A

KRISHNABAI DESHMUKH

v.

TULJERAMARAO NAMBIAR & ORS.

July 31, 1979

B

[R. S. SARKARIA AND D. A. DESAI, JJ.]

Interpretation—Deed of Settlement—Intention—How could be gathered.

Evidence Act, s. 92—When applicable.

Hindu Law—Family partition—Intimation to live separately—Whether should be explicit.

C

The grandfather and great-grand-father of the respondents and the father of the appellant were brothers. By a registered deed (Ext. 39) the elder brother purportedly gave the younger brother (appellant's father) some lands for separate living and maintenance of himself, and his male lineal descendants for ever. The lands in dispute were a part of the lands covered by the deed.

D

In their suit, the plaintiffs alleged that the suit lands were part of Desgat Watan estate which, by virtue of an immemorial family and territorial custom, was impartible and the junior members were given lands only for their maintenance, and that till his death, the appellant's father continued to be an undivided member of the joint family consisting of himself and the plaintiffs, and that on the death of the appellant's father the lands should go to them.

E

The trial court held : (1) that the impartibility of the estate and the rule of primogeniture had not been proved; (2) that there was severance of the joint family in 1902 since when the brothers were living separately; (3) that on the abolition of Watans by Bombay Act 60 of 1950, the suit lands which originally were Watan lands, were re-granted in favour of the appellant's father and that the plaintiffs tacitly assented to the regrant of the lands exclusively in his favour.

F

On appeal, the High Court affirmed the view of the trial court that the estate was not impartible and that the onus of proving partition was on the defendant (appellant herein). It was held that Ext. 39 did not establish that the brothers were divided in 1902 and that the suit lands were allotted to the appellant's father; that on the erroneous but honest belief that Desgat lands were impartible, the elder brother granted the lands to his brother and his descendants in the male line in lieu of their maintenance and that the younger brother having died without male issue, the tenure came to an end whereupon the plaintiffs who were the surviving male members of the family, were entitled to resume the lands. The High Court remitted the matter to the trial court with certain directions.

G

In appeal to this Court, the appellant contended : (i) that her father prior to the execution of Ext. 39, had clearly intimated to his brother his intention to divide the estate and to live separately after division, resulted in a severance of the joint family status, and that such severance was evident from the recitals in Ext. 39 and the subsequent conduct of the members of the erstwhile family.

H

A Since the appellant's father after such division was holding, the suit lands as his separate property, the same were inherited by the appellant to the exclusion of the plaintiffs. (ii) Since the regrant of the suit lands to the appellant's father created new rights exclusively in his favour, the regrant did not enure for the benefit of the plaintiffs.

B Allowing the appeal and dismissing the plaintiff's suit

HELD : 1. Unity of ownership and commonsality of enjoyment are the essential attributes of an undivided Hindu family of Mitakshra concept. So long as the family remains undivided no member can predicate a definite share to himself. Cesser of this unity *and* commonsality means cesser or severance of the joint family status, which in Hindu Law amounts to partition, irrespective C of whether it is accompanied or followed by a division of the properties by metes and bounds. Disruption of joint status covers both division of right and division of property. Division of joint status may be brought about by any adult member of the joint family by intimating the others his intention to separate and enjoy his share in the family property in severalty. Such intimation may be an explicit declaration (written or oral) or manifested by conduct of the members of the family. [170A-B]

D (i) In the instant case, Ext. 39 speaks of a division of the joint family status and separation of interests. The trial judge translated the term "Vibhaktarahave" in Marathi, as connoting division of status. But the High Court did not agree with the translation made by the trial judge, and preferred to rely on the translation by the High Court translator. Except for the English translation of the word "Vibhaktarahave" there is no substantial difference between E the two translations. [171 A-B]

The word "Vibhaktarahave" is a compound of two words viz., "Vibhakta" and "Rahave". "Vibhakta" appears to have its roots in the Sanskrit word "Vibhaga". "In the Mitakshra, Vijnanesvara, defines the word 'Vibhaga', which is usually rendered into English by the word 'partition' as the adjustment of diverse rights regarding the whole by distributing them in particular por- F tions of the aggregate". "Rahave" means "living". Understood in its etymological sense the word "Vibhaktarahave" means living separately after division. [172H]

(ii) None of the four features which, according to the High Court, militate against the literal interpretation of the word "Vibhaktarahave", viz., that the deed was one for maintenance, that it was executed by the elder brother, that the lands were given to the appellant's father and his descendants in the male line G and that the appellant's father would not have remained contended with only a small portion instead of claiming entire half-share detracts from the conclusion that in substance and reality the document evidence a division of joint family status as a result of an intimation by the appellant's father to his brother of his intention to live separately after division. [173D]

2. Section 92 of the Evidence Act prohibits only the varying of terms of a H document, not the memorandum or recitals of facts, bereft of dispositive terms, particularly when the correctness of the whole or any part of the recital is in question. [174E]

In the instant case the preliminary recital does not fall under the dispositive or operative portion of the document. The bar under s. 92 against the admissibility of extrinsic evidence for the purposes of showing that the insertion of the words 'for your maintenance' in the recital is wrong, is not attracted. [174G] A

3. (a) When there is a dispute in regard to the true character of a *writing evidence de hors* the document can be led to show that the writing was not the real nature of the transaction but was only illusory which cloaked something else and that the apparent state of affairs was not the real state of affairs. [174H] B

Chandi Prasad Singh v. *Piari Bidi,* CA No. 75 of 1964, decided on 16-3-1966, *Bhagwan Dayal* v. *Reoti Devi,* [1962] 3 SCR 440; referred to.

(b) The preliminary recital in Ext. 39 raises an inference that sometime prior to the date of the deed the younger brother had clearly intimated to his coparcener of his intention to sever the joint family status and to enjoy the joint family property in severalty. Disruption of the joint family status ensued. From that date onwards the brothers ceased to be coparceners. That is, at the time of the execution of the deed, joint family status did not exist. There is no evidence that after the severance of the joint family status there was a re-union. [175 E-F] C

(c) It cannot be said that the preliminary recital furnished little or no evidence that the younger brother intimated in clear terms his intention to sever the joint family status. The document had been let in evidence more than 70 years after its execution. All those who might have given evidence were dead. In such a situation it is permissible to draw reasonable inferences to fill the gap of details obliterated by time. [175H; 176A] D

Chintamanibhatla Vankat Reddy v. *Rani of Wadhawan;* 47 I.A. 6 at p. 10; *Sree Sree Iswar Gopal Jien Thakur* v. *Pratapmal Begaria,* [1951] SCR 332; referred to. E

(d) Once it is found that the division of joint status preceded the execution of the deed, the elder brother had no power to impose a condition that the land was being given to his younger brother and male lineal descendants for their maintenance. [176 E-F] F

(e) The expression 'Potgi' (maintenance) or 'Nirwahkrit' used in the deed could not be construed as conferring an estate with restricted rights of ownership to the younger brother and his descendants. The deed evidences a permanent transfer of land to be enjoyed from generation to generation. Moreover the younger brother remained in full ownership of the land till his death. After the abolition of Watans he alone applied for re-grant of this land in his favour. The plaintiffs were aware of this position. [177A-B] G

CIVIL (PPELLATE JURISDICTION : Civil Appeal No. 54 of 1969.

From the Judgment and Order dated 23-10-1968 of the Mysore High Court in R.F.A. No. 25/63.

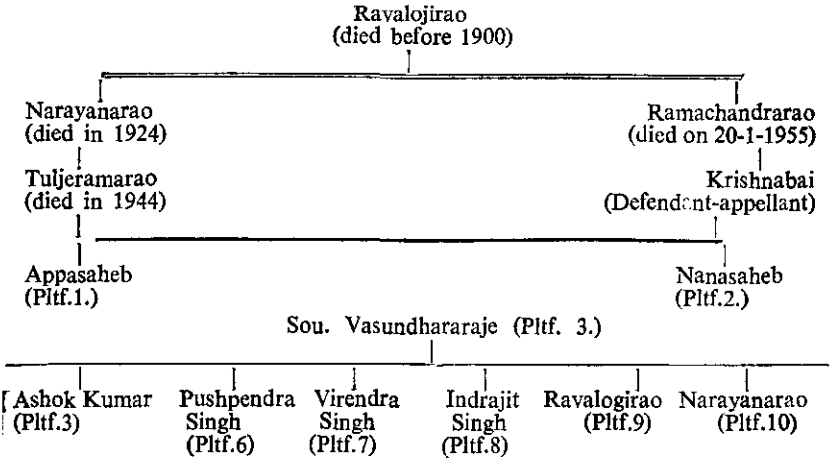
B. D. Dal, S. Bhandare, A. N. Karkhanis and *Miss M. Palival* for the Appellant. H

V. S. Desai and *N. Nettar* for the Respondent.

A The Judgment of the Court was delivered by

SARKARIA, J. This appeal by the defendant, on certificate, is directed against a judgment, dated October 23, 1968, whereby in First Appeal, the High Court of Mysore set aside the judgment and decree passed by the joint Civil Judge, Senior Division, Belgaum.

B The pedigree of the family given below will be helpful in understanding the facts leading to this appeal:



By a registered document, dated July 25, 1902 (Ex. 39), executed by Narayanarao, six Desgat lands situated in villages Nanandi, Umarani and Nandikurli totalling about 120 acres, were received by Ramachandrarao, for separate living and maintenance of himself and his male lineal descendants. Out of the lands covered by the said deed, three lands comprised in Survey Nos. 114 (26 acres-30 gunthas), 115 (9 acres-38 gunthas) and 116 (26 acres-34 gunthas), totalling about 63 acres and 22 gunthas, situate in the area of village Umarani, Taluka Chikodi, are the subject-matter of the suit, out of which this appeal has arisen.

The respondents herein, who are the grand-sons and great grand-sons of Narayanarao, on July 24, 1960, instituted Suit No. 26/60 in the Court of Civil Judge, Belgaum against Smt. Krishnabai, appellant, for possession of the said lands and for recovery of past and future *mesne profits,* with these allegations: (i) that the suit lands were Desgat Watan lands and were part of the Desgat Watan estate of Nanandi, (ii) that by virtue of an ancient and immemorial family and territorial custom, the Desgat estate of Nanandi was impartible and descended from generation to generation to the senior-most member by the rule of primogeniture, while the junior members of the family were only given some lands for their maintenance by the holder of the Desgat for the time being; (iii) that till his death,

the appellant's father continued to be an undivided member of the Joint family consisting of himself and the plaintiffs; and (iv) that on July 31, 1956, a partition by metes and bounds has taken place between the plaintiffs *inter se* under a partition deed.

The suit was resisted by the defendant-appellant. She denied the alleged ancient, family and territorial custom of primogeniture. She denied that the property formed part of the Desgat Watan estate of Nanandi. She further denied that her father, Ramachandrarao, came into possession of the suit land for his maintenance. She further pleaded that Ramachandrarao and his brother Narayanarao had separated during their life-time and the suit lands and some other lands were given to Ramachandrarao in the partition between the two brothers towards a part of his share, and it was agreed that the share of Raachandrarao in other family properties would be separated and settled at some future convenient time. She further stated that since 1902, Ramachandrarao was in separate possession and enjoyment of the suit lands till his death on January 20, 1955, and that at the time of his death he was not an undivided member of the joint family of himself and the plaintiffs. She further pleaded that on her father's death she succeeded to the suit lands, which were his separate property. She further relied on the Bombay Pargana and Kulkarni Wantans (Abolition) Act, 1950 (Bombay Act No. 60 of 1950), (for short, called the Act), and the re-grant of the land made in favour of her father, under that Act.

The learned trial judge by his judgment, dated September 29, 1962, dismissed the respondents' suit with these findings :

(a) that the alleged custom of impartibility and devolution of property by the rule of primogeniture had not been proved;

(b) that there was a severance of the joint family consisting of the two brothers, in 1902, when they had agreed to separate, that since then for about 53 years till his death in 1955, Ramachandrarao was living separately and enjoying the suit land as his separate property;

(c) that the suit lands were originally Watan lands, but they were not so at the date of the suit because the Bombay Act 60 of 1950, which came into force on May 1, 1951, had abolished Watans and thereafter the suit lands were, on the application of its holder, Ramachandrarao, regranted in his favour; that the plaintiffs were aware of Ramachandrarao's application for the regrant and they had tacitly assented to the regrant in his favour.

A Aggrieved, the plaintiffs preferred an appeal in the High Court of Mysore. The High Court affirmed the finding of the trial court, that the custom pleaded by the plaintiffs with regard to the impartibility of the property had not been established. It observed that "the onus of proving partition is on the defendant, "but the only evidence in B support of her case that Ramachandrarao was divided, is Exhibit No. 39". The High Court construed the deed (Ex. 39) with the aid of its translations into English, one made by the trial judge and the other by the High Court Translator. It then took note of these features in support of the 'theory of partition' :

> C "(a) Permanency of the arrangement. The deed provides that Ramachandrarao and his descendants in the male line shall enjoy the property from generation to generation without interference from the grantor.
>
> (b) Cesser of commonsality. The deed says that Ramachandrarao desired to live separately and therefore D the lands were granted to him. The evidence is that Ramachandrarao lived separate from 1902. There is no evidence to the contrary."

It then listed these features to negative the 'theory of partition' :

> "(a) The nomenclature of the deed. It is styled as a E deed of maintenance.
>
> (b) It was executed by one of the parties only. If it was intended to be a partition deed it would have been executed by both the parties each relinquishing his rights in the properties not allotted to him.
>
> (c) The deed says that the lands were given to the F grantee and his descendants in the male line for maintenance only and they should enjoy the lands continuously.
>
> (d) The total extent of the Desgat lands was over eight thousand acres; if partition was intended, Ramachandrarao who was entitled to a one-half share would not G have been contented with 90 acres valued at Rs. 3,400/-."

After cataloguing these pros and cons the High Court concluded :

> "In our judgment, Exhibit 39 considered along with the circumstances in which it was executed, does not establish the defendant's case that Rāmachandrarao was divided from H Narayanarao in 1902 and that the suit lands, among others, were allotted to Ramachandrarao's share. We are of the view that on the erroneous but honest belief that Des-

gat was an impartible estate, Narayanarao granted the lands to Ramachandrarao and his descendants in the male line in lieu of their maintenance. When Ramachandrarao died without male issue, the interest granted ceased or the tenure came to an end. The plaintiffs who are the surviving members of the family are entitled to resume the lands."

Although no such plea was taken by the plaintiffs in the plaint, the High Court held that in view of Section 90 of the Indian Trust Act, the regrant made, after the abolition of Watans, under the Act in favour of Ramachandrarao must ensure for the benefit of the family of the Watandars including the plaintiffs, because Ramachandrarao at the time of his death was holding the suit land as an undivided member of the joint family, for his own benefit and that of the other members of the undivided family.

Since there was no evidence as to the occupancy price paid by Ramachandrarao to obtain the regrant, the High Court, after allowing the appeal and setting aside the decree of the Trial Court, remanded the matter to the court below, with a direction that it should ascertain the amount of occupancy price paid by Ramachandrarao, and then pass a decree for possession in favour of the plaintiffs subject to the repayment of the said amount.

Hence this appeal by the defendant on the basis of a certificate granted by the High Court under Article 133(1)(e) and (c) of the Constitution.

Shri B. A. Bal, learned counsel for the appellant, has, in the course of his arguments, sought to make out two main points :

1. (a) Sometime *prior* to the execution of the deed. (Ex. 39) dated July 25, 1902, there was a severance of the joint Hindu family as a result of an intimation by Ramachandrarao of his intention to separate and Narayanarao's acceptance of the same. Such severance can be clearly inferred from:

(i) the recitals in the deed (Ex. 39), the permanent allocation of the suit land along with some other land, to Ramachandrarao and his descendants, and (ii) the subsequent conduct of the members of the erstwhile joint family.

(b) Since the deed (Ex. 39) (it is argued) is more than 75 years old and Narayanarao, Ramachandrarao and others who might have given evidence with regard to the circumstances resulting in this transaction are all deed and gone, the recitals, in the deed coupled with the subsequent conduct of the parties, and supplemented by reasonable inferences, were more than sufficient to discharge the initial

onus, if any, on the defendant to show severance of the joint family since 1902 or thereabout and the same continued till Ramachandrarao's death in 1955. Reference in this connection has been made to *Bhagwan Dayal* v. *Mst. Reoti Devi.*(1)

(c) Since at the time of his death in 1955, Ramachandrarao was not a member of an undivided Hindu family and the suit land was his separate property, his daughter the defendant would, even according to traditional Hindu Law, *inherit* his estate to the exclusion of the plaintiff-collaterals.

(2) Section 4 of the Bombay act 60 of 1950 abolished Watons with effect from May 1, 1951. Section 5 of the same Act abrogated the rule of primogeniture and also every law or custom by virtue of which females were postponed to males in the matter of succession. After the abolition of the Watons Ramachandrarao alone, to the knowledge of the plaintiff-respondents, obtained a regrant of the suit land from the Government in his favour. Similarly, the plaintiffs applied for regrant of the other Ex-watan lands measuring about 8000 acres, to the exclusion of Ramachandrarao. The regrant of the suit land in favour of Ramachandrarao created new rights exclusively in his favour. Since on May 1, 1951 he was holding the suit land separately as a divided member of the family, the regrant did not ensure for benefit of the plaintiffs.

As against this, Shri V. S. Desai submits that since it was the admitted case of the parties that sometime before the execution of the deed (Ex. 39) dated July 25, 1902. Narayanarao and Ramachandrarao constituted a joint Hindu family governed by Mitakshra, and the presumption of jointness in case of brothers is stronger, the burden was on the defendant to prove by cogent and convincing evidence that the joint family had disrupted and Ramachandrarao had separated in 1902 and the suit land was his separate property which fell to his share in partition. It is maintained that the recitals in the deed, Ex. 39, do not furnish any evidence that Ramachandrarao had communicated an unambiguous and clear intention to separate from his brother in estate and thenceforth hold it in defined shares. It is urged that the transaction evidenced by the deed should be construed by the Court, not according to its own sense of right and wrong, but according to the notions and beliefs prevailing among orthodox Hindus in 1902, of a strata of society to which Narayanarao and Ramachandrarao belonged. In 1902, proceeds the argument, to cause disruption of a joint Hindu family of Watandars

(1) [1962] 3 SCR 440.

was considered to be a sin. According to Shri Desai, if the document, Ex. 39, is considered from that view-point it would appear that the arrangement devised thereby was consistent with the continuance and preservation of the jointness of the family and its estate, rather than its division and disruption. It is pointed out that the area of Watan Land held by the joint Hindu family in 1902 was about eight thousand acres, and if the intention of the brothers was to sever the joint family status, there was no difficulty in declaring that thenceforth the two brothers would hold the entire estate in equal, defined shares. It is emphasised, though Ramchandrarao, died in 1955, he never asked for partition and possession of his one-half share in the remaining seven or eight thousand acres held by Narayanarao and his descendants, but remained contented with a mere 118 or 120 acres given to him for maintenance under Ex. 39 in 1902. It is further submitted that the Court cannot construe the deed Ex. 39, as a deed of partition, but only as a deed of maintenance, as it, expressly purports to be, because in view of Section 92 of the Evidence Act no extrinsic evidence is admissible to contradict or vary its terms.

In support of his arguments Shri Desai has referred to Paragraph 448 of Mayne's Hindu Law (1953 Edn.).

Learned counsel further submits that in view of the paucity of evidence produced by the defendant-appellant to show division of the joint-family, the High Court was right in holding that Ramchandrarao died as an undivided member of the joint Hindu family consisting of himself and the plaintiffs. It is submitted, in that view of the matter, the second point urged by Shri Bal does not survive for decision. Nevertheless, Shri Desai took us through the relevant provisions of the Bombay Act LX of 1950 and the Watan Act of 1874, to show that there is nothing in those provisions which militates against the finding of the High Court to the effect, that if Ramchandrarao died as an undivided member of the joint family, the regrant would enure for the benefit of all the members of the family.

We will take Point No. 1 canvassed by Shri Bal. The primary question that falls to be considered is, whether in 1902 or shortly prior to it, there was a partition between the two brothers—Narayanarao and Ramchandrarao—in a manner known to law. In this connection, it is necessary, at the outset, to notice the fundamental principles of Hindu Law bearing on the point. The parties are admittedly governed by Mitakshra School of Hindu Law. In an undivided Hindu family of Mitakshra concept, no member can say that he is

A the owner of one-half, one-third or one-fourth share in the family property, there being unity of ownership and commonsality of enjoyment while the family remains undivided. Such unity and commonsality or the essential attributes of the concept of joint family status. Cesser of this unity and commonsality means cesser or severance of the B joint family status, or, which under Hindu Law is 'partition' irrespective of whether it is accompanied or followed by a division of the properties by metes and bounds. Disruption of joint status, itself, as Lord Westbury put it in *Appovier v. Rama Subha Aivan.*,(1) in effect, "covers both a division of right and division of property." Reiterating the same position, in *Giria Bai* v. *Sadashiv*,(2) the Judi- C cial Committee explained that division of the joint status, or partition implies " separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject matter. This may, at any time, be claimed by virtue of the separate right."

The division of the joint status may be brought about by any D adult member of the joint family by intimating, indicating or representing to the other members in clear and unambiguous terms, his intention to separate and enjoy his share in the family property, in severality. Such intimation, indication or representation may take diverse forms. Sometimes it is evidenced by an explicit declaration (written or oral); sometimes, it is manifested by conduct of the mem- E bers of the family in dealing separately with the former family properties. Service of notice or institution of a suit by one member/ coparcener against the other members/coparceners for partition and separate possession may be sufficient to cause disruption of the joint status.

F We will now deal with the first proposition propounded by Shri Bal, in the light of these principles. The primary question that arises for consideration is, whether Ramchandrarao had brought about a division of the joint family status or partition by intimating to his brother in clear terms, sometime in 1902 or shortly prior thereto, his intention to separate and enjoy his share in severality. Answer to this G question depends on inferences which may, reasonably be drawn from the contents of the deed (Ex. 39) and the subsequent conduct of the parties.

The orginal deed, Ex.39 is in Marathi. It was rendered into English by the trial judge himself, who concededly had adequate knowledge of H Marathi. According to him, the deed (Ex.39) speaks of a division of

(1) [1886] 11 MIA. 75
(2) [1916] 43 I.A. 151.

the joint family status and separation of interests. For this construction, the trial judge drew much on the word "Vibhaktarahave" which, according to him, connotes division of status. The learned Judges of the High Court however, did not accept this interpretation. They preferred to rely on the English translator of this deed made by the High Court Translator. Since there is some variation between the two translations, it will be worthwhile to extract the same here for facility of comparison and reference.

The translation effected by the trial judge, reads as under :

> "You (Ramchandra Rao) are my younger brother. We were living jointly till today. Recently you have desired to take some property for maintenance (Nirwah Kurat) and live separate *after division* (*Vibhaktarahave*).
>
> Since I have deemed it proper to give you some property for your maintenance as befits our Sansthan, I have given you the following properties for your maintenance. (Then follows the description of the properties). All these lands have been given to you along with the appurtenances for meeting the livelihood of you and your family members. Hence, you and your successors i.e., your natural born male descendants should enjoy the properties from generation to generation and live happily. The Sansthan will not interfere with the lands any longer. Only you and your natural male descendants should enjoy the property. You shall also pay the Joodi to the Government hereafter."
>
> (The disputed words have now been underlined).

The translation made by the High Court Translator reads as below :

> "You are my younger brother and you have been residing with me only in jointness up till now. As you have been recently thinking of residing separately yourself by receiving some properties for your maintenance, I found it proper to give you some property for your maintenance as befits our Sansthan and have given you for your maintenance the 'Desgat' lands of our Khata situate in the below mentioned villages in Taluka Chikodi Sub-District, Belgaum District. Particulars thereof are as under : Lands situate at Village Nanadi. (1) Bagayat Land of No. bearing Survey No. 189 measuring 14 acres 23 guntas assessed at Rs. 20-0-0. The land together with a well valued at Rs. 1000/-. (2) The land

measuring 9 acres 30 guntas assessed at Rs. 41-8-0 out of Survey No. 187 is bounded on the east by a land in our possession out of the same No. on the west by the village limits, on the south by the land No. 196 and on the north by the land bearing Survey No. 198. In the land enclosed within the aforesaid boundary there is a well. This well has two "Veravantas" i.e. one on the Eastern side and another on the Southern side. It has 10 'motes'. Out of the 'motes' of that well we are to get water with 3 'motes' and you are to get water with 2 'motes'. Repairs to the said well also are to be carried in that portion only and the expenses required to remove the mud etc., are also to be borne in the same proportion itself.

Value Rs. 1000/- Lands situate at the Village Umarani.

	Rs. No.	Acres	Assessment	
3	99	26—30	14—0—0	The said 3 lands are entire No. and are valued at Rs. 1000/- together with the appurtenant thereof.
4	100	9—38	9—0—0	
5	101	26—34	17—0—0	

Land situate at Majare Kenpatte in the Village Nandikurli.

6	120	24—18	9—0—0

This land of entire No. together with the appurtenances thereof is valued at Rs. 400/-.

The lands as mentioned above are given to you for your maintenance and the maintenance of your descendants. Hence, you and your descendants, i.e., natural male descendants should enjoy the said lands continuously and live happily. In respect of the said lands given to you, you will not be put to any trouble from the state (Sansthan) in any manner but, the said lands are to be continued with you and your natural male descendants. You should go on paying the *joodi* payable by you to the Government in respect of the said lands in our possession are given to your possession today. To the above effect the deed of maintenance is duly executed."

A comparative study of the above extracts would show that except for the English rendering of the word "Vibhaktarahave" by the learned trial judge, there is no substantial difference between the two translations. The Marathi word "Vibhaktarahave", according to my learned Brother on this Bench, who has working knowledge of Marathi, is a compound of two words, namely, "Vibhakta" and "Rahave". "Vibhakta" appears to have its root in the Sanskrit word "Vibhaga". "In the Mitakshra, Vijnanesvara defines the word

"Vibhaga" which is usually rendered into English by the word "partition" as the adjustment of diverse rights regarding the whole, by distributing them in particular portions of the aggregate." (See Para 448 of Mayne's Hindu Law, 11th Edition.) 'Rahave' means "living". In view of this *etymological* analysis, it cannot be said that the learned trial judge's interpretation of the word "Vibhaktarahave" as equivalent to "live separately after division" was literally wrong. Even the learned Judges of the High Court (who did not claim to know Marathi), have not held in categoric terms that this translation of "Vibhaktarahave" made by the trial judge is grammatically wrong. What the learned Judges appear to say is that the context in which the word "Vibhaktarahave" has been used, gives it a meaning different from its grammatical sense, so that it cannot be understood as signifying an intention to divide, but connotes only a desire to live separately. The learned Judges have sorted out four features from the context of the deed, Ex. 39, which, according to them, militate against the literal interpretation of the word "Vibhaktarahave" and negative the theory of division of status. Those features—it will bear repetition are : (i) The deed is styled as one for maintenance, (ii) It was executed by Narayanarao only, (iii) The lands under the deed were given to Ramchandrarao and his descendants in the male line for maintenance only, (iv) The total extent of 'Desgat' lands was over 8000 acres. Ramchandrarao should have claimed half of the entire 'Desgat' area and not remained contented with about 90 acres given to him under the deed Ex. 39).

In our opinion, none of these features, if appreciated in the right perspective, detracts from the conclusion that there was a division of joint family status as a result of an intimation to Narayanarao by Ramchandrarao, of his intention to separate, followed by allotment to Ramchandrarao in furtherance of that division, the lands mentioned in Ex. 39. The four features listed above rested on erroneous assumptions. Even according to the High Court, both the brothers were, at the time of execution of the document Ex. 39, labouring under an erroneous belief that the 'Desgat' lands were impartible and held by the eldest member of the family in the male line, while the junior members were entitled only to maintenance. The High Court has expressly upheld the finding of the trial Court that no custom was established according to which, the 'Desgat' lands of the family were impartible and vested only in the eldest male member of the family to the exclusion of the junior members. The High Court has further not disagreed with the trial courts finding that no custom of primogeniture in this family has been established.

A Once it is held that this two-fold assumption or belief about the impartibility of the estate and its devolution in the male line by rule of primogeniture was fallacious, the said four features stemming therefrom, lose their significance. These features which purport to give the transaction (Ex. 39) the colour of a mere maintenance arrangement as distinguished from an absolute transfer or allotment, have to be credited with no more substance than phantoms conjured out of phantasy, probably by the sole executant of the deed with a self-serving motive. In any case, they are words of vain show or form lacking reality. We have therefore, to peal aside this jejune and illusory cover, to reach at the kernel and concentrate on the crucial features of the document Ex. 39.

We are unable to accept Shri Desai's argument that the process adopted by us would involve contravention of Section 92 of the Evidence Act.

Firstly, in this process, which is essentially one of construction of the deed, Ex. 39, no question of contradicting, varying, adding to or subtracting any term of the disposition is involved. The deed, Ex. 39, falls into two distinct parts : The first of them comprises the preamble or the preliminary recital of a past fact. This part does not contain any *term* of disposition of property. Such terms are confined only to the second part. Section 92 prohibits only the varying of *terms* of the documents, not the memoranda or recitals of facts, bereft of dispositive terms, particularly when the correctness of the whole or any part of the recital is in question. We are primarily concerned with this preliminary recital which does not fall under the dispositive or operative portion of the document. The question is, whether or not this recital of a past oral intimation by Ramchandrarao to Narayanarao had caused severance of joint family status. It is settled law that a clear intimation by a coparcener to the other coparcener of his intention to sever the joint status need not be in writing. For these two-fold reasons, the bar in section 92 against the admissibility of extrinsic evidence for the purpose of showing that the insertion of the words "for your maintenance" in the recital is wrong, unreal, unmeaning and the coinage of the executant's own brain, is not attracted.

Secondly, there is ample authority for the proposition that when there is a dispute in regard to the true character of a writing evidence *de hors* the document can be led to show that the writing was not the real nature of the transaction, but was only an illusory, fictitious and colourable device which cloaked something else, and that the appa-

rent state of affairs was not the real state of affairs. [See *Chandi Prasad Singh* v. *Piari* Bidi C.A. No. 75 of 1964, decided on 16-3-1966, and *Bhagwan Dayal* v. *Mst. Reoti Devi* (supra)].

This preliminary recital in the deed, Ex. 39 (as translated by the learned trial judge), with due emphasis on the words 'recently' and 'Vibhaktarahave', coupled with the surrounding circumstances and natural probabilities of the case, definitely raises the inference that sometime in the recent past, *prior to* the date of the deed, Ex. 39, Ramchandrarao had clearly and persistently intimated to his coparcener, Narayanarao, his intention to sever the joint family status and to hold and enjoy his share of the joint family property in severalty. The immediate and inexorable consequence of this intimation was disruption or division of the joint status, which, in the eye of Hindu Law, amounted to 'partition'. From that date onwards, which preceded the date of the deed, Ex. 39 Narayanarao and Ramchandrarao ceased to be coparceners and held the former coparcenary property as tenants-in-common. Thus, at the time of execution of the deed Ex. 39, the joint family status did not exist; it had already been put an end to by Ramchandrarao's intimation to Narayanarao, of his intention to divide and separate.

If that be the true position, it was not open even to Ramchandrarao, much less to Narayanarao, to nullify the effect of the communication of the former's intention which had resulted in severance of the joint status, by revoking or withdrawing that communication. Ramchandrarao could not get back to the old position by mere revocation of the intention. A coparcenary is purely a creature of Hindu Law; it cannot be created, or recreated after disruption, by the act of parties, save in so far that by adoption a stranger may be introduced as a member thereof or in the case of reunion. [See paragraphs 214 and 325 of Mulla's Hindu Law and this Court's decision in *Puttorangamma* v. *Ranganna*(1); *Bhagwan Dayal* v. *Mst. Reoti Devi* (supra).] There is not evidence that after the severance of the joint family status, there was a reunion.

As before the High Court, here also, an argument was raised that the preliminary recital in the deed, Ex. 39, being qualified, furnishes little or no evidence for a finding that Ramchandrarao had declared and intimated in clear and unambiguous terms his intention to sever the joint family status.

(1) A.I.R. 1968 S.C. 1019.

A We are unable to accept this argument. It has to be borne in mind that this document has been let in evidence more than 70 years after its execution. Narayanarao and Ramchandrarao and all others who might have given evidence with regard to the circumstances of this recital in particular, and the deed in general, are long deed and gone. There is no dearth of authority for the proposition that in such a situation, it is permissible to draw reasonable inferences to fill the gaps or details obliterated by time. [See *Chintamanibhatla Vankat Reddy* v. *Rani of Wadhawan*(1); *Sree Sree Iswar Gopal Jien Thakur* v. *Pratapmal Bagaria*(2).]

C The preliminary recital in the deed, therefore, assumes importance. Read in the light of the surrounding circumstances and in the perspective that the 'Desgat' land was partible coparcenary property of the two brothers, each of whom had an equal interest therein and an equal right to get his share divided and thereafter enjoy it in severalty, this D recital establishes with a preponderance of probability, that sometime before the execution of the deed, Ex. 39, Ramachandrarao had communicated to his brother, in clear, unmistakable terms his intention not only to separate in residence and user and put an end to commonsality, but also to sever the unity of ownership and enjoy his share in severalty. The result was division of the joint status.

E Once it is found that the division of the joint status preceded the execution of the deed, Ex. 39, then the disposition made thereunder could only be a step towards the implementation of that division and in recognition of Ramchandrarao's right to have his share, wholly or partly demarcated and specified for separate enjoyment as an F absolute and exclusive owner thereof. While giving the land measuring 118 or 120 acres to Ramchandrarao in recognition of the latter's equal right in the Desgat, Narayanarao had no power to impose the futile condition that the land was being given to Ramchandrarao and his male lineal descendants for maintenance. As already discussed, this insertion by the executant from an ulterior self-serving motive was G devoid of substance; it could not be attached any greater importance and realty than the phantasmic assumption, from which it was conjured up : *a fortiori,* when in the deed, Ex. 39, there is no stipulation that in the event of Ramchandrarao's male line becoming extinct, the land would revert to the 'Desgat', and Narayanarao or his descendants H would have a right of re-entry.

(1) 47 I.A. 6. at page 10.
(2) [1951] S.C.R. 332.

We are in agreement with the trial court that the expressions "Potgi" (maintenance) or "Nirwahkrit" in the deed cannot be construed as conferring an estate with restricted rights of 'ownership', limited to the lifetime of Ramchandrarao and his linear male descendants. The deed evidence a permanent transfer or allotment of about 118 or 120 acres of land to Ramchandrarao to be enjoyed from generation to generation to the entire exclusion of Narayanarao and his descendants. In terms, Narayanarao did not reserve any right of reversion in favour of himself and his branch in any circumstances. Irrigation rights also with regard to the land transferred or allotted under this deed, were divided. It was further provided that from the date of the deed, payment of *Joodi* to the Government in respect of this land, shall also be the exclusive liability of Ramchandrarao and his descendants.

The inference that this land, measuring about 118 acres was given to Ramchandrarao in partial implementation of division of joint family status or partition, receives further confirmation from the following circumstances : (a) From the date of the deed, Ex. 39, till Ramchandrarao's death in 1955, for a period of about 53 years, the lands disposed of by the deed, throughout remained in the full, exclusive and uninterrupted enjoyment of Ramchandrarao. The relevant entries in the revenue records during this period, also, stand exclusively in his name as owner-in-possession thereof. (b) After the abolition of Watans in 1951, Ramchandrarao *alone* applied for regrant of this land in *his* favour, under the Watan Abolition Act. The plaintiffs were at all material times, admittedly aware that Ramchandrarao had applied for the regrant of this land exclusively in his favour, but they never objected, and tacitly assented to the same. On the other hand, the plaintiffs applied and obtained regarnt of the 'Desgat' lands (other than those which were the subject of the deed, Ex. 39), in their favour to the exclusion of Ramchandrarao.

In the light of the above discussion, we are of opinion (i) that there was partition or division of the joint family status sometime prior to the execution of deed, Ex. 39, and (ii) that the disposition of about 118 or 120 acres made under that deed was, in substance an absolute allotment of that land to Ramchandrarao, towards implementation of that division or partition in recognition of the latter's right to have his share demarcated by metes and bounds to be enjoyed exclusively in severalty.

Point No. 1 is thus found in favour of the appellant. In view of the above finding that the suit property was the separate, divided

property of Ramchandrarao at the date of his death, and under the traditional Hindu Law, would go by succession to his daughter, the appellant herein, to the exclusion of the plaintiff-collaterals, it is not necessary to decide Point No. 2 canvassed by the appellant.

In the result, for all the reasons aforesaid, we allow this appeal and dismiss the plaintiffs' suit with costs throughout.

P.B.R. *Appeal allowed.*