

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 14th December, 2020

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

RSA No.05 of 2019

Appellants : Mahesh Agarwal and Others

versus

Respondents : Umesh Agarwal and Others

Appeal under Section 100 of the Code of Civil Procedure, 1908

Appearance

Mr. N. Rai, Senior Advocate with Ms. Sushmita Gurung, Advocate for the Appellants.

Mr. T. B. Thapa and Mr. Anmole Prasad, Senior Advocates with Mr. Ranjan Chettri, Mr. Sagar Chettri and Mr. Khemraj Sapkota, Advocates for the Respondents.

J U D G M E N T

Meenakshi Madan Rai, J.

1. In this Second Appeal, the Judgment and Decree, both dated 28.02.2019, in Title Appeal No.18 of 2017, is being assailed. By the impugned Judgment, the Learned First Appellate Court reversed the Judgment in Title Suit No.21 of 2013, dated 28.11.2017, by which the Learned Trial Court had dismissed the Suit of the Respondents herein.

2. The substantive questions of law framed for determination before this Court, are as follows;

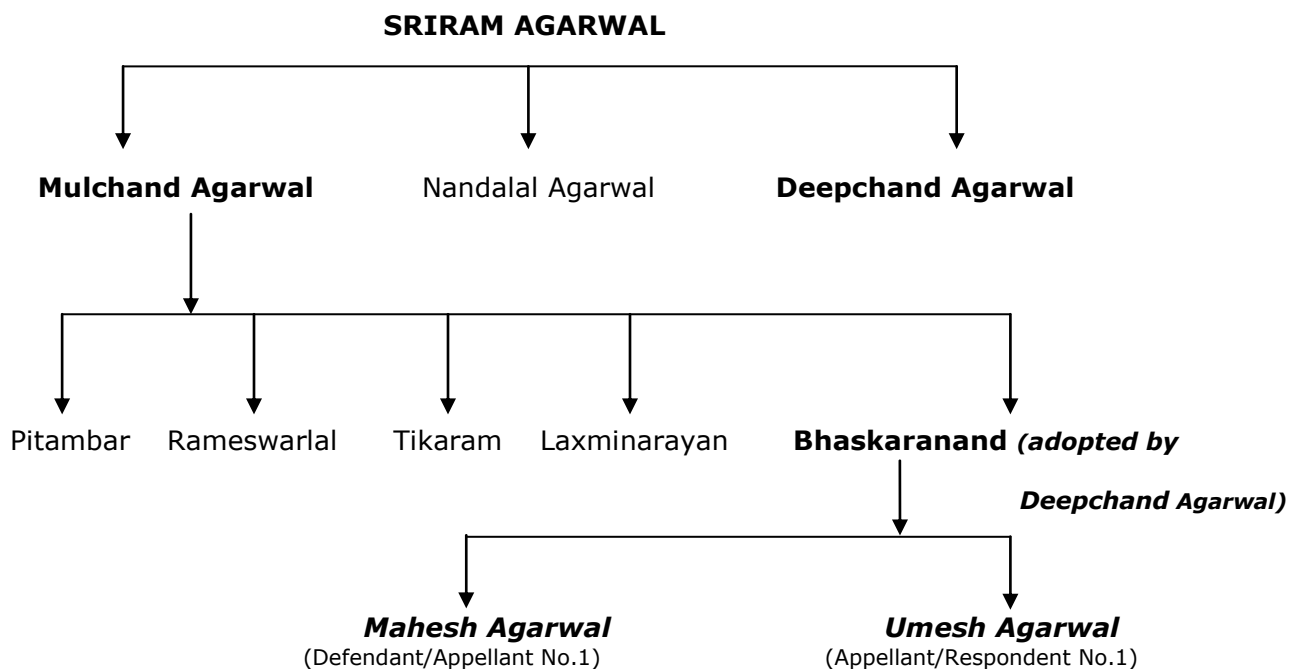
- "1. *Whether the Judgment of the learned First Appellate Court is based on misinterpretation of documentary evidence?*
2. *Whether a karta of a joint family needs a Power of Attorney to deal with the properties of Hindu Undivided Family?"*

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3. The Respondents No.1, 2 and 3 herein were the Plaintiffs before the Learned Trial Court and hereinafter they shall be referred to as the Plaintiffs/"P1," "P2" and "P3." The Appellants No.1, 2 and 3 herein were the Defendants before the Learned Trial Court. They shall be referred to as the Defendants/"D1," "D2" and "D3" hereinafter.

4. The Suit was originally instituted as Civil Suit No.10 of 1994 by the surviving Plaintiffs and one Bhaskaranand Agarwal, father of P1 and D1. Bhaskaranand passed away in 1999 and thereafter his name was deleted from the array of the Plaintiffs and the surviving Plaintiffs renumbered as Plaintiffs No.1, 2 and 3.

5.(i) To comprehend the dispute between the parties in its entirety, it is essential to briefly narrate the facts of the case. The Genealogical Chart of P1 and of D1 who are blood brothers, is as follows;



(ii) The Plaintiffs' (P1, P2 and P3) case is that one Sriram Agarwal (see Chart *supra*) had three sons *viz.* Mulchand Agarwal, Nandalal Agarwal and Deepchand Agarwal of whom Nandalal

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separated from the joint family. Mulchand had five sons, of whom one i.e. Bhaskaranand, was adopted by Mulchand's brother Deepchand. Together, the five sons constituted the joint family and joint family business in or around 1940 by the name of "M/s. Shree Mulchand and Sons."

6.(i) The joint family business originally was in Kalimpong, West Bengal but also had properties in Bombay, Calcutta and Siliguri. The twelve properties in Sikkim described in Schedule 'A' to the Plaint, were acquired around 1939-40 by the joint family of M/s. Shree Mulchand and Sons which included the Schedule 'B' property allotted to them by the then Maharani of Sikkim, on 14.09.1944. A seven storeyed RCC building was raised on the Schedule 'B' land for residential purposes of the joint family and for joint family business and presently, the families of both P1 and D1 are residing in this building of which they are in joint possession.

(ii) In 1968, M/s. Shree Mulchand and Sons settled the joint family properties amongst themselves amicably whereby the properties mentioned in Schedule 'A' to the Plaint, were allotted in favour of Late Bhaskaranand and his two sons. The three formed an undivided Hindu coparcenary governed by the Mitakshara School of Hindu Law and were in collective ownership of the Schedule 'A' properties, income from these properties went into a joint fund. As per P1, although some of the said properties have been recorded in the individual names of P1 and D1 in the State records, they are joint family property and none of the members thereof had individual or independent rights on the property. As D1 did not take part in the running of the business, he executed a Power of Attorney for this purpose in favour of his father, his

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mother Smt. Bimala Devi Agarwal and grandmother Smt. Narayani Devi Agarwal (wife of Deepchand Agarwal) on 31.03.1973. That, as females are not coparceners in a Mitakshara Hindu family, Bimala Devi and Narayani Devi were not impleaded as parties to the suit.

(iii) In 1979, D1 registered a firm in the name and style of "Shree Mulchand & Sons" for the exclusive purpose of running the joint family business but such registration does not create any absolute right, title and interest for him in the joint family properties and business nor does it confer him with powers to dispose of the properties in Schedule 'A.'

(iv) That, in order to deal with the property in Schedule 'A' to the exclusion of his coparceners, D1 took into his custody all documents and properties of the joint family business and properties of M/s. Shree Mulchand and Sons and Agarwal Trading Company on 25.01.1994, in regard to which a First Information Report ("FIR") was lodged against him.

(v) That, in February, 1994, D3 started demanding monthly rentals from the tenants of Schedule 'B' property and on enquiry, P1 and his father came to learn that D1 had on 31.01.1989, fraudulently executed a Deed of Gift of Schedule 'B' property in favour of D3 without the concurrence of the coparceners. D3 then mortgaged Schedule 'B' property for loan to a Bank. That, the Deed of Gift is void, invalid and inoperative in the eyes of law on account of non-compliance of the mandatory requirements of law, therefore no right, title or interest accrues on D3. That, D1 collusively with D3, is attempting to dispose of and may interfere in the running of the joint family business. P1, P2 and P3, therefore, sought for the following reliefs;

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- a) *For declaration that the suit properties mentioned in the Schedule 'A' hereunder are joint family properties and/or the coparcenary properties of the Plaintiffs and the Defendants.*
- b) *For declaration that the deed of gift executed and registered on 31.1.1989 by the Defendant No.1 in favour of Defendant No.3 in respect of the properties mentioned in Schedule 'B' hereunder is void and inoperative in law and is not binding upon the Plaintiffs and/or in coparceners of the Hindu undivided family or upon any members of the joint family of the Plaintiffs and the Defendants.*
- c) *For permanent injunction restraining the Defendants and each one of them from transferring, alienating, encumbering, dealing with and/or from disposing of any of the joint properties of the parties mentioned in Schedule 'A' hereunder and also from interfering with the peaceful possession of the Plaintiffs and their family members in all the joint properties as aforesaid including the specific residential house described in Schedule 'B' hereunder and also from interfering with running of the joint family business in any manner whatsoever.*
- d) *For Receiver.*
- e) *For Costs.*
- f) *For such other relief or reliefs to which the Plaintiffs are entitled in law and equity."*

7.(i) In response, the Defendants, while admitting the genealogy of the family, denied and disputed the averments in the Plaint and stated that no joint family existed nor was there joint family business in Kalimpong or other places. That, neither did Bhaskarananda and his sons P1 and D1 constitute a joint family or coparcenary, besides, the Plaintiffs failed to describe the joint family properties and denied that the properties described in Schedule 'A' and Schedule 'B' belonged to any joint family with no independent right of any individual. That, the Plaintiffs are residing in Schedule 'B' property as licensees of D3 and are not in joint possession of the property but have failed to vacate the premises despite expiry of the stipulated period. The Defendants asserted that D1 is the sole proprietor of the business of M/s. Shree Mulchand and Sons and all properties and assets belonging to and

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standing in the name and style of M/s. Shree Mulchand and Sons, were acquired from its funds. That, the property described in Schedule 'B' of the Plaint was the property of M/s. Shree Mulchand and Sons and D1 became its absolute owner and gifted it to his wife D3. It was denied that Schedule 'B' property was allotted to any Hindu family in 1944.

(ii) That, by the partition of 1968, the entire properties and business of M/s. Shree Mulchand and Sons in Sikkim were allotted in favour of D1 and P1 separately, with nothing given to Bhaskaranand who relinquished his interest in 1968 and the partition was between the heirs of Mulchand and P1 and D1 and the properties vested in them separately. It was stated that the concept of Hindu joint family and coparcenary governed by Mitakshara Hindu Law has no application in Sikkim.

(iii) That, in 1973, to avoid disputes and differences in the family, Bhaskaranand initiated division of all the properties allotted in 1968 to his two sons. Thereafter, the properties described in Item Nos.1, 4, 5, 6 and 8 of Schedule 'A' to the Plaint, vested on D1 as its absolute owner of which he gifted the Schedule 'B' properties to D3, with the knowledge of P1 and Bhaskaranand. Properties described in Item Nos.2, 3 and 7 of Schedule 'A' were allotted and given exclusively to P1 which he registered in his name as owner on 30.07.1980. D1 was the proprietor of Item No.2 premises "M/s. Laxmi Stores." In "1989," he gave up his right, title and interest in favour of Sheila Agarwal, the wife of P1, as evident from Exhibit 8, dated 30.05.1973. D1 applied for registration of the Firm "Shree Mulchand & Sons" on 07.09.1977 which was duly registered on 16.06.1979.

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(iv) That, Item No.8 of Schedule 'A' to the Plaint i.e. M/s. Agarwal Trading Company was handed over to D1 in 1975 by one Balkrishna Agarwal, the ostensible owner of the Company. That, Item No.9 of Schedule 'A' belongs to M/s. Shree Mulchand and Sons and P1 in moiety, P1 having purchased the said land on 18.10.1976 from M/s. Indo Sikkim Company. That, transfer of all properties described in Schedule 'A' to the Plaint were made as per the laws in force in Sikkim and whatever be the source of the properties described in Schedule 'A' to the Plaint, these now belong to different individuals, as detailed above. That, the Power of Attorney was executed by D1 in 1973 as he was engaged in the running of the Agarwal Wire Industries Private Limited, established in 1981. That, when D3 offered Schedule 'B' as collateral security against the loan availed from the Bank when objections were invited, Bhaskaranand raised a belated objection which was rejected. D1 denied any alleged illegalities or collusive acts by him and D3 and the Suit deserves to be dismissed being meritless.

8. Based on the pleadings of the parties, the Learned Trial Court settled the following issues for determination;

- "1. *Whether the plaintiffs have any cause of action to bring the instant suit?*
2. *Whether the suit is barred by limitation?*
3. *Whether the suit is properly valued?*
4. *Whether the properties as described in Schedule 'A' to the plaint are co-parcenary property/joint family property of the plaintiffs and the defendants?*
5. *Whether the transfer of the property under Schedule 'B' to the plaint as effected by the defendant No.1 in favour of defendant No.3 by way of gift is void, inoperative and not binding upon the plaintiffs?*
6. *Whether the suit is bad for mis-joinder and non-joinder of necessary parties?*

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7. *To what relief or reliefs, if any, are the plaintiffs entitled?*
8. *Had the defendant No.1 any right and authority to transfer the joint property as described in schedule 'B' to the plaint by executing the alleged Deed of gift?"*

The Learned Trial Court while taking up the Issues, considered the evidence on record and reached a finding that the Plaintiffs are not entitled to any of the reliefs claimed and dismissed the Suit of the Plaintiffs.

9.(i) The Judgment was assailed before the Learned District Judge, Special Division-I, Sikkim at Gangtok. While setting aside the Judgment of the Learned Trial Court, the Learned First Appellate Court observed that the challenge in the Appeal before him was confined to Issues No.1, 4, 5, 7 and 8. That, Issues No.2, 3 and 6 were decided by the Learned Trial Court in favour of the Defendants. The findings in that regard were not assailed by the Defendants by Cross-Objection.

(ii) The Learned First Appellate Court took up Issue No.4 first and while considering Exhibit 1 filed by P1, concluded *inter alia* that vide Exhibit 1, the properties in Sikkim (Schedule 'A' and Schedule 'B') had been allotted to the branch of Late Bhaskaranand which included Bhaskaranand as well and that a joint and undivided family is the normal condition of a Hindu society. Bhaskaranand and his sons constituted a joint Hindu family. The Court found no reason to doubt the clear recitals made in the endorsements in Exhibit 1. That, D1 had failed to substantiate his stand that the concerned properties had only been allotted to him and the present P1 and not their father Late Bhaskaranand. It was concluded that the Learned Trial Court, while considering the use of different pens and spacing in the endorsements made in Exhibit 1,

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had embarked on an issue which was not contested by either of the parties. The Learned First Appellate Court opined that there was nothing worthy on record to show that any partition with respect to the Schedule 'A' and Schedule 'B' properties ever took place between Late Bhaskaranand and his sons or even between P1 and D1 whether earlier or after the demise of Late Bhaskaranand and held the properties to be joint family/ancestral/coparcenary properties. The Learned First Appellate Court also declined to place reliance on Exhibit 'G' filed by D1 on grounds of vagueness and found that the reliance placed on it by the Learned Trial Court was totally misplaced. That, the Learned Trial Court had accepted the Defendants' claim that M/s. Shree Mulchand and Sons could not be a joint family business as one of its partners was an outsider, but no restriction under law prohibits any member of a joint family to enter into a partnership with an outsider. The Learned First Appellate Court, however, declined to place reliance on Exhibit 18 Cash Book and its English translation Exhibit 20, filed by P1, on grounds that no witness in support thereof was examined and ultimately decided Issue No.4 in favour of the Plaintiffs adding that the Learned Trial Court was influenced by the admissions made by P1 in Civil Suit No.76 of 1986 but the claims of D1 so far as admissions of P1 were abandoned, as P1 was not confronted with his admissions, denying him the occasion to explain them.

(iii) Issue Nos.5 and 8 were next taken up for discussion and it was opined that unless there is clear partition and allotment of the concerned properties/businesses in D1's name, he cannot claim exclusive rights over it and found the purported transfer/gift by D1 to D3 invalid sans authority of D1 to make the transfer. The

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finding of the Learned Trial Court was set aside and Issue Nos.5 and 8 decided by the Learned First Appellate Court in favour of the Plaintiffs.

(iv) Issue Nos.1 and 7 were taken up finally and decided in the affirmative by the Learned First Appellate Court relying on its own findings in Issue Nos.4, 5 and 8, as discussed *supra*. It was found that the Plaintiffs had succeeded in proving their case and was entitled to the reliefs claimed by them in Prayers (a), (b) and (c) of their amended Plaint and the Suit decreed accordingly.

10.(i) Before this Court, Learned Senior Counsel Mr. N. Rai while advancing his arguments for the Defendants, contended that Issue No.4 is the crux of the case. That, the Learned First Appellate Court set aside the findings of the Learned Trial Court in respect of the document Exhibit 1 and held that the suit properties are a joint family property solely relying on Exhibit 1. That, in fact, vide Exhibit 1, the properties in Sikkim were allotted only to D1 and P1 and Bhaskaranand had endorsed acceptance on their behalf as their natural guardian.

(ii) That, the onus to prove their case is on the Plaintiffs and they cannot take advantage of the weaknesses of the Defendants' case as done by the Learned First Appellate Court. On this aspect, reliance was placed on ***Rangammal vs. Kuppuswami and Another***¹. Reliance was also placed on ***Anil Rishi vs. Gurbaksh Singh***² and ***Md. Kalu Sheikh @ Abdul Gani Sarkar vs. On the death of Shahjahan Ali His Legal Heirs Hazarat Ali and Others***³.

¹ (2011) 12 SCC 220

² (2006) 5 SCC 558

³ (2020) 2 Gauhati Law Reports 391

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(iii) It is contended that the properties in Schedule 'A' recorded in the name of M/s. Shree Mulchand and Sons were allotted in favour of D1 while those in the name of Mulchand were in favour of P1. That, those in the name of the Firm Agarwal Trading Company was transferred from Balkrishna, cousin of P1 and D1, to D1 in terms of Clause 8 of Exhibit 1. However, the Learned First Appellate Court wrongly observed that in the pleadings, the Defendants took a stand that nothing was given to Late Bhaskaranand and he had relinquished all his rights, but in the Evidence-on-Affidavit of D1, he had stated that Late Bhaskaranand had retained three properties about which he has not stated anything in his Written Statement on the plea that at the time of preparation of the Written Statement, he was not aware of the existence of Exhibit 3. That, in fact, Exhibit 3 is not a proved document and mere marking of a document does not dispense with its proof. The document finds no mention in the pleadings and was produced only at the time of evidence. On this count, reliance was placed on ***Sait Tarajee Khimchand and Others*** vs. ***Yelamarti Satyam alias Satteyya and Others***⁴. Learned Senior Counsel submitted that the Learned First Appellate Court while disagreeing with the Learned Trial Court, concluded that the Trial Court while considering Exhibit 1 had found the words "and self" interpolated and there was no mention of Bhaskaranand being the *Karta* sans raising of this issue by the parties. Learned Senior Counsel urged that the Learned Trial Court can consider all aspects of the exhibited documents.

⁴ AIR 1971 SC 1865

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(iv) It was next submitted that P1 did not rely on and chose not to argue on Exhibit 2, which mentions that "Shree Mulchand & Sons" of Kolkata is a "Partnership at Will" and not a joint family, indicating the frail foundation of P1's case. That, as per the Learned First Appellate Court, the Defendants had not put forward any cogent evidence to prove that Bhaskaranand was not the *Karta* of their family during his lifetime but overlooked Exhibit 'C,' the admitted document of Firm Registration in 1977-1979, presented by Bhaskaranand neither did the Court consider Exhibit 'M' being a General Power of Attorney executed in 1973 by D1 in respect of his properties and businesses in favour of Bhaskaranand. Exhibit 'P,' 'Q' and 'R' are Eviction Suits filed by P1 and Exhibit 'T' by D1, in their individual names in which Bhaskaranand had appeared and deposed as their Constituted Attorney. That, the partition of Schedule 'A' amongst the two brothers is indubitably proved by the admission of P1 being Exhibit 'U' in Civil Suit No.76 of 1986 and the General Power of Attorney executed by both brothers (D1 vide Exhibit 'M' and P1 vide Document 'D18') in favour of their father, mother and grandmother who all through, acted as their Constituted Attorneys while Bhaskaranand did not act as *Karta*. In the said Suits, the Learned Court has declared that P1 was the owner of the suit property which is mentioned as Item No.3 in Schedule 'A' to the Plaint. In Exhibit 'T,' D1 was declared as owner of Item No.1 (Schedule 'B' property) of the Schedule 'A' property. Exhibit 'V' is the deposition of P1 as witness in the Eviction Suit admitting that by virtue of the Firm registration in 1977-1979, D1 had become the absolute owner of the Schedule 'B' property. On this count, reliance was placed on ***Dattatraya Shripati Mohite*** vs.

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Shankar Ishwara Mohite and Another⁵. That, evidence given by P1 in Civil Suit No.76 of 1986 can be considered by this Court without him having been confronted, as per the provisions of Section 145 of the Indian Evidence Act, 1872 ("Evidence Act"), as a previous admission is a substantial piece of evidence. That, there is a difference between previous statement and previous admission. To fortify these arguments, reliance was placed on ***Bhagwan Singh vs. State of Punjab***⁶; ***Venkatlal Baldeoji Mahajan vs. Kanhiyalal Jankidas and Others***⁷; ***Biswanath Prasad and Others vs. Dwarka Prasad and Others***⁸; ***Smt. Jai Shree Lalla vs. Sri Harbans Singh***⁹; ***Karam Kapahi and Others vs. Lal Chand Public Charitable Trust and Another***¹⁰; ***Suzuki Parasrampuriah Suitings Private Limited vs. Official Liquidator of Mahendra Petrochemicals Limited (In Liquidation) and Others***¹¹ and ***Dasa Singh and Another vs. Jasmer Singh***¹².

(v) It was canvassed by Learned Senior Counsel that there is no document on record filed by P1 to indicate the role of Bhaskaranand as *Karta* or any document signed by him as *Karta*. That, Exhibit 18 was the only document claimed by P1 to have been signed by Bhaskaranand which was rejected by the Learned Trial Court and the Learned First Appellate Court as not proved. That, the documents which could have been of assistance to P1 were "Annexure 1" and "Annexure 2" filed by them in the application under Order XII Rule 6 of the Code of Civil Procedure, 1908 ("CPC"), but these documents were not produced by P1 in the

⁵ AIR 1960 Bombay 153

⁶ AIR 1952 SC 214

⁷ AIR 1963 MP 155

⁸ AIR 1974 SC 117

⁹ 2014 SCC OnLine Del 1752

¹⁰ AIR 2010 SC 2077

¹¹ (2018) 10 SCC 707

¹² 2003 (2) RCR (Civil) 361

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instant case. That, the Learned First Appellate Court while rejecting Exhibit 'G', the document of the Defendants, recorded it as being vague and unregistered, although Section 67 of the Evidence Act allows the party to prove the document by identifying handwriting. On this aspect, reliance was placed on **Bank of India vs. Allibhoy Mohammed & Ors**¹³. Besides, D1 has identified Exhibit 'G' as being in his father's handwriting as also PW Gitanjali Jalan, witness for P1 (*before the Learned Trial Court, the witness was variously numbered as "PW3" and "PW2" hence, hereinafter for convenience, shall be referred to by name*) but P1 denied such claim and deposed that the document was devoid of his father's signature although he admitted that the handwritten portion and signature in Exhibit 1 was that of his father which is similar to that in Exhibit 'G.' That, Exhibit 'G' clearly sets out the details of the properties allocated to the two brothers and correlates to the allocation made in the settlement of 1968. The document was rejected as an unregistered document while reliance was placed on Exhibit 1 by the Learned First Appellate Court also an unregistered document, but admittedly accepted by both parties.

(vi) The Learned First Appellate Court overlooked the fact that the partition was done in metes and bounds in terms of the allotment made in Exhibit 1. The admissions of Bhaskaranand and P1 in their evidence Exhibits 'U' and 'V' were also not considered. Exhibit 8 and Exhibit 21 prove the transfer and registration of business of M/s. Laxmi Stores in the name of P1's wife Sheila Agarwal from that of D1. Exhibit 'B' establishes transfer of Schedule 'B' property in favour of D3 by D1. Learned Senior

¹³ AIR 2008 Bombay 81

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Counsel also urged that no common family account, one of the essential requirements of a joint family, was produced by P1. The different properties in Schedule 'A' to the Plaint said to be in the individual exclusive ownership of P1 and D1, was highlighted by Learned Senior Counsel.

(vii) The next argument advanced was that the Learned First Appellate Court held that the eldest member of the family would be the *Karta*, but in granting the Reliefs No.(a), (b) and (c) of the Plaint, he enjoined D1, the eldest member of the family from running the joint family and joint family business, if any.

(viii) It was urged that no "Power of Attorney" is required for a *Karta* by others constituting the coparcenary under the Mitakshara School of Hindu Law, as was given by the P1 and D1 to Bhaskaranand and the Learned First Appellate Court was on agreement on this aspect by placing reliance on ***Sunil Kumar and Another vs. Ram Prakash and Others***¹⁴. The Learned Court failed to consider that the registration of a Deed of Gift under the Sikkim Registration of Documents Rules, 1930, can be attested by one witness alone and is in force in Sikkim in terms of Article 371-f(k) of the Constitution of India. That, P1 in his evidence, has admitted the fact of partition by stating, "*.....in order to complete the process of partition, the original plaintiff No.1 got some of these allotted properties mutated either in my name or in the name of the defendant No.1 from the name of the coparceners in whose name the properties were acquired prior to 1968.*"

(ix) That, the evidence on record establishes that the properties were individual properties on which reliance was placed

¹⁴ AIR 1988 SC 576 : (1988) 2 SCC 77

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on ***Mudi Gowda Gowdappa Sankh*** vs. ***Ram Chandra Ravagowda Sankh***¹⁵; ***Mst. Rukhmabai*** vs. ***Lala Laxminarayan and Others***¹⁶; ***Sunil Kumar*** (*supra*); ***Union of India*** vs. ***Sree Ram Bohra and Others***¹⁷; ***Joint Family of Udayan Chinubhai Etc.*** vs. ***Commissioner of Income Tax, Gujarat***¹⁸; ***Tribhovandas Haribhai Tamboli*** vs. ***Gujarat Revenue Tribunal and Others***¹⁹; ***A. C. Narayanan*** vs. ***State of Maharashtra and Another***²⁰.

That, in view of the arguments advanced, the Appeal may be allowed and the Judgment of the Learned First Appellate Court set aside.

11.(i) *Per contra*, the arguments advanced by Learned Senior Counsel Mr. Anmole Prasad for the Plaintiffs, were that both P1 and D1 have descended from a common ancestor "Sriram." That, a settlement by an amicable partition took place on 06.06.1968 regarding the joint properties of the Hindu Undivided Family (for short, "HUF") of M/s. Shree Mulchand and Sons amongst the five brothers being the sons of Late Mulchand Agarwal. Schedule 'A' property (nine immovable properties) and three businesses, were allotted in favour of the coparceners of Bhaskaranand and his two sons, P1 and D1 which constituted a HUF, as all coparceners were engaged in the joint family business and properties were thrown into the joint family fund, no acquisition of property was independent. That, the evidence also reveals that over and above the nine immovable properties, there were three more properties received in the amicable partition of 1968 which was disposed of by Bhaskaranand alone, prior to the institution of the Suit. That, only

¹⁵ AIR 1969 SC 1076 : (1969) 1 SCC 386

¹⁶ AIR 1960 SC 335

¹⁷ AIR 1965 SC 1531

¹⁸ AIR 1967 SC 762

¹⁹ (1991) 3 SCC 442

²⁰ (2014) 11 SCC 790

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in February, 1994, when the illegal alienation of Schedule 'B' property in 1989 by D1 to D3 was discovered, that the dispute arose between the parties. Relying on the ratio of ***Appasaheb Peerappa Chamdgade vs. Devendra Peerappa Chamdgade and Others***²¹ and ***Adivappa and Others vs. Bhimappa and Another***²², it was urged that in a Suit for Declaration based on Title, once the Plaintiff has been able to create a high degree of probability so as to shift the onus on the Defendant, it is for the Defendant to discharge his onus in absence of which, the burden of proof lying on the Plaintiff must be held to have been discharged, thereby amounting to proof of the Plaintiff's Title.

(ii) That, the Plaintiffs have discharged the burden cast on them firstly, by establishing that there was a Hindu joint family comprising of one Sriram and his three sons, Mulchand, Nandalal and Deepchand. The parties have admitted that they are governed by the Mitakshara School of Hindu Law being Hindu by religion. Thus, the existence of a HUF consisting of members of the family of Late Mulchand having a nucleus of property, is firmly established. Drawing the attention of this Court to the documents relied on by P1, it was contended that Exhibit 1 reveals that the Gangtok allotment consisting of eleven properties, required the cooperation of all allottees for transfer of all the properties in the name of the allottee or representative. Paragraphs 2 to 7 of Exhibit 1 indicate a clear intention of separation in the family with conditions of independent business expenses, cost and liabilities and the document bears the signature of all the sons of Mulchand. The acceptance of the allotment and all terms and conditions

²¹ (2007) 1 SCC 521

²² (2017) 9 SCC 586

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therein proves that it was Bhaskaranand who received the Gangtok allotment for himself and his two minor sons, coparceners of the joint family. The partition was clearly amongst the brothers who were the sons of Late Mulchand and not between Bhaskaranand and his two sons. The interpretation of the Defendants that Exhibit 1 was a partition amongst Bhaskaranand and his two sons is nowhere borne out by documents. The rights of P1 and D1 over the suit properties accrued solely by virtue of the fact that they were the sons of P1. The document also does not establish that D1 was allotted all the property standing in the name of M/s. Shree Mulchand and Sons or that Bhaskaranand took three properties as his share or that P1 was allotted the remainder. That, Exhibit 1 was filed along with the Plaint and no challenge arose regarding its authenticity and, in fact, D1 has actually relied on it. The first challenge thereof emanated from the Learned Trial Judge who took upon herself the forensic duty of deciding the genuineness of Exhibit 1 ignoring that both parties were relying on the document and concluded that Bhaskaranand having mentioned the words "for and on behalf of Mahesh, Umesh and for self" does not show him to be acting as a *Karta* of his family. She also held that the words "and self" had been written by a different pen, doubting the rights of Bhaskaranand. This opportunity was thus seized by the Defendants and they questioned the endorsement in Exhibit 1.

(iii) Exhibit 3, another important document, corroborates and confirms the genuineness of Exhibit 1. Exhibit 3 is dated 04.06.1968 and was prepared by Bhaskaranand two days before Exhibit 1 was executed on 06.06.1968. That, in Exhibit 3, the valuation of the twelve Gangtok properties and other assets and

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liabilities amounting to a net of Rs.8.59 lakhs is rounded off and valuation is shown in Exhibit 1, i.e., Rs.8.59 lakhs. That, the Defendants raised no objections to the proof and admission of Exhibit 3 but, in fact, corroborated and relied upon it for their own evidence. In his evidence, D1 confirmed that, as per the assessment of Bhaskaranand on 04.06.1968, the valuation of the Gangtok properties was shown in Exhibit 3 and that the properties described in Item Nos.2, 3 and 7 of Schedule 'A' to the Plaint are out of the eleven properties mentioned in Exhibit 3 and that the eleven properties in Exhibit 3 were registered and stood in the name of different persons/entities. He further reconfirmed that of the eleven properties of Exhibit 3, there is landed property of Agarwal Trading Company at Jorethang which was transferred to the family vide Exhibit 1. That, since he was a minor, his father might have got Exhibit 'H' executed by his first cousin Balkrishna. Exhibit 'A' establishes that site allotment was made to the HUF of M/s. Shree Mulchand and Sons of Gangtok on which the Schedule 'B' building was constructed.

(iv) Exhibit 2 shows a partnership business in Calcutta registered in 1940. Taking advantage of this document, the Defendants have attempted to deny the existence of a HUF but that it was a "Partnership at Will" and not a HUF, sans pleadings to this effect. The statements made by D1, in fact, indicates the existence of a HUF doing diverse business and admission that M/s. Shree Mulchand and Sons had properties and businesses in Dikchu, Mangam, Dentam, Gangtok and Deorali since before 1968. Relying on Exhibits 16, 17, 18 and 19 which are Cash Books of property and business in Sikkim, it was contended by Learned Senior

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Counsel that no objection was taken by the Defendants at the time they were marked as genuine, the entries therein reveal jointness of the finances of the family of Bhaskaranand and their extensive businesses throughout Sikkim. Both the Learned Courts below, however, did not consider Exhibit 18 on grounds of unreliability of its translation (Exhibit 20), raised by D1 but bad translation cannot impeach the genuineness of Exhibits 16 to 19.

(v) The best evidence of physical joint status and joint possession of Schedule 'B' property comes from the testimony of D3 who admitted that when she came to Sikkim after her marriage in 1983, Bhaskaranand and his family including P1, were residing in the Schedule 'B' property. D1 admitted as much as well. The suggestions made to P1 about Bhaskaranand inducting Central Reserve Police Force ("CRPF") in the property at Item No.7 of Schedule 'A' negates D1's claim that Bhaskaranand relinquished his share in 1968. The sisters of P1 and D1 have all corroborated the Plaintiffs' case. PW Sonam Topden (before the Learned Trial Court, the witness was variously numbered as "PW2" and "PW3" hence, hereinafter for convenience, shall be referred to by name), a senior citizen, also stated that he had seen the family of Bhaskaranand and his sons and their families, living jointly in the matter of mess and enjoyment and occupation of Schedule 'B' property without disputes till 1994. D1 agreed to the suggestion of the said witness to settle the dispute, provided the share of Bhaskaranand was divided equally between him and P1. That, PW Gitanjali Jalan gave evidence that Late Bhaskaranand and his two sons constituted a joint family and Bhaskaranand was the *Karta* thereof. PW4 Kusum Bazaz also supported the evidence of PW Gitanjali Jalan and that of

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Bhaskaranand and P1 concerning the family dispute in 1994. The evidence of PW5 M. M. Jalan, corroborated the evidence of P1 indicating that Bhaskaranand took charge of the properties and business as *Karta* of the family comprising of himself, D1 and P1. As a *Karta*, he frequently consulted PW5 on important matters pertaining to the affairs of joint family business and initiated the process of transferring the properties and business standing in the names of Mulchand, Balkrishna and Bhagwandas Agarwal, transferred in the names of his family members. Reliance was also placed by Learned Senior Counsel on Document "X5" by which, according to him, D1 confirmed that the aforestated properties were ancestral properties and admitted to have been retained by him. Asserting that Bhaskaranand and his sons formed a coparcenary, reliance was placed on ***Sunil Kumar*** (*supra*).

(vi) That, there are glaring discrepancies between the pleadings of D1 and proof that cannot be resolved in any manner whatsoever. To substantiate this point, the attention of this Court was invited to the Evidence-on-Affidavit of D1 as well as the Document "X4" alleged to have been admitted by D1. That, D1 averred in his Written Statement that Bhaskaranand took no share in the alleged partition of 1968, which stood demolished by evidence wherein he deposed that Bhaskaranand had held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3 and had also disposed of these properties. That, he attempted to explain this lapse by stating that he only came to learn of this after Exhibit 3 was filed.

(vii) That, the Defendants perforce had to take resort to Exhibit 'G' to substantiate their claim of partition. That, although

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the Defendants had pleaded that the process of dividing all the properties started in or around 1973, however, as appears from the evidence of the Defendants in 1969, the name of D1 was recorded in respect of M/s. Laxmi Stores located in the building being Item No.2 of Schedule 'A' to the Plaint. This shows that there was no partition as alleged and the joint properties of the family of Bhaskaranand were being mutated in the names of his sons without specific allotment of shares. That, so far as Agarwal Trading is concerned, Exhibit 'H' reveals that Balkrishna, a cousin, was acting as a nominee of D1 since 1966, that is two years before the family settlement of 1968, indicating that the family was a joint family prior to 1968. At the relevant time viz. 1975, D1 was studying at Pune and hence, it cannot be said that the business of Agarwal Trading came to his absolute share when he himself stated that Balkrishna was the ostensible owner on his behalf from 01.01.1966.

(viii) That, it was the case of D1 that he became the absolute owner in respect of all the businesses, assets and properties of M/s. Shree Mulchand and Sons by virtue of the fact that in 1977-79, an entirely new Firm by the same name had been registered under his proprietorship at Mangan and Item Nos.1, 4, 6, 8 and half of 9 of Schedule 'A,' vested absolutely on him as its owner. Except Exhibit 'C,' no other document showing mutation of the properties of M/s. Shree Mulchand and Sons, were ever produced by D1 nor did he have documents to show transfer of Schedule 'B' property to him. The registration of "Shree Mulchand & Sons" was, in fact, only for business in general goods at Mangan Bazar having an approximate value of Rs.1,00,000/- (Rupees one

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lakh) only. On this count, reliance was placed on ***Sankalchan Jaychandbhai Patel and Others vs. Vithalbhai Jaychandbhai Patel and Others***²³.

(ix) The claim of the Defendants is based upon the alleged partition vide Exhibit 1. They do not claim that any of the suit properties were the self-acquired properties of D1, but denied the existence of a HUF or that the suit property was coparcenary properties. Even if D1 is claiming rights over the suit properties through succession by inheritance under the Hindu Law, no scope exists for a great grandson to lay claims over his great grandfather's property nor could he lay claim over his grandfather's property during the lifetime of this father. The only manner in which D1 could possibly have any direct claim over the suit property is as a coparcener of the third generation from his grandfather. Relying on the ratio of ***Adivappa (supra)***, it was contended that the Defendants have not pleaded a clear chain of Title and have deliberately kept it vague and ambiguous.

(x) That, the Defendants have taken a plea that the land of Indo Sikkim Company was purchased by a Deed dated 18.10.1976, but at the same time alleged that the property at Item No.9 of Schedule 'A' belonged to M/s. Shree Mulchand and Sons and P1 in moiety. This establishes that it was a part of the HUF property of M/s. Shree Mulchand and Sons. Relying on the ratio of ***Ramkrishna Transports, Kalahasti vs. The Commissioner of Income Tax, Andhra Pradesh, Hyderabad***²⁴, it was argued that the ratio observed that the *Karta* of a joint Hindu family may enter into a partnership with a stranger. Therefore, it establishes that the partnership by the five

²³ (1996) 6 SCC 433

²⁴ 1966 SCC OnLine AP 155

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sons of Mulchand Agarwal in conjunction with one stranger, was a family business. The Schedule 'B' property is included in Exhibit 1 as part of the Gangtok allotment but the Defendants claim right, title and interest in Schedule 'B' vide Exhibit 1. They are estopped from turning around and deposing that Schedule 'B' property did not belong to the family of Mulchand as when they opposed the application under Order XXII Rule 3 of the CPC, they averred that only coparceners of the deceased Hindu, i.e., the male heirs, could be parties. Having obtained an Order in their favour, the Defendants are now estopped from denying the fact that they are all members of a HUF as they cannot approbate and reprobate.

(xi) During the mutation of immovable property vide Exhibit 'D' in the name of P1, the General Power of Attorney was never utilized by Bhaskaranand and the properties standing in the name of M/s. Shree Mulchand and Sons were never mutated in the name of D1. Exhibit 'H' was also created only for the purpose of giving effect to the transfer of joint family businesses in accordance with Clause 8 of Exhibit 1. The same arguments apply to Exhibit 7. That, Exhibit 'L' is ambiguous and does not help the Defendants' case. That, the onus to prove partition was on the Defendants. On this count, reliance was placed on ***Madanlal (Dead) by LRS. And Others vs. Yoga Bai (Dead) by LRS.***²⁵ and ***Chinthamani Ammal vs. Nandagopal Gounder and Another***²⁶.

(xii) Exhibits 'P,' 'Q,' and 'R' are also rife with ambiguities as Exhibit 'D' shows that the suit properties in these litigations had already been mutated for convenience in the name of P1. That, examination of Exhibits 'S,' 'T,' 'U,' 'V' and 'W' would reveal that

²⁵ (2003) 5 SCC 89

²⁶ (2007) 4 SCC 163

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the HUF was dealing with the properties as a matter of convenience in the names of either of the two sons of Bhaskaranand. The ambiguity in the documents relied on by the Defendants went unexplained as no opportunity was given to do the same. That, Bhaskaranand took all actions *vis-à-vis* the tenants vide Exhibits 'U' and 'V.' The Defendants chose not to confront P1 during cross-examination with the alleged admission in terms of Section 145 of the Evidence Act nor did the Defendants afford P1 with an opportunity of explaining the same. On this count, reliance was placed on ***Karan Singh and Others vs. State of M.P.***²⁷; ***Sita Ram Bhau Patil vs. Ramchandra Nago Patil (Dead) By L.Rs. and Another***²⁸ and ***Udham Singh vs. Ram Singh and Another***²⁹. That, the Learned First Appellate Court rightly came to the finding that the Defendants are seen to have more or less abandoned their claim so far as it rested on the so called admissions of P1. Reliance was placed on ***Nagubai Ammal and Others vs. B. Shama Rao and Others***³⁰. In any event, the Defendants cannot fall back on the principles of admissions, estoppel, waiver and acquiescence to confer Title upon themselves. This submission was fortified by the ratio of ***Union of India vs. Purushotam Dass Tandon and Another***³¹ and ***Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd. and Others vs. State of Maharashtra and Others***³². The reliance of D3 is on Exhibit 'B' which contains several infirmities, besides being executed without the consent of the coparceners. On this count, reliance was placed on

²⁷ (2003) 12 SCC 587

²⁸ (1977) 2 SCC 49

²⁹ (2007) 15 SCC 529

³⁰ AIR 1956 SC 593

³¹ 1986 (Supp) SCC 720

³² (2016) SCC OnLine Bom 1784

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Thamma Venkata Subbamma (Dead) by LR vs. Thamma Rattamma and Others³³.

(xiii) Advancing arguments on the second substantial question of law, it was contended that the Power of Attorney Exhibit 'M' was taken at a time when D1 was away for studies at Darjeeling and Bhaskaranand was the *Karta* managing and looking after the joint properties in Gangtok. Exhibit 'M' was made out not only to Bhaskaranand, but also to the wife of Bhaskaranand as well as the Defendant's grandmother Narayani Devi. Exhibit 'M' was never used by P1 to represent D1 except in Civil Suit No.76 of 1986. Besides, it is not unusual for a *Karta* to take a Power of Attorney from other coparceners and the mere fact that he did so, does not divest him either of his status as *Karta* or of his right, title and interest in the coparcenary property. Reliance was placed on ***Tvl. M. Muthuraj (HUF), Represented by its Karta/Power of Attorney Holder vs. The Commissioner of Commercial Taxes and Another***³⁴ before the Madurai Bench of the Hon'ble Madras High Court. Reliance was also placed on ***Tribhovandas Haribhai Tamboli (supra)***. Hence, it was submitted that the Judgment of the Learned First Appellate Court requires no intervention.

12. The submissions advanced by Learned Senior Counsel for the parties were heard at length and duly considered. The pleadings, all evidence, documents on record, the Judgments of Learned Courts below and the citations placed at the Bar have also been perused.

13. Before embarking on an examination of the merits of the matter, the air needs to be cleared with regard to the personal

³³ (1987) 3 SCC 294

³⁴ W.P.(MD) No.13340 & 13344 of 2015 and W.P.(MD) No.1 & 1 of 2015, dated 26.06.2019

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law which governs the parties. In general, it may be said that in matters of status, every person is governed by the law of his personal status (See ***Duggamma, Kom Krishna Bhat and Another vs. Ganeshayya Bin Keshayya and Others***³⁵). Where a Hindu family migrates from one State to another, the presumption is that it carries with it, its personal law, that is, the laws and customs as to succession and family relations prevailing in the State from which it came. However, this presumption can be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated (See ***Bikal Chandra Gope and Another vs. Manjura Gowalin and Others***³⁶). In this regard, in the matter at hand, it is clear that the Plaintiffs assert that they are governed by the Mitakshara School of Hindu Law. Although the Defendants denied such governance in their averments, during the course of arguments, it was conceded by Learned Senior Counsel for the Defendants that the Defendants are indeed governed by the Mitakshara School of Hindu Law. In view of the fact that the documents and evidence reveal that the parties originally belonged to Haryana and migrated to Sikkim from Mumbai (then Bombay), Maharashtra and in view of the principles enunciated above pertaining to migration and the personal law, and the subsequent admission made by Learned Senior Counsel for the Defendants during the arguments, it is clear that the parties are governed by the Mitakshara School of Hindu Law.

14.(i) Now addressing the substantial questions of law framed. The apple of discord between the parties arises on account of P1, P2 and P3 asserting that the property is ancestral and no

³⁵ AIR 1965 Mysore 97

³⁶ AIR 1973 Patna 208

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partition of the joint properties of the family that fell in the share of Bhaskaranand, P1 and D1 took place, that mutation of the properties in the names of P1 and D1 were resorted to without specific allotment of shares. D1 contrarily claims that properties which came to P1 and D1 vide Exhibit 1 excluded Bhaskaranand from its ambit and were partitioned and mutated in the names of P1 and D1, whereby Item Nos.2, 3 and 7 of Schedule 'A' to the Plaint fell in the share of P1 while Item Nos.1, 4, 5, 6 and 8 of Schedule 'A' were the share of D1.

(ii) In *Adiveppa (supra)*, it was held *inter alia* as follows;

"**16.** It is a settled principle of law that the initial burden is always on the plaintiff to prove his case by proper pleading and adequate evidence (oral and documentary) in support thereof. The plaintiffs in this case could not prove with any documentary evidence that the suit properties described in Schedules B and C were their self-acquired properties and that the partition did not take place in respect of Schedule D properties and it continued to remain ancestral in the hands of family members. On the other hand, the defendants were able to prove that the partition took place and was acted upon.

.....
19. It is a settled principle of Hindu law that there lies a legal presumption that every Hindu family is joint in food, worship and estate and in the absence of any proof of division, such legal presumption continues to operate in the family. The burden, therefore, lies upon the member who after admitting the existence of jointness in the family properties asserts his claim that some properties out of entire lot of ancestral properties are his self-acquired property. (See Mulla, *Hindu Law*, 22nd Edn. Article 23 "Presumption as to coparcenary and self-acquired property", pp. 346 and 347.)"

(iii) It thus emanates that the essence of a coparcenary under Mitakshara Law is unity of ownership. It is well settled that the normal state of every Hindu joint family is one of jointness. Every such family is joint in food, worship and estate in the absence of proof of division and in the absence of any positive steps taken to effect a partition.

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15 P1 has placed reliance on Exhibit 1 (in four pages) as proof of existence of joint family. D1 has not denied this document. This document bears the heading "*Terms and Conditions for Gangtok Allotment.*" The total assets therein are described as follows, "*Rs.8,59,500/- Less Rs.59,500/- Joint Pool A/c. Nett asset 8,00,000/-.*" It indicates that eleven properties of Gangtok are to be received by the allottee. The three other pages bear the heading "*General Terms*" and are signed by Pitamberlal, Rameshwarlal, Tikaram, Lakshmi Narayan and Bhaskaranand. They are the sons of Mulchand, their grandfather being Sriram. When Exhibit 1 (first page) is read with the remaining pages being the "*General Terms,*" it appears that business of the five brothers named above (lineally descended from Sriram) had been divided into five lots. Exhibit 1, in no uncertain terms, reveals this circumstance and it is specified therein that the share which fell into the lot of any brother would have to be accepted without any objection by the allottee. Exhibit 1 is said to have been made by way of family settlement. In *Kokilambal and Others* vs. *N. Raman*³⁷ it was held that a settlement or family arrangement is recognized as a valid transfer of properties under Hindu Law. Normally, Courts do lean in favour of enforcement of such an arrangement or settlement.

16. Exhibit 2 was identified by P1 as the certified copy of Firm Registration of M/s. Shree Mulchand and Sons *alias* Mulchand and Sons. P1 relied on Exhibit 2 on grounds that the name of the Firm reflected in Exhibit 2 is the same as the name of the Hindu Undivided Family, i.e. Shree Mulchand and Sons. That D1 had

³⁷ AIR 2005 SC 2468

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taken advantage of the fact that the document was one showing a "Partnership at Will" and not a HUF, sans pleadings. While examining Exhibit 2, although the name of the Firm is "*Shree Mulchand & Sons alias & Mulchand & Sons,*" the words "*Duration or date of registration: Partnership at will.*" reflects that it was a "Partnership at Will." The Indian Partnership Act, 1932 at Section 7 provides that where no provision is made by contract between the partners for the duration of their partnership or for determination of their partnership, the partnership is a "Partnership at Will." It is settled law that members of an undivided Hindu family can form a partnership without disturbing their status as members of the joint family and without disrupting the same, just as they can acquire separate property or carry on business for themselves (See ***Chandrakant Manilal Shah and Another vs. Commissioner of Income Tax, Bombay-II***³⁸).

17. That having been said, it is evident that even if there was a partnership of the five brothers with an outsider, the five brothers were members of the same family lineally descended from a common ancestor and evidently maintained a joint pool of their accounts, as reflected in the "General Terms" of Exhibit 1 indicating their joint ownership of property and accounts. The existence of a Partnership Firm cannot wish away the existence of a HUF which undoubtedly existed, as can be gauged from the terms of Exhibit 1. Even if it is to be assumed that the allotment that fell in the share of P1, D1 and Bhaskaranand, was not joint family property as sought to be asserted by D1 (without fortifying such assertion with proof), once the property came into the share of Bhaskaranand, P1

³⁸ AIR 1992 SC 66

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and D1, it became their joint family property. The family is a joint family if it is joint in affairs of food, worship and estate as observed in *Mst. Rukhmabai (supra)*. In a joint family business, no member of the family can say that he is the owner of one-half, one-third or one-fourth. The essence of joint Hindu family property is unity of ownership and community of interest, and the shares of the members are not defined. (See *Mulla, Hindu Law, 23rd Edition, Page 354*). Hence, the family of Bhaskaranand formed a joint Hindu family comprising of Bhaskaranand, his wife, minor sons, unmarried daughters and his mother. The minor sons could not be said to be independent at that stage. Bhaskaranand signed on Exhibit 1 duly accepting the shares of P1 and D1 as also his own and being their father, became the *Karta* by virtue of the Mitakshara Law. The shares in the allotment made as per Exhibit 1 nowhere indicates that the division of properties was only between P1 and D1 or between the heirs of Mulchand and P1 and D1 and that Bhaskaranand had relinquished his claims, as claimed by D1, neither was any proof furnished by D1 that he had invested separate funds to obtain any of the Schedule 'A' properties standing in the name of M/s. Shree Mulchand and Sons, although he made such an averment in his pleadings.

18. So far as discharging the burden of proof is concerned, Learned Senior Counsel for the Defendants relied on *Rangammal (supra)*. In the said ratio, the Hon'ble Supreme Court, while discussing Section 101 of the Evidence Act, has *inter alia* held that;

"21.

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to

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examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."

The ratio in **Anil Rishi** (*supra*) relied on by Learned Senior Counsel for the Defendants, in sum and substance, deals with the same matter. **Md. Kalu Sheikh @ Abdul Gani Sarkar** (*supra*) relies on the ratio in **Anil Singh** and **Rangammal** (*supra*).

19.(i) On examining the evidence of PW Gitanjali Jalan, the blood sister of P1 and D1, she stated *inter alia* that Bhaskaranand lived ".....alongwith all his family members comprising of my brothers the Present Plaintiff No.1 and the defendant No.1, two maiden sisters and mother and grand-mother." PW Sonam Topden claimed close acquaintance with the family of Bhaskaranand Agarwal and saw Bhaskaranand, his sons and other members living jointly in Schedule 'B' property. He came to learn of the dispute pertaining to Schedule 'B' property and on the request of Bhaskaranand, took up the matter with the Defendant No.1 who was agreeable to partitioning of the properties in three shares i.e. between his father, himself and his brother (P1) on the condition that on the demise of Bhaskaranand, the property would then be divided equally between him and P1. According to him, ".....Seeing the relation maintained by the family of late Bhaskarananda Agarwal I felt that plaintiff no.1 and def. no.1's family were joint."

(ii) PW4 Kusum Bazaz, blood sister of P1 and D1, stated that prior to 1968, they were living at Bombay (now Mumbai) and her father Bhaskaranand Agarwal used to take care of and manage all affairs relating to the business and properties belonging to and owned by the then joint family known as M/s. Shree Mulchand and Sons. According to her, there was harmony and unity in the joint

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family in Sikkim. Her cross-examination however reveals her ignorance of the dealings made by Bhaskaranand Agarwal with regard to the properties and contrary to the evidence of the other witnesses of P1, she stated that Bhaskaranand received the properties in Sikkim only on his own behalf when the allotment of 1968 took place and P1 and D1 were not given any share on the said day.

(iii) PW5 M.M. Jalan is the husband of PW Gitanjali Jalan. He deposed that his father-in-law used to consult him in matters connected to the family and business matters of importance, more particularly since the middle of 1968, as all the children of Bhaskaranand Agarwal were then minors. Under cross-examination, he however admitted to having no knowledge about whether D1 transferred the business of Laxmi Stores in the name of Sheila Agarwal, wife of P1 or of the transfer of the seven storeyed building in the name of D3 on 31.03.1989. According to him, a state of distrust and hatred was prevailing amongst the members of the joint family and he tried to bring an amicable partition of the properties and businesses owned by the family but due to a condition set forth by D1, the settlement could not be achieved and this was in February, 1994.

(iv) The evidence of P1's witnesses reveal that they were unaware of the internal dealings with regard to the property of the family of Bhaskaranand but they all were aware and had seen Bhaskaranand, P1 and D1 living in a joint family.

20. Considering the above arguments advanced by Learned Senior Counsel for the Defendants, it is pertinent to mention that the reliance of P1 is on Exhibit 1. A detailed discussion has ensued

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on Exhibit 1 and how the property came to the coparcenary of Bhaskaranand and his two sons. Exhibit 1, on pain of repetition, it may be stated, is not denied by D1. Reliance was also placed on Exhibit 3 by P1, the contents of which were also admitted by D1. Hence, so far as burden of proof lies on P1 that the properties in Exhibit 1 fell in the share of Bhaskaranand, P1 and D1 vide the said document and that they were living in a joint family with joint properties, has duly been discharged by him. Consequently, it falls on the Defendants to prove partition, with cogent and reliable evidence.

21. While relying on Exhibits 16, 17, 18, 19 and 20 viz. Ledger Book/Cash Books of various businesses said to indicate maintenance of joint accounts by the joint family of Bhaskaranand, the argument advanced by Learned Senior Counsel for the Plaintiffs was that no objection was taken by the Defendants at the time they were marked as Exhibits. P1, in his evidence, has identified Exhibit 16 as the Hand Book accounts of Laxmi Store; Exhibit 17 as the Ledger Book of the property and business in entire Sikkim; Exhibit 18 as the record of Cash Book of business and properties of entire Sikkim; Exhibit 19 as the record of Cash Book of Laxmi store and Exhibit 20 as the translated version of Exhibit 18. P1 admitted however that the entries in Exhibit 18 were in the handwriting of one "Arvind Tripathi" but "Arvind Tripathi" was not produced as a witness to prove the contents of the document. In the absence of the proof of the contents of the document, both Learned Courts below rightly disregarded these documents. In **Sait Tarajee Khimchand** (*supra*), it was held that mere marking of an Exhibit does not dispense with its proof. Once the contents are proved,

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should the opposing party fail to raise objections or extract any contradictory evidence by way of cross-examination, then the contents of the document can be accepted as evidence. The probative value of a document must be established in the absence of which, the document deserves to be and is consequently disregarded.

22.(i) So far as the properties in Schedule 'A' and Schedule 'B' to the Plaint are concerned, as can be culled out from the evidence on record, more importantly of P1 and D1, Item No.2 in Schedule 'A' to the Plaint is one wooden shop house with land measuring 17'x65' at M.G. Marg, Gangtok and Item No.10 in Schedule 'A' to the Plaint is property in the form of business styled as "Laxmi Stores" at M.G. Marg, Gangtok. The business in Item No.10 is being run from the property in Item No.2. P1, in his Evidence-on-Affidavit has stated that this property was acquired by the joint family in the year 1963 and that although it is recorded in his name with the concerned Department but Item No.2 is a joint family business. However, he went on to admit that the properties mentioned in Item Nos.2, 3 and 7 in Schedule 'A' to the Plaint are recorded in his name. Exhibit 8 reflects that Item No.10 is recorded in the name of the wife of P1, Sheila Agarwal. It was in the name of D1 and prior to that in the name of one Bhagwandas Agarwala. Although P1 denied in his Evidence-on-Affidavit that the change of name in the record of the business known as Laxmi Stores was the result of mutual agreement between Bhaskaranand, D1 and himself, however, under cross-examination, it was extracted from him that Item Nos.2, 3 and 7 were recorded in his name. D1, while supporting the fact that Item Nos.2, 3 and 7 were recorded in the

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name of P1, stated that P1 is the absolute owner of the properties described in Item Nos.2, 3 and 7 of Schedule 'A' to the Plaint and his wife is the sole proprietor of the business of M/s. Laxmi Stores. The evidence on record establishes that Item No.2 is in the name of P1 and Item No.10 is in the name of his wife, Sheila Agarwal who is not a coparcener in the family. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth, an interest in the joint or coparcenary property. (See **Surjit Lal Chhabda vs. CIT Bombay**³⁹). For the aforesaid reason, Item No.10 cannot therefore be said to be joint family property having been recorded in the name of the wife of P1. No documents indicating a joint pool of expenditure for the said properties were furnished to support the contention of jointness by P1.

(ii) Item No.3 in Schedule 'A' to the Plaint viz. one three storeyed RCC building measuring 40'X30' at Deorali, Gangtok according to P1, was acquired by the joint family in or around the year 1963 and let out to different tenants but is recorded in the name of P1. D1 admitted that Item No.3 was allotted and given exclusively to P1. Exhibit 'D' dated 30.07.1980 is a Mutation Certificate reflecting that Item No.3 is recorded in the name of P1. No proof whatsoever was furnished by P1 to prove that it was held as a joint family property having a joint pool of accounts after such mutation. In my considered opinion, it is the sole property of P1.

(iii) For Item No.7 in Schedule 'A' to the Plaint i.e. one two storeyed wooden house and land measuring 20'x80' at Rangpo, East Sikkim, P1 submits that this property was acquired by the

³⁹ AIR 1976 SC 109

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joint family in or around the year 1955 and is standing in his name but is a joint family property and let out to the Government of Sikkim where CRPF have their camp. In fact, as already stated, his admission is that Item Nos.2, 3 and 7 were allotted to him and given to him exclusively and cross-examination extracted so much from him. D1 lent strength to this deposition of P1. The claim of P1 that Item No.7 is a joint family property lacks support sans any joint fund in the name of the family. Exhibit 'D' relied on by D1, proves that Item No.7 was recorded in the name of P1. In my considered opinion duly supported by the evidence in record, Item Nos.2, 3, 7 and 10 are the exclusive properties of P1.

(iv) So far as Item No.9 in Schedule 'A' to the Plaint is concerned, although parties admitted that it was held in moiety by them, according to P1, this property was acquired by the joint family in the year 1955 and is standing both in the name of M/s. Shree Mulchand and Sons and himself. D1, for his part, stated that P1 purchased Item No.9 from M/s. Indo Sikkim Company vide a Deed dated 18.10.1976 and is held in moiety by P1 and himself. No documents were furnished by either party in support of their respective evidence but both P1 and D1 are in agreement that the property belongs to them in moiety. In light of this admission of both parties even if no documents are furnished, the Court is of the view that Item No.9 belongs to them jointly.

(v) Item No.1 in Schedule 'A' to the Plaint, according to P1, is the same property as mentioned in Schedule 'B' to the Plaint which, according to him, was built out of the joint fund of the family Firm and was recorded in the name of M/s. Shree Mulchand and Sons with the concerned authorities. D1, for his part, deposed

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that since the registration of the Firm "Shree Mulchand & Sons" in the year 1979, he had become the owner in respect of all business, assets and properties of M/s. Shree Mulchand and Sons and the properties described in Item Nos.1, 4, 5, 6 and half of 9 in Schedule 'A' to the Plaint, vested on him as the absolute owner thereof. While examining the documents relied on by the parties it appears that so far as Item No.1 is concerned, Exhibit 'A' was relied on by D1. This is a document indicating that a site in the "New Extension Bazar, Gangtok" was allotted to "Messrs. Shree Mulchand & Sons" in the year 1944. The only reason for D1 to lay claim on Item No.1 of Schedule 'A'/Schedule 'B' property is the fact that he is the proprietor of a Firm registered in the year 1979 by the name of "Shree Mulchand & Sons." It is not denied that vide Exhibit 'A' the land on which Item No.1 of Schedule 'A'/Schedule 'B' building stands, was an allotment made by the then Maharani to "Messrs. Shree Mulchand & Sons" in the year 1944. There is no ambiguity in the fact that Item No.1 in Schedule 'A'/Schedule 'B' property, was allotted to M/s. Shree Mulchand and Sons in the year 1944. The house on the allotted Plot was built before 1968 as per the evidence of P1. D1 does not contradict this evidence. It is evident from the deposition of the witnesses and documents on record that no transfer of Item No.1 of Schedule 'A'/Schedule 'B' property had been made from "M/s. Shree Mulchand and Sons" of 1944 to "Shree Mulchand & Sons" registered in 1979 of which D1 is shown to be the sole proprietor. Thus, in my considered opinion, D1 cannot lay claim on Item No.1 of Schedule 'A'/Schedule 'B' property, sans documentary evidence of transfer or partition of the property causing it to fall in his share, relying on the serendipitous

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circumstance of having registered a Firm by the name of "Shree Mulchand & Sons" in his name in 1979, which was the name of the Firm to which the allotment of land was made in the year 1944, and in which Item No.1 of Schedule 'A'/Schedule 'B' property was built. The fortuitous circumstance of the same name as elucidated above, cannot be a ground for D1 to claim Item No.1 of Schedule 'A'/Schedule 'B' property to be his separate property, lacking as it is, in supportive evidence.

(vi) That having been said, while dealing with Item Nos.4, 8, 11 and 12 mentioned in Schedule 'A' to the Plaint;

(a) According to P1, Item No.4 is standing in the name of D1. Exhibit 'C' relied on by D1 indicates that registration of a Firm by the name of "Shree Mulchand & Sons" took place on 16.06.1979, the document having been presented for registration on 07.09.1977 by Bhaskaranand Agarwal. The sole proprietor of the Firm "Shree Mulchand & Sons" as already discussed, is D1. Exhibit 'O' relied on by D1, is a document dated 03.07.1979 addressed to "M/s. Mulchand & Sons, Gangtok." It is certified therein by the "Under Secretary, Local Self Govt. & Housing Departt." that M/s. Mulchand & Sons owned one wooden godown in Deorali Bazar. Now, while reverting back to Exhibit 'C,' the Firm came to be registered in the name of D1 on 16.06.1979 and Exhibit 'O' is dated 03.07.1979 thereby lending credence to the fact that Item No.4 belonged to D1 as the proprietor of M/s. Shree Mulchand and Sons in view of Exhibit 'C' and Exhibit 'O' and is therefore his sole property. P1 has failed to supplicate his evidence that it is a joint family property, with any specific documentary evidence.

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(b) Item No.8 in Schedule 'A' to the Plaint according to P1, is also a joint family property which was acquired in or around the year 1960. The said property comprised of a two storeyed brick built structure wherein the joint family business of petrol, diesel and kerosene oil dealership was carried out in the name and style of M/s. Agarwal Trading Co. Contrarily, D1 in his evidence, stated that the properties in Item Nos.1 and 8 belonged to him absolutely and nobody has any right, title and interest in the said property and relied on Exhibit 'L' for this purpose. No cross-examination was conducted to contradict this document. Exhibit 'L' is seen to be a "Rent Note" between 'Mahesh Agarwal, son of Bhaskaranand Agarwal' as Lessor and "Devendrasingh Sanjaysingh" as the Lessee for the premises in Jorethang, Naya Bazar, South Sikkim. Thus, although P1 deposed that Item No.8 is also a joint family property, Exhibit 'L' proves that D1 is the owner of the said property mentioned in Item No.8. The position with regard to Item No.1 of Schedule 'A'/Schedule 'B' property has already been explained *supra*.

(c) Item Nos.11 and 12 in Schedule 'A' to the Plaint are evidently recorded in the name of D1, Item No.11 vide Exhibit 'H' dated 06.05.1975, giving D1 the reason to have executed Exhibit 'M' and Item No.12 vide Exhibit 'C' dated 07.09.1977. These documents can well be considered by this Court since no cross-examination of D1 was conducted with regard to these documents.

(vii) So far as Item Nos.5 and 6 are concerned, P1 stated that these properties were also acquired by the joint family in or around the year 1943-44 and under cross-examination,

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volunteered to state that Item Nos.5 and 6 "are not recorded in the name of def. no.1 but in the name of Shri Mulchand and Sons." D1, for his part, could only state that because it was recorded in the name of M/s. Shree Mulchand and Sons, the properties belonged to him but no documentary evidence was furnished, as before, to indicate transfer of these properties acquired by M/s. Shree Mulchand and Sons of circa 1940, prior to 1979, when the Firm of D1 was registered as "Shree Mulchand & Sons."

(viii) It is evident that Schedule 'B' property was transferred to the name of D3 by D1 vide Exhibit 'B,' dated 31.01.1989, merely on the strength of the property standing in the name of M/s. Shree Mulchand and Sons and the fact by which D1, in 1977-79, registered a Firm by the name of Shree Mulchand & Sons in his name. The presentation of Exhibit 'C' before the concerned authority allegedly by Bhaskaranand, makes no difference to the position of Schedule 'B' property, as Bhaskaranand had not transferred the said property to D1 when he presented the application and sought registration of the Firm "Shree Mulchand & Sons" in the name of D1 nor has such intention been indicated or evidence led by D1. The transfer of Schedule 'B' property to D3 by D1 is, as a consequence, void and inoperative in law, D1 being devoid of such power. Therefore, the argument advanced by Learned Senior Counsel for the Defendants that the properties in Schedule 'A' recorded in the name of M/s. Shree Mulchand and Sons were allotted in favour of D1 while those in the name of Mulchand were allotted in favour of P1, are not borne out by the documents relied on by D1.

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23.(i) Now coming to the question of whether a Power of Attorney is required to be executed in favour of a *Karta* by the coparcener, it is necessary to understand that a property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The Manager of a joint family is called "*Karta*." So long as the members of a family remain undivided, the senior member of the family is entitled to manage the family property including even charitable properties and is presumed to be the Manager until the contrary is shown. The *Karta* as the head of the family, has control over the income and expenditure and he is the custodian of the surplus, if any. The Manager has power over the income of the joint family pertaining to maintenance, education, marriage and other religious ceremonies of the coparceners and of the members of their respective families. He also has power to contract debts for family purpose and family business. On going through Exhibit 'M' which is the General Power of Attorney executed by D1 in favour of Narayani Devi Agarwal, Bhaskaranand Agarwal and Bimla Devi Agarwal, it is clear that this document was not a Power of Attorney given solely to Bhaskaranand. Besides, it appears that D1 was a student at the relevant time and Item No.10, later transferred to Sheila Agarwal, was registered in his name in 1972 as he had attained the age of majority in 1971 as per P1, which went uncontested, and presumably should any action be required with regard to this property owned by him, he had jointly empowered Narayani Devi Agarwal, Bhaskaranand Agarwal and Bimla Devi Agarwal.

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(ii) The argument of Learned Senior Counsel for the Defendants that there is no document on record filed by P1 to indicate the role of Bhaskaranand as *Karta* or any document signed by him as *Karta*, flies in the face of the assumed state of a Hindu joint family. Bhaskaranand was the father of P1 and D1 who were both minors at the time of the settlement of 1968. As per P1, he attained majority in 1973 while D1 did so in 1971. By virtue of him having signed on the document of allotment and having taken care of the family itself makes him (Bhaskaranand) a *Karta*. An objection was raised by Learned Senior Counsel for the Plaintiffs that no Power of Attorney is required for a *Karta* by others constituting the coparcenary under the Mitakshara School of Hindu Law, as was given by P1 to Bhaskaranand and the Learned First Appellate Court was on agreement on this aspect by placing reliance on ***Sunil Kumar and Another (supra)***. There is indeed no reason for this Court to differ from the finding of the Learned First Appellate Court. It is worth mentioning that in the said ratio, the Hon'ble Supreme Court held *inter alia* as follows;

"**22.** In a Hindu family, the karta or Manager occupies a unique position. It is not as if anybody could become Manager of a joint Hindu family. "As a general rule, the father of a family, if alive, and in his absence the senior member of the family, is alone entitled to manage the joint family property." The Manager occupies a position superior to other members. He has greater rights and duties. He must look after the family interests. He is entitled to possession of the entire joint estate. He is also entitled to manage the family properties. In other words, the actual possession and management of the joint family property must vest in him. He may consult the members of the family and if necessary take their consent to his action but he is not answerable to every one of them."

Document D18, dated 18.02.1977, is the Power of Attorney issued by P1. This document was neither proved nor contradicted and

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therefore requires no further discussion by this Court, while discussions on Exhibit 'M' have already ensued *supra*. These discussions would, therefore, soundly quell the second substantive question of law, extracted above.

(iii) Now, while examining and analyzing the other documentary evidence on record, Exhibit 3 was relied on by the Plaintiffs which is not an original document, D1 also relied on the contents of Exhibit 3 and stated *inter alia* in his evidence that, "...The original Plaintiff No.1 held the properties mentioned in item No.6, 9 and 10 of Exhibit 3. He disposed of the said properties by himself. Document No. 'X-4' describes one of the said three properties. ..." P1 in his Evidence-on-Affidavit, at Paragraph 25, has deposed *inter alia* as follows;

"25.The original plaintiff No.1, Bhaskaranand Agarwal(since deceased) had even in his capacity as karta of his joint family, sold one of the properties allotted to his joint family by the said family settlement/arrangement of 1968, situated at Singtam Bazar...."

These properties in Exhibit 3 are described as, "Naya Bazar old building," "Naya bazaar thekedar building" and a building in Singtam. Both P1 and D1 are in agreement that one property, being a building situated at Singtam Bazaar, East Sikkim, was sold by Bhaskaranand, their father, in the year 1989. Although P1 has deposed that the proceeds of the said property were deposited in a joint family account, he admitted that he had no proof of such deposit. The argument of D1 that the properties were divided only amongst himself and P1, appears to be a figment of his imagination as he himself has admitted in his evidence extracted *supra*, that three properties in Exhibit 3 were retained by Bhaskaranand.

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24. Although Learned Senior Counsel for D1 contended that Exhibit 3 is an unproved document as mere marking of a document is not proof thereof, however, we may relevantly refer to Section 58 of the Evidence Act which provides;

"58. Facts admitted need not be proved.—No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

Hence, although the document has not been proved in terms of the Evidence Act, in view of the admission of the contents of the document by P1 and D1, this Court takes note of the evidence furnished in Exhibit 3.

25. Addressing the rival arguments of "non-partition" submitted by P1 and "partition" made by D1, we may relevantly refer to the ratio in ***Mudi Gowda Gowdappa Sankh*** (*supra*) relied on by Learned Senior Counsel for the Defendants, wherein it was *inter alia* observed as follows;

"5.It is now well established that *an agreement between all the coparceners is not essential to the disruption of the joint family status, but a definite and unambiguous indication of intention by one member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status.*"

The joint state of a Hindu family is a given, the coparcener who claims that he has separated, must prove that he has done so in terms detailed above. On careful examination of the evidence on record, it emanates that there was partial partition of the properties that came to the family of Bhaskaranand. A partition between coparceners may be partial either in respect of the

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property or in respect of the persons making it. **(See Mulla *supra* 23rd Edition, Page 522)**. D1 has not been able to establish by any documentary evidence that the entire joint family properties had been divided at any point of time neither has he been able to establish by an unambiguous indication of intention that he sought to separate himself from the family. The assertion of P1 that there was no partition at all, stands belied by the evidence pertaining to Item No.10 of Schedule 'A,' by which the property came to be registered in the name of his wife.

26. It thus concludes from the documentary evidence on record that after the settlement of 1968, there was a partition of the properties amongst Bhaskaranand and his two sons i.e. P1 and D1, in terms of which P1 was given Item Nos.2, 3, 7 and 10, D1 was given Item Nos.4, 8, 11 and 12, as detailed in Schedule 'A' to the Plaint and Bhaskaranand held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3 which he admittedly disposed of.

27. The evidence of both P1 and D1 is a clear indication of the partial partition of the joint family property and in the absence of documentary evidence indicating transfer of Item Nos.1, 5 and 6 to either P1 or D1 or for that matter to Bhaskaranand during his lifetime, it continues to remain a joint family property.

28.(i) While referring to Exhibits 'P,' 'Q,' 'R,' 'T,' 'U' and 'V,' Learned Senior Counsel for the Plaintiffs relied on Section 145 of the Evidence Act and argued that D1 had failed to comply with the legal mandate of this provision and P1 was not confronted with the said Exhibits. To the contrary, Learned Senior Counsel for the Defendants submitted that there is no hard and fast rule as regards the compliance with Section 145 of the Evidence Act and

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vehemently argued that in the light of the provisions of Section 80 of the Evidence Act, the necessity of Section 145 of the Act, in the instant matter, does not arise.

(ii) A careful reading of Section 80 of the Evidence Act reveals that the Section deals with presumptions attached to deposition of witnesses in a judicial proceeding or before any Officer authorized by law to take such evidence or statements or confessions by any person, taken in accordance with law. It must be borne in mind that the Section has nothing to do with the admissibility of any particular kind of evidence which has to be decided by reference to the other Sections of the Act. Section 80 of the Act dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law and gives legal sanction to the maxim *omnia praesumuntur rite essa acta, viz.,* that all acts are presumed to have been rightly done. This, however, does not tantamount to dispensing with the provisions of Section 145 of the Evidence Act, which provides as follows;

"145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

(iii) If D1 sought to contradict the evidence of P1 in the previous Civil Suits, his attention ought to have been drawn to these parts. In ***Bhagwan Singh*** (*supra*), relied on by Learned Senior Counsel for the Defendants, it was held that all that is required under Section 145 of the Evidence Act is that the witness must be treated fairly and be afforded a reasonable opportunity of

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explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. In the said ratio, evidently the witness concerned had been questioned about each separate fact point by point, the whole statement was read out to him and he admitted that he had made it in the Committing Court. The Hon'ble Supreme Court opined that this procedure may be open to objection when the previous statement is a long one and only one or two small passages in it are used for contradiction which may thereby confuse a witness. However, in the said case, the witness had been questioned about every material passage in it point by point and hence it was observed that the procedure adopted was in substantial compliance to Section 145 of the Evidence Act.

(iv) In *Biswanath Prasad and Others (supra)*, relied on by Learned Senior Counsel for the Defendants, the Hon'ble Supreme Court held *inter alia* as follows;

"8.There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence if it fulfills the requirements of S. 21 of the Evidence Act: in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore*: in the latter case the Court cannot be invited to disbelieve a witness on the strength of a prior contradictory statement unless it has been put to him, as required by S. 145 of the Evidence Act."

Learned Senior Counsel for the Defendants did not address whether the requirements of Section 21 of the Evidence Act was fulfilled or not.

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(v) In *Sita Ram Bhau Patil (supra)*, relied on by Learned Senior Counsel for the Plaintiffs, the Hon'ble Supreme Court observed *inter alia* as under;

"17. If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of Section 145 of the Evidence Act. The provisions in the Indian Evidence Act that "admission is not conclusive proof" are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, "it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute."

(vi) Later in time, in *Karan Singh and Others (supra)*, relied on by Learned Senior Counsel for the Plaintiffs, the Hon'ble Supreme Court, while explaining the object of Section 145 of the Evidence Act, held *inter alia* as follows;

"5. When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement it does not amount to any admission and if it is proved that he had given such a statement the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. In the instant case, Ext. D-4 statement as such was not put to the witness nor was the witness given an opportunity to explain it. Therefore, Ext. D-4 statement, even if it is assumed to be a statement of PW 1 Hari Singh, that is of no assistance to the appellants to prove their case of private defence."

(vii) From a reading of all of the above ratiocination, it is clear that a reasonable opportunity has to be afforded to the party alleged to have made the admission and he should be allowed to explain the contradictions in his evidence before the Court and any

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admission made previously. The deposition is to be put to the witness and his attention drawn to the admission. From the evidence on record, it is seen that P1 was never put the admissions said to have been made by him in the proceedings being Exhibits 'P,' 'Q' and 'R' neither was he confronted with the statements made by him in the said Civil Suits and it must be noted and considered that in his evidence, P1 had *inter alia* stated as follows,

"21.I say that, being told about such registration, and on misapprehension of law and in good faith, I believed that the defendant No.1 owned the properties standing in the name of Shri Mulchand and Sons and even deposed in one civil suit No.76 of 1986, which now stands disposed of, that the defendant No.1 is the owner of the schedule 'B' property, out of such belief."

(emphasis supplied)

(viii) The argument of Learned Senior Counsel for the Defendants that P1 had admitted that by virtue of the Firm Registration in the name of D1 in 1977-79, D1 had become the absolute owner of the Schedule 'B' property, is an erroneous contention as emerges from the evidence on record wherein P1 has deposed *inter alia* as follows;

"It is true that item no.1, 4, 5, 6, 8 and half of 9 of schedule A property are recorded in the name of def. no.1 It is true that I did not make any complaint against the above properties (1, 4, 5, 6, 8 and half of 9) being recorded in the name of def. no.1. Witness again volunteers to say that properties mentioned in 1, 4, 5, 6 and half of 9 are not recorded in the name of def. no.1 but in the name of Shri Mulchand and Sons."

(emphasis supplied)

(ix) The admission of Bhaskaranand and P1, in their evidence (in Civil Suit No.76 of 1986) viz. Exhibit 'U' i.e. deposition of Bhaskaranand before the Learned Civil Judge, East, Gangtok in July, 1987 and Exhibit 'V' i.e. deposition of P1 before the Learned Civil Judge, East, Gangtok in August, 1987, also needs no

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discussion in view of the discussions that have emanated under Section 145 of the Evidence Act *supra*.

29. It was the contention of Learned Senior Counsel for the Defendants that the Learned First Appellate Court had held that the eldest member of the family would be the *Karta*, but in granting the Reliefs No.(a), (b) and (c) of the Plaint, had injuncted D1, the eldest member of the family from running the joint family and joint family business. Towards this argument, it may be pointed out that D1 had stood his ground insisting that there was already a division of the properties between him and P1, in the face of the stand taken by D1, the Learned First Appellate Court had evidently granted the Reliefs to prevent D1 from taking detrimental steps or otherwise with regard to the properties in question as the finding of the Learned First Appellate Court was that all property in Schedule 'A' to the Plaint, were joint family property.

30.(i) While addressing the point on whether Bhaskaranand had relinquished his claim to any property, the averment and deposition of D1 in this context needs to be considered. D1, in his Written Statement averred as follows;

"17.It is further denied that by virtue of partition in the year 1968, the entire properties and business of M/s Shree Mulchand and sons in the state of Sikkim were allotted absolutely in favour of the coparceners of the family of the Plaintiff No.1. In fact by the said partition all the properties in Sikkim given (sic) to Defendant No.1 and Plaintiff No.2 separately. Nothing was given to the Plaintiff No.1 who also gave up his claim and relinquished his rights, even if there was any."

but his evidence is to the contrary. In his Evidence-on-Affidavit, D1 has deposed that,

".....The original Plaintiff No.1 held the properties mentioned in item No.6, 9 and 10 of Exhibit 3. He disposed of the said properties by

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himself. Document No. 'X-4' describes one of the said three properties."

During cross-examination, he deposed as follows;

".....The statement made in paragraph 5 of exbt-DD "but in fact, the said partition was between original plaintiff no.1, the present plaintiff no.1 and me" is a true statement. It is not true the original plaintiff no.1 did not hold the properties mentioned in item no.6, 9 and 10 of exbt-3. It is true that in the W.S I have stated that "the plaintiff no.1 did not claim any interest in any property and gave up his claim and also relinquished his interest in the property so partition in 1968". Witness volunteers to say that during the time of preparation of the W.S, since exbt-3 was not in his possession and knowledge and the same was only later filed by the plaintiffs, the above statement had been given by me. Witness also states that there is no mention of the said properties in the schedule of the plaint."

The vacillating averments and evidence of D1 raises doubts about the authenticity of his case and his grip on the facts and circumstances.

(ii) Although the matter with regard to the earlier Suits vide Exhibits 'P,' 'Q' and 'R' have already been discussed, I deem it imperative to emphasize that Exhibit 'P' pertains to Civil Suit No.42 of 1980. The Suit evidently was for eviction of a tenant. Exhibit 'Q' pertains to Civil Suit No.27 of 1985. This Suit was also for eviction and other reliefs. Exhibit 'R' pertains to Civil Suit No.47 of 1986. This is another Suit for eviction and other reliefs. These Suits were filed by P1 against different persons. Exhibit 'T' pertains to Civil Suit No.76 of 1986 filed by D1 against different persons for recovery of rent. None of the said Suits were Suits for declaration of Title or Ownership. In ***Keshar Bai v. Chhunulal***⁴⁰, the Hon'ble Supreme Court held *inter alia* as follows;

"14. The High Court has expressed that the respondent was justified in asking the appellant to produce the documents. Implicit in this observation is the High Court's view that the respondent could have

⁴⁰(2014) 11 SCC 438

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in an eviction suit got the title of the appellant finally adjudicated upon. There is a fallacy in this reasoning. **In eviction proceedings the question of title to the properties in question may be incidentally gone into, but cannot be decided finally. ..."**

(emphasis supplied)

This ratio (*supra*) would suffice to establish the position that "Title" is not decided in Suits for "Eviction."

(iii) It is also worth remarking here that although D1 is of the opinion that Exhibit 3 ought to be dispensed with, being an unregistered document but seeks to garner support from Exhibit 'G' which is clearly an unregistered document as well. The rejection of Exhibit 'G' by the Learned First Appellate Court aggrieved D1, I am of the considered opinion that such rejection was not erroneous. Although PW Gitanjali Jalan the witness of P1 identified the handwriting in Exhibit 'G' as being that of her father's and D1 then proceeded to invoke the provisions of Section 67 of the Evidence Act, this provision elucidates that if a document is alleged to be signed or to have been written wholly or in part, by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting, must be proved to be in his handwriting. The mode of proving the contents of a document are detailed in Sections 61 to 66 of the Evidence Act. The production of a document purported to have been signed or written by a certain person is no evidence of authorship. In other words, as per the Rules of evidence, a person who makes an assertion must prove it. The handwriting can be proved by circumstantial evidence besides direct evidence but in the instant case, the Defendants failed to furnish any other documents to indicate that Exhibit 'G' was authored by

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Bhaskaranand and although the handwriting may be similar to that in Exhibit 1, this, by no means establishes that it is indeed the handwriting of Bhaskaranand. Section 47 of the Evidence Act also becomes imperative for the present purposes wherein it is laid down that;

"47. Opinion as to handwriting, when relevant.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him."

(iv) In *Bank of India vs. Allibhoy Mohammed & Ors* (*supra*) relied on by Learned Senior Counsel for the Defendants, the Hon'ble High Court of Bombay *inter alia* held as follows;

"36. The definition of "proved" given under Section 3 must be read along with Section 67 which requires that there must be specified evidence that the signature purporting to be that of the executant is in the handwriting of the executant. Until this is proved the Court cannot proceed to consider whether execution is proved. In other words Section 67 makes proof of execution of a document something more difficult than proof of matter other than execution of a document. Original of the public document must be proved in the manner required by the provisions of the Act....."

(v) The evidence of PW Gitanjali Jalan for the purposes of Exhibit 'G' was not fortified by any other proof as laid down in Section 47 of the Evidence Act *supra* and the ratio relied on by Learned Senior Counsel for the Defendants, extracted above.

(vi) Reference made to and reliance placed by Learned Senior Counsel for the Defendants on Documents "X4" and "X5"

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are beyond the ambit of consideration of any Court being unproved documents.

(vii) In *Karam Kapahi and Others (supra)* relied on by Learned Senior Counsel for the Defendants, the main issue under consideration was pertaining to Order XII Rule 6 of the CPC and dealt with Judgment based on admission which, in my considered opinion, is not relevant for the present purposes.

(viii) Reliance placed on *Suzuki Parasrampuriah Suitings Private Limited (supra)* by Learned Senior Counsel for the Defendants, in my considered opinion, is of no assistance to the case of D1 as the Hon'ble Supreme Court has held *inter alia* therein that a litigant can take different stands at different times but cannot take contradictory stands in the same case. In other words, a party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands in the same case.

(ix) Disagreeing at this juncture with the argument of Learned Senior Counsel for the Plaintiffs that no partition as alleged, of the joint properties of the family of Bhaskaranand had taken place, the evidence on record, I find, cogently indicates that Item Nos.4, 8, 11 and 12 of Schedule 'A' to the Plaint were found mutated in the name of D1, Item Nos.2, 3, 7 and 10 of Schedule 'A' in the name of P1 and Bhaskaranand held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3.

(x) D1 has denied in his averments that the Schedule 'B' property was allotted to any Hindu family in 1944 but has relied on Exhibit 'A' which is a document that clearly states that a site in the "New Extension Bazar, Gangtok" was allotted to "Messrs. Shree Mulchand & Sons" in the year 1944. On pain of repetition, it may

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be stated that "Shree Mulchand & Sons" of which D1 claims to be the proprietor, was registered only in 1979, Exhibit 'A' speaks for itself and thereby requires no explanation in terms of Section 92 of the Evidence Act.

31. In the end result, it concludes that;

- (i)** Vide Exhibit 1, a family settlement, which Courts are wont to accept, the properties described therein came to the family of Bhaskaranand and his two minor sons who thus formed a coparcenary in the joint Hindu family, comprising of Bhaskaranand, his wife, his minor sons, unmarried daughters and his mother;
- (ii)** Partly differing with the Learned First Appellate Court on its finding that all properties described in Schedule 'A' to the Plaintiff was joint family property, I find that there was partial division of the joint family properties which were allotted vide Exhibit 1 amongst Bhaskaranand, P1 and D1, wherein the properties at Item Nos.4, 8, 11 and 12 of Schedule 'A' to the Plaintiff were allotted to the share of D1, Item Nos.2, 3, 7 and 10 of Schedule 'A' to the Plaintiff fell in the share of P1 while Bhaskaranand held the properties mentioned in Item Nos.6, 9 and 10 of Exhibit 3. In view of this finding, the Learned First Appellate Court had misinterpreted the documents pertaining to Item Nos. 2, 3, 4, 7, 8, 10, 11 and 12 of Schedule 'A' to the Plaintiff.
- (iii)** There is no proof whatsoever of relinquishment of any property by Bhaskaranand or that the partition of properties detailed in Exhibit 1 was only between the heirs of Mulchand and P1 and D1 or only between P1 and D1, as claimed by D1.

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(iv) The properties at Item Nos.1, 5, 6 and 9 of Schedule 'A' to the Plaint are found to be joint family properties.

32.(i) The Learned First Appellate Court opined that unless there is clear partition and allotment of the concerned properties/businesses in D1's name, he cannot claim exclusive rights over Schedule B property and found the purported transfer/gift by D1 to D3 invalid.

(ii) While agreeing with this view of the Learned First Appellate Court to the extent that no proof emanates to establish that Item No.1 of Schedule 'A' to the Plaint corresponding to Schedule 'B' property, fell in the share of D1, I augment it with the finding that Item No.1 of Schedule 'A' to the Plaint corresponding to Schedule 'B' property, was not partitioned, neither was it transferred or fell in the share of D1. Consequently, D1 had no right to transfer Schedule 'B' property to D3 on the basis of a serendipitous circumstance of having a Firm registered in 1979 in his name bearing the name "Shree Mulchand & Sons." Hence, the said Deed of Gift (Exhibit 'B') executed and registered on 31.01.1989 by D1 in favour of D3, is void and inoperative in law and not binding upon the Plaintiffs and/or coparceners of the HUF or upon any member of the joint family of the Plaintiffs and the Defendants. Conversely, the argument of Learned Senior Counsel for the Plaintiffs that there was no partition of the properties received vide Exhibit 1, is belied by the evidence on record.

33. Resultantly, the Defendants are restrained from transferring, alienating, encumbering, interfering with or disposing of any of the joint properties of the parties (already discussed *supra*) mentioned in Schedule 'A' to the Plaint, including the

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specific residential house described in Schedule 'B' to the Plaint, except by D1 in terms of the Hindu Law, he being the eldest male member and thereby the *Karta* of the family, who will expectedly stay his hands from acting to the detriment of his family or coparceners.

34. The Judgment of the Learned First Appellate Court is modified to the extent above and this Appeal stands disposed of accordingly.

35. Pending applications, if any, also stand disposed of.

36. No order as to costs.

37. Records of the Courts below be remitted forthwith along with a copy each of the Judgment, for information.

(Meenakshi Madan Rai)
Judge
14.12.2020

Approved for reporting : **Yes**

m/ds