HIGH COURT OF GUJARAT

CHAUHAN DAJIJI BALDEVJI
Versus
PITHUJI GALABJI CHAUHAN AND ORS

Date of Decision: 15 December 2010

Citation: 2010 LawSuit(Guj) 1369

Hon'ble Judges: H K Rathod

Eq. Citations: 2011 1 GLR 870, **2011 2 GLH 533**

Case Type: Second Appeal

Case No: 184 of 1990

Subject: Family , Property

Editor's Note:
(A) Hindu Law - Division of Joint family property - Division wife-wise, if a Hindu father has two wives & he has three male children by the first wife & two by the second, each wife constituting a branch with her children of the family is a concept foreign to Hindu law - Held - It is well settled position that severance of status takes place by mere indication of intention - Mere indication to separate & enjoy his share in severalty may amount to partition, it is a question of individual volition.- It is not necessary to say orally if it is acted upon - There is severance of joint status of the parries hold the property as tenant-in-common and not as joint tenants. If suit filed within limitation period division can be challenged on ground of inequality, unfairness, fraud etc.- Decree by lower appellate Court dismissing suit confirmed.
(B) Hindu Law - Suit for division of joint family property and recovery of property from co-sharer - Question of limitation of period.- Suit filed after 67 years from division- Division wife-wise, it is not necessary to say orally if is acted upon-
Held - Court come to the conclusion that there is a clear & unequivocal evidence that possession of defendant Nos. 1 to 4 is hostile and amounted to denial of title of plaintiff & defendant Nos. 5 to 11 - Possession of the defendant was adverse for more than the statutory period..

Final Decision: Appeal dismissed

Advocates: R C Jani, Ra Mishra

Cases Referred in (+): 20

H.K. Rathod, J.

[1] Heard learned advocate Mr. R.A. Mishra appearing on behalf of Appellant and learned advocate Mr. R.C. Jani appearing on behalf of Respondents.

[2] In this second appeal, substantial question of law has been raised by Appellant which is as under:

> Can the motherwise partition be relied upon for the purpose of coming to the conclusion that no joint family properties existed on the date of the suit for which partition could be effected that the partition that took place was acted upon ?

[3] The facts leading to present second appeal in short are as under:

> 3.1 The Appellant instituted Regular Civil Suit No. 212 of 1979 in the Court of Civil Judge (J.D.) at Vijapur contending inter alia that suit properties situated in sim of village Gerita and Ubkahal and houses situated in 'gamthan' of village Gerita as stated in Para 3(B) of plaint are ancestral properties of ancestor of original Defendant Nos. 1 to 11 and Plaintiff - present Appellant. The deceased father of Appellant Baldevji and uncle Kanaji were cultivating Survey No. 37 and 1/2 land of Survey No. 518, one bigha land of Survey No. 127 and they wanted to dispose of 1/2 land of Survey No. 518. But, they were restrained by Defendant Nos. 1 to 4 and so sale transaction was post-poned and on inquiry, it was found that there are many other fields of their ancestor and hence, a letter was written to Defendant No. 3 for furnishing information regarding ancestral properties, but, an evasive reply was given and, therefore, suit for possession of 1/28th share in ancestral property filed by present Appellant for partition of suit property and for possession.
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> 3.2 According to Appellant, Defendant Nos. 1 to 4 illegally and unauthorisedly sold some of fields as stated in Para 5AA of the plaint. The said transaction is not binding to Appellant. The Defendant Nos. 1 to 4 resisted the suit and issued have been framed by trial Court at Ex.57. The trial Court passed judgment and order and decreed suit in favour of present Appellant. Being aggrieved by said judgment and decree, Defendant Nos. 1 to 4 and other Defendants filed an appeal being Regular Civil Appeal No. 309 of 1982. This appeal was heard and decided vide judgment andorder dated 20th January 1986 which was allowed in favour of Defendants.

[4] Learned advocate Mr. R.A. Mishra relied upon decisions of Apex Court in case of Kalyani (dead) by L.Rs. v. Narayanand and Ors., 1980 AIR(SC) 1173 and in case of Dal Chand v. Babu Ram and Ors., 1981 AIR(All) 335. He submitted that wife-wise partition is not permissible under Hindu Law, even though, these judgments were referred and relied upon by Appellant before below Courts, but, same has not been properly appreciated by lower appellate Court. Therefore, relevant paragraphs of aforesaid two decisions are quoted as under:

In case of Kalyani (dead) by L. Rs. v. Narayanand and Ors., 1980 AIR(SC) 1173, - Para 27 to 31:

27. In Boddu Venkatakrishna Rao and Ors. v. Boddu Satyavathi and Ors., the following passage in Mulla's Transfer of Property Act (Fifth Edn.), was approved:

The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family.

28. Once disruption of joint family status takes place as Lord Westbury puts it in Appovier's case, (supra) it covers both a division of right and division of property. If a document clearly shows the division of rights and status its legal construction and effect cannot be altered by evidence of subsequent conduct of parties.

29. Now, in this case Ext. P-1 itself specifies the share of each member separately. There is no concept known to Hindu law that there could be a branch of a family wife-wise. To illustrate, if a Hindu father has two wives and he has three male children by the first wife and two by the second, each wife constituting a branch with her children of the family is a concept foreign to Hindu law. Therefore, tavazhi wife-wise stated in Ext. P-1 has to be ignored and the contention that there was a partition amongst wife-wise branches as represented by each wife is equally untenable. Ext. P-1 did bring about a specification of shares and once such shares were defined by the father who had the power to define and vesting the same there was a disruption of joint family. There was thus a division of rights and division of property by allotment of shares. The mode of enjoyment immediately changed and members of such family ceased to be coparceners holding as joint tenants but they held as tenants-in-common. Subsequent conduct of some of them to stay together in the absence of any evidence of re-union as understood in law is of no consequence. In any event when Kesavan, the son of the second wife, sought and obtained physical partition of the properties allotted to him and left the family there being no evidence whether others agreed to remain united except the so called evidence of subsequent conduct, which is irrelevant or of no consequence,

disruption of status was complete. Therefore, the four sons of the first wife held the property as tenants-in-common.

30. There is evidence in the form of some documents showing that Defendant was described as Karnavaran of a coparcenary of the four sons of the first wife of Karappan and that the property was enjoyed as a joint family property. In view of our conclusion that such subsequent conduct is not conclusive of any agreement to reunite, it is not necessary to examine the evidence.

31. In view of our conclusion that since the execution of Ext. P-1 on January 25, 1910, or after the death of Karappan in February 1910, when Kesavan, the son of the second wife took his share of the property left the family there was a disruption of the joint family and the sons of Karappan by his first wife held the property, which remained for them after Kesavan obtained his share, not as joint tenants but as tenants-in-common, the Plaintiff would be entitled to the share to which her deceased husband Raman was entitled. Raman had 1/4 share in A schedule properties which the Plaintiff would be entitled and therefore, there would be a preliminary decree in her favour to that effect. Plaintiff's claim to a share in properties set out in schedules B and C annexed to the plaint has been concurrently negatived by both the courts on the finding that they are the properties of Defendant and his wife and are not accretions to the property which devolved from Karappan. This concurrent finding of fact arrived at on appreciation of evidence appears to be correct and need not be disturbed. Therefore, Plaintiff's suit with regard to a share in B and C schedule properties has been rightly dismissed."

In case of Dal Chand v. Babu Ram and Ors., 1981 AIR(All) 335, - Head Note - 'A':

Head Note - 'A': Hindu Law - Mitakshara school - Joint Family - Property acquired in name of member - presumption.

In the case of joint family where there was a nucleus of joint property, the initial presumption is that the property acquired in the name of any member belongs to the joint family. The presumption is, however, rebuttable. The presumption can be displaced only by evidence to the effect that the individual had enough funds of his own source on income which he utilised for purchasing the property. In the case of a joint Hindu family, the analogy of benami transaction standing in the name of stranger does not apply at all because the joint family itself includes the alleged benamidar which is entirely different from a case where a stranger benamidar is involved in the transaction.

[5] Learned advocate Mr. R.C. Jani submitted that partition has been made by Dungarji in favour of his sons of two wives and accordingly, share has been decided

and delivered between four sons I.e. Malaji, Kalanji, Baldevji and Shivaji. Learned advocate Mr. Jani also submitted that this aspect has been properly appreciated by lower appellate Court and rightly come to conclusion that before filing civil suit by Plaintiff, partition of ancestral properties was made and came into effect in the year 1967. He submitted that partition between Plaintiff's father and father of Defendant Nos. 1 to 4 and father of Defendant Nos. 5 and 6 had already taken place in S.Y. 1967 and all parties of partition has given effect to such partition without any objection and since then, each of them are in possession and enjoying their respective shares and they are separate in business, food and residence, etc. He relied upon Ex.228 and Ex.230 which are main evidence for proving partition of S.Y. 1967 which is 70 years old document and are held to be proved and submitted that these deeds have taken place and had duly executed on the dates shown in those documents. The other documents of sale, mortgages, release, etc., also have been held to be proved. He also submitted that at the time when arguments were made before lower appellate Court by advocates of both parties, they have no serious objection against aforesaid factual position, therefore, appeal was decided on the basis of document having been legally admitted in evidence and proved between parties. He further submitted that according to Plaintiff, there was never a partition of suit properties and all the properties are joint Hindu family properties. It was not the case of Plaintiff that partition as alleged by Defendant is unfair or unequal or fraudulent or under undue influence and on that ground, Plaintiff wants to set aside the same on those grounds.

[6] In this second appeal, facts are complicated / confusive which are required to understand first, hence, narration of facts given and discussed by lower appellate Court in its judgment are relevant, therefore, Para 7 to 12 and 18 to 23 are quoted as under:

[7] I have heard learned advocate shri A.P patel for the appelants and learned advocate shri raol for Respondent No. 1 mand learned advocate shri P.B patel for the Respondents Nos. 2 to 5 . now considering the documents on record it appears that the lower court has specifically held in its judgment para 45 last lines that there is no dispute between the execution and the dates of the documents put on record in the case. So according to the lower court exh.228 and exh.230 which are the main deeds for proving the alleged partition of S.Y. 1967 are 70 years old documents and are held to be proved and that these deeds have taken place. Sand are duly executed on the dates shown in those documents. The other documents of sale, mortgage, release etc. also have been held to be proved. At the time of arguments fo the learned advocates of the partition this appeal also no serious objection is raised against this position. So this is to be decided only on the basis of documents having been legally admitted in the evidence and proved. Now, we looked into the case of the Plaintiff which is of partition as such alleging that there was never a partition of the suit properties and

that they all are joint family properties. It is not the case of the Plaintiff that the partition as alleged by the Defendants is unfair, unequivocal or fraudulent or under undue influence and that the Plaintiff wants to set aside the same on those grounds. The case of the Plaintiff is that there is no division at all of the joint family properties. The lower court has relied on the presumption that every hindu family is presumed to be joint in the absence of the division. The lower court has simply relied on this broad presumption without considering what is meant by division. Before relying on the presumption it is to be borne in mind that these presumption are rebuttable presumption. And if contrary is proved that such presumption can be rebutted. Now there are two documents exh228 and exh.230 which are abundant proof of division. Division is severance of status or disruption of joint status. It is now well settled position that severance of joint status takes place by mere indications of intention. Mere indication to separate and enjoy his share in severalty may amount to partition. The partition is question of individual volition. It is not necessary to divide by meters and bounds. It is not even necessary to say orally if it is acted upon. The learned advocate shri A.P. Patel has invited my attention to the case law , in the case of Ratneshwari nandansingh and Ors. v. bhagwati saran singh and others,1950 AIR(FC) 142 wherein it has been observed by his lordship as under:

> While a coparcener after his supervening insanity may not have the volition to declare a separation. His insanity does not take away the right of another sane member of the coparcenery to declare an intention to disrupt the family status. There is no reason why such a right can not exist when the coparcenery consist of only a sane and an insane person.
>
> The declaration of his intention to sever need not necessarily be by word of mouth. It can equally be inferred from his conduct. A clear declaration of the share of both members, followed by a division of all the properties, is, sufficient to establish the test of the disruption of the family completely.

[8] This authority supported the above contentions raised by the learned advocate Shri A.P. Patel.

[9] Now in this case there is a direct proof of division by Exh.228 and 230 and other documents which support division and partition. It is already proved that after the execution of document Exh.228 there is severance of joint status of the parties hold the property as tenant-in-common and not as joint tenants. The position of law is that a Hindu partition is not required to be in writing. It can be oral but here in the present case the partition is in writing also which could be seen by referring the documents Exh.228 and Exh.230. Even where partition is not in writing or if in writing but does not declare on the face of it, subsequent conduct is to be seen, now we have ample

evidence on record in the form of several documents between the parties and strangers which clearly and cogently support the partition of S.Y 1967 and prove that the partition is acted upon since that year and has become settled fact of the past. It is a well settled dictum that "once is the partition of the inheritance made, once is a damsul given in a marriage andonce does a man say 'I give' these three are by good men done once for all and irrevocably". So in this case, it is conclusively proved by oral and documentary evidence on record that there is a partition, it is final and can only be challenged or reopened only on the ground of unfairness or inequality or fraud etc. Here the case of the Plaintiff is not for setting aside the partition on any such ground but the suit is only for partition as such treating that there was never a partition of joint Hindu ancestral family property. If it is held that partition or severance of joint status has already taken place then no such suit for partition lies.

[10] the lower Court has not believed partition mainly on the ground that the Defendants have not proved the custom alleged by them in the written statement as to the partition having taken place mother-wise. Lower Court has disbelieved this plea of mother-wise partition and still has a relied upon this plea and has decided this point of partition as if the Defendants are bound by that plea. Now it is well settled legal position that the Plaintiff is bound to prove his own case and he cannot get the benefit from the loop-holes in the case of the Defendants. Thus, once a particular plea is not believed by the Court, it cannot be said that the parties alleging such plea is bound by it and that it can be used to non-suit him. To support this contention, the learned advocate Shri A.P. Patel for the Appellant has cited the ruling , in the case of Santram v. Ram Manorath,1929 AIR(Oudh) 41 wherein, it has been observed as under:

> If a particular fact is alleged in his pleadings by a party and an inquiry is made regarding its truth or otherwise and as a result of that inquiry, it is found to be untrue and decision is given on the basis of such finding in favour of the opposite party, such opposite party is no more in a position to ignore that finding and to asked the Court to hold the party originally taking such a plea to be bound by it.

> Thus, the lower Court has committed an error discussed above. Simply because partition is pleaded in a particular way or on particular shares or on particular basis and not proving that method does not mean that no partition has taken place at all. If custom pleaded is not proved, it may be held that the partition was not as per that custom but the factum of partition does not go away and shares obtained do not become non-existence. Thus, the lower Court has misdirected itself on this question and has often stressed that the Defendants have not proved mother-wise partition and hence, there is no partition at all. Now we have to see whether partition has taken place or not and for this, there is abundant proof and there being partition as alleged by the Defendants and this fact is supported by number

of circumstances which show that there was partition and that the partition was acted upon since long.

[11] The lower Court has given undue importance to the fact that at the time of the alleged partition in S.Y. 1967, Kanaji Dungaraji one of the party to the partition was minor and he being not competent to make a contract, the alleged partition cannot be said to be valid one. In taking this view, the lower Court has not properly followed the law on the point. Firstly a partition is not a contract and no consent is required of other coparceners for partition to take place. Even if a co-parcener is a minor or insane still the adult co-parcener can put an end to the joint status by his conduct and declaration. Minority is no bar for partition between coparceners. Thus, the lower Court has error in not believing partition on the ground of Kanaji Dungaraji being minor at the time of partition. In this respect, the learned advocate Shri A.P. Patel has relied upon the ruling, in the case of Jakka Deveyya and Sons v. Commissioner of Income Tax, Madras, 1953 AIR(Mad) 315wherein, it has been observed as under:

> A partition of joint family property cannot be impuned as invalid by the minor coparcener merely because he was not represented by a lawful guarding. So long as the interest of the minor has not suffered, it is open even to a person other than the natural guardian to represent the minor in the partition, and it would be binding on him. If a minor after attaining majority thinks that it was unfair or prejudicial, it would be open to him to attack the partition by appropriate proceedings.

[12] Shri A.P. Patel, learned advocate for the Appellants has also relied upon the ruling reported in, in the case of Mogalappa v. Vithoba and Ors.,1955 AIR(Hyd) 21wherein, it has been observed by their Lordships as under:

> A valid partition can be made during the minority of one or more coparceners, provided they are properly represented and it is not shown to have been prejudicial to their interest.

These authorities substantiated the above stated contention. Thus, if a coparcener is a minor and partition takes place, he can challenge the partition on attaining majority. If he does not challenge, no grievance can be made by his heirs or legal representatives after 60 years or more. As in this case, neither Kanaji nor Baldevji nor Shivaji has challenged the partition of S.Y. 1967 after they all attained majority. The Plaintiff who was not borne at the time of partition cannot challenge the fact of partition. The partition of 1911 A.D. stands good and same has been acted upon till the date of the suit. The suit itself is not for challenging the partition on any ground of unfairness or inequality or fraud, but, the case of the Plaintiff is that there is no partition at all and so the suit in this form is not maintainable.

[13] The above narrated circumstances go to conclusively prove the factum of partition. Thus, there are ample evidence on record of several documents of separate transaction subsequent to the date of partition which are relevant for proving the partition. In this respect, learned advocate Mr. A.P. Patel has relied upon the ruling, , in the case of Murarka Properties Ltd., and Anr. v. Biharilal Morarka and Ors., 1978 AIR(SC) 300 wherein, it has been observed as under:

> Held on consideration of the entire evidence that the joint family became divided in status prior to the execution of the document and that in any event, a division in status was effected from the date of execution of the document forming the company. The transaction was only for the purpose of preserving the properties for all the members after due deliberations by all the adult members and there was no dissipation of the property. The transaction was for the benefit of family and as such if it was found that there was a joint family, the transaction would bebinding on all of the coparceners.

[14] On the point of partition, it is to be presumed if acted upon for long time, Mr. A.P. Patel has relied upon the ruling, in case of Gangabai and Ors. v. Fakir Govada Somaiya Govada Desai and Ors., 1930 AIR(PC) 93 wherein, it has been observed as follows:

> Separation in food and residence for a long time between two brothers of a Hindu family, independent transaction of a family such as mortgages and leases and appropriation of the proceeds thereof to personal use description of one of the other as being separated in the record of rights prepared under the Bombay Land Record of Rights (1903), enjoying of the properties by the widow of one of the brothers after his death and the entry in the mutation register prepared under Bombay Land Revenue Amendment Act, 1913 of the name of the widow as the owner of the properties, all these facts clearly show that there had been a participation between two brothers during their life time.

> Shri A.P. Patel has also relied upon the ruling , in the case of Linga Govde Ghuran Govada v. Sangan Govada Bapu Govada,1933 AIR(Bom) 386 wherein, it has been observed as under:

> The severance of joint status is a matter of individual volition. It may be effected by agreement. Where possession of different portion of joint family property by different coparceners has been either a formal partition by metes and bounds or tactic agreement to separate, the Court is justified in assuming that partition has been effected in one way or the other, all though, owing to lapse of time, it is impossible to prove by definite evidence how and when it happened. And the onus of proving that the properties joint lies on the coparcenrs who alleges it.

Thus, the alleged partition of 1911 A.D. is acted upon throughout from 1911 A.D. To 1978 A.D. i.e. for more than 67 years and when Kanaji was alive upto 1969 and Baldevji who was alive upto 1972 and Shivaji who is still alive have never challenged the partition of 1911 A.D. After the alleged partition, many alienations and other deeds of transfer of the partitioned property have taken place, but, non of those alienation or other transaction is challenged by the parties or their heirs till the date of the suit. The suit is filed by the Plaintiff after the death of the father and uncle and when the Plaintiff's father and uncle have not challenged the partition when they have taken it as settled fact, now the Plaintiff was not even borne at the time of partition and at the time of subsequent alienation and transactions, has now no right to file such a suit. To substantiate this view, the learned advocate Shri A.P. Patel has cited, in case of A. Raghavamma and Anr. v. A. Chenchamma and Anr., 1964 AIR(SC) 136 wherein, it has been observed as under:

It is settled law that a member of a joint Hindu family can bring about its separation in status by a definite and unequivocal declaration of his intention to separate himself from the family and enjoy his share in severalty. The Hindu law text support the proportion the severance in status is brought about by unilateral exercise of discretion.

[15] Shiavji Dungraji who is alive has not been examined to negative the partition. He being Defendant No. 6 in the suit does not step in the witness box to corroborate the Plaintiff. The best evidence to prove the case of the Plaintiff is Shivaji who has taken part in several transactions and has full knowledge of the state of affairs of four brothers. The non-examination of Shivaji goes against the Plaintiff and an adverse inference can be drawn and hence, it can safely be said that partition had taken place as alleged by Defendant Nos. 1 to 4. To substantiate the above view, ld. Advocate Shri A.P. Patel has cited, in the case of Prakash Chand Sharma and Ors. v. Narendranath Sharma, 1976 AIR(SC) 2456 wherein, it has been observed on Page 2458 as under:

A very important document on record in exhibit A-26, copy of the statement of Ram Saran made on 11.5.51 only 20 days after the Court of Tehsildar of Anup Sahar. Ram Saran said in his deposition "my family and that of Narendra has not been joint since 1921." This was a very damaging admission on behalf of the Plaintiffs. Ram Saran did not examine himself in the suit to explain his admission. The reason for his non-examination was not accepted by the High Court. The said admission clearly showed that at lease since 1921 the partition of the parties were separate, yet the suit for partition of the properties by metes and bounds was not instituted for about three decades. No such case was made out in the plaint that the parties were separated from 1921. The plaint was drafted in a suppressive manner to claim partition as if the parties were joint till the institution of the suit.

Nor was it disclosed in the plaint as to who became the Karta of the allegedly joint family after the death of Bhagwati Prasad.

Said Shivaji Dungraji has signed the deeds exhibit 141, 154, 155, 177 and has attested deeds Ex.160 and 161. Still for the reasons best known to the Plaintiff, he is not put in the box. The lower Court has taken pain to compare the thumb mark of Kanaji at Exh.141 with the thumb mark in Exh.155 without any aid of expert and has held that by seeing with nacked eye that the two thumb marks are not similar but the important circumstances that both the deeds Ex.141 and 155 are signed by Shivaji who is none else but the brother of Kanaji who has put his signature along with the thumb mark of Kanaji. This cannot lead us to believe that the presence of his brother a false thumb mark can be affixed in such important document. Shivaji the best witness though available is not being examined to disprove the thumb mark and still the lower Court has doubted the thumb mark of Kanaji. Thus the lower Court has committed an error. The lower Court has also erred in observing that Kanaji was not put his thumb mark in Ex.228 while there is thumb mark of Kanaji in Ex.155 but in the Baroda State, it was the oustom that anybody can sign on behalf of illiterate person till 17.10.1946. After that date, the thumb mark was made compulsory and hence, an Ex.155 which is after 17.10.1946 a thumb mark is put and therefore, the thumb mark of Kanaji is not appearing in document Ex.228. The lower Court has also erred in holding that at the time of execution of Ex.228, Kanaji was minor and hence, the partition deed Ex.228 is ab initio void. This is not the correct view. The partition is not a contract and it can take place even if one is minor. Kanaji was accompanied or say represented by his mother's brother Motiji who has signed Ex.228. The lower Court has doubted as to whether Motiji who has signed Ex.228 was a brother of Bai Alba the mother of Kanaji. But looking to the deposition Ex.147, it specifically refers to this fact that Motiji was the brother of Bai Alba.

[16] The lower Court has also erred in holding that the deed Ex.228 is only between Kanaji and Malaji even though Kanaji had two other brothers viz., Baldevji and Shivaji. In this respect, it appears that the lower Court has guessed the ages of three sons of Bai Alba by referring to certain deeds which show the ages of the parties approximately. But looking to the deposition of the Plaintiff, he had categorically admitted that at the time of alleged partition in S.Y. 1967, his father Baldevji and uncle Shivaji was not borne. This fact is also supported by the deposition of witness Dajiji at Ex.75. Thus the deed Ex.228 has taken place beteen Kanaji and Malaji only as at that time Dungraji has only two sons borne. The very reading of Ex.228 speaks very clearly that partition between Kanaji the son of Bai Alba and Malaji the son of Bai Ujamba had taken place equally. Even if it is believed that at the time of partition in S.Y. 1967,

three sons of Bai Alba were borne and were minor. The partition which had taken place between four sons of Dungraji is not challenged by their father Dungraji nor by their mother Bai Alba or the three brothers Kanaji, Baldevji or Shivaji till the date of the institution of the suit. On the contrary, it is amply borne out that the partition of S.Y. 1967 had become a second fact or the past and Bai Alba had accepted the said and had mortgaged the property fallen to the share of her three sons treating them to be owners by partition. Thus, it is conclusively proved that partition has taken place in S.Y. 1967 and therefore, the lower Court has erred in holding that partition of S.Y. 1967 had not taken place and so this finding requires to be set aside and it should be held that partition as alleged by the Defendant Nos. 1 to 4 is proved.

[17] It was also held by the lower Court in deciding issue No. 1 that the properties which are purchased by Malaji are also joint family properties liable to be partitioned as the same has been purchased by Malaji as Vahivatkarta and this was nucleus of joint property from the income of which the purchase is made. The lower Court has erred in not taking into consideration proved facts that 1911 A.D. it was the mother Bai Alba was managing the affairs and properties of her three minor sons which had fallen into their share in partition of S.Y. 1967. This fact was supported by Ex.177 and has also specifically admitted by the Plaintiff himself in his deposition Ex.175 that it was his mother who did vahivat of her three sons when them were minors and after they became major, vahivat was not entrusted to anybody else. It was brought out in his examination in chief that Bai Alba has not given Vahivat to Malaji even after three sons got major. Thus, it is clear that Malaji had not done any management of the properties of three sons by Bai Alba and therefore, the lower Court has erred in relying upon the deed Ex.229 which is for redemption of one field bearing Survey No. 756 which was not a property put in partition as the same was a property of a third party and one Shivaji Kashiyaji who mortgaged the same who were strangers. Shivaji Kashiyaji's heirs were the sons of Dungraji who can claim redemption as that property was claimed as the heirs of the third party. The deed Ex.229 mentioned Malaji as the Vahivatkarta of the joint property of the heirs of Dungraji. This circumstance cannot prove that till 31.07.1945, there was no partition of properties and thus the lower Court was erred in holding that Malaji was managing all the properties of Dungraji till 1945 A.D. There is a good deal of distinction between Vahivatkarta of joint Hindu family and Vahivatkarta of property of the joint property that can be seen by reading Ex.139, Ex.154 and Ex.161 as Survey No. 756 was not ancestral no question of its partition in S.Y. 1967 arose. So, when no joint family property was managed by Malaji after S.Y. 1967, there is no question of getting income from such property which can be nucleus for the purpose of properties purchased by Malaji. It is also settled law that not only nucleus of joint property is required but the nucleus must be such as can raise sufficient funds or income for the purchase. There is absolutely no proof or iota of

evidence to show that property formed nucleus and that it was capable of giving sufficient income for the purchase. Shivaji Dungraji who is alive and party to the suit could have thrown light on this aspect but he is not examined and the best evidence is kept back and hence the adverse inference can be drawn that if he was examined it could have been proved that there was no sufficient nucleus. So the ruling relied upon by the lower Court is of no avail to the Plaintiff. Merely because a joint family is joint there is no presumption that it possesses joint property. The property stands in the name of a member of a joint family. It is for those who say that it is joint family property to prove it. To substantiate the above view, Shri A.P. Patel, ld. Advocate has cited, wherein, it has been observed in case of Modi Govada Gowdappa Sankh and Ors. v. Ramchandra Revgowds Sankh, 1969 AIR(SC) 1076 (dead by his legal representatives) and another, as under:

> There is no presumption that Hindu family merely because it is joint, possesses any joint properties. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it is coparcenery property. But if the possession of a nucleus of the joint family property is either admitted or prove, any acquisition made by a member of the joint family is presumed to be a joint family property. This is however subject to the limitation that the joint family property must be such as with its and the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifted on the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

[18] Shri A.P. Patel, ld. Advocate for the Appellant has also relied upon the case law,in the case of Achutan Nair v. Chinnammu Amma and others, 1966 AIR(SC) 411 wherein, it has been observed as under:

> Under Hind law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint family property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is well settled proposition of law. But the principle is not applied to acquisition of properties in the name of a junior member of a tarwad (anandravan) under the Marumakkathayam Law. There is no presumption either way and the question has to be decided on the facts of each case. The case of a property acquired in the name of the Karnavan, however, there is strong

presumption that it is tarwad property and the presumption holds good unless and until it is rebutted by accepatable evidence.

[19] I have considered submissions made by both learned advocates appearing on behalf of respective parties and I have also perused judgment and decree passed by trial Court as well as by lower appellate Court. In fact, there are two documents i.e. Ex.228 and Ex.230 which are abundant proof of division. Division is severance of status or disruption of joint status. It is well settled position that severance of joint status takes place by mere indication of intention. Mere indication to separate and enjoy his share in severalty may amount to partition. The partition is a question of individual volition. It is not necessary to say orally if it is acted upon. This aspect has been considered by lower appellate Court while relied upon decision of Federal Court, in the case of Ratneshwari Nandan Singh and Ors. v. Bhagwati Saran Singh and Ors,1950 AIR(FC) 142

[20] Now, in this case, there is a direct proof of division by Ex.228 and Ex.230 and other documents which support division and partition. It is already proved that after the execution of document Ex.228, there is a severance of joint status of the parties hold the property as tenant-in-common and not as joint tenants. The position of law is that Hindu partition is not required to be in writing, even, it can be oral, but, in this case, partition was in writing also which could be seen by referring document Ex.228 and Ex.230. In this case, subsequent conduct of respective parties is also necessary to be considered. This partition Ex.228 and Ex.230 suggest that same has been acted upon of S.Y. 1967 between parties and since that year has become a settled fact of the past. If the partition came into existence as per admitted document Ex.228 and Ex.230, then, it can only be challenge or re-open on the ground of unfairness or inequality or fraud, etc. There is no such contention raised by Plaintiff before trial Court. The suit has been filed by Plaintiff after aforesaid partition came into effect and acted upon between parties. The relevant discussion in respect to pedigree has shown in the plaint which is not in dispute between parties as discussed in Para 12 by lower appellate Court in its judgment. All the properties which are relating to claim made by Plaintiff, are not ancestral properties belonging to Dungarji and inherited by his four sons. Considering evidence on record, it comes out that some of the properties are not proved to be an ancestral as same are not belonging to Dungarji or his sons as discussed by lower appellate Court in Para 13 of judgment. The lower appellate Court has discussed that there are ample evidence on record by various documents of separate transactions subsequent to date of partition which are relevant for proving partition.

[21] The Apex Court's decision in case of Kalyani (dead) by L.Rs. v. Narayanand and Ors., 1980 AIR(SC) 1173 and in case of Dal Chand v. Babu Ram and Ors., 1981

AIR(All) 335 have been relied upon by learned advocate Mr. R.A. Mishra appearing on behalf of Appellant. Thereafter, observation has been made by lower appellate Court that considering factual aspect of present case and legal position as discussed in aforesaid paragraphs of judgment delivered by lower appellate Court, these decisions are not helpful to present Appellant, because, partition has been effected in S.Y. 1967 and implemented between the parties and that partition is not in respect to all ancestral properties. The decision of Apex Court reported in , AIR 1980 SC 1173 (supra) is not applicable to the facts of present case considering Ex.228 and Ex.230 which documents have been proved before trial Court being an undisputed documents.

[22] The lower appellate Court has come to conclusion that there is a clear and unequivocal evidence that possession of Defendant Nos. 1 to 4 is hostile and amounted to denial of title of Plaintiff and Defendant Nos. 5 to 11. As Malaji and after his death Defendant Nos. 1 to 4 are in exclusive possession and enjoyment of property alloted by partition for more than 12 years they acquire a good title by adverse possession even if they did not acquire exclusive title in law. The lower appellate Court has relied upon decision of Calcutta High Court, in case of Debabrata Ghose v. Janendra Ghose and Ors, 1960 AIR(Cal) 381 This aspect has been discussed by lower appellate Court in detail while deciding Point Nos. 3 and 4 in Para 34 and 35 which are quoted as under:

> 34. The Lower Court has decided that there is no partition at all but now I have already discussed above that there was a partition in 1911 A.D. the Defendants No. 1 to 4 acquired exclusive title in law so there is clear cut custer of the Plaintiff and his uncle and Defendant Nos. 5 to 11 from the suit property according to the ruling, in the case of Vishwanath Gupta v. Smt. Parbati Devi and others, 1982 AIR(All) 106wherein, it has been observed as under:
>
> Defendant claiming adverse possession. Ouster should be pleaded and proved as a positive matter. It could not be inferred from the negative animus.
>
> Thus, there is clear and unequivocal evidence that the possession of the Defendants No. 1 to 4 is hostile and amounted to denial of title of Plaintiff and Defendants No. 5 to 11. As Malaji and after his death, Defendants No. 1 to 4 are in exclusive possession and enjoyment of the property alloted by partition for more than 12 years. They acquired a good title by adverse possession even if they did not acquire exclusive title in law. Shir A.P. Patel is cited, between Debabrat Ghose v. Janendra N. Ghose and Ors., 1960 AIR(Cal) 381 wherein, it has been observed as under:
>
> Where a co-sharer after partition is in exclusive possession and enjoyment of the property alloted by the partition for more than 12 years and there is clear and

unchallenged evidence of open assertion of hostile title against other co-sharers, he acquires a good title by adverse possession even where he did not acquire exclusive title in law in the properties alloted to him.

35. Shri A.P. Patel, learned Advocate for the Appellant has also cited the ruling, in the case of Govindrao and Anr. v. Raibibi and another, 1931 AIR(PC) 48 wherein, it has been observed as under:

The Plaintiffs claimed in 1917 possession of four villages from the Defendants who, they alleged, were in possession but held as tenants in common. The Defendant's predecessor has not only been in sole possession and perception of the profits of these villages for more than the statutory period, but as regards three of them, there were revenue proceedings between the parties in which the Defendants claimed mutation in their sole name and denied that Plaintiff had an interest in them. As regards the fourth village, there was no express evidence on the Plaintiff's title having been denied before the settlement proceedings in 1912, but, having regard to the separation of the two branches of the family to which the parties belong and to the fact that Plaintiff never had possession or participation of profit in all these four villages over since his father death in 1880, and that they were not included in the property handed over to him by the predecessor of Defendants on his attaining majority, he must have know that his interest in them was not admitted.

Held that the possession of the Defendant was adverse for more than the statutory period.

Thus here in the present case, there are sales to third parties and hence there is adverse possession of the properties sold to strangers. Shri A.P. Patel has also cited ruling, between Khato Lal Das and Anr. v. Md. Jahiruddin Babar and others, 1984 AIR(Pat) 239 wherein, it has been observed as under:

The general rule that possession by one tenant-in-common cannot, in absence of special circumstances be treated as adverse to another tenant in common should not be applied to a case where the circumstances are such as to indicate that the possession of each must have been adverse to the other. Where a stranger purchases entire property of the two co-owners from one of the co-owners and enters possession over the disputed land on basis of sale deed, his entry is adverse to the other co-sharers from the very moment of his entry and the question of adverse possession is essential to be dealt with by the Court.

[23] Thereafter, one important question has been also examined in Para 38 that in partition suit of joint Hindu family property all the properties must be put in as subject

matter but here in this case, admittedly, certain properties are not put forth for partition. The same has been discussed in Para 38 which is quoted as under:

38. One important question crops up for decision is that in partition suit of Hindu Joint Family property all the properties must be put in as subject matter but here in this case admittedly certain properties are not put forth for partition. These properties are not shown as suit properties. That also goes against the Plaintiff that he has suppressed the material fact from the Court. Thus the Lower Court has erred in decreeing the suit of the Plaintiff for partition of his 1/28th share and has also erred in setting aside the sale deeds shown in para 5(a.a) of the plaint and also for mesne profits. A case of Brijraj Singh, (1913) 40 Ind. APP 161 (PC) has been referred in para 16 of the ruling, in the case ofKalyani (dead) by L. Rs. v. Narayanand and others, 1980 AIR(SC) 1173 In the case of Brijraj Singh, it has been clearly laid down if unequal shares have been alloted in partition if the same is acted upon the partition is not invalid but the same is a valid one. This Prevy Council's case applied squarely applied to the present case and though the share alloted to the parties are held to be unequal there is a valid partition as the same is acted upon. Thus the decree of the Lower Court deserves to be set aside. The Lower Court's order as to the mesne profit is also not tenable as laid down in, in the case of Gulabrao Fakirrao v. Baburao Fakirrao and Ors, 1960 AIR(Bom) 159 erein it has been observed as under:

Where the ancestral and joint family properties are partitioned between the Defendant and the Plaintiffs who formed the joint family, by the severance of the status the Plaintiffs and the Defendants become tenants in common of the property held by them. Where even after the partition the Defendant continues to remain in possession of the entire properties of the family, these is no presumption that the property which is acquired by the Defendant after severance of the joint family status must, even if be no agreement in that behalf, be regraded as acquired for the family.

The same principle is enunciated in, the case of M.N. Aryamurthi and Anr. v. M.I. Subataraya Setty (dead) by his legal representatives and others, 1972 AIR(SC) 1279 wherein, it has been observed as follows:

If one of the members remain in possession of the entire properties of the family even after severance in status, there is no presumption that the property, which is acquired by him after severance of the status, must be regarded as acquired for the family. Where rents and profits are received by the member in possession, he would be liable to account for the same. But the fund in the hands of that member do not become impressed with any trust in favour of the other members.

Therefore, if such a member acquired some property with the funds in his possession, the other members could claim no share in that property.

[24] The lower appellate Court has rightly examined the issue that suit filed by Appellant was time barred in limitation. The said discussion is made by lower appellate Court in Para 36 of its judgment which is quoted as under:

36. The lower Court has decided that the suit is not barred by limitation. This issue has not rightly decided. when question of limitation for suit arises it is always for the Plaintiff to prove his suit to be within the limitation even if no dispute is raised by the Defendant. The lower court has held that the suit is within limitation without considering the fact of partition and sales to strangers. The settled position of law is that the suit for partition must be within 12 years from the date of exclusion from the property. The present suit is brought after 60 years of the partition and thus it is prima facie timebarred. Once the court comes to the conclusion that, the partition has taken place in 1911 A.D. Even otherwise for the properties which were re-deemed the suit should be within 30 years from the date of mortgage as malaji had been subrogated as mortgagee and suit for those properties must be for redemption. The suit for redemption fo those four fields should have been filed within 30 years. In that way also the suit is time barred. As per Section 28, if the limitation is over then the title vests in the person in possession. To substantiate the above view learned advocate shri A.P.patel has cited, in the case of Sumra Abu Haji v. Himatsinhji Juvansinhji Jadeja, 1985 2 GLR 741 wherein it has been observed as under:

on completion of the period of limitation not only the title of the original owner is extinguished but at the same time the person who is in adverse possession acquires title in the immovable property and such person can maintain a suit for declaration and injuction even against the true owner who has lost title on account of his ouster for a period exceeding 12 years.

[25] In view of above observations made by lower appellate court and considering detailed discussion made by lower appellate Court after examining documents which are exhibited before trial Court and remained undisputed between parties, the fact of partition has been established and acted upon between parties and thereafter, suit has been filed by Plaintiff after death of his father which has been rightly dismissed by lower appellate Court while allowing appeal preferred by original Defendant. The decisions relied upon by learned advocate Mr. R.A. Mishra as referred above are not applicable to the peculiar facts and circumstances of present case. Therefore, contentions raised by learned advocate Mr. R.A. Mishra cannot be accepted, hence, same are rejected.

[26] There is no substance in present second appeal and substantial question of law which has been framed and raised before this Court as referred above is answered by this Court that partition was made effective between parties in respect to properties of joint Hindu family and accordingly, share has been divided between parties and thereafter, civil suit was preferred by Plaintiff on 29th October 1979 after 67 years, therefore, judgment and order passed by lower appellate Court wherein issue has rightly examined and for that, lower appellate Court has not committed any error which requires interference by this Court.

[27] Accordingly, present second appeal is dismissed. No order as to costs. Interim relief, if any, shall stand vacated.

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