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Decided on :- 16-02-2016
Duration :- Y. M. Ds.
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IN THE COURT OF CIVIL JUDGE SENIOR DIVISION,
ICHALKARANJI DIST.KOLHAPUR
(Presided over by U.T.Pol)

Reg.Civil Suit No.18/2010

Exh. No. 141/A

1. Meena Dagdu Chaye
Age about -45yrs. Occ.housework,
R/o.16/56, Dangre chaul,
Ichalkaranji, Tal.Hatkanangale,
Dist.Kolhapur.
2. Suman Mahadeo Ghaydar
Age about -65yrs. Occ.housework
through power of attorney
Shri.Dagdu Dattatray Chaye
Age about -58yrs. Occ.weaving
R/o.As above.

... Plaintiffs

-Versus-

1. Shri.Ananda Ramkrishna Mahajan
Age about -60yrs. Occ.agriculture,
R/o.Birdeo nagar, Rendal.
2. Shri.Dattatray Ramkrishna Mahajan
Age about -58yrs. Occ.weaving,
R/o.Ramnagar, Rendal.
3. Shri.Raghunath Ramkrishna Mahajan
Age about -55yrs. Occ.silver work,
R/o.Zenda chowk, Rendal (Deceased
through legal heirs -)

... Defendants

- | | |
|--|----------------------|
| <p>a) Smt.Bebitai Raghunath Mahajan
Age about -50yrs. Occ.housework
R/o.Zenda chowk, Rendal,
Tal.Hatkanangale, Dist.Kolhapur.</p> <p>b) Shri.Santosh Raghunath Mahajan
Age about -33yrs. Occ.silver work
and agriculture R/o.As above.</p> <p>c) Shri.Nitin Raghunath Mahajan
Age about -30yrs. Occ.silver work
and agriculture
R/o.As above.</p> <p>d) Sou.Anita Pravin Mhetre
Age about -28yrs. Occ.housework
R/o.Jawahar nagar, Ward No.29,
H.N.2180, Ichalkaranji
Tal.Hatkanangale, Dist.Kolhapur.</p> <p>4. Shri.Vasant Ramkrishna Mahajan
Age about -53yrs. Occ.weaving,
R/o.As above.</p> <p>5. Shri.Mahadeo Ramkrishna Mahajan
Age about -51yrs. Occ.silver work,
R/o.As above.</p> <p>6. Shri.Vishnu Ramkrishna Mahajan
Age about -49yrs. Occ.silver work,
R/o.As above.</p> <p>7. Smt.Bhagirathi Krishna Karde
Age about -70yrs. Occ.well to do,
R/o.Rendal.</p> <p>8. Shri.Vishwas Krishna Karde
Age about -50yrs. Occ.agriculture,
R/o.As above.</p> | <p>...Defendants</p> |
|--|----------------------|
- 

9. Shantabai Shrikant Jadhav
Age about -48yrs. Occ.housework,
R/o.As above.
(Defendants no.1 to 9 all r/o.Rendal
Tal.Hatkanangale)
- 10.Collector (Through State of
Maharashtra)
Kolhapur, Dist.Kolhapur.

...Defendants

Suit for partition, possession and
declaration

Advocates Appeared -

Shri.M.D.Jamadar for plaintiffs.
Shri.S.S.Patil for defendants no.1 to 6.
Shri.P.V.Kulkarni for defendants no.7 to 9.
Defendant no.10 - Exparte.

-J U D G M E N T-

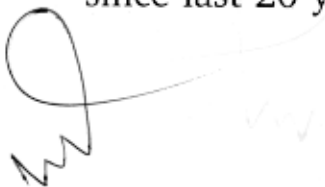
(Decided on 16-02-2016)

This is suit for partition, separate possession of
share and also for declaration of civil death of Prakash.

02. Briefly stated the facts of plaintiffs' case are as under :-

Landed property bearing Gat No.1244 total area
admeasuring 2H.51R, pot-kharab 69R out of which half
share situated at village Rendal, Tal.Hatkanangale,
Dist.Kolhapur. Similarly property bearing C.T.S.no.1069
total area 72.8 sq.mtr out of which half share, City Survey
no.1070 total area 27.4 sq.mtr out of which half share, City
Survey no.1071 total area 88.02 sq.mtr out of which half
share, City Survey no.1072 total area 10.00 sq.mtr out of

which half share, City Survey no.1073 total area 30.07 sq.mtr out of which half share situated at village Rendal, Tal.Hatkanangale, Dist.Kolhapur well particularly described in plaint para no.1A and 1B ((hereinafter referred to as "suit property") is the ancestral property of plaintiffs and defendants no.1 to 6. It was originally belong to their common ancestor Balaso. He has two sons viz.Pundlik and Ramkrishna. Pundlik expired leaving behind widow Geetabai, two sons Madhukar and Prakash and two daughters i.e. plaintiff no.1 and 2. Ramkrishna expired leaving behind defendants no.1 to 6 are the only legal heirs. After demise of Geetabai on 21-5-1979 their names were recorded in the record of right to the extent of half share. Defendants no.1 to 6 are the real cousin brothers of the plaintiff. Plaintiffs had given the property described in plaint para 1A to defendants no.1 to 6 for cultivation on crop share basis. However, defendants no.1 to 6 surreptitiously got recorded their names in record of right and also to crop statement detrimental to the right of the plaintiffs. Ramkrishna predecessor of defendants no.1 to 6 had sold the property bearing city survey no.1069 to one Krishna Karde and therefore his legal heirs defendant no.7 to 9 are added in the present suit. Their brother Madhukar expired issueless on 9-8-1993 and Prakash is absconding since last 20 years. Inspite of search he could not found and



his where about is not known. Defendants denied the share of plaintiffs which constrain plaintiffs to file the present suit for partition, separate possession of their share and also for declaration of civil death of their brother Prakash. Hence prayed to decree the suit with costs.

03. Defendants no.1 to 6 combated the suit claim by filing the written statement cum counter-claim Exh.63. They denied that the suit properties are joint family properties of the plaintiffs and defendants, in which plaintiffs have half share. They also denied that plaintiffs are the legal heirs of the Pundlik. Description of the suit property is not correct. The area of city survey no.1069 and 1070 is wrongly recorded and therefore suit must failed for want of proper identification of the suit property. They admitted that Madhukar expired issueless and Prakash is absconding. They denied that surreptitiously they filed application before the Circle Officer and illegally recorded their names in the record of right and crop statement of the suit property. The market value of the property described in plaint para 1A is more than 10 lac and valuation of property described in plaint para 1B is also more than 10 lac. Inspite of that true valuation of the suit property is not shown and proper court fee stamp is also not paid and therefore suit must failed on that count itself.

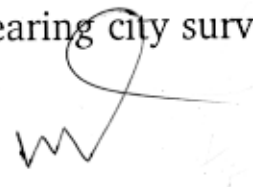


04. They submitted that suit property and C.T.S. no. 1067 and 1068 were joint family property of Pundlik predecessor-in-title of the plaintiffs and Ramkrishna predecessor-in-title of the defendant. Partition in between Ramkrishna and Pundlik was infact effected long back and suit property comes to the share of Ramkrishna and the properties which comes to the share of Pundlik are sold by him and now after death of Ramkrishna suit properties are exclusively belong to the defendants to which plaintiffs have no concern. The name of plaintiffs is recorded in the record of right of the suit property without notice to the defendants and therefore nominal one, by which plaintiffs are not getting any right, title and interest in the suit property. Property described in plaint para 1A Gat No.1244 old survey no.274/1 is belong to the defendant. Their predecessor Ramkrishna had filed the suit for possession against Nana Patil and Smt.Geetabai Mahajan in the Court of Civil Judge, Sr.Dn.Ichalkaranji. In the said suit issue of tenancy was framed which was referred to the Tenancy Court for decision. In the Tenancy case no.493/62 oral evidence of Geetabai was recorded, in which she admitted that possession of her half share is given to Nana Patil who was cultivating the said property as tenant. However, Ramkrishna by filing various proceeding obtained the possession of said land and therefore it is exclusively belong



to Ramkrishna. Pundlik has taken the loan from Nana Patil and one Dagade by mortgaging the property described in plaint para 1A and to absolve from the liability he left the village Rendal in the year 1956 and settled at Vadgaon, where he expired in the year 1960. Plaintiff sought the relief of declaration regarding civil death Prakash without making him party and therefore suit is premature one. Without joining him as a party relief of declaration cannot be granted.

05. Plaintiffs are not legal heirs of Pundlik, they have no any right, title and interest in the suit property. They filed the present suit through power-of-attorney who is not aware about the transaction in between Pundlik and Ramkrishna and therefore has no right to file the present suit. Pundlik Mahajan on 13-9-1956 sold the city survey no.1067 admeasuring 29.7 sq.mtr to one Chandsaheb Nadaf, Bebijan Nadaf and Halima Nadaf. Similarly he sold the property bearing city survey no.1067 admeasuring 39 sq.mtr to one Eknath Petkar and Eknath Pethkar sold the said property to Rajaram Petkar bearing grampanchayat house no.1068/2. Similarly property bearing city survey no.1069 admeasuring 700 sq.ft, house property is sold by Pundlik Mahajan to Krishna Karde. Property bearing C.T.S.no.1070 is allotted to Ramkrishna during partition which he was using as court yard and as a road to approach property bearing city survey



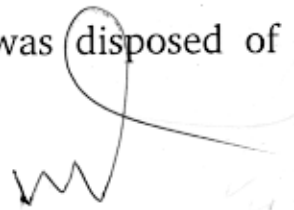
no.1068, 1073 and 1072. Similarly property bearing city survey no.1071 admeasuring 88.2 sq.mtr area allotted to the share of Ramkrishna which was in the form of dung-pit, in which he has constructed the two storied house. Similarly property bearing city survey no.1072 is allotted to Ramkrishna Mahajan during partition which is in possession of defendant no.3. Similarly property bearing city survey no. 1073 admeasuring 30.7 sq.mtr is sold by Pundlik Mahajan to Eknath Petkar and Eknath Petkar sold the said property to defendant no.2 by registered sale deed dated 29-4-2002 where he constructed the R.C.C structure i.e two storied building which was exclusively belong to defendant no.2. Similarly Pundlik Mahajan has sold 5 Anna 4 paid share in Rev.Survey no.137/15 to one Maruti Bhosale by sale deed dated 9-9-1950. Accordingly mutation entry no.3499 was effected in record of right. Similalry Pundlik Mahajan has also sold the 3 Anna 10paid share in Rev.Survey no.132/26 to Sadashiv Petkar by registered sale deed dated 31-12-1952 and accordingly mutation entry no.3431 was recorded in record of right. Similarly he sold 8 anna share in Rev.Survey no.132/7 and 10 paid share in rev.survey no.132/23 to one Lingappa Mahajan by registered sale deed dated 5-8-1953. Accordingly mutation entry no.3415 was recorded in record of right. Similarly he has sold 5 anna 4 pai share in Rev.Survey no.154/18 to one Shankar Mahajan by sale deed



dated 23-10-1953. Accordingly mutation entry no.3416 was recorded which itself shows that Pundlik has already disposed of all the properties which comes to his share and therefore plaintiff has no right to again claim the partition in the property which is allotted to the defendant. Hence the property which are sold by Pundlik be adjusted to the share of plaintiff. Suit is not maintainable and ought to be dismissed with compensatory costs of Rs.25,000/-.

06. Defendants also filed the counter-claim for declaration of ownership of the suit property of the defendants and also for mandatory injunction for deleting the name of plaintiffs which is recorded in record of right of the suit property.

07. Defendants no.7, 8 and 9 also combated the suit claim by filing written statement Exh.17. They denied that suit properties are joint family properties of plaintiffs and defendants, in which plaintiffs have share. Property bearing city survey no.1069 is exclusively belong to them, in which they have constructed their house. R.C.S.37/78 was filed before the Civil Judge, Jr.Dn., Ichalkaranji which was disposed of. Against which appeal was filed before the District Judge, Kolhapur bearing Civil Appeal No.162/83. Against that order second appeal no.4890/86 was filed before the Hon'ble High Court which was disposed of in



favour of the defendant. Against which Madhukar Mahajan filed appeal before the Hon'ble Apex Court, which was also disposed of. Hence property bearing city survey no.1069 belong to defendants no.7 to 9, to which plaintiffs have no concern. Plaintiffs filed this false suit and therefore prayed to dismiss the suit with costs.

08. While suit was pending, defendant no.3 expired, his legal heirs were brought on record who adopted written statement of defendant no.3 by pursis Exh.48.

09. Plaintiffs combated the counter-claim of defendants by filing written statement Exh.63. They denied that partition of the joint family property was taken place in between Pundlik and Ramkrishna and suit property was allotted to the share of Ramkrishna and Pundlik has already disposed of the properties allotted to his share. Defendant filed the counter-claim just to grab the property of the plaintiffs. Hence prayed to dismiss the counter-claim filed by defendants no.1 to 6.

10. On the basis of rival pleadings of the parties, my learned predecessor has framed issues at Exh.22. My findings to the said issues with reasoning thereon are as under :-



<u>ISSUES</u>	<u>FINDINGS</u>
1 Whether plaintiffs prove that suit properties are joint family properties of plaintiffs and defendants no. 1 to 6?	... In the affirmative..
2 Whether the plaintiff prove that they have share in the suit properties ? If yes, what is their share ?	Yes, plaintiff no.1 is 1/4 th share and plaintiff no. 2 is 1/4 th share
3 Whether the plaintiffs are the legal heirs of deceased Pundlik ?	... In the affirmative..
4 Whether the defendant prove prior partition of joint family property in between Pundlik and Ramkrishna ?	... In the negative...
5 Whether defendant no.1 to 6 prove that Pundlik has already sold the properties which came to his share ?	... In the negative..
6 Whether defendant prove that landed property bearing Gat No.1244 described in plaint para 1A and property bearing C.T.S.no.1070, 1071 and 1072 are belong to defendants no.1 to 6 exclusively to which plaintiffs have no concern ?	... In the negative..
7 Whether defendant no.7, 8 and 9 prove that property bearing C.T.S.no.1069 are belong to them, to which plaintiffs have no concern ?	To the extent of property which is sold to them
8 Whether plaintiff prove that their brother Prakash is not heard by any one who ought to have heard for more than 7 years ?	... In the affirmative..
9 Whether suit is bad for non joinder of necessary parties ?	...In the negative...



<u>ISSUES</u>	<u>FINDINGS</u>
10 Whether plaintiff is entitled for partition and separate possession of their share ?	... In the affirmative..
11 Whether plaintiff is entitled for relief of declaration of civil death of Prakash ?	... In the affirmative..
12 Whether defendant no.1 to 6 are entitled to declare that they are the exclusive owner of land Gat No.1244 and house property bearing C.T.S.no.1070, 1071 and 1072 as prayed in the counter-claim ?	... In the negative...
13 What order and decree ?	..As per final order..

-REASONS-

11. In support of the suit claim, plaintiff examined one Dagdu Dattatray Chaye, the power of attorney holder of plaintiff no.1 and 2 by filing his affidavit Exh.51 in lieu of examination-in-chief. Besides oral evidence they relied upon the documentary evidence namely the revenue record i.e 7/12 extract and 8A extract of Gat No.1244 Exh.71 to 73, property card extract of C.T.S.no.1069, 1070, 1071, 1072, 1073 Exh.74 to 78, extract of inquiry register of C.T.S.no. 1069, 1070, 1071, 1072 Exh.79 to 81. 7/12 extract of Gat No.1244 for the year 1978-79 to 87-88 Exh.82, certified copy of the village map Exh.83, power of attorney Exh.84, death certificate of Geetabai and Madhukar Exh.85 and 86. Defendants in rebuttal examined Vasant Mahajan as D.W.1 by filing his affidavit Exh.91 in lieu of examination-in-chief. Besides oral evidence they also relied upon certified copy of

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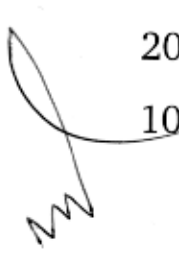
the order passed by Circle Officer, Hupari Exh.103. Property card extract of city survey no.1067, 1068, 1069, 1070, 1071, 1072 and 1073, extracts of village map Exh.104 to 111, extract of inquiry register of suit property described in plaint para 1B Exh.112 and 113. Assessment extract of Grampanchayat house no.1067, 1068/1, 1068/2, 1072, 1073 Exh.114 to 118, extract of inquiry register of city survey no.1067 and 1068 Exh.119 and 120, agreement of purchase of property by Eknath Petkar Exh.121 and Exh. 122, certified copy of the deposition of Geetabai Mahajan and Nana Patil before the Tahsildar Hatkanangale in Tenancy Case no.493/62 Exh.123 and 124. Mutation entry no.3499 Exh.125. Mutation entry no.3415 Exh.127, 7/12 extract of survey no.274/1 from 1955 to 1968 Exh.132, 133, mutation entry no.8387 Exh.134. Heard the learned counsel for both the parties.

As to issues No.1 to 7 :-

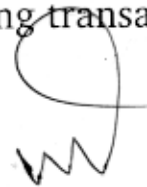
12. In this suit fact is not in dispute that originally suit property was belong to one Balaso. He has two sons viz.Pundlik and Ramkrishna. Pundlik expired leaving behind widow Geetabai, two sons Madhukar and Prakash. Geetabai also expired on 21-5-1979. Her death certificate Exh.85 produced on the record. Defendant no.1 to 6 are the only legal heir of Ramkrishna. In the present suit plaintiffs claim the legal heirs of Pundlik and defendant denied that

plaintiffs no.1 and 2 i.e Suman and Geeta are the daughters of the Pundlik. It is the specific contention of plaintiff is that suit properties are being the joint family properties being from the branch of Pundlik have half share. After demise of Geeta, their names are recorded in record of right of suit property. Their brother Madhukar expired on 9-8-1993 (vide death certificate Exh.86) issueless. Prakash is absconding since last 20 years and his whereabouts is not known and they are only legal heirs of Prakash and Madhukar. They had given the landed property described in plaint para 1A to defendants no.1 to 6 for cultivation, however, by filing application before the Circle Officer they have recorded their names surreptitiously in record of right and crop statement column of the suit property excluding plaintiff. One Krishna Karde purchased some portion out of C.T.S.no.1069 from Ramkrishna. Defendants no.7 to 9 being his legal heirs are added as defendants in present suit. They claim partition and possession of their half share in the suit property.

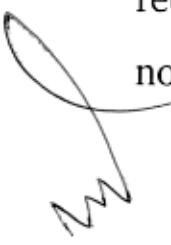
13. Per contra, it is the contention of defendants is that description of suit property is not correct one. Plaintiffs are not the legal heirs of Pundlik and therefore they have no right to file the suit for partition. However, they admitted Madhukar expired issueless and Prakash is absconding since 20 years. They stated that suit property alongwith C.T.S.no. 1067 and 1068 were the joint family property of the Pundlik



and Ramkrishna and the oral partition was taken place in between them, in which suit properties allotted to the share of the Ramkrishna, to which plaintiffs have no concern. Petitioner during his life time sold all the properties come to his share. Name of the plaintiffs is wrongly recorded in record of right of the suit property without notice to defendants and therefore nominal one by which plaintiff shall not get any right. Their predecessor Ramkrishna had filed the civil suit for possession of property bearing Gat No. 1244 old survey no.274/1 against Nana Patil and Geetabai, in which tenancy issue was framed and was referred to Tenancy Court for decision. In Tenancy Proceeding no. 493/62 Geetabai depose before the Tenancy Court that she had given half share to Nana patil who was cultivating it as a tenant. However, Ramkrishna Mahajan by filing various proceedings obtained the possession of property bearing Gat No.1244 and therefore it is exclusive property of the Ramkrishna. Pundlik has taken the loan from Nana Patil and in security of the loan mortgage the suit property described in plaint para 1A and to absolve from the liability left the village Rendal in the year 1956 and settled down at village Vadgaon, where he expired in the year 1960. Suit filed through Power of attorney holder is also not maintainable. Power of attorney holder has no right to file the present suit for want of knowledge regarding transaction



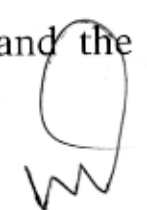
in between Pundlik and Ramkrishna. After partition Pundlik has disposed of the properties comes to his share. He accordingly sold property bearing C.T.S.no.1068 admeasuring 29.7 sq.mtr to Chandso Nadaf, Bebijan Nadaf and Halima Nadaf. He also sold property bearing C.T.S.no. 1068 39 sq.mtr to Eknath Petkar who in turn sold the said land to Rajaram Petkar. Pundlik also sold C.T.S.1069 area admeasuring 700 sq.ft area to Krishna Karde. C.T.S.no.1070 is allotted to the share of Ramkrishna. He was using the said land as court yard and as a road to approach C.T.S.no.1068, 1073 and 1072. Similarly C.T.S.no.1071 is allotted to the share of Ramkrishna, in which he has constructed the rooms. Similarly C.T.S.no.1073 is sold by Pundlik to Eknath Petkar who in turn has sold the said property to defendant no.3 where he has constructed the house. Similarly Pundlik has sold 5 Ann 4 pai share out of survey no.137/15 to Maruti Bhosle on 9-9-1950 vide mutation entry no.3499. Pundlik also sold 3 Anne 10 pai share out of city survey no.132/26 to Sadashiv Powar by sale deed dated 31-12-1952, accordingly mutation entry no.3431 was recorded. Pundlik also sold his 8 anne share in survey no.132/7 and 10 pai share in the survey no.132/23 to Lingappa Mahajan by sale deed dated 5-8-1953. Accordingly mutation entry no.3415 is recorded. Similarly Pundlik sold 5 anne 4 pai share in survey no.154/18 to Shankar Mahajan by sale deed dated



23-10-1953. Accordingly mutation entry no.3416 is recorded. Hence the contention of defendant is that all those properties which are disposed of by Pundlik during his life time be dropped to his share. Defendants also filed the counter-claim claiming relief of declaration of title to the suit property and also declaration that legal heir of Pundlik have no concern to the suit property and mandatory injunction to delete their names from the record of right of suit property.

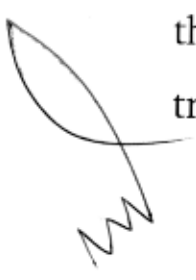
14. In the present suit it is also contention of defendants no.7 to 9 that property bearing C.T.S.no.1069 is sold to their predecessor-in-title, to which plaintiffs have no concern. They are owners in possession of C.T.S.no.1069 in which they have constructed the house. Various litigations are filed upto Hon'ble Apex Court, in which it was declared that property bearing C.T.S.no.1069 is belong to defendants no.8 to 9. They are residing in the house and paying the taxes regularly.

15. In this suit defendants firstly denied that plaintiffs are the legal heirs of late Pundlik. Their contention is that when this suit is filed plaintiff no.1 was 45 years old, however, Pundlik was expired prior to 49 years, from which it can be easily inferred that plaintiffs are not the legal heirs of Pundlik. Infact the property card extract and the 7/12



extract of the suit property produced on record showing the name of the plaintiffs in record of right as legal heir of Pundlik and Geeta. It does not appears to be probable that if plaintiffs were stranger their names would be recorded as legal heir of Pundlik in record of right of the suit property. It is further contention of defendant is that names of plaintiffs are recorded in record of right of the suit property, without their knowledge. Hence all those entries in record of right are nominal one and on that basis plaintiffs shall not get any right, title and interest in the suit property. Moreover all those entries in revenue record cannot be treated as document of title. The presumption regarding correctness of mutation entry can be rebutted. To buttress he relied upon the judgment in the case of Karewwa and others Vs. Hussensab Khansaheb Wajantri and others, reported in AIR 2002 S.C. 504, wherein it is held that, "Entry in revenue record - Presumption as to correctness has to be rebutted by leading evidence - Entry does not stand rebutted by mere statement of fact made in written statement" There cannot be any quarrel about the ratio laid down in above cited ruling.

16. Then he submitted that plaintiffs filed the present suit through power of attorney Dagdu Chaye the husband of the plaintiff no.1 who has no knowledge about the transaction which are taken place in between Pundlik and



Ramkrishna and therefore evidence of P.W.1/Dagdu, the power of attorney holder of the plaintiff cannot be relied upon. P.W.1 during cross admitted that plaintiff no.1 is his wife of plaintiff no.2 is his sister-in-law. Plaintiff no.1 is present in the Court, she is physically fit and can depose before the Court. He denied the knowledge regarding transaction in between Ramkrishna and Pundlik. He do not know the survey number of agricultural land. He do not know the four boundaries of house property. He do not whether plaintiff and Prakash, Madhukar and Geetabai had given notices to defendant claiming the partition. It is the contention of learned counsel for defendant is the evidence of P.W.1/Dagdu, power of attorney holder in this case cannot be relied upon. To buttress he relied upon the judgment in the case of Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. And others, reported in 2005(1) Mh.L.J.1170, wherein it is held that, "Word "acts" employed in Order 3 Rule 1 and and 2 of the Code of Civil Procedure is confined only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. It would not include deposing in place and instead of the principal. Power of attorney holder can appear as witness in his personal capacity". There cannot be any quarrel about the ratio laid down in above cited ruling.

17. It is very material to note that in this suit

defendants have taken the plea that already partition of the suit property and other joint family property was effected long back and suit properties are allotted to the share of Ramkrishna and properties which were allotted to Pundlik is already sold by him and therefore suit properties are the exclusive properties of defendant. Hence the burden lies upon the defendant to prove prior partition. If defendants prove the partition then plaintiffs will be non suited. Hence primary burden lies upon defendant to prove partition. In such circumstances merely because plaintiff not entered into the witness box, no adverse inference can be drawn against them. Moreover under Section 120 of the Indian Evidence Act in all civil proceedings parties to suit and husband or wife of any party to suit shall be competent witness. Hence contention of learned counsel for defendant that suit is not maintainable through power of attorney holder cannot be accepted.

18. In the present suit defendant also taken the plea that description of the suit property is not correct. The area of city survey no.1069 and 1070 is wrongly recorded and therefore suit property cannot be identified. It is very material to note that plaintiff by proper amendment has corrected the area of city survey no.1069 and 1070 and therefore contention of defendants that the description of suit property is not correct one cannot be accepted.

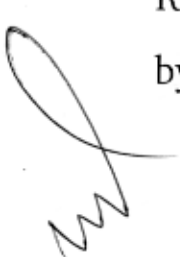


19. In this suit as I have already stated above, it is the specific contention of defendants is that infact partition of the suit property and other joint family property including C.T.S.no.1067 and 1068 is already taken place in between Pundlik and Ramkrishna. Properties which are allotted to the Pundlik is already disposed of by him and suit properties are allotted to the share of Ramkrishna and therefore it is separate property of defendant and therefore they are exclusive owner of the suit property. It is also contention of the defendant is that Ramkrishna has filed the civil suit against Nana Patil and Geeta in respect of Gat no.1244 for possession, in which tenancy issue was framed which was referred to Tenancy Court. In tenancy proceeding no.493/62 Geeta deposed before the Tahsildar and admitted that their half share is given to Nana Patil, in which he started cultivating it as a tenant. However, Ramkrishna filed the proceeding and obtained possession of Gat No.1244 and therefore it is exclusive property of Ramkrishna. Defendant produced on record certified copy of the statement of Geeta and Nana Patil Exh.123 and 124 which is recorded by Tahsildar. I myself scrutinize both the statements, in which Geeta and Nana admitted that property bearing Gat No.1244 was equally belong to Pundlik and Ramkrishna who have equal share in it and therefore contentions of defendants that it was exclusive property of Ramkrishna cannot be

accepted.

20. Defendants produced various documents on record to show that Pundlik has already sold the property come to his share. He produced on record the mutation entry no.3499 Exh.125 showing 5 Anna 4 pai share in Rev.Survey no.137/15 is sold by Pundlik to Maruti Bhosale by sale deed dated 9-9-1950. Then he produced on record the mutation entry no.3431 Exh.125 showing that Pundlik sold 3 Anne 4 pai share out of survey no.132/26 to Sadashiv Powar. Then he produced mutation entry no.3415 Exh.127 showing that Pundlik has sold 8 Anna share in survey no. 132/7 and 10 pai share in survey no.132/23 to Lingappa Mahajan.

21. Both parties produced various documents viz. 7/12 extract of Gat No.1244 old survey no.274/1 Exh.71, 72, 73 and 133 showing name of the plaintiff, Madhukar, Prakash and name of defendants no.1 to 6 are commonly recorded. Then plaintiff produce the property card extract of C.T.S.no.1069 admeasuring 72.8 sq.mtr Exh.74 wherein there is remark as ancestral, extract of inquiry register Exh. 79 is also produced on record, which shows that it is belong to Ramkrishna and Pundlik Mahajan out of which Ramkrishna sold area admeasuring 12 x 7ft to Krishna Karde by sale deed dated 16-11-1959 for Rs.450/- and the



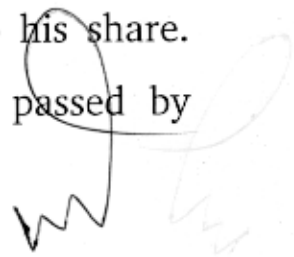
remaining property is mortgaged by Pundlik Mahajan, Mahadeo Ramkrishna Mahajan to Anna Karde for total amounting to Rs.150/- which was, however, repaid by them. However, property is in possession of Krishna Karde to the extent of 12ft x 7ft area and therefore recorded his name in record of right. Then he produced the property extract of C.T.S.no.1070Exh.75 wherein there is also remark that the property is ancestral one to which name of the plaintiff and Prakash is recorded, extract of inquiry register is produced at exh.80, 81 and 112. Then he produced the property card extract of C.T.S no.1071 Exh.76 and extract of inquiry register Exh.81 wherein there is remark of ancestral belong to Ramkrishna Mahajan and Geeta Pundlik Mahajan. After their death it is recorded in the name of plaintiffs and defendants no.1 to 6. Then they produced the property card extract of C.T.S.no.1072 Exh.77 and extract of inquiry register Exh.81 where is remark of ancestral property in the name of Ramkrishna Bala Mahajan. After his death it is recorded in the name of defendants no.1 to 6. They also produced the property card extract of C.T.S.no.1073 Exh.78, in which name of the plaintiff is recorded. In this case plaintiff during cross admitted that he do not know when and where Pundlik is expired. He has not filed the death certificate of Pundlik. Balasaheb has two sons viz. Pundlik and Ramkrishna. He do not know the four boundaries of

C.T.S.no.1069 and 1073 and their measurement. The property bearing C.T.S.no.1069 is in possession of defendant no.7 and 8. Plaintiff not demanded the partition from the defendant. Except suit property other properties were also belong to Pundlik and Ramkrishna which were not added in the present suit. He further admitted that as per inquiry register extract, area admeasuring 12 x 7ft in C.T.S 1069 is given to Ramkrishna and remaining land was given to Pundlik. Name of Pundlik and his legal heirs were not recorded to city survey no.1072. The name of Geeta, Prakash and plaintiff is deleted from C.T.S record of 1073. In C.T.S record of city survey no.1073 it is shown that suit property was allotted to the Pundlik which were sold by him to Petkar. He further admitted property bearing C.T.S.no. 1067 is allotted to the Pundlik who has sold property to Chandso Nadaf and others. He further admitted that name of the plaintiff is not recorded in record of right of Gat No. 1244 as legal heir of Pundlik. Prakash is absconding since 1984. They have not filed any complaint in police station nor given any public notice in newspaper. He cannot state total area of survey no.274/1. He do not know whether Ramkrishna filed the civil suit no.207/61 against Nana Patil. He do not know whether Ramkrishna has taken the possession of said property from Nana Patil. He denied that legal heirs of Pundlik has no concern to the suit property. He

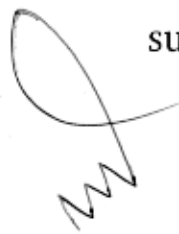


has not filed the assessment record of the house property.

22. It is also material to note that defendant during cross admitted that suit property was originally belong to Balasaheb Mahajan. After his death it is inherited by his three sons Pundlik, Ramkrishna and Mahadeo. Mahadeo is expired issueless. Pundlik has two sons Madhukar and Prakash. Name of Prakash and Madhukar is recorded to half share in record of right of Gat No.1244. He further admitted that name of Ramkrishna is recorded to remaining half share. He further admitted that plaintiff, Prakash and Madhukar are the only legal heirs of Pundlik. Madhukar is expired and Prakash is absconding. He has not heard about Prakash since last 20-25 years. The proceeding was initiated before the Circle Officer bearing complaint register no.53/08 for recording the name of plaintiff after death of Madhukar and absconding of Prakash. He has received the copy of the said order which is filed at Exh.103. He admitted that name of plaintiff is recorded in property card extract of the suit property. He further admitted that suit properties are ancestral property, in which plaintiff has half share and defendant has half share. He also admitted that they denied to give half share to the plaintiff. He further admitted that he has not produced any documentary evidence to show that Pundlik has deposed all the properties come to his share. Defendant also produced on record the order passed by

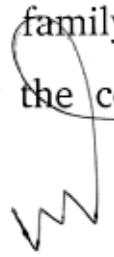


Circle Officer, Hupari in complaint register no.15/08 dated 25-8-2008 wherein the defendant objected the mutation entry no.7387 whereby the name of plaintiffs were recorded in record of right to Gat No.1244, by which the Circle Officer cancelled the mutation entry no.7387 observing that plaintiff has not produced the heirship certificate from the Competent Civil Court as they are the legal heirs of Madhukar and Prakash. In this way defendant unequivocally admitted the half share of the plaintiff in suit property which is denied by them. However, learned counsel for the defendant vehemently submitted that the admissions which are given by defendant cannot be relied upon in this case as they are not the conclusive proof. To buttress he relied upon the judgment in the case Sheopurari Singh Vs. Coal India Ltd., Kolkatta and others, reported in 2010(3) Mh.L.J. 381, wherein Hon'ble Bombay High Court held that, "admissions are never considered to be conclusive proof of the matter stated therein de horse the circumstances if any, in which the same were made by the maker ". There cannot be any quarrel about the ratio laid down in the above cited ruling. However, in the case in hand, the admissions which are given by defendants are unequivocal one with opportunity to explain and therefore can be very well relied upon under Section 21 of Indian Evidence Act. Then he submitted that the mutation entries in revenue record even



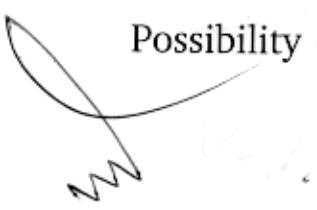
can be relied upon to prove the partition of the property. To buttress he relied upon the judgment of Hon'ble Apex Court in the case of Digambar Adhar Patil Vs. Devram Giridhar Patil (died) and another, reported in AIR 1995 SC 1728, wherein it is held that, "factum of partition between two brothers – proof, entries in record of right maintain in official course of business is relevant piece of evidence. It is also held that under the Hindu Law, it is not necessary that the partition should be effected by registered partnership deed. Even a family arrangement is enough to effectuate the partition between co-parceners and to confer right to a separate share and enjoyment thereof". There cannot be any quarrel about ratio laid down in above cited ruling. It is, however, material to note that defendant, however, not produced a single mutation entry on record showing that partition of joint family property was infact effected in between Pundlik and Ramkrishna and therefore above cited ruling shall not come to the help of defendant.

23. It is material to note that in the case of Chintamani Amal Vs. Nanda Gopal Gounder, reported in 2007(4) S.C.C, 163, wherein it is held that, "There is presumption against the partition. Party raising the plea of partition has to prove the same. Since in law there is presumption regarding continue of joint family. Even separate possession of portion of party by the co-sharer



would not lead to presumption of partition". Similarly in the case of Mahadu Appa Wanjole Vs. Laxman Veerappa Wanjole and others, reported in 2008(5), Mh.L.J. 680, it is held that, "In a suit for partition burden of proof, assertion of defendant that there was partition in the year 1960. Apart from bare words, defendant did not adduce any documentary evidence to show that there was partition in the year 1960. Appellate Court perfectly justified in decreeing the suit of the plaintiff and holding that there was no partition whatsoever in the year 1960. The mutation entry recorded in record of right on basis of worthy given by defendant no.1, however, that cannot be the conclusive proof of partition. In absence of any documentary or oral evidence adduced by defendant, it cannot be hold that there was family partition in the year 1960".

24. In the present case though defendant has taken the plea about prior partition but no specific and positive evidence is adduced on record about the partition in between Pundlik and Ramkrishna. Nothing is stated exactly which property were allotted to the share of Pundlik and which properties are allotted to the share of Ramkrishna. Merely producing the mutation entry showing that Pundlik has disposed of items of properties shall not be accepted as proof of prior partition as contended by defendant. Possibility cannot be ruled out that Pundlik must have sold



those properties during the continuous of joint family for the legal necessity.

25. Defendant without taking a plea in the pleading first time during the argument submitted that properties described in plaint para 1B are the house property and therefore in view of Section 23 of Hindu Succession Act. Plaintiff being the daughters have no right to claim the partition of dwelling house till male persons claiming the partition. Admittedly in the present case plaintiffs are the Class-II heirs claiming the partition of the house property being the legal heirs of Prakash and Madhukar. Under Section 23 the restriction imposed by section is applicable where the intestate or female is surviving by the male or female heirs enumerated in Class-I of Schedule and not where the intestate is surviving only by heirs in Class-II of Schedule or by agnates or cognate. The restriction is confined to the right of any of the female heir where there are other male heirs enumerated in Class-I and does not apply to a case where the heirs in that class are only male or female heirs. Section protects only dwelling house which means the house wholly inhabited by one or more members of family of the intestate where the some or other family members even if absent for some temporary reason have the animus revertendi. Learned counsel for the plaintiff relied upon the judgment in the case of Gajanan Sakharam

Gadewar through his L.Rs Vs. Smt.Anjanabai wd/o. Sakharam Gaddewar and others, reported in 2010(3) ALL MR 90, wherein it is held that, "partition of dwelling house after 9-9-2005 when Hindu Succession (Amendment) Act 2005 came into the operation whereby Section 23 is deleted, female heir can seek partition even of dwelling house, subsequent event arising out of the change of law is obviously to be applied and therefore dwelling house is also to be partitioned as per the share of the parties". Hence in the present case plaintiffs being Class-II heirs of brother Prakash and Ramkrishna can claim the partition and separate possession of properties described in plaint para 1B i.e the house property being the joint family property of plaintiff and defendants. Defendant failed to prove prior partition in between Pundlik and Ramkrishna. Considering the overall evidence and discussions made above, according to me, plaintiffs prove that suit properties are joint family properties of plaintiff and defendant no.1 to 6. Plaintiffs also proved that they are legal heirs of deceased Pundlik, Prakash and Madhukar. Defendants, however, failed to prove prior partition of joint family property in between Pundlik and Ramkrishna and suit properties comes to the share of Ramkrishna. Defendant also failed to prove that Pundlik has already sold the properties which comes to his share. Defendants also failed to prove that suit properties are



exclusively belong to them. Hence plaintiffs no.1 is entitled to $1/4^{\text{th}}$ share and plaintiff no.2 is entitled to $1/4^{\text{th}}$ share in the suit property. It is, however, material to note that admittedly in the present case property bearing C.T.S.no. 1069 admeasuring 14ft x 7ft is sold to defendant no.7 to 9, in which they have constructed their house and they are residing there. Plaintiff not claimed declaration that the sale deed executed in favour of predecessor in title of defendants no.7 to 9 are not binding on them. They also not sought the relief to set aside the sale deed and therefore plaintiff entitled to their share excluding the property sold and in occupation of defendants no.7, 8 and 9 in C.T.S.no.1069. I, therefore, answer Issue no.1 to 7 accordingly.

As to Issue no. 8, 9 and 11 :-

26. In the present suit plaintiff sought the relief regarding declaration of the civil death of their brother Prakash on contention that he has not heard by any one who ought to have heard of him for more than 7 years preceding the filing of present suit and therefore under Section 107 and 108 of Indian Evidence Act he is presumed to be dead and therefore sought the declaration to that effect. It is, however, contention of defendants is that though plaintiff sought the relief of declaration of civil death of Prakash, the brother of the plaintiff, but he is not added in the present suit and without adding him in the present suit as

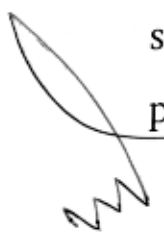
defendant, plaintiff has no right to seek the relief of declaration of civil death and the suit is premature one and ought to be dismissed. It is material to note that learned counsel for the defendant not brought to my notice any provision to show that in a suit for declaration of civil death party whose declaration of civil death is sought is necessary and therefore contention of learned counsel for the defendant cannot be accepted. Before appreciating and analysing evidence on record, it is necessary to advert the legal position on record. Section 107 and Section 108 of Indian Evidence Act are very material for our purpose -

Section 107 – Burden of proving death of person known to have been alive within thirty years.

“Where the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it “.

Section 108 – Burden of proving that person is alive who has not been heard of for seven years.

(provided that when) “ the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is (shifted to) the person who affirms it”.

27. After adverting the provision of Section 107 and 108 of Evidence Act, it reveals that there is presumption that when the question is whether man is alive or dead and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirm it.
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Section 108 of the Act add proviso that when the question is whether a man is alive or dead, and it is proved that he has not been heard for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to person who affirms it. The burden of proving when the person had not been heard of by his neighbour or relatives for more than 7 years before filing of this suit that he was alive on the plaintiff. When court has to determine date of death of a person who had not been heard for period of more than 7 years, there is no presumption that he died at the end of the first 7 years or at any particular date.

28. Admittedly defendant in their written statement admitted that Prakash is absconding since last so many years and they have not heard of him. Even during cross examination D.W.1 admitted that Prakash is absconding since last 20-25 years and he do not know his whereabouts. Hence considering the overall evidence on record, according to me, plaintiffs prove that they have not heard of their brother Prakash for more than 7 years before filing the present suit and therefore entitled for relief of declaration of civil death of Prakash. I, therefore, answer Issue no.8 in the affirmative, Issue no.9 in the negative and Issue no.11 in the affirmative.



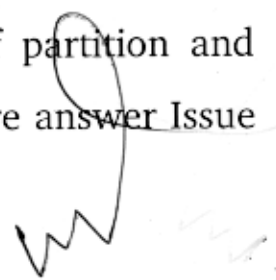
29. In the present suit defendants also challenged the valuation of the suit on contention that infact the market value of property described in plaint para 1A is more than 10 lac and also market value of property described in plaint para no.1B is more than Rs.10 lac. Inspite of that plaintiff valued the property described in plaint para no.1B is Rs. 1 lac and property described in plaint para 1A on the basis on assessment of the land revenue and therefore suit must failed for want of proper valuation and also for want of payment of the proper court fee stamp. Admittedly property described in plaint para 1A is assess to land revenue. In view of the Rule 2 of Maharashtra Suit Valuation (Determination of Value of Land for jurisdiction purpose) Rules 1983 reads that, for the purpose of jurisdiction of the court value shall be equal to 200 times the assessment payable in respect of land and for purpose of payment of court fee valuation of the property shall be equal to 40 times of survey assessment. Hence according to the provision of Maharashtra Suit Valuation Rules 1983 the suit for partition of land assess to the land revenue is required to be valued two times of the assessment. In the present suit plaintiff has properly valued the suit property described in plaint para 1A for jurisdiction purpose. It is the contention of learned counsel for defendants that the valuation of suit property described in plaint para 1B is also more than Rs.10 lac. Defendant relied



upon the admissions given by the P.W.1 in the present case. Admittedly plaintiff valued the property described in plaint para 1B Rs.1 lac for jurisdiction purpose. When defendants come with the case that the suit is not properly valued then burden lies upon them to adduce evidence regarding the valuation of properties on the date of filing of the suit. IN the present case, defendants not adduced any evidence in any form showing that the valuation of the property described in plaint para 1B was Rs.10 lac and more and therefore contention of the learned counsel for the defendants in this regard cannot be accepted.

Issues No.10 and 12 :-

30. In the present case, plaintiff proved that the suit properties are joint family properties of plaintiff and defendants. In which plaintiff no.1 has $1/4^{\text{th}}$ share and plaintiff no.2 has $1/4^{\text{th}}$ share and defendants no.1 to 6 has half share. Defendants failed to prove prior partition of the suit property and suit properties which come to the share of Ramkrishna their predecessor in title and therefore exclusively belong to them and also prayed to delete the name of the plaintiff from the record of right. Hence defendants no.1 to 6 are not entitled for declaration and mandatory injunction as prayed for in counter-claim. However, plaintiffs are entitled for relief of partition and separate possession of their share. I, therefore answer Issue



no.10 in the affirmative, Issue no.12 in the negative and proceed to pass the following order -

-ORDER-

1. Suit is hereby partly decreed with proportionate costs.
2. It is hereby declared that plaintiff no.1 has $1/4^{\text{th}}$ share, plaintiff no.2 has $1/4^{\text{th}}$ share and defendants no.1 to 6 jointly have half share in the suit properties excluding property bearing C.T.S.no. 1069 described in plaint para 1B which is sold to the predecessor-in-title of defendants no.7, 8 and 9.
3. In respect of the property described in plaint para 1A which is the property assess to land revenue, precept be send to Collector for effecting partition under Section 54 of the Code of Civil Procedure.
4. In respect of property described in plaint para 1B, Commissioner be appointed for effecting partition.
5. It is hereby declared the civil death of Prakash the brother of the plaintiff.
6. Counter-claim of the defendants is hereby dismissed.
7. Preliminary decree be drawn up accordingly.

Date : 16-2-2016

(U.T.Pol)

Civil Judge, Sr.Dn.Ichalkaranji

U. T. Pol
16/2/16