2024 INSC 222

**[NON-REPORTABLE]**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO(S). 773-775 OF 2023**

**MOHAN HIRACHAND SHAH** **…APPELLANT(S)**

**VERSUS**

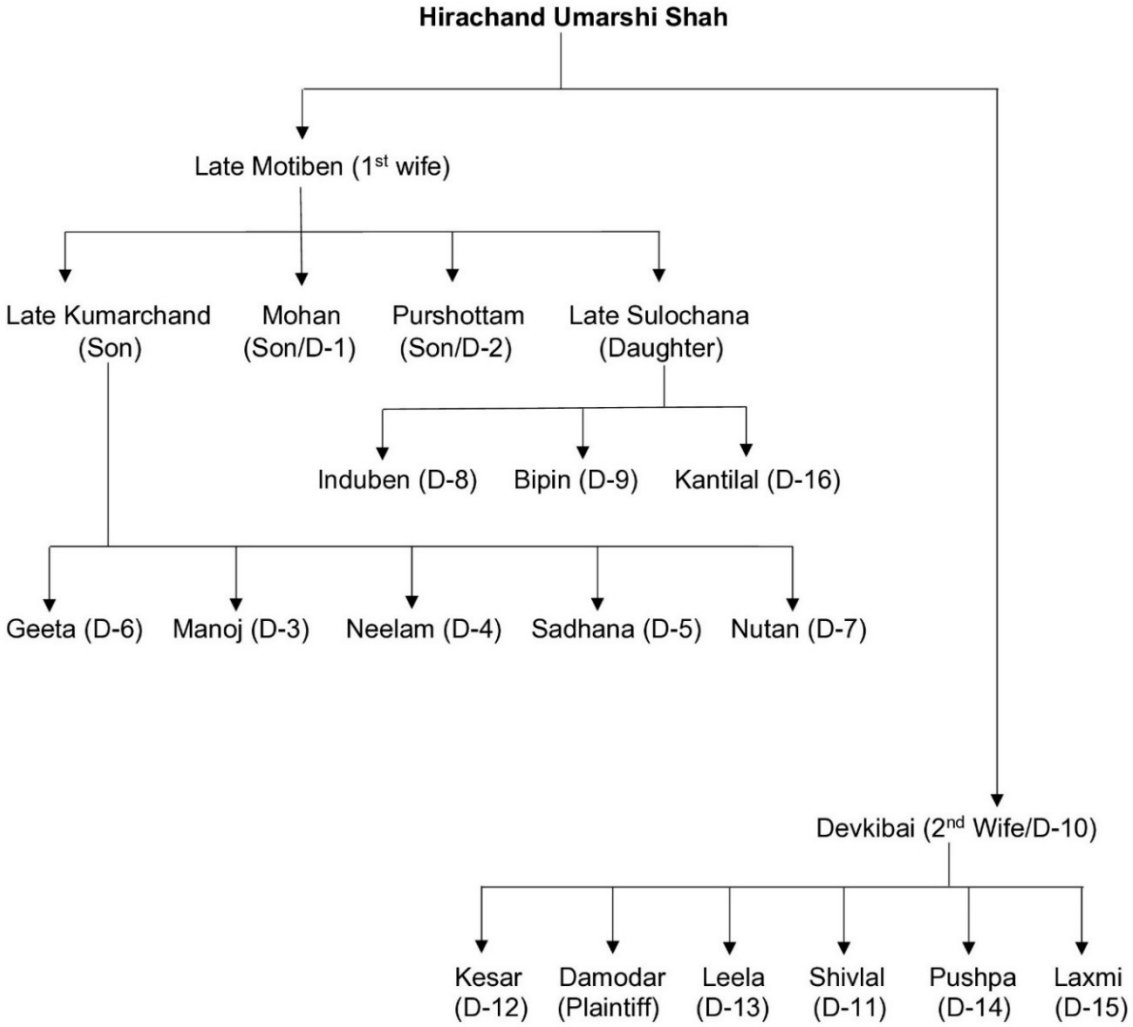
**GEETA KUMARCHAND SHAH & ORS.** **...RESPONDENT(S)**

**J U D G M E N T**

**S.V.N. BHATTI, J.**

**1.** Late Hirachand Umarshi Shah is the propositus. The legal representatives (LRs) and/or their successors in interest are in *lis* for partition and separate possession of the plaint schedule properties. At the outset, reference to the genealogy and the array of the parties in the present litigation would make the narrative of the respective pleadings precise and brief.

## I. GENEALOGY




**I**

## I. FACTUAL MATRIX

**2.** The Civil Appeals are at the instance of Mohan Hirachand Shah/Defendant No. 1 in Regular Civil Suit No. 103 of 1996 on the file of IInd Jt. Civil Judge, J.D., Alibag. The appeals arise from the common judgement dt. 21.03.2017 in S.A. No. 708 of 2008, S.A. No. 38 of 2009

and S.A. No. 386 of 2009 in the High Court of Bombay. The parties are referred to as per their respective standing in the Trial Court.

**3.** Damodar Hirachand Shah/Plaintiff filed RCS No. 103 of 1996 for partition of the Plaintiff's 1/11$^{th}$ share in the suit schedule property by metes and bounds and allot the said share to the Plaintiff. Originally, the plaint was presented with 15 items for partition. By amendments and additions to the suit schedule, as it stands in the plaint dealt with the following 21 items:

| Sr. No. | Situated at | Survey No. | Hissa No. | Gat No. | Area H.R. | Assmt. Rs. Ps |
|---|---|---|---|---|---|---|
| 1. | Mandve-Zirad | 2 | 1C3 | -- | 0-23-3<br>0-03-3 | 7-02 |
| 2. | -"- | 9 | 1A1B2 | -- | 0-12-9<br>0-02-6 | 3-68 |
| 3. | -"- | 9 | 1A1A4 | -- | 0-23-7<br>0-05-1 | 7-11 |
| 4. | -"- | 9 | 1A1A3 | -- | 01/09/09<br>0-01-8 | 2-89 |
| 5. | -"- | 5 | 2 | -- | 2-26-9<br>0-68-1 | 2-99 |
| 6. | -"- | 4A | 1 | -- | 0-22-0<br>0-06-0 | 0-47 |
| 7. | -"- | 4A | 3B | -- | 0-99-0<br>0-32-0 | 2-10 |
| 8. | Dhokwade | -- | -- | 437 | 0-17-7<br>0-02-3 | 4-09 |
| 9. | -"- | -- | -- | 491 | 0-62-0 | 1-12 |
| 10. | -"- | -- | -- | 540 | 0-32-0 | 0-56 |
| 11. | -"- | -- | -- | 318 | 0-00-8 | 0-12 |
| 12. | -"- | -- | -- | 261 | 0-46-6<br>0-00-2 | 14-18 |
| 13. | -"- | -- | -- | 520 | 01-10-0<br>0-04-0 | 2-01 |
| 14. | -"- | -- | -- | 266 | 0-07-1<br>0-03-0 | 2-06 |
| 15. | -"- | -- | -- | 434 | 0-18-0<br>0-09-4 | 4-94 |
| 16. | Dhokwade | -- | -- | 313 | 0-25-0 | 37-50 |
| 17. | Mhatroli | -- | -- | 236 | 0-45-0 | 0-47 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | Gaon | | | | | |
| 18. | Dhokwade | -- | -- | 351 | 0-23-9<br>0-01-0 | 4-14 |
| 19. | Dhokwade | -- | -- | 214A | 2-70-48 | 3-66 |
| 20. | Dhokwade | -- | -- | 262 | 3-06-0<br>0-08-0 | 5-62 |
| 21. | Dhokwade | -- | -- | 214(B) | 0-03-18 | 4-80 |

**4.** The Plaintiff avers that the parties to RCS No. 103 of 1996 constitute a Hindu undivided family (HUF). The HUF owns and possesses the plaint schedule properties. The propositus/Hirachand Umarshi Shah was at the helm of the family till he died on 21.08.1970, leaving behind three sons, namely, Late Kumarchand (represented by LRs, Defendant Nos. 3-7), Mohan (Defendant No. 1) and Purshottam (Defendant No. 2), and one daughter, Sulochana (mother of Defendant Nos. 8, 9 and 16), through his first wife, late Motiben. The propositus was also survived by his second wife, Devkibai (Defendant No. 10) and their two sons, Damodar (Plaintiff) and Shivlal (Defendant No. 11), and four daughters, Kesar (Defendant No. 12), Leela (Defendant No. 13), Pushpa (Defendant No. 14) and Laxmi (Defendant No. 15).

**5.** The claim for partition of plaint schedule properties rests on the family of Hirachand Umarshi Shah as an HUF, and the parties are members of the said HUF. The next premise is that the plaint schedule properties are not only ancestral, but also available for partition at the initiation of the suit, and the Plaintiff and Defendants are in possession of the plaint schedule as co-parceners/members of HUF. The cause of

action refers to the legal notice dt. 06.04.1996, served by the Plaintiff on the other members of the HUF, demanding partition and separate possession. Defendant No. 1, through reply notice dt. 20.04.1996, refused the relief of partition of plaint schedule properties. The other Defendants either did not reply or were passive participants to the emerging differences in the family members.

**6. <u>Written Statement of Defendant Nos. 1-7 dt. 26.11.1996</u>**

Defendant No. 1, for himself and on behalf of Defendants Nos. 2-7, filed a written statement dt. 26.11.1996. Considering the contentions canvassed for Defendant No. 1 in the subject appeals, the defence is set out in some detail.

**i.** The relationship interse parties is admitted, so also the description of the properties in the plaint. Defendant No. 1, at the outset, contended that the Plaintiff and Defendants do not form part of an HUF. The consequential averment is that the plaint schedule properties are not joint family properties.

**ii.** Defendant No. 1 denies that the suit properties were either owned or enjoyed by the propositus. The suit properties are not joint family properties or in joint possession.

**iii.** Suit properties in Sl. Nos. 1 to 7 of the plaint schedule were sold by the propositus in favour of one Chotalal Bhrajgovind, Thakkar Hirji and Vitthaldas Amarsing by sale deed dt. 01.03.1939. The parties to the document dt. 01.03.1939 have litigated for the title,

possession, etc., in C.S. No. 319 of 1941 before the Court of First Class Sub-Judge, Thane. On 13.03.1942, C.S. No. 319 of 1941 was decreed. The propositus was directed to deliver possession to decree holders (DHRs), Chotalal Bhrajgovind, Thakkar Hirji and Vitthaldas Amarsing. For implementing the decree dt. 13.03.1942, Special Darkhast No. 10/52 was filed before the Court of Civil Judge, Senior Division, Alibag, against the propositus. The sons of Motiben, namely Late Kumarchand and Defendant Nos. 1 and 2, filed objections to the Special Darkhast No. 10/52. In a settlement with the Plaintiffs in C.S. No. 319 of 1941 (Special Darkhast No. 10/52), the properties at Sl. Nos. 1-7 and 18 were settled and given in favour of Chotalal Bhrajgovind and others. On 12.01.1955, a mutation in revenue records of the names of the above three sons was carried out and therefore, Sl. Nos. 1-7 and 18 do not form part of the HUF headed by the propositus. Defendant Nos. 1 and 2 and the LRs of Late Kumarchand, *viz.,* Defendant Nos. 3-7, are in exclusive possession and enjoyment of their respective shares in Sl. Nos. 1-7 and 18.

**iv.** Properties at Sl. Nos. 8-15 are not available for partition. Defendant No. 1 alleges that there has already been an oral partition between the heirs of the propositus. The factum of oral partition is admitted in the release deed dt. 23.11.1973 of

Defendant No. 1. Therefore, the oral partition disrupted the family's status as an HUF and properties at Sl. Nos. 8-15 are no more ancestral properties. It is contextual to remark at the present juncture on the insufficiency of details on what constitutes an oral partition, details thereof, etc.

**v.** The properties at Sl. Nos. 8 and 10 are partitioned in favour of the Plaintiff. The oral partition is evidenced through the subsequent documents and bears the signatures of all the co-parceners.

**6.1 <u>Additional Written Statement by Defendant Nos. 1-7 dt. 28.02.2000</u>:**

Oral partition without details is reiterated, and it is stated that Sl. No. 17 has been allotted to Late Kumarchand. The said properties are in the possession and enjoyment of his LRs, Defendants Nos. 3-7.

**6.2 <u>Additional Written Statement by Defendant Nos. 1-7 dt. 13.08.2001</u>**:

The property covered by Sl. No. 18 (Gat No. 351 of Dhokawade village), corresponding to Sy. No. 164 of Dhokawade village, has been the settled property in favour of Defendant Nos. 1 and 2 and the LRs of Late Kumarchand, Defendant Nos. 3-7. Therefore, independent of other circumstances, Sl. No. 18 is not available for partition.

**6.3** Although Defendant No. 2 filed a common written statement along with Defendant No. 1, he filed independent written statements at a

subsequent point in time. In fine, on appreciation of the pleadings of the parties, it is noted that Defendant Nos. 10, 11 and 14 support the Plaintiff for the relief of partition and separate possession. Defendant Nos. 3-7 filed their independent written statements through their power of attorney, supporting the suit/claim of the Plaintiff for partition.

**7.** By the judgement dt. 30.12.2005, RCS No. 103 of 1996 was decreed by the Trial Court. Aggrieved by the said judgement, Defendant Nos. 1 and 2 filed C.A. No. 56 of 2006 before the Court of District Judge, Raigad.

**7.1.** The First Appellate Court, by the judgement dt. 10.07.2006, allowed C.A. No. 56 of 2006. Thus, the relief for the partition of suit properties was rejected.

**7.2** The parties, aggrieved by the judgement dt. 10.07.2006, moved the High Court of Bombay. S.A. No. 386/2009 was filed by the Plaintiff. Defendant Nos. 3-7 filed S.A. No. 38/2009 and S.A. No. 708/2008.

**8.** By the impugned judgement, the Second Appeals were disposed of and for convenience, the operative portion of the judgement is excerpted hereunder:-

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

*(ii) Property described at Serial No.7 of the plaint is owned by the defendant nos.3 to 7 exclusively.*
*(iii) Property described at Serial No.16 of the plaint is owned by the defendant no.1 exclusively.*
*(iv) Properties described at Serial Nos.8 to 15 and 17 of the plaint are already partitioned and are not ancestral properties of late Hirachand Shah and cannot be partitioned at the instance of the plaintiff or any of the defendants.*
*(v) Properties described at Serial Nos.19 to 21 of the plaint are declared as ancestral properties of late Hirachand Shah and shall be partitioned by metes and bounds. The plaintiff, defendant nos.1 and 2 are having 1/4$^{th}$ share each in those properties. Defendant nos.3 to 7 collectively are having 1/4$^{th}$ share therein·.*
*(vi) The Collector is directed to partition the suit properties described at Serial nos.1 to 6 and 18 of the plaint between the defendant nos.1,2 and 3 to 7 in the*
*ratio provided in paragraph 184 (i) of this judgment, himself or through any gazetted officer subordinate to him in accordance with Section 54 of the Code of Civil Procedure, 1908. Properties described at Serial Nos.19 to 21 of the plaint shall be partitioned by metes and bounds by the aforesaid officer between the parties mentioned in paragraph 184(v) of this judgment in the ratio mentioned therein.*
*(vii) Second Appeal Nos.708 of 2008, 38 of 2009 and 386 of 2009 are disposed of in aforesaid terms.*
*(viii) There shall be no other as to costs."*

**8.1** The Second Appeals were heard and decided on the following substantial questions of law:-

| Sr. No. | Issue | Observation |
|---|---|---|
| A. | Whether from the interpretation of the documents at Exhibit 160, 162 and 197, a conclusion can be arrived at that there was a partition between legal heirs of deceased Hirachand in 1973? | Answered in the affirmative<br>Upon interpretation of the document at Exhibit-160, a conclusion can be arrived at, that there was an oral partition between the legal heirs of deceased Hirachand in 1973 in so far as the properties at Sr. Nos. 8 to 17 are concerned. |
| B. | Whether Exhibit 162 and Exhibit 196, i.e., the Affidavit and Power of Attorney, sworn and executed before the Registrar & Metropolitan Magistrate, Esplanade Court, Bombay, respectively, in respect of properties at Sr. Nos. 19 to 21 | Answered in the negative<br>Since the Affidavit and Power of Attorney were not registered documents, they came to be inadmissible as evidence. |

| | | |
|---|---|---|
| | out of the suit properties, were at all admissible in evidence, in view of provisions of the Registration Act, 1908, more particularly Sec. 17 thereof? | |
| C. | Whether Exhibit 162 and Exhibit 196, i.e., Affidavit and Power of Attorney, in law, have an effect of relinquishment of rights, i.e., permanent destruction of admitted co-ownership of the executants thereof, more particularly by the heirs of deceased Hirachand, in favour of the 1st Defendant? | Answered in the negative<br>The defendants, except Defendants Nos. 1 to 7, have relinquished their rights by registered documents in all the properties, including properties at Sr. Nos. 19 to 21. |
| D. | Whether Exhibit 162 and Exhibit 196, i.e., the Affidavit and Power of Attorney, can operate as estoppel in law to such an extent that the executants thereof, more particularly the heirs of deceased Hirachand, permanently lose their admitted co-ownership of the properties covered by these documents? | Answered in the negative<br>The Affidavit (Exhibit 162) and Power of Attorney (Exhibit 196) do not operate as estoppels in law to the extent that the heirs of the deceased Mr. Hirachand Shah would permanently lose their admitted co-ownership of the properties covered by those documents. |
| E. | Whether Exhibit 197, i.e., registered partition deed and/or contents thereof, having been admittedly executed by and between the parties to the said document during the pendency of the suit and the same having been not signed by all the family members, particularly the heirs of deceased Hirachand, can be considered as a proof of alleged oral partition affected in April 1973? | Though the said registered partition deed (Exhibit 197) is executed during the pendency of the suit, the parties to the said deed cannot raise any contention contrary to what was stated therein. The partition deed is in furtherance of the confirmation of contents of the registered release deed dated 23.11.1973 and thus, would be binding upon those parties to the said registered partition deed. |
| F. | Whether the Courts below erred in not passing a decree for partition in respect of the properties at Sr. Nos. 1 to 6 and 18 out of the suit properties by allotting 1/3rd share to each of Defendant Nos. 1, 2 and 3 to 7 in the absence of any pleadings much fess evidence as to any partition already effected in respect thereof? | Answered in the affirmative<br>The two courts below ought to have passed a decree for partition in respect of the properties at Sr. Nos. 1 to 6 and 18 and ought to have allotted a 1/3rd share to Defendant Nos. 1 and 2 each and the remaining 1/3rd share to Defendant Nos. 3 to 7. |
| G. | Whether the Courts below could | Answered in the negative |

| | | |
|---|---|---|
| | have ignored the legal effect of the undisputed registered release deed (Exhibit 201) executed by Defendant Nos. 1 and 2 in favour of deceased Kumarchand thereby relinquishing their rights in Suit property at Sr. No. 7 out of the suit properties, that too for a valuable consideration of Rs. 300? | Defendant No. 1, who entered the witness box, had admitted the execution of the said registered release deed (Exhibit 201) in respect of the property at Sr. No. 7 in favour of Mr. Kumarchand Shah for consideration of Rs. 300. |
| H. | Whether the Courts below ought to have passed a decree of partition by metes and bounds granting 1/3rd share to three branches, i.e., plaintiff, defendant no. 1 and defendant nos. 3 to 7 in respect of Suit Properties at Sr. Nos. 8 to 17 and 19 to 21? | The two Courts below ought to have passed a decree for partition by metes and bounds granting shares to the legal heirs of late Hirachand Shah in respect of the properties described at Sr. Nos. 19 to 21 only. The properties at Sr. Nos. 8 to 17, having been already partitioned, cannot be further partitioned thereof. |
| I. | Whether the learned lower Appellate Court, without setting aside the order passed by the learned trial court permitting Defendant Nos. 3 to 7 to file separate Written Statement at Exhibit 84, could have just simplicitor observed that the order passed by the learned trial court permitting such filing of WS was illegal? | Answered in the affirmative<br>The first appellate Court has rightly held that the Defendant Nos. 3 to 7 could not have taken a contrary stand than what was taken in the earlier written statements. |
| J. | Whether the Defendant Nos.3 to 7 can resile from the admission made in the written statement and can be permitted to file new Written Statement? | Answered in the negative<br>Defendant Nos. 3 to 7 could not resile from the admissions made in the written statement, though was permitted to file an additional written statement. They could have explained the admissions in the written statement in the additional written statement, but not have taken a contrary position. |

**9**. As noted earlier, the Civil Appeals are at the instance of Defendant No. 1. The other parties to the Second Appeal including the Plaintiff, did not challenge the decree and the judgement of the High Court. Hence, either by elimination or by confining the subject matter of the instant Civil

Appeals, it is noted that Sl. Nos. 8-17, i.e., covered by the oral partition and the order dt. 12.01.1955 in Special Darkhast No. 10/52, are not challenged by the other parties to the instant suit. Sl. Nos. 16 is held in favour of Defendant No. 1. The aggrieved parties, including the Plaintiff, did not assail the said finding. Therefore, the reasons otherwise noted for the other Sl. Nos. except the Sl. Nos. 19-21 *mutatis mutandis* will apply. Defendant No. 1 is not contesting the arrangement made in so far as the property at Sl. No. 17.

**9.1** What emerges from the narrative is that Defendant No. 1 in the Civil Appeals challenges the decree for the partition of properties at Sl. Nos. 19-21. The converse of the above narrative is that the Civil Appeals deal with the decree for the partition of Sl. Nos. 19-21 of the plaint schedule through the impugned judgment. By choice, we are not independently adverting to the arguments on behalf of the Plaintiff because the defendants who were passive in the litigation before in the courts below have advanced arguments supporting a claim for partition.

## III. SUBMISSIONS BY PARTIES

**10.** Mr. Jay Savla, the Ld. Sr. Counsel for Defendant No. 1, contended that the High Court of Bombay rightly confirmed the First Appellate Court's finding of oral partition and distribution of properties but

erroneously restricted it to properties in Sl. Nos. 8-17; thus, disturbing the family settlement arrived at by all the parties for Sl. Nos. 19-21.

**11.** With respect to properties at Sl. Nos. 1 to 7 and 18 (referred to as Darkhast Properties), Defendant No. 1 and his brothers, Purshottam (Defendant No. 2) and Late Kumarchand Shah became the absolute owners based on compromise in C.S. No. 319 of 1941. The names of the three brothers, pursuant to the compromise made with Chotalal Bhrajgovind in C.S. No. 319 of 1941, were mutated in the revenue records. The properties were later partitioned among themselves in April 1973. In other words, these properties are not HUF properties; therefore, they are unavailable for partition. The arguments are made to bring home the case of Defendant No. 1, that by the operation of oral partition and the settlement dt. 22.11.2001 between the family members, none of the items is available for partition.

**12.** With respect to properties at Sl. Nos. 19-21 (referred to as the Bunder properties), the Counsel for Defendant No. 1 contended that since the villagers of Mandve claimed the ownership of these properties, the family members entered into an oral partition and a subsequent family settlement to allocate these properties to Defendant No. 1. In support of this argument, the Counsel for Defendant No. 1 relied on exhibits *viz.,* the affidavit dt. 12.04.1982 (Ex. 162) sworn by other family members allegedly relinquishing their share in the properties; release

deed (Ex. 198) dt. 07.02.2002 executed by the sisters of Defendant No. 1 declaring that they have no claim to the properties covered by the document as these properties were partitioned in 1973; lastly, land revenue and other taxes were being paid by Defendant No. 1 as the exclusive owner.

**13.** The Counsel for Defendant No. 1 argues that the High Court of Bombay disregarded documentary evidence and held that since the documents, like the affidavit, were not registered, they would not be admissible in evidence, or affect the right of the deponent to the immovable properties. The impugned judgement erred in disbelieving partition of Sl. Nos. 19-21.

**14.** Mr. A.I.S. Cheema, Ld. Sr. Counsel appearing for Defendant Nos. 3, 4, 6 and 7 contended that the properties at Sl. Nos. 19-21, have been rightly concluded on an elaborate reasoning and based on the legal position, cannot amount to a release deed. Affidavit (Ex. 162) and power of attorney (Ex. 196) are inadmissible for want of registration and payment of stamp duty.

**14.1** It is further contended that a document by which a right is relinquished ought to be registered under the provisions of the Registration Act, 1908. The Ld. Judge analysed the facts that various suits and proceedings were filed in the name of the then six legal representatives of the propositus, and the District Court proceedings had

declared them as owners of the said properties. Defendant No. 1, in his oral evidence, admitted that he did not mention, in the proceedings filed by him in the Civil Court and the Revenue Court, the oral partition of the HUF properties in the year 1973 and the said properties were allotted to the share of Defendant No.1. These attending circumstances clearly demonstrated that there was no relinquishment/partition of Sl. Nos. 19-21. If partition/settlement was affected, Defendant No. 1 would have participated in the ongoing litigation in his own right and standing. As the case was against the co-parceners, these exhibits, *viz.,* the affidavit and power of attorney, have been executed in favour of Defendant No. 1 to pursue the litigation.

**15.** Mr. DN Goburdhun, Ld. Sr. Counsel, appearing on behalf of LRs of Purshottam/Defendant No. 2 contends that properties at Sl. No. 19-21 are available for partition between Plaintiff, Defendant No. 1, Defendant No. 2 and Defendant Nos. 3-7 jointly. Exs. 162 and 196 are the affidavit and power of attorney, respectively, executed before the Magistrate when there was an ongoing dispute with the villagers of Mandve in respect of Sl. Nos. 19-21. Defendant No. 1 admitted those proceedings were in the name of the brothers. Defendant No. 1 also admitted that there was no oral partition in the year 1973 vis-à-vis these properties. The Trial Court held that these properties are ancestral properties. The two documents, affidavit and power of attorney, were not registered

documents, and the High Court holds that they require registration under Section 17(1)(b) of the Registration Act, 1908. Since these documents are unregistered, they do not have any legal effect on the properties covered by these documents. Hence, the exclusive claim of Defendant No. 1 for properties at Sl. Nos. 19-21 is unsustainable. Thus, the impugned judgment is right in recording that the properties at Sl. Nos. 19-21 are to be partitioned and distributed in the ratio 1/4$^{th}$ to the Plaintiff, Defendant No. 1, 2, and Defendant Nos. 3-7 jointly.

**15.1** Defendant No. 1 never pleaded in the written statement or in the additional written statement regarding the affidavit and power of attorney. In the absence of any pleadings for the said documents, no amount of evidence could be led as proof of a pleading, or any relief granted.

**15.2** It is reiterated that Defendant No. 2 did not give a release deed in respect of Sl. Nos. 19-21. The only release deed was given on 23.11.1973 in favour of Defendant No. 1 in respect of land admeasuring 25 guntas situated in Dhokwade village, Alibag, which is not the subject matter of the *lis* here.

**15.3** No substantial question of law of public importance arises herein and the SLP deserves to be dismissed.

## IV. ANALYSIS

**16.** Ld. Senior Counsel A.I.S. Cheema and DN Goburdhun, also contended that the finding of the High Court accepting oral partition of Sl. Nos. 8-17 in the year 1973 is fallacious and contrary to the principle laid down by this Court in ***Vineeta Sharma v. Rakesh Sharma and Ors***.[1] Therefore, these properties are also partitioned among the members of the HUF. Reliance is placed on the following portion from ***Vineeta Sharma (supra)***-

> *"**137.5**. In view of the rigour of provisions of the explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised as the mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (sic effected) by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly."*

**17.** Mr. Jay Savla, Ld. Sr. Counsel opposes the prayer for reopening the oral partition at the instance of the Plaintiff, etc. *Firstly*, once the factum of oral partition is accepted by the High Court, the High Court fell in a serious error of law by not extending the fact established by Defendant No. 1 to properties at Sl. Nos. 19-21. *Secondly*, without any appeal on the findings, in the way known to law, the Plaintiff, etc. cannot insist upon the partition of properties covered by oral partition.

**18.** We have considered the rival contentions on the oral partition vis-à-vis Sl. Nos. 8-17 of the plaint schedule properties, and we deem it

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1 (2020) 9 SCC 1.

appropriate to consider the said contention before proceeding to take up the challenge on the decree of the partition made by the High Court with respect to Sl. Nos. 19-21.

**19.** The Plaintiff, Defendant No. 1, etc. have accepted the findings recorded by the impugned judgement on oral partition of Sl. Nos. 8-17. The Civil Appeals are confined to the relief of partition of properties shown at Sl. Nos. 19-21. The aggrieved party of a finding on oral partition of Sl. Nos. 8-17 is expected to challenge the decree on the items covered by the oral partition. In the peculiar circumstances of the case, particularly after noticing the combinations or cliques of parties are changing from the Trial Court to the Appellate Court, and from the Appellate Court to the High Court, and now in this Court we have to judiciously decide whether the plea accepted by the High Court is to be re-examined in the absence of an appeal. It may be one way of looking at the conduct of the parties, but the decision of the court is dependent on pleadings and evidence on record. Beforehand, without much deliberation, it can be noted that Defendant No. 1 ought not to be in a worse position by rejecting the argument on Sl. Nos. 19-21. Simultaneously, the argument on the oral partition of Sl. Nos. 8-17 is accepted, then this Court would be invited to set aside the findings and the decree of the High Court on the oral partition of Sl. Nos. 8-17. Thus explained, we are not persuaded to entertain or accept any argument at

the instance of the Plaintiff, etc. made on the strength of ***Vineeta Sharma (supra)***.

**20.** The above discussion takes us to the decree of partition of Sl. Nos. 19-21 through the impugned judgement. The gist of Defendant No. 1's argument, vis-à-vis Sl. Nos. 19-21, is that the affidavit (Ex. 162), power of attorney (Ex. 196), partition deed (Ex. 197) and release deed (Ex. 198) speak of oral partition and the conduct of parties. In other words, the parties affirm the oral partition of Sl. Nos. 19-21, said to have taken place in 1973.

**21.** The contesting parties object to relying on the exhibits referred to above by contending that the written statements filed by Defendant No. 1 are bereft of any details on these alleged exhibits. These exhibits even otherwise do not satisfy the requirements of the Indian Stamp Act, 1899 and the Registration Act, 1809. Hence, the documents do not have evidentiary value to accept the factum of partition of properties at Sl. Nos. 19-21.

**22.** Therefore, so much depends on the availability of pleadings and evidence adduced on the lines of pleadings of Defendant No. 1.

**23.** It is apposite to refer to a few citations on the effect of evidence adduced without pleadings. The citations noted hereunder are nearer to the argument considered by us:-

i. ***Ram Sarup Gupta (Dead) by LRs v. Bishun Narain Inter College and Ors.***[2]**:**

> *"**6.** … It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Some times, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal."*

**ii.** ***Bachhaj Nahar v. Nilima Mandal and Anr.***[3]**:**

> *"**10(i)**. No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court."*

**iii.** ***Biraji @ Brijraji and Anr. v. Surya Pratap and Ors.***[4]**:**

> *"**8.** …It is fairly well settled that in absence of pleading, any amount of evidence will not help the party…."*

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2 (1987) 2 SCC 555.
3 (2008) 17 SCC 491.
4 (2020) 10 SCC 729.

**23.1** To the same effect, is the judgement reported in ***Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and Ors.***[5] We are not multiplying the judgement with the axiomatic proposition of law.

**23.2** In ***Ram Sarup Gupta (supra)***, it is held despite the deficiency in pleadings, and the parties have proceeded to trial on those issues by producing evidence, then at a later point in time, it is not available to a party to object to the finding on lack of pleadings. The said exception is also not attracted to the case on hand, because of the tenor of pleadings required in support of any one of these exhibits: affidavit (Ex. 162), power of attorney (Ex. 196), partition deed (Ex. 197) and release deed (Ex. 198). In paragraph 6 *(supra)* we have excerpted in sufficient detail the stand taken by Defendant No. 1 in the written statement and two additional written statements filed by him. On carefully perusing the written statements, there is no room for any doubt on the inadequacy of pleadings on these crucial exhibits.

**24.** In addition to the above, we have to keep in perspective the jurisdiction of this Court under Article 136 of the Constitution of India. The scope is outlined in the following cases:-

i. ***Taherakhatoon (D) by LRS v. Salambin Mohammad***[6] decided that despite dealing with the appeal after granting special leave,

5 (2008) 4 SCC 594.
6 (1999) 2 SCC 635.

this Court was not bound to go into merits and even if it did so by declaring the law or point out the error, the Court still did not see the need for interference because the facts of the matter did not require interference or that the relief prayed for could be moulded in a different fashion.

**ii.** In ***Chandra Singh and Ors. v. State of Rajasthan and Anr.***[7] it is held that discretionary jurisdiction under Article 136 of the Constitution of India need not be exercised by this Court wherein impugned judgement is even found to be erroneous, for justice on the main issues has been done by the judgement of a court.

**iii.** In ***Municipal Board, Pratabgarh and Anr. v. Mahendra Singh Chawla and Ors.***[8], it was held that:

> *"Having performed that duty under Article 136, is it obligatory on this Court to take the matter to its logical end so that while the law will affirm its element of certainty, the equity may stand massacred. There comes in the element of discretion which this Court enjoys in exercise of its extraordinary jurisdiction under Article 136. In approaching the matter this way we are not charting a new course but follow the precedents of repute."*

**25**. Let us independently look at the legality and evidentiary value of the affidavit dt. 12.04.1982 (Ex. 162) on which much emphasis has been laid by Defendant No. 1, in resisting the decree of partition of Sl. Nos. 19-21. The sentence in the affidavit relied on by Defendant No.1 is that, the Plaintiff, Defendant No. 2, 3-7, 10 and 11 relinquished their rights and management over the Mandve properties in favour of Defendant No. 1. The argument proceeds on the assumption that the signatories of the

7 (2003) 6 SCC 545.
8 (1982) 3 SCC 331.

affidavit relinquished their rights over the Mandve properties. The High Court in the impugned judgement noted the contemporaneous circumstances under which not only Ex. 162 but also Ex. 196 were executed by the parties referred to therein. The argument of Defendant No. 1 on Ex. 162 fails by the very execution of power of attorney granted in favour of Defendant No. 1 through Ex. 196. Section 17(1)(b) of the Registration Act, 1908 is categorical and clear that other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property requires registration.

**26**. The power of attorney dt. 12.04.1982 is again a contemporaneous document brought into existence along with the affidavit dt. 12.04.1982 (Ex. 162). The recitals in Ex. 196 allege to give power of alienation of executor's rights, etc., in favour of Defendant No. 1. It is argued that the affidavit has already conferred exclusive rights in favour of Defendant No.1. That being so, the necessity of the power of attorney (Ex. 196) can easily be appreciated. These documents cannot be relied upon to accept the claim of exclusive ownership of Defendant No. 1 for properties at Sl. Nos. 19-21 of the plaint schedule.

**27**. Adverting to the partition deed dt. 22.11.2001 and the release deed dt. 07.02.2002 (Ex. 198), without much deliberation, we are

convinced to hold that these *pendente lite* documents without incorporating subsequent events as additional pleadings in the written statement, particularly in the circumstances of this case, we are satisfied that these exhibits are not relied on to accept the exclusive claim of Defendant No. 1 of Sl. Nos. 19-21 of the plaint. In fine, we summarise that the findings recorded by the Appellate Court are in detail. Therefore, we do not see a valid reason to interfere with the impugned judgment on the ground that the examination of issues by the High Court is contrary to Section 100 of the Code of Civil Procedure, 1908.

**27.1** Detailed written submissions have been filed by the Ld. Counsel appearing for Defendant No. 1 and we have perused the written submissions, and these grounds are taken up for consideration before this Court. The said exercise amounts to re-appreciation of oral and documentary evidence and this Court ought to be avoiding re-appreciation except in a few established cases. Apropos to the above discussion, we hold that the High Court within the jurisdiction under Section 100, Code of Civil Procedure, 1908 examined in detail and reckoning oral evidence to arrive at the findings recorded, we notice that there is no re-appreciation of evidence. We are in agreement with the findings recorded by the High Court.

**28**. Therefore, the impugned judgment is sustained, and the Civil Appeals fail. No order as to costs.

**……..…….....J.**
**[M. M. SUNDRESH]**

**……..…….....J.**
**[S.V.N. BHATTI]**

**NEW DELHI;**
**MARCH 19, 2024**