

(1990) 01 BOM CK 0011
In the Bombay High Court
Case No : First Appeal No. 158 of 1977

Rambhau @ Ramchandra Narhari Pavtekar and Others	APPELLANT
Vs	
Vinayak Keshav Pavtekar and Others	RESPONDENT

Date of Decision : 12-01-1990

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 3
Limitation Act, 1963 — Article 65

Citation : (1990) 1 BomCR 661

Hon'ble Judges : M.S. Ratnaparkhi, J

Bench : Single Bench

Advocate : M.V. Paranjape and P.M. Pradhan, for the Appellant; V.M. Kanade for respondent Nos. 1(A) to 1(D), for the Respondent

Final Decision : Dismissed

Judgement

M.S. Ratnaparkhi, J.—A decree passed by II joint Civil Judge, Senior Division Pune on 4-1-1977 in Special Civil Suit No. 45 of 1970 decreeing plaintiff's claim for partition and separate possession of one-eighth share in the property described in paragraphs 2-A to 2-E of the plaint has been challenged in this appeal

- . 2. The facts giving rise to this litigation may briefly be stated as follows
- . Plaintiff and the defendants 1 to 7 are the close relations. The genealogical tree disclosing their relationship is shown in paragraph 1 of the judgement of the trial Court. Enough to point out at this stage that Trimbakrao Pawtekar a resident of Yeola was person who had three sons Narahari, Kashinath and Keshavrao. Kashinath's branch become extinct. Narahari's branch is represented by Ramchandra defendant No. 1, Digambar-defendant No. 2, Dattatraya-defendant No. 3 and Gajanan-defendant No. 7 (son of Ranganath deceased) and Anant deceased. Keshavrao's branch is represented by Vinayak (the plaintiff), Vishnu defendant No. 4, Vaman-defendant No. 5 and Eknath-defendant No. 6. To be more specific, the plaintiff, defendant Nos. 4, 5 and 6 are the real brothers

representing Keshavrao's branch whereas Ramchandra-defendant No. 1, Digambar-defendant No. 2, Dattatraya-defendant No. 3 and Gajanan-defendant No. 7 represent the branch of Kashinath. The plaintiff came before the Court with the allegation that Narhari and Keshavrao constituted a joint Hindu family at Yeola. This family had the ancestral business of pawtekari. In addition, they had the business of goldsmith sarafi and money lending. They had two houses at Yeola and these houses are shown in paragraphs 2-C and 2-D of the plaint. They had also landed property admeasuring about 125 acres situate at village Babulgaon in the vicinity of Yeola

. 3. The plaintiff averred that the branch of Kashinath had been separated long back and that fact need not be considered now. Of the remaining two branches, defendants 1 and 4 were managing the affairs of the family business and also of the family. The whole family business continues to be joint. The family had opened a fresh shop (carrying on the same business) at Pune. The plaintiff was also working in that shop, while taking his education. After this matriculation he joined service. However, the whole salary, which he was getting from his employer, was being paid by him the defendant No. 1 who was the manager. The plaintiff was transferred to Nagar sometimes in 1953 but still the family continued to be joint and the business also continued to be joint.

4. It is the case of plaintiff that from the income of the joint family property two properties mentioned in paragraphs 2-A and 2-B of the plaint were purchased by defendants 1 and 4 in their own name. In fact, this is an acquisition of the joint family estate. Thus, all the properties mentioned in the plaint are the joint family property in which the plaintiff has one-eighth share. He demanded his share. However, it was in vain. Hence, this suit for partition and separate possession.

5. Defendants 1 to 5 have filed a joint written statement denying that there was ever a joint family as contended by the plaintiff and further denied that the so-called joint family possessed any property. On the other hand, it is contended that there was no ancestral business of the family. The family did not deal in money lending, jewellery, sarafi, etc. etc. as contended by the plaintiff. It is their contention that while the family was joint and Kashinath and Anant were in management, it incurred huge debts with the result that the whole property including the houses described in paragraphs 2-C and 2-D of the plaint, had to be mortgaged to one Gopal Gujarathi. This Mr. Gujarathi instituted a suit on the basis of that mortgage. A decree was passed and all these properties, covered in the mortgage, were auctioned on 10-4-1919. A sale certificate was also issued in his favour in Regular Darkhast No. 726 of 1923. Thus, according to them, all the properties of the family were lost to the family due to this decree. In 1936, the said Eknath Gujrathi instituted a suit against the plaintiff, defendants and two others (Kashinath and Anant) for possession of the property which was sold to him in the auction. There was an amicable settlement in this suit. By way of compromise defendants 1 and 4 paid Rs. 3500/- to the said Eknath Gujrathi who relinquished his right, title and interest in the properties mentioned in

paragraphs 2-C and 2-D of the plaint. It is their case that this was the property lost to the family and it was re-purchased by the defendants 1 and 4 with the aid of their own earnings. It is their contention that the defendant No. 1 shifted to Pune long back in 1922 or 1923 and started a shop. He then called his other brothers defendants 2, 3, 4 and 5 who also assisted him in that shop. The shop become prosperous in business. It is from the income of this business that these two properties were purchased by defendants 1 and 4 sometime in 1926. Thus, these properties are the self-acquisition of the defendants 1 and 4 and the plaintiff has absolutely no concern with that property. It is also contended by them that from the separate earnings of defendants 1 and 4 they purchased the open side (described in para 2-B of the plaint). In 1951, and then the house (described in para 2-A of the plaint) in 1959. These also were their separate acquisition. The plaintiff has absolutely no concern with it. It is further alleged by them, that they are in possession of this property, particularly the houses described in paragraphs 2-C and 2-D of the plaint, openly, adversely and continuously at the exclusion of the plaintiff for more than 12 years and hence plaintiff's title, if at all any, was extinguished and they became the owner thereof by adverse possession. On these counts, they opposed the claim of the plaintiff.

6. The learned Judge of the trial Court framed necessary issues and directed the parties to trial. True, the issues regarding misjoinder of the parties, misdescription of the property and adverse possession were framed by the trial Court. But, all these issues have been had against the defendant and Mr. Paranjape fairly conceded before me that he is not pressing these issues. The trial Court recorded a finding that the suit is not bad for mis-joinder of parties. He further recorded a finding that the suit property has been correctly described. According to him, the suit has been correctly valued for the purposes of Court fees and jurisdiction. The learned Judge further held that the suit property is the joint family property. He negatived the contention of the defendants 1 to 5 that the suit property was lost to the family and has been subsequently acquired by the defendants 1 and 4 alone on 14-12-1957. He negatived their case that it was the self-acquired property of defendants 1 and 4. He also negatived the contention of the defendants that the properties as described in paragraphs 2-A, 2-B, 2-E, and 2-F are the self acquired properties of defendants. On these findings the learned Judge came to the conclusion that the property being a joint family property, the plaintiff has one-eighth share therein. Accordingly, a decree for partition and separate possession came to be passed.

7. Feeling aggrieved with this decree, the original defendants 1 to 5 came up in appeal. During the pendency of this appeal, the appellant No. 2 Digamber died and his legal heirs are brought on record. Similarly, appellant No. 4 Vishnu also died and his legal heirs are brought on record. Eknath and Gajanan have been joined as respondents 2 and 3 but they have not put in their appearance in this Court, inspite of service

. 8. Mr. Paranjape, the learned Advocate for the appellants took me extensively

through the records including pleadings, the evidence oral as well as documentary. He strenuously urged before me that the trial Court has committed a serious error in appreciating the evidence. It was also his contention that the trial Court has made out a new case which was pleaded neither by the plaintiff nor by the defendants. With a view to appreciate the real arguments of Mr. Paranjape it will be necessary to recapitulate the factual positions which are either undisputed or well borne out from records. As far as the position prior to 1919 is concerned, there is no dispute that Narhari, Kashinath and Keshavrao constituted a joint family and this family had two houses (described in paragraphs 2-C, and 2-D of the plaint) and a lot of landed property admeasuring about 125 acres of land. It is also in the testimony of defendant No. 1 that the family was running a shop dealing in Pavtekari. Main business of the shop was to prepare jari, golden ornaments etc. etc. There is no allegation that there was ever any dislocation in this family. It will have, therefore, to be presumed that the family continued to be joint. We shall take up the point as to whether this joint family had ever any property and whether that property furnished a nucleus.

9. Till 1919 the family had a joint business. It had two houses and about 100 to 125 acres of land which was cultivated by defendant No. 1. There is no dispute that defendant No. 1 happens to be the eldest person in the family today, in paragraph 55 of his deposition the defendant No. 1 has stated without any reservation, that house Nos. 526 and 528 at Yeola (described in paragraphs 2-C and 2-D respectively of the plaint) was ancestral houses and no partition ever took place between Keshavrao and Narahari. Suffice it to say that no disruption of the family has been alleged. He further states that the landed property situated at Babulgaon was about 2 to 2½ miles away from Yeola. He has further stated that at the time of his father, the family used to have cattle and agricultural implements. There were two wells in one land and one more well in another land at Babulgaon. There were three servants who used to work in the agricultural lands. This in short is the description about the landed property and the mode of its enjoyment. Enough to point out at this stage that the land was not dead asset. It was being tilled. It was not merely a dry land but at least a part of the land admeasuring about 48 acres was under irrigation. This is the property which this family had.

10. Mr. Paranjape, however, invited my attention to some circumstances. According to him, the family was in distress financially and, therefore, the whole property had to be mortgaged with one Gujarathi. The mortgage deed is not on record. Therefore, the property which was the subject matter of that mortgage cannot be easily ascertained. According to Mr. Paranjape, a suit was instituted on the basis of this mortgage in 1919 and this property was directed to be sold, in pursuance of that decree. Accordingly a Darkhast came to be filed in 1922 and all the property was auctioned in that darkhast. Mr. Gujarathi (the mortgagee) was the auction purchaser. It is also urged that the sale certificate was executed in favour of Mr. Gujarathi.

11. What Mr. Paranjape urged before me that whatever property the family had, had been lost to the family in 1923 or so, and thereafter the family had absolutely no property. This argument has some inherent infirmity in itself because, as already pointed out, neither the mortgage deed nor the mortgage decree nor the sale certificate have been produced on record. We do not know whether whole of the property was mortgaged and sold or whether only a part of the property was mortgaged and sold. However, this need not detain us because there has been a positive evidence consisting of the admissions of the defendant No. 1 himself. Material part can be found in paragraph 59 of the deposition of the defendant No. 1. He deposes that inspite of the fact that the whole property was auctioned in 1924 (or so), the family did not physically part with either the house property or the landed property. According to him, both the houses at Yeola and the land at Babulgaon remained in possession of the family and the family continued to receive the income from these properties even after the auction. There appears to be considerable substance in what the defendant No. 1 says, because the auction-purchaser had to institute a suit (Regular Civil Suit No. 405 of 1936) for possession of the property. The certified copy of the judgment has been produced on record. Similarly, the certified copy of the decree has also been produced on record. The copy of the decree shows that inspite of the fact that the property was purchased in the auction sale and inspite of the fact that the sale certificate has been issued in his favour, the defendants continued to remain in possession of the property illegally. That is why a separate suit for possession of this property has been brought. The judgement and the decree, however, are silent on some material points. It does not show as to what was the property covered by the suit. The decree however gives the description of only two houses and no landed property which means that the landed property was not the subject matter of the suit. The fact, therefore, remains that though the property of this family was sold in auction long back in 1924, the family did not lose this property physically. They continued to remain in possession of the property and they continued to enjoy the usufruct of this property. There was no hindrance in enjoyment of this property. There is no satisfactory evidence on record to show as to what happened to the landed property. It is true that the landed property has not been the subject matter of this suit. No partition is claimed. But the fact remains that the family continued to hold the landed property inspite of the sale. The landed property was not the subject matter of the litigation in Regular Civil Suit No. 405 of 1936. Not only that but we have some material on record which shows that the landed property continued with the family at least till 1949. We have on record the letter Exhibit 109 addressed by Prabhakar (the son of defendant No. 1) to Eknath, defendant No. 6 on 27-10-1949. It must be pointed out at this stage that all the members of the family, except Eknath, had left Yeola to seek their fortune Eknath was the only person who continued to remain at Yeola. He was the person who was looking after the landed property and the house property situate thereat. In this letter, the son of defendant No. 1 has written to Eknath that he (Prabhakar) is coming to Yeola on 3-10-1949 in connection with the work of agriculture. The defendant

No. 1 while in the witness box was confronted with this letter and he admitted this letter. Not only that but he admits that he has instructed his son to look after Yeola property. To remove any doubt, he specifically states that Prabhakar was directed to look after the property at Yeola which was the joint family property belonging to the family. This fact specifically shows that the family continued to have the landed property till 1949. There is no evidence to show whether this landed property continued with the family thereafter or whether it was disposed of.

12. The position which prevails is that though on papers the property belonging to the family was auctioned, in fact the property continued with the family and a family had a seisin over the property. This was till 1949 at least. It cannot be said with any decree of certainty, that the family lost this property subsequently thereafter or any time prior to 1959 when the fresh acquisition was made.

13. This evidence as discussed above negatives the argument of Mr. Paranjape that there was no nucleus available to the property. It is true that there is no presumption that joint family must necessarily possess a joint family property. That fact has to be established independently and objectively. In the present case, we have a positive evidence before us that there was not only a joint family consisting of the plaintiff and the defendants, but in addition that joint family positively owned considerable property consisting of two houses and about 100 to 125 acres of land of which 48 acres was the irrigated land. The landed property continued to be with the family not only till 1937 but at least till 1949. There is no other evidence to show that the family, lost this landed property thereafter. The only fact that is brought to our notice is that this landed property has not been claimed in this suit.

14. The property claimed in this suit, is four houses, running business and the movable properties. They are described in paragraphs 2-A, 2-B, 2-C, 2-D, 2-E, and 2-F of the plaint. Mr. Paranjape, the learned Advocate for the appellants, has strenuously urged before me that he defendants 1 to 4 claim a derivative title to all this property. It is true that the defendants 1 to 5 were not claiming this property as their ancestral property when this suit was instituted. What Mr. Paranjape urged before me (and what has been averred in the plaint) is that the whole property was lost to the family long back in 1923 and thereafter two houses at Yeola were acquired by defendants 1 and 4 independently in pursuance of a decree passed in Regular Civil Suit No. 405 of 1936. Then, according to the defendants 1 to 5, an open plot admeasuring about 965 sq. ft. was purchases by defendants 1 to 5 by a sale deed dated 12-8-1951 (Exhibit 195). Thereafter a house situate at City Survey No. 173 in Kasba Peth, Pune was purchased by defendants 1 and 4 separately by a registered sale deed dated 16-4-1959. These immovable properties have been described in paragraphs 2-A, 2-B, 2-C, and 2-D of the plaint and their description is not disputed.

15. According to Mr. Paranjape, the defendants 1 to 5 has alleged derivative title to these properties. At a particular time, there was no joint family property with

the family and all these properties came to be purchased from the separate earnings of defendants 1 and 4. This in short, was his argument. He also invited my attention to the evidence of defendants 1 and 5. Defendant 1 states that after the mortgagee obtained the decree against the plaintiff and the defendants, the defendant had left for pune and started a small shop there. Thereafter he called his brothers, defendants 2, 3, 4 and 5, who also started working in the same shop. Initially the shop was taken on rent and all these four brothers were residing in a rented premises. It is also in his testimony that the plaintiff who was a small boy by that time also came along with his mother and stayed with him. The plaintiff was taking his education and he passed his matriculation at pune. We have it in the evidence of the plaintiff that while attending his school, he also used to work in the shop and help his uncles and brothers in the day to day working of the shop. This is the unimpeached evidence that is brought before the Court. We have also the evidence of the plaintiff who deposes on oath that he joined a service at Pune in 1942. Whatever salary he was getting he used to pay to defendant No. 1 and that salary used to be credited in the accounts of the shop. His salary was in between Rs. 75/- and Rs. 350/- per month. The fact however remains that the plaintiff took up the service and whatever salary he got, he paid to the defendant No. 1 and that salary used to be credited in the accounts of the shop. I would have hesitated in accepting this evidence had there been no corroboration. We have on record the admission of defendant No. 5 who states that whatever salary the plaintiff was getting used to be paid to defendant No. 1 and defendant No. 1 used to credit that salary into the accounts of the shop. It is interesting to note at this stage that defendant No. 5 has a common and joint defence with defendant No. 1. His admission, therefore, cannot be ignored by the defendant No. 1. The position which prevails is that the plaintiff joined a service in 1942. He was at pune till 1953 and whatever salary he used to get he used to pay to defendant No. 1 and defendant No. 1 used to credit it in the accounts of the shop. This shows that the income of the members of this family used to be pooled and all the expenses were made through this pool, Mr. Paranjape strenuously urged before me that this is not a case of acquisition from joint funds. It is not also a case, according to him, of purchase of property from joint contributions. It cannot be so. We may now consider that point. Enough to say at this stage that all the income of the family used to be pooled together in one hotch potch and the expenditure used to be made from this common pool. Everybody contributed to this common pool. The plaintiff was not exception to it.

16. This evidence thus shows that the family was not without any property. On the other hand it had a substantial property consisting of about 125 acres of land of which about 48 acres was irrigated. There was a separate establishment for looking after the agriculture.

17. Mr. Paranjape, however, urged before me that it is not enough that there should be a nucleus, but in addition what the plaintiff has to prove in such case is that the nucleus had enough potentiality to purchase the property. Mr. Paranjape is correct as far as this position is concerned. It is true that there is no evidence

as to what was the income that this landed property fetched. As far as the house property is concerned the evidence shows that the house was let out at a monthly rent of Rs. 6/- and it could not provide for purchase of new property. The situation which prevails is that the family has a substantive landed property. It was not unproductive. On the other hand, bulk of the landed property was irrigated. There was a separate establishment. We can just imagine, reasonably, whether this nucleus has any potential. In fact, having admitted that the family continue to enjoy the usufruct of this property throughout, the burden was on the defendants to prove as to what was the income from this property. To repeat it once again, defendant No. 1 was the eldest member of the family and he was looking after the affairs. He could have come before the Court and said that this property had absolutely no potential. But he does not say so. On the other hand, he keeps himself silent when the question of income comes. In fact, lot of cross-examination has been directed against the account books. At one stage the defendant No. 1 had an audacity to State before the court that there were no account books kept by him. But the position changed from time to time and stage. Ultimately, he had to admit that he used to keep Kachha account books. The defendants No. 5 on the other hand has been fair enough to state before the Court that :

"Accounts books were kept regularly"

These account books could have shown the extent of income which the defendants No. 1 received from this plaintiff. However, the omission to produce this evidence before the Court has deprived the Court of the opportunity of assessing that particular evidence. The failure squarely lies on the defendant No. 1 himself and none else. On this background, it can be reasonably and legitimately said that the family had a nucleus which had a tremendous potentiality. Thus, this is not a case where the family has no nucleus or the nucleus was not potent enough. Both these points are established in the present case.

18. We have now to proceed with the acquisition of these properties. To repeat it once again, it is the case of the defendants that both the houses at Yeola were lost by the family in 1923 or so and in the litigation initiated by the auction purchaser these properties were acquired by the family. Mr. Paranjape invited my attention to the decree passed in the suit. His particular emphasise was that all the present plaintiff and the present defendants were the parties to this suit and there was a compromise in which the litigating parties agreed between themselves; that Rs. 3500/- have been paid by the present defendants 1 and 4 and they are the exclusive owners of the property and other defendants have absolutely no concerned with that property. Emphasis was on these terms of the decree. It is true that these terms are incorporated in the decree. It is also true that it was a compromise decree. We cannot lose sight of the litigation which the defendants (including the present plaintiff) were required to face. It was a suit for possession by the auction purchaser. His contention was that he has acquired

a title in pursuance of the auction. His further contention was that inspite of the acquisition of the title the defendants continued to remain in possession illegally and deprived him of the fruits of his purchase. It is on this count that he wanted the possession of the suit property. Defendants were called upon to defend the suit. Ultimately what happened in that suit was that the defendants paid Rs. 3500/- to the auction purchaser plaintiff and the auction purchaser relinquished his right, title and interest in the property. The position that prevails is that by accepting Rs. 3500/- the plaintiff in that suit got his suit settled because of the relinquishment of his right. We have now to examine whether the averments in that decree can effect prejudicially the right of the parties. It was not the litigation between the present plaintiff and the present inter se. They were added as co-defendants. They had to face the suit instituted by a stranger. It was an arrangement only for the purposes of that suit and they succeeded in getting that suit dismissed by paying Rs. 3500/- to the auction purchaser. Thus, the contents of the decree cannot create title nor can it extinguish the title already exists. Admittedly, this property prior to 1919 was the joint family property. Though it was sold in auction, it was the joint family who continued in possession of the property. It was this joint family who continued to enjoy the usufruct of the property. Thus, the mode of enjoyment did not suffer a change during this intervening period. What Mr. Paranjape urged before me is that in pursuance to the compromise decree this is a fresh acquisition in 1936 and that acquisition is only in favour of defendants 1 and 4 with a rider that others have absolutely no right, title and interest in that property. For this purpose Mr. Paranjape also invited my attention to the fact that it is defendants 1 and 4 who paid the amount of Rs. 3500/- to the auction purchaser. It is true that the defendants does states in the witness box that it is he who paid the amount. We have now to scrutinise and scan the evidence particularly on the background that has been established. To repeat it once again, the family was joint. The family had a joint property. It had a sufficient nucleus. The nucleus has tremendous potentiality to purchase the property. In these circumstances when the nucleus is established, the burden completely shifts on the defendants to establish that this property has been purchased from their self acquisition. There is no such clinching evidence brought on record. As a matter of fact, tremendous evidence has been led to show that defendant I shifted to Pune and started a shop there but the shop at Yeola continued even thereafter. There is correspondence which has been discussed by the Trial Court which shows that business from Pune shop used to be sent to Yeola shop and vice versa. There is thus no demarcating line separating these two shops. And this has also to be scrutinised on the background that all the parties were joint in mess and estate. Thus, unless there is positive evidence to show that defendants 1 and 4 had separate earnings enough to purchase this property, the presumption will always help the plaintiff and none else. The liability to rebut this presumption is exclusively on the defendants but it cannot be said that the defendants had discharged this burden. Thus, as far as the acquisition of the two Yeola houses is concerned, there is no evidence to show that the defendants 1 and 4 had their own earnings and it is

from their personal earnings that they have purchased these properties.

19. This now brings us to another acquisition of an open plot at Haveli. This plot has been purchased in the name of defendants No. 1 by the sale deed dated 21-8-1951 (Exhibits 195). The property purchased under this sale deed is 965 sq. ft and it is purchased for Rs. 2500/-. The sale deed only shows that the vendor was in financial difficulties and, therefore, he sold this property to defendant No. 1 for Rs. 2500/-. It has been the contention of defendant No. 1 that the consideration flew from him and him alone. No account books have been produced. No corroborative evidence has been led. On the other hand, inspite of the fear of repetition, it may be stated that the plaintiff entered into the service in 1943 and whatever earnings he had, he used to pay to defendants No. 1 who in turn, used to credit it in the accounts of the shop. This is a position admitted even by defendants No. 5 who is a co-defendant having a common defence. This show that the earning of the members of the family pooled in a common pool and they expenditure was made from the common pool. It is not a case where out of Rs. 2500/- Rs. 1000/- was paid by one Rs. 1000/- was paid by one and Rs. 500/- were paid by third person. The case put forth before us is that all these 2500/- rupees flew from a common fund of the joint family. The share of each member becomes redundant. It is enough if the property is purchased from the common fund. The existence of the common fund is admitted by defendant No. 5 in his cross-examination. Thus, it cannot be said with any degree of certainly that this plot has been purchased by defendant No. 1 from his own separate earnings.

20. This now brings me to the last lap of this litigation. The house property consisting of a double storey building situate in Kasba Peth, has been acquired by defendants 1 and 4 by a sale deed dated 16-4-1949 for Rs. 24,000/-. This sale deed is at Exhibit 194. The sale deed shows that defendant No. 1 Ramchandra and defendant No. 4 Vishnu are the vendees. One Vithhal Hari Gunjal and his wife Santabai are the vendors. It is the contention of the defendants 1 to 5 that the consideration for this sale deed flew from defendants 1 and 4 alone and from none else. It is also in the evidence of defendant No. 1 that he could arrange for Rs. 14,000/- but he had no hard cash of remaining Rs. 10,000/-. Therefore, he had to mortgage the very property and arrange for an amount of Rs. 8000/-. The mortgage deed has been filed at Exhibit 196. This mortgage deed has been executed by all the five defendants 1 to 5). Interestingly enough, Yeshwant and Chandrakant (sons of Vishnu defendant No. 4) are the consenting parties to this mortgage. We do not know why. When Vishnu has joined as a purchaser, it was not necessary for these two persons particularly when the defendants 1 to 5 have taken a plea that this is their self-acquisition and not their joint family property. The very fact that Yeshwant and Chandrakant have been joined as consenting parties to the mortgage deed shows positively that defendants 1 and 4 were not the sole owners or title holders of the property. That is why Digamber, Dattatraya and Waman had to be joined as mortgages and Yeshwant and Chandrakant had to be joined as consenting parties. This act on the part of the

defendant No. 1 contradicts his own case as it comes out from the witness box. If it was a separate acquisition, there was no need to join either of these three brothers or two sons of defendant No. 4. This circumstance has to be weighed on this background. Then, reliance was placed on some of the averments made in this document itself. One of the averments made in this documents is Eknath and Vinayak (two brothers) have been separated from the family since long and they have no concern with the family nor had they any concern with the family property. Another averment is that whatever property the family had was already lost to the family and now the family has no property. Mr. Paranjape argued before me with a good deal of vehemence that these averments in the mortgage deed should remove any doubt regarding the acquisition of the property. I feel myself unable to agree with this argument. Firstly the averments are merely the statements made by the defendants 1 to 4. Those statements cannot in law annul the right, title and interest of the plaintiff if at all he has any. Nor does it amount to the relinquishment of the right, title and interest by the plaintiff. Plaintiff has not been made a party to this document. In fact, the defendants 1 and 4 could have joined even the plaintiff as a consenting party if this statement were to be made binding on him. Unilateral declaration by defendants 1 and 4 regarding the nature of the family would not annul the rights of a third party if he has any in the property. In my view, this document does not in any way add to the strength of the defendants 1 to 5 that this was a self-acquisition.

21. A couple of circumstances which have been established on record would be necessary to be mentioned. This sale deed was executed on 16-4-1959. On 22-2-1959 the defendants No. 1 addressed a letter to the present plaintiff. It can be found at Exh. 118 on record. To repeat it once again this letter has been addressed by defendant No. 1 to the plaintiff about two months prior to the execution of the sale deed. At that time the parties had decided to purchase the property and they were arranging for the amount. The defendant No. 1 had specifically mentioned in the letter that defendant No. 1 was trying to collect the amount by selling ornaments of his wife. The defendant No. 1 informed the plaintiffs that inspite of this, he is falling short of Rs. 10,000/-. In this letter the defendant No. 1 has asked the plaintiff to bring all the golden ornaments so that money could be collected from the sale thereof. In addition, he has also asked the plaintiff to bring Rs. 1000/- in cash. This is a letter written by defendant No. 1 to the plaintiff about two months prior to the sale deed wherein he has asked the plaintiff to bring golden ornaments and also cash so that the property could be purchased. It is in the evidence of the plaintiff that he accordingly gave his ornaments and cash to the defendant No. 1. There is another letter addressed by the defendant No. 1 to the plaintiff on 17-4-1959 i.e. immediately after the sale. It is at Exhibit 122. The defendant No. 1 informs the plaintiff that Rs. 8000/- are yet to be paid and interest thereon is also to be paid within two months. He asked the plaintiff to send him some amount every month. We have thus these two documents. The authorship of these two documents has been admitted by defendant No. 1. If the defendant were really the sole purchaser of the property,

it was not necessary for him to ask the plaintiff to bring golden ornaments. If defendants 1 and 4 were the sole purchasers of this property it was not necessary for him to ask the plaintiff that because the amount has to be paid within two months he should send the amount within one month. At the stage of arguments, Mr. Paranjape tried to explain these two letters. According to him, this was a sort of loan that was asked for from the plaintiff. I find myself unable to accept this explanation particularly when the defendant No. 1 did not dare to give such explanation

. 22. The position which prevails is very simple. There is a joint family consisting of the plaintiff and the defendants. This joint family had property which provided a nucleus. The nucleus itself has tremendous potentiality. At least the defendants have not brought any evidence to establish the income from this nucleus. The plaintiff who was in service and was sharing a common residence and common mess with the defendant No. 1 was handing over all his salary to defendant No. 1 who in turn used to keep it in the accounts of the shop. This discloses that there was a common pool of the family of which the plaintiff was a constituent. No attempt has been made by the defendant to establish as to what was their contribution to the common pool. Their account books have not at all been produced though evidence has been led that they did not maintain the accounts. It is on the background of all these circumstances that we have to scrutinise the evidence. The scrutiny of the evidence, if made in the correct perspective, would show that the story that is now put by the defendants that this is their self acquisition falls to pieces as it has no basis in fact as well as in law. The fact remains that the family remained a joint family; property became a joint family property that further acquisitions came to be made from the funds that the joint family had. There is absolutely no evidence worth the name to show that the properties came to be possessed by separate earnings.

23. There are one or two more circumstance which need to be mentioned at this stage. Much is made by the defendants of the acquisition of the Yeola properties in 1936. Admittedly these properties were the joint family properties before they were auctioned. Admittedly, it is the family who continued to enjoy the usufruct of this property even after the auction sale. We have in the testimony of the defendant No. 1 himself who says that they had decided to institute a suit for recovery of this property. It is pertinent to note the state of mind of the defendant then. Defendant No. 1 say that these properties were to be required for the family and not for the individual. This is the intention which the defendant No. 1 had in 1936. However, examining the pros and cons and seeking advise of the advocates, they gave up the idea of instituting the suit. The fact however, remains that even in 193 the intention of the defendant No. 1 was to acquire this property not for himself personally but for the whole family

. 24. Even subsequent conduct after 1959 needs a special scrutiny. To repeat it once again defendant No. 5, a co-defendant added along with defendants 1 to 4, has a common defence with defendants 1, 2, 3 and 4. He is interested in

dislodging the plaintiff. His written statement is to that effect. Not only that but the opening sentence of his deposition leaves no doubt that he has absolutely no interest in the plaintiffs. However, when he was cross examined, one letter Exhibit 123 was brought to his notice. This letter was addressed by defendant No. 5 to the plaintiff on 28-8-1964. It is in vernacular. He has given all the details of the happenings in the family. He has written in the letter that defendant No. 1 has become self entered not helping the other constituents of the family. In the last paragraph, he states that he desires Vinayak (present plaintiff) should also get his share in the Kasaba Peth house. Mr. Paranjape urged before me that it is only his sacred wish or desire which is not tantamount to admission of the plaintiff's share in the property. It may be so, but it shows definitely the conduct of the parties.

25. There is another circumstance which throws considerable light on the conduct of the parties concerned vis-a-vis the suit. It is the case of the defendants 1 to 5 that the property in dispute is exclusively theirs. According to them, defendants 1 and 4 are the exclusive owners of these properties. The acquisition of these properties is not a recent one. Two properties at Yeola were acquired long back in 1936. One plot at Haveli was acquired sometime in 1951. The house in kasba Peth, Pune was acquired sometime in 1959. Twenty years had already elapsed when the suit was filed. We have now to see the conduct of the parties vis-a-vis these properties. Defendants 1 to 5 were all the while at Pune. The plaintiff was at Nagar, defendant No. 6 did not ask the defendant No. 6 to furnish any accounts. This conduct is inconsistent with the concept of self-acquired property. Similarly, it is an admitted position that the plaintiff collected the rent of Yeola property right from 1960 onwards. But he was never asked to submit the accounts about the receipts and expenditure. This also appears inconsistent with the character of self-acquisition or separate acquisition or separate acquisition. Admittedly they belonged to the same family. The collection of rent and its appropriation without any objection is more consistent with the concept of joint family property rather than the self-acquired property

. 26. Another circumstance that needs to be pointed out here is that though it has been the specific case of defendants 1 and 4 that the property in suit was their self-acquisition, the correspondence which has been produced on record and has been exclusively relied upon by the parties concerned, contradicts the case of self acquisition. I have already referred to Exhibit 123 which is a letter written by defendant No. 6 to the plaintiff on 28-8-1984. Mr. Paranjape at one stage urged that this letter is irrelevant in as much as the acquisition of the last property was in 1969. According to him, this letter has a relevance not to the acquisition of the property but it has relevance regarding the conduct of the defendants 1 to 5 themselves. I have already referred to a circumstance where the defendant No. 1 expresses his intention to re-acquire the lost property not for himself but for the whole family. The idea was that whatever was acquired was not for individual but for the family as a whole. Exhibit 123 speaks about the mind of the persons who have acquired the property. Defendant No. 5 in specific

terms says that he desires that the plaintiff should also have a share in the property. Then we have on record a series of letters written to the plaintiffs and they are at Exhibits 126, 127, 128 and 130. These letters are written either by the son of defendant No. 1 or the brothers of the defendant No. 1. They speak about the partition. Now, Exhibit 129 is written by defendant No. 1 himself and in this letter also reference has been made to the disputes regarding partition. Now, this reference to partition appears in consistent with the concept of self-acquired property. If properties were really the properties of defendants 1 and 4 exclusively, there was no question of any partition. This conduct assumes relevance in this particular case because this property is being treated even by the acquirers not as separate property of theirs but as a joint property.

27. A vain attempt was made to explain that the so called partition referred to in these letters had nothing to do with the plaintiffs. It was only the defendants 1 to 5 who are concerned with this partition and the plaintiff had absolutely no concern. If we go through the genealogical tree that has been well established by cogent evidence, the relationship between the parties will be clear. Defendants 4, 5 and 6 are the real brothers of the plaintiffs. They are all, the sons of Keshavrao. Defendants 1, 2, 3 and 7 are the sons of Narahari. Defendant No. 1 is representing the branch of Narhari whereas the plaintiff and defendants 4, 5 and 6 are representing the branch of Keshavrao. The argument could have been understood if the partition referred to in the above mentioned letters pertain to defendants 1, 2, 3 and 7. But it is difficult to accept this explanation when defendants 4 and 5 are accommodated in the partition whereas their real brothers plaintiff and defendant i.e. Eknath are sought to be excluded exclusively. It may also be pointed out at this stage that at the stage of argument an attempt was made to show that the defendants 1 to 5 had a partnership and these acquisitions are of all the partners including defendants 1, 2, 3, 4 and 5. This cannot be accepted at this stage because it has not been made out in the plaint and the written statement.

28. All these circumstances detailed above show that the property which has been subsequently acquired (including the property mentioned in paragraphs 2-A and 2-B of the plaint) was intended as a joint family property. Mr. paranjape did urge, before me and quite vehemently, that there is no case made out in the plaint at all that this property has been blended into a common stock. It is true that no such case has been made out. The case made out in the plaint is that the property was purchased from the joint pool pertaining to the family. The contention was also restricted to the fact that it was the self-acquisition of defendants 1 and 4. There is no question of the treatment of the property in joint stock. I am not taking this circumstance to establish what has not been pleaded. I am resorting to this circumstance only to show that the conduct of the parties is inconsistent with their case pleaded in the written statement. If at all they were self-acquisition of defendants 1 and 4 they would have never conducted themselves in the way that they have done by writing the letters which I have referred to above. The trial Court also has considered the circumstances in the

same way. But it was commended upon by Mr. Paranjape. He urged before me that the trial Court has made out altogether a different case which has been pleaded neither by the plaintiff nor by the defendants. In fact, it is not so no separate case has been made out by the Court. The Court has considered the evidence that was led before it and it came to the conclusion that the acquisitions were from the common funds belonging to the joint family. It is only for showing the subsequent conduct of the parties concerned that the letters have been relied upon.

29. The sum and substance of what has been said so far is that the plaintiff as well as the defendants are the constituents of the joint family which had a considerable estate consisting of house property, agricultural property and other properties. Though the family was indebted in 1919 and though some property was mortgaged, and though these properties were auctioned in execution of the mortgage decree, the family continued to enjoy that property and they did not allow the auction-purchaser to enjoy that property. They continued to enjoy that property inspite the decree having been passed. The enjoyment continued for years even after 1923. The property which the family had (and particularly the landed property) had potentialities enough to make available the funds for acquisition of the new properties. There is thus a good cogent and reliable evidence to show that this family had a nucleus and this nucleus was sufficient enough to permit the new acquisitions. It is on this background that the new acquisition in 1936, 1951 and 1959 have been made. Though the burden was exclusively on the defendants to show that they were their self-acquisitions, no believable evidence has been led. Though other corroborative evidence was available it was not brought before the Court. Accounts books though maintained have not seen light of the day. The presumption would help the plaintiff in inferring that the properties are the joint family properties. Not only that but the subsequent conduct of the defendants would show that they had never the desire to treat these properties as their self-acquisition but they desired to keep them joint in as much as the dispute regarding the partition started and the assistance of the plaintiff was sought by all concerned to settle the matter amicably. All these circumstances taken together do not permit the Court to record a finding that they were the self-acquisitions. The finding as recorded by the trial Court is, therefore, upheld.

30. The view that I have taken of the matter does not permit this Court also to hold that the shop at Pune and the other immovable properties were the self-acquisitions. That property also must necessarily be held as joint family property. The trial Court has considered all the evidence in a proper perspective and he has reached to the correct conclusion that the properties are the joint family properties. In view of this finding the case of adverse possession pleaded by the defendants 1 to 5 cannot succeed. If it is a joint family property and if not ouster is pleaded then there can be no scope for adverse-possession because the very concept of the family is that the person in possession of the property holds the representative character. He holds the property and administers the property on

behalf of the other family members. There is, thus, no scope for adverse possession. There is also no scope for any limitation.

31. Thus, the decree passed by the trial Court is quite correct and it needs no interference at the hands of this Court. In the result, the appeal is dismissed with costs.