

**(2019) 06 BOM CK 0045**

**In the Bombay High Court**

**Case No :** Notice Of Motion (L) No. 2482 Of 2018, Suit No. 1861 Of 1984

Sardar Sambhaji Angre

APPELLANT

Vs

H.H. Jyitiraditya M. Scindia And Ors

RESPONDENT

**Date of Decision :** 18-06-2019

**Acts Referred:**

Hindu Succession Act, 1956 — Section 6, 8  
Income Tax Act, 1961 — Section 256  
Estate Duty Act, 1953 — Section 59  
Code Of Civil Procedure, 1908 — Section 151, 152, 153, Order 6 Rule 16, Order 6 Rule 16(a), Order 6 Rule 16(b), Order 6 Rule 16(c), Order 19 Rule 3, Order 20 Rule 18  
Bombay High Court Original Side Rules, 1980 — Rule 204  
Constitution Of India, 1950 — Article 226

**Citation :** (2019) 06 BOM CK 0045

**Hon'ble Judges :** R.D. Dhanuka, J

**Bench :** Single Bench

**Advocate :** D.J. Khambata, Zal Andhyarujina, Kunal Dwarkadas, Fareha Khan, Rushabh Sheth, Neha Shah, Nidhi Boriya, Bodhanwalla, Sheetal Shah, Ajay Kapur, Farhan Dubash, Praveer Shetty, Ruby Wargadh, Niranjan

**Final Decision :** Dismissed

## Judgement

1. By this notice of motion filed by the applicants (original defendant nos. 1(a) and 2) under Order VI Rule 16 of the Code of Civil Procedure, 1908, the applicants pray that the written statement filed by the defendant nos. 3 to 5 be struck off. Some of the relevant facts for the purpose of deciding this notice of motion are as under :-

2. On 17th July, 1961, Maharaja Jivajirao Scindia, the former ruler of the erstwhile princely State of Gwalior died intestate, leaving behind diverse immovable and moveable properties and leaving behind him (1) Smt. Vijayaraje Jivajirao Scindia (widow), the original plaintiff, (2) Shri Madhavrao Jivajirao Scindia (son) original defendant no.1, (3) Smt. Madhavi Raje Madhavrao Scindia (daughter-in-law) defendant no.2, (4) Smt. Usharaje Rana Pashupati Singh

(daughter) defendant no.3, (5) Smt.Vasundhara Raje Hemant Singh (daughter) defendant no.4, (6) Smt.Yashodharaje Bhansali (daughter), defendant no.5, (7) Smt.Padma Raje who died leaving behind her two daughters (i) Ms.Kanikadevi Deo Burman and (ii) Ms.Pratimadevi Rana Burman (defendant nos.6 and 7).

3. On 9th August, 1984, the original plaintiff in her capacity as the widow of the Maharaja Jivajirao Scindia (the said deceased) filed a suit bearing no. 1861 of 1984 in this court inter-alia praying for partition and division of the moveable estate of the said deceased on the ground that the said property was HUF property. It was the case of the plaintiff that the said deceased was the Karta and Manager of the said joint and undivided Hindu Family known as the Sir H.H.Jivajirao (HUF). In the said suit the original plaintiff claimed that she was entitled to 50% undivided share in the properties of the said deceased and the balance 50% undivided share allegedly belonged to the original defendant no.1 i.e. Shri Madhavrao Jivajirao Scindia. The original plaintiff also filed a notice of motion bearing no.1742 of 1985 in the said suit on 13th August,1984 praying for various interim reliefs in respect of the said moveable estate of the said deceased. In the affidavit in support of the said notice of motion,the original plaintiff had averred that the estate of the said deceased divided in equal share between the original plaintiff and the original defendant no.1.

4. On 23rd September,1985, the original plaintiff also filed a Special Civil Suit No.705 of 1985 in the Court of the Civil Judge, Senior division, Pune seeking declaration, partition and possession of her alleged 50% share in the immoveable properties of the deceased on the ground that those properties were HUF properties. The defendant nos. 3 to 7 in this suit were joined as defendant nos. 2 to 6 in the said Pune suit by the original plaintiff. The original plaintiff in the said suit prayed for a declaration that the original plaintiff and the original defendant no.1 herein were entitled to 50% undivided share in the immoveable properties of the said deceased.

5. It is the case of the defendant no.1(a) and 2 that the original defendant no.4 in this suit on behalf of herself as well as on behalf of the original defendant no.3 and 5 to 7 filed an affidavit in reply to the notice of motion filed by the original plaintiff on 15th October,1985 stating that she had read a copy of the plaint, notice of motion and a copy of the affidavit in support of the said notice of motion filed by the original plaintiff and also copy of the affidavit in rejoinder thereto. The defendant nos. 3, 5 to 7 crave leave to repeat and reiterate all the averments submissions and statements made and contentions raised by the original plaintiff therein as if they were incorporated in the said affidavit verbatim and form part of her present affidavit. In the said affidavit, it was also prayed by those defendants that the notice of motion be made absolute with costs in the circumstances stated in the said affidavit filed by them.

6. It is the case of the defendant no.1(a) and 2 that the said affidavit was not only duly affirmed but was subsequently filed and taken on record by this court on 12th December,1985. On 12th December,1985, the notice of motion filed by

the original plaintiff came to be disposed of by consent order. The defendant nos. 3 to 7 were all represented by a common advocate.

7. It was the case of the defendant no.1 in the written statement that the original plaintiff had from time to time had appropriated to herself and had given defendant nos. 2 to 5 and Smt.Padma Raje and after her death to the defendant nos. 6 and 7 various moveables, cash, jewellery etc. from the estate of the said deceased. It was also the case of the original defendant no.1 that since there was no HUF, the question of rest of the alleged HUF properties continuing to belong to the plaintiff and the defendant no.1 as member of the said alleged joint family did not and could not arise.

8. On 20th October,1986, the original defendant no.1 herein and also the original defendant no.1 in Pune suit filed written statement. On 21st August,1987, the original defendant nos. 2 to 6 in the Pune suit filed a pursis before the learned trial judge stating that 'the Say of the defendant nos. 2 to 6 is as per the plaint of the plaintiff. Hence this pursis'.

9. On 20th February, 1989, this court passed an order in Notice of Motion 3453 of 1988 recording the statement made by the counsel appearing for the defendants that there was also HUF properties at Nainital. This court recorded that the defendants were at liberty to take out such proceedings as permissible in law or if necessary, may reserve such liberty to take out proceedings as and when they deem necessary.

10. On 29th November,1995, the evidence of the original plaintiff in Pune suit was completed. The original plaintiff in her examination in chief had deposed that she had undivided ½ share in the suit property and that the defendant nos. 3 to 7 had already received their respective shares and had no complaint in respect of their share in the suit property. The defendant nos. 3 to 7 did not cross examine the plaintiff in the said Pune suit. It is the case of the defendant nos. 3, 5, 6 and 7 that in the Pune suit, the original plaintiff in her examination in chief conducted on 3rd October,1991 admitted that the original plaintiff and her son i.e. the original defendant no.1 did not make any transfer of immoveable property in favour of the daughter of the deceased.

11. In the month of July 1997, the original defendant no.1 filed written statement in the suit filed by the original plaintiff. On 25th January,2001 the original plaintiff expired. On 17th October,2001 the original defendant no.1 expired in a plane crash in Uttar Pradesh leaving behind the original defendant no.1(a), Shri Jyotiraditya Madhavrao Scindia and Smt.Chitrangada Raje i.e. defendant no.2 and defendant no.1(b) respectively as his legal heirs.

12. On 12th December, 2010, the original defendant nos. 3 to 5 filed a suit bearing no.27A of 2010 before learned District Judge, Gwalior against some of the defendants herein inter alia praying for partition of immoveable and moveable properties left behind by the said deceased for various declarations and for other reliefs. It was prayed for a declaration by the defendant nos. 3 to 5

in the said Gwalior suit that the estate of the said deceased was his personal property/self acquired property.

13. On 5th January,2012, on application of the defendant nos. 3 to 5 they were transposed as plaintiffs in place of the original plaintiff being the legal heirs of the original plaintiff. On 22nd September,2016, it is the case of the defendant nos. 1(a) and (2) that in the said application for amendment, the defendant nos. 3 to 7 introduced a new case that under section 8 of the Hindu Succession Act 1986, all Class I heirs are entitled to a share in the estate of the said deceased.

14. By an order dated 25th July, 2017, the learned trial judge rejected the said application filed by the defendant nos. 3 to 5 praying for amendment of the plaint on various grounds. The writ petition filed by the defendant nos. 3 to 5 challenging the said order dated 25th July, 2017 passed by the learned trial judge rejecting the application for amendment of the Pune plaint is pending before this court.

15. By an order dated 20th January, 2017, this court granted leave to the defendant nos. 3 to 7 to file the written statement in this suit on or before 17th February, 2017. In the month of February 2017, the defendant nos. 3 to 5 filed a common written statement which was verified by the defendant nos. 3, 4, 5 each. On 31st October,2018, the original defendant nos. 3 to 5 filed their affidavit in reply to this notice of motion opposing the interim reliefs prayed by the applicant i.e. the defendant nos.1(a) and 2.

16. Mr.Khambata, learned senior counsel appearing for the applicant invited my attention to various exhibits to the plaint filed by the original plaintiff, affidavit dated 15th October,1985 filed by the defendant nos. 3 to 7 in the notice of motion filed by the original plaintiff, the pleadings filed before the Pune Court by the parties, the plaint filed by the defendant nos. 3 to 5 before the learned District Court Gwalior, affidavit in reply filed by the defendant nos. 3 to 7 in this notice of motion and also various orders passed by the Pune court and this court from time to time.

17. Learned senior counsel invited my attention to the averments made in the suit and more particularly paragraphs 5 and 6 and the prayers in the suit and would submit that in the plaint the case of the original plaintiff was that during the period between 1961 and 1971, the defendant nos.3 to 5 and the said Padmaraje and after her death, the defendant nos.6 and 7 had received their share in the estate of the said deceased Jivajirao Scindia in accordance with law. It is further averred in the plaint that the suit is for partition of the immovable properties belonging to the said HUF. The defendant nos.2 to 7 were joined as proper parties to the suit but had no interest in the said movable properties. He submits that in the prayers also the plaintiff had specifically prayed that in those HUF suit properties the plaintiff and the original defendant no.1 were entitled to equal share and prayed for partition in respect of the movable properties belonging to the said HUF equally between the plaintiff and the original

defendant no.1.

18. In prayer clause (f) of the plaint, the plaintiff had also prayed for an order and decree against the original defendant no.1 to deliver to the plaintiff movable properties coming to the share of the plaintiff and to pay such amount as may be ascertained as being payable by the original defendant no.1 to the plaintiff. Learned senior counsel also placed reliance on the prayers in Notice of Motion No.1742 of 1987 filed by the original plaintiff in this suit inter-alia praying for appointment of the Court Receiver in respect of the HUF alleged properties. He strongly placed reliance on the affidavit dated 15th October, 1985 filed by the defendant no.4 i.e. Vasundhara Raje Hemant Singh for self and on behalf of the defendant nos.3 to 7 in the said notice of motion stating that she had read the copy the plaint, the said notice of motion and the affidavit in support of the said notice of motion as well as copy of the affidavit in rejoinder and in reply thereto. She craved leave to repeat and reiterated all the averments, submissions, and the statements made and the contentions raised by the plaintiff therein as if they were incorporated in the said affidavit in verbatim and formed part of the said affidavit. The defendant no.4 on behalf of herself and defendant nos.3 and 5 to 7 also submitted that the notice of motion filed by the plaintiff be made absolute with costs.

19. It is submitted by the learned senior counsel that the defendant nos.3 to 7 have thus admitted each and every averment in the plaint, submissions and the prayers and have made a statement that the notice of motion filed by the plaintiff be made absolute. The averments made in the plaint that the properties which were subject matter of the said suit were HUF properties of the said deceased in which only the original plaintiff and the original defendant no.1 were entitled to half share each was specifically admitted by the defendant nos.3 to 7. He submits that the said affidavit dated 15th October, 1985 was identified by an advocate and was taken on file by this Court by an order dated 12th December, 1985.

20. Learned senior counsel also invited my attention to the plaint filed by the original plaintiff i.e. Smt.Vijayaraje Jivajirao Scindia against the original defendant no.1 and other five defendants including the defendant nos.3 to 5 bearing Special Civil Suit No.705 of 1985 filed before the Court of the learned Civil Judge, Senior Division, Pune. He submits that the said suit was filed by the original plaintiff inter-alia praying for a declaration that the plaintiff was having  $\frac{1}{2}$  share in the immovable properties described in Schedule - A, Annexure - II and Annexure - III attached to the plaint and prayed for a decree for separate possession of her undivided half share by meets and bounds. He invited my attention to paragraph 5 in the said plaint.

21. It is averred in paragraph 5 of the said plaint that the plaintiff has got  $\frac{1}{2}$  share in the properties of late H.H. Jiwaji Rao Scindia (HUF). The defendant no.1 has also got  $\frac{1}{2}$  share in the properties. It is further averred that the defendant nos.2 to 6 have already received their shares and they did not claim any share in

the said property. They were made only proper parties so that the suit may not fall for non-joinder of necessary parties. Learned senior counsel submits that the defendant nos.2 to 6 appeared in the said suit as well as in this suit through a common advocate. He also invited my attention to the Pursis filed by the defendant nos.2 to 6 dated 21st August, 1987 in the said Pune suit stating that the say of those defendants was as per the plaint of the plaintiff.

22. Learned senior counsel for the defendant nos.1(a), 1(b) and 2 submits that by an order dated 25th July, 2017 passed by learned 8th Joint Civil Judge, Senior Division, Pune an application (Exhibit - 301) filed by the defendant nos.3 to 6 herein in the said Pune suit for amendment of the plaint is rejected. He submits that the writ petition filed by the defendant nos.2 to 6 in this Court is still pending. He submits that in the said amendment application of the defendant nos.2 to 6 in the said suit those defendants had prayed for amendment seeking partition in the suit properties as per the provisions of the Hindu Succession Act, 1956. He submits that the defendant nos.2 to 4 in the said suit applied for their transposition as the plaintiffs by relying upon the alleged Will and Testament dated 26th February, 1999 allegedly executed by the original plaintiff bequeathing her entire estate to her daughters and daughter of pre-deceased daughters i.e. defendant nos.2 to 6.

23. The Pune Court had permitted the amendment by passing a separate order below Exhibit - 200 and transposed the defendant nos.2 to 6 as the plaintiffs in place of the original plaintiff who died on 25th January, 2001. Insofar as the prayer for amendment applied by the defendant nos.2 to 6 who were transposed as the plaintiffs for seeking partition of the properties is concerned, learned trial Judge dismissed the said application below Exhibit - 301 on the ground of limitation and for various other reasons.

24. Learned senior counsel invited my attention to the order dated 20th January, 2017 passed by this Court in this suit permitting the defendant nos.3 to 7 to file and serve their written statements on or before 17th February, 2017. He also invited my attention to the written statement affirmed on 14th February, 2017 filed by the defendant nos.3 to 7 and would submit that for the first time in the said written statement which is filed after 32 years from the date of filing the suit, the defendant nos.3 to 5 have contended that the estate left behind by late Maharaja Jivajirao Scindia devolved upon all his Class - I legal heirs in equal shares. It was further alleged that the submission of the original plaintiff that only she and the original defendant no.1 were having  $\frac{1}{2}$  share in the properties of the HUF each was factually incorrect and legally untenable.

25. It is submitted by the learned senior counsel that in paragraph 5 of the said written statement, it is contended by the defendant nos.3 to 5 that these defendants were minor on 16th / 17th July, 1961 and that all Class - I legal heirs inherited the estate left behind by late Maharaja Jivajirao Scindia in equal share. In paragraph 6, the defendant nos.3 to 5 contended that these defendants are liable to be transposed as the plaintiffs in the said suit. The defendant nos.3 to 7

also denied that during the period between 1961 and 1971, the defendant nos.3 to 7 and Padmaraje and after her death, the defendant nos.6 and 7 had received their share in the estate of the said deceased Maharaja Jivajirao Scindia in accordance with law.

26. It is submitted by the learned senior counsel that not only the stand taken by the defendant nos.3 to 5 is contrary to the admissions in the affidavit in reply filed in the earlier notice of motion, joint Pursis filed in the Pune suit but have taken inconsistent and contradictory stand in the written statement also. He submits that the stand taken by the defendant nos.3 to 5 now claiming vital interest in the suit properties is inconsistent and afterthought. He submits that in paragraph 19 of the written statement, the defendant nos.3 to 5 have prayed for a declaration that these defendants are entitled to their respective shares in the properties left by the said deceased and for partition of those properties. He submits that in paragraph 27 of the written statement, the defendant nos.3 to 5 have set out various prayers. No counter claim is filed by these defendants in this suit.

27. It is submitted that the defendant nos.3 to 7 having filed affidavit in reply in the earlier notice of motion and the Pursis before the Pune Court adopting the plaint filed by the original plaintiff stating that only the original plaintiff and the original defendant no.1 were entitled to ½ share each in HUF properties of the said deceased, the defendant nos.3 to 7 could not have taken a contrary stand now. He submits that there is no change in law. Even if there is any change in law, the plea of the original plaintiff that the defendant nos.3 to 7 have received their share in the properties of HUF was not disputed by the defendant nos.3 to 7 in the affidavit in reply filed in the earlier notice of motion and in the Pursis filed before the Pune Court. The defendant nos.3 to 7 have not disputed that the defendant nos.3 to 5 and Padmajare had filed an affidavit in reply to the earlier notice of motion and adopted the entire plaint as if part of their submission.

28. It is submitted that the defendant nos.3 to 5 did not disclose the pleadings filed by them in Pune suit. Neither any application has been made by the defendant nos.3 to 7 to explain the admissions made in the earlier affidavit in reply nor any Pursis was filed before the Pune Court for modification of the statements made in the said affidavit or for recall of the admissions made by them. The defendant nos.3 to 5 have made suppression of various admitted facts in the written statement. He submits that no such written statement could have been filed after 32 years by the defendant nos.3 to 5.

29. Learned senior counsel invited my attention to the averments made in paragraph 6 of the written statement, the defendant nos.3 to 5 have even prayed for their transposition as the plaintiffs in place of the original plaintiff and seeks to propound what is stated by the original plaintiff. He submits that the original plaintiff had never applied for any amendment in the plaint to the effect that the defendant nos.3 to 7 also are entitled to equal share or any part in the suit properties.

30. It is submitted by the learned senior counsel that in the proceedings before the Pune Court, the evidence of the original plaintiff is already over which was led in support of her original case.

The original plaintiff had made a statement before the Pune Court that she was entitled to 50% share as claimed in the suit. The said suit is now pursued by the executor by an alleged Will left by the original plaintiff. The executor in the said suit did not apply for any impleadment of the defendant nos.3 to 7 as the plaintiffs in place of the original plaintiff. The defendant nos.3 to 7 on the contrary got them transposed as the plaintiffs on the basis of the second Will propounded by them.

31. Learned senior counsel submits that prior to rejection of an application for amendment by Pune Court on 25th July, 2017, the defendant nos.3 to 5 have already filed a written statement in this suit on 14th February, 2017. Learned senior counsel placed reliance on Order VI Rule 16(c) of the Code of Civil Procedure, 1908 and would submit that filing of the written statement by the defendant nos.3 to 5 in the aforesaid circumstances taking a total false and inconsistent stand than the stand already taken in the affidavit in reply in this Court and the Pursis filed before the Pune Court amounts to gross abuse of process of law. The defendant nos.3 to 5 have not made any attempt to explain at least in the affidavit in reply in the earlier notice of motion and in the Pursis filed before the Pune Court. He submits that the admissions in the pleading are on higher pedestal.

32. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of S.P. Chengalvaraya Naidu (dead) by L.Rs. vs. Jagannath (dead) by L.Rs. & Ors. AIR 1994 SC 853 and more particularly paragraphs 7 and 8 in support of the submission that the defendant nos.3 to 5 have withheld the vital documents / pleadings before the Pune Court and this Court in the written statement and have committed fraud on this Court and also suppressed various facts. He submits that the defendant nos.3 to 5 have not even referred to the said affidavit in reply dated 15th October, 2015 filed in the earlier notice of motion. It is submitted that in view of the defendant nos.3 to 5 having committed fraud upon this Court, the written statement filed by them is required to be struck off being abuse of process of law.

33. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of V. Chandrasekaran & Anr. vs. Administrative Officer & Ors., (2012) 2 SCC 133 and in particular paragraphs 45 to 48. He also placed reliance on the judgment of the Supreme Court in case of K.D. Sharma vs. Steel Authority of India Limited & Ors, (2008) 12 SCC 481 and in particular paragraphs 32 to 39 in support of the submission that the judicial admissions stand on higher footing. Learned senior counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Nagindas Ramdas vs. Dalpatram Ichharam @ Brijram & Ors. (1974) 1 SCC 242 and in particular paragraph 27. He submits that the said affidavit filed by the defendant nos.3 to 7 in the earlier notice of motion



which is accepted on record of these proceedings has to be accepted as an evidence which admission is the best evidence. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in case of Narayan Bhagwantrao Gosavi Balajiwale vs. Gopal Vinayak Gosavi & Ors. AIR 1960 SC 100 and in particular paragraph 11.

34. It is submitted that the defendant nos.3 to 5 have admittedly not made any application for withdrawal of the admissions either in the written statement or by filing any separate application. It is not the case of the defendant nos.3 to 5 that the admissions made in the affidavit in reply in the earlier notice of motion or in the Pursis filed before the Pune Court is based on any mistake committed by them. The admissions thus made by the defendant nos.3 to 7 in the affidavit filed in the earlier notice of motion and the Pursis before the Pune Court is conclusive and binding on the defendant nos.3 to 7 and cannot be allowed to be resiled.

35. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Gautam Sarup vs. Leela Jetly & Ors. (2008) 7 SCC 85 and in particular paragraphs 16, 18 and 28 and would submit that the admissions made by either party need not be proved but can be explained. He submits that the defendant nos.3 to 5 are resiling from the admissions made in the affidavit in reply filed earlier which cannot be permitted.

36. It is submitted by the learned senior counsel that it was not the case of the original defendant no.1 that the plaintiff was entitled to ½ share in the suit properties. It was the case of the defendant no.1 and defendant nos.1(a), 1(b) and 2 brought on record that the original defendant no.1 was entitled to the entire property on the principles of primogeniture.

37. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Rao Saheb vs. Rangnath Gopalrao Kawathekar & Ors., (1972) 4 SCC 181 and in particular paragraph 10 and would submit that the admission by the defendant nos.3 to 7 in the earlier affidavit, at least title of the defendant no.1 to the extent of 50% in the suit property would show that these defendants did not have any claim or share in the suit properties.

38. Learned senior counsel placed reliance on an unreported judgment delivered by the Supreme Court on 8th October, 2018 in case of Suzuki Parasrampur Suits Pvt. Ltd. vs. The Official Liquidator of Mahindra Petrochemicals Ltd. (In Liquidation) & Ors. in Civil Appeal No.10322 of 2018 and in particular paragraph 12 and would submit that the defendant nos.3 to 5 cannot be allowed to take any inconsistent and contradictory stand and cannot be allowed to approbate and reprobate at the same time.

39. It is submitted by the learned senior counsel that during the period between 1985 to 2018, none of these defendants have raised any contention that the said affidavit in reply filed in the earlier notice of motion was not made on their behalf. He submits that even in the written statement filed in the year 2017,

none of these defendants have taken such stand even at this stage. The said written statement filed in the year 2017 is also a joint written statement filed on behalf of the defendant nos.3 to 5.

40. Learned senior counsel invited my attention to the order dated 12th December, 1985 passed by this Court in Notice of Motion No.1742 of 1984 and would submit that the defendant nos.3 to 7 had appeared in the said notice of motion through a common counsel when the order was passed by this Court by consent. Even at that stage also the defendant nos.3 to 7 did not allege that the suit property was to be distributed amongst all the parties.

41. Mr.Ajay Kapur, learned senior counsel appearing for the defendant nos.3 to 7 on the other hand invited my attention to the averments made in paragraphs 4 to 8, 13, 19 and 22 of the plaint and would submit that in the plaint filed by the original plaintiff, his clients were impleaded as proper parties. Insofar as movable properties are concerned, it was averred in the plaint and more particularly paragraph 22 that the plaintiff and the defendants were co-owners of such movable properties.

42. Insofar as the affidavit dated 15th October, 1985 strongly relied upon by the defendant nos.1(a) and 2 is concerned, learned senior counsel submits that the said affidavit was signed by the defendant no.4, which was purportedly notarized at Delhi on 15th October, 1985. The said affidavit would not suggest that the deponent of the said affidavit was present in Delhi. In the said affidavit, there was no prayer for decreeing a suit filed by the original plaintiff. Various contradictory submissions were made in the plaint regarding the shares of the defendants. The said affidavit was not verified as per normal practice in Delhi. There was no averment in the said affidavit that the other defendants had read the plaint or had authorized the defendant no.4 to make any statement on their behalf.

43. Learned senior counsel submits that the said affidavit was hit by the provisions of Order XIX of the Code of Civil Procedure, 1908 and thus cannot be relied upon even against the defendant no.4. The said affidavit was on a stamp paper which was also not as per the normal practice for filing an affidavit in the Court proceedings. Though an order was passed by this Court on 21st October, 1985 in Suit No.1861 of 1984, there was no reference of the said affidavit made in the said order. In the order dated 12th December, 1985 passed by this Court when the Notice of Motion No.1742 of 1984 was taken up on board, the said order also does not mention any such affidavit dated 15th October, 1985. The said order was also without prejudice to the rights and contentions of the parties.

44. Learned senior counsel submits that while partitioning the properties which are the subject matter of the suit, the Court has to pass appropriate order as per the prevalent law and not on the basis of any affidavit which cannot be construed to be a pleading but was merely an attempt to facilitate the appointment of the Court Receiver in order to reduce the suffering of the widowed mother at the

hands of estranged son. He submits that in any event the said so called affidavit can at the most be confronted to the defendant nos.3 to 7 at the stage of their cross-examination in the suit and the written statement filed by his clients cannot be struck off on that ground. There was no whisper in the said affidavit that the defendant no.4 had an authority on behalf of the defendant nos.3 and 5 to 7. No number of the notice of motion was mentioned on the said affidavit.

45. It is submitted by the learned senior counsel that though a statement is made in the written statement filed by the defendant nos.3 to 5 that they are liable to be transposed as the plaintiffs, no such prayer for transposition has been either made or pressed. He submits that even if a preliminary decree is passed based on an alleged admission, such preliminary decree can be always changed or modified even at the final stage. It is submitted by the learned senior counsel that even in the partition deed of the year 1971, there was no whisper that the defendant nos.3 to 7 were given any share. It is not the case of the defendant nos.1-a and 2 that the defendant nos.3 to 7 had signed any Deed of Relinquishment relinquishing their rights in the immovable property.

46. Learned senior counsel placed reliance on the orders dated 21st September, 1984, 12th April, 1985 and 21st October, 1985 passed by this Court in the earlier notice of motion and would submit that the defendant nos.3 to 7 were not present when those orders were passed. They appeared only on 12th December, 1985. Interim order came to be passed by this Court in the said notice of motion without prejudice to the rights and contentions of the parties.

47. Learned senior counsel for the defendant nos.3 to 7 placed reliance on the order passed by the Division Bench of this Court on 9th June, 1993 in the Income Tax Reference Nos.158 of 1979 and 440 of 1979 holding that Rule Primogeniture not applicable to the Scindia family. He submits that his clients were not the parties to the said proceedings. The Division Bench of this Court held that it was common ground that Rule Primogeniture did not apply to Gwalior estate under any law. The Covenant dated 22nd April, 1948 did not indicate that the estate stood guaranteed to a single heir on the terms thereof. The Division Bench held that the succession to the estate would be governed under section 6 and other relevant provisions of the Hindu Succession Act under which legal status of the properties was clearly a Hindu Undivided Family. He submits that this judgment of the Division Bench of this Court which was binding on the parties to the suit proceedings including the defendant no.1 and his successors has been suppressed by them from this Court. The submissions made by the defendant nos.1(a) and 2 are contrary to the said judgment dated 9th June, 1993 passed by the Division Bench of this Court.

48. Learned senior counsel for the defendant nos.3 to 7 invited my attention to paragraph 6 of the plaint and also the written statement of the defendant no.1 to that paragraph and paragraph 9 of the written statement which was in response to paragraph 6 of the plaint, alleging that the plaintiff had appropriated to herself and had also given to the defendant nos.2 to 5 and said Padmaraje and after her

death to the defendant nos.6 and 7 various ornaments, cash, jewelry etc. from the estate of the said deceased. In the written statement, the defendant no.1 also alleged that since there was no HUF, the question raised of the alleged HUF properties continued to belonging to the plaintiff and the defendant no.1 as the members of the alleged joint family did not and could not arise. He submits that even in the said written statement, the defendant no.1 did not rely upon the said affidavit dated 15th October, 1985. It is submitted that in the year 2005, Hindu Succession (Amendment) Act, 2005 was passed amending various provisions of the Hindu Succession Act, 1956.

49. Insofar as the civil suit filed by the original plaintiff before the Pune Court in which the defendant nos.1(a) and 1(b) are also parties and in which the defendant nos.3 to 7 are transposed as the plaintiffs, it is submitted that the cross-examination of the original plaintiff was over. The original plaintiff had allegedly admitted during the course of her cross-examination that the plaintiff or the defendant no.1 had not transferred any property in favour of the defendant nos.3 to 7. It is submitted that though the written statement was filed by the defendant no.1 in the year 1997, there was no reference of the Division Bench judgment dated 9th June, 1993 made by the defendant no.1 deliberately.

50. It is submitted that in view of the amendment to the provisions of the Hindu Succession Act, 1956 in the year 2005, the shares of co-parceners were changed. In the year 2010, the defendant nos.3 to 7 have already filed a separate suit for partition before the Civil Court at Gwalior. In the year 2010, the defendant nos.3 to 7 have already asserted their rights in the immovable properties which are subject matter of this suit. In the year 2012, the defendant nos.3 to 7 filed application for amendment of the plaint in Pune Court.

51. Learned senior counsel placed reliance on the order dated 20th January, 2017 passed by this Court granting liberty to the defendant nos.3 to 7 to file a written statement. He submits that the said order was not challenged either by the plaintiff or the defendant nos.1(a) and 2. If according to the defendant nos.1(a) and 2, the said affidavit dated 15th October, 1985 strongly relied upon by the defendant no.1(a) and 2 was to be considered as the written statement on behalf of the defendant nos.3 to 7 in the suit, the plaintiff as well as the defendant no.1(a) and 2 would have objected to the defendant nos.3 to 7 filing the written statement in the suit on 20th January, 2017. He submits that pursuant to the liberty granted by this Court, the defendant nos.3 to 5 have already filed a written statement. The suit is of the year 1984. The pleadings are complete. At this stage, this Court cannot strike off the written statement filed by the defendant nos.3 to 5.

52. It is submitted by the learned senior counsel that in a partition suit, all the parties are to be treated as the plaintiffs. The defendant nos.3 to 7 will get a chance to rebut the case of the defendant nos.1-a and 2. The original defendant no.1 had filed the returns with the Income Tax Department showing the suit properties as HUF properties.

53. Insofar as the provisions of Order VI Rule 16 of the Code of Civil Procedure, 1908 invoked by the defendant nos.1-a and 2 to strike off the written statement filed by the defendant nos.3 to 5 is concerned, it is submitted by the learned senior counsel that such powers can be exercised sparingly and shall not be exercised to defeat the legitimate rights of any parties. He submits that no part of the said provision is satisfied by the defendant nos.1(a) and 2 in the notice of motion filed by them inter-alia praying for striking off the written statement filed by his clients. Learned senior counsel placed reliance on Order XIX Rule 3 of the Code of Civil Procedure, 1908 and would submit that an affidavit in the interlocutory proceedings need not be based on personal knowledge but may be based on belief. He submits that the said affidavit dated 15th October, 1985 in any event does not show any admission on the part of the defendant nos.3 to 7.

54. Insofar as the alleged partition of the immovable properties in the year 1971 is concerned, it is submitted by the learned senior counsel that there was no such partition took place in the year 1971 or at any other point of time. Neither the original plaintiff nor the defendant no.1(a) or the defendant no.2 have shown any proof of any share in the said immovable property given to the defendant nos.3 to 7.

55. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Akshaya Restaurant vs. P. Anjanappa, 1995 Supp (2) SCC 303 and in particular paragraphs 2 and 4 in support of the submission that a party is allowed to take inconsistent plea in the amendment required to be carried out due to subsequent events and change of law. He submits that even if a preliminary decree would have been passed by this Court, the defendant nos.3 to 7 are not precluded from seeking share at the stage of final decree based on the subsequent event and change of law.

56. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Mahila Ramkalidevi & Ors. vs. Nandram (Dead) through L.Rs. & Ors., (2015) 13 SCC 132 and more particularly paragraphs 22 and 23 and would submit that it is not the case of the original defendant no.1 that because of the stand taken by the defendant nos.3 to 5, the defendant no.1 had altered his position or any right was accrued to the defendant no.1.

57. Learned senior counsel for the defendant nos.3 to 7 placed reliance on the judgment of the Supreme Court in case of Kishori Lal vs. Mt.Chatribai, AIR 1959 SC 504, and in particular paragraphs 14 and 15 and would submit that the alleged admissions in the said affidavit dated 15th October, 1985 would not amount to estoppel. He submits that the relations between the original plaintiff and the original defendant no.1 were strained. Various criminal proceedings were filed by them against each other. In that circumstances, the said affidavit dated 15th October, 1985 could not be considered as binding upon the defendant nos.3 to 7.

58. Learned senior counsel placed reliance on the judgment of the Hon'ble

Supreme Court in case of *Prema vs. Manje Gowda & Ors.*, (2011) 6 SCC 462 and in particular paragraphs 16 and 19 in support of the submission that the change in law which may affect a partition decree has to be considered by the Court before passing any final decree.

59. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of *Danamma @ Suman Surpur & Anr. vs. Amar & Ors.*, (2018) 3 SCC 343 and in particular paragraphs 1, 25 and 26 in support of his submission that inherent rights of the parties prescribed in law of seeking partition cannot be abrogated or lost. Such rights have to be considered by the Court while passing a final decree and such decree has to be passed on the basis of the law prevalent on the date of decree.

60. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of *S. Sai Reddy vs. S. Narayana Reddy & Ors.*, (1991) 3 SCC 647 and in particular paragraphs 6 and 7. He also placed reliance on the judgment of the Supreme Court in case of *Ganduri Koteswaramma & Anr. Vs. Chakiri Yanadi & Anr.*, (2011) 9 SCC 788 and in particular paragraphs 4, 5, 9, 11 to 14, 19 and 21. He also placed reliance on the judgment of the Delhi High Court in case of *Hira Lal vs. Amarjit Singh*, 1977 RLR 520 (Delhi) and in particular paragraphs 2 and 3.

61. Learned senior counsel placed reliance on the judgment of the Delhi High Court in case of *Arun Jaitley vs. Arvind Kejriwal*, 246 (2018) Delhi Law Times 24 and in particular paragraphs 9 and 10 on the issue as to when the pleadings can be struck off under Order VI Rule 16 of the Code of Civil Procedure, 1908. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in case of *Abdul Razak (Dead) through L.Rs. & Ors. vs. Mangesh Rajaram Wagle & Ors.*, (2010) 2 SCC 432 and in particular paragraphs 16 and 17. Learned senior counsel also placed reliance on the judgment of the Supreme Court in case of *Gyarsi Bai & Ors. vs. Dhansukh Lal & Ors.*, AIR 1965 SC 1055 and in particular paragraph 8.

62. Insofar as the reference made to the Pune suit by the learned senior counsel for the defendant nos.1-a and 2 is concerned, learned senior counsel for the defendant nos.3 to 7 submits that at best the pleading filed by the defendant nos.3 to 7 in the said suit can be used against them to show the alleged inconsistency. The defendant nos.3 to 7 have already filed an application for amendment. It may at best be the case of miscommunication and not the case of relinquishment. The application for impleadment filed by the defendant nos.3 to 7 has been already allowed in the said proceedings at Pune by the learned trial Court.

63. Mr.Khambatta, learned senior counsel for the defendant nos.1-a and 2 in rejoinder would submit that the Court proceedings before the Pune Court, the defendant nos.3 to 7 are now transposed as the plaintiffs and as on today are pursuing the original suit filed by the mother. He submits that in this case as well

as in the said Pune suit, now the defendant nos.3 to 7 have stated that they have got their share in the suit property. The suit before the Civil Court at Gwalior has been filed in the year 2010 for partition of movable and immovable properties only by three defendants i.e. the defendant nos.3 to 5. The said suit has been filed under section 8 of the Hindu Succession Act, 1956. The said suit is not filed on the basis of any alleged co-parcenary property but seeking succession to the private properties and nothing to do with the HUF.

64. It is submitted that the amendment to the provisions of the Hindu Succession Act, 1956 was brought with effect from 9th September, 2005. Learned senior counsel invited my attention to the averments made in paragraphs 4, 5, 6, 9 to 13 and 17 in the said suit and would submit that the said suit is not filed on the basis of co- parcenary property. The plaintiffs in the said Gwalior suit have claimed 1/18th share based on section 8 of the Hindu Succession Act, 1956. No claim is made under section 6 of the Hindu Succession Act, 1956 duly amended in the year 2005. It is alleged in the said Gwalior suit that Maharaja Jivajirao Scindia had 1/3rd share in the HUF and thus the plaintiffs in that suit have one sixth share in the alleged properties in the alleged 1/3rd share. It is alleged in the said plaint that the defendant nos.3 to 5 came to know about their alleged rights only in the year 2010 i.e. after the amendment to the provisions of the Hindu Succession Act, 1956 came to be made in the year 2005.

65. It is submitted that the entire submission of the learned senior counsel for the defendant nos.3 to 7 that they were entitled to make their claim on the basis of the amendments to the Hindu Succession Act, 1956 and to claim the share in the HUF property is contrary to the position taken by his clients in the civil suit at Gwalior. He submits that according to the amended section 6 of the Hindu Succession Act, all the plaintiffs would have claimed 1/6th share each if according to the defendant nos.3 to 7 that they were entitled to claim share under section 6 of the Hindu Succession Act, duly amended. He submits that the written statement thus filed by the defendant nos.3 to 5 in this proceeding is gross abuse of process of law.

66. It is submitted by the learned senior counsel that the admissions in the pleadings stand on a higher pedestal. He submits that it is not in dispute that the said civil suit filed before the Gwalior Court was admittedly filed in the year 2010 much after the amendment introduced in the year 2005 to section 6 of the Hindu Succession Act, 1956. In the year 1985, the defendant nos.3 to 7 had filed an affidavit adopting the plaint in entirety before the Pune Court and thus cannot be allowed to take an inconsistent stand.

67. Learned senior counsel placed reliance on Rule 204 of the Bombay High Court (Original Side) Rules and would submit that the affidavit dated 15th October, 1985 was admittedly filed in Court by the defendant nos.3 to 7 and was accepted by this Court. An endorsement on the said affidavit was made by this Court i.e. "affidavit filed". The said affidavit was signed by the defendant no.4. The defendant no.4 cannot be allowed to say that she had not read the plaint or

had not understood the plaint. He invited my attention to the written statement filed by the defendant nos.3 to 5 in this suit and would submit that the said written statement was also filed by all the sisters jointly. Even in the said written statement, there was no reference made to the affidavit dated 15th October, 1985 filed by the defendant nos.3 to 7 nor the same is explained. In the joint written statement also, an authority of the defendant no.4 is not challenged by the other defendants to file the said affidavit dated 15th October, 1985.

68. Learned senior counsel invited my attention to an affidavit in reply dated 31st October, 2018 to this notice of motion filed jointly by the defendant nos.3 to 5 and would submit that the said affidavit also signed by the defendant no.3 for herself and for defendant nos.4 and 5. There is no reference to any authority in her favour by the defendant nos.4 and 5 or to any power of authority executed, if any, in her favour by the defendant nos.4 and 5.

69. Learned senior counsel placed reliance on paragraph 1 of the said affidavit and would submit that the said deponent who had filed the affidavit on behalf of herself and for defendant nos.4 and 5 has clearly stated that she had received and read the plaint. There is no verification clause in the said affidavit. There is no proof of any authority filed along with the said affidavit. If the arguments of the learned senior counsel for the defendant nos.3 to 7 are accepted that the affidavit dated 15th October, 1985 was without the authority of the defendant nos.3 and 5 to 7 or that the same was not in accordance with law, then the affidavit in reply filed by the defendant no.3 on behalf of the defendant nos.4 and 5 also cannot be relied upon. He submits that it is not the case of the defendant nos.3 to 7 that there was any mistake of law.

70. In the affidavit in reply filed by the defendant nos.3 to 5 also, the authority of the defendant no.4 is not challenged to file the affidavit dated 15th October, 1985 on their behalf. Even in the written statement filed by the defendant nos.3 to 5, they have suppressed the said affidavit dated 15th October, 1985 and have not even bothered to explain the admission in the said affidavit in reply. The defendant nos.3 to 7 had filed the Pursis in the suit filed before the Pune Court by the original plaintiff and applied for transposition as the plaintiffs. It was not the case of the defendant nos.3 to 5 in this affidavit that they have not got their share in HUF. There is no reference to the transposition of the defendant nos.3 to 7 in the Pune suit as the plaintiffs, about Gwalior suit filed by them in the written statement and also to the affidavit dated 15th October, 1985 filed by them in this suit. In paragraph 5 of the written statement filed by the defendant nos.3 to 5 also, there is not the case of those defendants that they are entitled to the share in accordance with clause 6 of the Hindu Succession Act duly amended.

71. In payer clause (b) of the written statement, the defendant nos.3 to 7 have claimed the share as Class - I heirs and have claimed equal share in the estate left behind by their father and not claiming the share under section 6 of the Hindu Succession Act. Though the written statement came to be filed by the defendant nos.3 to 5 after 32 years from the date of filing of this suit by the



original plaintiff, the defendant nos.3 to 5 have not claimed any advantage on the amended section 6 of the Hindu Succession Act, 1956. Even the said written statement was verified by all the three defendants.

72. Mr.Khambatta, learned senior counsel for the defendant nos.1(a) and 2 distinguished the judgment of the Hon'ble Supreme Court in case of Akshaya Restaurant (supra) and would submit that judicial admissions in the earlier judgment may be binding. In the facts and circumstances of this case, the written statement filed by the defendant nos.3 to 5 does not seek to explain the admission in the affidavit dated 15th October, 1985.

73. Insofar as the judgment of the Supreme Court in case of Mahila Ramkali Devi & Ors. (supra) is concerned, learned senior counsel for the defendant nos.1-a and 2 states that there is no dispute about the proposition of law laid down by the Supreme Court in the said judgment as to when the amendment can be permitted. Learned senior counsel distinguished the judgment of the Hon'ble Supreme Court in case of Kishori Lal (supra) and would submit that it is not the case of the defendant nos.3 to 5 in the written statement that they were not aware of law or were under the influence of mother etc. when the said affidavit dated 15th October, 1985 was filed.

74. Learned senior counsel distinguished the judgment of the Supreme Court in case of Prema (supra) and would submit that in this case, the written statement filed by the defendant nos.3 to 5 does not indicate that the rights claimed in the immovable property by these defendants is based on change of law but clearly indicates that the claim is now based under section 8 of the Hindu Succession Act, 1956 though made after the amendment to the provisions of Hindu Succession Act, 1956 in the year 2005.

75. Learned senior counsel distinguished the judgment of the Supreme Court in case of Danamma @ Suman Surpur & Anr. (supra) on the ground that the facts before the Supreme Court in the said suit were totally different than the facts before this case. Insofar as the judgment of the Supreme Court in case of S. Sai Reddy (supra) is concerned, it is submitted by the learned senior counsel that there is no dispute about the proposition of law laid down by the Hon'ble Supreme Court in the said judgment. The said judgment however, does not assist the case of the defendant nos.3 to 7. Similar submission is made in respect of the judgment of the Supreme Court in case of Ganduri Koteshwaramma & Anr. (supra).

76. Learned senior counsel distinguished the judgment delivered by the Delhi High Court in case of Hira Lal (supra) on the ground that in this case the affidavit dated 15th October, 1985 was filed by the defendant nos.3 to 7 and was received by the Court. He submits that according to the provisions of the Bombay High Court (Original Side) Rules, even the defective affidavit can be received. It is not the case of the defendant nos.3 to 7 on oath that the affidavit signed by the defendant no.4 was without authority.

77. Learned senior counsel distinguished the judgment of the Delhi High Court in case of Arun Jaitley (supra) on the ground that the facts before the Delhi High Court were totally different. Insofar as the judgment of the Supreme Court in case of Abdul Razak (Dead) through L.Rs. & Ors. (supra) is concerned, learned senior counsel for the defendant nos.1-a and 2 does not dispute the proposition of law laid down by the Supreme Court in the said judgment.

78. The judgment in case of Gyarsi Rai & Ors.(supra) is distinguished on the ground that the case of the defendant nos.3 to 7 is not based on change of law.

79. Insofar as the judgment of the Division Bench of this Court in case of Income Tax Reference Nos.158 of 1979 and 440 of 1979 (supra) strongly relied upon by the defendant nos.3 to 7 is concerned, it is submitted that the said judgment can be confronted to the defendant no.1 in his evidence. He placed reliance on the judgment of the Allahabad High Court in case of British Indian Corporation Limited, Kanpur vs. Commissioner of Income Tax, AIR 1967, Allahabad 362 and would submit that under section 256 of the Income Tax Act, 1961, the High Court has advisory jurisdiction and does not decide the rival claims of the parties. The Income Tax Appellate Tribunal is the fact finding authority. The findings in such judgment cannot be considered as res-judicata in a civil suit. He submits that the judgment of the High Court delivered in one of the assessment year is not binding on the High Court for subsequent years. The defendant no.1 can deal with the said order passed by the Division Bench of this Court in case of subsequent assessment years. No reliance thereon can be placed by the defendant nos.3 to 7.

80. It is submitted by the learned senior counsel that in the said written statement filed even before the Pune Court by the defendant no.1, a plea of primogeniture was taken by the defendant no.1. He invited my attention to the order passed by this Court framing issues.

81. Mr.Ajay Kapur, learned senior counsel for the defendant nos.3 to 7 submits that while dealing with an application under Order VI Rule 16 of the Code of Civil Procedure, 1908, the pleadings filed by the defendant nos.3 to 7 in other proceedings cannot be relied upon. In the writ petition filed by the defendant no.1 also, the defendant no.1 had taken a plea of primogeniture. The defendant no.1 had not disclosed the order of the Division Bench of this Court in the said Income Tax Reference at any stage in these proceedings. He submits that the findings rendered by the Division Bench in the said judgment about HUF property would amount to res-judicata and such finding cannot be re-opened by this Court in this suit. He submits that all the three suits are pending. Even no preliminary decree has been passed in any of those suits.

82. Ms.Sheetal Shah, learned counsel appearing for the plaintiffs submits that there is no res-judicata against the law. Even according to the defendant no.1, the property is HUF and if this Court comes to that conclusion, the property would be partitioned as HUF property.

## REASONS AND CONCLUSIONS

83. The question that arises for consideration of this court is in this notice of motion is whether the applicants in this notice of motion (original defendant nos. 1(A) and 2) have made out a case for striking out the written statement filed by the defendant nos. 3 to 5 under Order VI Rule 16 of the Code of Civil Procedure, 1908 or not.

84. The admitted facts are that the original plaintiff Smt.Vijayaraje Jivajirao Scindia had filed this suit against Shri Madhavrao Jivajirao Scindia and six others inter alia praying for a declaration that the moveable properties described in Exs.D-1 to D-29 to the plaint and all other immoveable properties that may on proper enquiries be ascertained belong to the said Sir H.H.Jivajirao (HUF) were the HUF properties to which the plaintiff and the defendant no.1 were entitled to equal share, for a decree of partition of those properties equally between the plaintiff and the defendant no.1 and for other reliefs. During the pendency of the suit, the original plaintiff and the original defendant no.1 expired. Insofar as defendant nos. 3, 4 and 5 are concerned, they are married daughters of the original plaintiff and late Shri Jivajirao Scindia and were the sisters of the original defendant no.1 i.e. Shri Madhavrao Jivajirao Scindia. Smt.Padma Raje was one of the daughter of the original plaintiff and the late Shri Jivajirao Scindia and the sister of the original defendant no.1 who expired.

85. In paragraph (4) of the plaint, it is alleged that late Shri Jivajirao Scindia was the Karta and Manager of the joint and undivided Hindu family known as the Sir H.H.Jivajirao HUF consisting of himself, the plaintiff, original defendant nos.1 to 3 and 4 and 5 and the said Smt. Padma Raje. In paragraph (5), it is alleged that between the year 1961 and 1971 from time to time, the defendant nos. 3 to 5 and the said Smt.Padma Raje and after her death, defendant nos. 5 and 7 had received their shares in the estate of the said deceased in accordance with law. It is further alleged that the rest of the said HUF properties, moveable and immoveable continued also belonged to the plaintiff and the defendant no.1 in equal share as members of the joint family of which the defendant no.1 became Karta and Manager on the death of the said deceased Shri Jivajirao Scindia.

86. In paragraph (6) of the plaint, it is alleged that the defendant nos. 2 to 6 are joined as proper parties to the suit but have no interest in the said moveable properties. It is not in dispute that in the said Suit No. 1861 of 1984, the original plaintiff had filed a Notice of Motion No.1742 of 1984 praying for various interim reliefs including the prayer of appointment of Court Receiver in respect of all moveable properties belonging to Sir H.H.Jiwajirao (HUF). The original plaintiff made some of the averments in the affidavit in support of the notice of motion which were made in the plaint.

87. It is the case of the applicant that on 15th October,1985, the defendant no.4 on behalf of herself and on behalf of defendant nos. 3 and 5 to 7 filed an affidavit stating that she had read the copy of the plaint and notice of motion and the

copy of the affidavit in support of the notice of motion as well as the copy of the affidavit in rejoinder and in reply thereto. She herself and on behalf of defendant nos. 3 and 5 to 7 craved leave to repeat and reiterate all the averments, submissions and statements made and contentions raised by the plaintiff as if they were incorporated in the said affidavit in verbatim and formed part of the said affidavit. In paragraph (2) of the said affidavit, it was prayed that the notice of motion be made absolute with costs. The said affidavit was filed by the defendant nos. 3 to 7.

88. The applicant strongly placed reliance on the averments made by Smt.Vijayaraje Jivajirao Scindia, widow of late Shri Jivajirao Scindia in Special Civil Suit No. 705 of 1985 filed in the Court of Civil Judge, Senior Division at Pune against late Shri Madhavrao Jivajirao Scindia and the daughters of the late Smt.Vijayaraje Jivajirao Scindia (widow of late H.H.Jivajirao Scindia) inter alia praying for a declaration that the plaintiff therein was having  $\frac{1}{2}$  share in the properties described in the Annexures II and III attached to the plaint and for a decree for separate possession of her undivided  $\frac{1}{2}$  share by meets and bounds.

89. In paragraph (5) of the plaint in the said suit, it was averred by the original plaintiff that the defendant no.1 i.e. late Madhavrao Jivajirao Scindia had also  $\frac{1}{2}$  share in the said properties. The defendant nos. 2 to 6 had already received their shares and they did not claim any share in the suit property. They were joined only as proper parties so that the said suit may not fail for non-joinder of necessary parties. The applicant also strongly placed reliance on the pursis dated 21st August, 1987 filed by the defendant nos. 2 to 6 in the said suit stating that the 'Say of the defendant nos. 2 to 6 was a per the plaint of the plaintiff'.

90. Learned senior counsel for the applicant strongly placed reliance also on some of the allegations made by the defendant nos. 3 to 5 in the written statement filed by them contending that defendant nos. 3 to 7 were given liberty to file written statement on or before 17th February, 2017 by an order dated 20th January, 2017. He submits that the stand now taken in the written statement which is filed after more than 30 years of the service of the writ of summons, totally new, contradictory and false stand claiming an equal share in the estate of the late Maharaja Jiwaji Rao Scindia as Class I legal heirs under section 8 of the Hindu Succession Act, 1956 for the first time is contrary to the affidavit in reply filed in the earlier notice of motion filed in the year 1985.

91. Learned senior counsel for the applicant strongly canvassed before this court that not only such inconsistent plea is taken in this written statement in this suit but also such plea is also raised in the suit filed by the original plaintiff before the learned Civil Judge, Senior Division, Pune inter alia praying for partition of the immoveable properties in favour of the original plaintiff and the original defendant no.1. Learned senior counsel also invited attention of this court to the allegations made in the plaint before the Civil Court at Gwalior filed by the defendant nos. 3 to 5 taking all together different stand and claiming share in the suit properties. Based on this background, the case of the applicant is that

the case of the defendant nos. 3 to 5 in the written statement being completely new, contradictory, false and there being a abuse of the court deserves to be struck off in the interest of justice. It is also the case of the applicant if such written statement is allowed to be remained on record which is inconsistent with the affidavit dated 15th October,1985, the same shall be prejudice, embarrass and delay the fair trial of the caption suit and thus such written statement shall be struck off by this court's power under Order VI Rule 16 of the Code of Civil Procedure, 1908.

92. On the other hand, Mr.Kapur, learned senior counsel for the defendant nos. 3 to 7 opposed the notice of motion on various grounds. Learned senior counsel disputed the evidenciary value of the said affidavit dated 15th October,1985 on various grounds. He also strongly placed reliance on the provisions of sections 6 and 8 of the Hindu Succession Act, 1956 in support of the submission that his clients were entitled to share in the suit properties forming part of the subject matter of this suit and also forming part of the subject matter of the suit filed before the learned learned Civil Judge, Senior Division, Pune. It is the case of the defendant nos. 3 to 7 that even if there is any admission on the part of the defendant nos. 3 to 7 as sought to be canvassed by the applicant, such alleged admission can be explained by his client during the course of the trial of the suit. The alleged admission made by his client in the suit filed by the original plaintiff before the learned Civil Judge, Senior Division, Pune or the suit filed by his client client before the Civil Court at Gwalior cannot be relied upon by the applicant while invoking Order VI Rule 16 of the Code of Civil Procedure, 1908 inter alia praying for striking off the written statement filed by the defendant nos. 3 to 5 in this suit.

93. It is also strongly urged by the learned senior counsel for the defendant nos. 3 to 7 that in the partition suit, all the parties have to be treated as plaintiffs. Even if this court would have passed a preliminary decree based on the affidavit dated 15th October,1985 in the earlier notice of motion which affidavit itself does not have evidenciary value, this court has ample power to modify even the preliminary decree based on the subsequent facts and entitlement of the legal heirs and representatives of the Hindu male or female in accordance with the law prevailing on the date of passing of the final decree. It is vehemently urged that admittedly in this case, no such preliminary decree is passed by this court. His clients are entitled to explain the alleged admission during the course of the trial. It is strongly urged that even if there is any alleged contradiction or inconsistency as sought to be canvassed by the applicant in the affidavit purportedly filed by his client and the stand taken in the written statement, merely based on such alleged inconsistency or contradiction, power of court under Order VI Rule 16 cannot be exercised in a routine manner.

94. The defendant nos. 3 to 7 also strongly placed reliance on the cross examination of the original plaintiff in the civil suit filed by her in the court of learned Civil Judge, Senior Division, Pune inter alia praying for partition of the

immoveable properties by metes and bound. He submits that the original plaintiff had admitted that the defendant nos. 3 to 7 herein who were also parties to the said suit were not given any share in the properties of the said deceased H.H. Late Jivajirao Scindia.

95. The defendant nos. 3 to 7 also strongly placed reliance on the judgment of Division Bench of this court dated 9th June, 1993 in the Income Tax Reference No.158 of 1979 filed by the Commissioner of Income Tax against Highness Maharani Vijaya Raje Scindia and also the averments made by the original plaintiff and the defendant no.1 in the Misc.Petition No.937 of 1969 filed before this court impugning notices issued by the authorities under the Estate Duty Act. It is submitted that the applicants have suppressed the judgment of this court in the said income tax reference holding that the rule of primogeniture did not apply to the Gwalior Estate.

96. Supreme Court in case of Abdul Razak (Dead) through Lrs & Ors. (supra) construing the powers of court to strike out any pleading at any stage of the proceedings has held that such powers can be exercised in either of the three eventualities, i.e., where the pleadings are considered by the Court unnecessary, scandalous, frivolous or vexatious; or where the court is satisfied that the pleadings tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise considered as an abuse of the Court. It is held by the Hon'ble Supreme Court that normally, a court cannot direct or dictate the parties as to what should be their pleading and how they should prepare their pleadings. If the parties do not violate any statutory provision, they have the freedom to make appropriate averments and raise arguable issues. The Court can strike off the pleadings only if it is satisfied that the same are unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay the fair trial of the suit or the Court is satisfied that suit is an abuse of the process of the Court. It is held that since the striking off pleadings has serious adverse impact on the rights of the concerned party, the power to do so has to be exercised with great care and circumspection. In this case, the applicants have invoked Order VI Rule 16(C) i.e. "which is otherwise an abuse of process of the court".

97. Delhi High Court in case of Arun Jetley (supra) has followed the judgment of the Hon'ble Supreme Court in case of Abdul Razak (Dead) through Lrs & Ors. (supra) and has held that the pleadings can be ordered to be struck off under Order VI Rule 16 of the Code of Civil Procedure only if they are shown to be unnecessary, scandalous, frivolous or vexatious or abuse of process of law or if they amount to re-litigation or tend to embarrass defendants in trial of suit. It is not in dispute that no such application under Order VI Rule 16 has been filed by the plaintiffs as on date on the ground that the plea raised by the defendant nos. 3 to 5 in the written statement is an abuse of process of law or would fall under Order VI Rule 16(A) or (B).

98. I do not propose to go into the issue at this stage about the validity and evidentiary value and the effect of the affidavit dated 15th October, 1985 strongly

placed reliance on by the applicants in support of the submission that the defendant nos. 3 to 7 having allegedly admitted that the suit properties were HUF properties and only the original plaintiff and the defendant no.1 were entitled to one half share each in the suit properties, the defendant nos. 3 to 5 could not have taken an inconsistent stand in the written statement ascertaining individual rights under section 8 of the Hindu Succession Act, 1956 or not. The oral evidence has not commenced in the suit though the same is pending since last more than 35 years. In my view, even if there is any admission on the part of the defendant nos. 3 to 7 in the said affidavit dated 15th October, 1985 strongly relied upon by the applicant or even if there is any inconsistency in the stand taken by the defendant nos. 3 to 7 in the said affidavit and in the written statement, same can be confronted to the witnesses, if any, examined by the defendant nos. 3 to 7 at the stage of oral evidence and if no such oral evidence is led at the stage of final arguments. At the same time, the defendant nos. 3 to 7 also would be entitled to explain the alleged admission in accordance with law.

99. It is not in dispute that the original plaintiff and the original defendant no.1 had filed petition bearing Misc.Petition No.937 of 1969 in this court under Article 226 of the Constitution of India impugning the notice dated 12th and 16th September, 1969 under section 59 of the Estate Duty Act, 1953. In the said joint petition filed by the original plaintiff and the original defendant no.1, it was averred that the original defendant no.1 herein was born on 18th March, 1945 and on his birth, he became a co-parcener with his father deceased Maharaja H.H.Jivajirao and acquired interest in the private property which came to the deceased Maharaja H.H.Jivajirao by inheritance from his father H.H.Maharaja Madhavrao Scindia under Hindu Law. It was specifically averred in the said petition that there was no custom by which the Rule of Impartible Estate of Primogeniture could have been said to have been applied to the private properties of the Scindia rulers and at Gwalior.

100. It was averred in the said petition filed by the original plaintiff and defendant no.1 that in case of Gwalior family, there would be such a notional partition just before the death of Maharaja who would get one- third share on a partition and the other shares being of his wife and his son viz. the petitioner nos.1 and 2 in the said petition in equal proportion. The Division Bench of this court in case of Commissioner of Income Tax against Highness Maharani Vijaya Raje Scindia (supra) has considered the substantial question of law whether in the facts and circumstances of the case, the tribunal was right in holding that 2/3rd of the income from the Gwalior estate for the assessment years 1970-71, 1971-72, 1972-73 and 1973-74 was assessment in the hands of the Hindu undivided family consisting of Shri Madhavrao Scindia and his mother and the balance 1/3rd of the income was assessable in the hands of the 'association of persons' consisting of the legal heirs of the late Maharaja Sir J.M.Scindia and that no part of such income was assessable in the hands of Shri Madhavrao Scindia individually. This court in the said judgment held that succession to the estate would be governed by section 6 and other relevant provisions of the Hindu

Succession Act under which the legal status of the property is clearly HUF. It is also held that the rule of primogeniture did not apply to the Gwalior Estate under any law.

101. In the written statement filed by the original defendant no.1, it is the case of the original defendant no.1 and now the case of the defendant nos. 1A and 2 that rule of primogeniture apply to the Scindia family and accordingly the entire suit property was held by the original defendant no.1 and not between the original plaintiff and the defendant no.1. The question as to whether the judgment of this court in case of Income Tax Reference No.158 of 1979 filed by the Commissioner of Income Tax against Highness Maharani Vijaya Raje Scindia (supra) holding that the rule of primogeniture does not apply to the Gwalior Estate whether would be binding only in respect of assessment years which were subject matter of the income tax reference or that the said finding would also apply in respect of the subsequent period or not can be considered by this court at the stage of final hearing of the suit. I do not propose to decide this issue raised by the learned senior counsel at this stage.

102. Insofar as the cross-examination of the original plaintiff in the suit filed by the original plaintiff in the court of Civil Judge, Senior Division, Pune allegedly admitting that the defendant nos. 3 to 7 have not given any share at any point of time in the suit properties forming subject matter of the said suit is concerned, if that part of the alleged admission is confronted to the witnesses proposed to be examined, if any, by the plaintiff in this case, the court can consider the effect thereof at that stage. The alleged inconsistency, if any, in the stand taken by the defendant nos. 3 to 7 herein in the Pune suit or in the Gwalior suit also can be confronted with to the witness, if any, proposed to be examined by the defendant nos. 2 to 7 herein.

103. There is no dispute about the proposition of the law that in case of the partition suit, all the parties are to be treated as plaintiffs. Even if any preliminary decree would have been passed by this court in this suit based on the said affidavit dated 15th October, 1985 under Order 20 Rule 18 read with sections 151 to 153 of the Code of Civil Procedure, 1908, court has ample power to pass more than one preliminary decree or to modify the preliminary decree prior to passing of the final decree having regard to change of supervening circumstances.

104. The Hon'ble Supreme Court in case of Ganduri Koteschwaramma & Anr. (supra) has held that final decree is always required to be in conformity with preliminary decree but that does not mean that preliminary decree, before final decree is passed cannot be altered or amended or modified by Trial Court in the event of changed or supervening circumstances even if no appeal has been preferred from preliminary decree. It is held that the suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final



decree is passed. The Hon'ble Supreme Court in the said judgment has considered the effect of amended section 6 of the Hindu Succession Act, 1956 by Amendment Act, 2005.

105. Hon'ble Supreme Court in case of Danamma @ Suman Surpur & Anr. (supra) has considered the amendment to section 6 of the Hindu Succession Act in the year 2005 and considered that the suit for partition was filed in the year 2002. However, during the pendency of the suit, Section 6 of the Act was amended. The decree was passed by the trial court only in the year 2007. The rights of the appellants got crystallized in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. It is held that the rights of daughters in co-parcenary property as per the amended Section 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005. Similar view has been taken by the Hon'ble Supreme Court in case of S. Sai Reddy (supra).

106. The Hon'ble Supreme Court in case of Akshaya Restaurant (supra) has held that admission is a material piece of evidence and such admission can be explained and even inconsistent pleas could be taken in the pleadings. Hon'ble Supreme Court in case of Mahila Ramkalidevi & Ors. (supra) has held that the court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting malafide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost. The Hon'ble Supreme Court in case of Kishori Lal (supra) has also taken similar views.

107. Admittedly in this case, no oral evidence is led by the parties till date. No preliminary decree in this suit for partition has been passed by this court. The applicant cannot be allowed to raise any objection regarding filing of the written statement by the defendant nos. 3 to 7 in this suit at this stage. The said written statement has been filed by the defendant nos. 3 to 5 pursuant to the liberty granted by this court. The said order passed by this court has been already implemented by the defendant nos. 3 to 5. The correctness of the contents and the stand taken by the defendant nos. 3 to 5 in the said written statement can be considered at the stage of trial in the suit. The aforesaid judgments regarding the powers of court under Order VI Rule 16, to pass more than one preliminary decree and modification of the preliminary decree, explanation of admission during the course of trial are applicable to the facts of this case. I am respectfully bound by these judgments.

108. Insofar as the submission of Mr.Khambata, learned senior counsel for the applicants that the defendant nos. 3 to 7 had applied for their transposition as the plaintiffs in the Pune suit and thus virtually admitting the contents of the said suit are concerned, the effect of such transposition would be considered in the said suit during the course of trial. The inconsistency of the stand taken by the

defendant nos. 3 to 7, if any, can be confronted to the witnesses proposed to be examined by the defendant nos. 3 to 7 in the suit at the time of oral evidence. The writ petition filed by the defendant nos. 3 to 7 against the said order passed by the learned Civil Judge, Senior Division, Pune rejecting the application for amendment of the plaint is pending.

109. Insofar as the submission of the learned senior counsel for the applicant that the defendant nos. 3 to 7 did not disclose the affidavit filed by them in the year 1985 in the written statement or about the pleadings filed by them in the Pune suit is concerned, the effect of such alleged not disclosure can be considered at the time of final arguments. If the defendant nos. 3 to 7 do not explain the alleged admission even if any opportunity is granted to explain such alleged admission, consequences in law would follow and would be considered at the stage of final arguments in the suit. There is no dispute about the proposition of law laid down by the Hon'ble Supreme Court in case of S.P. Chengalvaraya Naidu (dead) by L.Rs. (supra). Whether the defendant nos. 3 to 5 have suppressed any material facts or have committed any fraud of this court or not can be gone into by this court at the stage of final arguments and based on such adjudication, an appropriate order can be passed by this court at the stage of passing of decree. There is no dispute about the proposition of law laid down in case of V. Chandrasekaran & Anr. (supra) and in case of K.D. Sharma (supra) decided by the Hon'ble Supreme Court holding that the judicial admission stands on higher footing. Such admissions however can be explained by the parties during the course of the trial.

110. Similarly judgment of the Hon'ble Supreme Court in case of Nagindas Ramdas (supra), in case of Narayan Bhagwantrao Gosavi Balajiwale (supra) and the judgment of the Hon'ble Supreme Court in case of Gautam Sarup (supra) are also clearly distinguishable in the facts of this case and would not assist the case of the applicants on the similar grounds.

111. Whether the submission of the learned senior counsel for the applicants that affidavit in reply filed by the defendant nos. 3 to 7 in the earlier notice of motion has to be accepted as an evidence or not is concerned, this submission also can be considered by this court at the stage of final arguments subject to the rights of the defendant nos. 3 to 5 to explain the alleged admissions. In my view, the pleadings filed by the parties before the court of learned Civil Judge, Senior Division, Pune and before the Civil Court Gwalior cannot be considered for the purpose of deciding this application under Order VI Rule 16 of the Code of Civil Procedure, 1908. Such inconsistency, if any, can be confronted at the stage of oral evidence to the witnesses proposed to be examined by the defendant nos. 3 to 7, if any, at the stage of oral evidence.

112. Insofar as reliance placed on the judgment of Hon'ble Supreme Court in case of Rao Saheb (supra) in support of the submission that atleast title of the defendant no.1 to the extent of 50% in the suit property as admitted is concerned, since this court is of the view that the alleged admission on the part

of the defendant nos. 3 to 7 if any can be explained, the principles of law laid down by the Hon'ble Supreme Court in case of Rao Saheb(supra) would not assist the case of the applicant. Similarly the judgment of the Hon'ble Supreme Court in case of Suzuki Parasrampuriah Suitings Pvt. Ltd. (supra) also would not assist the case of the applicants at this stage.

113. Insofar as the submission of the learned senior counsel for the applicant that even in the written statement filed in the year 2017, defendant nos. 3 to 5 have not raised any contention that the affidavit in reply filed in the earlier notice of motion was not made on their behalf is concerned, this court can consider the pleadings and the effect of not having taken such stand, if any, by the defendant nos. 3 to 7 in the written statement can be considered at the time of final arguments in the suit.

114. Insofar as the submission of the learned senior counsel for the applicant that the civil suit filed by the defendant nos. 3 to 5 before the Civil Court at Gwalior in the year 2010 is for partition and moveable and immoveable properties is filed under section 8 of the Hindu Succession Act, 1956 and not on the basis of any alleged co- parcenary property and not under amended section 6 of the Hindu Succession Act having been brought into the effect on 9th September, 2005 is concerned, this Court cannot decide the merits of the said suit filed by the defendant nos. 3 to 5 before the Civil Court Gwalior while deciding this notice of motion filed under Order VI Rule 16 of the Code of Civil Procedure, 1908. The applicants herein can raise all the contentions permissible in law in the said suit. Admittedly the said suit filed by the defendant nos. 3 to 5 before the Civil Court at Gwalior is still pending. The civil suit filed by the original plaintiff before the learned Civil Judge, Senior Division, Pune for partition of the immoveable properties is also still pending.

115. In my view, since the defendant nos. 3 to 5 are entitled to explain the alleged admission, if any, in the affidavit in reply filed in the earlier notice of motion, filing of the written statement allegedly taking an inconsistent stand cannot be considered as an abuse of the process of court under Order VI Rule 16(C) of the Code of Civil Procedure, 1908. Though this court has power to strike off the pleadings if the conditions set out under Order VI Rule 16 are satisfied, this court is not inclined to exercise such power firstly on the ground that no case is made out by the applicant for invoking power under Order VI Rule 16(C) or any other sub-rule thereof and secondly such powers have to be exercised with great care and circumspection and not in a casual manner. Striking of the written statement filed by the defendant nos. 3 to 5 would have serious adverse impact on the right of the defence available to the defendant nos. 3 to 5 filed pursuant to the liberty granted by this court. Such powers can be exercised sparingly and in case of clear finding that such pleadings if allowed to be remain on record, would be a abuse of process of the court. In my view, since suit itself is pending since last 35 years, though the power under Order VI Rule 16 can be exercised at any stage, no case is made out by the applicant for striking off the written

statement filed by the defendant nos. 3 to 5 in this notice of motion. There are several contentious issues raised by both the parties which would require a detailed adjudication on facts and law.

116. I, therefore, pass the following order :-

(a) Notice of Motion (L) No.2482 of 2018 is dismissed.

(b) The alleged inconsistencies in the affidavit dated 15th October, 1985 and the written statement filed by the defendant nos. 3 to 5 can be considered at the time of trial in the aforesaid suit.

(c) The effect of the alleged inconsistency, contradiction in the pleadings filed by the parties in different suits also can be considered by this court at the stage of trial.

(d) It is made clear that this court has not expressed any views on the alleged inconsistencies or contradictions made by any of the parties in any of the suits or in the interlocutory proceedings. All such contentions are kept open.

(e) Place the matter on board for directions before the learned Judge on 1st July, 2019 having assigned this suit for appropriate directions so as to proceed with the suit.

(f) There shall be no order as to costs.