BOMBAY HIGH COURT

Rudragouda Venkangouda Patil

Vs.

Basangouda Danappagouda Patil

First Appeal No. 335 of 1932

(Wassoodew and Thakor, JJ.)

24.08.1937

JUDGMENT

Wassoodew, J.

1. This is an appeal from the decree of the First Class Subordinate Judge of Belgaum dismissing the suit for possession of certain entire parcels of property and for a share in others after partition. The plaintiff and the defendant are members of a watandar family of patels of Neginhal, a town in the Belgaum District. The plaintiff's branch was separated several years ago. There is conflict as to the year of separation. The plaintiff alleged that the separation took place in 1881, and not in 1883 as the defendant maintained. At the time of separation there were three branches of the patel family entitled to division of the family property which consisted of watan lands and houses in four Government villages, namely, Keserkop, Neginhal, Singarkop and Ramapur, and the entire alienated or inam village of Dori. The three branches were represented at the time of the division by Venkangouda, Basangouda, the father of the defendant, and Rudragowda, the grandfather of the minor plaintiff. Venkangowda died childless in September, 1885. His widow Parvateva died in December, 1916. The said Venkangowda was the genitive brother of the defendant and was adopted by his uncle prior to the division. At the time when the reversion opened the plaintiff was the nearer reversioner than the defendant and as such would be entitled to the entire interest in the separate property of Venkangowda.

2. The plaintiff's case must be divided into two parts. The first part of his case was that the said Venkangowda by virtue of the family partition was owner of certain entire parcels of land allotted to his share in the villages of Neginhal and Keserkop and was a tenant-in-common with regard to the residue of the family property situated in the villages of Singarkop and Ramapur and the entire village of Dori which by agreement was left undivided at the family partition. The plaintiff claimed possession of those properties by partition if necessary as a next reversioner of Venkangowda. The suit was instituted on November 28, 1928, within twelve years after the death of Ven-kangowda's widow Parvateva, and in this appeal limitation has not been urged against the plaintiff's claim.

3. The second part of the plaintiff's case was that he was entitled to a share in his own right in the

properties of the family left common at the division, particularly those situated in the village of Ramapur and the inam village of Dori, the lands in Singarkop having been divided in 1915.

4. In the written defense first submitted it was contended inter alia that there was a complete separation of the plaintiff's ancestor's share in all the properties of the family and it was maintained that Venkangowda died in union with the defendant who therefore was entitled to possession of all his interest in the property by survivorship. That defense was thus adumbrated in the written statement (exhibit 26) filed on November 27, 1929 :-

> In about the year 1883 A. D. as plaintiff's grandfather Rudragouda separated in interest from Venkangouda and Basangouda, took his share and became separate, the undivided family of aforesaid persons became separate according to law ; even assuming as above, Venkangouda and Basangouda-both these-reunited and began to live jointly alone as previously, as Venkangouda and Basangouda-both of these-reunited and lived jointly alone up to the end and as Venkangouda died in that state, defendant's father Basangouda alone became the owner of all the property in the possession of both Venkangouda and Basangouda by right of survivorship. And after him, the defendant alone has become the owner. The plaintiff has no title to any portion of the aforesaid property.

5. Upon the above pleadings the learned trial Judge framed the following issue on August 28, 1930 :-

> (1-A) Is the reunion between Venkangowda and Basangouda set up in paragraph 3 of exhibit 26 proved ?

6. Thereafter on July 4, 1932, in response to the Court's question the defendant submitted his supplementary statement (exhibit 81) as follows :-

> About the year 1883 the plaintiff's grandfather Rudragouda, took his one-third share in the entire property of the family and went to live separately from Basangouda Danapagouda and Venkangouda Ningangouda who were full brothers by birth, who never divided between them the remaining two-thirds of the family property and who continued to live as members of a joint family until the death of Venkangouda Ningangouda in 1885. Defendant has pleaded reunion in paragraph 3 of his written statement (exhibit 26) only because of the legal presumption which certain recent rulings of the Privy Council say arises that when one coparcener in a Hindu family takes his share and separates the presumption is that the partition is complete and that all the other coparceners also take their respective shares. As a matter of fact Basangouda Danapagouda and Venkangouda Ningangouda never divided the undivided two-thirds of the family property between them but held it jointly as before.Notwithstanding that change in the pleadings the issue framed upon the original written statement remained unaltered. There was also another issue raised (No. 2) to the following effect : " Does plaintiff prove that the property in the Schs. A and D belongs to the deceased Venkangouda bin Ningangowda alone at his death ? "

> That issue apparently involved the plea in the supplementary defense although the issue was framed much earlier-perhaps on January 12, 1931. The learned trial Judge accepted the explanation offered in the supplementary written statement for alleging reunion after separation and accordingly thought that the decision on the question of reunion was unnecessary. He held that Venkangowda and Basangowda, the father of the defendant, continued to be joint. The finding has been thus expressed by him :-After careful consideration of the documentary and oral evidence adduced on both sides, and from the probabilities of the case already noted, I disbelieve plaintiff and his witnesses, accept the statement of defendant's witnesses and find that Venkangouda and Basangouda remained as members of the joint Hindu family, when Rudragouda separated from them. Plaintiff's claim to Venkangouda's share as reversioner of Parvatibai is not therefore tenable, as that share, if any, went to Basangouda; by right of survivorship.

7. On the second part of the plaintiff's case the learned trial Judge thought that the evidence displaced the case made by the plaintiff that the lands mentioned in Schs. D and E were kept common at the time of the family division.

8. Mr. Coyajee, counsel for the plaintiff-appellant, has stressed the effect of the irregularity in not seeking for the necessary amendments of the pleadings and the issues in proper time upon the alteration of the defence, His argument is that the change of front could not properly be allowed and, if allowed, the regular procedure should have been followed. Without suggesting that more or different evidence which was available was not tendered by the plaintiff, counsel complained of the inability of the plaintiff to put the legal aspect of the case in argument in a proper perspective which might perhaps have influenced the learned trial Judge in the appreciation of the evidence. Whilst deprecating the manner in which the defense was allowed to be modified by the supplementary statement without seeking for an amendment of the pleadings and issues, I do not think any grave injustice has been caused to the plaintiff in the course of the trial, particularly when both sides tendered all the evidence which they intended to adduce in support of their respective pleas. The point was thoroughly argued and assimilated by the learned Judge in the consideration of the evidence before him as it appears from the judgment.

9. With regard to the first part of the plaintiff's case, the substance of the argument of the learned Counsel is that there is sufficient and reliable evidence to hold that the deceased Venkangowda was separated in interest from his other coparceners, and that, apart from it, when one coparcener, namely the plaintiff's grandfather, separated from the other two branches there was not only in fact a complete separation of the shares of the three branches entitled to the family property, but there was a severance of interest in law which affected the devolution of the estate held by the respective sharers including the deceased Venkangouda, and that therefore the latter at the time of his death held his estate in severalty. In fact it is urged that upon the pleadings the learned trial Judge erred, in the absence of evidence of reunion, in not giving a decree to the plaintiff, as reversioner of Venkangouda, for possession of his share.

10. Upon the question of law urged there have been several important pronouncements by their Lordships of the Judicial Committee. There can be no doubt that the presumption of union cannot continue after the separation of one member. The case of *Balabux Ladhuram v. Rukkmabai*[1], is an authority on the point. There Lord Davey in delivering

[1](1903) ILR 30 P.C. 725 : (1903) L.R. 30 I.A. 130
the judgment of the Board observed as follows (p. 137) :-

> It appears to their Lordships that there is no presumption, when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact.
>
> It does not necessarily follow from the above remarks that upon the separation of one co-parcener the presumption is that the rest are separated. In that case when the cousins entered into an agreement it was stated that defined shares in the whole joint family property had been allotted to the several coparceners. The agreement also gave them liberty either to live together or to separate their own business. And upon the construction of that agreement it was held that the agreement effected a partition in estate, and that evidence of some of the coparceners having continued to enjoy their shares in common would not affect the tenure of the property or their interest in it.

11. In *Ram Pershad Singh v. Lakhpati Koer*[2], in dealing with the contention that the decree in the suit effected a separation quoad some of the coparceners and left the rest united inter se, their Lordships refused to draw any presumption and they remarked that (p. 10) " here, again, the conduct of the parties must be looked at in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners."

12. It is obvious that when one coparcener separates from the others, the latter if so disposed may remain joint and enjoy their shares as joint owners in whatever property that remains after the separation of the share of the separated member. The intention to remain united can be inferred from their conduct even without any express agreement. Sir John Edge, in delivering the judgment of the Board in *Palani Ammal v. Mutkuvenkatacharla Maniagar*[3] made the following observations (p. 56):-

> It is also now beyond doubt that a member of such a joint family can separate himself from the; other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned oft for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. In dealing with the presumption it was also stated that the mere fact that the shares of the coparceners had been ascertained did not by itself necessarily lead to an inference that the family had separated. There may

be reasons other than a contemplated separation for ascertaining what the shares of the coparceners on a separation would be. Speaking entirely for myself, I do not

[2](1903) ILR 30 P.C. 231 : (1902) L.R. 30 I.A. 1

[3](1924) L. R. 52 L A 83 : 27 Bom. L. R. 735

> think the above observations support the view that when one coparcener separates from the rest there is a presumption that there is a complete severance or separation in interest as to the rest, which, according to the argument of the appellant's learned Counsel, must be displaced by proof of reunion or of an agreement to continue joint.

13. It was urged that that view is supported by the observations in *Bal Krishna v. Ram Krishna*[4], That was a case of partition between brothers and the previous rulings were again, considered by the Board. Their Lordships thought that the matter was put beyond doubt in *Palani Ammal v. Muthuvenkatacharla Moniagar* by the observations of Sir John Edge referred to above. The argument of law advanced before the Board was whether the separation of one member of the family necessarily caused the separation of all, In summarizing the effect of their decisions their Lordships observed as follows (p. 226) :-

> This problem has been discussed in many cases, the argument usually turning upon a question of presumption. The general principle undoubtedly is that every Hindu family is presumed to be joint unless the contrary is proved. If it is established that one, member has separated, does the presumption continue with reference to the others? The decisions of this Board show that it does not : per Lord Davey in *Balabux Ladhuram v. Rukhmabai*[5], followed in *Jatti v. Banwari Lal*[6], But it is equally clear on these decisions that the other members of the family may remain joint: it is again, their Lordships think, a question of their intention, which must no doubt be proved.

Far from saying that the effect of the severance of one member is an automatic separation in estate of the rest so that the presumption with regard to the status of the rest could be drawn, the authorities as I interpret them support the view that the question as to the nature of that status is one of intention which must be proved like any other fact. The interpretation put on *Balabux Ladhuram v. Rukkmabai* by Chandavarkar J. in *Anmdibai Hari Suba Pai*[7] in the following passage of the judgment (p. 296) –

> If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property, and the presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to cpnflne the partition to the rest, or, if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united,"- goes much beyond what was intended to be conveyed as explained in the subsequent decisions referred to (See *Sahebgouda v. Basmgouda*[8] and *Babanna v. Parawa*[9]

14. Therefore it seems to me the question whether Venkangowda and Basan-gowda remained united after the separation of Rudragowda is a question to be determined on the evidence in the case without any presumption in favor of either contention. So far as this

[4](1931) L.R. 58 I.A. 220.
[5](1903)ILR 30 P.C. 725 : (1903) L.R. 30 I.A. 130
[6] AIR 1923 PC 136 : 1923-18-LW 273 : (1923) L.R. 50 I.A. 192
[7] I.L.R. (1911) Bom. 293 : 13 Born. L. R. 287
[8](1930) 33 Bom. L. R. 580
[9] I.L.R. (1926) Bom. 815 : 28 Bom. L. R. 1446.

appeal is concerned, the contention as to the incidence of the onus assumes an academic aspect as both parties have led the available evidence. That question is not free from difficulty inasmuch as the direct evidence, both oral and documentary, is interested, inconclusive and unsatisfactory, and the circumstantial proof conflicting.

15. The principal documentary proof of the alleged partition of all the three sharers,-the oral evidence of persons supposed to have witnessed the partition and that of the parties regarding their enjoyment of their separate parcels, will be dealt with presently-tendered for the plaintiff consists of three partition memos (A, B and C) which purport to bear the date November 1, 1881, the signatures of the parties to the agreement, and the attestations of three arbitrators or panchas according to whose decision, as the recital goes, the parties agreed to take their respective portions in denned shares. The three memos. are identical in every respect and were apparently intended to be given to each of the three sharers. The memos. begin as follows :--

> Particulars regarding the partition that was effected in respect of Gowdki lands, houses, backyards (situate in) Mouze Neginhal and Kesarkop and Shingarkop in Taluka Parasgad and in Ramapur, Taluka Dharwar (i.e.) partition that was effected (in respect of the lands situate in) Inam villages including Dori in the two Districts of Dharwar and Belgaum as below; details thereof are as follows:-Date November 1, 1881, A. d., lunar date the 10th day of Kartik Shudh, Tuesday, Shake year 1803, Cyclical year Vrishabha.

16. The names of the different parties are given at the top of the three columns that are sub-joined in each of which the lands allotted to the sharer concerned are stated. Wherever the entire properties are given there is no qualification mentioned, but where an undivided share is allotted it is accompanied by a statement that ' it should be divided' later on. The concluding portion, which is as follows, is important :-

> As decided by Mallappa Puttar, Jinappa Kambar, Bhaskarappa Puttar, Appujapipa Bagar Hubli, in the presence of four persons the houses, backyards, fields as mentioned above, all that has come accordingly to our respective shares in our names and the houses, back-yards, lands situated in the said four villages as per above decision, these also should be divided and taken. And Judi Jirayat in respect of all villages should be paid according to one-third share mentioned above. After deducting Najarana that is payable to Government in respect of the Inam village Dori, the remaining amount should be taken as mentioned above, Date November 1, 1881, A. D. Hand-writing of Krishnaji Narayan Kulkarni.

17. The learned trial Judge, instead of expressly dealing with the question of the propriety of raising a presumption of the genuineness of the documents under the provisions of Section 90 of the Indian Evidence Act on the ground of their antiquity, has held upon the evidence and circumstances in the case that those memos. are not genuine. The argument of the appellant's learned Counsel in regard to these memos. is of a threefold character. The first is that a

presumption ought rightly to be raised of their genuineness, they having been documents of 1881 coming from the custody of a descend-ant of a party who was entitled to retain in his possession at least one of those memos. It is also urged that there is sufficient evidence to prove the handwriting of the writer and the signatories which ought to be accepted in this case. The next point in the argument is that these memos. do not require to be compulsorily registered inasmuch as they recite a past fact and were not intended to record the terms of the partition or to declare any interest in property within the meaning of Section 17 of the Indian Registration Act. As a ground for exemption from registration it is also argued that these memos. are no better than awards accepted and agreed to by the parties or made the foundation of their agreement, the awards themselves under the law then prevailing not being required to be registered, The alternative ground of contention is that, even if the memos. were required to be compulsorily registered, the recitals could be used to serve a collateral purpose, namely, proof of the fact that the parties had intended to sever by reference to arbitration and that that expression of their intention affected the character of their subsequent possession.

18. After anxious consideration I am inclined to the view that the circumstances and the proof supplied do not justify the raising of the presumption of the genuineness of the documents. The presumption under Section 90 of the Indian Evidence Act is rebuttable. It is to be made at the discretion of the Court. The presumption being based on the rule of expediency unless the surrounding circumstances satisfied the Court that the documents were produced from proper custody, it would be unsound to admit them. The provisions in Section 90 read with the explanation insist on a satisfactory account of the origin of the possession being given by the party relying upon the documents (see *Sharfudin v. Govind*[10]. The custody might not be in ' the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. Now the documents on the face of them were intended to be delivered to each of the parties interested in the division. The custody of all the three documents by the descendant of one of the parties, therefore, gives rise to the gravest suspicion, and invites the application of the rule of caution indicated in *Trailokia Nath Nundi v. Shurno Chungoni*[11]. There Sir Richard Garth C.J. pointed out that (pp. 541-542) :-

> ...the rule laid down in Section 90 of the Evidence Act ought to be applied in this country, with special care and caution. It is a rule which even in England must be exercised with caution... nothing can be more easy than for an unscrupulous person, who is wrongfully in possession of property, and wants to make out a title to it, to forge a deed in his own favor more than thirty years old, and then produce it himself in Court, and say that, because he is in possession of the land, he must needs be the proper custodian of the deed, and so relieve himself from the necessity of proving the execution of the instrument.
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> Necessarily upon the custody of these three documents investigation must commence as to the circumstances under which they were brought about and possessed. The Court must therefore examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the documents should naturally have been. For that purpose contemporary events assume importance. The Courts' action will be largely influenced by their appreciation in raising the presumption and appraising the value to be attached to the documents.

19. It is important to note that the plaintiff's mother was unable to say how those

[10] I.L.R. (1902) Bom. 452 : 5 Bom. L. R. 144

[11] I.L.R. (1885) 11 Cal. 539

documents came into the custody of her husband. She stated that on the advice of his pleader her husband had collected these papers five years before his death and had so informed his clerk one Mallaya (vide exhibit 82). The latter took a leading part in these preceedings, and, when examin-ed, was unable to say how his master came into the possession of the documents. Mallaya appears to have avoided the production of other papers, such as account books, by professing his inability to do so on the ground that they were destroyed by fire in their residence, the fire reaching only the cupboard in which the account books were deposited and not the receptacle in which these documents and others, to which reference will presently be made, were left. There is no independent evidence of this fire and the explanation does not carry conviction. Indeed it is true that one of the three documents could, if they are genuine, have been in the plaintiff's possession. But the possession of the two others cannot be traced to the plaintiff upon any honest or reasonable hypothesis. The suggestion that Rudragouda being the eldest living coparcener and living in the same premises was charged with their custody is unsatisfactory. The soundest policy even upon the rule of expediency will necessitate circumspection and scrutiny in the examination of the surrounding circumstances before raising the presumption.

20. Now one of the most important circumstances which might strengthen or remove the suspicion is the year in which the partition took place in this family. For, if the partition took place in 1883 necessarily the partition memos. of 1881 must be regarded as fabricated. The plaintiff in fixing the year of partition relied upon his clerk Mallaya, who gave instructions to his legal advisers. He also relied upon four other witnesses Rachappa (exhibit 124), Bhimappa (exhibit 125), Basavantappa (exhibit 126) and Dhulappa (exhibit 127), who came forward to depose that they were witnesses to the partition in his family. Now Mallaya attempted to fix the year as 1881 upon his personal knowledge stating that he was about seventeen years of age then, and that the partition memos. were executed a fortnight after the separation. Mallaya was confronted with his own school register of the year 1882 (exhibit 92) in which his age was stated to be ten and a half years when he entered school. He then stated that the partition was effected one year after he entered the school, that is, in the year 1883. That supports the case of the defendant at least in regard to the year of the partition and aggravates the difficulty of accepting the memos. as genuine. On important points Mallaya definitely decided to give no satisfactory replies and pretended ignorance in regard to contemporary events.

21. The other witnesses have apparently been tutored to say that the division took place four or five years after the great famine of 1877. With meticulous accuracy every witness has repeated that fact whilst on other important matters they have, like Mallaya, pretended ignorance or confessed failure of memory. They have apparently not much intimate connection with the family which perhaps might explain their ignorance. But when regard is had to their statements in reply to questions discreditive of the plaintiff's story, such as the division of agricultural cattle and implements upon a family partition and the like, they were unable to give cogent and fair replies. After reading their statements carefully I think the view of the learned Judge that they are unreliable is substantially correct.

22. We have been taken through the evidence of persons proving the handwriting of these partition memos. to corroborate the direct oral evidence. The first witness in the series is Annaji

(exhibit 101), and he came forward with the story that he recognized the handwriting of Krishnaji who has written the documents and signed them. The reason for his being able to identify the handwriting of Krishnaji is that the latter was officiating Kulkarni of Neginhal. It is worthy of note that he, according to his cross-examination, had seen Krishnaji write about forty years ago, although he could not say what particular documents were written in his presence. There was no correspondence between the two. It is difficult to rely upon that kind of testimony in proof of the documents,

23. The second witness on the point is Hanmant (exhibit 109) who produced two documents (exhibits 111 and 112) which are supposed to be in the handwriting of Krishnaji. Those documents have not been proved to be so. On comparison he was able to say that the handwriting on the disputed documents was that of Krishnaji. That witness was about five or six years old when Krishnaji died, and not being familiar with Modi Script in which Krishnaji's signatures appear on the documents produced by him, his evidence is hardly of any value. Moreover this witness is not much versed in Marathi script, for he is only able to sign his name Upon that evidence it is difficult to conclude that the documents were in fact executed by the coparceners interested in the partition.

24. The learned trial Judge, who was familiar with Kanarese script, on comparison of the handwriting with the other documents (exhibits 173 and 174) which were produced before him and which were not challenged as fabricated, was not satisfied with the result of his comparison. Such a process of comparison by the Court upon its own initiative and without the guidance of an expert and even with it is at all times hazardous and recognizably inconclusive. But, apart from that comparison there are other circumstances which strengthen the suspicion. Those circumstances could properly be dealt with in the consideration of the story whether Venkan-gouda's share was denned and separated. It is sufficient to say that the presumption under Section 90 of the Indian Evidence Act could not properly be raised and the evidence in proof of those documents is unsatisfactory and unreliable.

25. In the above view on the question of genuineness of the documents it would not be necessary to deal with the argument relating to their admissibility for want of registration. I would, however, in noticing it briefly state the foundation of my conclusion in that respect also. Having regard to the recitals in the deeds and their phraseology in my view it cannot be said that they constitute a record of a past division. Mallaya who comes forward with that story cannot be believed, and there is no reference to the subsequent execution of the documents in the plaint itself If the documents were not intended to be evidence of partition and allotment of shares, there can be no assignable reason for their existence. The statements in regard to certain lands to the effect that they "should be divided" clearly emphasize the terms of the agreement to sever and therefore incompatible with a prior division. The suggestion that those words are used in relation only to lands held by the family in common with strangers and that the demarcation of each sharer's parcels in the survey numbers affected was left for future action, is open to comment, and even if that view were permissible, the documents could not be regarded as recitals of a past division. The suggestion derives no support from the evidence and is opposed to the tenor of the deeds. It seems to me that the documents were compulsorily registrable and the omission to do so destroys their utility as proof of the fact of partition.

26. With regard to the alternative suggestion I do not think that those documents can be looked upon as awards merely or intended to operate as such There is indeed a reference to the decision

of a panch therein. But the parties apparently have made that decision the basis of their agreement when they signed it. It is true that the panchas have also signed the deed and there is authority for the view that an award merely because it is signed by the parties to the reference is none the less an "award-see *Yem-nava v. Revanshiddappa*[12]. But the question would be in what character the parties or the panchas executed the document. If the parties treated the document as their own act and the panchas merely signed it as attesting witnesses, I do not think the document would be regarded as an award merely because it bears the signatures of the panchas. Therefore the claim made to exemption from registration is, I think, not well-founded.

27. It would be unnecessary, therefore, to consider whether the documents could be used, notwithstanding the absence of registration, for a collateral purpose. That documents which are compulsorily registrable can be admitted for a collateral purpose cannot be disputed (see *Varatha Pillai v. Jeeva-rathammal*[13], Speaking entirely for myself, it would be possible, if the documents were genuine, to regard the reference to arbitration for the purpose of division of the family property as constituting proof collateral of the fact that the parties intended to sever. Coparceners of a joint Hindu family continue to remain united so long as there is no declaration of their will to sever. It has been well recognized that that declaration of will could be made even by an unilateral act (see *Ramchandra v. Dinkar*[14] and *Bageshwari Charon Singh v. Jagarath Kuari*[15], and a fortiori if such declaration were manifested by a joint reference to arbitration by all the adult coparceners calling upon the arbitrators to effect a division Of the family property and apportion it to the respective sharers, the partition memos. could be made use of in proof of the change of status or the declaration of will in question. That purpose, however, cannot be served by the deeds as I have already indicated, because in the view I take the memos. do not represent a genuine record of the transaction which they purport to evidence.

28. It is now necessary to examine the other evidence adduced by the parties in support of their respective contentions on the status of Venkangouda after the separation of Rudragouda, I have already expressed my view that there is no presumption that upon the separation of Rudragouda the other two coparceners were also divided in interest. It is true that the defendant at one time stated that they were reunited which might by implication show that they were divided along with Rudragouda and that the reunion took place later on. But he has explained that position and that explanation seems to be satisfactory.

29. I have already referred to portions of the oral evidence for the plaintiff in reference to the conflict as to the exact year in which the division took place and have expressed the view that it has failed in that respect to carry conviction to my mind. Now dealing with the oral evidence relating to the nature of that division I might briefly refer to the various witnesses' statements bearing upon that question. It has to be noted that the plaintiff's mother knows nothing personally about the state of the family at the time of the division. Her important witness is the aforesaid Mallaya (exhibit 84). He has distinctly stated that he does not know which of the lands were divided between Basangouda and

[12](1926) 29 Bom. L. R. 297 [14](1900) 2 Bom. L. R. 800
[13](1918) L.R. 46 I.A. 285 [15](1931) L.R. 59 I.A. 130

Venkangouda or who looked after them or paid their assessment. He has also admitted that he had not seen separate census numbers being given to Venkangouda's portion of the house and that the defendant's house occupies double the area of the plaintiff's house since 1887 when it was rebuilt. Rachappa (exhibit 124) suggested that there were three divisions of the house, but he

admitted that two-thirds of the house had been in the defendant's possession and that it was wholly rebuilt after the death of Venkangouda's mother. Now that witness was never a servant of the family and could not describe the agricultural activities of Venkangouda. But he was constrained to state that the management of the residue after the separation of Rudragouda's share was in the hands of Basangouda and there was no discrimination in the collection of the rents of the entire residue of the two-thirds of the family lands. The other witnesses Bhimappa (exhibit 125) and Basavantappa (exhibit 126) on the same point have no knowledge as to whether Basangouda managed the lands of himself and Venkangouda, and they were unable to say what lands had fallen to the share of Venkangouda about which they have come forward to speak. Bhimappa has admitted that Venkangouda's widow Parvatibai lived with the defendant, The other witness Dhulappa (exhibit 127) is no better.

30. But the learned Counsel for the appellant has relied upon the defendant's witnesses to prove that Venkangouda's share was defined. For instance, he has relied upon the evidence of Shiddappa (exhibit 144) to prove that Venkangouda and Basangouda had taken two shares. From that fact it is suggested that their shares were defined. But the witness made it plain that Venkangouda and Basangouda did not divide the property between themselves. Similarly the witness Yellappa (exhibit 146) stated that the lands were divided into three shares and that Rudragouda selected one. But that calculation does not affect the character of their possessions, for he distinctly stated that the two-thirds that remained was in the possession of Venkangouda and Basangouda as members of a joint family, The mere ascertainment of the shares for the purpose of division would not necessarily betray an intention to sever. The statement of the defendant's witnesses Revappa (exhibit 147) and Irappa (exhibit 148) derives considerable support from the statement of the plaintiff's own witnesses that Basangouda was managing the whole estate on behalf of himself and his brother who was given in adoption in another family.

31. From what the witnesses have stated the following facts emerge. At the time when the plaintiff's grandfather Rudragouda was separated, his share of the lands in certain villages at least was transferred into his possession and that he paid its assessment. The possession of the residue of the family estate remained with Basangouda who managed them on behalf of himself and Venkangouda. A portion of the house was demolished and rebuilt by the defendant in 1887 on two-thirds of the whole area and has been solely occupied after the death of Venkangouda by Basangouda. At the time of the census only two numbers were given to the family residence, one, to the portion occupied by Rudragouda, and the other, to that occupied by both Venkangouda and Basangouda.

32. Before considering the other evidence and circumstances it may be proper to visualize certain circumstances which are not seriously disputed. Venkangouda was the brother of Basangouda and lived with him prior to his adoption. Their wives were also mutually related. The ties of natural affection therefore would draw them together. It is consequently very likely, as the defendant and his witnesses have stated, that they lived together after the separation of Rudragouda. It is expressly admitted by the plaintiff's witnesses that Venkangouda's widow Parvateva lived with Basangouda and died in his house. It has been proved by the defendant that after Rudragouda's separation the rest of the lands stood in Basangouda's name, and although Venkangouda's adoptive mother Gangabai insisted since the adoption that he should be recognized as eligible for patilkiship she never pressed for the separation of his share and a change of his name in the khata. That was so is evident from the course of the conduct of the parties. After Venkangouda's death there was neither any varsa (heirship) inquiry nor mutation of

names in the village records, and Parvateva too did not set forth her claim to succeed to Venkangouda's property as his widow. It is true that in the Sanad of Dori (exhibit 45), which is of the year 1856, the inam was transferred in the name of two persons, Venkangouda and Basangouda, and Rudragouda's name was entirely omitted. If that refers to the state of things prior to the alleged division, it is certainly detrimental to the plaintiff's claim. But even if it was so subsequent to it, if is not inconsistent with the defense.

33. One indication more than another of the intention to divide and separate is furnished by the state of the Government records of the villages in question. Indeed it is true that the demarcation of shares or the absence thereof in the village records does not by itself afford very clear indication of actual separation or otherwise in a Hindu family. (See *Nageshar Bakhsh Singh v. Ganesha*[16] where the observations in *Bhagoji v. Bapuji*[17] were referred to with approval.) Therefore it might be said that the evidence of Pahani Suds (exhibits 151 and 139), relied upon by the defendant to show that Venkangouda had no special ledger account in the Government villages of Kesarkop and Neginhal in 1883, is not valuable in itself, specially when it is inconsistent with the defendant's statement (exhibit 177). But it is different where the law has made the Record of Rights presumptive evidence of the correctness of the entries therein under Section 135J of the Land Revenue Code. There the record is cogent evidence of the facts recorded. (See *Gangabai v. Fakirgowda*[18] Now after the introduction of the Record of Rights in the Government villages in question in 1915 or even prior thereto all the lands which might have stood in the joint names of Venkangouda and Basangouda or in their separate names were continued to be shown in the name of Basangouda alone without any protest from Parvateva. (See exhibits 152-155 relating to Kesarkop, exhibits 156-159 of Neginhal, exhibits 160-166 of Singarkop and exhibits 167-168 of Ramapur.) It is a circumstance of materiality that even after Parvateva's death in 1916 no attempt was made to assert her claim to the estate of Venkangouda. The defendant's statement therefore that he and Venkangouda continued to remain joint and that he managed the entire estate is entitled to credence in the absence of any proof in rebuttal.

34. It was also the defendant's case that Basangouda continued to pay the assessment and that there was no division of the profits or income. Now to discredit the suggestion the plaintiff produced certain assessment receipts relating to the years 1887 and 1890. Most of those assessment receipts do not bear any seals and there is no satisfactory explanation as to how they came into the plaintiff's possession. It is difficult to say to what survey numbers the receipts (exhibits 102 and 103) of 1887 and 1890 refer. No survey number is mentioned ini the earlier note. There is mention of Vat No. 53 and its connection with the disputed numbers is not explained. Stress has been laid upon the production of three

[16](1919) L. R. 47 IndAp 57 : 22 Bom. L. R. 596 [18](1929) 32 Bom. L. R. 368
[17] I.L.R. (1888) Bom. 75

receipts of the same date, namely, January 20, 1887 (exhibits 104, 105 and 106), relating to survey No. 72. They are passed in favor of three individuals relating to Kesarkop lands. That survey number stood in the khata of Shivappa bin Venkappa Savadatti, and it seems that the assessment has been paid by Basangouda, Rudragouda and Gangawa separately In the year 1886. If survey No. 72 was part of the family property and divided into three branches, the cogency of that evidence, if it were accepted as genuine, is undoubted. But even in the plaintiff's partition memos. survey No. 72 is absent and there is no satisfactory account given as regards that survey number. At the last stage of the proceedings a list of the estate which was divided according to Mallaya was produced (exhibit 75), and that survey number was introduced in it. But no

satisfactory explanation has been given as regards the family's connection with it. Moreover, there is no reliable evidence of the writing of the receipts'and it is unsound, having regard to the obvious suspicious nature of their possession, to draw any presumption regarding their genuineness. The remarks as to the value of the evidence of the handwriting of exhibits A, B and C, the partition memos., apply to the proof tendered through the same witnesses in regard to these receipts. The suggestion that the defendant might have produced better evidence of the payment of assessment loses its force in view of the statement of the plaintiff's witness Mallaya and the strong circumstances in the defendant's favor.

35. But it has been urged that certain lands stood in Parvateva's khata in the village of Dori and that not only were they exempted from payment of judi but the defendant suffered the assessment thereon to be paid out of the general inam income of the Dori village. The defendant has given an explanation as to the continuance of those lands in the name of Parvateva. He has stated that they were given to her during her widowhood to meet her expenses in charity. Having regard to the state of the Government records in the Other villages where the lands were certainly very valuable, the explanation does not seem to be unreasonable. It is true with regard to the payment of judi, the statement of the village talati (exhibit 115) supports the claim made that the assessment was so paid. There is a letter from the village officer of Dori (exhibit 116) to support that view. But, as I have said, that payment is not inconsistent with the explanation given.

36. It is pointed out that a yadi purporting to be written by the inamdar of Dori in 1926 at the time of the preparation of the Record of Rights suggests that the inamdar-defendant claimed as heir of Parvateva. Now that yadi was produced on February 20, 1930, with a list exhibit 30. But there is no further proof of its due execution and it might be expunged on that ground. The defendant when confronted with that memorandum in the form of a certified copy stated that unless he saw the original he could not explain it. But neither the original was called for nor was attention drawn to it in cross-examination. Assuming that he did then claim as heir of Parvateva, the implication is not inconsistent with the claim that the trust resulted in his favor. That equivocal statement would not outweigh the circumstances in favor of the view propounded by the defendant.

37. It is the main argument of the plaintiff's learned Counsel that the manner in which Venkangouda, Parvateva and Basangouda treated their estate, could be ascertained by a scrutiny of the accounts, and inasmuch as those accounts have not been produced, every inference should be drawn against the defense. In regard to the accounts the defendant was asked to produce his accounts, both private and public, on March 27, 1930 (exhibit 32). Three months later the defendant produced the village account of Dori only (exhibit 34) from his possession of 1907 and onwards and maintained that he had no past accounts in his possession. The accounts maintained by the inamdar were not examined or scrutinised to rebut the defence. The private accounts of the defendant could not be produced1 according to his explanation because he did not maintain any.

38. But there has been a consistency in the conduct of the defendant. Ever since 1890 or thereabouts he has been dealing with the property both of himself and Venkangouda as if he was the survivor and sole owner. For instance, he mortgaged certain properties at Kesarkop and Neginhal and also the house of the family. The first mortgage was effected in September 1890 in favor of one Mallappa (exhibit 95). Subsequently in October, 1890, he also mortgaged another

property in favor of one Shankargouda (exhibit 96). He then mortgaged another property in favor of one Ryawappa in September, 1892 (exhibt 97). That was followed by another mortgage in February, 1897 in favor of one Gurusatappa (exhibit 98). The mortgage of 1890(exhibit 95) is important. It includes survey No. 43 which according to the plaint went exclusively to Venkangouda. So also it is important to note that the property mortgaged by exhibit 96 was according to' the plaint part of the property of Venkangouda. But exhibit 96 refers to the house of the family and it shows that two-thirds was built upon. That is apparent from the boundaries of the house which include the extreme limit of the plaintiff's house on the one side and a stranger's house on the other. The intervening space would naturally be as admitted by Mallaya, two-thirds of the family house. It is not out of place to observe that Shankargouda, the mortgagee in one of the deeds, is a bhauband of the parties. That fact was admitted by the plaintiff in his own application (exhibit 94) made to the Assistant Collector in 1904. It is unlikely that Shankargouda would venture to take the lands as security if he had any doubt about the claim of Basangouda as the sole survivor of Venkangouda.

39. The above circumstances are more consistent with the intention to continue joint and less compatible with separation. There is, however, an important admission of the plaintiff's father in his application (exhibit 94) made to the Assistant Collector on July 7, 1904, referred to, for being appointed to the Gavadki of Kesarkop. In that application he made the following statement :

> Out of the remaining eight-annas share, I have a share of two annas and eight pies, and Danapgouda has the remaining share of five annas and four pies.
> That admission, it is not stated, is mistaken, and it contains an acknowledgment of fact leading to the inference that the defendant and Venkangouda lived in union and that the latter was entitled to Venkangouda's estate by survivorship. The explanation of that conduct, namely, that the plaintiff's father was a young boy of eighteen and that the admission was perhaps made without his father's consent and without any necessity, is unsatisfactory. That conduct is consistent throughout and is destructive of the view set: up, for he never after Parvateva's death in 1916 claimed to be the reversioner of Venkangouda, nor did he do so at the time of the introduction of the Record of Rights. In 1919 there was a litigation in the Mamlatdar's Court and the relationship between the parties was strained. Notwithstanding that fact no claim was made to succeed to Venkangouda when the reversion opened.

40. It is a circumstance of importance that in 1915 some lands in Singarkop village, which were not demarcated and divided by metes and bounds at the general partition were divided, but no claim was made by the plaintiff's father to the other lands in Basangouda's possession.

41. Now these are unquestionably circumstances of great cogency affecting the merits of the contentions of the parties, and lead irresistibly to the inference which the lower Court has drawn. Therefore the plaintiff's claim to succeed as reversioner of Venkangouda cannot be sustained.

42. Then there remains the question as to whether the inam village of Dori and the lands in Ramapur were left as common property at the time of the division, The burden undoubtedly lies on the plaintiff who alleges that although partition has already taken place those lands still Main

the character of joint or common property. In these the plaintiff has claimed a share in his own right. One important fact that has been relied upon is the division of Singarkop lands in 1915. That fact it is urged militates against the complete division of all the properties of the family in 1883. Now the defendant's allegation was that there was complete division of all the family property. That statement in the written defense was made with the consciousness that Singarkop lands were divided in 1915, The question is whether that division of 1915 would raise a presumption in the plaintiff's favor so that the case made by him with regard to certain other property must be assumed in his favour. The presumption according to Hindu law is that if a partition has taken place, then the burden of proof lies upon the person who alleges that certain family property was excluded at that partition. (See *Vinayak Narsinvh v. Datto Govind*[19] If the plaintiff succeeds in proving that there was partial partition only, that fact is insufficient in itself to establish that certain other parcels of property claimed as common must partake of the character of common property. (See *Kumarappa Chettiar v. Adaikkalam Chetty*[20]. It is a matter of proof and not presumption that such property was excluded and kept common.

43. It is the case of the plaintiff as set out in Mallaya's deposition that the income of the property alleged to have been left undivided was received by the plaintiff's father. Now just as we are asked to draw an inference against the defendant for not producing his accounts, the defendant has asked us to draw an inference against the plaintiff from the omission to produce his accounts, in regard to the receipt of his share of the income of the disputed properties. The plaintiff's mother has admitted that private accounts have been maintained by them. The only evidence in regard to the alleged exclusion of that property is the division of the Singarkop lands and the payment of judi and assessment of certain lands in Don in the plaintiff's possession. It is admitted that the plaintiff possessed seven lands in Dori village for which the judi and assessment were paid by the defendant. The evidence as regards the payment of judi is the same as that of the lands at Dori in the possession of Parvateva. Various explanations have been offered at this distant time as to the reason for such payment. Now the separate possession of lands in Dori is repugnant to the plea that the inam rights in the village were not divided. If the defendant's story were true that only certain number of fields were given to the plaintiff to equalize his share, it is not, upon the circumstances, unreasonable to suppose that perhaps on account of the

[19] I.L.R. (1900) Bom. 367 : 2 Bom. L. R. 1134

[20] I.L.R. (1931) Mad. 483)

enjoyment of the revenues in inam by the family the inam rights were conveyed in certain fields to the plaintiff.

44. The exact extent of the income of the plaintiff from these lands and others is not on the record. It is the defendant's case that the plaintiff had several lands in other villages larger in extent than his fair share and therefore he was given only seven lands in Dori. For that purpose the defendant relied upon a statement prepared by him after the case was almost over. But it appears no notice was given to the plaintiff of that statement (exhibit 177). We have therefore decided to exclude that statement from our consideration. There is, however, another piece of evidence to conclude as to what was the extent of the holdings of the plaintiff. Mallaya has stated that about 440 acres in the four villages belonged to the family. The statement prepared by the plaintiff (exhibit 175) gives no idea as to its extent. But the defendant has stated in his evidence that 250 acres fell to the share of Venkan-gouda and Basangouda in Neginhal and Kesarkop and that the plaintiff had got nearly 180 acres. That is certainly more than the full extent of his one-third share, and we are told that the Records of Rights produced in this case justify the estimate.

Ordinarily if the plaintiff's claim to the reversion were true the remaining lands would be double the portion allotted to his share.

45. It is to be noted that the Record of Rights of Ramapur (exhibits 161-168) shows that the defendant alone has been the occupant of the lands in that village and the plaintiff is not shown to be in possession of any interest in those lands. That is inconsistent with the retention of Ramapur lands as common property. It was suggested that the plaintiff's exclusion from Ramapur supports his case. It is also said that the story of equalization of shares is untrue inasmuch as at one time the plaintiff had in his possession nine lands at Dori and that two out of those lands survey Nos. 84 and 77 were taken away from him. The relevancy of that alleged dispossession is not quite clear. On the evidence however no such deprivation of possession seems to have taken place. It cannot be denied that survey No. 84 stood in the name of Ningava Mirasi (see exhibit 166). That Ningava is alive but she is not called to say whether she surrendered her possession in favor of the plaintiff. Several witnesses have been examined, such as, Shankareppa, Bhujappa, Bharamappa, Shidappa, Hanamantappa, Laxmart and Rama (exhibits 115 to 122), to show the alleged dispossession. The plaintiff was unable to prove that kabulayats or rent-notes were taken from his supposed tenants. One of the patils (exhibit 117) examined was unable to say who cultivated those fields. The witness Bharamappa (exhibit 118) was unable to prove the area of those fields. Rama (exhibit 122), a tenant, came forward to say that he cultivated the land on behalf of the plaintiff. But there is no account of the receipt of rent from him. It appears that his brother is interested in the plaintiff. The fact that the plaintiff took no serious steps at the time of his alleged dispossession or did not resist it, militates against his assertion. Moreover, this is not a claim for recovery of possession upon dispossession, but one for partition of common property. As the question of dispossession is immaterial, and the other evidence is neither sufficient nor cogent to establish that the lands in Ramapur or in the inam village of Dori.were kept common at the time of the division, I think the plaintiff cannot claim a partition of those lands.

46. For the reasons stated above, I would confirm the decree of the lower Court and dismiss the plaintiff's appeal with costs.

Thakor, J.

1. I agree with the order proposed by my learned brother.

2. I have had the advantage of reading the full and exhaustive judgment of my learned brother, and it would not be necessary for me to recapitulate all the facts and to deal with the facts as well as the law in great detail. As the case was, however, stated to us to be of some importance, and out of respect for the arguments of the learned Counsel for the appellant who argued the case exhaustively and for several days, I feel myself justified in recording my conclusions and giving short reasons therefore on some, of the principal points in the case.

3. The point on which the appellant's counsel laid very great stress in his opening, and in fact made the very basis of his subsequent discussion and comments on the evidence, related to the pleadings of the parties and the issues framed thereon and the failure of the trial Court to record its finding on the issue as to re-union which had been framed by the Court. Both the trial Court as well as my learned brother have given reasons in detail for holding that that issue did not really arise on the pleadings as they stood when the hearing commenced and that it was not necessary,

therefore, to record a finding on the same. As the point is of some importance, I proceed to give shortly the reasons why I too agree with the views so- expressed.

4. It is necessary to remember in this connection as to how the plaint started. The plaintiff's case in the plaint was not the case of severance in interest at all but was a case of a physical partition by metes and bounds, followed by the taking of possession and management by each of the three parties to the partition, namely, Venkangouda the deceased, Basangouda the father of the defendant, and Rudragouda, the grandfather of the plaintiff. Paragraph 1 expressly states:-"They outright partitioned by metes and bounds some of the property and took the same for separate vahiwat of each. In the remaining property they got it settled that each one should take a one-third share." Paragraph 2 proceeds to say that after Venkangouda, his mother Gangabai and widow Parwatewa were in enjoyment of the property of his share. Along with the plaint was filed a list with which the documents referred to as partition memos. A, B and C were also filed. These memos. were filed to strengthen the case of the plaintiff in the plaint that the bulk of the properties were partitioned by metes and bounds. It is true that there are some properties which have been referred to in the schedules to the plaint as being kept common. But even as regards them the case in the plaint sought to be supported by the evidence in the case clearly was that Rudra-gouda's one-third share of the income was being given to him almost up to the date of the suit and it would follow from this that the income of Venkan-gouda's one-third share also was suggested as being so received by Venkangouda during his lifetime and by his widow after his death.

5. The written statement, exhibit 26, that was filed on November 27, 1929, was filed to meet this specific case of the plaintiff. Whereas the plaint alleged the partition to have taken place in 1881, the case in the written state ment was that the partition was two years later, i.e. in 1883, and whereas the plaint alleged a case of partition between all the three, the written statement in substance alleged that the partition was effected so as to separate the interest of Rudragouda only from Venkangouda and Basangouda and that Rudragouda alone took his share and became separate. Paragraph 5 of the written statement expressly repudiates the allegation in para. 1 of the plaint to the effect that Venkangouda separated or took actual possession of the lands of his share or that he was personally making vahiwat, and concludes by saying " neither Venkangouda nor his widow Parvatibai were in possession of any property at any time in their own independent right of ownership." This is followed by the further statement that " during Venkangouda's lifetime and even after his death, the entire property in suit was in the possession of Basangouda the father of the defendant and after him it is in, the defendant's possession." The quotation from para. 3, which my learned brother has quoted, has got to be read and interpreted in the light of the statements in the plaint and the other paragraphs of the written statement. In para. 3 of the written statement it is stated :-"In about the, year 1883 a,d. as plaintiff's grandfather Rudragouda separated in interest from Venkangouda and Basan-gouda, took his share and became separate, the undivided family of aforesaid persons became separate according to law." Stopping here, the fact appears even in this paragraph to be clearly stated that it was only the plaintiff's grandfather Rudragouda alone who separated in interest from Venkangouda and Basangouda, took his share from them, and; became separate from them. The further words " even assuming as above, Venkangouda and Basangouda-both these re-united and began to live jointly alone as previously," appear, in my opinion, to have been stated merely as being the legal consequence of the separation of Rudragouda from the other two, and not by way of an assertion of a fact. As the separation of all in interest is assumed (though erroneously) to be the necessary consequence of

the separation of only one, namely Rudragouda, from the other two by taking his share, it would not be unreasonable, in my opinion, to read the statement as to their being re-united and living jointly alone as previously as having been intended to convey the meaning that the other two members continued to live as coparceners as before, there having been nothing except the notional severance in law erroneously assumed as above referred to.

6. At the stage at which the issues were framed, this position appears not to have been clearly explained to the Court and the issue now appearing as (1A) relating to re-union came to be accordingly framed. I may note in passing that when the issues were first framed, they were framed only as preliminary issues. Later on, an application was made to have all the issues framed and tried together. The legal position was, however, again overlooked and not explained to the Court when on January 12, 1931, Mr. Pathak, the predecessor of the learned Judge who eventually tried the cast:, framed all the issues. It appears that interrogatories were also put to the defendant by exhibit 39 in the interval on June 19, 1930, and that the defendant had stated his position in para. 2 of his reply, exhibit 40, dated July 17, 1930, as follows :-" The aforesaid partition took place in the undivided family of the plaintiff and the defendant and the plaintiff's grandfather Rudragouda alone took his share and became separate. And the remaining two, that is, defendant's father Basangouda and defendant's paternal uncle Venkangouda re-united and began to live jointly as previously." Paragraph 3 says :- " All the remaining property excepting that which is in the possession of the plaintiff out of all the property mentioned in the plaint, remained for the share of the two-Basangouda and Venkangouda." Paragraph 4 adhering to the theory of notional re-union under the same assumption and misapprehension of law says that "the act of re-union on the part of Basangouda and Venkangouda took place on the very day of the partition."

7. When the actual date of hearing and recording of evidence arrived, it appears that before the evidence begun, the Court asked the defendant's pleader to explain his position as to the plea of re-union and the defendant's pleader has there endeavoured fully to explain what the plea in the written Statement meant in the following words :-

> About the year 1883 the plaintiff's grandfather Rudragouda took his one-third share in the entire property of the family and went to live separately from Basangouda Danapagouda and Venkangouda Lingangouda who were full brothers by birth and who never divided between them the remaining two-thirds of the family property and who continued to live as members of a joint family until the death of Venkangouda Lingangouda in 1885. Defendant has pleaded re-union in para, 3 of his written statement only because of the legal presumption which certain recent rulings of the Privy Council say arises that when one coparcener in a Hindu family takes his share and separates, the presumption is that the partition is complete and that all the other co-parceners also take their respective share. As a matter of fact Basangouda Danapgouda and Venkangouda Lingangouda never divided the undivided two-thirds of the family property between them but held it jointly as before.
>
> (The italics are mine.)
>
> This explanation was given before the hearing commenced, and it was therefore that the plaintiff's mother began to lead evidence in the case and not the defendant. If re-union had been asserted as a fact, it would be the defendant who would have been asked to begin.

8. Whatever the position was or may have been at the date of the original written statement or the reply to the interrogatories, both of which I have analysed above, in my judgment, the position became absolutely clear to both the parties at this date that the assertion of re-union as a fact was never made or intended to be made in the written statement and exhibit 40. The subsequent progress of the proceedings and the way in which the evidence was led by either side makes this position absolutely clear to my mind. The onus was accepted by the plaintiff to prove the facts with which he started in the plaint, and no attempt was made by the defendant, either during the cross-examination of the plaintiff's witnesses or in the course of the examination of his own, to establish the fact of reunion in the sense in which the appellant's counsel has been now laying emphasis on the word, as a fact. It is unfortunate that the Court did not reframe the issues in the light of the clear statement in exhibit 81 as it was then understood by all the parties and the Court and did not formally delete issue No. (1A). The matter which, as I stated, was clear at the date when the evidence began to all the parties must have become clearer to them by the time the evidence was closed and the arguments heard, and it was, therefore, that in the course of writing his judgment the learned Judge very naturally came to record no finding on the issue, and stated that the issue did not arise.

9. We have been taken in this case through practically the whole of the evidence led by both the sides and at no stage has it appeared to us that the omission to formally delete this issue at an earlier stage has or could have caused the slightest prejudice to either of the parties and particularly to the plaintiff. The duty of framing issues under the Civil Procedure Code in the mofussil has been technically understood to be the duty of the Court and it would have been better if this issue had been deleted or modified on the day when exhibit 81 was filed on which date the parties and the Court had, in my opinion, clearly understood the true position on the pleadings. The bare circumstance that it was not so done, and that it was therefore considered unnecessary to find upon it by the learned Judge in the course of writing his judgment is not sufficient to vitiate the conclusions arrived at by the learned Judge on the other points in the case. As my learned brother has remarked there was alongside with it another issue, issue No. 2, which was as follows :-" Does plaintiff prove that the property in the schedules A, B and C belonged to the deceased Venkangouda bin Ningangouda alone at his death ? " (D seems to be a mistake for B and C). The Court, under the Code, has undoubtedly the power to strike off any issue at any stage, and having regard to the facts that I have stated, I agree with my learned brother in holding that no prejudice whatever has occurred to the plaintiff by reason of issue No. (1A) remaining as such on the record and not found upon., The issue may be treated as struck off, as the Court has every power to do even at that stage, there being no prejudice resulting to either side by the Court's doing so.

10. The questions between the parties on this view of the pleadings must be decided on the law discussed by my learned brother as applicable to the facts of the present case and not on the basis suggested by the appellant's counsel in his arguments, namely, that there being no evidence of re-union or of an agreement to reunite as such led in the case, the plaintiff should straightway have a decree in his favor in so far as the interest of Venkangouda is concerned.

11. Now, on the law to be applied to the facts of the present case, I have, on the authorities that have been cited to us or to which I have myself referred, no doubt that the view expressed by my learned brother is the correct view. The facts that I assume for the application of law are those

that are stated in exhibit 81, as those are the facts which can be said to have been substantially established by the evidence in the case. Shortly stated they are that in the year 1883 the plaintiff's grandfather Rudragouda alone separated in interest from Venkangouda and Basangouda ; that he took his share of the properties and thus became separate; that Venkangouda and Basangouda, who were full brothers in their natural family, never divided or even separated in interest between them the remaining two-thirds of the family property but continued to live as before as members of a joint Hindu family until the death of Venkangouda in 1885, holding and enjoying the remaining property during this period jointly as before.

12. The appellant's counsel has gone to the length of arguing that on the statements of fact to be found in exhibit 81 itself, the Court must come to the conclusion that there was on that date necessarily and according to law a severance in interest between all the three, and that unless the defendant established by affirmative evidence that there was a specific agreement entered into between Venkangouda and Basangouda to remain joint or to reunite, the plaintiff must have in his favor a decree at least to the extent of the one-third of Venkangouda's share because the plaintiff's father was the nearest reversioner on the death of Parwatewa on December 26, 1916. The learned Counsel in effect wants the Court to presume severance in interest between all the three as resulting in law by reason of the separation of Rudragouda alone, and to require the defendant to prove a specific affirmative agreement to remain joint or to reunite between Venkangouda and Basangouda at this distance of time.

13. The learned Counsel has referred in this connection to decisions of their Lordships of the Privy Council, and laid considerable stress in particular on the decisions in the case of *Balabux Ladhuram v. Rukhmabai*[21], and *Bal Krishna v. Ram Krishna*[22],

14. Dealing with the first case it must be observed that in that case their Lordships have at page 136 specially observed as follows :-

> There is therefore a concurrent finding that there was a partition between all three brothers in 1869 or 1870.
> (The italics are mine).

Starting on this concurrent rinding of a partition between all three, their Lordships then proceed to give their reasons for agreeing with the further inference drawn by the Judicial Commissioner. Having referred to the evidence on either side which their Lordships regard as too slight, their Lordships observe (p. 137) :-

> It appears to their Lordships that there is no presumption, when one coparcener separaties from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other coparceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact.

15. Now, the agreement here referred to to remain united or to reunite appears to have been

referred to, because on the facts of that case the Civil Judge had arrived at the conclusion that there was re-union between the appellant's mother and Girdhari Lall before the latter's death and because the Judicial Commissioner had held that after the partition in 1869 or 1870 Girdhari Lall and Ladhuram became partners in the firm of Amarchand Girdhari Lall. Haiving regard to the position that both the Civil Judge as well as the Judicial Commissioner had arrived at a concurrent finding that there was a partition between all the three brothers in 1869 or 1870 which their Lordships accepted, it became necessary for their Lordships to refer to and require an agreement to remain united or to reunite. Their Lordships were not dealing with the facts of a case in which only one of the brothers had separated from the rest after taking his share and the others had continued to remain joint as before.

16. The decision in Bal Krishna's case also cannot support the learned Counsel in his extreme contention. In that case too there were concurrent findings which their Lordships refer to at p. 225. The Subordinate Judge held that in 1907 Lal Man " alone separated and all the other members continued joint." The High Court expressly stated; (p. 225) :-

> The separation of Lal Man, however, did not automatically involve the separation of the three other branches of his family. There cannot be the slighest doubt that Hazari Lal, Gulzari Lal and Kesho Das remained joint. It was Lal Man and Lal

[21](1903) ILR 30 P.C. 725 : (1903) L.R. 30 I.A. 130

[22](1931) L.R. 58 I.A. 220

> Man alone who had separated his one-fourth share.

17. It was urged before their Lordships in spite of these findings as an argument of law that the separation of one member of the family necessarily caused the separation of all. Their Lordships declined, as I understand their judgment, to accede to this contention. At p. 226, after quoting from the observations of Lord Davey in *Balabux Ladhuram v. Rukhmabai*[23], they proceed to refer to the decision in *Palani Ammal v. Muthuvenkatacharla Moniagar*[24]in the following terms :-

> But the matter is put beyond doubt in ***Palani Ammal v. Muthuvenkatackarla***, where Sir John Edge says :-It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business, was carried on after their previous co-parcener had separated from them'.

18. The words " without any special agreement amongst themselves " are necessary to be noted in dealing with this quotation. The decision of *Bal Krishna v. Ram Krishna*, therefore, far from supporting the position for which the learned Counsel contends, goes against his contention in so far as their Lordships adopt the view expressed in Palani Ammal's case, that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners

and to enjoy as members of a joint family what remained after such a partition of the family property.

19. The quotation from the judgment of Sir Andrew Scoble in *Ram Prashad Singh v. Lakhpati Koer*[25], which their Lordships adopt with approval, also supports the above view.

20. In Palani Ammal's case their Lordships before dealing with the special facts of the particular case proceeded to enunciate certain principles of law to be borne in mind. At p. 86 their Lordships say :-

> But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the share of the coparceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property.

[23](1903) ILR 30 P.C. 725 : (1903) L.R. 30 I.A. 130 [25](1903) ILR 30 P.C. 231 : (1902) L.R. 30 I.A. 1
[24](1924) L. R. 52 IndAp 83, 86 : 27 Bom. L. R. 735

21. At p. 87 their Lordships say :-

> In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other.

22. The first of these quotations which was approved of in the latter case of *Bal Krishna v. Ram Krishna*, as well as the second quotation, make it amply clear that no presumption as to the severance or separation of all the members arises as a matter of law by reason of one member having elected to separate from the rest by taking his share from them. It is not necessary to refer to decisions prior to these in view of the clear dicta of their Lordships of the Privy Council above referred to which support our conclusion.

23. As regards the decisions of the Bombay High Court, three decisions only need be noted. The first is the decision in *Babanna v. Parawd*[26] where it was held :-

> An expression of an unequivocal intention to separate suffices to dissolve the joint status of a joint Hindu family. But it is not correct to say that, because one brother has separated or has expressed such intention, therefore, the intention of the other brothers must be taken to be the same. They may, without any special agreement amongst themselves, continue to live as members of a joint Hindu family and enjoy the remaining family property jointly.

(The words in italics are mine).

24. This passage which I have quoted from the head note of the case is sup ported by a detailed discussion of the authorities at pp. 824 and 825 by Mr. Justice Madgavkar, which was intended to meet an argument precisely like the one addressed to us by Mr. Coyajee.

25. The second Bombay case I would refer to is the case of *Bhimabai v. Gurunathagowda*[27], where also the Court held that when a member of a joint Hindu family separates, the remaining coparceners without any special agreement among themselves may continue to be coparceners and enjoy as members of a joint family the property remaining after such a partition of the family property. This conclusion has also been arrived at on a discussion of various authorities discussed at p. 862 of the judgment where Mr. Justice Patkar says as follows :-

> On the question as to the jointress or separation between Nilkanthagowda and Jivangowda, it is urged on behalf of the appellants, relying on the case of *Balabux Ladhuram v. Rukhmabai*[28], that the separation of Khandappagowda, one of the members of the joint family, was virtually the separation of all, and the question "whether the remaining coparceners remained joint or united would depend upon the agreement between the parties, and that such agreement must be proved like any other fact. Having regard to the decisions of the Privy Council in *Jatti v. Baniomi Lal*[29], and *Palani Animal v. Mulhuvenkatachmla Moniagar*[30], and the decision in

[26] I.L.R. (1926) Bom. 815 : 28 Bom.L.R. 1446 [28](1903) ILR 30 P.C. 725 : (1903) L.R. 30 I.A. 130
[27] AIR 1928 Bom 367 : (1928) 30 Bom LR 859 : 114 Ind. Cas. 392
[29] AIR 1923 PC 136 : 1923-18-LW 273 : (1923) L.R. 50 I.A. 192
[30](1924) L.R. 52 I.A. 83

> *Babanna v. Farawa*[31] I think it is clear that when a member of a joint family separates, the remaining co-parceners without any special agreement among themselves may continue to be coparceners and enjoy as members of a joint family the remaining property after such a partition of the family property, and the question whether or not the other members of the family continue to be joint or separate is to be determined on the evidence in the case.

26. The third Bombay case to which I shall refer is the one cited by the respondent's counsel, viz. the case of *Sahebgouda v. Basangouda*[32] wherein also the statement of the law in the previous cases, to which I have alluded, was again repeated. In this case also it was urged that an agreement to remain joint must be specifically proved as a fact, and it is in reply to that argument that the Court stated as follows (p. 586) :-

> But if some of the persons of a joint family separate, it does not necessarily follow that there is separation as amongst the members of the family who continue to be joint, and according to the decision of the Privy Council in *Palani Ammal v. Muthuvenkatcharla Moniagar*[33], if some of the members continue to be joint, that fact may be inferred from the conduct of the persons who continue to remain joint in the family and surrounding circumstances. When a member of a joint family separates, the remaining coparceners without any special agreement among themselves may continue to be coparceners, and

enjoy as members of a joint family the property remaining after such partition of the family property.

27. I may mention that the Bombay view derives support from the decision in *Parsotam Das v. Jagan Nath*[34] the head note of which is as follows :-

> The filing of a suit by a member of a joint Hindu family in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation. But from this it does not follow that where, without any suit, one member of a family separates himself from the others and relinquishes his rights in the family estate, taking either no share in the family estate or perhaps a less share or a greater share, the surviving members cannot remain united.
>
> Where such a separation of one member of a joint family takes place, it is not the necessary result in law that the other members must be taken to have separated inter se and then to have reunited.

28. In the view I take as above, I do not agree with the view of the law inaccurately expressed by the lower Court in paragraph 17 of the judgment where the lower Court says as follows :-

> Thus when admittedly Rudragouda, one of the coparceners separated, the presumption of law is that V]enkangouda and defendant's father Basangouda also separated, unless defendant proves that they continued as members of a joint Hindu family agreeing to remain united.

29. I hold, having regard to the authorities which I have discussed above, that the

[31](1926) I.L.R. 50 Bom. 815 : 28 Bom. L. R. 1446
[32](1930) 33 Bom. L. R. 580
[33](1924) L.R. 52 I.A. 83
[34] I.L.R. (1919) All. 361

contention of the learned Counsel for the appellant cannot be acceded to. In my opinion, if one member of a joint Hindu family separates from the rest or goes out of the family by taking his share, it does not necessarily follow, as a matter of law, that there is a severance in interest as regards the remaining property in the family between the other members of the family also. As no such severance in interest has got to be presumed under the law, it also follows that it is not necessary for the remaining members of the family to prove any specific agreement on their part either to reunite or to remain joint. The question, whether after the separation of one, the other members of the family have remained joint, will be a question of fact which will have to be determined in each case from the conduct of the parties and the other evidence in the case.

30. There is another point on which the learned Counsel for the appellant also laid considerable stress, and although my learned brother has dealt with *t*he point in his judgment, in view of the importance given to it in the course of the arguments, I should like to say a few words about the same also.

31. In the lower Court it appears that the appellant sought to establish the memoranda of partition A, B and C by leading evidence to prove the same. That attempt failed as the trial Court entirely

disbelieved the evidence of Mallaya, exhibit 84, and the other witness by whose testimony the documents were attempted to be proved. Realizing the difficulty, counsel for the appellant attacked the judgment of the lower Court on the ground that the lower Court had failed to draw the presumption which should have been raised under Section 90 of the Indian Evidence Act as regards the genuineness of these documents without calling for proof of the same. It was urged that the memoranda A, B and C purporting to be more than thirty years old and having been produced from custody which was proper, the Court should have presumed that the same were duly executed and attested by the persons by whom they purported to be executed and attested, and that the other parts of such documents which purported to be in the handwriting of the writer should have been presumed also to be in his handwriting without requiring proof of the same. The custody of the plaintiff, it was claimed, was proper custody, because even though all the three documents would not be ordinarily in the custody of the plaintiff's father or grandfather, at least one of the documents would be properly in the custody of the plaintiff's grandfather Rudragouda as it would be reasonable to assume that one copy at least would be left with him at the time of the partition in 1881.

32. It is true that the learned Judge has not referred to Section 90 in terms, in dealing with these documents in his judgment. But the judgment does give an indication that the learned Judge had not overlooked the provisions of Section 90 in dealing with the same. In paragraph 27 of his judgment the learned Judge says :-

> If exhibits A, B and C were really meant to be partition memos. to be handed over to each sharer, why should all these three memos. come; from the custody of the plaintiff alone? Two at least would have remained with defendant. They do not, therefore, come from proper custody.

33. The learned Judge, no doubt, uses this conclusion in support of his view that the documents are not genuine, but it is not reasonable to contend, as was in effect done in the course of the arguments, that the learned Judge had entirely overlooked the provisions of Section 90, and that if he had not so overlooked them, he might have thought it fit to draw the presumption required by Section 90 of the Indian Evidence Act.

34. Now, the only evidence as to custody furnished by the appellant in this case is the statement of the plaintiff's mother in paragraph 4 and the statement of Mallaya in paragraph 6 read with paragraph 11. My learned brother has dealt with the evidence as to custody given by the plaintiff's mother and Mallaya. I have no hesitation in saying that the explanation given by these two witnesses as to the custody of the documents A, B and C as also of the various receipts is false and disingenuous. I do not for a moment believe that these documents were kept by the plaintiff's father in a cupboard or that they were in his possession during his lifetime. Mal-laya's statement that he kept them in the plaintiff's house during the lifetime of the plaintiff's father is incredible having regard to the rest of his statements on various other points which are demonstrably false. It is difficult for me to see why the plaintiff's father, if he had the custody of these documents, should not have produced them before the revenue authorities between 1916 to 1923 or why he should not have relied upon the same in the proceedings of 1919 when the question about getting the Patilki rights arose during his lifetime between the plaintiff's father and others against the defendant.

35. As I do not believe the explanation offered by the plaintiff's mother and witness Mallaya as to the custody of these documents to be true, and as I do not believe that they were ever in the possession of the plaintiff's father, I am not prepared to say that one of the conditions necessary to be established under Section 90 has been satisfied in this case. There is also no basis laid for the suggestion made in the course of the arguments that the three parties to the division prepared three copies in order that one such copy may be kept: with each of them. In the absence of any such basis being laid, I would not be prepared to assume from the mere fact of three copies being produced in the case that the custody of at least one of them must be regarded as proper custody.

36. Apart, however, from these considerations, I do not think that Section 90 confers any right upon a party to compel the Court to draw a presumption as regards any document which purports to be thirty years old and is produced from proper custody. My learned brother has already indicated the caution needed to be exercised in such a case by reference to the observations in the case of *Trailokia Nath Nundi v. Shurno Chungoni*[35] Similar observations are to be found in the case of *Hari Chintaman Dikshit v. Moro Lakshman*[36] In this connection the observations of their Lordships of the Privy Council made in the case of *Musammat Shafiq-un-nisa v. Khan Bahadur Raja Shaban Alt Khan*[37] are pertinent. The observations were made in a case relating to a letter produced out of the custody of the Deputy Collector. In dealing with Section 90 their Lordships say at p..220 as follows :-

> 'The Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting.' What is meant by 'the Court may presume ' a document to be genuine is shown by Section 4 of the Act, which is in these terms : Whenever it is
>
> provided by this Act that the Court may presume a fact, it may either regard such fact as proved unless and until it is disproved, or may call for proof of it. The learned Judge in the Civil Court called for proof of the document, but no proof was forthcoming... Therefore it may be taken that, unless it can be admitted to evidence under Section 90 of the Evidence Act, there is no proof of the genuineness of the document... Their Lordships would always be extremely slow to overrule the discretion exercised by a learned Judge under Section 90 of the Act, and certainly this is not a case in which they would be disposed to do so.

[35] I.L.R. (1885) Cal. 539.
[36] I.L.R. (1886) Bom. 89
[37](1904) L. R. 31 IndAp 217 : 6 Bom. L. R. 750

37. These observations aptly apply to the present case. The learned Judge did not apply the terms of Section 90 and called for proof of the documents. The plaintiff endeavoured to lead such proof. The evidence led by him was found to be unsatisfactory, and the learned Judge disbelieving such evidence came to the conclusion that the documents were not genuine. It was perfectly within the competence of the learned Judge to do so, and we are not prepared on the facts of this case to overrule the discretion exercised by the learned Judge under Section 90 and to say that the documents should have been admitted in evidence.

38. In another decision of the Calcutta High Court in the case of *Surmdra Nath Rath v.*

Sambhunath Dabey[38] a contention similar to the one raised by the counsel for the appellant in the present case had been raised. At p. 215 of the report in dealing with that contention their Lordships say as follows :-

> The first contention is to the effect that in considering the question of the genuineness or otherwise of the document of 1272 the Courts below have ignored the presumption which arises under Section 90 of the Evidence Act from the fact that the document purports to be more than 30 years old, and that if that presumption had been relied upon the said Courts would have been in a position to hold that the document is a genuine one. Now, as regards this contention it is sufficient to say that upon the plain language of Section 90, the presumption that is referred to in that section is not one which it is obligatory on a Court to raise in favor of a person who desires to prove a document more than 30 years old, but that it is discretionary with the Court either to rely on that presumption or not. It is a presumption which the Court is not bound to make and notwithstanding that the elements mentioned in that section are satisfied the Court may require the document to be proved in the ordinary manner. If any authority is needed for this proposition, reference may be made to the case of *Shafiq-un-nissa v. Shaban Ali Khan*[39]. Of course if the plaintiffs asked the Court to make a presumption in their favor in accordance with the provisions of this section, it would have been necessary for the Court to deal with that matter; but it appears from the judgments of the Courts below as well as from the record itself that in point of fact the plaintiffs did not rely upon this presumption but on the other hand adduced evidence in order to prove the genuineness of the document. The evidence so adduced has been disbelieved by the learned District Judge. In these circumstances the appellants can hardly complain if this presumption has not been referred to in the judgments of the Courts below.

[38] I.L.R. (1927) Cal. 210

[39](1904) L. R. 31 IndAp 217 : 6 Bom. L. R. 750

39. With respect I adopt the same argument and use the same language in dealing with the contention of the appellant's counsel in the present case.

40. The learned Judge has dealt fully with the evidence led in proof of these documents and has come to the definite conclusion that the documents are not genuine. My learned brother has also fully dealt with the documents and the evidence bearing on the same. Agreeing as I do with the Court below and the conclusions of my learned brother on the point that the documents have been proved not to be genuine, it will be impossible for me in appeal to come to the conclusion that the documents should have been held proved by applying the provisions of Section 90 of the Indian Evidence Act and admitting the same in evidence without proof. I have, therefore, no hesitation, on this part of the case, in overruling the contentions of the learned Counsel for the appellant to the effect that the documents should have been treated as held proved by applying the provisions of Section 90.

41. On the question whether the memoranda A, B and C require to be registered, I hold agreeing in that respect also with my learned brother that the memoranda do require registration. Section 17 of the Indian Registration Act is clear on the point. Whatever may be the circumstances under

which the alleged partition came to be agreed upon, on which we have no reliable evidence in the case, if the arrangement arrived at between the parties was followed by a writing which in express terms is an agreement to divide, the only question would be whether the terms of the agreement or arrangement were reduced to the form of a document, that is to say, were formally recorded in a document, with the purpose that they should be evidenced by that document. That would be a question of fact in each case to be determined upon a consideration of the nature and phraseology of the writing and the circumstances in which and the purpose for which the writing came to be made. In the present case, on the case endeavoured to be made by the plaintiff himself, there is no doubt that the documents A, B and C were prepared and executed with the sole desire to keep a formal record of the terms of the agreement arrived at between the three parties to the documents. The object with which they have been sought to be put in evidence is also the object of showing that there was a partition between all the three parties to the documents, the terms of which were as stated in these documents to which the parties had subscribed their signatures in token of their acceptance, and which they had put in a formal shape by also getting the same attested. The wording of the memoranda, both at the foot as well as at the top of them, also supports the same conclusion. That being so, it is impossible to say, in my opinion, that the documents were not compulsorily registrable under Section 17 of the Indian Registration Act. Two out of the several cases referred to by the learned Counsel for the respondent support this conclusion. The Judges of the Lahore High Court in the decision in *Ganesh Das v. Kanthu*[40] express the opinion as regards the lists about which the question arose in that case, that having regard to the endorsements on the lists signed by the parties, they had no doubt that the lists together were intended by the parties to be the only evidence of an arrangement arrived at, that the lists declared the rights of the parties, and that therefore they were not admissible, being unregistered, to prove the terms of the partition. These observations are supported by the observations of the full bench in the case of *Ram Gopal v. Tulshi Ram*[41]. Similar observations are to be found in some Bombay cases also to

[40] AIR[1935] Lah. 448

[41] I.L.R. (1928) All. 79

which it is not necessary to refer in this connection. Holding, therefore, that on the case for the plaintiff himself, the documents being prepared with the express object of making them the only formal record of the transaction evidenced by the same, the three memoranda create or declare rights, that they are not mere records of past transactions, and that therefore they require to be compulsorily registered.

42. The argument that the memorandum A should be read as an award is hardly worth noticing. A bare persual of the document shows that the same is an agreement effecting a partition and not an award. The decision cited by Mr. Coyajee referred to a document, the wording of which was entirely different, and the only question that arose in that case was whether the particular document, which was recognized on all hands to be an award, should cease to be regarded as such merely because the parties put their signatures on the same as a token of their acquiescence in the decision of the arbitrators.

43. The only other argument advanced in this connection was that the memoranda could be used for a collateral purpose, and in support of that argument the decision of the Privy Council in the case of *Varatha Pillai v. Jeevarathammal*[42], was relied upon. The facts in that decision were entirely different, as in that case the petition, there in question, was not relied upon to prove a gift but was sought to be used merely to explain the nature and character of the possession in order to

show that the possession was not as manager but as owner. In the present case Mr. Coyajee has all along endeavoured to rely upon the documents, as his client did in the lower Court, in order to prove the fact of partition between the three as also the terms of the partition. That purpose certainly is not a collateral purpose, nor is the purpose of showing that by these documents a severance in interest was created a collateral purpose. Severance in interest, which is another expression for partition under the Hindu law, being itself the object of the documents, cannot be stated to be a purpose which is collateral to the main purpose and object of the document in any sense of the expression. It is the very purpose for which the document was executed and got attested. Mr. Bahadurji has suggested that that matter alone could be stated to be a matter which can come within the expression " collateral purpose " the proof of which does not depend upon the proof of the transaction. Without going to the length to which he has asked us to go, it can safely be stated that severance in interest being the object with which the partition deed is executed, severance in interest will not be a purpose which can in any sense be regarded as a purpose collateral to the transaction.

44. Mr. Coyajee next relied upon an alternative suggestion, namely, that as the documents, exhibits A, B and C, refer to the decision of the panchas, they can be used for the purpose of showing that there was a reference to arbitrators. A reference to arbitration would, according to him, be a purpose collateral to the transaction and evidenced by the documents. He contends that he can, therefore, rely upon the documents for the purpose of showing by the recitals therein that there was a reference to arbitration for the purpose of effecting a partition. His argument is that if such a reference could be established by these documents as a collateral purpose, all the three parties could be held to have separated in interest as the reference to arbitration is in Hindu law sufficient to effect such a severance. I have myself a doubt that if the effect of a reference to arbitration is to create an immediate severance in interest between the parties, that the object of establishing such a reference can be said to be a purpose collateral to the transaction. But

[42] (1918) L.R. 46 I.A. 285

even assuming that it is, and even assuming further that the documents can be used by reason of the recital contained therein to prove the fact of a reference implied therein, I would have no hesitation in holding that such a recital by itself would not be sufficient to establish the fact of a reference to arbitrators, there being in this case no other reliable evidence worth the name oral or documentary to establish the fact of such a reference to arbitration.

45. On the whole, therefore, I agree with the conclusions of the lower Court and of my learned brother that the documents are inadmissible for proving a partition or a severance in interest between all the three.

46. Having discussed almost all the questions which were discussed before us as questions of law, I have no desire to write any lengthy judgment on the facts which have been held proved by the lower Court and which have also been held established by my learned brother.

47. On the question of dispossession of survey No, 84 and part of survey No. 77 in the village of Dori, on which both the sides have devoted considerable energy and argument, I fail to see how that question has any direct bearing on the principal points in the case. As the question has, however, been argued, I have no hesitation in recording my conclusion that the case sought to be introduced by amendment of the plaint by exhibit 31 about the dispossession of these lands after

the suit, is not proved.. None of the witnesses examined for the plaintiff proved actual dispossession on such by the defendant though they referred to the plaintiff's possession till 192S or 1929. The witnesses are such as could hardly be given credence and the admission of the principal witness for the plaintiff, Mallaya, in paragraph 15 of his deposition that when the Record of Rights was introduced in Dori village, he approached the Prant about the entry of these lands in 1927 (i. e. before the suit) and that that officer asked him to go to a civil Court, is enough to destroy the effect of the allegation that the plaintiff was in possession of these lands and was deprived of the possession of them after suit.

48. On the question of the proof of the memoranda, exhibits A, B and C, as also the receipts, I entirely endorse the conclusions of the lower Court which have been amplified by my learned brother in his judgment that the documents A, B and C are not proved to be genuine, that the receipts produced in the case are also suspicious and that the witnesses brought forward to prove the handwriting of Krishnaji, Virupax, Chidamber and Shidayya are entirely unreliable. Full reasons having been given for their conclusions by the lower Court and by my learned brother, it is unnecessary for me to enter into detailed reasons for those conclusions.

49. I also agree that the witness Mallaya and other witnesses, exhibits 124, 125, 126 and 127, who come to prove the fact of the alleged partition between the three in or about the year 1881 have been rightly disbelieved. These witnesses, particularly the witnesses, exhibits 124 and 125, have on the other hand by their admissions in cross-examination proved the case of the defendant that it was Basangouda who was letting the lands and collecting the rents of them even during Venkangouda's lifetime. Although the witnesses for the defendant would, by themselves, have not been in my opinion sufficient to establish the case for the defendant, I agree that the circumstantial evidence consisting, inter alia, of the conduct of the parties, the state of the revenue papers and the Record of Rights, the failure on the part of both Gangava and Parwatewa to ask for the names of Venkangouda or Parwatewa to be entered or even to have an inquiry made in 1885 coupled with the failure of the plaintiff's father himself to take any action to recover Venkangouda's share after the death of Parwatewa for a period of nearly seven years, these and several other circumstances noted in the judgments are enough to prove that the original partition that took place in the early eighties was not a partition between the three, i. e. Rudragouda, Basangouda and Venkangouda, but was only a transaction by which Rudragouda alone took his share in the joint family properties leaving Basangouda and Venkangouda to continue to hold the remaining property as members of a joint undivided family as before. The admission of the plaintiff's father alluded to by my learned brother contained in exhibit 94, which was wholly in his handwriting, is very significant and removes the little doubt if any that might have remained on the other evidence in the case.

50. The attempt made by Mr. Coyajee to read into the evidence of two of the defendant's witnesses, an admission as to severance between all the three cannot succeed unless we misread their evidence. The witnesses are village witnesses having no conception of a notional severance in interest under Hindu law and they were called to disprove the assertion of a physical partition between all the three made by the plaintiff's witnesses.

51. I, therefore, agree with my learned brother that the plaintiff is not entitled to the one-third share of the properties alleged to have been left by Venkan-gouda as the reversionary heir after his widow Parwatewa's death in 1916.

52. On the other question as to the lands at Dori and other villages alleged to have been kept joint or common at the partition of 1881, I have very little to add. The plaintiff's main case as to partition between the three, at which these properties are alleged to have been kept joint, having failed, and the principal witness Mallaya having been disbelieved, there remains no evidence on which this case can reasonably be held to be supported. Parwatewa's name having been entered in a few lands can hardly help the case of the plaintiff. My learned brother has accepted the explanation as to why these lands came to be entered in the name of Parwatewa, and it is an explanation which on the record of this case I am not prepared to reject. The more important fact of the plaintiff himself being in possession of seven lands in the village of Dori remains unexplained by any evidence offered for the plaintiff. The case for the defendant in his written statement, exhibit 26, paragraph 13, that only the seven numbers there referred to in the inam village of Dori were of the plaintiff's ownership gains very great support from the unexplained possession by the plaintiff as owner of these numbers, particularly when it is remembered that the additional case the plaintiff tried to make about the two other survey numbers is found to be false. The inequality in the area of the lands in the other villages spoken to by the defendant has been already referred to by my learned brother in his judgment. The failure of the plaintiff to produce the account books which were admittedly kept an, the false excuse that by a curious coincidence they were all burnt at a fire which destroyed only one cupboard in the house has also been commented upon by my learned brother. Mallaya's evidence, which is the only evidence in the case, can be proved in some respects to be demonstrably false. No reliable evidence of the receipt of income from the lands alleged to have been kept joint or common or of accounts having been ever made up between the plaintiff's father or grandfather and the defendant or his father, has been adduced. It is not explained why, if any lands were common, they were kept common for so long a time and were not actually taken possession of or divided when some of the Singarkop lands were taken possession of as admitted by the plaintiff and the defendant. Under these circumstances the Courts have no alternative but to reject the second part of the plaintiff's claim also.

53. In the result I agree, on the grounds stated in the exhaustive judgment of my learned brother, supplemented as above, that this appeal should be dismissed with costs.

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