

(2005) 03 GUJ CK 0005
In the Gujarat High Court

Case No : First Appeal No. 7100 of 1995 with Civil Application No. 6201 of 1995

Kantibhai Ishwarbhai Patel through his heirs and Legal Representatives APPELLANT

Vs

Chandrakant Ishwarbhai Patel RESPONDENT

Date of Decision : 28-03-2005

Acts Referred:

Bombay Civil Courts Act, 1869 — Section 26, 26
Bombay Court Fees Act, 1959 — Section 6
Civil Procedure Code, 1908 (CPC) — Section 96
Suits Valuation Act, 1887 — Section 8

Citation : (2005) 3 GLR 2110

Hon'ble Judges : A.M. Kapadia, J

Bench : Single Bench

Advocate : A.J. Patel, for the Appellant; N.K. Majmudar, for Respondent Nos. 1-2, for the Respondent

Final Decision : Allowed

Judgement

A.M. Kapadia, J.—Instant Appeal u/s 96 of the CPC is directed against the judgement and decree dated September 30, 1995 rendered in Special Civil Suit No. 170 of 1985 by the learned Civil Judge (SD), Vadodara, by which the Suit filed by the appellant against the respondents for partition, claiming 1/3rd share in the ancestral undivided properties, mentioned in para 2 A to U of the Plaint, came to be dismissed.

2. For the sake of convenience, the parties herein are referred to as they are arrayed in the trial Court.

3. The facts giving rise to this First Appeal are as follows:

3.1 The plaintiff and the defendants are the real brothers and sisters. Their father - Isharbai Ranchhodbhai - died on 26.2.1982. The deceased Isharbai Ranchhodbhai was having ancestral properties of agricultural lands, Gabhan land and houses mentioned in para 2 A to U of the Plaint ("the suit properties" for

short) . It was alleged in the Plaint that the suit properties were the ancestral properties. The land bearing Revenue Survey No. 188 was also an ancestral property as the same was purchased from the income derived from cultivating ancestral properties bearing Revenue Survey No. 445 which was obtained by the deceased father as a tenant and therefore the suit properties shown in the Plaint were ancestral properties. According to the plaintiff, he had 1/4th share in the suit properties by birth, as the suit properties were divided into four equal shares amongst three brothers and the deceased father. It was also alleged that the deceased father had a right to execute the will in respect of his 1/4th share only and he had no right to execute the will in respect of the whole properties. According to the plaintiff, as his wife had some quarrel with the family members, he was residing separately from his father and his brothers were residing with his father. Therefore, taking advantage of his absence, the defendants have got executed the will of their father in respect of the suit properties. As per the averments made in the plaint, the plaintiff came to know about the will of his deceased father in the year 1982. It was also alleged that the defendants started getting false entries made in the Revenue record and therefore he raised dispute. When the plaintiff raised the dispute, the defendants gave the possession of Revenue Survey No. 445 and 188 to the plaintiff and, since then, the agricultural land is in his possession. The defendants had given assurance to the plaintiff at the relevant time that they will also give half portion of Adalwala Gabhan land and that was also entered into the name of the plaintiff, but the defendants did not give actual possession of the same to the plaintiff. According to the plaintiff, by misleading him, the defendants got their names entered in respect of rest of the properties and raised false dispute and also being pressurised by the defendants he was compelled to give his consent to enter their names in the revenue record in respect of the rest of the properties. It was also alleged that, taking advantage of his absence from his family, the defendants got the will executed in their favour in respect of the suit properties, which is not binding to him and thereafter transferred the land in their favour in Revenue Record. The plaintiff, therefore, requested the defendants to give his share in the suit properties but the defendants raised false dispute regarding Adalawala Gabhan land and the plaintiff, therefore, realised that the defendants did not want to give his share. The plaintiff, therefore, served a notice dated 5.2.1982 on the defendants, for partition and claiming his share in the suit properties. The defendants gave an evasive reply dated 18.2.1985 and, therefore, the plaintiff filed the suit for partition of the suit properties against the defendants by claiming his share in the suit properties and also prayed for actual possession of the same.

3.2 The suit was contested by the defendants by filing written statement at exh.9, wherein, inter alia, they have denied all the allegations and contentions made in the plaint. It was also stated that the plaintiff had no right to file the suit and the suit in the present form was not maintainable. The suit was also bad for nonjoinder of necessary parties. They denied that their deceased father had any

ancestral property. It was also asserted that some of the survey numbers were mortgaged at the time of marriage ceremony of defendant Nos. 3 and 4 and thereafter the mortgage was redeemed. According to the defendants, they alongwith the deceased father were jointly cultivating the land and earning money out of the same and, from that income, they got the mortgaged properties released and, therefore, according to them the suit properties cannot be termed as ancestral properties. It was also contended that after the marriage of the plaintiff he was residing separately from his father and, at the time of his separation he had taken full share and, therefore, the plaintiff had no right or interest in the suit properties. It was asserted that the suit properties were mortgaged and the same were redeemed by the defendants and their deceased father. Revenue Survey No. 188 was the self acquired property of the deceased father and the said Survey No. was purchased by the defendants' father from the income of all the defendants who had put hard work by cultivating lands and, thus the plaintiff had no right or interest in the suit properties. It was also denied that the land bearing Revenue Survey No. 445 was cultivated by their father as a tenant. It was also denied that the houses in the open lands were also ancestral properties. According to them, all the houses were purchased by their deceased father and therefore they were his self acquired properties. It was also contended that the deceased father had spent sizable amount in the marriage of the plaintiff and when the plaintiff started living separately, he was given his share and therefore plaintiff was not entitled to claim his share in the suit properties and therefore, according to them their deceased father had a right to execute the will in respect of the suit properties acquired by him. It was denied that they have illegally or unauthorisedly got the will of their deceased father executed in their favour. It was also asserted that the will was executed by their father in the year 1973 and at that time independent witnesses were also present and the plaintiff was given his share. It was also denied that they had got mutation entry in their favour in the revenue record, behind the back of the plaintiff. According to them, while making the entry in the revenue record, the plaintiff was present as all of them were served with the notice by the revenue authorities. Before the revenue department, the plaintiff had raised the dispute but, thereafter, on realising the real fact, he gave his consent on 1.8.1983 for entering the name of the defendants on the revenue record. It was also denied that, at the time of making the entries in the revenue record, the plaintiff was given survey Nos. 452 and 188 as, according to them, they were in possession of the said survey numbers. It was also denied that the plaintiff was given half portion of Adalawala Gabhan land. It was also contended that the suit properties were entered in the name of the defendants with written consent of the plaintiff and thereafter with a view to get some more share, he has filed the suit by making false and frivolous allegations. It was also contended that the plaintiff had not challenged the will executed by the deceased father, therefore, also the plaintiff was not entitled to get any relief as prayed for in the suit. Lastly it was contended that the plaintiff was not entitled to 1/3rd share from the suit properties as claimed by him in the plaint. It was therefore prayed to dismiss the

suit with compensatory cost of Rs.5000/= from the plaintiff.

3.3 On the basis of the pleadings, the learned trial Judge framed issues at exh. 10.

3.4 To bring home the reliefs claimed in the plaint, on behalf of the plaintiff, he himself was examined at exh. 11 and also produced several documents at exhs. 12 to 29, 31 and 32 whereas to disprove the claim made by the plaintiff, on behalf of defendants, defendant No. 1 Chandrakant Ishwarbhai Patel, was examined at exh.71 and one witness Govindlal Ranchhodbhai was examined at exh.101. The defendants had also relied upon several documents which were produced vide exhs.72 to 85, 89, 90, 92, 94 and 102.

4. On appreciation, evaluation and critical analysis of the evidence on record, the learned trial Judge has recorded a finding that the suit properties were ancestral properties, which were mortgaged and subsequently redeemed by the deceased father of the plaintiff and, the plaintiff never came to rescue of his father for redemption by never cultivating the land and never putting labour in the field and, therefore, on redemption of the mortgage, the said properties ceased to be ancestral properties and became self-acquired properties. On the basis of the aforesaid finding, the learned trial Judge came to the conclusion that the plaintiff failed to prove that he had 1/3rd share in the suit properties and, therefore, not entitled to the relief as prayed for. On the basis of the aforesaid finding and conclusion, the learned trial Judge dismissed the suit filed by the plaintiff, which has given rise to instant First Appeal at the instance of the original plaintiff.

5. Mr. A.J.Patel, learned advocate of the appellant raised the following contentions in support of the claim made by the plaintiff which can be summarised as under:

5.1 The suit properties were inherited by the deceased father from his grandfather. The agricultural land bearing Survey No. 188 was purchased under the provisions of the Tenancy Act as it was cultivated by the grandfather as a tenant and, on demise of the grandfather the father had inherited the said property and, therefore the said property was also an ancestral property.

5.2 The deceased father had no right to dispose of the suit properties by executing the will or, by any other manner except partition of the suit properties by making partition amongst his sons and himself because deceased father was merely a coparcener of the suit properties alongwith his three sons.

5.3 The succession opened on the death of the father, i.e. on 26.2.1988 and, therefore, the will alleged to have been executed by the father, is required to be ignored.

5.4 The entries effected in the revenue record has no evidentiary value for the purpose of establishing title to the suit properties, because they are effected only for fiscal purpose and in order to establish title to the land in question of which mutation entry is effected in the revenue record, the only remedy available is to

obtain a decree from the competent Civil Court.

6. To buttress the aforesaid contention, Mr. A.J.Patel, learned advocate of the plaintiff has taken this Court to the oral as well as voluminous documentary evidence to establish that the suit properties were ancestral properties at the hands of the deceased father who had never partitioned the properties and therefore the deceased father had no right to execute the will and, the entries made in the revenue records are only for fiscal purpose. In support of the aforesaid contention, he has relied upon the statutory provisions contained in the Hindu Succession Act ("the Act" for short), the Bombay Land Revenue Code ("the Code" for short) and also relied upon the following reported decisions of the Supreme Court as well as this Court:

- (i) Smt. Raj Rani Vs. Chief Settlement Commissioner, Delhi and Others,
- (ii) C.N. Arunachala Mudaliar Vs. C.A. Muruganatha Mudaliar and Another,
- (iii) Valliammai Achi Vs. Nagappa Chettiar and Others,
- (iv) Sankalchan Jaychandbhai Patel and Others Vs. Vithalbhai Jaychandbhai Patel and Others,

On the aforesaid premises Mr. A.J.Patel, learned advocate of the plaintiff has asserted that the judgement and decree which is impugned under the appeal is passed ignoring the evidence, statutory provisions contained under the Act and the Code and, the learned trial Judge was misdirected himself in dismissing the suit filed by the plaintiff, which is required to be quashed and set aside by decreeing the suit filed by the plaintiff in his favour, by allowing the suit filed by him. Therefore, according to him, this appeal is required to be allowed. He, therefore, urged to allow this appeal.

7. In counter submission Mr. N.K. Majmudar, learned advocate of the defendants, raised the following contentions which can be summarised as under:

7.1 The appeal before this Court is not maintainable as the same was required to be filed before the District Court as per the law laid down by this Court in its reported decision in the case of Filoma Pathubhai Patel and Ors. v. Ambalal D. Bhagat and Ors. 1987 (1) GLH 21.

7.2 The suit properties were self acquired properties at the hands of the deceased father in view of redemption of the mortgage by him and, therefore, the father had a right to bequeath the same as per his desire and will.

7.3 The plaintiff had not raised any objection at the time when the mutation entry was effected in revenue record and, therefore, he is estopped from raising any dispute in that behalf.

8. To fortify the aforesaid contentions, Mr. N.K.Majmudar, learned advocate of the defendants also relied upon the same piece of evidence which has been relied upon by Mr. A.J.Patel, learned advocate of the plaintiff. According to him, the

judgement and decree which is impugned under this appeal, is passed by the learned trial Judge in favour of the defendants, after considering the voluminous evidence and, therefore, the same is not required to be interfered with in this appeal. On the contrary, the same is required to be affirmed and, therefore, according to him the appeal lacks merit and deserves to be dismissed. He, therefore urged to dismiss the appeal.

9. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned judgement and decree, the set of evidence supplied by them during the course of their submissions and also the statutory provisions contained under the Act, the Code and the decisions cited at the bar.

10. Since Mr. N.K.Majmudar, learned advocate of the defendants has raised the preliminary contention about maintainability of the appeal before this Court, the said point is required to be dealt with first.

11. According to Mr. N.K.Majmudar, learned advocate of the defendants, the appeal before this Court is not maintainable as the appeal is required to be filed before the District Court in view of Section 8 of the Suit Valuation Act.

12. Mr. A.J.Patel, learned advocate of the plaintiff has submitted that the claim in the suit was valued at Rs.37000/= by the plaintiff, therefore as per Section 26 of the Bombay Civil Courts Act, 1869, the Civil Judge (SD) had jurisdiction to try suits of which the amount or value of the subject matter exceeded Rs.20,000/= and by virtue of the Gujarat Act No. 19 of 1993, the said amount was substituted by Rs.50000/=. The said amendment came into operation only w.e.f. 1.11.1993. Therefore, the learned Civil Judge (SD) had jurisdiction to decide the suit, and, therefore, the appeal against the decree passed in such suit would lie to this Court only.

13. On a perusal of para 6 of the plaint, there is no manner of doubt that the suit was valued at Rs.37000/= for the purpose of Court Fee Act and claiming 1/3rd share from the same and the plaintiff had paid the Court fee Stamp of Rs.925/= of his share of Rs.12500/= (1/3rd of Rs. 37000/=) and also paid Rs. 21/= Court fees by claiming 1/3rd share in the agricultural land. Therefore, obviously, the plaintiff had valued the suit exceeding RS.37000/= and, on the date of filing of the suit, the pecuniary jurisdiction of the Civil Judge (SD) was exceeding Rs.20000/=.

14. Mr. N.K.Majmudar, learned advocate of the defendants, by relying upon the judgement in the case of Filoma Pathubhai Patel and others (supra) contended that the valuation for the purpose of the court fee would automatically govern valuation for the purpose of jurisdiction and, therefore, the suit will have to be treated by deeming fiction of Section 8 of the Suit Valuation Act to be valued for the purpose of jurisdiction also on that basis. Therefore, the appeal would lie to the District Court.

15. On having looked at the said judgement of Filoma Pathubhai Patel and others (supra), the suit was filed on court fee stamp of Rs.30/= only and was valued for the purpose of court fees u/s 6(iv)(j) of the Bombay Court Fees Act, 1959 and, therefore, this Court has held that valuation for the purpose of court fee would govern the valuation for the purpose of jurisdiction and, therefore, the suit will have to be treated by deeming fiction of Section 8 of the Suit Valuation Act to be valued for the purpose of jurisdiction also on that basis and therefore the appeal would lie to the District Court.

16. In the instant case the plaintiff has not valued the suit on fixed court fee stamp of Rs.30/= but, as observed earlier, the suit was valued for the purpose of court fee also at Rs.37000/= and plaintiff had paid court fee stamp of Rs.925/= of his share of Rs.12500/- (1/3rd share of Rs.37,000/=). Therefore, the preliminary contention advanced by Mr. N.K.Majmudar has no merits.

17. At this stage, it would be advantageous to refer to the judgement rendered by a Division Bench of this Court in the case of Manubhai Khandubhai Naik Vs. Sumantrai Ranchhodji Naik since Deced. by his Heirs and L/R, wherein, this Court has held that; for the purpose of deciding whether the appeal lies or not to the High Court, the value for the purpose of jurisdiction would be material which was Rs.1 lac being the market value of the properties, as mentioned in Para 7. Obviously, therefore, against the judgement and decree of the learned Civil Judge (SD), an appeal would lie to the High Court in view of Sec. 26 of the Bombay Civil Courts Act, 1869, which provided that in all suits, decided by a Civil Judge of which amount or value of the subject matter exceeds Rs.10,0000/= (which later on was substituted by Rs.20,000/=), the appeal from his decision shall be direct to the High Court.

18. Applying the principle laid down by the this Court in the above referred to decision, to the facts of the present case, at the cost of repetition, be it stated that, in the instant case also, the plaintiff had valued the suit at Rs.37000/= for the purpose of court fee u/s 6 of the Bombay Court Fees Act and paid the court fee stamp of Rs.920/= of his notional share on valuation of Rs.12500/=. Therefore, obviously, the appeal would lie to this Court.

19. To answer the preliminary objection raised by Mr. N.K.Majmudar, learned advocate of the defendants it is also appropriate to reproduce Section 8 of the Suit Valuation Act which reads as under:

"8. Court fee value and jurisdictional value to be the same in certain suits; wherein suits other than those referred to in the Court Fees Act, 1870, Section 7, paragraphs (v), (vi), (ix) and (x), clause (d), Court fees are payable ad valorem under the Court Fees Act, 1870, the value as determinable for the computation of Court Fees and the value for purposes of jurisdiction shall be the same."

It is also appropriate to reproduce Section 6(vii) of the Bombay Court Fees Act, 1859 which reads as under:

"(vii) For share in joint property: In suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property whether or not the plaintiff is in actual or constructive possession of the property of which he claims to be a coparcener or co-owner according to the value of the share in respect of which the suit is instituted:

Explanation : For the purpose of this paragraph, if the property in which a share is claimed consists of or included any land assessed to land revenue for the purpose of agriculture, the value of such land shall be deemed to be the value as determined under paragraph (v) of this Section."

20. In view of the specific provisions contained in the Court Fees Act, Section 8 of the Bombay Civil Courts Act, 1979 will have no application to the present suit, therefore, also the decision relied upon by Mr. N.K.Majmudar, learned advocate for the defendants in the case of Filoma Pathubhai Patel and others (*supra*) will not be applicable to the facts of the present case.

21. It is also required to be noted that, infact no contention can be permitted to be raised in this behalf by the defendants in this appeal because, no such contention was ever raised before the trial Court and no issue was framed, and also no opportunity for meeting such a contention was ever afforded to the plaintiff during the trial of the suit. Moreover, this is not a case of absolute lack of inherent jurisdiction. As demonstrated hereinabove, the learned trial Judge did have jurisdiction to entertain the suit.

22. In aforesaid view of the matter, the preliminary objection raised by Mr. N.K.Majmudar, learned advocate of the defendants with regard to maintainability of the appeal before this Court has to be repelled and accordingly it is repelled and rejected.

23. Now, this takes me to the first contention advanced by Mr. A.J.Patel, learned advocate of the plaintiff that the suit properties were inherited by the deceased father from his grandfather, therefore were ancestral properties and subject matter of the partition at the hands of deceased father, wherein the plaintiff has a right since his birth.

24. According to Mr. Majmudar, learned advocate of the defendants, the suit properties were not an ancestral properties as the deceased father had acquired the same by his self labour and also same were mortgaged which came to redeemed by him in his life time.

25. In this connection, on having perusal of the oral as well as voluminous documentary evidence, there is no manner of doubt that the suit properties were inherited by the deceased father from his grandfather. There is also evidence on record that the father had no independent source of income out of which he could have acquired the suit properties. It is, however, true that the suit properties were mortgaged once upon a time which came to be redeemed by the

deceased father. However, the same were redeemed by the income earned by cultivating the suit properties. But merely because the father had redeemed one of the suit properties, would not change the characteristics of the suit properties. Once it is admitted that the suit properties were inherited by the father from his grandfather, the suit properties become coparcenary properties and unless a partition by metes and bounds is effected, the suit properties continue to be coparcenary properties and none of the coparcener has any exclusive right to deal with the suit properties or dispose of the same to the prejudice of the rights of the other coparcener. Once it is admitted that no partition had ever taken place during the life time of the father, on his death a notional partition would be presumed to have been effected as per the provisions of Sections 6 and 8 of the Act, which reads as under:

"6. Devolution of interest in coparcenary property :-

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the properties shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation -1 : For the purpose of this section the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation -2: Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

8. General rules of succession in the case of males:- The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:

- (a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;
- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased."

26. In this connection, it is profitable to refer to the reported decision of the Supreme Court in the case of Raj Rani (supra). In the said case, similar question arose before the Supreme Court with regard to the interpretation of Section 6 of the Act. The Supreme Court, while interpreting Section 6 of the Act, succinctly and aptly observed in paras 17 and 18 that; where a Hindu died after the enforcement of the Act leaving behind him his widow, three sons and three daughters, the devolution of his Mitakshara coparcenary properties would be as follows: In view of explanation I to S.6 he would have got $\frac{1}{5}$ th interest on partition between him and his wife and three sons. If once his interest was determined to be $\frac{1}{5}$ th before his death, his interest would devolve upon his widow, three sons and three daughters equally and thus the share of each one of them would be $\frac{1}{5} \times \frac{1}{7}$ that is $\frac{1}{35}$ th each and as the widow had inherited the interest of her husband after his death her share would be augmented by $\frac{1}{5}$ that is $\frac{1}{25} + \frac{1}{5} = \frac{8}{35}$.

27. Applying the principle laid down by the Supreme Court in above referred to judgement as well as statutory provisions contained under Sections 6 and 8 of the Act, to the facts of the present case, the father died leaving behind him three sons and two daughters. Therefore, on the death of the father a notional partition is presumed to have taken place, under which, four coparcener would be entitled to $\frac{1}{4}$ th share in the properties left by the deceased father. Therefore, three sons would be entitled to $\frac{1}{4}$ th share each and out of the $\frac{1}{4}$ th share of the deceased father, as per Explanation I to Section 6 of the Act, it would be divided amongst three sons and two daughters. Therefore, each of the heirs of the deceased father would be entitled to claim $\frac{1}{20}$ th share in $\frac{1}{4}$ th share of the deceased father. In this view of the matter, the plaintiff is entitled to claim share in the suit properties, which were ancestral properties at the hands of the deceased father. Therefore, it has to be held that the plaintiff is entitled to $\frac{1}{4}$ th share + $\frac{1}{20}$ th share in the suit properties. To put it more precisely, the plaintiff, in all, is entitled to 30% share in the suit properties.

28. Now this takes me to the second and third contentions advanced by Mr. A.J.Patel, learned advocate of the plaintiff that the deceased father had no right to dispose of the ancestral properties by a will except partition of the suit properties amongst his son because the father was merely a coparcener of the suit properties alongwith his three sons and the succession opened on the date of death of the father, i.e. 26.2.1988 and, therefore, the will alleged to have been executed by the father is required to be ignored.

29. It is settled proposition of law that the deceased father as a coparcener, could not have claimed any properties out of the suit properties as his self acquired properties or the properties exclusively owned by him because, he had inherited the suit properties from his father as an heir of the deceased grandfather of the plaintiff. Therefore, the suit properties were coparcenary properties in his hand. It is also an admitted position on record that the suit properties were never partitioned by metes and bounds during his life time. The

suit properties were coparcenary properties in the hands of the father and, therefore, could not have bequeathed any of the suit properties by will.

30. In this connection it is appropriate to refer to the decision of the Supreme Court in the case of C.N.Arunachala Mudaliar (supra). The relevant observations made in paragraph 12 is as under:

"According to Mitakshara, the son has a right by birth in his father's and grandfather's estate, but a distinction is made in this respect by Mitakshra itself. In the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father; while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or predominant interest in the same."

It is further observed that;

"The son can assert an equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his lifetime. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hand."

31. Applying the principle laid down by the Supreme Court in above referred to judgement, to the facts of the present case, since no partition was effected during the lifetime of the deceased father, the deceased father could not have executed any will in respect of the suit properties because, the suit properties continued to be a coparcenary properties till his death.

32. While dealing with the question as to the right of the father to execute a will in respect of coparcenary properties, the Supreme Court in the case of Valliammi Achi v. Nagappa Chettiar (supra) has clearly held that; the father in Mitakshara family has very limited right to execute a will in respect of the coparcenary properties in the absence of partition; that the father has a right to execute a will in respect of his self-acquired properties, but he has no right to execute any will in respect of the ancestral properties in his hand.

33. The aforesaid judgement is also squarely applicable to the facts of the present case. Therefore, in aforesaid premises, it has to be deduced that the suit properties were ancestral properties at the hands of the deceased father which was never partitioned and he has no right to execute the will in favour of any of his three sons and, therefore, the plaintiff has a right in the suit properties to the extent of $\frac{1}{4}$ th + $\frac{1}{20}$ th share.

34. It is feebly contended by Mr. N.K.Majmudar, learned advocate of the defendants, that there was an oral partition amongst the plaintiff and the defendants at the time of mutating the entry in the revenue record as the

plaintiff has given consent. For that purpose Mr. N.K.Majmudar, learned advocate has relied upon the revenue record and the mutation entries made in that behalf. As per the same, the suit properties were mutated in the names of the defendants.

35. It is settled proposition of law that the revenue record has no evidentiary value. They are made only for the fiscal purpose and, title to the properties cannot be decided on the basis of the mutation entries effected in the revenue record. Such entries are required to be effected in view of the provisions of Section 135C of the Code. Mutation entries have only presumptive value as provided u/s 135J of the Code, which reads as under:

"135J presumption of correctness of entries in record of rights and register of mutations:

An entry in the record of rights and a certified entry in the register of mutations shall be presumed to be true until the entry is proved or a new entry is lawfully substituted therefor."

36. On having perusal of the provisions contained u/s 135J of the Code, an entry made in the revenue record raises a presumption and, such entry is presumed to be true until contrary is proved. In the instant case, the presumption is rebutted by documentary evidence adduced on record of the case and, therefore, it stands rebutted.

37. In this connection, it would be appropriate to refer to the decision of the Supreme Court in the case of Sankalchand J. Patel (supra), wherein, the Supreme Court has held that; it is settled law that mutation entries are effected only to enable the State to collect revenues from the persons in possession and enjoyment of the properties and that the right, title and interest as to the properties should be established dehors the entries. The mutation entries are only one of the modes of proof of the enjoyment of the property. Mutation entries do not create any title or interest in the entries.

38. In view of the settled principles laid down by the Supreme Court in above referred to judgement, there is no manner of doubt that, if any dispute is not raised while effecting the mutation entry, it will not adversely affect the right of the plaintiff to challenge the said mutation entry at a subsequent stage. If the title to the land is claimed on the basis of such mutation entry, the Civil Court has jurisdiction to decide the question as to title irrespective of such mutation entry effected in the revenue record. In the present case the presumption has been rebutted by oral as well as documentary evidence adduced in the case. Even in the oral evidence the concerned defendants have admitted this fact. Once the question as to title to the suit land is raised the learned Civil Judge is required to decide the question as to title on the basis of the evidence that is led in the suit independently of the mutation entry and in light of the law laid down by the Supreme Court and this Court. In view of the law laid down by the Supreme Court, the mutation entry effected in the revenue record will be

required to be either cancelled or suitably modified as per the decision rendered by the Civil Court and therefore the defendants are not entitled to raise such contention that the plaintiff is estopped from raising such a dispute in the suit as he has not raised the dispute at the time when the mutation entry was effected. In this view of the matter, the contention advanced by Mr. N.K.Majmudar, learned advocate of the defendants, deserves to be rejected and, accordingly, it is rejected.

39. In aforesaid view of the matter, the findings recorded by the learned trial Judge that the suit properties were ancestral properties, which were mortgaged and subsequently redeemed by the deceased father of the plaintiff and, the plaintiff never came to rescue of his father for redemption by never cultivating the land and never put labour in the field and, therefore, on redemption of the mortgage, the said properties ceased to be ancestral properties and became a self-acquired properties is absolutely erroneous and perverse, which can never be sustained in view of the provisions contained under the Act as well as catena of decisions of the Supreme Court. Therefore, impugned decree is required to be quashed and set aside by holding that the plaintiff and defendant Nos. 1 and 2 have 1/4th share each in the suit properties and, so far as remaining 1/4th share of the deceased father is concerned, the plaintiff and defendant Nos. 1 and 2, sons and defendant Nos. 3 and 4, daughters have 1/20th share in 1/4th share of the deceased father.

40. In view of the aforesaid discussions, the judgement and decree, passed by the learned trial Judge, dismissing the suit filed by the plaintiff, deserves to be quashed and set aside by allowing the suit filed by the plaintiff, by holding that the plaintiff and defendant Nos. 1 and 2, each have 1/4th share in the suit properties and the plaintiff as well as all the defendants, including defendant Nos. 3 and 4 daughters have 1/20th share in 1/4th share of the deceased father. To put it more precisely, it has to be held that the plaintiff and defendant Nos. 1 and 2 each have a 30% share and defendant Nos. 3 and 4 each have 5% share in the suit properties.

41. For the foregoing reasons, the appeal succeeds and accordingly it is allowed, with no order as to costs. The judgement and decree passed by the learned trial Judge dismissing the suit filed by the plaintiff is quashed and set aside and resultantly the suit filed by the plaintiff is allowed and decreed, by holding that the plaintiff and defendant Nos 1 and 2, each have 1/4th share in undivided ancestral suit properties and the plaintiff and defendant Nos. 1 to 4 have a further 1/20th share out of the 1/4th share of the deceased father. To put it more precisely, it is held that the plaintiff and defendant Nos. 1 and 2 each have a 30% share and defendant Nos. 3 and 4 each have 5% share in the suit properties.

42. The matter is remitted back to the trial Court for passing final decree on the basis of this preliminary decree, after giving opportunity to all the concerned parties in accordance with law as expeditiously as possible and preferably on or

before 31.12.2005.

43. Preliminary decree be drawn accordingly.

44. Since the First Appeal is allowed, Civil Application No. 6201 of 1995 which is filed for interim relief in terms of para 5 (B) (ii) deserves to be granted. Accordingly relief in terms of para 5 (B) (ii) is granted and Rule is made absolute to the aforesaid extent with no order as to costs.