



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

**SECOND APPEAL NO.228 OF 2006
WITH
SECOND APPEAL NO.237 OF 2006**

SECOND APPEAL NO.228 OF 2006

- 1] Mangesh s/o Vishnupant Mankar,
a/a 40 yrs., occ. Business & cultivator.
- 2] Sau. Maya w/o Shivajirao Patil,
a/a 42 yrs., occ. Household work.
- 3] Vidya d/o Vishnupant Mankar,
a/a 34 yrs., Occ. Legal practitioner.
- 4] Sucheta d/o Vishnupant Mankar,
a/a 31 yrs., Occ. Household work.
- 5] Kiran d/o Vishnupant Mankar,
a/a 29 yrs., Occ. Household work.
- 6] Seema d/o Vishnupant Mankar,
a/a 27 yrs., Occ.- household work.
- 7] Archana d/o Vishnupant Mankar,
a/a 25 yrs., Occ. Household work.
All r/o Gupte Marg, Jatharpeth, Akola,
Ta. Distt. Akola.

.. Appellants
(Ori. Defendants
Nos.2 to 8 RESP on
on R.A.)

.. Versus ..

Smt. Kamlabai wd/o Ramraoji Kakad,
a/a 68 yrs, occ.- Household work,
r/o. Wadegaon, Balapur, Distt. Akola.

.. Respondent
(Ori. Plaintiff
on R.A.)

Mr. A.V. Khare, Advocate for Appellants.

Mr. R.L. Khapre, Senior Advocate assisted by Mr. A.M. Tirukh,
Advocate for Respondent-Sole.

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CORAM : SANJAY A. DESHMUKH, J.

DATE : 29/11/2024.

JUDGMENT :

1. This appeal is preferred by the defendants against the judgment and decree passed by the learned Additional District Judge, Akola in Regular Civil (First) Appeal No.17/2003, dated 20.09.2005. The said first appeal was preferred against the judgment and decree passed by the learned Civil Judge, Junior Division, Balapur, District - Akola in Regular Civil Suit No.26/1999 (Old Special Civil Suit No.373/1997) dated 13.12.2002.

PLAINTIFFS' CASE :

(i) The agricultural lands bearing Survey No.381/2 ad-measuring 3.38 acres and 380/4 ad-measuring 4 acres situated at village Wadgaon, Tahsil Balapur, District-Akola are subject matter of suit.

(ii) Plaintiff no.2 Shantabai, was the wife of Ananda and Plaintiff no.1 Kamlabai is their daughter. Ananda passed away in the year 1941. Amruta, Pandhari, Pandu are brothers and Savitra and Tulsa are sisters of Ananda. All these four brothers are no more.

(iii) The plaintiffs contended that the oral partition of the suit properties and other ancestral agricultural lands of the Hindu joint family of these four brothers took place in the year 1939. The partition was reduced into writing on 22.8.1939. After the death of her husband Ananda in 1941, plaintiff no.2 Shantabai become the owner of suit property No.381/2, which was allotted in partition of 1939 to her husband Ananda. The defendants are sons and daughters of late Vishnu, who was son of deceased Pandhari. The defendants are in possession of the suit properties. Therefore, the plaintiffs have filed the suit for possession of suit property No.381/2 on the basis of title.

(iv) The brother of husband of plaintiff no.1 viz. Pandu passed away after the Hindu Succession Act, 1956 in the year 1959. The plaintiff no.1 is his legal heir. An oral partition of his land Survey No.380/4 took place between the plaintiffs and defendants etc. in which each party received two acres of land in

that partition. The defendants are in possession of Survey No.380/4. The plaintiff prayed for the possession of suit properties on the basis of title.

2. **DEFENDANTS' CASE :**

(i) The defendants have admitted the relationship between the plaintiffs and themselves. However, they denied the alleged partition in the year 1939. The defendants further contended that agricultural land bearing Survey No.381/2 was allotted to the share of Vishnu in a family partition. Accordingly, the mutation entries were effected. Survey No.380/4 was allotted to the share of Pandu, who died issueless. Vishnu inherited the Pandu's property. After the death of Ananda, both plaintiffs left the Mankar family. The defendants contended that they are not legal heirs of Pandu.

(ii) The defendants also contended that deceased Vishnu since 15.4.1948 has been exclusively cultivating the suit properties and as a result, he had become owner of the suit properties by adverse possession. It is further contended that the plaintiffs issued notice dated 1.6.1986 through their Advocate G.A. Pimparkhede and claiming partition of the suit properties.

The notice was received by Vishnu and other brothers and the purchasers of some properties of the Mankar family. In that notice, plaintiff's stated that all these properties are ancestral properties of their joint family and if there was any partition, it would not bind them. It is contended that since plaintiffs have already taken the stand that the partition did not taken place, the suit for possession of suit properties is not maintainable. The suit is barred by the law of limitation. The defendants have become owner of the suit property by adverse possession. Therefore, it is lastly prayed that the suit be dismissed.

DECISION OF TRIAL COURT:

3. The learned trial court held that as per Exhibits 79 and 80, the partition of 1939 was proved, in which Survey No.380/4 was allotted to the share of the Pandu. The suit regarding Survey No.380/4 was dismissed. The suit was partly decreed regarding Survey No.381/2. It held that plaintiff no.1 has no right to claim possession of two acre land out of Survey No.380/4 and it was not allotted in the oral partition. A plea of adverse possession raised by the defendants was rejected.

DECISION OF 1st APPELLATE COURT :

4. The plaintiff No.1 preferred an appeal bearing Regular Civil Appeal No.17/2003. The defendants preferred an appeal bearing Regular Civil Appeal No.18/2003. The defendants' appeal was dismissed and plaintiffs appeal was allowed and entire suit was decreed by holding that plaintiff no.1 is entitled to get possession of two acres land out of Survey No.380/4 of the Pandu as his heir. These two second appeals have been preferred by the defendants against these two impugned judgments.

SUBSTANTIAL QUESTIONS OF LAW:

5. (i) The following substantial questions of law in Second Appeal No.228/2006 by an order dated 7.8.2008, are formed :

(i) Whether the Courts committed a serious error in discarding the legal notice issued by the plaintiff on 01.06.1986 on the ground that it was not proved, specially when a plea about the issuance of notice and the effect thereof was raised in the written statement and the plaintiffs had failed to enter the witness box to deny the issuance of the notice.?

(ii) Whether the suit filed by the plaintiff in respect of the property which allegedly allotted to their share in the partition dated 22.08.1939 was liable to be dismissed in view of the notice dated 01.06.1986.?

(ii) The following substantial questions of law in Second Appeal No.237/2006 by order dated 7.8.2008, are formed :

(i) Whether the Courts committed a serious error in discarding the legal notice issued by the plaintiff on 01.06.1986 on the ground that it was not proved, specially when a plea about the issuance of notice and the effect thereof was raised in the written statement and the plaintiffs had failed to enter the witness box to deny the issuance of the notice.?

(ii) Whether the plaintiffs were entitled to seek a share in Pandu's property under the provisions of the Hindu Succession Act.?

ARGUMENTS FOR DEFENDANTS :

6. Learned Advocate Mr. Khare for the defendants submitted that notice claiming partition at Exh.73 was sent by the plaintiff is proved by the defendants. In that notice, the partition was demanded by the plaintiffs. Thereafter, the suit for partition was not filed. Therefore, the suit for possession of the suit properties without claiming partition is not maintainable. He further submitted that the memorandums of partition at Exh.79 and 80 are not admissible in the evidence and as per Section 17 of the Indian Registration Act, 1908, if the partition is effected

and it is reduced into writing on the same day, it must be registered. He pointed out the cross-examination of witness Bhikaji Pagrul, PW-2 of 85 years old, who is author of that memorandum of partition. He deposed that after the partition took place, the memorandums of partition Exh.79 and 80 were signed by all the members. He submitted that such a document cannot be read into evidence for collateral purpose as per Section 49 of the Indian Registration Act, 1908. He further submitted that oral partition of Pandu's property is not proved.

7. Learned Advocate for the defendants further pointed out the application bearing Civil Application No.561/2024, which has been filed for forming additional substantial questions of law. He pointed out proposed substantial question of law nos.2 and 3 which are raised in the second appeals, which addresses as to whether the memorandum of partition dated 22.8.1939 was inadmissible due to lack of registration and whether aforesaid memorandum of partition dated 22.8.1939 could have been used for any collateral purpose.

8. Learned Advocate for the defendants is relying the following precedential laws :

(i) ***Ravindra Kaur Grewal and others .vs. Manjit Kaur and others, (2020) 9 SCC 706***, in which it is observed as under :

“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.”

(ii) ***Chikkam Koteswara Rao .vs. Chikkam Subbarao and others, AIR 1971 SC 1542***, in which para no.3 of it reads as under :

“3.....the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. There should be no doubt or ambiguity about the alleged admission.”

(iii) ***Siromani and another .vs. Hemkumar and others, 1968 Mh.L.J. 791***, in which in para no.4, it is held that the registration of the document like partition is compulsory under Section 17 (1(b) of the Registration Act.

(iv) **Yellapu Uma Maheswari and another .vs. Buddha Jagadheeswararao and others, 2015 AIR SCW 6184**, in Para 17 it is observed as under :

“17. It is well settled that the nomenclature given to the document is not decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the documents and that the admissibility of a document is entirely dependent upon the recitals contained in that document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question.”

(v) **K.B. Saha and Sons Private Limited .vs. Development Consultant Limited, (2008) 8 SCC 564**, in which it is observed that :

“5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.”

(vi) **Ram Rattan (dead) by legal representatives .vs. Bajrang Lal and others, AIR 1978 SC 1393**, regarding instrument not duly stamped admitted in evidence subject to objection. Duty of Court to judicially determine admissibility before the suit is finally disposed of.

(vii) **Iswar Bhai C. Patel alias Bachu Bhai Patel .vs. Harihar Behera and another**, (1999) 3 SCC 457, in which it is observed as under :

"It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

(viii) **Mohinder Kaur .vs. Sant Paul Singh**, (2019) 9 SCC 358 in which law is laid down that power-of-attorney cannot depose unless he has special knowledge.

(ix) **Manisha Mahendra Gala and others .vs. Shalini Bhagwan Avatramani and others**, 2024 SCC OnLine SC 530, in which it is observed that :

28.The functions of the General Power of Attorney holder cannot be delegated to any other person without there being a specific clause permitting such delegation in the Power of Attorney; meaning thereby ordinarily there cannot be any sub-delegation.

(x) **Gulabrao Maruti Bhagat .vs. Bhagwan Nana Bhagat and others**, 2001 (2) Mh.L.J. 665, in which it is observed that :

“The trial Court was entirely wrong in relying upon the hearsay evidence of the first defendant, respondent No. 1 herein, having regard particularly to the fact that there was no independent or authentic proof of the alleged partition of 1935. Severance of joint status had hence not been proved.”

(xi) **P Chandrasekharan and others .vs. S. Kanakarajan and others, (2007) 5 SCC 669, In para no.13**
observed that :

13. In [Rev. Fr. M.S. Poulose v. Varghese & Ors.](#) [1995 Supp. (2) SCC 294], interpretation of the recitals contained in a document was held to be involving a substantial question of law. What is prohibited for the High Court while exercising this jurisdiction under [Section 100](#) of CPC is to interfere with a finding of fact. This limited jurisdiction, inter alia, would become exercisable when the findings are based on misreading of evidence or so perverse that no reasonable person of ordinary prudence could take the said view.

(xii) **Union of India and others .vs. Vasavi Co-operative Housing Society Limited and others, (2014) 2 SCC 269, in para no.15, observed that :**

15. It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

(xiii) **Pandurang Doulu Patil .vs. Ramrao Dadu Patil**, since deceased by his L.Rs. **Lalaso Ramrao Patil and others**, 2009 (5) **Mh.L.J. 62**, in which it is held that substantial question of law if it is not formed at the time of appeal, it can be considered at the time of hearing of the Second Appeal.

9. Learned Advocate for the defendants lastly submitted that considering the substantial questions of law formed by this court as well as raised in the Application No.561/2024 for additional evidence, the appeal deserves to be allowed, as the right of the plaintiffs was decided based on inadmissible evidence of alleged partition deeds, which is not registered. He lastly prayed that appeal be allowed, the judgments of both courts be set aside and the suit be dismissed.

ARGUMENT FOR PLAINTIFF :

10. Learned Senior Counsel Mr. R.L. Khapre for the plaintiffs submitted that there is concurrent finding of both the courts. He submitted that the partition is proved as it is acted upon and further submitted that issues raised for the proposed two substantial questions of law are covered by the substantial

questions of law formed in both the Second Appeals. He is relying upon the following precedential laws :

(i) ***Kishori Lal .vs. Chaltibai***, it is observed in para 14 as follows :

14....Admissions are mere pieces of evidence and if the truth of the matter is known to both parties the principle stated in [Chandra Kunwar's](#) case (1) would be inapplicable. And in this case there is no admission by the respondent of the appellant's adoption by her husband in his lifetime. Such admissions that there are cannot help the case of the appellant or support a different appraisal of the evidence of the factum of adoption or establish an adoption which is otherwise disproved."

(ii) **Bennett Coleman and Co.(P) Ltd. .vs. Punya Priya Das Gupta**, (1969) 2 SCC 1, in which it is held as follows :

"The foundation of rule of estoppel incorporate in Section 115 of the Evidence Act is that it is inequitable and unjust to a person, that if another person is a representation induces he to act as he would not have otherwise acted."

(iii) **Kale and others .vs. Deputy Director of Consolidation and others**, (1976) 3 SCC 119, 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.”

11. The learned counsel for the plaintiffs lastly submitted that the proposed additional evidence is not necessary for deciding the legal controversy in this appeal. It is prayed that the appeal be dismissed and to reject the application for forming substantial additional question of law, as well as the application filed for adducing additional evidence be rejected. He submitted that both the Second Appeals be dismissed.

PARTITION OF SURVEY NO.381/2 :

12. The relationship between the parties is admitted. The plaintiff adduced documentary evidence of memorandum of partition at Exh. 79 and 80 and proved through the evidence of scribe Bhikaji Pagrul (PW-2) and Govindrao Amrutrao Mankar (PW-3) who is nephew of Ananda and Pandu as per Section 67 of the Indian Evidence Act, 1872 (for short 'I.E. Act') to prove the signatures on these documents. He deposed that he wrote memorandum of partition Exh.79 and 80 and that, after it were reduced into writing, it were signed by all the brothers in his

presence. He admitted in his cross-examination that partition was effected, and the memorandum of partition was reduced into writing at that time itself.

13. There is oral admission of PW-2 that partition took place and it was reduced into writing immediately. However, as per Section 31 of the Indian Evidence Act, admission is not conclusive proof of the fact admitted. As per Section 58 of the Indian Evidence Act, 1872, an admitted fact need not be proved. However, the proviso of Section 58 of the Evidence Act states that even though there is an admission, the court may in its discretion, require the facts admitted to be proved otherwise by such admissions.

14. In order to appreciate the evidences of memorandums of partition deeds Exh.79 and 80, the subsequent conduct of parties after the execution of these documents is crucial and decisive in determining as to whether the partition was acted upon or not.

15. To disprove the partition of 1939, defendants adduced the evidence of notice Exh.73 which was sent by the plaintiffs to them demanding partition. This conduct, according to the learned Advocate for the defendants, clearly reflects the real intention of the plaintiff's that there was no such partition of 1939 of the joint family properties. He submitted that notice sent by the Advocate of the plaintiffs is proved. He further submitted that original envelope of the said notice sent by Advocate Mr. G.A. Pimpalkhede along with envelope was not found to the defendants during the trial or first appeal. It is now traced out. Hence, he prayed to allow application for additional evidence.

16. The notice Exh.73 was not replied by the defendants as soon as it was sent. Even if it is accepted that notice was sent, the notice itself is contrary to the proved documents at Exh.79 and 80, which are signed in the year 1939 as memorandums of that partition. The signatures upon it are not denied and disproved by the defendants. The oral partition was acted upon. The names of all brothers were recorded separately to the record of the rights of their properties which they received in that partition, which is proved by revenue record filed by the plaintiff

at Exh.74 to 76 and 84 to 90. The evidence of notice Exh.73 will not prevail over memorandums of partition at Exh.79 and 80. Therefore sending of notice by plaintiffs is certainly a mistake of fact and even though explanation of admission by notice is not given by adducing oral evidence, no adverse inference can be drawn against plaintiff no.1 as per Section 114 illustration (g) of the Indian Evidence Act, that she did not adduce oral evidence and face the cross-examination only because the evidence was against her.

17. The partition took place in the year 1939 which was reduced into writing on 22.8.1939. The notice at Exh.73 dated 01.06.1986 was sent by the plaintiffs to the defendants more than 45 years later. Therefore, sending of notice (Exh.73) does not establish the existence of fact that there was no such partition in the year 1939 took place. If the entire evidence of plaintiff and defendant along with their pleadings is considered together, the partition as per Exh.79 and 80 is legally proved by the evidence of PW-2 who wrote it. The evidences of memorandums of partition are found natural and probable and they were rightly relied upon by the trial court as well as first appellate court. Therefore,

argument of the learned Advocate for the defendants, that admission of PW-2 that it were reduced into writing immediately after partition is not sufficient to rely upon the defence taken by the defendants that partition deed Exh.79 and 80 are not admissible in evidence as it was not registered. The defence of adverse possession is also not proved. However, when the defendants raised the defence of adverse possession, it implies that they admit the plaintiff's title to Survey No.381/2. The oral partition is permissible in law. The writing of Memorandum of partition after oral partition is also permissible. However, registration of the partition is compulsory if it is reduced writing on the same day when partition is effected as per precedential law. There is no such independent reliable evidence to prove that partition was effected and on the same day it was reduced into writing except the admission of PW-2. It is well established that oral admissions are weaker evidential admissions. Judicial admissions are stronger to believe. Therefore, as per provision to Section 58, defendants have to prove that partition at Exh.79 and 80 was reduced into writing on the same day. These defendants have not adduced such evidence to corroborate to the admission of PW-2. Therefore, these memorandums of partition are

admissible in evidence. Even if such document of partition is illegal and not registered in accordance with law but if it is acted upon it can be safely relied upon. The evidence of partition adduced by the plaintiffs is sufficient.

18. In the memorandums of partition Exh.79 and 80, it is specifically stated which properties were allotted in the partition by Khushal, the father of the Ananda, Pandu, Amruta and Pandhari to them. The unregistered memorandum of partition is permissible in law however if it is reduced into writing later on. However, if partition is reduced into writing on the same day as soon as it takes place, it must be registered as per Section 17 (1) (d) of the Registration Act, 1908. The law on this point is well settled by the precedential law of **Roshansingh and others .vs. Zile Singh and others, AIR 1988 SC 881** in which it is held that in case of memorandum of partition, registration is not necessary.

19. It is pertinent to note that in para no.16 of the written statement, the defendants stated that Vishnu got Survey No.381/2 in the family partition. This means they have admitted the partition. Thus, there is material corroboration to the plaintiffs

case of earlier partition from said admission is in para no.16 of the written statement of the defendants.

20. Learned Advocate for the defendants argued that both courts ought to have held that partition of the year 1939 was effected on the same day and it require registration since it was not impounded and therefore, it is not admissible in evidence. This argument is also not acceptable because memorandums of partition are acted upon, hence it can be safely relied upon to hold that partition was effected in the year 1939 as asserted by plaintiff's.

21. In civil cases, the standard of proof is preponderance of probability. The sterling quality evidence is not always necessary and it is not possible to adduce such evidence in each case. The preponderance of probability means, the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by the evidence that has the most convincing force on the principle of probability of superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair

and impartial mind to one side of the issue rather than the other. This is the standard of proof applied in the most of civil trials. It may not be strongest but stronger evidence, however, slight the edge may be. The test of sufficiently is most important aspect weighing of evidence. The court has weighed the evidence in the scale of ordinary prudent man considering psychology of the parties and witnesses. The court cannot weigh the evidence too intellectually with the scale of scientist or an intellectual man. It is, therefore, termed as preponderance of proof; balance of probability. In this case, upon appreciation and re-appreciation of entire evidence trial court and first appellate court accepted the evidence of partition as evidenced at Exh.79 and 80, the memorandums of partition. There are concurrent finding of both the courts. Therefore there is no scope in Second Appeal to interfere in the said findings as per law laid by Hon'ble Supreme Court in case of **Damodar Lal .vs. Sohan Devi and others, (2016) 3 SCC 78** that even wrong finding of fact cannot be substantive question of law. The evidence of notice Exh.73 is not helpful to the defendants even if it is held as proved. Therefore the production of the additional evidence regarding said notice and its envelope is not necessary for the final decision of this appeal.

Hence that application for production of additional evidence is rejected.

22. For the reasons discussed above and in view of the settled position of law, all the precedential laws cited supra by the learned Advocate for the defendants are not helpful to them as the facts of these cases are different than the case at hand. For the reasons discussed above, the argument of advocate for plaintiff is not accepted. Therefore, substantial questions of law no.1 in both the appeals are answered by holding that both the courts did not commit serious error in appreciating the evidence of notice (Exh.73) sent by the plaintiffs to the defendants for claiming partition.

ORAL PARTITION OF SURVEY NO.380/4 :

23. As far as second substantial question of law formed in the Second Appeal No.237/2006 is concerned, learned Advocate for the defendants submitted that Survey No.380/4 of Pandu was not allotted to the share of plaintiff no.1. The plaintiff's advocate argued that after the death of Pandu, plaintiff no.1 received her share of two acres of land in Survey No.380/4 by oral partition,

as she is his legal heir as per Section 8 of the Hindu Succession Act, 1956 (for short 'H.S. Act 1956')

24. As per mutation entry at Exh.76 of land Survey No.380/3, Pandu died on 10.11.1959. It was effected after the date of death of Pandu in the year 1961. It means that Pandu died after the passing of H.S. Act, 1956. He was issueless. His wife had died earlier to him. He did not have any Class-I heir.

25. It is an admitted fact that Pandu died issueless and his two sisters viz. Savita and Tulsa are alive. All the brothers of Pandu are died prior to his death. There is no Class-I heir to Pandu. There is no evidence that Pandu's sisters waived their rights in Survey No.380/4. As per Section 8 of the Hindu Succession Act, 1956, they are the legal heirs of Pandu as per Entry No.II of the Schedule as per Section 8 of the H.S. Act. Unless Pandu's sister expressly waives their rights to succession in the property, the question of granting of the share to the plaintiff no.1 who is daughter of his brother Ananda would not arise as she comes in the entry no.IV of the Schedule under Section 8 of

the H.S. Act, 1956. Needless to mention that sisters of Pandu are heirs in Entry no.II of Class II of Schedule of the H.S. Act, 1956.

26. According to plaintiffs, after death of Pandu, in an oral partition, 2 acres of land was allotted to the share of Amruta, 2 acres of land was allotted to the share of Vishnu and 2 acres of land was allotted to the share of plaintiff no.1. However, apart from oral evidence of plaintiffs witnesses, there is no other evidence to corroborate the oral partition of property of Pandu. The date or year or approximate time of that oral partition of land of Pandu is neither pleaded in the plaint nor it is proved by acceptable evidence or conduct. It cannot be inferred on the basis of revenue record at Exh.76, that oral partition as asserted by the plaintiff might have taken place.

27. Learned trial court rightly held that there is no such evidence of waiver of rights in land Survey No.381/4 by the sisters of Pandu. The first appellate court erred in holding that there are no legal heirs to the Pandu from Entry nos.I, II and III of the Class-II of Schedule under Section 8 of the H.S. Act, 1956 and plaintiff no.1 is legal heir as per entry no.IV of it. Thus, first

appellate court erred in para no.30 of its judgment and wrongly concluded that plaintiff no.1, being the brothers' daughter of Pandu, is entitled to share in his property and she received it through oral partition. However, since plaintiff no.1 is not legal heir of Pandu, she has no any legal right to claim share in suit property Survey No.380/4. Therefore, it cannot be accepted that Survey No.380/4 of Pandu was orally partitioned and plaintiff No.1 got 2 acres share in it.

28. The first appellate court did not consider and reappreciate the revenue record at Exh.76 properly and legally. However, the trial court properly and legally appreciated the same. The evidence of the plaintiff in this regard is not legal, correct and acceptable. The findings of the trial court in this regard is legal and correct and no interference is warranted in it. Therefore, the substantial question of law no.2 in Second Appeal No.237/2006 is answered in the negative that the plaintiff No.1 was not entitled to seek a share in the property of Pandu as per entry no.IV of schedule of Section 8 of the H.S. Act, 1956. For the reasons discussed above, the argument of the learned counsel for the plaintiffs is not acceptable.

29. The controversy between the parties on these two important aspects has been decided on merit, therefore, the application of the defendants for forming additional substantial questions of law needs to be rejected as no any substantial question of law arises for determination as stated in it. The Second Appeal No.237/2006 deserves to be partly allowed in respect of Survey No.380/4. The Second Appeal No.228/2006 deserves to be dismissed. The suit deserves to be partly decreed and the judgment of the trial court deserves to be confirmed and upheld. The impugned judgment of first appellate court deserves to be partly set aside. Hence the following order :

ORDER

- (1) Second Appeal No.237/2006 is partly allowed, and Second Appeal No.228/2006 is dismissed. The judgment and decree of first appellate court in R.C.A. No.17/2003 is partly set aside in respect of the property Survey No.380/4. The judgment and decree of the trial court is upheld.
- (2) No costs.
- (3) Record and proceeding be sent back to the trial court.
- (4) Pending applications, if any, are disposed of.

(Sanjay A. Deshmukh, J.)