

Madankuwar and Others Vs. Sushila and Another

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Court : Mumbai Nagpur

Decided On : Apr-04-2016

Judge : A.B. Chaudhari

Appeal No. : Second Appeal No. 109 of 2015

Appellant : Madankuwar and Others

Respondent : Sushila and Another

Advocate for Def. : Mr. S.C. Mehadia

Judgement :

Oral Judgment:

FACTS

1. The respondent, plaintiff, Smt. Sushila wife of Gyanchand Kataria, filed Special Civil Suit No. 129 of 1987 in the Court of Civil Judge [Senior Division], Chandrapur, for a declaration, partition and separate possession. In the suit, she stated that Jethmalji, who died in November, 1956, left behind his widow Smt. Heerabai, her step-son, Rekchandji. Smt. Heerabai died on 30th June, 1983, and was a member of Hindu Joint Family with Rekchand, possessing undivided immovable and movable properties. For the purpose of partition, Schedules-A and B were the properties, immovable and movable attached with the plaint. Rekchand died on 20th January, 1980, leaving behind his widow, Smt. Madankunwar and

three daughters, namely Smt. Sharadkunwar, Smt. Shantakunwar and Smt. Sushila, the plaintiff. Rekchand had no son and, therefore, the defendant no.4 Deepakkumar was adopted as a son, for which plaintiff, Sushila, had a reservation.

Further, according to the plaintiff, Smt. Heerabai executed her last Will, duly attested on 18th October, 1981, and bequeathed her half share in all the joint family properties to her as shown in Schedules-A and B. Defendant no.1, Smt. Madankunwar, being her natural mother, she was allowed to receive rents etc., in respect of the properties bequeathed to her due to love and affection. However, taking advantage of her goodness, defendant no.1 started alienating the properties, though orally requested by the plaintiff not to do so and, in fact, sold some properties to defendant no.5, which caused loss to her. Defendant no.3 sold a plot admeasuring 2954 sq.ft., to defendant no.5 with a building thereon at Mouza Saoli. It was under those circumstances, she wanted to claim partition in the joint family properties with separate possession. The plaintiff then contended that her prayers for partition should, therefore, be accepted by the Court. With these pleadings, the suit was instituted on 13th November, 1987. The defendant nos. 1 to 4 filed their Written Statement to the suit, and denied all the allegations, including the execution of the Will dated 18th October, 1981 by Smt. Heerabai, so also that she had a half share in the joint family properties. In the Special Pleadings in the Written Statement, it was stated that Rekchandji died on 20th January, 1980. The Will of Heerabai was fabricated. The alleged Lease-Deed dated 30th July, 1982, executed by Smt. Heerabai in favour of plaintiff, was also false. As to the execution of Will dated 18th October, 1981, Smt. Jatanbai, the other widow of Dhanraj Parakh was alive, who died on 3rd November, 1982, which falsified the making of Will dated 18th October, 1981. On 20th November, 1982, a Family Settlement Deed was executed between plaintiff and defendants and late Heerabai. Thereafter, on 21st April, 1983, defendant no.4, Deepak, was adopted as a son of late Rekchandji by registered Adoption-Deed as per consent of all the family members, relatives and friends. Before execution of Adoption Deed, there was a partition of joint properties between defendant nos. 1 to 3 and late Heerabai on 9th January, 1982. The plaintiff had filed Regular Civil Suit No. 238 of 1984, which was pending. In that suit, no mention about the Will dated 18th October,

1981 was at all made and the Will was being brought to light by the plaintiff for the first time on 13th November, 1987. The Family Settlement dated 20th November, 1982 as well as Memorandum of Partition dated 9th January, 1983 do not even remotely make a mention of the alleged earlier Will dated 18th October, 1981, though late Heerabai was a party to both the instruments and had put her thumb impressions. The properties shown in Schedules A and B were recorded in the names of the defendants to the full knowledge of the plaintiff and still she kept silent till 13th November, 1987. She was given property worth Rs. 50 lakhs in the Family Settlement dated 20th November, 1982, and had nothing to claim from the joint Hindu Family properties which belonged to Rekchandji, Jatanbai and late Heerabai with which the plaintiff was not at all concerned. In fact, the Family Settlement was acted upon and plaintiff herself is in exclusive possession of the property from 20th November, 1982 onwards. The plaintiff, however, suppressed all the material facts about the family arrangement deliberately. The Will was, therefore, factually false and baseless and was liable to be rejected.

2. The defendants having filed their Written Statement and having disclosed about the family settlement, Memorandum of Family Arrangement etc., the plaintiff filed an application for amendment to the plaint, and amended the plaint by inserting paragraphs 4-A to 5-C, which were duly replied by amending the respective paragraphs in the Written Statement by amendment. In these amended paragraphs, the plaintiff having been confronted with the pleadings in the Written Statement about the family arrangement etc., denied that there was any partition on 9th January, 1983 or that the same could be admissible for want of registration. In the amended paragraphs, it was contended that Heerabai inherited half share in the property left by Jethmal with Rekchandji. It was only from one-half share of Rekchandji, the share of plaintiff was separated by family settlement; but one-half share of property of Heerabai remained intact. Therefore, the plaintiff was entitled to claim share from Heerabai's estate apart from Rekchandji's share. Heerabai had $\frac{3}{5}$ th share in the total property. Her share could not be diverted in the partition during her lifetime and her $\frac{3}{5}$ th share was intact and undivided at the time of her death and, therefore, the stand taken by the defendants that she had no share at all was false and baseless. It was then stated that a Lease-Deed dated 30th July, 1982 about the properties of her share in the joint family properties was

registered by Heerabai in favour of Sushila and, therefore, the plaintiff was entitled to enjoy the fruits of the share of the properties of Heerabai against the Lease-Deed. The plaintiff then stated that due to the Will executed on 18th October, 1981 in her favour by Smt. Heerabai, she was entitled to half share in the joint family properties. The plaintiff then averred that Heerabai was not pulling on well with Rekchandji and his wife Smt. Madankunwar, and had demanded partition from him; but due to the death of Rekchandji, the partition was not effected. As to the Will that was brought forth by the defendant nos. 1 to 4 in their favour, the plaintiff contended that the Will was never executed in their favour and was, thus, challenged as a fabricated document. As to the partition arrangement dated 9th January, 1983, it was stated by the plaintiff that the same was due to misrepresentation of facts to Heerabai and force brought on her. In fact, she had never intended any partition and that she had even no right in law to partition the estate. Her thumb impression was obtained by misrepresentation and she was not willing to execute the document. She had, therefore, sent notices to defendants and others and also given a copy thereof to Police Station, Chandrapur and husband of the plaintiff, i.e., Gyanchand, was consulted by Heerabai in the matter. The amended pleadings were duly replied by the defendants by denying adverse allegations. The parties filed many documents. The suit thereafter went for trial. The Trial Judge recorded the evidence and finally found that Heerabai had undivided half share in the suit properties, plaintiff as well as defendants both failed to prove their respective Will dated 18th October, 1981 and 26th May, 1983 and, thus, rejected both the Will. The Trial Court further found that the plaintiff could not inherit any share in the properties of Heerabai. The suit was not barred by limitation. The defendant no.4, Deepak, was a duly adopted son of late Rekchand by defendant no.1, Madankunwar as per consent of the relatives. The plaintiff was not entitled to any share in the property and consequently, the Trial Court dismissed the suit.

3. The plaintiff filed an appeal before the District Judge, Chandrapur, which was registered as Regular Civil Appeal No. 60 of 2012. The Lower Appellate Court allowed the appeal and decreed the suit by setting aside the Judgment of the Trial Court. It, however, rejected the Will dated 18th October, 1981, pressed into service by the plaintiff, and further held that she was entitled to partition and

separate possession of 1/4th share in the suit properties described in Schedules-A, B and C, while defendants were entitled to partition and separate possession of 1/4th share in those properties. It this Judgment, which is under challenge in this Second Appeal. The respondent no.1 has also filed a Cross-Objection No. 11 of 2016 to assail the findings.

Arguments:

4. In support of the appeal, Mr. K.H. Deshpande, learned Senior Adv., with learned counsel Mr. A.M. Sudame for the appellant made the following submissions:

[a] Deceased Rekchand was the stepson of Heerabai and he predeceased Smt. Heerabai, his step-mother. During the lifetime of Rekchand, there was no partition, family arrangement or distribution of any estate. Rekchand had three daughters but no son. After his death, all close relatives and friends, including Heerabai decided to have a son in the family and, therefore, defendant no.4 was to be adopted as a son. But then, all the family members, including Heerabai and relatives were of the opinion that there should be clear cut distribution/disposition of estate. It started with plaintiff, Smt. Sushila, because her husband, Gyanchand, an Advocate by profession and also Asstt. Govt. Pleader practising at Chandrapur, was pestering for a separation of share for his wife, Smt. Sushila. Neither Heerabai nor defendant no.1, Smt. Madankunwar or other daughters wanted to have partition. But since plaintiff, Smt. Sushila, was, due to her husband, pressurizing to give her share, the first family settlement was reduced to writing on 20th November, 1982 [Exh.244], under which plaintiff, Smt. Sushila, was given to what she was entitled to, as her share from the joint family properties, and even from the estate of Heerabai, in order to exclude her complete share from the properties of Rekchand and Heerabai for all times to come and which is as crystal as it could be. Mr. K.H. Deshpande then contended that since Gyanchand Kataria was behind plaintiff, Smt. Sushila, and having obtained her entire share under Exh.244, he caused Regular Civil Suit No. 238 of 1984 instituted in the Court for a mandatory and permanent injunction.

According to Mr. Deshpande, in the meanwhile, i.e., before filing of the said suit, there was an oral partition amongst the remaining family members, and in

particular, Heerabai and other defendants, which was thereafter reduced to writing on 9th January, 1983, and Heerabai though put her thumb impression in presence of several persons, on the ill-advice of Gyanchand, appeared to have given notices to all those persons about the said Memorandum of Partition, which was obviously manipulated by PW 1, Gyanchand only. However, the pleadings in the Regular Civil Suit No. 238 of 1984 in clear terms bring out the truth of the matter that plaintiff, Smt. Sushila, had accepted that she received her entire share from the estate of Rekchand as well as Heerabai and had left nothing to claim. But then PW 1 Gyanchand having an evil eye on the other remaining properties of the family and particularly having found that the properties would also go to the adopted son, Deepak, manured on behalf of Heerabai without her authority and on his own set up a new case that the plaintiff had not received any share in the properties of the share of Heerabai in the joint family.

[b] Mr. Deshpande then contended that plaint in Regular Civil Suit No. 238 of 1984, if read carefully, will show the above position apart from a close reading of the documents [Exhs. 243 and 244] also.

[c] Mr. Deshpande then contended that having received her entire share in the joint properties of Heerabai and Rekchand and having acted upon the said arrangement and accepted the entire Memorandum of Partition [Exh.243] without any murmur and without assailing Exh.243 within a reasonable time or even when the first suit was filed, she was, in law, clearly estopped from claiming partition over and again having received her share and acted upon the Family Settlement [Exh.244] with full satisfaction and entirety, at least till the time she filed the suit for partition in question. Mr. Deshpande elaborated on the principle of estoppel.

[d] Learned Sr. Adv., for the appellant then contended that both the courts below have held that Exhs. 243 and 244 were not admissible in evidence for want of registration. He also submitted that there is a further erroneous finding recorded by both the courts below that relinquishment of her share by Heerabai in Exh. 243 without taking any immovable property in her name was not admissible for want of registration of Relinquishment. He contended that the courts below have erred in holding that registration for Relinquishment was necessary on the part of Heerabai

even in the cases of family settlements which is contrary to the law repeatedly laid down by the Apex Court in relation to the family settlement and arrangement in the Hindu Joint Families. Mr. Deshapnde cited several decisions on this aspect and contended that both the courts below have erred in law in treating Exhs. 243 and 244 as inadmissible documents, which is wholly wrong and illegal.

[e] The learned Sr. Adv., for the appellant then contended that there is nothing wrong in Smt. Heerabai not choosing to have any share in the immovable properties looking to her old age and her satisfaction that plaintiff, Sushila, had received the entire share from the joint family properties, to which she was entitled from the estate of Rekchand as well as Heerabai and family settlement that a son should be adopted in the family and before doing so, the estate should be properly divided in order to avoid any conflict or conundrum and complications. There was nothing wrong on her part to relinquish her share in favour of the remaining members of the family, except the plaintiff. Heerabai was pretty old and had lost interest in the properties, particularly when she herself had given some estate from her undivided share to the plaintiff Sushilabai and wanted that the remaining family should live happily with the estate properly demarcated and given to them before the entry of adopted son in the family.

[f] The learned Sr. Adv. further continued his arguments and contended that at least at the behest of the respondent-plaintiff, the Court could not examine the admissibility of the documents, though Exhs. 243 and 244 are both admissible in law and could not have been rejected for want of registration. At any rate, for collateral purpose, the documents could be read.

[g] The learned Sr. counsel for the appellant then contended that the Will as well as Lease-Deed dated 30th July, 1982 relied upon by the plaintiff were rightly rejected and there is a concurrent finding of fact in relation to the Will and Lease projected by the appellant as well as the respondent, plaintiff. The findings of facts are legal, correct and proper about the Will filed by the respondent, plaintiff.

Learned Sr. Adv. Mr. K.H. Deshapnde cited the following decisions:-

[1] Kale and others Vs. Deputy Director of Consolidation and others [(1976) 3 SCC 119],

[2] Narendra Kante Vs. Anuradha Kante and others [(2010) 2 SCC 77],

[3] Hari Shankar Singhania and others Vs. Gaur Hari Singhania and others [(2006) 4 SCC 658],

[4] Roshan Singh and others Vs. Zile Singh and others [AIR 1988 SC 881],

[5] Smt. P.N. Wankudre Vs. C.S. Wankudre and others [AIR 2002 Bombay 129],

[6] Addanki Narayanappa and another Vs. Bhaskara Krishnappa (dead) and thereafter his heirs and others [AIR 1966 SC 1300 (V 53 C 252), and

[7] Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay [(1976) 3 SCC 142].

5. Per contra, Mr. S.C. Mehadia, learned counsel for the respondent no.1, plaintiff, vehemently opposed the appeal and also invited my attention to the Cross-Objection filed by the respondent no.1, i.e., Cross-Objection No. 11 of 2016. He made the following submissions:-

[a] Referring to the Cross-Objection filed by the respondent no.1, plaintiff, Mr. Mehadia contended that the Will [Exh.202] dated 18th October, 1981, executed by Smt. Heerabai in favour of the plaintiff, has illegally been rejected by both the courts below on surmises and conjectures and contrary to the settled legal position, the Will having been proved in accordance with law. Similarly, the Lease-Deed dated 30th July, 1982 [Exh.214] should not have been ignored by the courts below and accepting both these documents, the plaintiff, Smt. Sushila, was entitled to entire undivided share of Heerabai in the joint properties, since Heerabai had become an absolute owner of her half share in the undivided properties between her stepson, Rekchand after the death of her husband, Jethmal, and also a share in the property left by Rekchand, her stepson, after his death. Mr. Mehadia took me through the findings recorded by the courts below on

the Will [Exh.202], so also the evidence, and contended that the reasons recorded by both the courts below on the Will [Exh.202] are flimsy and will have to be held to be perverse. Similar is the case with the registered Lease-Deed dated 30th July, 1982 [Exh.214] under which half share of Heerabai was leased out to Sushila, the plaintiff and the same ought to have been enforced by the courts below.

[b] Further, referring to the Cross-Objection, Mr. Mehadia contended that the respondent no.1, plaintiff, being a legal heir of Heerabai, was entitled to 1/4th share from the one-half share of Heerabai in the joint family properties.

[c] The learned counsel for the respondent no.1, plaintiff, in opposition to the Second Appeal filed by the appellants, took me through both the documents Exhs. 243 and 244. Referring to Exh.244 [Family Settlement], Mr. Mehadia contended that the respondent no.1 does rely on the said family settlement under which the respondent no.1 received share and acted upon. But then, according to Mr. Mehadia, under that Family Settlement [Exh.244], what plaintiff, Smt. Sushila, was given, was her share from the properties of Rekchand only and she was not given anything from the share of Heerabai which she absolutely had in the undivided joint family properties. Inviting my attention to the relevant clause in Exh.244, he contended that the fact that 1/8th share is being mentioned as being given to plaintiff, Sushila, supports the said submission that it was only from the estate of Rekchand, her share was carved out, but she was not given any share in the estate of Heerabai, obviously because Heerabai's share was never taken out or partitioned or determined. He then contended that even if plaintiff is accepting the Family Settlement [Exh.244], still when it comes to looking to the admissibility of the document in law, the same would not be admissible because it was not registered. The courts below, therefore, were not entitled to treat Exh.244 as a legally admissible document for that purpose. He then contended that estoppel never operates against law is the trite legal position and non-admissibility of Exh.244 in evidence cannot be made admissible with the aid of the doctrine of estoppel.

[d] The learned counsel for the respondent no.1, plaintiff, then contended with reference to Exh.243 dated 9th January, 1983, that the plaintiff never admitted the

legality or binding effect of Exh.243, nor she accepted the said Memorandum of Family Partition [Exh.243] ever while making averments in her Regular Civil Suit No. 238 of 1984. In that suit, she had only admitted the fact of the Family Settlement dated 9th January, 1983 having taken place and nothing more. Inviting my attention to the cross-examination of defendant no.1, Madankunwar, he contended that she admitted in cross-examination that in December, 1982, no partition was effected by metes and bounds and, therefore, there is a reason to hold that by document [Exh.243] dated 9th January, 1983 itself, the partition came to be recorded and in that event, the documents required registration. He then contended that Regular Civil Suit No. 238 of 1984 was limited only for removal of encroachment and nothing more and, therefore, the plaint in the said suit should not be read adverse to the interest of the plaintiff.

[e] The learned counsel for the respondent no.1, plaintiff, then contended that under the document [Exh.243] dated 9th January, 1983, Heerabai is said to have relinquished her entire share in the immovable properties, which is per se false, baseless, apart from being invalid and illegal in law. Heerabai had undivided absolute interest in the first place after the death of her husband along with her stepson, Rekchand. After the death of Rekchand, she had again a share in the half share of Rekchand, though undivided. Her half share in the estate with Rekchand, after the death of Jethmal, could never be relinquished by any document like Exh.244 or Exh.243 and the only way if she had to make relinquishment was by a registered instrument. According to him, that is what is ordained by law. Both the documents [Exhs. 243 and 244] were admittedly not registered and there cannot be any relinquishment in the estate by Heerabai without relinquishment being registered, since the question of blending a share in the property of a female Hindu does not arise. Mr. Mehadia invited my attention to the finding recorded by the Lower Appellate Court in that behalf, based on the few judgments, including the one by Patna High Court, on the question of blending, and submitted that Heerabai's share remained intact and she could not have relinquished her share without due registration and at least the law will never recognize such relinquishment.

[f] The learned counsel then continued his submissions, and contended that Section 14 of the Hindu Succession Act in clear terms provides for Heerabai's absolute right in the half estate and thereafter such a share could not be separated or merged or relinquished without a registered document of relinquishment. He then contended that at any rate the document dated 9th January, 1983 [Exh.243] was out and out fraud, misrepresentation on Heerabai, inasmuch as on the very next day she sent notices to all the persons concerned, who had, according to her, obtained her thumb impression by misleading her on Exh. 243, and had also lodged a complaint/report with the Police Station, which was duly received by the Inspector Mr. Pathank, that she was cheated. It was, therefore, difficult to accept Exh.243, since Heerabai had on the very next day denied to have made any settlement [Exh.243], which was an outcome of fraud and misrepresentation. The document [Exh.243], therefore, should be rejected., apart from the fact that the same is not admissible in evidence for want of registration, as partition itself was effected by Exh.243 and there was no earlier oral partition reduced to writing as claimed by the appellants.

[g] He then contended that it would be a misnomer to use the word relinquished or released in the present case, because the releasee must have some interest in the property and, therefore, in absence thereof, it becomes a gift which compulsorily requires registration. In support of his arguments, Mr. Mehadia then relied on the following decisions and finally urged this Court to dismiss the appeal with costs:-

[a] Smt. Pushpa Devi Vs. The Commissioner of Income Tax, New Delhi [AIR 1977 SC 2230],

[b] Rajasthan State TPT Corpn. and another Vs. Bajrang Lal [2014 AIR SCW 2058 (From : Rajasthan)],

[c] Yatin Gordhandas Dossa Vs. Supriya Shailesh Patel [2015 (5) Mh.L.J. 587],

[d] Wilma Levert Canuao and others Vs. Allan Sebastian D'souza and another [2014 (3) Mh.L.J. 1],

[e] M.B. Ramesh (D) By Lrs vs. K.M. Veeraje Urs (D) by Lrs. and others [2013 AIR SCW 2732],

[f] Mahesh Kumar (Dead) BY L.Rs vs. Vinod Kumar and others [2012 AIR SCW 2347],

[g] Nathia Bai and ors. vs. Gangaram Horal Singh and others [AIR 2010 (NOC) 353 (M.P.) (Gwalior Bench)],

[h] Hirday Narain Tandon Vs. Kashi Prasad Tandon and another [AIR 1983 Allahabad 187],

[i] Vasant Dattatraya Bopardikar Vs. Sakharam Dattraya Bopardikar and others [AIR 1983 Bombay 495],

[j] Pasagadugula Narayana Rao, S/o Rama Murty Vs. Pasagadugula Rama Murty, s/o Rama Murty [Coram M. Satyanarayan Murthy, J., Andhra High Court, A.S. No. 1685/94, decided on 21st August, 2015],

[k] Kuppuswami Chettiar Vs. A.S.P.A. Arumugam Chettiar [1966 CJ (SC) 151],

[l] Madhuri Pukharaj Baldota Vs. Omkarlal Daulatram Banwat and others [2015 (4) Mh.L.J. 327],

[m] Leela Rajagopal and others Vs. Kamala Menon Cocharan and others [2014 AIR SCW 5233 (From : Madras)],

[n] Domnic D'souza Nelson D'souza Vs. Julie D'Mello [2013 (6) Mh.L.J. 732],

[o] Subhash Hiraji Jadhav (since deceased) Mrs. Kumud Subhash Jadhav and another Vs. Padmakar Hiroo Jadhav and others [2009 (4) Mh.L.J.266],

[p] Madhukar D. Shende Vs. Tarabai Aba Shedage [AIR 2002 SC 637],

[q] Mani Ram Vs. Padma Datta (D) by LRs. and another [AIR 2007 Uttarakhand 74],

[r] Mallesappa Bandeppa Desai and another Vs. Desai Mallappa alias Malesappa and another [AIR 1961 SC 1268], and

[s] Mt. Murti Goalin Vs. Ram Briksha Gope and others [AIR 1959 Patna 466 (vol.46, C. 127)].

CONSIDERATION :

6. This appeal was taken up for final hearing in view of the early hearing application filed by the appellants, namely Civil Application No. 860 of 2015, and all the counsel appearing for the parties had given consent for final hearing of the appeal, because the appellant no.1 is said to be a Senior Citizen of the age of 94 years and, therefore, all the parties wanted a decision from this Court, one way or the other. This Court accordingly acceded to the request of the counsel for both the parties and fixed it for final hearing.

7. Heard learned counsel for the rival parties at length. Perused the entire record, pleadings, oral as well as documentary evidence, so also the reasons recorded by both the courts below.

8. This Court on 3rd March, 2015 framed the following two Substantial Questions of Law:-

1. Whether the first appellate Court was justified in reversing the decree passed by the trial Court?
2. Whether the first appellate Court erred in discarding the family arrangement at Exh. 244 on the ground that same was not registered?

Thereafter, on 13th October, 2015, the following two Substantial Questions of Law were framed:-

1. Whether the respondent No.1/plaintiff being the legal heir of Hirabai is entitled for 1/4th share from the share of Hirabai in the joint family properties of Parakh family?

2. Whether the lower Appellate Court is justified in rejecting the family settlement dated 20-11-1982 in absence of proper pleadings and evidence?

9. After hearing the learned counsel for the rival parties, I recast and re-frame the Substantial Questions of Law, which arise for consideration as under:-

1.	Whether the findings of facts recorded by both the courts below for rejecting the Will [Exh.202] dated 18th October, 1981 and not accepting the Lease-Deed [Exh.214] dated 31st July, 1982, both projected by the plaintiff, and the Will [Exh.232] dated 26th May, 1982 projected by the defendants, are perverse?	No.
2.	Whether the plaintiff having accepted, admitted and acted upon the Family Settlement dated 20th January, 1982 [Exh.244] would be estopped by conduct in setting up a challenge to the same Family Settlement [Exh.244] as not receivable in evidence for want of registration?	Yes.

3.	Whether the plaintiff did not receive any share from the share of Heerabai under the Family Settlement dated 20 th January, 1982 [Exh.244] and consequently whether she was entitled to claim partition in the undivided estate of Heerabai?	Plaintiff received her share from the share of Heerabai and hence was not entitled to claim partition.
4.	Whether the Family Settlement dated 20 th January, 1982 [Exh.244] and oral partition reduced to Memorandum Fard dated 9 th January, 1983 [Exh.243] require compulsory registration under Section 17 of the Registration Act?	No.
5.	What order?	Second Appeal is allowed . Cross-objection is dismissed .

10. **As to Question No.1:-** Both the courts below rejected both the Will [Exhs.202 and 232] projected by both plaintiff as well as defendants. Both the courts did not consider the Lease-Deed dated 31st July, 1982 [Exh.214] in the suit for partition. At the outset, in so far as Lease-Deed [Exh.214] is concerned, the courts below were right in rejecting or ignoring the same in a suit for partition and separate possession, as the Lease-Deed had no semblance of any right while adjudicating the suit for partition. There is one more important reason for ignoring the Lease-Deed [Exh.214], inasmuch as in para 9 of the Family Settlement [Exh.244], signed by the plaintiff, Smt. Sushila, following is the recital:-

9. The Party No.1 having received the estates as per the present Family Settlement, the registered Lease-Deed dated 30th July, 1982 and the rights thereunder given by Party No.3 shall stand completely cancelled automatically.

I, therefore, hold that the courts below did not make any error in ignoring the Lease-Deed [Exh.214].

11. Mr. S.C. Mehadia, the learned counsel for respondent no.1, plaintiff, invited my attention to the grounds of Cross-Objection and I have gone through the same. As to the Will [Exh.202], Mr. Mehadia on facts raised several points also having taken me through the evidence of the witnesses. He also took me through the reasons recorded by the courts below. Similarly, as to the Will [Exh.232], projected by the defendants, I have gone through the reasons recorded by both the Courts to find out whether there is any perversity, comparing with the evidence on record. In the first place, it would be appropriate to quote relevant portions of paras 13, 17 and entire para 22 in the Judgment of Trial Court, which contain the reasons recorded by the Trial Judge for rejecting both the documents. The same read as follows:-

13. As to Issues Nos. 3 and 9 :-

.....The copy of the said will is filed by him on record at Exh.202. He was cross-examined by the defendants. He, in his cross-examination has admitted that Hirabai was uneducated and could not read or write. The R.C.S. No. 238/84 was filed by the plaintiff against the defendant nos. 1 and 4 on 13-8-84 for mandatory and permanent injunction on the basis of family settlement deed Exh.244 dated 20-11-82. Admittedly, will dated 18-10-81 is prior to it. P.W. 1 Shri G.C. Katariya, in his cross-examination has admitted that there is no mention of will in R.C.S. No. 238/84. Even no reliance is placed by the plaintiff on the said document in R.C.S. No. 238/84. The counsel for the plaintiff Shri R.M. Bhagwat, Adv., has argued that the said R.C.S. No. 238/84 was for mandatory and permanent injunction and no relief was sought on the basis of the said document. Hence, the will was not referred in the said suit. The explanation furnished by the plaintiff is not satisfactory, as admittedly the said suit was filed for removal of encroachment on the basis of title. Admittedly, the will if proved is the document of title. Hence, the

will if was in existence on the date of filing of the suit was required to be disclosed at the time of filing the said suit. It is one of the suspicious circumstances, which the plaintiff has failed to prove. Similarly, the lease deed Exh.214 executed on 31-7-82 in favour of the plaintiff by deceased Hirabai makes no mention of will dated 18.10.81. PW 1 himself has admitted this fact in his cross-examination. There was no reason for Hirabai to execute the lease deed Exh.214 in favour of plaintiff and collect leased amount from the plaintiff if she had already executed the will in favour of the plaintiff. Even family settlement deed [Exh.244] dated 20.11.82 and partition deed Exh.243 dated 9.1.83, wherein, Hirabai is also one of the party and signatory, makes no mention of executing family settlement deed and partition deed, if the property is already bequeathed by Hirabai in favour of the plaintiff. PW 1, in his cross-examination, has admitted that there is no mention of execution of will Exh.202 in any other document except in the plaint. Besides this, the plaintiff has alleged that there is another will Exh.404 executed by Hirabai in favour of the plaintiff Sushilabai. Interestingly, the said will is undated. Interestingly, if the said will Exh.404 executed by Hirabai in favour of the plaintiff Sushilabai. Interestingly, the said will is undated. Interestingly, if the said will Exh.404 was already in existence in favour of the plaintiff, then, there was no question of executing another will Exh.202 in favour of the plaintiff again by Hirabai. Similarly, if the will Exh.202 was already in existence, then, there was no question of executing a will Exh.404 in favour of the same person again. This is also one of the suspicious circumstance, which the plaintiff has failed to explain.

17.

.....PW 2 has deposed contrary to the human nature. It cannot be expected from any man or woman to call the person with whom he or she has even no formal acquaintance. Hence, it is presumed that PW 2 for executing a will. Even if it is presumed that PW 2 was called by Hirabai for executing a will, then, it is expected from PW 2 to know and identify Hirabai, as he is alleged to have met Hirabai initially at the time of issuing notice, then at the time of taking the instructions for preparing the will and then for execution and attestation of the will. Even thereafter, he is said to have gone to Shri G.C. Katariya from time to time, even then, the PW 2 has failed to identify the photographs of Hirabai when shown

to him in his cross-examination. There were two photographs Article A and E of Hirabai amongst the photographs of other women shown to the PW 2. He failed to identify either of the photographs Article A and E. This creates suspicion about his being attesting witness. The counsel for the plaintiff Shri R.M. Bhagwat, Adv., has argued that Hirabai was maintain Parda system, Hence, PW 2 cannot be expected to identify the photographs of Hirabai. The aforesaid argument of Shri R.M. Bhagwat, Adv., cannot be accepted, as the PW 2 has nowhere deposed that they would not identify Hirabai, as she was maintaining Parda system. The plaintiff has failed remove this suspicious circumstance. The entire property of Hirabai is alleged to have been bequeathed by Hirabai in favour of Sushilabai the plaintiff, though, there are other legal heirs also with whom, Hirabai had not any strained relations. ..

22. The will in the instant case constitutes the plaintiff as a sole legate with no right whatever to the other heirs. It casts a serious doubt about the genuineness of the will. The will was executed on 18.10.1981 and was disclosed for the first time in the year 1987 at the time of filing the present suit. Thus, the will has not been produced by the plaintiff for many years before the Court or public authorities even though, there were occasions to produce it for ascertaining the plaintiff's title to the property. The plaintiff was required to remove this suspicious circumstance by placing satisfactory material on record. He has failed to discharge her duties. Hence, the will was not genuine and proper.

As to the Will [Exh.312] dated 26th May, 1983 propounded by DW 1 Smt. Madankunwar, the Trial Court recorded the reasons in para 23 of its judgment, the relevant initial portion of which is quoted below:-

23. Interestingly, DW 1 Sau. Madankunwar has also deposed about this execution of will Exh.312 dated 26.5.83 in her favour. She has deposed that on 26-5-83, Dhanpatlal Baid wrote the will in Hindi on the say of Hirabai in her presence and in presence of Ravindrakumar Baid and Pannalal. It was explained to Hirabai in Marwadi. Thereafter, Hirabai put her thumb impression on the will and Pannalal and Ravindrakumar Baid signed on it. She was cross-examined by the plaintiff. She, in her cross-examination, has admitted that the portion marked-A dated

31.12.1982 in Exh.312 is scored and 9.1.1983 is written. No reason is assigned why it is scored and different date is mentioned. DW 1 in her cross-examination has admitted that she was knowing the property of Hirabai. Hence, she asked Dhanpatlal not to write the property bequeathed. Interestingly, the will was to be executed as per the instructions of Hirabai. But the instruction is said to be given by the defendant no.1 Madankunwar. Even both the attesting witnesses are interested witnesses. D.W. 1 herself has admitted that immovable property is not given to her and defendant no.4 by Hirabai vide Exh.312. DW 2 Dhanpatlal is the attesting witness. He has deposed that Hirabai told the contents of the will in Marwadi, which he wrote in Hindi and explained the same in Marwadi to Hirabai. Pannalal and Ravindrakumar Baid signed it as witnesses. He, in his cross-examination, has deposed that Hirabai did not allot any immovable property to the defendant no.1 by will Exh.312. No description of ornaments was given by Hirabai. He has further admitted that the defendant no.1 has influenced over him, as she is her sister. Hence, the possibility of his acting as per the whims of defendant no.1 cannot be ruled out. DW 3 Ravindrakumar is second attesting witness of the will Exh.312. He has deposed about the mode and manner in which the will Exh.312 was executed. He has deposed that the date 31-12-82 was corrected to 9-1-83 on the say of Hirabai. He, in his cross-examination has deposed that Exh.312 is word to word translation of the script told by Hirabai in Marwadi. If it was so, then there was no question of writing 31-12-82 instead of 9-1-83 by DW 2 Dhanpatlal. He has deposed that Hirabai did not tell Dhanpatlal to mention about the partition. Interestingly, there is a mention of partition in the will Exh.312. This itself shows that the will was not prepared as per the instructions of Hirabai. DW 3 has further deposed that Dhanpatlal did not note anything in writing, which was told by Hirabai and he will Exh.312 was written by memory. The deposition of DW 1, DW 2 and DW 3 in respect of the property bequeathed is contrary to the will Exh.312, which shows the bequeathing of movable and immovable properties. But, DW 2 and 3 have admitted that no immovable property was bequeathed to the defendant no.1 vide will Exh.312. Hence, it is highly unsafe to rely upon the will Exh.312 as a last will of deceased Hirabai. ..

The learned Lower Appellate Court also rejected both the Will while answering Point Nos. 1 and 2. It recorded the reasons in paras 9, 12 and 13 of the Judgment

for doing so. The relevant portion of Para 9, and paras 12 and 13 are quoted below:-

9.

.....The evidence of PW 1 Gyanchand shows that he is practicing advocate. He was also Additional Govt. Pleader. So all these facts show that PW 1 Gyanchand is well aware about the law. PW 2 Shriram Shaineshchandra was also practicing advocate and he was also District Govt. Pleader during the period when PW 1 Gyanchand was Additional Govt. Pleader. The record shows that PW 1 Gyanchand claimed that he and plaintiff were present when deceased Hirabai executed Will [Exh. 202] in their favour. But surprisingly Will [Exh.202] did not bear any endorsement that either PW 1 Gyanchand or plaintiff was present at the time of execution of the said Will.

12. The defendants have come with the case that deceased Hirabai had executed last Will in their favour vide Exh. No. 312. According to the evidence of DW 2 Dhanpatlal Baid, he had scribed the Will [Exh. No. 312] on the say of deceased Hirbai. He had read over and explained the said Will to Hirabai in Marwari language and thereafter she put her thumb impression on the said Will. D.W. 3 Ravindrakumar Baid is attesting witness on the Will [Exh. No. 312]. He testified that in his presence the contents of Will were read over and explained to Hirabai. Thereafter, Hirabai put her thumb impression on the Will. He signed the Will [Exh. No. 312] as attesting witness.

13. There is another Will vide Exh. No. 404. This Will is undated. This Will is type written and made in favour of the plaintiff. It shows that D.W. 2 Dhanpatlal Baid had signed the said Will [Exh. No. 404] as attesting witness. Even during the course of evidence, D.W. 2 Dhanpatlal Baid admitted his signature on the Will [Exh. No. 404], but surprisingly none of the party tendered any explanation as to why Exh. No. 404 was executed and when it was executed and how D.W. 2 Dhanpatlal Baid signed the same as attesting witness.

Thus, the courts below rejected both the Will propounded by both the parties.

12. In order to consider the submissions made by Mr. Mehadia on these findings about Will, I have carefully seen the entire evidence to find out whether the view taken by both the courts is perverse. I have perused the Will [Exh.202] carefully. The Will runs into full three pages typed by the typist and Smt. Heerabai is said to have put her thumb impression at the end of the Will. Thereafter, the attesting witnesses have signed. The entire document [Exh.202] is written in Marathi of a superior quality. Shriram [PW 2], the attesting witness on Exh.202 in para 3 of his evidence, stated that the drafted Will was read over to Heerabai and she was asked whether she understood the contents as they were in Marathi language. She replied in the affirmative, and stated that she understood the Marathi language. He further stated that Heerabai was also intermittently talking in Marathi. It is an admitted fact that Heerabai was an illiterate lady. She understood only Marwari language. She was required to be explained the contents of a document in Hindi into Marwari language. I have underscored the observations about deposition of DW 2 Dhanpatlal and DW 3 Ravindrakumar made by the Trial Court in para 23 [see earlier para 11], which shows that except Marwadi language, Hirabai hardly understood any other language, much less Marathi. Though DWs 2 and 3 are the witnesses of the Defendant No.1, fact remains that this part of evidence on this aspect has gone unchallenged. It is, therefore, highly improbable that upon reading the Will [Exh.202] running into three long pages with a superior Marathi language not commonly talked in Chandrapur, that Heerabai would have understood without Marathi being translated either into Hindi or Marwari language. This, in my opinion, is the additional reason, inter alia the reasons recorded by the courts below, why they were right in not accepting the Will. The Question No.1 is, therefore, answered in negative.

13. As to Question Nos.2 and 3 :- It would be necessary to have a careful look at the document [Exh.244] in the first place. The English translation of the relevant portion of that document reads thus:-

Family Arrangement Document

Party No.1 : Sau. Sushilkunwar [Plaintiff].

Party No.2 : Smt. Madankunwar [defendant no.1].

Party No.3 : Smt. Heerabai [dead].

Party No.4 : Sau. Shardakunwar| [Defendant Nos. 2 and 3]

Party No.5 : Sau. Shantakunwar|

The stepson, Shri Rekhchandji Jethmalji Parakh, died two years before, leaving behind widow, Smt. Madankunwar, and three daughters. Smt. Jatanbai, the aunt of Rekhchand, was issueless and died fifteen days before. When Rekhchand died, he was a member of Joint Hindu Family and the Parakh Family has joint immovable properties. There is no partition made. Party No.2, Smt. Madankunwar [defendant no.2], widow of Rekhchand, and all others have a desire to adopt a son for continuation of family; but in the absence of any partition in the family, before taking adoption, all the disputes and misunderstandings for the benefit of all the parties and as per the advice of the relatives and for the benefit of Party No.2, with their desire, the following Family Arrangement is being made in respect of the joint estate, on the terms and conditions stated below:-

[1] Party No.1 Sau. Sushilakunwar wife of Gyanchand Kataria has 1/8th share in the joint family estate. Out of the entire share, she is allotted the following estate to her share, of which she would become full owner and would be able to enjoy her estate:-

..[Details of estate].....

[2] ..

[3] ..

[4] In the share of estate allotted to Party No.1 by this arrangement, in some portion of the house property, Shri Kamalsingh Kachchwa, M/s. Balaji Ramkunwar, Dehli Cloth Bhandar and M/s. Devidas Stores are the tenants. Henceforth, from January, 1983, Party No.1, Smt. Sushila [plaintiff], as the landlord, would be entitled to recover the rent from them and accordingly tenancy should be attorned.

[5] Party No.1 should mutate her name in the relevant Nazul or other revenue records in respect of the share allotted to her as under for which Party Nos. 2 to 5

will give their signatures, and all shall be done by her at her cost.

[6] Party No.3, Heerabai, has given her express consent to Party No.2 [defendant no.1] to adopt a son for continuation of Parakh Family and has also given some share out of her half share to Party No.1. In lieu of the same, Party Nos.2,4 and 5 have decided to give Rs. 100-00 each, i.e., Rs. 300-00 for maintenance of Party No.3 and accordingly Party Nos. 2,4 and 5 shall pay Rs. 500/- per month to Party No.3, Heerabai.

[7] ..

[8] In lieu of immovable properties received by Party No.1, Smt. Sushilakunwar, as per this Family Arrangement, Party No.1 today is giving up/losing all her rights in other remaining properties than the one given to Party No.1 under this Family Arrangement.

14. Having extracted important and relevant portions from Exh.244, now it is necessary to go to the document [Exh.243], which is titled as Memorandum of Division , the relevant portions whereof, which are translated into English, read thus:-

[1] ..

[2] Rekhchandji Jethmalji Parakh died two years before leaving behind Party No.1, Madankunwar [defendant no.1], Party No.2 stepmother, Smt. Heerabai, and Party Nos. 3 and 4, the daughters. Thereafter, Smt. Jatanbai, the aunt of Rekhchandji, died one-and-half-month before. When Rekhchandji died, he was a member of Hindu Joint Family with joint family estate of Parakh Family. After the death of Rekhchandji, Party Nos. 1 to 4 and Smt. Sushila Gyanchand Kataria were the only legal heirs to the estate, which has not been partitioned. However, on 20th November, 1982, a Family Arrangement [Exh. 244] was arrived at, under which Sushila Gyanchand Kataria, the daughter of Party No.1, was given the immovable property estates known as Parakh Niwas , Sarang etc.

[2] On 31st December, 1982, except the above estate described [that is given to Sushila], the remaining immovable and movable properties were orally partitioned

amongst Party Nos. 1 to 4 in the presence of the following four Panchas after having made measurements and putting demarcation so also the maps were prepared. After the oral partition was made as above, Party Nos.1 to 4 were given possession of their respective properties falling to their shares which they took, and having done that, they became owners of the properties falling to their respective shares. In order to remember and have some note of the oral partition as made above and the allotment of share to each heir, the present Memorandum of Division Fard is being written by way of Note.

[Note : Allotment of shares to Party Nos. 1 to 4 are narrated.

Party No.2, Heerabai, has also been allotted the movable property in this partition.

Party No.2, Heerabai, Shri Rekhchand Parakh did not have any son or brother and in order to have a son in the Parakh family, adoption was required to be made. But then, before taking a child in adoption, it was necessary to have the estate divided by partition and misrepresentation removed. As per the relatives and well wishers' advices, Sau. Sushila Gyanchand Kataria was given share from the entire joint estate, including the share from the property falling to the share of Party No.2, Heerabai. In lieu of Party No.2 giving the share to Sushilabai from her share, an amount of Rs. 300/- per month was agreed to be paid by other parties. It is for all these reasons, Party No.2, who is aged about eighty years, has agreed for peaceful adoption to be made in the family with a view to have continuation of the Parakh Family and Party No.2 having, thus, been satisfied, agreed to the oral partition. Party No.2 has not been given any immovable property to her, but has been given the following movable properties, and has become owner thereof:-

..[Description of properties]....

As per the above oral partition, Party Nos. 1 to 4 shall mutate their names in the respective Govt. records and Municipality.

Dt : 9-1-1983. Party No. 1

Party No. 2

Party No. 3

Party No. 4

Panchas 1 and 2

Heerabai, Party No.2, has put her thumb impression on this document at Sr. No.2 in the presence of witnesses and Panchas.

15. It is equally important now in the light of the above documents to have a look at the averments in the plaint. [Exh.203] is the plaint filed by plaintiff Smt. Sushila in Regular Civil Suit No. 238 of 2004 for mandatory and permanent injunction. The paragraphs required to be quoted read as under:-

2. After the death of Rekhchandji, the defendant no.2 desires to take a body in adoption. In order to facilitate the adoption, the heirs of Shri Rekhchandji with the meditation of well wishers agreed that the plaintiff will be given some property as her legal share of her legal claim. Accordingly on or about 20.11.1982 the following properties was given exclusively to the plaintiff.`

All those buildings known as Parakh Niwas situated on Plot Nos. 15/1, 16/2, 17, 18..... 27 and 109 in Block No. 29, Sheet No. 8 of Nazul Mohalla Bhanapeth Ward (Except the building on the Northern side known as Sarang , and open land in front of Sarang together about 4000 sq. ft.) having boundaries as under:-

To the East .. Mahatma Gandhi Road.

To the West .. House of Dr. Mude.

To the North .. Open space and Sarang

Building and Dr. Mude's building beyond.

To the South .. Public land, Liberty Shop and other private shops. There are tenants in some parts of the building given the rent to the plaintiff as the plaintiff has been residing the Northern portion. It was agreed by the plaintiff to allow the defendant no.1 to occupy and use exclusively one bathroom and the room

adjacent to it known as Chhatrawas having dimensions of approximately 25 ft. x 25 ft., for her life time. It is submitted that at the time of this arrangement, no measurements were made.

4. That as agreed the plaintiff became the exclusive owner of the property described in para 2 above and the tenants have attorned to her and she is recovering the rents from January, 1983, as agreed. The other shares of the joint properties also have effected a partition between themselves of the remaining joint properties on or about 9.1.1983. ..

5.It is also submitted that this construction will completely block the air and light to the Verandah and the room on the southern side of the verandah. Noticing this illegal and unauthorised act the plaintiff by telegraphic notice requested the defendants to desist from their illegal acts and remove the centering extended to Southern side beyond the open space in front of Sarang , allotted by the agreement dtd. 20.11.1982.

12. That Shri Gyanchand Katariya the husband of the plaintiff is well conversant and having first hand knowledge of all the facts and circumstances described in the above paras.

Dtd: 16-8-1984 Plaintiff

Chandrapur

Counsel for the Plaintiff.

Verification

I, G.C. Katariya, husband of the plaintiff, do hereby declare that the contents are true to my personal knowledge and hence verified and signed at Chandrapur on 13.8.1984.

Plaintiff.

In response to the plaint [Exh.204], Written Statement was filed by the defendants. Reply to Para 2 is as under:-

Reply to Para 2 of the plaint

2. The statement of facts in para 2 of the plaint are admitted for the purposes of this suit except the last statement that no measurements were made at the time of the arrangement mentioned in this para. It is submitted that approximate measurement of the area were taken into consideration at the time of arriving of this arrangement.

This plaint was filed in the Court on 16th August, 1984 and as seen from the averments above, the respondent no.1, plaintiff, herself described that she became the owner of the properties allotted to her by virtue of the Family Arrangement [Exh.244]. It is very important to note the statement in para 4 above which is underscored. Thus, Gyanchand Kataria verified this plaint for his wife, Sushilabai and Sushilabai did not have even a wild imagination that Sushila did not get a share in and from the estate left by Heerabai in the joint properties. On the contrary, the plaint, if read carefully, shows that there is a crystal clear indication that the Family Arrangement [Exh.244] as well as the next document of Oral Partition reduced to writing [Exh.243] was fully accepted by Sushilabai and acted upon and she fully understood that except for the properties given to her under Exh.244, the remaining properties in the joint family of Parakh, including Hirabai's, were duly distributed by partition under the Memorandum of Fard [Exh.243]. Had the plaintiff Sushila any grievance of she not getting any share in the remaining estate, at least from the share of Heerabai, in the joint family properties of Parakh, her husband Gyanchand Katariya, who verified the plaint and who is an Advocate, would not have failed to make a murmur about it in the entire plaint, instead of simply making a reference about the Memorandum of Oral Partition [Exh. 243]. In other words, the plaintiff had fully accepted the position of she receiving whatever was due in the joint estate of the family and including Heerabai and no estate remained to be received by her as a share, including the properties that would have undividedly been held by Heerabai. It is important to note that till the suit, in question, was filed in the year 1987, no such grievance

was made even by amending the plaint [Exh.203] or by making any grievance anywhere. The submission that mention about plaintiff's any 1/8th share in the entire estate cannot turnaround the position upon reading of Exh. 244 in full and in totality does not have any legal foundation.

16. It is then important to note that after execution of Exh.243 dated 9th January, 1983, the plaintiff claimed that Heerabai, who had put her thumb impression on Exh.243, had given notices in consultation with Shri Gyanchand Kataria to the Panchas, alleging misrepresentation, fraud etc., with a copy thereof to the Police Station. In that behalf, it is important to state that it is an admitted fact that all those notices given on 10th January, 1983 to various persons were actually given by Shri Gyanchand Kataria. He also got her affidavit [Exh.221] sworn before the Executive Magistrate. This is clear from his evidence in paragraph 13 of his Examination-in-Chief, the relevant portion of which reads thus:-

13.I have produced on record xerox copy of the affidavit of Hirabai dated 10th January, 1983. I have brought along with me the original affidavit. I am now shown the original affidavit, it bears the thumb impression of Hirabai. It is at Exh.221. I have filed on record the copy of letter dtd. 10.1.1983 issued by Hirabai to nine persons. Copy of this letter was also given to the police station. I am filing on record the original letter dtd. 10.1.83, it bears thumb impression of Hirabai. I can identify the same. It also bears my own signature as scribe as a person who obtained the thumb impression of Hirabai. Original letter is at Exh.222. It bears the endorsement of one Shri Pathak. At the relevant time Shri Pathak was P.S.O., of City Police Station, Chandrapur. ..

The evidence about getting Heerabai's affidavit [Exh.221] sworn before the Executive Magistrate contains in paras 18 and 19 of the cross-examination of PW 1 Gyanchand. The relevant portion of Para 18 and entire para 19 read thus:-

18.

.....I have produced Exh.222 after 12 years of filing the suit as the copy was already filed. I am now shown the document at Exh.222. I do not know whether copies were sent to all the persons mentioned in Exh.222. I had personally gone to

P.S. to give the copy. At that time I was not holding power of attorney for Hirabai. Hirabai had not come along with me to Police Station. Plaintiff Sushilabai had also not come along with me. I know all the persons mentioned in Exh.222. Except Tarachandji, all the persons mentioned in Exh. 222 are alive. I had not myself gone for sending the notices by registered post. I cannot tell as to who had gone for registration. It is not true to say that Hirabai was residing along with me and plaintiff at the time of issuing notice Exh.222. I do not know whether at that time Adv. Shanaishchandra was advocate of Hirabai. Now says, he was the Advocate of Hirabai. I do not know whether during her time Hirabai has not taken any action against deft. no.1 to 3, as stated in Ex.222. Tarachand Khajanchi had given reply to the notice Exh.222. Volunteers, I am stating, this from the papers available. I am now shown one reply dtd. 14/15th January, 1983. I cannot tell whether this is the reply which is at Exh.241. It is true that the relations plft. Sushilabai with all the persons mentioned in Exh.222 are good. It is true that plft. Sushilabai was also having good relations with Tarachand Khajanchi. Plft. Sushilabai cannot tell whether the reply was sent by Tarachandji Khajanchi. I and plft. did not try to trace out the reply given by Tarachand Khajanchi.

19. I am now shown the document at Exh.222 as well as Article-C. It is not possible that both these documents were typed on one day. It is true that the original of Article-C is not produced on record. I do not know whether thumb impression Exh.222 and Article-C were taken on the same day. I say that Exh.222 is the original and copies of the same were not sent to the addressee mentioned in Exh.222. At this, stage document at Article-C is marked at Exh.242. It is not true to say that the thumb impression of Exh.242 has been taken by me. It also does not bear my name as having obtained the same. I had received the typed copy of Exh.222. I cannot tell as to who had typed the same. I cannot tell as to who had written the contents. Nanayya, servant had brought the same to me. It is not true to say that Hirabai had not asked me to submit the application to police station. Volunteers, after receiving the letter, I enquired from Hirabai, obtained thumb impression and then handed over the same to police station. It is true that I have not sent the copies of Exh.222 by Regd. Post. I have no knowledge as to who had sent the same. I have no knowledge whether Sushilabai plaintiff had sent the same. I am not shown the document at Exh.203. It is a suit filed by present plft.,

against deft. no. 1 and 4. I do not remember who was the Advocate for plaintiff as the document Exh.203 does not bears his signature. It is true that I have myself verified the contents personally at Exh.203, in the original plaint. I again says, that I have verified Exh.203 to my personal knowledge. I am now shown copy of partition deed along with Exh.203. I do not remember whether I have produced the copy of the partition deed. I am now shown the copy of plaint at Exh.203, para-II. I have mentioned the documents in the plaint, but I do not remember whether it was filed or not. I cannot tell whether there is possibility of my having filed the same. It is true that I have not made a false statement as mentioned in paragraph-II. I am now shown para 4 of Exh.203, contents there in are correct and true. It is true that there is mentioned of partition deed dtd. 9.1.83 in Exh.222. It is true that there is also mentioned in Exh.242 of partition deed. It is true that there is no mentioned regarding the contents pertaining to partition deed 9.1.83 in Exh.203, as the that suit was concerned with only plaintiffs property and not that of others property. I have seen the partition deed dtd. 9.1.83. I was aware that Hirabai had taken objection at the time when plaintiff filed the suit to the partition deed dtd. 9.1.83. I am now shown the document dtd. 9.1.83. It is the same memorandum of partition. It is at Exh.243. I cannot tell whether the document at Exh.243 is the copy of the partition deed filed in Reg. C.S. No. 238/84. It is true to say that in R.C.S. No. 238/84 Hirabai had not taken any objection about the partition deed dtd. 9.1.83. It is not true to say that no objection was taken as document at Exh.222 was prepared subsequently, after 10.1.83. Hirabai was not alive when the suit bearing R.C.S. No. 238/84 has been filed. It is true that in R.C.S. No. 238/84 no mentioned is made regarding the Will executed by Hirabai. I cannot tell as to who had obtained the thumb impression of Hirabai on Exh.242.

17. A careful reading of the entire evidence of PW 1 Gyanchand shows that he is highly interested person being the husband of the plaintiff, who was instrumental in first obtaining the Family Settlement [Exh.244], getting the entire share of his wife and then when he found that there was an encroachment according to him, he filed the suit. An attempt was made to show that Exh. 243 [Partition Fard] was fraudulently obtained from Heerabai and, therefore, on 10th January, 1983 itself, the notices were sent. But then it clearly appears from his evidence that Heerabai did not appear to have done all that and the entire exercise, as is clear from the

above evidence, was done by PW 1 Gyanchand himself to show that Exh.243 was not obtained from Heerabai fraudulently. There is another angle for looking at his evidence. First Will dated 18th October, 1981 [Exh.202] was brought into existence. Thereafter, registered Lease-Deed dated 30th July, 1982 [Exh.214] was brought into existence and not having been satisfied therewith, one more Will [Exh.404] was again brought into existence. This entire exercise has been found by the courts below to be a highly suspicious circumstance in order to somehow get the property having realized that the adopted son would be the king of those remaining properties. When plaintiff was given all that she was entitled to, it did not behove of well for her to ignite spark of avoidable litigation. For these reasons, therefore, it is not possible to accept the contention raised by Mr. Mehadia that the plaintiff did not receive any share from the share of Heerabai under Family Settlement [Exh.244], or that she received only her share from the share of her father. It is not possible to agree with Mr. Mehadia that plaintiff would not be estopped from claiming her share in the share of Heerabai. There can be no dispute that estoppel cannot operate against law. But then, as discussed above, the plaintiff, Sushila, received her share in the estate of Rekhchand and also her share from the estate of her grand-mother, Heerabai. Not only that, because Heerabai had given Sushila, the plaintiff, from her share in the joint family properties, all other parties agreed to give Rs.300/- per month for maintenance of Heerabai, as narrated in Exh.244. It is important to note that Exh.244, which is an admitted document of Family Settlement, must be put on a very high pedestal as a document having a very high probative value. The recitals in this document are as significant as they could be. After the death of Rekchand, there was no male member in the family and Heerabai had along with other relatives full desire that Parakh Family must continue, which was not possible in the absence of adoption of a male child. Since it was the desire of Heerabai and others and rightly so and she being of the age of eighty years with no greed in the immovable properties, was obviously interested only in having an adopted son in the family of Parakh. After all, Sushila, the plaintiff, was also a grand-daughter, so also other daughters and there was no other go, except to adopt a male child. Recitals further show that it was necessary to have equitable division of the property before making adoption, as, otherwise, there could be riddles in the way of process of adoption

and the adopted son. Therefore, even if in this connection the Memorandum Fard [Exh.243] is not given importance, the document Family Settlement [Exh. 244] with the above recitals and the events and happenings depict a clear picture about the plaintiff because of her husband, Gyanchand, Adv., wanting her entire share before the entry of an adopted son into the family and Heerabai was fully interested in continuing the Parakh Family by having an adopted son in the family.

18. Section 115 of the Evidence Act speaks of estoppel. The doctrine embodied in this Section is not a rule of equity, but is a rule of evidence formulated and applied in the courts of law. It precludes a person from denying the truth of some statement previously made by himself. When a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. This is estoppel by conduct. The above discussion, to my mind, must lead to the only inference that the plaintiff, Sushila, by her conduct must be held to be fully estopped from putting to challenge the Family Arrangements by both Exhs. 244 and 243. She had in clear terms under Exh.244 taken the undivided share from Heerabai's estate, and had categorically given up any right in the remaining estate of Rekhchand and Heerabai, to which all other legal heirs, except the plaintiff, Sushila, were entitled to succeed and that remaining estate was thereafter divided by Exh.243. To sum up, Question No.2 will have to be answered in the affirmative and Question No.3 will have to be answered by saying that plaintiff received her share from the undivided estate of Heerabai under Exh.244, and was not entitled to claim any partition in the estate of Heerabai.

19. As to Question No.4 :- Having held that the plaintiff was estopped from putting to challenge Exh.244 on the ground of non-registration, still this question needs to be decided. In the case of **Kale and others Vs. Deputy Director of Consolidation and others** [(1976) 3 SCC 119], the Apex Court [Three-Judge Bench] held thus:-

9. Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise *Kerr on Fraud* at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus;

The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend.

The object of the arrangement is to protect the family from long-drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administering of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a *spes successionis* so that future disputes are sealed for ever and the family instead of

fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. 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. The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations regarding the essentials of the family settlement and the principles governing the existence of the same are made:

A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections- to the binding effect of family arrangements".

10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence:

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made **under the document** and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17 (2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement.

Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) 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.

24. This Court has also clearly laid down that a family arrangement being binding on the parties to the arrangement clearly operates as an estoppel so as to

preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same. We shall deal with this point a little later when we consider the arguments of the respondents on the question of the estoppel. In the light of the decisions indicated above, we shall now try to apply the principles laid down by this Court and the other Courts to the facts of the present case.

44. In view of our finding that the family settlement did not contravene any provision of the law but was a legally valid and binding settlement in accordance with the law, the view of Respondent No. 1 that it was against the provisions of the law was clearly wrong on a point of law and could not be sustained. Similarly, the view of the High Court that the compromise required registration was also wrong in view of the clear fact that the mutation petition filed before the Assistant Commissioner did not embody the terms of the family arrangement but was merely in the nature of a memorandum meant for the information of the Court. The High Court further erred in law in not giving effect to the doctrine of estoppel which is always applied whenever any party to the valid family settlement tries to assail it. The High Court further erred in not considering the fact that even if the family arrangement was not registered it could be used for a collateral purpose, namely, for the purpose of showing the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose of applying the rule of estoppel which followed from the conduct of the parties who having taken benefit under the settlement keep their mouths shut for full seven years and later try to resile from the settlement.

..

46.

SARKARIA J. (concurring) - I am at one with my learned Brother that this appeal should be allowed with no order as to costs and that the order dated January 22, 1965 of Respondent No. 1 quashed, the order dated November 28, 1964 of the Settlement Officer restored, and the revenue authorities directed to attest the mutation in accordance with the antecedent family arrangement which had been orally arrived at between the parties and acted upon for several years. I further agree that the family settlement arrived at by the parties was oral, and the petition

filed by them on August 7, 1956 before the Assistant Commissioner, was merely an information of an already completed oral transaction. In other words, the petition was only an intimation to the revenue court or authority that the matters in dispute between the parties had been settled amicably between the members of the family, and no longer required determination and that the mutation be effected in accordance with that antecedent family settlement. Since the petition did not itself create or declare any rights in immovable property of the value of Rs. 100 or upwards, it was not hit by Section 17 (1) (b) of the Registration Act, and, as such was not compulsorily registrable. ..

In **Hari Shankar Singhania and others Vs. Gaur Hari Singhania and others** [(2006) 4 SCC 658], in paras 42, 43, 44 and 53 of its Judgment, the Apex Court stated thus:-

42. Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eyes of law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well-being of a family.

43. The concept of family arrangement or settlement and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation etc should not be put at risk of the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into to allay disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family . Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in the case of Ram Charan v. Girija Nandini Devi.

44. In *Lala Khunni Lal v Kunwar Gobind Krishna Nairain*, the Privy Council examined that it is the duty of the courts to uphold and give full effect to a family arrangement.

53. Therefore, in our opinion, technical considerations should give way to peace and harmony in enforcement of family arrangements or settlements.

20. In the case of **Roshan Singh and others Vs. Zile Singh and others** [AIR 1988 SC 881], the Apex Court in Para 16 of its judgment stated thus:-

16. In the present case, admittedly, there was a partition by metes and bounds of the agricultural lands effected in the year 1955 and the shares allotted to the two branches were separately mutated in the revenue records. There was thus a disruption of joint status. All that remained was the partition of the ancestral residential house called rihishi, the smaller house called baithak and ghers/ghetwars. The document Exh. P-12 does not effect a partition but merely records the nature of the arrangement arrived at as regards the division of the remaining property. A mere agreement to divide does not require registration. But if the writing itself effects a division, it must be registered. See: *Rajangam Ayyar v. Rajangam Ayyar*, (1923) 69 Ind Cas 123 : (AIR 1922 PC 266) and *Nani Bai v. Gita Bai*, AIR 1958 SC 706. It is well-settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family as co-tenants. The document Exh. P-12 can be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted was in pursuance of the original intention to divide. In any view, the document Exh. P-12 was a mere list of properties allotted to the shares of the parties.

The view propounded in the above judgments by the Apex Court is to the effect that Courts should be loath in disturbing the family arrangements, agreements arrived at between the parties in a Hindu Family, which arrangement stands acted upon and such family arrangement must be enforced rather than disturbed by the courts of law. No technical considerations should give way to peace and harmony in the family. It is the duty of the Court to uphold and give full effect to the family arrangements, as it is the desire, wish and will of the family members with which the Court should not have business to interfere or interdict and disturb the peace in the family. The submission made by Mr. Mehadia that DW1 Madankunwar in

her cross-examination admitted that there was no oral partition on 30th December, 1982, as stated in the Partition Fard [Exh.243], does not appeal to me. After all, the Partition Fard in Exh.243 in clear terms records the fact of partition having been made orally on 31st December, 1982, in the presence of Panchas who were also examined before the Court. In fact, measurements were also taken and possessions to the respective shareholders were given on the same day when the oral partition was made and it is thereafter for remembering, for mutation purpose, oral partition was reduced to writing on 9th January, 1983, i.e., after about nine days. These are the recitals in the document [Exh.243], which have been fully corroborated by the witnesses as well and when the documentary evidence is produced before the Court, there is no reason why a stray admission from Defendant No.1, Madankunwar, should be utilized contrary to what is written in the document [Exh.243]. The fact that oral partition had taken place earlier in December, 1982 with measurements in the presence of Panchas and possessions were also given to respective parties, and it is thereafter only nine days, Partition Fard was prepared, in order to remember what was allotted in the oral partition and for mutation purpose. This case squarely falls within the ratio laid down by the Apex Court in the case of Roshan Singh and others [cited supra] requiring no registration under Section 17 of the Registration Act. The decisions cited by Mr. Mehadia do not have any application in this context. The issue of blending of the share of a female member has no relevance in the present matter in the light of the above discussion. As a sequel, I answer Question No.4 in the negative.

21. The upshot of the above entire discussion is, the present Second Appeal must succeed and the Cross-objection is liable to be dismissed. Hence I make the following order:-

ORDER

[a] Second Appeal No. 109 of 2015 is **allowed**.

[b] Cross-Objection No. 11 of 1960 is **dismissed**.

[c] The Judgment and Decree dated 18th September, 2014 passed by learned District Judge-2, Chandrapur, in Regular Civil Appeal No. 60 of 2012 is **set aside**.

[d] The Judgment and Decree dated 20th September, 2001, passed by learned Civil Judge [Senior Division], Chandrapur, in Special Civil Suit No. 129 of 1987 is restored.

[f] No order as to costs.

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