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Decided On - 26-10-2017

Duration- 10-04-12

Exhi.No 89

**IN THE COURT OF ADDITIONAL CIVIL JUDGE,**

**GANDEVI, AT. NAVSARI**

**REGULAR CIVIL SUIT NO. 53/07**

**Plaintiff -**

**1. Mr. Thakorbhai Vallhabhai Naik**

Age- 64 yrs.

Address- Nursary road Billimora at. Gandevi,

Dist. Navsari

v/s

**Defendant-**

**1. Mr. Amratbhai Vallhabbhai Naik**

Age- 68 yrs.

**2. Mr. Lalbhai Vallhabbhai Naik**

Age- 64 yrs.

**3. Mrs. Shantaben Manharlal Desai**

Age- 75 yrs.

**4. Mrs. Durgaben Dhirubhai Naik**

Age- 72 yrs.

Address of defendant no.1 & 2- Desai Fadia  
Pipaldhara at. Gandevi, Dist. Navsari.

Address of defendant no.3 & 4- Desai Fadia Udhana  
Dist. Surat.

**Subject- Suit for partition and possession.**

Ld.Adovacte for the plaintiff - Mr. A.M.Desai

Ld.Adovacte for the defendant no.1 & 2- Mr. T.M.Vasi

Ld.Adovacte for the defendant no. 3 to 4- Exparte

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

1. The plaintiff has filed this present suit for partition and decleration against the defendants. The sum and substance of the plaintiff's suit in nutshell is that the ancestor of the parties Mr. Lallubhai Bhanabhai had died intestate. His wife and the grandmother of the parties Ladhuben also died intestate before the year 1956.

1.1 The suit proprerty mentioned in article A and B of para. no. 3 of the plaint as- (A) Agricultural land of khata no. 8 which incorporates block nos. mentioned in the coloumns below and fruit

bearing trees, well, electric motor pump and other benefits attached to it.

(B) House no. 91 and 92 including all the benefits attached to it situated at Pipaldhara, Tal. Gandevi Dist. Navsari, is undivided joint Hindu family property.

The defendant no. 2 & 3 are illegally trying to do illegal construction over it and when the plaintiff tried to stop them they have denied plaintiff's right over the suit property. So the plaintiff has filed this suit for paartition and possession.

Block no.	H.A.Sf.	Assesment
350	0 - 42 - 49	2-00
388	0 - 14 - 16	3-31
394	0 - 13 - 89	3-25
403	0 - 28 - 33	2-75
408	0 - 38 - 14	8-06
536	0 - 23 - 09	8-81

561	1 - 29 - 50	5-88
594	0 - 06 - 07	0-44

**1.2.** Being a male family member the plaintiff has got right in the suit property by birth and after the death of Mr. Vallabhbhai mutation entry no. 1246 on 29-06-1973 has been made in the revenue records. By virtue of this entry name of the plaintiff and defendant no. 1 and 2 has been entered in the revenue records of the suit property. Further the defendant no. 3 and 4, the daughters of late Vallabhbhai have also consented to this entry and that is mentioned in this mutation entry no. 1246.

**1.3.** Defendant no. 1 Amratbhai was the elder son of the late Vallabhbhai and so as a karta of undivided Hindu joint family he was doing the administration and use of the agricultural land and its proceeds and defendant no.2 was assisting him in this.

The defendant no.2 was residing in the house mentioned in the para. 3 article (B) of the plaint.

**1.4** The plaintiff did not want to continue as a member of joint family and he wanted his share to be separated so he asked the defendant no.1 to do so but he has not given him a proper reply, so the plaintiff has given him a notice in this regard on dt. 22.05.07 through his advocate but he has not acted accordingly so the plaintiff has filed this present suit for partition to get his share out of the suit property and for the account of the proceeds out of the suit property.

**2.** In compliance of provisions of **Order-5 of The Code Of Civil Procedure,1908** summons have been issued to the defendants which has been duly served and the defendant no.1 and 2 have appeared before the court and have filed their written statement vide exhi. 12. But defendant no. 3 and 4 have not appeared before the court so the suit proceedings have been conducted *exparte* against them. In their written statement the defendant no. 1

and 2 have denied most of the facts mentioned in the plaint and *interalia* contended that-

1. The plaintiff's suit is barred by The Law Of Limitation.
2. He has no cause of action to file the suit.
3. The possession of the suit property is with the defendants, the plaintiff has never ploughed the disputed fields.
4. The plaintiff has relinquished his share from the suit property by his actions and words.
5. This court has no jurisdiction to conduct this suit.
6. One of the houses amongst the suit property has been purchased by the defendant no. 1 out of his independent income still the plaintiff has wrongfully shown it as a joint family property.

So the defendants have prayed that the present suit should be rejected with cost.

3. Considering the documents pleadings and affidavits this court has framed following issues vide exhi. 15 on 16/06/09 -

### **I S S U E S**

1. Whether the plaintiff proves that the suit property mentined in para. 3A and 3B is an ancestral property?
2. Whether the plaintiff proves that he is having share of 28/100 in the suit property?
3. Whether the plaintiff proves that he is entitled for the partition of the suit property?
4. Whether the plaintiff is entitled for taking account of the income of the suit property?
5. Whether the suit is time barred?
6. Whether the defendants prove that suit is barred by Arbitration Act?
7. Whether the defendants prove that the plaintiff has relinquished his right in favour of the defendants?

8. What order and decree?

4. To prove his case the plaintiff has produced the following documentary and oral evidences-

<b>Sr. No.</b>	<b>Description</b>	<b>Exhi.</b>
1.	Plaintiff's deposition on affidavit	23
2.	Certified copy of Khatavahi	24
3.	Certified copy of revenue record of block no. 350	25
4.	Certified copy of revenue record of block no.388	26
5.	Certified copy of revenue record of block no.394	27
6.	Certified copy of revenue record of block no.403	28

<b>7.</b>	Certified copy of revenue record of block no.408	<b>29</b>
<b>8.</b>	Certified copy of revenue record of block no. 536	<b>30</b>
<b>9.</b>	Certified copy of revenue record of block no. 561	<b>31</b>
<b>10.</b>	Certified copy of revenue record of block no. 594	<b>32</b>
<b>11.</b>	Certified copy of mutation entry no. 1246	<b>33</b>
<b>12.</b>	Certified copy of assessment sheet of disputed house	<b>34</b>
<b>13.</b>	Counterpart of notice given by the plaintiff	<b>35</b>
<b>14.</b>	Receipt of A.D.	<b>36</b>
<b>15.</b>	Acknowledgement	<b>37 to 39</b>

Thereafter, the plaintiff's evidence has been closed on his producing closing pursis to close his evidence vide exhi.-73.

5. The defendants have produced the following documentary and oral evidences in their defence-

<b>Sr. No.</b>	<b>Description</b>	<b>Exhi.</b>
1.	Defendant's deposition on affidavit	75

Thereafter, the defendants' evidence has been closed on their producing closing pursis to close their evidence vide exhi.- 79.

6. Thereafter I have passionately and calmly heard the arguments of the rival sides and have given my thoughtful consideration to the arguments canvassed by the ld. advocates for the respective parties. I have minutely

perused the ocular and documentary evidence obtainable on record. After minutely perusing each and every evidence obtainable on record finding of this court on the above issues are as follows-

### **FINDINGS**

Issue No. 1	In affirmative
Issue No. 2	In affirmative
Issue No. 3	In negative
Issue No. 4	In partly affirmative
Issue No. 5	As per final order.
Issue No. 6	In negative

7. My basis and reasons for the above mentioned findings are as follows-

## REASONS

### 7. Issue No. 1-

7.1 Before discussing the reasons for the findings of the issues it is necessary to mention that in Civil suits unlike the Criminal proceedings the plaintiff has to prove his suit till preponderance of probability and not beyond reasonable doubts. Before deciding the suit property is of Joint Hindu Family/ ancestral property or not it is necessary to see what is Joint Hindu Family- a joint and undivided family is a body of group persons who are united together by the tie of *sapindarship* arising by birth, marriage or adoption. It is founded upon agnatic relationship and is characterised by community of interest and unity of possession among persons descended from a common ancestor in the male line, -as define in Mitra's **Joint Property and Partition**.

7.2 Now if we consider what is a **Joint Family or Ancestral Property**- "joint family or ancestral property would ordinarily mean

property which descended upon another from an ancestor however remote or of whatever sex, as defined in Mitra's Joint Property and Partition pg.21. Further Mayne has explained it as- "the term in its technical sense is applied to property which descends upon one person in such a manner that his issue acquire certain rights in it as against him"

**7.3 Further in Uttam v/s Subagh Civil Appeal no. 2360/16-** Apex Court ruled that a conjoint reading of Sec. 4, 8 & 19 of the Hindu Succession Act, 1956, after joint family property has been distributed in accordance with sec. 8 on principles of intestancy, the joint family property ceases to be that in the hands of various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants."

**7.4 Burden of Proof-** The person who asserts an alleges any property to be joint family property has to prove that. Firstly, he can prove that the property was inherited from a common ancestor and as such being ancestral property, it should be

presumed to be joint family property. In the alternative satisfactory evidence has to be laid to warrant a conclusion that the property was acquired with the joint family nucleus which in its term has to satisfy a further test that such a nucleus was sufficient to acquire the property in question. So here considering the nature of this issue burden of proof of it, as per **sec. 101 and 102 of The Indian Evidence Act, 1872**, ( herein after mentioned as the Act )is on the plaintiff.

7.5 Now looking to this defination in connection with the present suit and considering the plaint *vide exhi. 1* & the affidavit of examination in chief of the plaintiff *vide exhi.-23*, and looking to the evidences obtainable on record regarding this the plaintiff has contended that he & the defendants are the heirs (son) of the same ancestor Mr.Vallabbhai. The suit property had been acquired by the father of the parties by inheretance. The defendants have also not denied specifically that the suit property is joint family property but it is the say of the defendants that every property in the suit properties is not joint

family property. The plaintiff has included self acquired properties of the defendants in the suit property. So first we have to bifurcate the properties mentioned as suit properties, which are as follows. Now after the death of Late Vallabhbhai the suit property has been transferred in the name of his wife late Gajrabai Vallabhbhai and the parties. Then She also died in the year of 1983.

Block no.	H.A.Sf.	Assesment
350	0 - 42 - 49	2-00
388	0 - 14 - 16	3-31
394	0 - 13 - 89	3-25
403	0 - 28 - 33	2-75
408	0 - 38 - 14	8-06
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And house no. 91 and 92 including all the benefits attached to it situated at Pipaldhara, Tal. Gandevi Dist. Navsari.

**7.6** Now perusing the revenue record of the suit property produced wide Exhi. 24 to 32 the name of the plaintiff & the defendant Nos. 1 & 2 is mentioned in these revenue records as the possession holder of the suit property mentioned in Article-A of the para.-3 of the plaint. These entries are of the year 1973 and are continued till 2007 i.e. of soon before filing of the suit.

**7.7** Further considering the document produced wide exhi. 33 which is the mutation entry no. 1246 dt. 29-6-1973 regarding the succession of late Vallabhbhai Lallubhai, father of the parties. Considering this entry, after the death of Vallabhbhai the suit property has been transferred to the name of the parties along with their mother. Further looking to the record of the suit this entry was not objected by any party & has been certified on 8-1-1974. Thus

this entry was unchallenged till date. Considering these entries the name of all the parties have been entered in the revenue record of suit property by virtue of succession.

**7.8** Now if we discuss by one & all properties, as it is the say of the defendant no. 1 that the plaintiff has included his self-acquired property in the suit property, so considering the revenue records produced vide exhi. 24 to 31 block nos. 350 to 594 ( as mentioned in para 3-A of the plaint) are in the name of the plaintiff & both of the defendants in these revenue records. Further as per exhi. 33 the father of the parties was the owner of the suit property but after his death a mutation entry to this regard was made all the parties became the owner of the suit property.

**7.9** Further looking to exhi. 34 i.e. the assesment sheet of house no. 91 & 92, in these documents the father of the parties late vallabhbhai is shown as the owner of the disputed houses. Here it is important to note that all these revenue entries

has never been challenged by any of the parties, which shows the conduct of the parties as per section 8 of The Act of 1872, "Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to a fact in issue therein or relevant thereto..." Now as per the above mentioned discussion it is clear by the conduct of the parties that these entries are acceptable to all the parties. Moreover these documents are true copies of revenue record so these are secondary evidence within the meaning of **Sec.63 (1) of the Act**. Now if we consider the legal provisions relating to admissibility of secondary evidence as provided in **Sec. 65 (e) & (f) of The Act, 1872 as- Sec. 65- Cases in which secondary evidence relating to documents may be given-**

Secondary evidence may be given of the existence, condition, or contents of a document in the following cases-

(a) when the original is shown or appears to be in the possession or power – of the person against whom the document is sought to be proved, or any person out of the reach of the court.....

(e) when the original is a public document within the meaning of Section 74 ;

(f) when the original is a document of which a certified copy is permitted by The Indian Evidence Act, 1872, or by any other law in force in India, to be given in evidence ;.....

In case of (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible...

**7.10** These documents are a public document within the meaning of Sec. 74(2) of Indian Evidence Act,1872 as a public record of these private documents are being kept in State and Sec. 77 Indian evidence act allows these documents to be proved by their certified copies. These documents

are issued by the appropriate authority and bear the sign and seal of the head of the office. Therefore there is no reason to not to consider these revenue records. Further looking to the principle laid down in the judgment of - **Jayantilal Tribhuvandas Patel v/s State of Gujarat Reported in 1994 (2) G.L.H. 79 and State Of H.P. v/s Keshavram A.I.R. 1997 S.C. 2181** " The right and title of the parties can not be decided by revenue records but regarding the revenue entries it will be presumed that they are true and correct and in absence of other evidence the court is bound to take these entries in to consideration" Now as the ratio laid down in this judgment clearly establishes that the revenue entries are true in absence of other evidence. Thus, it is clear from the revenue entries that the suit properties are in the name of all the parties in the revenue records.

**7.11** Further looking to the cross examination of the defendant on his affidavit of examination in chief vide exhi.-75, he has accepted the pedgree produce by plaintiff. Moreover the

defendant no.1 has also accepted that the suit property is in the name of all the brothers & not in his name alone in the revenue records, & he has not tried to get the plaintiff name deleted out of the revenue records of the suit property. And most importantly he has accepted that-"પીપલઘરા મુકામે દેસાઈવાડ ઘર નં: ૯૧ અને ૯૨ વાળી મીલકત વડીલોપાર્જીત ચાલી આવેલી ."

**7.12** Now, considering the oral as well as documentary evidence and legal provisions in this regard, as per **Sec. 58 of The Act**- "Facts admitted need not be proved- No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing..." and rule of evidence that admission is the best evidence against the person making it.

**7.13** Thus from the above mentioned discussion the plaintiff has proved that the suit property is ancestral property. So I answer issue no. 1 in affirmative.

## **8. Issue No. 2 -**

**8.1** As per Sec. 101 & 102 of The Act, 1872 the burden of proving this issue is also on the plaintiff. According to the discussion of the reasons for the findings of issue no.1 the suit property is joint family property and now the plaintiff has claimed his share out of this. As per para.- 7 sub-para.- A, B, K & D the plaintiff has suggested shares of the heirs of late Vallabhbhai in the suit property.

**8.2** Consider the plaint & the written statement late vallabhbhai died leaving his wife, three sons & two daughter behind. Now as per **sec 8 of The Hindu Succession Act**, The property of male hindu dying intestate shall devolve according to the provisions of this chapter-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule.."

**8.3** Thus, firstly the property shall devolve upon the class I heir first. So we have to see who are the class I heir of late Vallabhbhai living at the time of his death-(1) widow (2) two daughter (3) two sons.

**8.4** Now as the widow of late Vallabhbhai has also died in the yr. 1983, so as per **sec.15 of The Hindu Succession Act**, her share will also devolve upon her sons & daughter. But the defendants have objected that the plaintiff has not resided in the suit property for long and he has never cultivated the disputed fields. The defendant nos. 1 & 2 have been cultivating the I disputed fields for long. The plaintiff has no knowledge and experience of farming and he has no one to look after the fields. Moreover the ld. advt. for defendents has argued and submitted in the written statement that one of the houses amongst the suit property is self-acquired property of the defendant no. 1. He has purchased that out of his own income but the plaintiff has knowing full well wrongly shown it as a suit property. Now if the defendent is taking such kind of

defence then the onus to prove this fact is on him as per **sec.102 of the Act**. But the defendant no. 1 has not produced any sell deed of the disputed house nor has examined the seller regarding this. Moreover looking to the revenue records regarding the disputed house it is in the name of the late father of the parties and not of the defendant no. 1. So this submission of the defendant no.1 appear to be baseless and he has failed to discharge his onus.

**8.5** Moreover the defendant no.2 has submitted that he has been residing in the other disputed houses for long with his family and the plaintiff has never resided in that but this submission appears to be total non-sense because for claiming partition of one's share out of the ancestral property it is not necessary to reside in that, thus this submission of the defendant no.2 is also not acceptable.

**8.6** Now considering all the facts and circumstances it appears that the plaintiff has 1/5 share in the suit property as the defendents no.1 to 4

also have equally 1/5 share in the suit property. Because even if the name of the defendant no.3 & 4 is not mentioned in the revenue records of the suit property their is not relinquish letter by them on record, so it can not be said that they have relinquished their share from the suit property.

So I answer issue no.2 in partly affirmative.

### **9. Issue No. 3, 4 &7-**

**9.1** Considering the facts and circumstances of the suit and submissions on behalf of the parties I think it proper to discuss and decide issue nos. 3, 4 & 7 concurrently to avoid unnecessary repetition for the sack of brevity, as all these issues are inter connected with each other on the question of fact and law.

**9.2** As I have discussed earlier in detail in the reasons for the issue nos.1 and 2 that the suit property is ancestral property and that the plaintiff has 1/5 share in it. The burden of proof of

issue nos. 3 and 4 is on the plaintiff whereas of issue no.7 is on the defendants. It is the say of the plaintiff that he has a right in the suit property & being a member of the joint hindu family he is entitled for the patition.

**9.3** But the defendants have submitted that the plaintiff has relinquished his portion/share out of the suit property. And one of the houses is a self- acquired property of the defendant no. 1 so it should not be incorporated amongst the subject matter of partition. The plaintiff has not taken care of the elders of the family and for that reason also he is not entitled for partition.

**9.4** Moreover the defendants have submitted that in his cross examination the plaitiff has admitted that - " એ વાત ખરી છે કે ઁઘલ ગામનો દસ્તાવેજ થવાથી મારો હીસ્સો સંયુક્ત મીલકતમાથી છુટો પડેલો. " and " એ વાત ખરી છે કે અમ્રતભાઈના નામે આવેલ મકાન સહીયારી રકમથી ખરીદેલુ એ હકીકત અનુમાનના આધારે જણાવુ છું. "

So for the above mentioned reasons the plaintiff does not appears to be entitled for partition. But the plaintiff has further denied the fact that he has relinquished his share after 1972- " એ વાત ખરી નથી કે ૧૯૭૨ પછી મેં દાવાવાળી મીલકતમાંથી મારો હિસ્સો જતો કર્યા છે. "

**9.5** Moreover looking to the suit as a whole the defendant has accepted in his cross examination that suit property is of joint family which was in the name of their father & after his death it was mutated in the name of all the there brotheres as- " પીપલધરા ગામની કોઈપણ જમીન મારા એકલાના નામે નથી. પીપલધરાની જમીન અમો પ્રતિવાદીઓ તથા વાદીના નામે રેવન્યુ દફતરે દાખલ થયેલ છે." Further the defendants have also accepted that he has not given any application to delete the name of the plaintiff from the suit property which shows the conduct of the defendants that they are agreed to the revenue records which shows the plaintiff also as the owner of the suit property. Moreover, there has never been partition of the suit property between the parties as the defendant accepts "એ વાત ખરી છે કે દાવામા જણાવેલી

ખેતીની જમીનોનું કોઈ વહેંચણું અમારા ત્રણે ભાઈઓ વચ્ચે પિતાની હયાતી કે હયાતી બાદ વહેંચણી થયેલ નથી."

**9.6** So being a member of a joint family the plaintiff is entitled for partition as there has never been partition of the suit property amongst the parties, as per the admission of the defedants. And the arguments that the plaintiff has never taken care of the elders appears to be meaningless because for partition there is no precondition of taking care of the elders. Here, even at the cost of repeatition, it is important to mention that so far as the submission of the defendants that, one of the houses out of the suit property is acquired by him from his independent income, is concerned as per **sec.102 of the Act** it on the defendant and he had to prove that but as I have dicussed earlier the defedants have failed to prove it, because it is clear from the record that the disputed houses are in the name of the father of the parties and in the revenue records he is shown as the owner of it. There is no proof available on the record to show that the disputed house is the self acquired property of the defendant no. 1. So it can't

be considered as proved within the meaning of Sec. 3 of the Act that one of the houses is self-acquired property of the defendant no. 1.

**9.7** Now if the most important submission of the defendants on which they have emphasised a lot that is the plaintiff has relinquished his share out of the suit property, is considered. the plaintiff has accepted in his cross examination that " એ વાત ખરી છે કે એંધલ ગામે મારી પત્નીના નામે જમીન કરવામા આવેલી. એ વાત ખરી છે કે એંધલ ગામવાળી જમીન મારી પત્નીને મે તથા અમરતભાઈ તથા લાલભાઈએ વેચાણ આપેલી." Further he submits that " એ વાત ખરી છે કે એંધલવાળી જમીન મારી પત્નીના નામે હતી તે બીલીમોરાના ઈસમને વેચી છે. સાહેદ જણાવે છે કે સંયુક્ત કુટુંબનાકહેવાથી વેચી છે."

**9.8** Thus considering the cross examination of the plaintiff as a whole it is clear that one of the suit properties i.e. the land situated at Endhal was transferred in the name of plaintiff's wife. But according to the question asked by the

defendant's side it appears that the said property was sold out to the plaintiff's wife by the plaintiff and the defendant nos. 1 and 2 which was later on sold out to a person residing at Billimora by the decision of the joint family. Thus, though the plaintiff has accepted that due to the execution of the Andhel property document his share has been separated from the joint family property yet if as per the say he has got his share in the form of Andhel property then why he sold out this property to his wife and has not got that transferred in his own or his wife's name. Moreover he has also explained further that the said property was sold out to some other person on the say of the joint family, which has not be rebutted by the defendants and there appears no grounds for not believing it as this fact is unchallenged. So it appears that this was all a family arrangement and not partition. Because the defendant has also accepted in this cross examination that there has never been a partition between the parties." guj."

**9.9** Thus if there has never been a partition then there is no question of the relinquishment because no portion/ share of the plaintiff has ever been decided. And as discussed above the defendants have failed to prove that the plaintiff has relinquished his share. Further the plaintiff has relied upon the ratio laid down in the judgment of **Sneh Gupta v/s Deni Sarup & ors. reported in 2009(2) G.L.H. 94** as "...if a party relinquishes his/her right it must be done by registered instrument in terms of provisions of the Indian Registration Act." But considering the record of the suit there is not such instrument executed at any point of time by the plaintiff.

**9.10** I am thoroughly agreed with the ratio laid down in this judgment & as it is clear that according to the defendant the plaintiff has relinquished his partition by words & deed which is not acceptable in law. Moreover it is even not proved that the plaintiff relinquished his partition in favour of the defendants. Because he has said only

that "मारो हीस्सो संयुक्त भीलकतमाथी छुटो पडेलो." " संयुक्त कुटुंबना कडेवाथी ते भीलकत वेची." So as discussed above as a co-owner alongwith the defendant nos. 1 and 2 the plaintiff has sold out the disputed property to his wife and that does not mean he has got his share and relinquished his share because he has sold out that property further on the saying of the joint family. Thus the defendants have failed to prove that the plaintiff has relinquished his share in favour of the defedants.

**9.11** Now so far as accounts is concerned, the plaintiff has asked for the accounts from the defendants as a karta because the have been cultivating the suit property for long and has been using the proceeds alone, so the plaintiff has held them liable for accounts asking for it to be decided by the court and the share of the proceeds to be given to the plaintiff. The defendants have objected it stating that if at all this court decides that the plaintiff has a share in the suit property still they are not liable for the accounts because they have been so much hard work and labour in farming.

**9.12** For deciding that whether the plaintiff is entitled for the accounts or not I rely upon the ratio decided in the judgment of Mst. Nepur Kuer v/s Sheochand Sahu & Ors. reported in A.I.R. 1961 Pat. 57- " It is a settled law that, in the absence of proof of direct misappropriation or fraudulent and improper conversaiion, by the manager of the joint family estate, of the moneys of the joint family to his personal use, he is liable to account on partition only for estate which he has received, not for what he ought to or might have received if the family monies had been profitably dealt with, therefore, in an ordinary suit dor partition of joint family property, in the absence of fraud or other improper conduct, the only account the karta is liable for is as to the existing state of the property divisible, and the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters.

A co-parcener seeking partition, therefore, in the absence of such proof, is not entitled to require the manager or karta account for his past dealings with

the family property. All that he is entitled to is an account of the family property as it exists at the time he demands a partition."

The principle laid down in this judgment is relied upon in the judgment of **K.V. Narayana Swami Iyer v/s K.V. Ramakrihna Iyer And Ors. 1965 A.I.R. 289.**

**9.13** Thus it is clear that the defendants have cultivated and put their efforts in the suit property so the plaintiff does not appears to be entitled for accounts due to the above mentioned reasons and hence I answer issue no. 3 in partly affirmative. issue no. 4 in negative and issue no. 7 in negative.

#### **10. Issue No. 5 -**

**10.1** The issue rearding to the limitation is considered to be partly of fact and partly of Law. It is the defence of the defendant no.1 & 2 that the plaintiff's suit is barred by the Law of Limitation, as the father of the parties Mr.

Vallabhbahi was died on dt. 11-04-1973 and the plaintiff has filed this suit in the year 2007, so this suit is barred by the Law of Limitation. Now looking to the **Limitation Act, 1963**, no period of limitation is prescribed for Partition suit in it. But it has been held by the Hon'ble Supreme Court in the case of **Vidhyadevi v/s Om Prakesh 1995(4)SCC 496, & Govindmal v/s R. Perumal A.I.R. 2007 S.C. 204 that-** "Right to sue for a partition is a continuing right. Legislation has not prescribed any period of limitation for filing a suit for partition there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his shares joint with other co-sharers."

**10.2** Thus for the above mentioned reasons, it appears that the plaintiff's suit is not time barred & therefore, considering the evidence on record, due to the above mentioned reasons I answer issue no. 5 in negative.

**11. Issue No. 6 & 8 -**

**11. 1** The defendants have taken the defence of the suit being barred by the provisions of Arbitration Act, in para. 12 of the written statement, so the burden of proving this issue is upon the defendants as per the sec. 102 of the Act but the defendants have not produced any arbitral award to prove their point nor they have asked any question to the plaintiff regarding it.

**11.2** The defendants have not produced any kind of evidence to prove this issue and hence they have failed to prove it. So I answer the issue no.6 in negative and pass a final order of issue no. 8 as-

**ORDER**

1. The plaintiff's suit is hereby partly allowed.

2. The plaintiff is hereby declared to be entitled to get 1/5 (one fifth) share in the houses house nos. 91 and 92 including all the benefits attached to it situated at Pipaldhara, Tal. Gandevi Dist. Navsari.

3. The plaintiff is hereby declared to be entitled to get 1/5 (one fifth) share of the agricultural land Block nos. 350, 388, 394, 403, 408, 536, 561, 594 including all the benefits attached to it situated at Pipaldhara, Tal. Gandevi Dist. Navsari.

4. A court commissioner is hereby ordered to be appointed to make the partition of the houses by mates and bounds and to report this court within four months.

5. The office of Collector of navsari is hereby directed to make the partation of the agricultural land mentioned in point no.3 of the order by mates and bounds and allot 1/5 share of the said land to the plaintiff report to this court within A court commissioner is hereby ordered to be appointed to make the partition of

the houses by mates and bounds and to report this court within four months.

6. The preliminary decree shall be drawn accordingly.

7. No order as to cost.

Pronounced in open Court today on 26 th  
October 2017.

Date: 26-10-2017  
Gandevi

**(CHANDNI PRATEEK SHARMA)**

Addl. Civil Judge  
Gandevi

Code no. GJ 01049