no.1 on their behalf, the defendant nos.3 to 7 did not explain the admissions.

158. The witness examined by the defendant nos.3 to 7 had no personal knowledge of the facts at all and his entire deposition admittedly was based on hearsay information alleged to have been provided to him by the other members of Shah family, who did not enter the witness box though were available. The learned

trial Judge in my view, thus could not have considered the oral evidence of Mr.Prakash Shah, who was constituted attorney of the defendant nos.3 to 7 which was totally based on hearsay and was on the facts which were only to the personal knowledge of the defendant nos. 3 to 7.

159. The question now that arises for consideration of this Court is whether there was other evidence on record to prove that there was oral partition of the properties described at serial nos.8 to 17 or not. The Court also has to consider as to whether the said alleged oral partition can be inferred by considering the conduct of the parties after such alleged oral partition had taken place.

160. It is not in dispute that Mrs.Devkibai, second wife of Mr.Hirachand Shah, Kumarchand, Purushottam, Damodar and Shivlal (original plaintiff, defendant nos.2 , 10 and 11) and the deceased Kumarchand had executed the said registered release deed dated 22<sup>nd</sup> December 2011 in favour of the defendant no.1 in respect of the properties described at serial no.16 of the plaint. There is also no dispute that in the said registered release deed, there was a reference to the oral partition effected by and between the parties. The defendant no.1 to 7 had already admitted oral partition in reply dated 20<sup>th</sup> April 1996 to the notice dated 6<sup>th</sup> April, 1996 issued by the plaintiff seeking partition of the properties.

161. On 22<sup>nd</sup> November, 2001, all the legal heirs and the representatives of Mr.Hirachand i.e. Devkibai, real mother of the plaintiff, Shivlal, who was real brother of the plaintiff, Mohan, Purushottam and Damodar executed a partition deed acknowledging that there was a real partition in respect of the properties in April, 1973. The defendant nos.3 to 7 however, did not sign the said partition deed. On 7<sup>th</sup> February, 2002, four sisters of the plaintiff who were the defendant nos.12

to 15 executed a registered release deed in favour of the defendant nos.1, 2, 10 and 11 thereby giving effect to Wardi which was already filed in the year 1973 and the effect whereof was given in the revenue record in the year 1973 itself based on the oral partition in the month of April, 1973. On 7<sup>th</sup> February, 2002, the defendant nos.12 to 15 executed a registered release deed in favour of the defendant nos.1, 2 and 11. It is admitted position that except the plaintiff, defendant no.1 and defendant nos.3 to 7, no other parties led any oral evidence before the learned trial Judge.

162. Supreme Court in the case of *Janaki Vashdeo Bhojwani (supra)* has held that if the power of attorney holder has rendered some “acts” in pursuance to the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. Supreme Court considered the similar facts where the burden of proof was on the parties to prove that it was obligatory on their part to have entered the box to discharge the burden. Since those parties did not enter the witness box and allowed their constituted attorney to enter the witness box and to depose on their behalf, Supreme Court has held that those parties had failed to establish that they had any independent source of income and that they had contributed any amount for purchase of property from their own independent income. Supreme Court has accordingly set aside the order passed by the tribunal by which the tribunal had held that those parties had a share and were co-owners of the property in question.

163. In the facts of this case, admittedly none of the defendant nos.3 to 7

entered the witness box to depose that the properties were the ancestral properties and/or were continued to be such ancestral properties on the date of the plaintiff filing such suit or thereafter. In my view, the said constituted attorney who was married to the daughter of the defendant no.6 much after filing of the suit by the plaintiff had admittedly no personal knowledge of the alleged oral partition from 1973 onwards till date of his deposition before the learned trial Judge and thus could not depose to prove those allegations made by the defendant nos.3 to 7 in the additional written statement filed before the learned trial Judge based on hearsay. In my view, the learned trial Judge thus could not have placed reliance on the deposition of the constituted attorney of the defendant nos.3 to 7 in the impugned judgment and decree. Such allegations that the properties were ancestral properties and were not partitioned could be proved only by those defendants themselves. The principles of law laid down by the Supreme Court in the case of **Janaki Vashdeo Bhojwani (supra)** squarely applies to the facts of this case. I am respectfully bound by the said judgment.

164. A perusal of the record further indicates that all sisters and heirs of the said Sulochana had also filed affidavit confirming the oral partition and have executed various registered documents recording oral partition and relinquishing their rights in various properties. Insofar as the evidence of the plaintiff on the issue of oral partition of the aforesaid properties is concerned, the plaintiff admitted in his deposition that on 23<sup>rd</sup> November 1973, the release deed was executed by him along with all his brothers in favour of the defendant no.1. He not only identified his signature thereon but also the signatures of his brothers on the said documents. It was admitted by the plaintiff that from the date of execution of the release deed (Exhibit-160) till filing of the suit, he did not make any complaint alleging that contents of the said release deed were false. He also

admitted that for more than 30 years, each of the brothers were maintaining their separate financial transactions.

165. In so far as the defendant no.1 is concerned, admittedly he had entered the witness box. In his cross-examination, he deposed that since Mr.Kumarchand Shah was looking after all these transactions till 1990, he did not feel it necessary to give effect to the release deed of 1973 in any records. He further deposed that there was no dispute about what was decided amongst the brothers and thus there was no necessity to give effect to the said release deed of 1973 in the record. He admitted that the oral partition was not given effect in the Government record. He further deposed in his cross-examination that whatever lands were allotted to the share of each one as per oral partition were being possessed and cultivated by each one since 1973 and in accordance with the same, apportionment of the share was made in the partition deed dated 22<sup>nd</sup> November, 2001.

166. The defendant no.1 was asked in the cross-examination as to whether the plaintiff and the defendant nos. 3 to 7 had been given their shares as per partition deed dated 22<sup>nd</sup> November, 2001 to which the defendant no.1 replied in affirmative. The defendant no.1 was asked in his cross-examination by the plaintiff as to whether he had any proof to show that the joint family of the father and the parties to the proceedings was dissolved. He deposed that in the release deed (Ex.160), the oral partition of the joint family was mentioned which was the proof of the dissolution of the joint family. He further deposed that after April 1973, there was no joint family.

167. A perusal of the record indicates that the defendant no.1 had also

examined Mr.Manohar Narayan Keni who was residing at Bhokwade since his birth and knew the defendants. He deposed that he himself and his father had been cultivating the land of Mr.Kumarchand from 1974 till 1990. In 1974, the said Mr.Kumarchand had told him that the said agricultural land was allotted to his share by partition and he had asked the said witness and his father to cultivate the same. The said witness and his father were cultivating the said land on 50-50 basis of income. The said witness denied the suggestion given by the defendant nos. 3 to 7 through their advocate that he and his father were cultivating the land upon the instructions of defendant no.1.

168. Insofar as the witness examined by the defendant nos.3 to 7 is concerned, admittedly the said witness deposed that the constituted attorney of the defendant nos.8, 11, 12, 13, 15 and deceased Mrs.Sulochana had relinquished their rights on 2<sup>nd</sup> May, 1973 and accordingly statements were recorded and mutation entry no.1626 was taken. He admitted that his mother in law and Manoj, one of the son of Mr.Kumarchand Shah were residing at Indapur, Taluka Mangaon and were doing papad business. He admitted that after death of Mr.Kumarchand Shah, his family was residing at Mandva in the house on payment of rental basis. He admitted that the registered release deed in favour of Survey No.61-B (Gat No.313) was executed in favour of the defendant no.1 by his brothers. It is not in dispute that the plaintiff did not file any suit for more than 30 years for partition. The defendant nos.3 to 7 did not make any claim alleging that the properties were ancestral properties or that the same were partitioned. Neither the plaintiff nor the other defendants could explain as to why there was reference to the oral partition in the released deed dated 23<sup>rd</sup> November 1973. Though the other defendants filed separate written statements did not appear before the trial Court, first appellate Court as well as this Court to prove the allegations made in their

respective written statements.

169. A perusal of the record further indicates that some time in the year 1994, Mr.Shivlal (original defendant no.11) who was one of the son of Mr.Hirachand Shah and real brother of Mr.Damodar (original plaintiff) sold the property bearing Survey No.68, Hissa No.3-5-6 and Survey No.85, Hissa No.1 by registered sale deed and accepted the consideration under the said documents for himself only. I am inclined to accept the submission of the learned counsel for the defendant no.1 that those properties were allotted to Mr.Shivlal in oral partition as mentioned in the partition deed of 2001. I am inclined to accept the submission of the learned counsel for the defendant no.1 that in the oral partition, the plaintiff was allotted the property bearing Gat Nos.540 and 437 in the said oral partition as his share. The defendant no.1 and Mr.Kumarchand Shah were also allotted separate properties which continued to be in enjoyment of the respective members of the family as their own property. The oral partition was thus acted upon.

170. Supreme Court in the case of ***Kale & Ors.Vs. Deputy Director of Consolidation & Ors. (supra)*** has held that the Courts have leaned in upholding a family arrangement instead of disturbing the same on technical or trivial grounds. It is held that where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect, the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. It is held that the family arrangement may be even oral in which case no registration is necessary. It is held that even if bona fide disputes, present or possible, which may not involve

legal claims are settled by a bona fide family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement.

171. A perusal of the record indicates that the parties had treated the properties allotted to them on oral partition as their own properties and some of the properties were also dealt with by some of the parties and consideration was received by them exclusively. In my view, the parties having taken an advantage of allotment of such properties on oral partition thus cannot challenge such oral partition and would be estopped from challenging such oral partition. The principles of law laid down by the Supreme Court in the case of **Narendra Kante Vs. Anuradha Kante & Ors. (supra)** squarely applies to the facts of this case. I am respectfully bound by the said judgment.

172. Supreme Court in the case of **Mandali Ranganna and others (supra)** has held that the parties had been in possession of the property which was partitioned for long time and had been admittedly dealing with the properties exclusively, it would establish the partition of the properties and such partition cannot be challenged. In my view, considering the facts and circumstances of this case and the evidence placed on record, the first appellate Court has rightly held that there was an oral partition of the aforesaid properties. Judgment of Supreme Court in the case of **Mandali Ranganna and others (supra)** applies to the facts of this case. I am respectfully bound by the said judgment.

173. Insofar as the submission of Mr. Kumbhakoni, learned senior counsel for the defendant nos. 3 to 7 that the defendant no. 1 did not lead any oral

evidence to prove that there was an oral partition in the year 1973 or any other point of time is concerned, in my view, there is no substance in this submission of the learned senior counsel for the defendant nos.3 to 7. The oral evidence produced by the defendant no.1 clearly indicates that the defendant no.1 has not only pleaded the oral partition but has also proved the same.

174. In so far as the submission of the learned senior counsel for the defendant nos.3 to 7 that except Exhibit-160, the defendant did not produce any other documents to prove the oral partition is concerned, there is no substance in this submission of the learned senior counsel for the defendant nos.3 to 7. The defendant no.1 had produced several documents to prove that the oral partition was referred in those documents and was acted upon. Be that as it may, the defendant nos.3 to 7 had admitted the oral partition in their reply to the notice seeking oral partition of the properties. The defendant nos.3 to 7 had also admitted the oral partition in the several written statements filed before the learned trial Judge before filing additional written statement which written statement continued to be on record without any amendment thereto.

175. Insofar as the judgment of the Supreme Court in the case of ***Union of India vs. Ibrahim Uddin and Anr.*** (supra) relied upon by the learned senior counsel for the defendant nos.3 to 7 is concerned, the defendant no.1 had given enough details of the oral partition in the pleadings and also had relied upon the documentary evidence which was on record before the learned trial Judge. The judgment of the Supreme Court in the case of ***Union of India vs. Ibrahim Uddin and Anr.*** (supra) thus would not assist the case of the defendant nos. 3 to 7.

176. Insofar as the submission of the learned senior counsel for the

defendant nos.3 to 7 that two Courts below had interpreted the documents and thus the question of law arises is concerned, since this Court has already formulated various additional substantial questions of law, by consent of the parties, this Court need not deal with the said judgment relied upon by the learned senior counsel.

177. In my view, the defendant no.1 had proved the oral partition of the properties described at serial nos.8 to 17 and possession thereof with allottees thereof. The learned trial Judge could not have ordered partition of those properties once again. In my view, the first appellate Court has rightly set aside the decree in so far as the properties at serial nos.8 to 17 are concerned.

178. In so far as the submission of the learned senior counsel for the defendant nos.3 to 7 that the defendant no.1 not having challenged the order passed by the learned trial Judge granting permission to file an additional written statement to the defendant nos.3 to 7 and thus cannot challenge the said written statement at this stage is concerned, it is not in dispute that the defendant nos.3 to 7 had applied for permission to file an additional written statement. No notice was served upon the defendant no.1 or upon the plaintiff. Copy of the said application was not served upon the defendant no.1. Be that as it may, even if the order passed by the learned trial Judge granting permission to file additional written statement to the defendant nos.3 to 7 is not challenged by the defendant no.1, the said permission cannot be construed as permission to resile or withdraw the admission already made in those earlier written statements on record. Submissions made by the learned counsel for the plaintiff are partly accepted for the aforesaid reasons.

179. For the reasons recorded aforesaid, in so far as the substantial question of law no.(a) is concerned, in my view, upon interpretation of the document at Exhibit-160, a conclusion can be arrived that there was oral partition between the legal heirs of deceased Hirachand in 1973 in so far as the properties at serial nos.8 to 17 are concerned. The said issue is answered accordingly.

180. Insofar as the substantial question of law no.(e) is concerned, though the said registered partition deed (Exhibit-197) is executed during the pendency of the suit, the parties to the said deed cannot raise any contention contrary to what was stated therein. Be that as it may, the said document is in furtherance of confirmation of contents of the registered release deed dated 23<sup>rd</sup> November 1973 and thus would be binding upon those parties to the said registered partition deed (Exhibit-197). In any event, those parties have not challenged the said document. The said question is answered accordingly.

181. Insofar as the substantial question of law no.(h) is concerned, in my view, two Courts below ought to have passed a decree for partition by metes and bounds granting shares to legal heirs of late Hirachand Shah in respect of the properties described at serial nos.19 to 21 only. The properties at serial nos.8 to 17 having been already partitioned, there cannot be any further partition thereof. The said question is answered accordingly.

182. Insofar as the substantial question of law no.(i) is concerned, in my view, the first appellate Court has rightly held that the defendant nos.3 to 7 could not have taken a contrary stand than what was taken in the earlier written statements. The said issue is answered accordingly.

183. Insofar as the substantial question of law no.(j) is concerned, in my view, the defendant no.3 could not resile from the admissions made in the written statement though was permitted to file an additional written statement. They could have explained the admissions and could have proved. The said issue is answered in negative.

184. For the reasons recorded aforesaid, I therefore pass the following order :-

(i) Properties described at Serial Nos.1 to 6 and 18 of the plaint were not the ancestral properties on the date of filing suit. The defendant nos.1 and 2 are entitled to  $\frac{1}{3}$ <sup>rd</sup> share therein each. The defendant nos.3 to 7 being legal heirs of Kumarchand Shah are jointly entitled to one third share therein. These properties are liable to be partitioned by metes and bounds.

(ii) Property described at Serial No.7 of the plaint is owned by the defendant nos.3 to 7 exclusively.

(iii) Property described at Serial No.16 of the plaint is owned by the defendant no.1 exclusively.

(iv) Properties described at Serial Nos.8 to 15 and 17 of the plaint are already partitioned and are not ancestral properties of late Hirachand Shah and cannot be partitioned at the instance of the plaintiff or any of the defendants.

(v) Properties described at Serial Nos.19 to 21 of the plaint are declared as ancestral properties of late Hirachand Shah and shall be partitioned by metes and bounds. The plaintiff, defendant nos. 1 and 2 are having  $1/4^{\text{th}}$  share each in those properties. Defendant nos. 3 to 7 collectively are having  $1/4^{\text{th}}$  share therein.

(vi) The Collector is directed to partition the suit properties described at Serial nos.1 to 6 and 18 of the plaint between the defendant nos.1, 2 and 3 to 7 in the ratio provided in paragraph 184(i) of this judgment, himself or through any gazetted officer subordinate to him in accordance with Section 54 of the Code of Civil Procedure, 1908. Properties described at Serial Nos.19 to 21 of the plaint shall be partitioned by metes and bounds by the aforesaid officer between the parties mentioned in paragraph 184 (v) of this judgment in the ratio mentioned therein.

(vii) Second Appeal Nos.708 of 2008, 38 of 2009 and 386 of 2009 are disposed of in aforesaid terms.

(viii) There shall be no order as to costs.

**(R.D.DHANUKA, J.)**