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**IN THE COURT OF CIVIL JUDGE JUNIOR DEVISION,**  
**SHINDKHEDA, DIST. DHULE.**  
**(Presided over by P.S.Bhandari)**

**Regular Civil Suit No.35/2012**  
**(Old Spl.C.S.No.116/2010)**

**Exhibit No.**

Pratapsing Vithoba Girase  
Age:- 56 years, Occup. Agriculture,  
R/o. Nirgudi, Tal. Shindkheda,  
Dist. Dhule.

... **Plaintiff.**

... **VERSUS** ...

1. Jaising Vithoba Girase  
Age:- 66 years, Occup. Agriculture,
2. Smt. Kamalbai Rupsing Girase  
Age:- 58 years, Occup. Household,
3. Ramsing Vithoba Girase  
**(Dead Legal heirs)**
  - A. Smt. Shantabai W/o. Ramsing Girase  
Age:- 55 years, Occup. Household,
  - B. Tejendrasing Ramsing Girase  
Age:- 35 years, Occup. Agriculture,
  - C. Rajendrasing Ramsing Girase  
Age:- 25 years, Occup. Agriculture,  
All R/o. Nirgudi, Tal. Shindkheda,  
Dist.Dhule.
  - D. Sau. Vandanabai Bhuresing Girase  
Age:- 25 years, Occup. Household,  
R/o. Bole, Tal. Parola, Dist. Jalgaon

4. Sattarsing Vithoba Girase  
Age:- 58 years, Occup. Agriculture,
5. Himmatsing Vithoba Girase  
Age:- 52 years, Occup. Agriculture,
6. Smt. Kesarbai Vithoba Girase (**Dead**)  
Age:- 96 years, Occup. Household,  
All R/o. Nirgudi, Tal. Shindkheda,  
Dist. Dhule.
7. Shantabai Ramesh Girase  
Age:- 40 years, Occup. Household,  
R/o. Darane, Tal. Shindkheda  
Dist.Dhule. ... **Defendants.**

**Suit for partition, perpetual injunction and mesne profit.**

Advocate for the Plaintiff : Mr. B.Z.Marathe.  
Advocate for the Defendant No. 1 & 2 : Mr. V.P.Bhamare.  
Advocate for the Defendant No. 3-A to 3-D : Mr. K.V.Bhamare.  
Advocate for the Defendant No. 4 to 7 : Mr. A.A.Khairnar.

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

**( Delivered on : 24<sup>th</sup> Day of October, 2017)**

**Description of suit property:-**

- 1) C.T.S.No.12 admeasuring 0 Hector 20 Ares bounded as toward East- Block No.8, West- Block No. 1, North- Block No. 24 and South- Block No. 3 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.
- 2) C.T.S.No.13/1 admeasuring 0 Hector 40 Ares bounded as toward East- Block No. 16 & 17, West- Block No. 11 & 12, North- Block No. 22 and South- Block No. 13/2 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.
- 3) C.T.S.No. 63/1 admeasuring 0 Hector 50 Ares bounded as toward East- Block No.64, West- road, North- Block No. 62 and South- Block No. 63/1 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.

4) C.T.S.No. 1073/1 admeasuring 1 Hector 47 Ares bounded as toward East- Block No.106, West- Block No.117, North-Block No. 64 and South- Block No. 107/2 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.

5) C.T.S.No. 120/1 admeasuring 2 Hector 43 Ares bounded as toward East- Block No.120/2, West- Block No.120, North-Block No. 121 and South- road situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.

6) C.T.S.No. 514 admeasuring 1 Hector 73 Ares bounded as toward East- Block No.515, West- Block No.512, 513, North-Sulwade boundary and South- Block No. 520 situated at Patan, Tal. Shindkheda, Dist. Dhule.

7) C.T.S.No. 515 admeasuring 3 Hector 42 Ares bounded as toward East- Block No.516, 519, West- Block No.514, North-Sulwade boundary and South- Block No. 520 situated at Patan, Tal. Shindkheda, Dist. Dhule.

8) C.T.S.No. 516 admeasuring 2 Hector 17 Ares bounded as toward East- Block No.518, West- Block No.515, North-Sulwade boundary and South- Block No. 519 situated at Patan, Tal. Shindkheda, Dist. Dhule.

9) Tractor bearing registration No.MH-18-N-83

**(Here-in-after referred as suit property)**

**Facts in nutshell is as under-**

2) One Vithoba Tanaji Girase was common ancestor and owner of suit property and house properties No. 28, 35, 40 and 27. Both parties have no dispute on these house properties. According to plaintiff himself and defendants are legal heirs of Late Vithoba. After the death of Late Vithoba name of defendant No.1 has been mutated as a manager of Hindu Joint family property and name of plaintiff and other defendants have been mutated in other right column of suit property. Defendant No.1 illegally mutated his name on revenue record of suit property No. 5. Suit property No. 6 and 8 are in the name of defendant No. 3 and 6 but have been purchased from the income of joint family

property. Suit property No. 7 is in the name of Bajirao Damodar Patil but said property is in the possession of defendant No.1 on the basis of agreement for sale. Further contention of plaintiff is that defendant No.1 refused to divide the property and in a mood to dispose the same. So plaintiff prayed for 1/6th share in suit property and relief of perpetual injunction to restrain the defendant No.1 from alienating suit property and mesne profit. During pendency of suit mother of plaintiff (defendant No.6) is died. So by way of amendment plaintiff deleted name of defendant No.6 and thereafter by way of amendment plaintiff added name of defendant No.7 as a sister.

3) Defendant No.1 filed written statement at Exh.31. According to him house No.40, 28 and suit property No. 9 (tractor) are his self acquired property. Plaintiff and defendants have no any concern with house No. 40 and 28. On 19/09/1976 Late Vithoba allotted House No. 35 and suit property No. 5 to defendant No.1 by way of partition. One Bajirao Damodar Patil delivered possession of suit property No. 7 to him on the basis of agreement for sale. Mother of plaintiff and defendants Late Kesarbai is owner of suit property No.6. Further contention of defendant is that suit property has been already divided in the year 1976 and thereby suit property No. 2 has been allotted to defendant No.2, suit property No. 3 has been allotted to defendant No.1, suit property No. 4 has been allotted to plaintiff and defendant No.4, suit property No. 6 has been allotted to mother Kesharbai. Further contention of defendant is that defendant No.4 purchased some property at Surat, he is also having one floor mill and defendant No.3 has 8 cattle's, but plaintiff intentionally not included these properties. Further contention of defendant No.1 is that Late Vithoba had one other wife but plaintiff not included the other wife and her daughter. Bajirao Damodar Patil was also necessary party. In conclusion defendant No.1 prayed to dismiss the suit.

4) Defendant No.2 also taken the same stand as taken by defendant No.1. In addition according to defendant No.2 she is also having 1/6th share in suit property. So by way of counter claim defendant No.2 prayed 1/6th share in suit

property and relief of mesne profit. Defendant No. 3 to 6 admitted the claim of plaintiff and prayed for 1/7th share in suit property.

5) On the basis of pleading my ld. Predecessor framed issues below Exh. 46. this court re casted issues and reproduce it with reasons as follow-

S.N.	ISSUES	FINDINGS
1)	Whether plaintiff proves that suit property is ancestral property ?	.. <b>Yes</b>
2)	Whether plaintiff proves that the defendant No.1 illegally mutated his name on revenue record of suit property No.5 (3E)?	.. <b>Yes</b>
3)	Whether suit is bad for non joinder of necessary party ?	.. <b>No</b>
4)	Whether suit is barred by principle of common hotchpotch ?	.. <b>No</b>
5)	Whether defendant No.1 proves that house No.28, 51 and suit property No. 7 i.e. block No.515 and suit property No.9 i.e. tractor are his self acquired property?	.. <b>No</b>
6)	Whether defendant No.1 proves that Late Vithoba allotted suit property No. 5 i.e. block No. 120/1 and house No. 35 to him in partition on 29/09/1976 ?	.. <b>No</b>
7)	Whether suit is within limitation?	.. <b>Yes</b>
8)	Whether plaintiff and defendant No. 2 are entitle for 1/6th share in suit property ?	.. <b>Yes, but to the extent of 8/49<sup>th</sup> share</b>
9)	Whether defendant No.1 proves that suit property is already divided ?	.. <b>No</b>
10)	Whether plaintiff is entitle for relief of injunction as claimed?	.. <b>Yes</b>
11)	Whether plaintiff and defendant No.2 are entitle for relief of mesne profit as claimed ?	.. <b>Yes</b>
12)	What order and decree?	<b>Suit is decreed with costs.</b>

#### **REASONS FOR FINDINGS**

6) To substantiate his claim plaintiff examined himself as P.W.1 at Exh.53. Plaintiff relied on 7/12 extracts of suit property at Exh. 56 to 63 and 68, particular of registration of tractor at Exh.64, mutation entry No. 1280 and 1140

at Exhs. 65 and 66, heir-ship certificate at Exh.67. Defendant No.1 examined himself as D.W.1 at Exh.124.

**AS TO ISSUE NO 1 AND 5 :-**

7) Both these issues are interlinked with each other hence it would be worthwhile to have a conjoint discussion of the aforesaid issues in order to avoid repetition.

8) Mr. B.Z.Marathe learned counsel for plaintiff laid much stress on the fact that no any evidence by defendant No.1 to show that the suit property is his self acquired property. Per contra Mr. V.P. Bhamre learned counsel for defendant brought into notice the copies of sale deeds and submitted that defendant No.1 purchased the suit property by his own income.

9) I have given anxious consideration to the submission of both parties. It will be imperative to have a brief glance at some of the legal positions which are relevant for this suit.

10) The property owned by a Joint Hindu Family is a co-parcenary property. The properties inherited from the father, grandfather and great grand-father also constitutes coparcenary property. A distinction has to be made between co-parcenary property and self-acquired property. Property may be acquired through inheritance, partition, gift and other modes. The nature of the title depends upon how a property is acquired.

**BURDEN OF PROOF AND ONUS OF PROOF:**

11) Chapter 7 of the Evidence Act deals with the concept of burden of proof. While trying to draw a distinction between the burden of proof and onus of proof one has to bear in mind that going by the dictionary meaning, the words 'burden' and 'onus' do not carry any different meaning. The distinction is primarily drawn in order to show who carries the weight of proving a particular fact. It therefore,

becomes necessary to understand at this juncture the concept of standard of proof.

12) Standard of proof means the quantum and quality of evidence a party is required to prove in order to get a successful decision in his favour. Once the standard is discharged and unless a rebuttal evidence is adduced by the adversary, the party discharging the standard would be entitled to the relief prayed for. On a reading of Section 101 of the Evidence Act, it would be clear that the burden never shifts and it remains on the party who asserts the existence of any right, liability of disability. Once the standard of proof required to discharge that burden is satisfied, the party denying the existence of such right, liability of disability has the duty to show that no such right exists. This duty on the part of adversary is termed as onus. Once the onus is discharged, the party asserting the right must again lead evidence to overcome the onus discharged by the adversary. In a way even though the burden remains fixed on that party who asserts the existence of right, liability of disability, the onus keeps on shifting from one party to another depending on the standard of proof.

13) In the case of **Appasaheb Chamdgade v. Devendra Chamdgade and Ors, reported in (2007) 1 SCC 521**, Hon'ble Apex Court held that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims Joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that property was acquired without the aid of the joint family property by cogent and necessary evidence.”

14) The same proposition has been propounded in the case of **Surendra Kumar V/s Phoolchand (dead) through LR's and Anr , reported in [1996] 2 SCR 15**, wherein their Lordships held that it is no doubt true that there is no presumption that a family because it is joint, possessed joint property and

therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired. But such a presumption is a presumption of fact which can be rebutted. But where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family.”

**ANALYSIS OF THE EVIDENCE ON RECORD:**

15) At the cost of repetition, let me again remind myself that in a civil litigation, the initial burden is always on the plaintiff to prove that the suit property is a Joint Hindu Family property. If he successfully discharges this burden, the onus then shifts to the defendant to prove the contrary. Both parties have no dispute over mutation entries (Exh.65 and 66 ) which clearly discloses that suit property No.1 to 5 were ancestral property and after the death of common ancestor name of defendant No. 1 has been mutated as manager of Hindu Joint Family and name of other defendant have been mutated in other right column of revenue record of suit property No 1 to 5. In his cross-examination also defendant No.1 admitted this fact. He further admitted that plaintiff and defendants have equal share in suit property. Further 7/12 extracts ( Exhs.56 to 60 ) also discloses that name of defendant No.1 has been mutated as manager of Hindu Joint Family and name of other defendant have been mutated in other right column of revenue record of suit property No 1 to 5. No doubt defendant No.1 claimed that he got suit property No. 5 in partition but this issue will be discussed separately. So sequence narrated in above clearly discloses that suit property No. 1 to 5 are Joint family property. Now it is necessary to see position of suit property No. 6 to 9.

16) According to defendant No. 1 suit property No. 7 is in his possession on the basis of agreement for sale. Record discloses that on 20/06/1998 one Bajirao Damodar Desle executed agreement for sale in favour of defendant No.1 and on 10/12/1986 one Dayaram Dhudku Patil executed sale deed of suit property No.8 in favour of mother of defendant No.1. Now question arise that whether defendant No. 1 and his mother had a separate income to purchase theses property or they purchased the same on nucleus of joint family property. No any evidence by the defendant No. 1 that himself and his mother had any other source of income. On the contrary it is proved fact that suit property No. 1 to 5 are ancestral property of joint family and mutation entry No. 1280 (Exh.65) discloses that since 01/01/1984 suit property No. 1 to 4 is in possession of defendant No.1. Further mutation entry No.1140 (Exh.66) discloses that suit property No. 5 also is in his possession since 29/09/1976. This sequence clearly discloses that nearabout all property of joint Hindu family was/is in possession of defendant No.1. Considering this situation it would be apposite to mention observation of Hon'ble Apex Court in **Mallappa Girmallappa v. Yellappa Gowda, AIR 1959 SC 906** it is held that the existence and the adequacy of the nucleus are, primarily, questions of fact. The presumption is certainly stronger where it is the manager who is responsible for the acquisitions, which he later claims to be his.

17) In present case once it is proved that major portion of Hindu Joint Family was in the possession of defendant No.1 as a manager of Hindu Joint Family then certainly the presumption arise that he has sufficient nucleus from Joint Hindu family and newly acquired properties were the properties of Joint Hindu Family and unless that presumption is rebutted it must prevail. Needless to mention that defendant No.1 not proved that he had any other source of income. On the contrary suit property No. 1 to 5 is in his possession since long, so logical inference can be drawn that defendant No. 1 and his mother purchased suit property No. 7 and 8 from the income of suit property No. 1 to 5. So far as suit property No. 9 is concern i.e tractor, the defendant No. 1 clearly admitted that he

mortgaged suit property No. 3 and 5 in favour of bank to purchase the said tractor. So it is crystal clear that defendant No. 1 purchased the said tractor on the income of joint Hindu Family property. In the light of what has been discussed and pointed out above, it is clear that the suit property No. 1 to 9 are ancestral property of Joint Hindu Family and not the self-acquired property of defendant No. 1 and his mother. Accordingly, I answer issue No.1 in the **affirmative and issue No. 5 in the negative.**

**AS TO ISSUE NO.4:-**

18) Ld. counsel for defendants submitted that while claiming partition of joint family properties, all properties brought into the hotch potch should be included in the suit. He further submitted that plaintiff and some defendants intentionally withheld some property, so suit is hit by principle of common hotch potch. I am not impressed with this submission for the simple reason that except mere word defendant No.1 not proved by any other independent or documentary evidence to prove his claim that plaintiff and other defendants have any other property including suit property. Another aspect is that plaintiff described all properties of common ancestor Vithoba and defendant No.1 also contended that deceased Vithoba divided all the properties in between plaintiff and defendants. No single word in the written statement of defendant No.1 that deceased Vithoba had some other property excluding suit property and now in possession of plaintiff and other defendants. Even defendants not produced any document to disclose said property. So defendant No.1 miserably failed to prove that suit is barred by principle of common hotch potch. Accordingly, I answer issue No.4 **in the negative**

**AS TO ISSUE NO.2 , 6 AND 9:-**

19) All these issues are interlinked with each other hence it would be worthwhile to have a conjoint discussion of the aforesaid issues in order to avoid repetition.

20) Plaintiff challenged title of defendant No.1 on suit property No.5(3E) and very maintainability of mutation No. 1140 (Exh.66) by which title of suit property No.5 has been conferred on defendant No.1. According to plaintiff defendant No.1 illegally transferred suit property No.5 on his name without any registered instrument. Ld. Counsel Mr. V.P.Bhamre for defendant No. 1 strongly opposed this contention and submitted that in the family partition suit property No.5 has been allotted to him, accordingly his name has been mutated in revenue record by way of mutation entry No 1140 (Exh. 66) and since then suit property No.5 is in his possession. He further contended that the partition of the ancestral properties of the plaintiff and the defendants took place between them in the year 1976. Hence according to the defendants mutation entry No 1140 (Exh. 66) is legal and proper and, there is no right to the plaintiff to claim partition.

21) To prove prior partition defendant No.1 placed his reliance on copy of mutation entry No. 1140 (Exh.66) and highlighted the point that deceased Vithoba himself allotted suit property No.5 in family partition. His Further contention is that the kartha of the family, has the power under Hindu Law to effect a division of the joint family property, even without the consent of other co-parcener and therefore, ordinarily, the said partition cannot be disturbed, unless it is shown that while exercising the power vested on the kartha of the family, he had acted detrimental to the sharers or effected an unequal or unfair partition, he further submitted that the partition cannot be set aside by the affected co-parcener viz. the plaintiff in this case. He heavily relied upon the separate title and long standing possession of defendant No. 1 on suit property No.5 showing transfer of suit property by deceased Vithoba. Mr. B.Z.Marathe strongly opposed the contention of defendants and submitted that plaintiff and other defendants are one of the class-I heir of deceased Vitthal and in their absence no partition can be effected. He strongly assailed the theory of prior partition and mutation on the basis of inequality in division of suit property.

22) Admittedly, parties are Hindus and governed by Mitakshara School of Hindu Law and Hindu Succession Act, 1956, in the matter of succession. Admittedly the suit property was recorded in the name of Vitthal, the common ancestor of the parties. In order to resolve the dispute it is necessary to reproduce relevant provision and observation of Hon'ble Apex court in connection to subject issue

**Section 6 Devolution of interest in coparcenary property:**

*When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:*

*Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative, specified in that class who claims through such female, relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or in testate succession, as the case may be under this Act and not by survivorship.*

**Explanation 1** : *For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.*

23) The Hindu Succession Act came into force on June 17, 1956, Vitthal having died after the commencement of that Act, to wit in 1983, and since he had at the time of his death an interest in Mitakshara coparcenary property, the pre-conditions of section 6 are satisfied and that section is squarely attracted. By the application of the normal rule prescribed by that section, Vitthal's interest in the coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act. Therefore, the proviso to section 6 comes into play and

the normal rule is excluded. Vitthal's interest in the coparcenary property would therefore devolve, according to the proviso, by intestate succession under the Act and not by survivorship.

24) Forgoing legal position clearly establishes that plaintiff and other defendants being a class-I heir are entitled for their share. Now it is necessary to see available evidence. Defendant No. 1 is totally depend upon mutation entry No. 1140 (Exh. 66), it is needless to mention that said mutation entry No. 1140 (Exh.66) showing the partition only in father and one son means defendant No. 1, it nowhere shows the right of plaintiff and other defendants. Thus it will be unjust to accept theory of prior partition in their absence.

25) Now I turn the further contention of defendants about the allotment of share to defendant No. 1 in alleged partition. First it is necessary to reproduce relevant provision of Chapter XVI Partition and Union Mitakshara law and observation of Hon'ble Apex Court in connection to present subject.

***Paragraphs 320 Shares on partition:- On partition between the members of joint Hindu Family share are allotted according to following rules:***

*(1) On partition between the father and his son each son takes a share equal to Father*

*(2) Where a joint family consists of brothers, they take equal share on partition.*

26) In **Shiromani & Ors vs Hem Kumar & Ors on 4 April, AIR 1948 SC 1299** Hon'ble Apex Court Held that The principle of Hindu Law is equality of division and the exceptions to that rule have almost, if not altogether, disappeared. One of the exceptions was in favour of the eldest son, who was originally entitled to a special share on partition, either a tenth or a twentieth in excess of the others, or some special chattel, or an extra portion of the flocks. But unequal partition of ancestral or joint property was from early times

condemned.

27) On the basis of the above principle alone, alleged theory of prior partition has to be decided.

28) Main blow of defendant No.1 is on prior partition and his stand is totality hinges upon a mutation entry No. 1140 (Exh.66). Said mutation entry only showing the division on the request of deceased Vithoba. However defendants nowhere proved that before recoding such mutation in fact notices were issued to all co-parcener but defendants not touched this subject. In absence of following prescribed procedure before recording any mutation it can not be held valid mutation and it can not be a basis to prove valid partition. Another aspect is that there is no dual opinion on the theory of oral partition, but except mere word defendant No.1 not proved his contention by any other independent evidence.

29) Another contention of defendant No.1 about separate title and possession of defendant No 1 and other defendants. Only separate title can not be treated as basis of partition unless one of the co-parcener expressly showing his intention to end the joint status. Defendant No.1 not proved that defendant No1 expressly shown his interest to end the joint status and other defendants and plaintiff had a full knowledge. If this was the situation then defendant No. 1 could inform this fact to plaintiff and to defendants to remove their name from other right column of suit property No. 1 to 4 but in fact he kept the name of plaintiff and other defendants in other right column as it is.

30) That apart, except oral evidence, the defendant No. 1 does not brought any other evidence to support his contention. Other defendants not entered into witness box. Record specifically discloses that nearabout all portion of suit property of Hindu Joint Family is in possession of defendant No. 1 and in absence of any special reason I am of the considered opinion that alleged partition is unfair and unequal and it will be unjust to hold that in such partition

share are allotted to defendant No1 , plaintiff and other defendants as per paragraph 320 as mentioned above. Hence I am of the considered opinion that suit property is not legally divided in between plaintiff and defendants and defendant No. 1 illegally mutated his name on revenue record of suit property No.5. Consequently claim of defendant No.1 that deceased Vithoba allotted suit property No. 5 to him in partition found merit-less. Hence, I answered issue No. 2 **in the affirmative and issue No. 6 and 9 in the negative.**

**AS TO ISSUE NO.3:-**

31) Ld. counsel Mr. V.P. Bhamre heavily urged that late Vithoba had a another wife Kesarbai, she had one daughter Rajabai. He further submitted that late Vithoba had one daughter Gangabai, she had one daughter Shantabai but plaintiff not impleaded them as defendants. His further contention is that one Bajirao Damodar Patil is owner of suit property No.7, he was also necessary party. On this basis it is his contention that suit is barred by non-joinder of necessary party. I am not impressed with this contention for simple reason that plaintiff added Shantabai as defendant during pendency of suit. Further defendant No.1 not proved the fact that late Vithoba had one other wife. Furthermore plaintiff proved that defendant No.1 got the possession of suit property No.7 on the basis of nucleus of Joint Hindu family. It is also matter of record that plaintiff not claimed any relief against Bajirao Damodar and separate suit in between Bajirao Damodar and defendant No.1 is also pending. Hence I have no hesitation to hold that defendant No.1 failed to prove that suit is barred by non joinder of necessary party. Hence, I answered issue No. 3 **in the negative.**

**AS TO ISSUE NO. 7 :-**

32) Mr. V.P.Bhamre the learned counsel for the defendants has laid great stress on the delay to file the suit. He submitted that the limitation would start running against the plaintiff from the date of his exclusion of suit property. To substantiate his claim he brought into notice some of the admission of plaintiff

in his cross-examination, he admitted that defendant No.1 issued notice to him in the year 2010. He also brought into notice the copy of mutation entry No.1140 (Exh.66) which has been recorded in the year 1976. On this basis he submitted that plaintiff is excluded from suit property much before long and his admission showing his knowledge of exclusion.

33) Copy of mutation entry No. 1140 (Exh.66) showing that on the application of the deceased Vithoba suit property No.5 has been allotted to defendant No. 1 in the year 1976. In short defendants want to bring into notice that plaintiff has been excluded from suit property in the year 1976. It is matter of record that present suit includes suit property No. 1 to 9. Mutation entry No.1280 (Exh.65) discloses that name of plaintiff and other defendants have been mutated in revenue record of suit property No.1 to 4. 7/12 extracts (Exhs. 56 to 59) discloses that today also name of plaintiff and other defendants appeared in 7/12 extracts of suit property No.1 to 4. It was not the situation that plaintiff has been completely excluded from suit property. On the contrary it is the claim of plaintiff that he prayed for partition in the year 2010. Notice (Exh.88) also discloses the dispute in between plaintiff and defendant in the year 2010. In fact plaintiff filed this suit in the year 2010. Period of limitation in view of Art 110 of the limitation Act is prescribed twelve years from the date of exclusion. Hence suit is within limitation. Moreover, copy of mutation Entry No. 1140 (Exh.66) is proved to be illegal. It is judicial trite that for limitation to begin to run for a suit for partition, there must be complete exclusion of the plaintiff from enjoyment of the joint family properties. Considering this situation I do not find any merit in submission of defendants and suit is within limitation. Accordingly, I answer issue No.7 in the **affirmative**.

**AS TO ISSUE NO.8 :-**

34) Admittedly dispute is in respect of suit property No. 1 to 9. It is matter of record that at present one Bajirao Damodar Desle is owner of suit property No.7. He executed agreement for sale in favour of defendant No.1 and suit in that

respect is pending, so status of suit property No.7 is not certain. As well as suit property No.9 i.e. tractor is admittedly sold out, details of sold price is also not on record. So at present suit property No. 7 and 9 are not available for partition. Consequently plaintiff and other defendants are entitled for partition in suit property No. 1 to 6 and 8.

35) Plaintiff is claiming 1/6 share. Admittedly deceased Vithoba had 6 sons and one daughter. Defendant No.2 is wife of Rupsing (deceased son of Vitthal), defendant No. 3A to 3D are legal heirs of Ramsing (deceased son of Vitthal), defendant No. 7 is daughter of Gangabai (deceased daughter of Vitthal). In short 6 sons of deceased Vitthal including their legal heirs are entitle for equal share. So far as defendant No.7 is concern, she is grand-daughter of deceased Vitthal. In respect of the co-parcenary property the right of a daughter to receive a share equal to that of a son applies only if the death of male Hindu is after commencement of the Amendment Act, 2005. In instant case admittedly father of plaintiff and defendants is died in the year 1983 hence defendant No.7 is governed by the provision of section 6 of the Hindu Succession Act, 1956 and not as per Amendment Act of 2005. Consequently, defendant No.7 is not entitled for equal share as like son but she is entitled as a intestate succession in notional partition in share of father of plaintiff and defendants. Therefore plaintiff would have his 8/49 share, defendant No. 1, 2, 4 and 5 would have each 8/49 share, defendant No. 3A to 3D have a together 8/49 share and defendant No. 7 has 1/49 share in the suit property. I, therefore, answer issue No.8 as **affirmative**

**AS TO ISSUE NO.10 :-**

36) Section 38 of the Specific Relief Act speaks about the grant of perpetual injunctions. Sub-section (3) of Section 38 says that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of the property the court may grant a perpetual injunction in the circumstances detailed in the section. Thus a court can grant a perpetual injunction only after it determines that the plaintiff has a right to enjoy the property. In present case it is proved fact

that plaintiff is one of the co-owner of suit property so certainly he has a right to enjoy suit property to the extent of his share. It is matter of record that defendant No.1 is cultivating the entire suit property and now a day defendant No.1 is not ready to allot the share of plaintiff. This situation discloses that defendant No.1 invades the plaintiff's right to or enjoyment of the suit property. Another aspect is that situation no way disclose the exact standard to ascertain the actual damage suffered to plaintiff. So it can not be hold that plaintiff has any other remedy. Considering overall situation in my view this is a fit case to protect the possession of plaintiff to the extent of his share. Consequently plaintiff is entitled for relief of perpetual injunction as prayed. Hence, I answered this issue **in the affirmative.**

**AS TO ISSUE NO.11 :-**

37) Plaintiff and defendant No.2 claimed mesne profit. It is proved fact that suit properties are ancestral undivided properties. Plaintiff and other defendants also proved their respective share in suit property. It is also matter of record that suit property is in possession of defendant No.1. 7/12 extract of suit property discloses that defendant No.1 is taking various crops from the suit property. So it is necessary to order inquiry under Order 20 Rule 12 of The Code of Civil Procedure. Hence I answer this issue in the **Affirmative.**

38) No serious argument was advanced about the award of cost. But it is matter of record that plaintiff successfully proved his claim. The primary object of levying costs under sections 35 and 35A of The Code of Civil Procedure, is to recompense a litigant for the expense incurred by him in litigation to vindicate or defend his right. It is therefore payable by a losing litigant to his successful opponent. It is matter of record that plaintiff has already paid the prescribed court fee in regard to the suit, for that he engaged his counsel, he is persuading the suit since long and got success to prove his claim against defendant No.1. Consequently plaintiff is entitled for costs from defendant No.1. In the result, in answer to issue No 12, I pass the following order-

**ORDER**

- 1) The suit is hereby decreed with costs.
- 2) It is declared that plaintiff has 8/49 share, defendant No. 1, 2, 4 and 5 have each 8/49 share, defendant No. 3A to 3D have a together 8/49 share and defendant No. 7 has 1/49 share in the suit property as mentioned follow-
  - 1) *C.T.S.No.12 admeasuring 0 Hector 20 Ares bounded as toward East- Block No.8, West-Block No. 1, North- Block No. 24 and South-Block No. 3 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.*
  - 2) *C.T.S.No.13/1 admeasuring 0 Hector 40 Ares bounded as toward East- Block No. 16 & 17, West- Block No. 11 & 12, North- Block No. 22 and South- Block No. 13/2 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.*
  - 3) *C.T.S.No. 63/1 admeasuring 0 Hector 50 Ares bounded as toward East- Block No.64, West-road, North- Block No. 62 and South- Block No. 63/1 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.*
  - 4) *C.T.S.No. 107/1 admeasuring 1 Hector 47 Ares bounded as toward East- Block No.106, West- Block No.117, North- Block No. 64 and South- Block No. 107/2 situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.*
  - 5) *C.T.S.No. 120/1 admeasuring 2 Hector 43 Ares bounded as toward East- Block No.120/2, West- Block No.120, North- Block No. 121 and South- road situated at Nirgudi, Tal. Shindkheda, Dist. Dhule.*
  - 6) *C.T.S.No. 514 admeasuring 1 Hector 73 Ares bounded as toward East- Block No.515, West-Block No.512, 513, North- Sulwade boundary and South- Block No. 520 situated at Patan, Tal. Shindkheda, Dist. Dhule.*

AND

- 8) *C.T.S.No. 516 admeasuring 2 Hector 17 Ares bounded as toward East- Block No.518, West-*

*Block No.515, North- Sulwade boundary and  
South- Block No. 519 situated at Patan, Tal.  
Shindkheda, Dist. Dhule.*

- 3) Partition of the above mentioned suit property be effected equitably by the Collector, Dhule or any Gazetted subordinate of the Collector, Dhule deputed by him in this behalf in accordance with the above declaration and in accordance with the provisions of law, if any, for the time being in force relating to the partition or the separate possession of the shares of the said lands and the parties be delivered possession of the land of their respective shares.
- 4) The plaintiff, defendant No.2,4,5,defendant No. 3A to 3D and defendant No. 7 are entitle to get mesne profit for the suit property No. 1 to 6 and 8 from the defendant No.1 from the period date of the institution of suit till those are given in their possession. Inquiry is hereby directed for the same as per Order XX Rule 12 of The Code Of Civil Procedure.
- 5) Defendant No.1 ,his agent, servant or anybody claiming through him are perpetually restrained from transferring, alienating or creating any sort of charge over suit property No. 1 to 6 and 8.
- 6) The defendant No.1 shall pay costs of Rs.3000/- to the plaintiff.
- 7) Decree be drawn accordingly.

(Dictated and pronounced in open Court.)

sd/-

Shindkheda.  
Dated : 24/10/2017

(P.S.Bhandari)  
Civil Judge, J.D.Shindkheda.

Certificate

I certify that the contents of this PDF File are word to word as per Original Judgment.

Name of the Steno :- Mrs. N.Y.Bhalerao  
Name of the Court :- C.J.J.D. Court, Shindkheda  
Tal. Shindkheda, Dist. Dhule.  
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