



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 240 OF 2011

- | | | | |
|-----|---|---|-----------------------------|
| 1) | Vasant Dhondiba Choudhari |] | |
| | Since deceased through his heirs & |] | |
| | Legal Representatives:- |] | |
| | |] | |
| 1a) | Lilabai Vasant Choudhari |] | |
| | Age : 72 Yrs., Occ: Household, |] | |
| | Residing at: Sortapwadi, Post: Naigaon, |] | |
| | Pune-Sholapur Road, Near Gajre-Kushan, |] | |
| | Tal: Haveli, Dist: Pune – 412110. |] | |
| | |] | |
| 1b) | Sanjay Vasant Choudhari, |] | |
| | Age: 46 R/at Sortapwadi, Post: Naigaon, |] | |
| | Pune-Sholapur Road, Near Gajre-Kushan, |] | |
| | Tal: Haveli, Dist: Pune – 412110. |] | |
| | |] | |
| 1c) | Subhadra Suresh Bagade |] | |
| | Age: 52 Yrs., Occ: Agriculturist, |] | |
| | R/at: Urali Kanchan, Foundation Road, |] | |
| | Tal: Haveli, Dist: Pune. |] | |
| | |] | |
| 1d) | Lata Dattatray Ghule |] | |
| | Age: 50 Yrs., Occ: Household, |] | |
| | R/at: Manjri budruk, More Vasti, |] | |
| | Tal: Haveli, Dist: Pune. |] | |
| | |] | |
| 2) | Sanjay Vasant Choudhari |] | |
| | Age: 39 Yrs., Occ: Agriculturist, |] | |
| | |] | |
| 3) | Leelavati Vasant Choudhari |] | |
| | Age: 69 Yrs., Occ: Agriculturish, |] | |
| | |] | |
| 4) | Neelam Sanjay Choudhari |] | |
| | Age: 34 yrs., Occ: Agriculturist, |] | |
| | The Appellant Nos. 1 to 4 R/at; |] | |
| | Sortapwadi, Tal: Haveli, Dist: Pune. |] | <u>...Appellants</u> |

Versus

- | | | |
|----|--|-----------------------|
| 1) | Sadashiv Dhondiba Choudhari
Age: 59 Yrs., Occ: Agriculturist, |]
]
] |
| 2) | Navnath Sadashiv Choudhari
Age: 31 Yrs., Occ: Agriculturist, |]
]
] |
| 3) | Sulochana Sadashiv Choudhari
Age: 50 Yrs., Occ: Agriculturist, |]
]
] |
| 4) | Yamunabai Dnyanoba Choudhari
Age: 72 Yrs., Occ: Agriculturist, |]
]
] |
| 5) | Laxmibai Ramchandra Harpale
Age: 60 Yrs., Occ: Agriculturist,
The respondent Nos. 1 to 5
R/at: Sortapwadi, Tal: Haveli, Dist: Pune. |]
]
]
]
] |
| 6) | Sunder Maruti Ghisare
Age: 50 Yrs., Occ: Agriculturist,
R/at: Bhiwari, Tal: Purandar,
Dist: Pune. |]
]
]
]
] |
| 7) | Balasaheb Vasant Choudhari
Age: 43 yrs., Occ: Agriculturist, |]
]
] |
| 8) | Surekha Balasaheb Choudhari
Age: 39 Yrs., Occ: Agriculturist,
Respondent Nos. 7 & 8 R/at: Sortapwadi,
Tal: Haveli, Dist: Pune. |]
]
]
]
] |
- ...Respondents.**

Mr. Ram Apte, Senior Advocate along with Mr. Vaibha P. Patankar i/b Patankar & Associates for the Appellants.

Mr. S. M. Gorwadkar, Senior Advocate along with Mr. Sujay Gangal for Respondent Nos. 1 to 3.

Mr. Vijay Killedar for Respondent Nos. 4 to 6.

Mr. S. C. Wakankar for Respondent No. 7.

Mr. Harshad A. Sathe for Respondent No. 8.

Coram : Sharmila U. Deshmukh, J.

Reserved on : March 14, 2024

Pronounced on : April 25, 2024.

Judgment :

1. The Appellants before this Court are the original Defendant Nos.1 to 4 aggrieved by the concurrent findings of the Appellate Court and the Trial Court cancelling the registered partition deed dated 23rd December, 1999 and decreeing the suit for partition and separate possession. The Respondent Nos.1 to 3 are the original Plaintiffs and the Respondent Nos.4 to 6 are the original Defendant Nos.7 to 9. The Respondent Nos.7 and 8 are the original Defendant Nos.2 and 5. The Second Appeal was admitted by this Court vide order dated 4th August, 2015. For sake of convenience, parties are referred to by their original status before the Trial Court.

FACTUAL MATRIX:

2. Regular Civil Suit No.116 of 2002 was instituted seeking cancellation of the partition deed dated 23rd December 1999 registered at Serial No.1526/1999 as having been obtained by misrepresentation and fraud and for partition and separate possession of the suit properties.

PLAINT:

3. The suit properties were described in paragraph 1A of the plaint as the properties at Sortapwadi bearing New Gat No.395 (Old Gat No.711), Gat No.278 (Old Gat No.506), Gat No.180 (Old Gat No.306), Gat No.182 (Old Gat No.308), Gat No.183 (Old Gat No.309), Gat No.189 (Old Gat No.299), Gat No.187 (Old Gat No.297), Gat No.188 (Old Gat No.298), Gat No.178 (Old Gat No.300), Gat No.173 (Old Gat No.312), Gat No.174 (Old Gat No.304), Gat No.394 (Old Gat No.716). Properties described in paragraph 1B of the plaint situated at Gram Panchayat Tarde bearing Gat No.243 alongwith the Well situated therein having 5 H.P. pipe line. Properties described in paragraph 1C of the plaint at Village Walati bearing Gat No.482 and Gat No.483. House Property bearing No.52 situated at village Sortapwadi described in Paragraph 1D of the plaint.

4. The case of the Plaintiffs was that the properties described above were the joint family properties of Dhondiba Sadhu Choudhari, the father of the Plaintiff No.1 and Defendant Nos.1, 7, 8 and 9. Dhondiba expired on 26th June 1986. Properties at Sortapwadi bearing Gat Nos.304, 306, 309, 506, 711 and 308, Gat Nos.299 and 300 part and Gat No.243 of village Walati and Gat No.482 of Village Walati came to be inherited by the Plaintiff No.1 and Defendant Nos 1, 7 to

9. Gat No.483 of Village Walati and part of Gat Nos.716, 292 and 312 and 297 of village Sortapwadi was purchased out of joint family income and Gat No 297 at Village Sortapwadi was the ancestral joint family property in which the Plaintiffs have a share.

5. There was no partition by metes and bounds and the properties are in joint possession of the parties. Plaintiff No.1 demanded partition which was agreed by Defendant No.1. As the Plaintiff No 1 was illiterate whereas the Defendant No.1 was educated, the Plaintiff No.1 called the respectable persons from the village and decided the manner of partition. On 23rd December 1999, the Deed of partition was registered before the Sub Registrar, Haveli, Pune at Serial No.1526 of 1999. However, the said deed is not in consonance with the oral terms of partition agreed upon by the parties and was not read over to Plaintiff No.1. As per the terms of partition, the share of the Plaintiff No.1 was to be measured and handed over to the Plaintiff No.1 which is not done and neither the boundaries are fixed. The share allotted in the partition deed and the boundaries of the properties are stated incorrectly. The entire property is not included in the partition deed. After the deed was registered, legal advice was sought and the Plaintiff No.1 learnt about the mistake. The Plaintiff No.1 requested the Defendant No.1 to rectify the partition deed and

to measure the properties and to handover possession to the Plaintiff No.1 after fixing the boundaries. Despite the demand, the Defendant No.1 avoided the same and the Defendant No.1 on the pretext of correcting the partition deed got the thumb impression of the Plaintiff No.1 on a stamp paper on 19th February 2001 without reading over the contents of stamp paper to the Plaintiff No.1. The contents of the stamp paper are not agreeable to the Plaintiff No.1. Plaintiff No.1 had lodged complaint with the Uruli-Kanchan Police Station against the Defendant No 1.

6. It was contended that Defendant Nos.7 to 9 are the sisters of the Plaintiff No.1 and the Defendant No.1 and they have right in the joint family properties and are therefore impleaded as Defendants however no relief is sought against them. It was contended that there are certain movable properties such as Tractor bearing No.MTJ 6228, Trailer No. MTQ 6114, Mahindra Jeep bearing No. MVB 5010, One oil engine of 5 HP, One Bullet bearing No. MZA 9988, however, separate suit will be filed for partition of these properties after their market value is ascertained.

WRITTEN STATEMENT OF DEFENDANT NOS.1 TO 6:

7. The specific case put up in paragraph 15 of the written statement was that during life time of their father, Gat Nos.304, 306,

308, 309, 506 and 711 and Gat Nos.299 part and 300 part of Village Sortapwadi and Gat No.482 from Village Walati and Gat No. 243 from Village Tarde were partitioned. As written partition was demanded by Plaintiff No.1, duly registered deed of partition was executed on 23rd December 1999. The Plaintiff No.1 and Plaintiff No.3 affixed their thumb impressions and the Plaintiff No.2 affixed his signature on the partition deed. There was no fraud as the document was executed in the presence of witnesses and the Sub Registrar. Gat No.483 of Village Walati and New Gat No.394 of Village Sortapwadi were the self acquired properties of Defendant No.1, which were subject matter of dispute and not forming subject matter of partition. A document was executed by Plaintiff No.1 on 19th February 2001 that the Plaintiff No.1 has no concern with the said properties or the Court proceedings.

WRITTEN STATEMENT OF DEFENDANT NOS.7 TO 9:

8. The Defendant nos.7 to 9 supported the case of the Plaintiff. It was contended that suit properties as well as the movables are ancestral joint family properties and the Defendant Nos 7 to 9 are entitled to a share in the suit properties. It was contended that there was no partition during the lifetime of their father and the alleged partition deed dated 23rd December, 1999 is not acceptable and is not

binding on the answering Defendants. It was contended that the Defendant Nos 7 to 9 have 1/5th share in the suit properties which should be partitioned and possession handed over.

EVIDENCE:

9. The Plaintiffs examined Plaintiff No.1. The Defendant Nos.1 to 6 did not step in the witness box. On behalf of Defendant Nos.7 to 9, Defendant No.8 adduced evidence.

10. In the cross examination, the Plaintiff No.1 was questioned in respect of the gift executed by the Plaintiffs in respect of 1 Are land of New Gat No 304 of Village Sortapwadi on 29th August, 1997, sale of 1 Are land out of Gat No.306 on 25th May, 1989, sale of 2 Are land out of New Gat No.104 on 14th August, 1997, sale of 1 Are land out of Gat No.304 on 30th August, 1999 to which he stated that he is not aware. The Plaintiff No.1 deposed that he became aware of the contents of partition deed dated 23rd December, 1999 after he read the document upon reaching home. He has admitted that he does not remember whether prior to 23rd December, 1999 the terms of partition were decided between him and the Defendant No 1 in the presence of respectable persons from the village. He has further admitted that the sale deeds of Old Gat No 716 of Village Sortapwadi and Gat No 483 of Village Walati stands in the name of Defendant No

1 and were executed prior to 12-13 years. He has admitted that he has not described which boundaries have been stated incorrectly in the partition deed. He has admitted that he has no document to prove that the Gat No 483, Gat No 716, Gat No 312 part and Gat No 298 were purchased from joint family income. He has admitted that his son Navnath is literate person and Navnath has signed the partition deed and he and his wife has affixed their thumb impression before the Sub Registrar. Plaintiff No 1 has admitted that the Defendant Nos 7 to 9 are not parties to the partition deed of 23rd December, 1999.

11. In her cross examination, the Defendant No 8 has deposed that she is not aware that as per Mutation Entry No 632, the Defendant Nos 7 to 9 have released their share in the joint family property. She has admitted that she has not challenged the Mutation Entry.

FINDINGS OF THE TRIAL COURT :

12. The findings of the Trial Court can be summarised as under :

- During the lifetime of Dhondiba Choudhary, Defendant No 1 was given certain properties which constitute family arrangement and not partition. There was no oral partition during lifetime of Dhondiba Choudhary.
- The fraud pleaded by the Plaintiffs is that there is no partition by metes and bounds and partition is unjust. As per the

partition, properties allotted to Plaintiff's share were not measured and handed over.

- There was no free consent of the Plaintiff No 1 to the partition deed as contemplated under Section 19 of Indian Contract Act, 1872.
- The Defendant Nos 7 to 9 being the legal heirs of Dhondiba have share in the suit properties as per the amendment to Section 6 of Hindu Succession Act, 1956. The Defendant No 1 has not established that Defendant Nos 7 to 9 have voluntarily relinquished their share.
- The Defendant Nos.1 to 6 have not established that the partition deed of 23rd December, 1999 and 19th December, 2001 is legal and valid.
- The Defendant Nos 1 to 6 have filed photocopies of the sale deed dated 1st October, 1992 and have failed to prove that the properties at Gat No 716 and 394 are self acquired properties.
- The Plaintiffs have proved their case for partition. The Plaintiffs, Defendant No 1 to 6 and Defendant Nos 7 to 9 have 1/5th share in the suit properties.

13. By judgment dated 21st March 2009, the Trial Court declared that the partition deed dated 23rd December 1999 having been obtained by misrepresentation and without free and informed consent of the Plaintiff No.1 stands cancelled. It was further declared

that the Plaintiffs and Defendant Nos.1 and 7, 8 and 9 are entitled to 1/5th share.

FINDINGS OF THE APPELLATE COURT:

14. The Defendant Nos 1 to 6 filed Civil Appeal No 258 of 2009. The Appellate Court framed and answered the points for determination as under:

	Points	Findings.
1]	Whether the Plaintiff proved that the suit properties are their ancestral joint family properties ?	Yes.
2]	Whether the plaintiffs further proved that the alleged partition deed dtd. 23-12-99 is obtained by Defendant no.1 by playing fraud ?	Yes.
3]	Whether the Defendant no.1 proved that Gat No. 483 of Walati and Gat No. 716 and 394 from Sortapwadi were his separate properties ?	No.
4]	Whether the Defendant No. 1 further proved that there was partition of the joint family property in the life time of his father ?	No.
5]	Are the Plaintiffs entitled to partition and separate possession ?	Yes.
6]	What Order ?	As per final order.

15. The Appellate Court held that Defendant Nos.1 to 6 have not led any evidence in respect of the partition during the lifetime of the

father and had not proved their case. The Appellate Court held that there was no valid partition for the following reasons:

- a) Plaintiffs were not given share in Gat Nos.998 and 312.
- b) Shares were recorded to the suit properties as per Mutation Entry No.2718 on 3rd December 1986 on the death of Dhondiba.
- c) Loan was taken jointly from Bank of Baroda.
- d) Heirship entry – Mutation Entry No.2709 dated 21st August 1986 shows shares.
- e) Sisters were not parties to the alleged partition deed though they had share in the suit property.
- f) The properties at Sortapwadi and Walati were not included in the alleged partition.
- g) Gat No.716 was purchased by the father and later on purchased by the Defendant No.1 and therefore cannot be separate property and there is no evidence to show acquisition by his own funds.

16. The Appellate Court noted that for proving fraud, it was necessary for the Plaintiffs to prove what was the oral partition agreed upon in the presence of respectable persons from the village, which evidence has not been adduced by the Plaintiff. The Appellate Court held that the Defendant Nos.1 to 6 who relied upon the said partition did not bring any evidence. The Appellate Court held that

the partition was invalid partition as all the parties were not parties to the partition, i.e., the sisters, and secondly all the properties of the joint family were not available for partition.

17. As regards the movable properties which were not included in the partition, the Appellate Court held that the Plaintiff no.1 has waived his right in respect of the same and the suit is not liable to be defeated on this ground. As regards the relinquishment of their rights by the sisters, the Appellate Court held that it is not the case of the Defendant no.1 that the sisters were present either at the time of partition during the lifetime of the father or at the time of execution of partition deed dated 23rd December 1999 and on the contrary, the sisters have contested the suit and claimed shares in the properties. The Appellate Court considered that the daughters by virtue of the amendment to section 6 of the Hindu Succession Act, 1956 were coparceners along with the sons and the partition of 23rd December 1999 was not a partition as per law, there was no disposition or alienation of the property prior to 20th December 2004 and therefore the daughters have equal share in the suit properties as that of the Plaintiff No.1 and the Defendant No.1. The Appellate Court thus dismissed the appeal.

SUBSTANTIAL QUESTION OF LAW:

18. The Second Appeal was admitted on 4th August, 2015 on the following substantial question of law:

“Whether the finding recorded by both the Courts below that the registered partition deed dated 23rd December, 1999, was illegal as it was vitiated by fraud, is based upon any relevant and admissible evidence available on record.”

ADDITIONAL SUBSTANTIAL QUESTIONS OF LAW:

19. The admitted position is that the Partition Deed dated 23rd December, 1999 though produced by the Defendant No.1, was not tendered in evidence either by the Plaintiffs or by the Defendants and was not exhibited. Relief sought by the Plaintiffs was the cancellation of the partition deed dated 23rd December, 1999 as the same was obtained by misrepresentation and fraud. The Trial Court has rendered declaration of cancellation of the registered partition deed and Appellate Court has held that the registered deed of partition was obtained by fraud. Without the partition deed being tendered in evidence, the Courts have tested and returned a finding on the validity of the partition deed.

20. In the plaint, specific pleading of the Plaintiffs is that apart from immovable properties of which the partition is sought, there are certain movables which form part of the joint family properties, i.e.,

tractor, trailer, Jeep, bullet etc. for which the Plaintiffs will be filing a separate suit. The Defendant Nos.1 to 6 in their written statement have not specifically denied the pleading in respect of movables. As the movable properties which are forming part of the joint family properties were not included in the present suit, the instant suit would constitute suit for partial partition.

21. The Defendant Nos.7 to 9 were not parties to the registered partition deed of the year 1999 and were married prior to the execution of the partition deed. The mutation entry on record shows oral relinquishment by the Defendant Nos 7 to 9. The Defendant Nos. 7 to 9 claim share in the suit properties by virtue of amended Section 6 of the Hindu Succession Act, 1956.

22. The discussion above, in my view, raises the following additional substantial questions of law:

(i) Whether the trial Court and the first appellate Court could have rendered a finding of illegality of the registered partition deed dated 23rd December, 1999 without the document being tendered in evidence but the existence of which is admitted by the Plaintiffs and the Defendant Nos 1 to 6?

(ii) Whether the relief of partition and separate possession was a consequential relief which could be granted only after the grant of substantive relief of cancellation of the registered partition deed?

(iii) Whether the instant suit was suit for partial partition as the joint family movable properties were not included and thus not maintainable ?

(iv) Whether the Defendant Nos 7 to 9 are entitled to partition of the suit properties ?

23. The learned counsel for the parties were heard extensively on the additional substantial questions of law framed by this Court and they have also tendered their written submissions which are taken on record.

SUBMISSIONS :

24. Mr. Ram Apte, learned Senior Advocate appearing for the Defendant Nos 1 to 4 points out the pleading in the plaint to urge that as movable joint family property was not included, suit for partial partition was not maintainable. He submits that without any case of waiver being pleaded, the Appellate Court has held that the Plaintiff No.1 has waived his right with respect to the movable properties. He would further submit that in respect of self acquired properties, the initial burden was upon the Plaintiff to show sufficient joint family nucleus, and without the burden being discharged onus would not shift on Defendant no.1. In that context, he points out the admission of the Plaintiff No.1 in the cross examination.

25. He submits that as the registered partition deed was not exhibited and not marked in evidence, the document could not be cancelled. Pointing out to Exhibit 50 from the paper-book, he submits that the application was filed by the Plaintiffs for direction to the Defendants to produce the partition deed to which the Defendant No.1 had not objected and accordingly the partition deed was produced on record. He submits that despite thereof, the said document was not admitted by the Plaintiffs. He would submit that in absence of the document the relief under Section 31 of the Specific Relief Act cannot be granted.

26. Without prejudice, he submits that the execution of partition deed of the year 1999 was admitted by the Plaintiffs and what was pleaded was a case of fraud, which was not established. He would point out the admission of Plaintiff No 1 that his son Navnath is literate and has signed the partition deed. He submits that the partition deed is registered document and in view of Section 91 of the Indian Evidence Act, 1872 no oral evidence contrary to the terms of the contract can be permitted to be given. He submits that the case of Plaintiffs is that he has not received possession of properties as per agreement and thus remedy was to seek specific performance.

27. Pointing out to Mutation Entry No.252, he submits that the

Mutation Entry is evidence of the separation of Defendant No 1 and allotment of Gat No 297 to share of Defendant No 1. Drawing attention of this Court to document at Exhibit 107 he submits that the application filed by heirs of Dhondiba is evidence of the properties being partitioned during life time of Dhondiba as the said application specifically mentions that Gat Nos.298, 308, 309, 306, 711, 300 and part of Gat No.506 have been allotted to the share of the Plaintiff No.1 and he is in possession of the same whereas Gat No. 304 and part of Gat No. 506 is allotted to the share of the Defendant No.1. He submits that the Plaintiff No 1 has admitted that he has independently sold some of the properties which supports the case of earlier partition and those properties are not included in the suit.

28. Mr. Apte would further submit that the sisters though have filed written statement have not challenged partition deed by way of counter claim and neither challenged the mutation entries. He submits that documentary evidence shows oral relinquishment which is permissible in law. He would further submit that revenue entry recording names of sisters as heirs of Dhondiba will not make them coparceners. He would submit that as partition had already taken place, daughters have no share and at the most can have share in the share of father.

29. He would further submit that partial partition is permissible in law, which position has not been appreciated by the Appellate Court while rendering a finding of illegality of partition deed.

30. In support of his submissions, Mr. Apte relies upon following decisions :

- [a] ***Anil Rishi v. Gurbaksh Singh [(2006) 5 SCC 558];***
- [b] ***Kenchegowda v. Siddegowda [(1994) 4 SCC 294];***
- [c] ***Rattan Singh v. Nirmal Gill [(2021) 15 SCC 300];***
- [d] ***Vineeta Sharma v. Rakesh Sharma [(2020) 9 SCC 1];***
- [e] ***Govindrao v. Dadarao @ Shrawan [2004(4) Mh.L.J. 653];***
- [f] ***Shivaram v. Vrundavani [2016 SCC Online Bom 2704];***
- [g] ***Ramdas Chimna v. Pralhad Deorao [1964 SCC OnLine Bom 20];***
- [h] ***Swarnalatha v. Kalavathy [AIR 2022 SC 1585];*** and
- [i] ***Dnyanu v. Shripati [2008(4) Mh.L.J. 931]***

31. *Per Contra* Mr. Gorwadkar, learned Senior Advocate appearing for the Plaintiffs submits that in view of the fact that the registered partition deed dated 23rd December, 1999 was not proved or exhibited, the substantial question of law as to its validity has been rendered redundant. He submits that the main relief was for

partition and separate possession and if the deed of partition is not produced on record, the decree for partition must be sustained.

32. As regards the issue of partial partition, he would submit that under Order II Rule 2 of CPC, the Plaintiffs are entitled to abandon part of the claim. He would submit that non inclusion of the movable properties is not fatal to the suit and the waiver is statutorily presumed under Order II Rule 2 of CPC. He submits that the admitted position is that the Defendant No.1 did not enter into the witness box and as such the presumption would arise that the case set up by him is not correct as is settled by the Apex Court in the case of ***Man Kaur v. Hartar Singh Sangha [(2010) 10 SCC 512]***.

33. He submits that only prayer clauses (b), (c) and (d) and the claim of the sisters for partition and separate possession is required to be decided by discarding or ignoring the partition deed dated 23rd December 1999. He would further submit that the theory of previous partition as propounded by the Defendant Nos.1 to 6 has not been proved as they have not stepped into the witness box. He would further submit the Plaintiffs have pleaded that properties acquired in the name of Defendant no.1 are purchased from the joint family income and no particulars are given by Defendant no.1 as to his source of income for purchase of properties.

34. He would further submit that by the decision of the Apex Court in the case of ***Vineeta Sharma v. Rakesh Sharma [(2020) 9 SCC 1]*** the amendment to Section 6 of the Hindu Succession Act, 1956 has been given a retro-active effect and therefore by reason of birth, every daughter has been given a status of coparcener and right to claim a share in the joint family property and as such the sisters are entitled to have equal share in the properties and the shares are therefore rightly calculated.

35. He would further submit that as regards the contention that some of the properties have been independently dealt with is not a conclusive indicator of the earlier partition of the joint family properties and it only shows that other sharers have acquiesced in the transactions made by the Plaintiffs and the properties which have been individually sold can be put to his share in order to make partition equitable. In support of his submissions, Mr. Gorwardkar, relies upon following decisions :

- [a] ***Badat and Co., Bombay v. East India Trading Co. [AIR 1964 SC 538];***
- [b] ***Vidhyadhar v. Mankikrao [AIR 1999 SC 1441];***
- [c] ***Om Prakash Berlia v. Unit Trust of India [AIR 1983 Bombay 1];***
- [d] ***Babu J. Jadhav v. Muktabai W. Somwanshi [2022(1) Bom.C.R. 294.***

[e] ***Sushil Kumar v. Rakesh Kumar [(2003) 8 SCC 673];*** and

[f] ***Man Kaur v. Hartar Singh Sangha [(2010) 10 SCC 512]***

36. Mr. Killedar, learned counsel appearing for the Defendant Nos. 7 to 9 would submit that sisters not being parties to the alleged partition deed dated 23rd December, 1999, the same is not binding upon them. He submits that Defendant No.1 has not entered into the witness box and proved the case of prior partition during the lifetime of father. He would submit that the Defendant No.1 has not discharged the burden cast upon him and an adverse inference is required to be drawn under Section 114 of the Indian Evidence Act, 1872 as the Defendant No.1 has not stepped into the witness box. He would further submit that the Apex Court in the case of ***A. Krishna Shenoy v. Ganga Devi G [2023 Live Law 778]*** has held that in the partition suit the parties are interchangeable and there is no bar in passing of numerous preliminary decrees and submits that as such the Defendant Nos.7 to 9 have a right to seek partition. He would further submit that the provisions of Order VIII Rule 3 and Rule 5 of CPC provide for specific admission and denial of the pleadings in the plaint which requirement has not been met by the Defendant Nos.1 to 6 while dealing with averments of fraud pleaded in plaint.

37. He would further submit that oral relinquishment by the Defendant Nos.7 to 9 as claimed by the Defendant No.1 does not satisfy the requirement of the family arrangement. He submits that the specific procedure prescribed under Section 85 of Maharashtra Land Revenue Code, 1960 providing for oral partition has not been followed in the present case. He would further submit that this Court in the case of ***Babu v. Muktabai [2021 SCC OnLine Bom 4588]*** has held that where the alleged partition is unequal, it cannot be accepted as partition effected and be protected under law. He submits that merely because the sisters have not challenged the Mutation Entry cannot be taken as acceptance of partition. He points out to various observations of the Apex Court in the case of ***Vineeta Sharma (supra)*** and would submit that the daughters acquire an equal status as that of the son by reason of their birth. He would further point out from the written statement of Defendant Nos.1 to 6 that there are no pleadings in respect of the said application Exhibit 107 and the said document cannot be read in evidence as regards the relinquishment of the shares of the sisters. He would urge the Court to consider the difference in signatures on Exhibit 107 and in present proceedings. He would submit that mere marking of the exhibit would not dispense with the proof and that there is no oral relinquishment. He submits that as per decision of the Apex Court in

Vineeta Sharma (supra) plea of oral partition can only be entertained if supported by public document. He submits that as partition deed dated 23rd December 1999 has not been proved, the partition is not saved.

38. As regards the submission on Section 29A of the Hindu Succession Act, 1956, which is a State Amendment, Mr. Killedar submits that it is impliedly repealed by Section 6 of the Amendment Act of 2005. He submits that as per Article 254(1) of the Constitution in event the provision of law made by the State legislature is repugnant to the law made by Parliament, then subject to the provisions of clause (2), the law made by the Parliament shall prevail and the State law to that extent shall be void. He submits that the Explanation to this is contained in Article 254(2) which provides that the State law shall prevail in that State over the Central law in event the State law is reserved for consideration of the President and received its assent. He submits that the Maharashtra Amendment to the Hindu Succession Act is neither pending for consideration before the President nor has received its assent and Section 29A(iv) is inconsistent with the amended Section 6 and is void.

39. Mr. Killedar would further submit that the Apex Court in the case of ***State Bank of Travancore v. Aravindan Kunju Panicker***

[(1972) 4 SCC 274] has held that the Hindu family is presumed to be joint unless the contrary is established and the entire evidence of jointness of properties has been left unrebutted. He submits that apart from the fact that the Defendant Nos 1 to 6 did not step into the witness box, there is no suggestion given to the PW-1 that some of the properties were self acquired properties of the Defendant No.1. He submits that as the Defendant Nos.1 to 6 have failed to prove partition deed, the theory of previous partition fails. In support of his submissions, Mr. Killedar pressed into service following case laws :

- [a] ***Vidhyadhar v. Manikrao [(1999) 3 SCC 573];***
- [b] ***Mohinder Kaur v. Sant Paul Singh [(2019) 9 SCC 358];***
- [c] ***State of Maharashtra v. Bharat Shanti Lal Shah [(2008) 13 SCC 5];***
- [d] ***Hoechst Pharmaceuticals Ltd. v. State of Bihar [(1983) 4 SCC 45];***
- [e] ***Babu v. Muktabai [2021 SCC OnLine Bom 4588];***
- [f] ***State Bank of Travancore v. Aravindan Kunju Panicker [(1972) 4 SCC 274];***
- [g] ***Sait Tarajee Khimchand v. Yelamarti Satyam [(1972) 4 SCC 562];***
- [h] ***Thangam v. Navamani Ammal [2024 SCC OnLine SC 227];***
- [i] ***A. Krishna Shenoy v. Ganga Devi G [2023 Live Law 778];***
- [j] ***Devisingh v. Smt. Shailabai [1994 SCC OnLine Bom 151];***

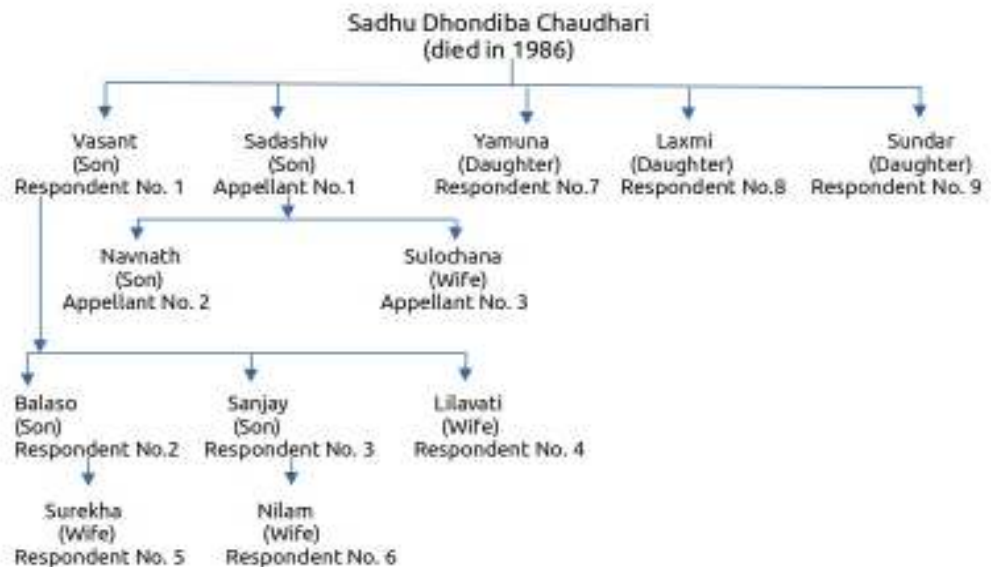
[k] ***Parutappa Sidramappa Madale v. Shrishail Sidramappa Madale [2019 SCC OnLine Bom 12733];*** and

[l] ***Kewal Krishan v. Rajesh Kumar [2021 SCC OnLine SC 1097].***

40. In rejoinder, Mr. Apte, learned Senior Advocate for the Appellants would contend that the documents were marked as Exhibit 106 and 107 being certified copies of public documents and relevant for deciding the dispute between the parties. He would further submit that the burden was cast upon the Plaintiffs to prove his case and it was not required for Defendant Nos.1 to 6 to step into the witness box. Pointing out to paragraph No.4 of the plaint, he submits that the existence and execution of the partition deed is admitted. He submits that the intention to separate is clear from the execution of the partition deed. He submits that in the year 1999 the daughters were not coparceners and therefore were not required to be made party to partition deed. He submits that at the most the sisters would have 1/15th share upon the notional partition of the father's share. He submits that as the pleadings admit the deed of partition, the proviso to the Amendment of 2005 will set in.

REASONS AND ANALYSIS:

41. For better understanding of the relationship of the parties, the genealogy is reproduced hereunder:



42. The fulcrum of the present case is the registered partition deed dated 23rd December, 1999 executed between the Plaintiffs and the Defendant Nos.1 to 6. The Plaintiffs seek to set it aside on the ground of fraud and misrepresentation and consequentially seek partition and separate possession. The Defendant Nos.1 to 6 defend the registered partition deed and the Defendant Nos.7 to 9 support the case of Plaintiffs claiming right to partition.

43. The Second Appeal was admitted on the substantial question of law of perversity in the concurrent findings of the partition deed being illegal and vitiated by fraud. Upon perusal of the record during

the hearing, it was disclosed that the registered partition deed was not tendered in evidence and has not been marked as Exhibit. Both the Courts as well as the parties have proceeded on the assumption that the registered partition deed is part of evidence. The Courts have rendered concurrent findings on the validity of registered partition deed holding the same to be illegal as vitiated by fraud.

EVIDENCE AS REGARDS REGISTERED PARTITION DEED DATED 23rd DECEMBER, 1999:

44. PW-1 has deposed that on 23rd December, 1999, the partition deed between Plaintiffs and the Defendant Nos 1 to 6 was registered before the Sub Registrar, Haveli at Serial No 1526/99. He has further deposed that the cause of action first arose upon the registration of the partition deed dated 23rd December, 1999. In cross examination, PW-1 deposed that the pleadings in the plaint are in respect of the registered partition deed dated 23rd December, 1999. The Affidavit in lieu of examination in chief filed by PW-1 on 14th November, 2005 does not tender the registered partition deed of 23rd December, 1999 as part of his evidence.

45. On 9th November, 2006, an application was moved by the Plaintiffs below Exhibit-50 seeking direction to the Defendant No.1 to

produce the original partition deed dated 23rd December 1999 for the purpose of tendering the same in evidence. By way of pursis below Exhibit 52 dated 15th February, 2007, the partition deed registered in the office of Sub-Registrar, Haveli No6 at Sr No.1526 was produced by Defendant No 1. On the said pursis, the Plaintiffs have noted their say "*Not admitted by the Plaintiff*". The cross-examination of PW-1 commenced on 18th July, 2008 and concluded on 23rd October, 2008. During the cross examination, PW-1 was not confronted with the registered partition deed. Admittedly, Defendant Nos 1 to 6 have not stepped in the witness box.

46. The documents produced by the Plaintiffs during their evidence have been marked as Exhibit 61 to 103 and the documents which were produced by the Defendant No.1 below Exhibit-46 were marked as Exhibit-73 to 87 as the documents were certified copies of 7/12 extracts. The partition deed dated 23rd December 1999 was not tendered in evidence and not marked as Exhibit.

47. The procedure for production of documents and endorsement on the documents admitted in evidence is laid down in Order XIII Rules 4 and 7 of CPC which read thus:

"ORDER XIII:

4. Endorsements on documents admitted in evidence.— (1)

Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted,

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

7. Recording of admitted and return of rejected documents.—

(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them."

48. The above provisions of CPC set out in detail the procedure for marking the documents which are admitted in evidence. The registered partition deed has not been endorsed by the Trial Court as admitted in evidence. Only those documents which have been admitted in evidence form part of record of the suit and can be read in evidence. During the hearing upon a question being posed by this Court, learned counsel appearing for the respective parties have

admitted that the partition deed of 23rd December 1999 was neither produced in evidence nor marked as exhibit.

49. In case of ***Om Prakash Berlia v. Unit Trust of India (supra)***, learned Single Judge of this Court has considered the provisions of the Indian Evidence Act, 1872 in the context of proof of documents and in paragraph nos.6, 11 and 12 has held as under:

"6. Secondly, Ss. 61 and 62 read together show that the contents of a document must, primarily, be proved by the production of the document itself for the inspection of the Court. It is obvious that the truth of the contents of the document, even prima facie, cannot be proved by merely producing the document for the inspection of the Court. What is stated can be so established.

11. Fourthly, Sec.67 of the Act requires the proof of the handwriting or signature upon a document. If by mere production of the original document for the inspection of the Court the truth of its contents was proved prima facie, the requirement of proof of the handwriting and of the signature upon it would be almost superfluous.

12. The Act requires, first, the production of the original document. If the original document is not available, secondary evidence may be given. This is to prove what the document states. Upon this the document becomes admissible, except where it is signed or handwritten, wholly or in part. In such a case the second requirement is, under S.67, that the signature and handwriting must be proved. Further, where the party tendering the document finds it necessary to prove the truth of its contents, that is, the truth of what it states, he must do so in the manner he would prove a relevant fact....."

50. The pleadings would indicate that the Plaintiffs and the Defendant No 1 to 6 admit the execution of the registered partition deed. However, the deed is not part of evidence on record. Resultantly, the partition deed though produced, cannot be considered as part of judicial record. Even if the execution of document has been admitted by the Plaintiffs, the contents thereof were not admitted as can be discerned from the noting of Plaintiff on the pursis below Exhibit-52 when the original partition deed was produced by the Defendant No.1.

51. Judgments of the Trial Court and the Appellate Court indicate that the registered partition deed has been read by the Courts and finding has been rendered on its validity. The specific case of the Plaintiff is that the partition deed though executed by him is vitiated by misrepresentation and fraud relatable to the contents of partition deed. The Plaintiff's case is that the registered partition deed was not according to the oral terms agreed upon, the boundaries of the properties are not fixed, area of the properties allotted to the Plaintiffs as per the partition deed are incorrect, the allotted properties were not handed over to the Plaintiffs and all the properties do not form part of the partition deed. Even though the execution of the partition deed has been admitted by the Plaintiffs as

well as the Defendant Nos 1 to 6, considering the nature of fraud pleaded by the Plaintiffs, the contents of partition deed play a pivotal role for determining its validity. The burden was specifically cast upon the Plaintiffs to prove that the alleged partition deed dated 23rd December, 1999 is obtained by Defendant No 1 by playing fraud. The Plaintiffs could not have discharged the burden of proof of fraud unless the document itself is tendered in evidence. Without the registered partition deed forming part of the evidence, no declaration as regards its validity could have been rendered by the Trial Court and Appellate Court.

WHETHER CASE OF FRAUD IS ESTABLISHED:

52. Though the registered partition deed was not tendered in evidence, even if it is accepted to form part of record, the burden was upon the Plaintiffs to establish fraud and misrepresentation. Before considering whether the Plaintiffs have discharged the burden cast upon them, it will be profitable to refer to the principles of Hindu Law pertaining to partition of joint family properties. In the treatise of Principles of Hindu Law by Mulla, 24th Edition, the learned author has stated thus :

“§ 324: How partition may be effected :

Partition is severance of joint status, and as such, it is a matter of individual volition. All that is necessary, therefore, to

constitute a partition, is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severality..... A partition may even be effected orally. In case a partition is effected orally, it must be supported by evidence, such as subsequent separate mutation entries and also payment of taxes, cesses or levies to prove that such oral partition had indeed taken place, in the absence of which it would be difficult to uphold a claim of such an oral partition. It may be effected by a deed of partition between the members or by a deed of release with or without consideration, which would bind the executants.....

Prima face, a document expressing the intention to divide brings about a division in status, but it is open to a party to prove that the document was a sham or a nominal one, not intended to be acted upon and executed for some ulterior purpose. It sometimes happens that persons make statements, which serve their purpose, or proceed upon ignorance of the true position: and it is not their statements, but their relations with the estate which is the determining fact. When a purported partition is proved to be a sham, the effect would be that the family is considered joint."

"§ 325. Partition by agreement:

(1) As regards partition, no act done by any member of a joint family, can operate as a partition, unless it has been done with the intention to put an end to his status as coparcener and acquire a new status, i.e., the status of a separate owner. As has been stated by their lordships of the Privy Council in the leading case of *Appovier v Rama Subba Aiyar* the true test of partition of property according to Hindu law is the intention of the members of the family to become separate owners. Intention being the real test, it follows that an agreement between the members of a joint family to hold and enjoy the property in defined shares as separate owners operates as a partition, although, there may have been no actual division of the property by metes and bounds.

In such a case, the interest of each member is divided, though the property remains physically undivided.....

An agreement to separate is not required by law to be in writing, if it is in writing, and clearly indicates on the face of it an intention to separate and hold the property in defined shares as separate owners, no evidence is admissible of the subsequent acts of the parties to alter or control its legal effect.....”

53. In order to constitute partition there must be a definite and unequivocal indication of intention by member of joint family to separate himself from the family and enjoy his share in severalty. The partition can be effected either orally or through written document and though there may have been no actual partition by metes and bounds, an agreement between members of joint family to hold and enjoy the property in defined shares as separate owners operates as a partition.

54. Applying the above principles of Hindu Law to the facts of the instant case, the execution of the registered partition deed is manifestation of the intention of the parties to separate and intention being the true test there was severance of joint family status. To constitute partition there is no requirement of actual partition by metes and bounds and it suffices if the defined shares are held and enjoyed as separate owners.

55. The case of oral partition during the lifetime of Dhondiba which was reduced to writing on 23rd December 1999 has not been proved as the Defendant Nos 1 to 6 have not stepped in the witness box, however, the pleadings indicate that the Plaintiffs and Defendant No to 6 have executed a registered partition deed. There was thus severance of joint family status.

56. Upon the severance of joint family status being established by the execution of registered deed of partition, the partition can be re-opened only in certain contingencies such as at the instance of posthumous son, minor son, mistake, fraud etc. The principles of Hindu Law relevant for our purpose i.e. fraud has been laid down by Mulla in Principles of Hindu Law 24th Edition as under:

“VI. RE-OPENING OF PARTITION

§ 336. Fraud

A partition may be reopened, if any coparcener has obtained an unfair advantage in the division of the property by fraud upon the other coparceners.

If in a suit for partition, no fraud is pleaded initially in the plaint, the plea cannot be allowed to be changed belatedly that the partition was fraudulent.

However, fraud vitiates everything, and even a belated plea of fraud cannot be discountenanced. Where a consent decree of partition was sought and it was found that a widow was shown to have

relinquished her rights, on evidence of fraud being adduced and accepted, the decree of partition was set aside.”

57. Section 17 of Indian Contract Act, 1872 defines fraud as under:

17. “Fraud” defined.—“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak³, or unless his silence is, in itself, equivalent to speech.”

58. The conspectus of fraud pleaded by the Plaintiffs is as under:

- a) The registered partition deed was not in accordance with the terms of partition agreed in presence of respectable persons

from the village.

- b) The contents of partition deed was not read over to the Plaintiffs.
- c) The properties allotted to share of Plaintiffs are not measured and handed over, and, boundaries not fixed.
- d) The areas of the properties allotted to share of Plaintiffs are incorrect and show incorrect boundaries.
- e) All the joint family properties are not included in the partition deed.

59. The principles of Hindu Law permit the re-opening of partition if it is established that any coparcener has obtained an unfair advantage in division of property by fraud. The essential ingredient of fraud is intent to deceive to induce the person to enter into contract. The provisions of Order VI, Rule 4 of CPC mandate necessary particulars to be given in all cases where party pleading relies upon misrepresentation or fraud. The Constitution Bench of Apex Court in ***Bishundeo Narain v. Seogeni Rai (1951 AIR 280)*** held that in cases of fraud, undue influence and coercion, the parties

pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice however strong the language in which they are couched may be.

60. The Plaintiffs had thus to prove that the Defendant Nos 1 to 6 had obtained an unfair advantage in division of the properties and the unfair division was obtained by fraud. Coming to the evidence adduced by the Plaintiffs, the deposition of PW-1 is reiteration of the plaint. The unfair division pleaded by the Plaintiffs is that the properties allotted to share of Plaintiffs were not measured and handed over and boundaries are not fixed, the share allotted in the partition deed and boundaries of the properties are stated incorrectly, and, the entire property is not included in the partition deed.

61. The deposition of the Plaintiff No 1 would render the case of the Plaintiffs as that of non compliance with the obligations of the registered partition deed and nothing further. It was necessary for the Plaintiffs to adduce evidence such as giving the details of the

properties, the comparative areas of the properties allotted to the shares of the parties, the manner in which the shares allotted to the Plaintiffs is incorrect. The deposition is too general in nature and bereft of any particulars for the Courts to arrive at a finding of unfair division. PW-1 has himself admitted in his cross examination that he has not given the details of which boundaries are incorrectly stated.

62. Coming to the aspect of fraud, there is no element of fraud disclosed from the case pleaded by the Plaintiffs sufficient to re-open the partition. PW-1 has deposed that the registered partition deed was not in accordance with oral terms agreed in presence of the respectable persons from the village. To substantiate the same, the best evidence available was the evidence of the villagers in whose presence the terms of partition were orally agreed upon. However, no witness was examined by the Plaintiffs. PW-1 has further deposed that the contents of the partition deed were not read over to the Plaintiffs. In the cross examination PW-1 has admitted that the registered partition was signed by his son Navnath who is literate and his wife has affixed thumb impression. PW-1 has further admitted that the document was executed in front of Sub Registrar and he did not make any complaint to the Sub Registrar that his thumb impression was obtained without the document being read to him. In

the cross examination, PW-1 has admitted that some of the properties which were allotted to the Plaintiffs in the partition deed were subsequently sold by them. It can thus be inferred that after severance of joint family status the parties have independently dealt with their respective properties. I thus find considerable force in submission of Mr. Apte that the remedy available to the Plaintiffs was to seek specific performance of the partition deed and not to re-open the partition.

63. The 1st Appellate Court has rightly appreciated the evidence on record and held that evidence of fraud has not been adduced by the Plaintiffs. The Appellate Court has however held that there is no valid partition by considering the revenue records of the year 1986 recording the shares of the parties in the suit properties, no share being given in Gat No 998 and 312, properties at Sortapwadi and Walati not included in the partition and sisters not being parties to the partition though having a share. There is no discussion or reasoning given for the Appellate Court to arrive at the finding on the invalidity of partition. For arriving at a conclusion that the sisters were required to be joined in the partition deed, the Appellate Court was firstly required to consider the law prevailing at the time of execution of the partition deed before concluding that the sisters in

the year 1999 were entitled to a share as coparceners. The Appellate Court failed to consider that the partition deed was executed on 23rd December 1999 when the daughters were entitled to limited share in coparcenary interest of her father and not share as coparcener in their rights. The Appellate Court also failed to consider that in case of partition by agreement of parties, partial partition is permissible in law. The recording of shares in the suit properties in names of the legal heirs on death of Dhondiba would amount to negating the case of oral partition during the lifetime of father put by the Defendant Nos 1 to 6. The noting in the mutation entries admittedly does not create or extinguish any right in the properties and what was required to be considered is the admitted existence of registered partition deed.

PROPERTIES CLAIMED TO BE SELF ACQUIRED PROPERTIES :

64. One of the reasons that the Appellate Court has held the partition to be invalid is that the properties at Sortapwadi and Warati were not included in partition. It is settled position that partial partition by agreement of parties is permissible in law. Properties being Gat No. 483 at village Walati, Gat No. 394 at village Sortapwadi are claimed to be self acquired properties. The initial burden is upon Plaintiffs to show sufficient joint family nucleus from which the

properties claimed to be self acquired properties were purchased and thereafter onus shifts upon the Defendant Nos. 1 to 6 to prove the properties to be self acquired. In the present case, the Plaintiff no.1 has admitted in his cross examination that that he has no evidence to show that the properties were acquired out of joint family income. The initial burden not being discharged by Plaintiff no.1, the onus did not shift upon the Defendant Nos. 1 to 6. There is no question of any adverse inference being drawn for failure to step into the witness box by Defendant Nos. 1 to 6.

65. In *Anil Rishi v. Gurbaksh Singh (supra)*, the Apex Court has held that the burden of proving the fact rests on the party who asserts the affirmative of issue and pleading is not evidence far less the proof. Thus, ordinarily, the burden of proof is on the party who asserts the affirmative of the issue and it rests, after the evidence is gone into, upon the party against whom at the time the question arises the judgment would be given, if no further evidence were to be adduced by either side. The decision applies to the facts of the present case. Under Section 101 of Evidence Act, the burden was upon the Plaintiffs to produce the document of which relief of cancellation was sought and the Plaintiffs having failed to produce the document, the suit must fail.

66. Even if the oral partition during the lifetime of father was not established by the Defendant Nos 1 to 6, as they did not step into the witness box, the Plaintiffs have themselves admitted that there was a registered partition deed executed between the Plaintiffs and the Defendant Nos 1 to 6. There is finality which is attached to the partition effected by agreement of the parties. For the purpose of re-opening the partition, it was necessary for fraud to be established, which the First Appellate Court has held that the Plaintiffs have failed to establish. Once the case of fraud as pleaded is not established, the Appellate Court could not have declared the partition as illegal without any reasoning in support of the conclusion. The findings of the Appellate Court based on erroneous application of law suffers from perversity.

67. In ***Rattan Singh v. Nirmal Gill (supra)***, the Apex Court has held that there is a presumption that the registered deed is validly executed and the onus would be on the person who leads the evidence to rebut the presumption.

68. The submission of the Mr. Gorwadkar, learned Senior Advocate for the Plaintiffs is that irrespective of the fate of the partition deed, the deed is required to be ignored and the relief of partition to be

considered. I am unable to subscribe to the said position as canvassed by Mr. Gorwardkar. The partition deed dated 23rd December, 1999 is a registered document by which partition has been effected. The partition in the instant case could be reopened only upon fraud being pleaded and established and shares determined by decree of Court. When there is already a deed of partition resulting in severance of joint family status, without the said deed being set aside, the re-opening of partition determining the shares of the parties is unsustainable. The parties cannot shut its eyes to the registered partition deed and still seek partition. The principles of Hindu Law reproduced above make it clear that if the agreement to separate is in writing and clearly indicates, on the face of it, an intention to separate and to hold the property in defined shares, unless the deed of partition is shown to be vitiated by fraud, the partition cannot be reopened. The relief of partition is consequential relief which could have been granted only upon the deed of partition being set aside on ground of fraud. In the absence of the partition deed being cancelled, the suit could not be decreed for partition and separate possession. In the instant case, as discussed above firstly the partition deed was not tendered in evidence and thus no finding on its validity could have been rendered and secondly even if it is taken as part of judicial record, the Plaintiffs have failed to prove case

of fraud.

MAINTAINABILITY OF SUIT FOR PARTIAL PARTITION:

69. The property available and divisible on partition is coparcenary property which will include immovable as well movable properties. Where the property is indivisible, as in the instant case the motor vehicles, it may be sold and its value distributed. The general rule is that where a suit for partition is brought by a coparcener against the other coparceners, it should embrace the whole family property subject to certain exceptions where the property is not available for actual partition or where it is held jointly by the family with a stranger, a separate suit for partition may be brought in respect of that portion or part of the joint family property is outside the jurisdiction of the Court etc.

70. The case of the Plaintiffs was that there are certain movables of the joint family for which a separate suit for partition will be filed. In the cross examination of PW-1, the question was put as to whether any suit has been filed or any action taken in respect of partition of the properties to which the witness replied in the negative. This has been construed by the first appellate Court as a waiver of the right in respect of other properties. It is well settled that the essential

element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants inference of relinquishment of such right. There is no case of waiver pleaded and on the contrary it is pleaded that separate suit for partition of the movables would be filed. The suit was thus a suit for partial partition which is not maintainable. The contention that the waiver is statutorily presumed under Order II Rule 2 of CPC as sought to be contended by the learned counsel for the Plaintiff cannot be accepted. There is no relinquishment or abandonment of part of the claim. The Apex Court in ***Kenchegowda (supra)*** has held that the suit for partial partition in the absence of inclusion of other joint family properties was not warranted in law. This is the general rule against maintainability of suits for partial partition but in case the properties were not established to be joint or are disputed otherwise held commonly their exclusion would not be fatal to the suit for partition. In this context, apart from general denial to the movables forming part of the joint family property, no specific case is put up by the Defendant Nos 1 to 6 that these movables are not joint family properties. The Plaintiff No 1 has deposed in his evidence that the four vehicles are joint family properties and separate suit will be filed for recovery of Plaintiff's share upon ascertainment of market value of the vehicles. The suit being for partial partition was thus not

maintainable.

71. In *Shivaram v. Vrundavani (supra)*, learned Single Judge of this Court has held that if all the properties are not included in the common hotchpot in the suit for partition and separate possession, the said suit would get dismissed purely on such failure and it is in the interest of all the litigating sides who are naturally close relatives in the suit for partition and separate possession to have all the properties included in the suit for proper adjudication.

RIGHT OF DEFENDANT NOS.7 TO 9 TO PARTITION OF THE SUIT PROPERTIES:

72. The substantive relief sought by the Plaintiffs was cancellation of registered partition deed. The instant suit, thus, stands on a different footing than an usual suit for partition as it is only upon the cancellation of registered partition deed, that partition could be reopened. The Defendant Nos. 7 to 9, who are the sisters of Plaintiff No.1 and the Defendant No. 1, supported the case of the Plaintiffs, however, they have not challenged the registered partition deed dated 23rd December, 1999 by way of counterclaim. In the absence of any independent challenge being mounted by the Defendant Nos.7 to 9, the necessary corollary will be that it is only in event the partition is re-opened that the Defendant Nos 7 to 9 would be entitled to a share

in the joint family properties.

73. In this context, it will be profitable to consider the position of daughters as coparcener by virtue of the amendment of the year 2005 to Section 6 of the Hindu Succession Act 1956. By virtue of the amendment of the year 2005 to Section 6 of Hindu Succession Act, 1956, the daughters of a coparcener in a joint Hindu family governed by Mitakshara Law are given equal status as that of the sons by birth. Sub Section (5) of Section 6 provides that nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. The Apex Court in ***Ganduri Koteshwaramma v. Chakiri Yanadi (AIR 2012 SC 169)*** has held:

“Sub section (5) of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been effected before 20 December, 2004. For the purposes of new Section 6 it is explained that ‘partition’ means any partition effected by a decree of a court. In light of the clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non applicability of the Section, what is relevant is to find out whether the partition has been effected before 20 December, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a Court”.

74. The applicability of the amended Section 6 of Hindu Succession Act, 1956 to Defendant Nos.7 to 9 is therefore dependent on the non

alienation by the two modes prescribed there in i.e. by way of registered deed of partition or by way of decree of Court. The execution of the registered partition deed on 23rd December, 1999 is admitted by the Plaintiffs and the Defendant Nos 1 to 6. Much emphasis has been laid by Mr. Killedar, learned counsel appearing for Defendant Nos 7 to 9 on the fact that Defendant Nos 7 to 9 not being party signatory to the partition deed, the same was not binding upon the Defendant Nos 7 to 9 and by virtue of amended Section 6 of Hindu Succession Act, 1956, the daughters could seek partition of the suit properties.

75. The fallacy of the said contention is that the same overlooks the statutory position which protects the alienation by two prescribed modes. The amendment of the year 2005 to Section 6 of Hindu Succession Act, 1956 protects the alienation by mode of registered partition deed or decree of Court effected before 20th December, 2004. The submission of Mr. Killedar would attain force only if registered deed of partition is held to have been rightly cancelled on the ground of fraud and misrepresentation, in which case the Defendant Nos 7 to 9 would be entitled to a share equal to that of the sons. As indicated above, the entire dispute hinges on the validity of the registered deed of partition dated 23rd December,

1999, which deed itself was not tendered in evidence by any of the parties. Further, even on merits the Plaintiffs have not established fraud so as to be entitled to cancellation of the partition deed. Without the registered partition deed being cancelled, the Defendant Nos. 7 to 9 who have not independently challenged the partition deed, are not entitled to seek share in the joint family properties.

76. The Apex Court in ***Vineeta Sharma (supra)*** in paragraph nos. 68, 69 and 76 has held :

“68. Considering the principle of coparcenary that a person is conferred the rights in the Mitakshara coparcenary by birth, similarly, the daughter has been recognised and treated as a coparcener, with equal rights and liabilities as of that of a son. The expression used in section 6 is that she becomes coparcener in the same manner as a son. By adoption also, the status of coparcener can be conferred. The concept of uncodified Hindu law of unobstructed heritage has been given a concrete shape under the provisions of section 6(1)(a) and 6(1)(b). Coparcener right is by birth. Thus, it is not at all necessary that the father of the daughter should be living as on the date of the amendment, as she has not been conferred the rights of a coparcener by obstructed heritage. According to the Mitakshara coparcenary Hindu law, as administered which is recognised in section 6(1), it is not necessary that there should be a living, coparcener or father as on the date of the amendment to whom the daughter would succeed. The daughter would step into the coparcenary as that of a son by taking birth before or after the Act. However, daughter born before can claim these rights only with effect from the date of the amendment, i.e., 9.9.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5).

69. The effect of the amendment is that a daughter is made coparcener, with effect from the date of

amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint Hindu family governed by Mitakshara law. The coparcenary must exist on 9.9.2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not. Conferral is not based on the death of a father or other coparcener. In case living coparcener dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted section 6(3).

76. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to section 6(1). When we read the provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it became necessary to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20.12.2004. A daughter can assert the right on and from 9.9.2005, and the proviso saves from invalidation above transactions."

77. Apart from the above, even on merits as the Defendant Nos 7 to 9 have relinquished their share, they were not entitled to seek partition. It is settled that oral relinquishment is permissible in law (***See AIR 1965 BOM 74 Ramdas Cikka vs Pralhad Deorao***). The Defendant Nos.1 to 6 have produced documents on record below Exhibit 46. The 7/12 extracts and the Mutation Entries produced on record were admitted by the Plaintiffs and marked as Exhibits. During the cross-examination, PW-1 has deposed that he has no objection in

respect of the Mutation Entries and 7/12 extracts produced on record. During the final hearing before the Trial Court, the application dated 21st August, 1986 alongwith statement of Plaintiff No.1, Defendant No.1 and 7 to 9 recorded before the Talathi were marked as Exhibit 106 and 107 being certified copies of public documents and relevant for deciding the dispute between the parties. Exhibit 107 is statement given to the talathi admitting that during the lifetime of Dhondiba, the properties were partitioned between the Plaintiff No 1 and Defendant No 1 with the consent of the parties and there is no objection to mutating their respective names.

78. Further, in ***Vineeta Sharma (supra)*** the Apex Court has also considered the issue of oral partition and held that oral partition was permissible and the burden of proof remained on the person who asserted that there was partition. In the context of oral partition, the Apex Court in paragraph No. 135 held thus :

“135. A special definition of partition has been carved out in the explanation. The intendment of the provisions is not to jeopardise the interest of the daughter and to take care of sham or frivolous transaction set up in defence unjustly to deprive the daughter of her right as coparcener and prevent nullifying the benefit flowing from the provisions as substituted. The statutory provisions made in section 6(5) change the entire complexion as to partition. However, under the law that prevailed earlier, an oral partition was recognised. In view

of change of provisions of section 6, the intendment of legislature is clear and such a plea of oral partition is not to be readily accepted. The provisions of section 6(5) are required to be interpreted to cast a heavy burden of proof upon proponent of oral partition before it is accepted such as separate occupation of portions, appropriation of the income, and consequent entry in the revenue records and invariably to be supported by other contemporaneous public documents admissible in evidence, may be accepted most reluctantly while exercising all safeguards. The intendment of section 6 of the Act is only to accept the genuine partitions that might have taken place under the prevailing law, and are not set up as a false defence and only oral *ipse dixit* is to be rejected outrightly. The object of preventing, setting up of false or frivolous defence to set at naught the benefit emanating from amended provisions, has to be given full effect. Otherwise, it would become very easy to deprive the daughter of her rights as a coparcener. When such a defence is taken, the Court has to be very extremely careful in accepting the same, and only if very cogent, impeccable, and contemporaneous documentary evidence in shape of public documents in support are available, such a plea may be entertained, not otherwise. We reiterate that the plea of an oral partition or memorandum of partition, unregistered one can be manufactured at any point in time, without any contemporaneous public document needs rejection at all costs. We say so for exceptionally good cases where partition is proved conclusively and we caution the courts that the finding is not to be based on the preponderance of probabilities in view of provisions of gender justice and the rigor of very heavy burden of proof which meet intendment of Explanation to section 6(5). It has to be remembered that courts cannot defeat the object of the beneficial provisions made by the Amendment Act. The exception is carved out by us as earlier execution of a registered document for partition was not necessary, and the Court was rarely approached for the sake of family prestige. It was approached as a last resort when parties were not able to settle their family dispute amicably. We take note of the fact that even before 1956, partition in other modes than envisaged under section 6(5) had taken place."

79. Mr. Killedar would contend that the Mutation Entry No 252 by virtue of which it is contended that the Defendant Nos.7 to 9 had made application for relinquishment was not proved as the Defendant Nos.1 to 6 did not enter into witness box nor the Talathi was examined. It needs to be noted that the Mutation Entry No 252 was admitted by the Plaintiffs and under Section 58 of Evidence Act, facts admitted need not be proved. Mr. Killedar would rely on the decision of ***Devisingh v. Smt Shailabai (supra)*** which held that the family arrangement must be bonafide one so as to resolve the family disputes and rival claims by a fair and equitable division or allotment of properties between various members of the family. There is no quarrel with the proposition of law. However, Exhibit 106 and 107 is the statement of no objection given by the Defendant Nos 7 to 9 to the Talathi for mutating the names of the Plaintiff No 1 and Defendant Nos.1 to 6. Mutation Entry No 632 records that the Defendant Nos.7 to 9 have relinquished their rights. It is also admitted by Defendant No.8 that there is no challenge to the Mutation Entry No 632 which has presumptive value under Section 157 of Maharashtra Land Revenue Code, 1960.

80. The consideration of the provisions of Section 29A i.e. State

Amendment vis-a-vis amended Section 6 of Hindu Succession Act, 1956 would have arisen for consideration in event the relief of cancellation of partition deed of 23rd December, 1999 would have been granted. Absent the relief of cancellation of partition deed being granted, the interplay between Section 29A and Section 6 of the Hindu Succession Act, 1956 is irrelevant. In any event, what is sought to be contended is that the provisions of section 29A are void *ab initio* and that by virtue of amendment of section 6 in the year 2005, the State law, that is, Section 29(A)(4) stood impliedly repealed. This issue was considered by this Court in the case of ***Babu v. Muktabai (supra)*** where this Court has held that both the enactments, i.e. section 29(A) and section 6 as amended in the year 2005 cannot stand together and therefore the law made by the Parliament will prevail over the State law in view of Article 254(1) of the Constitution of India. There cannot be any quarrel with the said proposition of law laid down by this Court in ***Babu v. Muktabai (supra)*** and in case where the issue arises as to whether the provisions of section 29(A), that is the State Amendment would prevail over the amendment by the parliament to section 6 of the Hindu Succession Act 1956, the law made by Parliament would prevail over the State law. In the present case, the same would not assist the case of the Defendant No. 7 to 9 for the reason that without the

partition deed of the year 1999 being cancelled the subsequent relief of partition and separate possession even *qua* the Defendant No. 7 to 9 could not have been granted by the appellate Court.

JUDGMENTS CITED :

I shall now deal with the judgments cited at the bar and which have not been dealt with hereinabove.

81. JUDGMENTS RELIED UPON ON BEHALF OF THE RESPONDENT NOS. 1 TO 3:

[a] *Badat and Co., Bombay v. East India Trading Co.(supra)* :

This decision, on which reliance was sought to be placed by Mr. Gorwardkar cannot be considered as he fairly admits that he seeks to rely upon the minority judgment which is not unanimous judgment.

[b] *Vidhyadhar v. Mankikrao (supra)* :

In this case, the Apex Court, in the facts of that case, has held that Defendant no.1 had contended that the sale deed executed by Defendant no.2 in favour of the Plaintiff therein was fictitious and this plea was not supported by the Defendant no.1 as he did not enter into the witness box which was enough to reject the claim. The Apex Court held that

where a party to the suit does not appear in the witness box and states his own case and does not offer himself to the cross-examination, the presumption would arise that the case set up by him is not correct and an adverse inference would be drawn. In the present case, as declaration was being sought by the Plaintiff that the sale deed was vitiated by fraud and misrepresentation, the burden lay upon the Plaintiffs to establish their case.

[c] ***Babu J. Jadhav v. Muktabai W. Somwanshi (supra) :***

In this case, the learned Single Judge of this Court was considering the issue as to whether the Defendants who had come with the case of partition effected in the year 1982, was proved by them or not. Learned Single Judge considered the position in the year 1982 and held that though the daughters may not be getting any share in the property as coparcener but when there would be partition between the father and the son, then definitely the mother would get equal share. Learned Single Judge also considered the effect of the amendment to section 6 of the Hindu Succession Act on Section 29A and has held that the law made by the Parliament would prevail over the State law. This decision would have assisted the case of the

Defendant Nos 7 to 9 in event the relief of cancellation of registered partition deed was granted and partition was re-opened.

[d] ***Sushil Kumar v. Rakesh Kumar (supra)*** :

The Apex Court has held that in terms of Order 8 Rule 3 of CPC, evasive denial would amount to admission of allegation made in the plaint in terms of Order 8 Rule 5 of CPC. Considering the finality attached to the registered partition deed, for purpose of re-opening the partition on ground of fraud, heavy burden lay upon the Plaintiffs to establish fraud. The Plaintiffs cannot take advantage of the weakness of the case of Defendant Nos 1 to 6 to discharge the burden cast upon them.

82. JUDGMENTS RELIED UPON ON BEHALF OF RESPONDENT NOS. 4 TO 6:

[a] ***State of Maharashtra v. Bharat Shanti Lal Shah (supra)*** and ***Hoechst Pharmaceuticals Ltd. v. State of Bihar (supra)*** :

These decisions were pressed into service in support of submissions canvassed on the interplay between Section 29A of the Maharashtra Amendment to the Hindu Succession Act and the amendment to section 6 to emphasis that by virtue of

Article 254 of the Constitution the State law is repugnant to the Union law, the State law would become void only to the extent of repugnancy. There is no quarrel with the settled proposition of law, however, its applicability to the present case would arise only if the partition is re-opened and shares of the parties were to be determined.

[b] *Babu v. Muktabai (supra)* :

In this case, the learned Single Judge has held that when the alleged partition is unequal, it cannot be accepted as partition effected and merely because the Plaintiff has never challenged the mutation entry, it cannot be taken as she has accepted that partition. Even if the Defendant nos.7 to 9 are not parties to the partition deed, considering that in the year 1999 by virtue of Section 29A State amendment, the Defendant nos. 7 to 9 having been married did not acquire status as coparcener. At the most, upon partition being re-opened the daughters would have been entitled to share in their father's share. However, there is no counterclaim filed by Defendant Nos. 7 to 9 challenging the partition deed.

[c] *State Bank of Travancore v. Aravindan Kunju Panicker (supra)* :

In this case, the Apex Court has held that a Hindu family is

presumed to be joint unless contrary is established and in that case there was no evidence produced on record to rebut that presumption. In the present case, both the parties have come with the case of execution of partition deed and there is also an admission of the Plaintiffs that subsequently there are transactions of sale and purchase entered into individually by the Plaintiffs and the Defendant nos. 1 to 6 in respect of some of the properties forming part of the subject matter of partition deed. The partition deed expresses a clear intention to separate and the partition was sought to be re-opened on the premise that the same is vitiated by fraud. There was severance of joint status of the Hindu family upon the execution of partition deed.

[d] ***Sait Tarajee Khimchand v. Yelamarti Satyam (supra)*** :

In this case, the Apex Court has held that mere marking of the exhibit does not dispense with the proof of document and the document not having been shown to the other party at the time of giving oral evidence cannot be used against the Defendants. The observations of the Apex Court was in context of private documents such as ledger book and communications exchange between the parties. In instant case, the oral

relinquishment by the Defendant Nos 7 to 9 are noted in revenue records which are public documents and carry presumptive value.

[e] *Thangam v. Navamani Ammal (supra)* :

In this case, the Apex Court has considered the provisions of Order 8 Rule 3 and Rule 5 of the CPC which provide for specific admissions and denials. There is no quarrel with the said proposition.

[f] *A. Krishna Shenoy v. Ganga Devi G (supra)* :

In this case the well settled position in law that in partition suit every interested party is deemed to be plaintiff and there is no bar in passing numerous preliminary decrees has been reiterated. The decision does not assist the Defendant Nos 7 to 9 as the instant suit sought substantive relief of cancellation of partition deed and could not be equated with usual partition suit.

[g] *Devisingh v. Smt. Shailabai (supra)* :

This decision is in the context of acceptance of a valid oral relinquishment deed for which no registration is necessary. However, the family arrangement must be bona fide so as to

resolve family disputes and rival claims by a fair and equitable divisions or allotment of properties and that it must be voluntary and not induced by fraud, coercion or undue influence. The said decision has been pressed into service to support the case of Defendant nos. 7 to 9 that despite the noting in the mutation entry, that they have voluntarily relinquished their share unless the same is shown to be voluntary, the same cannot be accepted. It is admitted by the Defendant Nos 8 that there is no challenge to the mutation entry noting their oral relinquishment. There are no steps taken by the Defendant No 7 to 9 to seek partition after the death of their father in the year 1986. In any event, the issue of oral relinquishment would have come into consideration only if the partition is re-opened and not otherwise as the partition is prior to 20th December, 2004.

[h] ***Parutappa Sidramappa Madale v. Shrishail Sidramappa Madale (supra) :***

In this case, learned Single Judge of this Court in the facts of that case held that in respect of the partial partition, the Respondent-Plaintiff was not a party and it was thus not binding upon the Respondent-Plaintiff. The position pre-supposes that the party was entitled to a share in the joint

family property, which was not the position of the Defendant Nos 7 to 9 at the time of execution of registered partition deed dated 23rd December, 1999.

[i] *Kewal Krishan v. Rajesh Kumar (supra)* :

In this case, the Apex Court has held that the document which is void need not be challenged by claiming a declaration as the said plea can be set up and proved even in the collateral proceedings. In that case, the suits were filed for injunction restraining the Defendants from interfering with the possession of the Appellant and from alienating the share of Appellant in the suit property and by way of amendment, relief of declaration that the power of attorney and sale deeds were null and void was sought. The trial Court dismissed the suit which was reversed by the First Appellate Court. In second appeal, the findings of First Appellate Court were upheld by the High Court. The Apex Court considered the provisions of section 54 of the Transfer of Property Act, 1882 and held that the pleadings in the plaint was that the sale deeds are void as the same are without consideration. In that context, the Apex Court has held that the sale deeds will have to be ignored

being void and it was necessary for the Appellants to specifically claim a declaration as regards the sale-deed by way of amendment to the plaint. The facts being clearly distinguishable are not applicable to the present case as the challenge is to the partition on the ground that the same is vitiated by fraud and the consequential relief of re-opening of partition is sought.

CONCLUSION:

83.

[a] The registered partition deed dated 23rd December, 1999 was not tendered in evidence by either of the parties and in the absence of the deed forming part of judicial record, the document could not have been read by the Trial Court and the 1st Appellate Court for the purpose of adjudicating its validity. The declaration of the Trial Court and the 1st Appellate Court cancelling the registered partition deed dated 23rd December, 1999 as vitiated by fraud is unsustainable.

[b] Even if it is accepted that the registered partition deed dated 23rd December, 1999 is part of judicial record, the fraud pleaded by the Plaintiffs is that the deed is not as per the oral terms agreed upon in the presence of respectable persons from the village, boundaries

of properties are not fixed, area of properties allotted to the Plaintiffs as per partition deed are incorrect, the allotted properties are not handed over and all properties do not form part of the partition deed. No witnesses from the village were examined in whose presence the oral terms were agreed upon, no documentary evidence has been produced to demonstrate the area of the properties forming subject matter of partition deed, the manner in which the boundaries have been stated incorrectly to show unfair division of properties. The oral evidence is reiteration of plaint and is completely silent as regards the areas of properties, the comparative allotment, the properties of which possession has not been given and properties left out from the partition. The inference of the Courts that the registered partition deed is invalid and vitiated by fraud suffers from perversity as there is no evidence on record.

[c] The Plaintiffs seek to re-open the partition effected by registered partition deed dated 23rd December, 1999, on basis of fraud by seeking relief of cancellation of registered partition deed. There is finality which is attached to the partition effected by agreement of parties and partition can be re-opened only if the Plaintiffs are able to establish fraud as pleaded. Apart from the fact that the case of the Plaintiffs does not have an element of fraud, the

Plaintiffs have failed to establish their case as pleaded and the partition cannot be re-opened and the Plaintiffs are not entitled to the relief of partition and separate possession being relief consequential to the cancellation of partition deed.

[d] The pleadings in the plaint is that the joint family movable properties are not included in the instant suit and separate suit for partition of the movables will be instituted. The First Appellate Court has held that there was waiver of right in the movables without any case of waiver pleaded by the Plaintiffs. The suit being suit for partial partition the consequential relief of partition and separate possession was thus not maintainable in law.

[e] The Defendant Nos.7 to 9, i.e. the sisters have not filed any counter-claim challenging the registered partition deed dated 23rd December, 1999. Absent the cancellation of the registered partition deed, in view of the settled position in law that the amendment of the year 2005 to Section 6 of Hindu Succession Act, 1956 will not affect the partition duly registered under the Registration Act, 1908 prior to 20th December, 2004, the daughters will not be entitled to seek re-opening of partition. It is only in event of the partition being re-opened, that the daughters would be entitled to status of coparceners equal to that of sons. Further, there is no challenge to

the long standing mutation entries on record which notes the oral relinquishment by the Defendant Nos 7 to 9.

84. The substantial questions of law are accordingly answered in favour of the Appellants and the judgment of Appellate Court dated 7th January, 2011 is quashed and set aside. Resultantly, Regular Civil Suit No 116 of 2002 stands dismissed.

[Sharmila U. Deshmukh, J.]

85. At this state, request is made by learned counsel appearing for Defendant Nos. 7 to 9 seeking stay of the present judgment for a period of four weeks as the apprehension is that third party rights may be created. Request is opposed by learned counsel appearing for the Defendant Nos. 1 to 4. Considering the apprehension expressed, I am inclined to grant relief of status quo for a period of four weeks from the date of uploading of this judgment against all the parties.

[Sharmila U. Deshmukh, J.]