

(2020) 01 BOM CK 0159
In the Bombay High Court
Case No : Second Appeal No. 102 Of 2018

Kewalram And Ors

APPELLANT

Vs

Khemchand And Ors

RESPONDENT

Date of Decision : 31-01-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100
Evidence Act, 1872 — Section 68, 101
Hindu Marriage Act, 1955 — Section 5(i)
Indian Succession Act, 1925 — Section 63

Citation : (2020) 01 BOM CK 0159

Hon'ble Judges : Vinay Joshi, J

Bench : Single Bench

Advocate : T.G. Bansod, Deoul Pathak

Final Decision : Allowed

Judgement

1. Heard both learned counsel appearing for parties.
2. Being dissatisfied by the judgment and decree passed in Regular Civil Appeal No. 135/2006, original plaintiffs came in second appeal. Respondents Nos. 1 to 3 were appellants in first appeal as well as defendants of original suit. For the sake of convenience, the parties are referred as per their status before the Trial Court.
3. Regular Civil Suit No. 19/1998 was for declaration of title over suit land described in para 1A, 1B of the plaint and for perpetual injunction to restrain defendants from interfering into plaintiffs peaceful possession.
4. Shown unnecessary details, the facts can be stated as follows.
5. The suit property was comprising of various pieces of agricultural land and house property as described in para 1A and 1B of the plaint. Though the

property described in para 1C was included in plaint, however, plaintiffs have claimed relief about property described in para 1A and 1B of the plaint

which was referred as suit property. The entire suit property was initially owned by one Rama Ramteke. Plaintiff No. 1 Kewalram was nephew of

original owner Rama. One Gunabai was legally wedded wife of Rama. Since couple was issueless, somewhere in the year 1965 Rama brought a

widowed lady namely Baijabai to reside with him. Moreover, Rama also brought his nephew Kewalram (Plaintiff No.1) in his childhood to reside with

him as a â??Balposeâ? (nurtured from childhood). As such, Rama, his wife Gunabai, Plaintiff No. 1 Kewalram and a widowed lady Baijabai were

residing together till Ramaâ??s death of the year 1981. Matrimonial relationship of Rama with Gunabai was subsisting till Ramaâ??s death. Rama

never remarried to Baijabai at any point of time. Rama being issueless, had bequeathed suit property to plaintiffs by executing Will dated 17.06.1981.

6. After demise of Rama, plaintiffs started to cultivate suit land. Plaintiff No. 1 Kewalram was looking after Gunabai, Baijabai and other family

members. Though he acquired the title by way of testamentary document of Will, however he had not mutated his name to the Revenue Record of

suit property. Latter on due to differences, Baijabai went to reside with her children begotten from her deceased husband Tukaram Khobragade and

died there on 10.09.1995. Defendants who are children of Baijabai from Tukaram got mutated name of Baijabai to the Revenue Record of suit

property. Thereafter on the strength of Will allegedly executed by Baijabai, defendants got mutated their name to the revenue record of suit property

along with Gangubai. When Gunabai came to know about said mutation, she had approached to the Revenue Authorities. Thasildar had confirmed the

mutation in the name of defendants. Gangubai challenged the same to the Sub Divisional Officer and then to the Additional Collector. Since civil suit

was pending, the Additional Collector has not interfered with the controversy but directed to resolve the dispute in Civil Court.

7. According to plaintiffs, they acquired ownership by way of Will executed by Rama and then by another Will executed by Gunabai. The plaintiffs

were peacefully possessing suit property for a long period. However, defendants by virtue of false and bogus Will allegedly executed by Baijabai had

altered revenue entries and tried to disturb plaintiffsâ?? peaceful possession. Therefore, plaintiffs have filed suit for declaration of ownership and for

injunction.

8. Defendants resisted suit claim by denying the plaintiffs exclusive ownership. It is denied that Rama had adopted plaintiff No. 1 Kewalram during his

lifetime. Both testamentary documents executed by Rama as well by Gunabai were denied. Defendants came with a case that as Rama had no issue

from Gunabai, he remarried with Baijabai somewhere in the year 1950. After demise of Rama, his two widows i.e. Gunabai and Baijabai became the

joint owner of suit property as second marriage was preceding to the commencement of Hindu Marriage Act, 1955. According to defendants, revenue

entries were carried about ownership of both Gunabai and Baijabai. Further, it is defendants's case that Baijabai executed a Will dated 05.11.1993

in their favour and thus, they became owner to the extent of half of suit property. Defendants were cultivating half portion of suit property as absolute

owner.

9. The learned Civil Judge on examination of oral and documentary evidence held that plaintiffs failed to prove the theory of adoption of Plaintiff No.1

Kewalram by Rama. The Trial Court has not recorded a categorical finding regarding genuineness of Will of Rama. It was observed that Baijabai

came to reside with Rama in the year 1965 and therefore, even if it is accepted that she got married with Rama, she has no legal status. On that basis,

it is held that document of Will even if executed by Baijabai, has no force in law since she was not legally wedded wife of Rama. It is held that

plaintiffs acquired ownership on the strength of Will executed by Gunabai. Moreover, it is held that Baijabai has no legal status hence, she has no

power to dispose the property by way of Will. Accordingly, plaintiffs were held to be owner of the suit property.

10. Defendants challenged the judgment and decree of Trial Court in Regular Civil Appeal No. 135/2006. On re-examination and reassessment of the

evidence, the appeal was partly allowed. The First Appellate Court discarded the theory of adoption and both Wills allegedly executed by Rama and

Gunabai. It is held that Baijabai married with Rama in the year 1950 i.e. prior to the commencement of Hindu Marriage Act, 1955. Therefore,

Gunabai and Baijabai both took equal share in the suit property after demise of Rama and accordingly, modified the decree passed by the Trial Court.

The modification was to the extent that the plaintiffs were declared owner only to

the extent of half share of suit property and consequential relief of injunction was granted. In other words, the Trial Court held that plaintiffs were owner of entire suit property, whilst by reversing the decree, the First Appellate Court held that plaintiffs were owner to the extent of half share of suit property.

11. Being dissatisfied by reversal of decree, plaintiffs came in second appeal in terms of Section 100 of the Code of Civil Procedure. The appeal was admitted by framing following substantial questions of law:-

â??(1) Whether the appellate court was justified in disbelieving the will deed dated 17.06.1981 (Exh.60) and will deed dated 2.12.1995 (Exh.61), in holding against the appellants and reversing the decree passed in their favour by the Trial Court?

(2) Whether the appellate court was justified in holding that the appellants were entitled to only $\frac{1}{2}$ share in some of the suit scheduled properties?â??

12. The elaborate submissions were made by both sides on facts as well as on law. Defendants relied on some reported judgments to support their stand. Before entering in to the controversy, the placement of few admitted facts would be advantageous for quick appreciation of the issue involved.

There is no dispute that Rama was the original owner of the suit property. Undisputedly Gunabai was legally wedded wife of Rama. Baijabai was

residing with Rama during subsistence of his first marriage. Plaintiffs were the nephew of Rama. Defendants were children of Baijabai from her

erstwhile husband Tukaram. Rama had no issue either from Gunabai or Baijabai. Rama died in the year 1981. Baijabai died in the year 1995 whilst

Gunabai died in the year 1997. After demise of Rama, suit property was mutated in the name of Gunabai and Baijabai. The defendants names were

mutated to the Revenue Record to the extent of half share on the strength of testamentary documents of Will executed by Baijabai. Plaintiffs had filed

RTS appeal challenging the mutation carried in the name of defendants. Additional Collector instead of deciding appeal, directed plaintiffs to resolve the controversy through Civil Court.

13. The real controversy hinges around few question of facts coupled with legal position. They are pertaining to the adoption of Plaintiff No. 1 â?

Kewalram, execution of Will by Rama, Gunabai and legal status of Baijabai. Though the defendants have pressed into service the Will executed by

Baijabai, however it will fall for consideration only if Baijabai acquires any right in the property. It is disputed question of facts, firstly whether Baijabai

got married with Rama, and if so whether said marriage was prior to the commencement of Hindu Marriage Act, 1955. If the marriage of Rama with

Baijabai was prior to the commencement of Hindu Marriage Act, then only she would acquire right, title and interest in the property. Otherwise, she

has no lawful right to bequeath the suit property to defendants.

14. It is plaintiffs' case that Rama being issueless, had adopted plaintiff No. 1 Kewalram. It is pleaded in colloquial language that while Kewalram

was minor, as per custom he was taken as 'Balpose' by Rama. The learned counsel for plaintiffs would submit that 'Balpose' is nothing but

an adoption. On assessment, both Courts rejected the theory of adoption. There is no reason to take other view since there is no evidence on the point

of adoption. The plaintiffs have not pleaded and proved the custom or usage of the community relating to the adoption. There is no specific averment

as to when the adoption took place, meaning thereby, whether it was prior to the commencement of the Hindu Adoption and Maintenance Act, 1956.

Admittedly, no document was created nor there is evidence of ceremony of adoption. Moreover plaintiff No. 1 Kewalram never used Rama's

name as father at any point of time therefore, the story of adoption utterly fails and both the Courts rightly held accordingly.

15. It is plaintiffs' case that Rama had no issue from his wife "Gunabai. Therefore, somewhere in the year 1965, Rama brought widowed lady

namely Baijabai to reside with him. Though Baijabai lived with Rama and Gunabai till death of Rama, however Rama never married with her. As

against this, defendants came with a case of marriage of Rama with Baijabai of the year 1950. Admittedly, the parties have not led oral or

documentary evidence specifically about actual marriage between them. The Trial Court cast burden on defendants to prove that marriage of Rama

and Baijabai took place prior to the year 1955. On facts, the Trial Court held that defendants failed to establish Rama's marriage with Baijabai

that too prior to the year 1955. The First Appellate Court held that the plaintiffs failed to prove that Rama brought Baijabai in the year 1965. It is

observed that (para 58) there was no burden on defendants to prove that their marriage took place prior to the year 1955. Moreover, the First

Appellate Court observed (Para 28) that the marriage between Rama and Baijabai was not disputed. In-fact, the plaintiffs never admitted said

marriage at any point of time. However, the conclusion to that effect was drawn by the First Appellate Court which is erroneous. Rather the First

Appellate Court proceeded by presuming marriage between Rama and Baijabai as admitted one.

16. Undisputedly Gunabai was legally wedded wife of Rama. There is no dispute that Baijabai started to reside with Rama and Gunabai. The

Defendants are coming with a specific case that Baijabai got married with Rama prior to the year 1955. In the circumstances, the onus would

squarely lie on the defendants to establish a positive fact which they asserted. Section 101 of the Indian Evidence Act, 1872 cast burden on a party

who desires that Court to give judgment on the existence of certain fact which he asserts. Herein, the plaintiffs never asserted either about the

marriage of Rama with Baijabai nor stated that she was staying with Rama since prior to the year 1955. It is defendants's positive assertion about

the remarriage of Rama that too prior to the year 1955. It is apparent that the First Appellate Court has misdirected itself by wrongly placing burden

on plaintiffs to establish a negative fact which led to erroneous conclusion.

17. It is strange to note that First Appellate Court (para 61) observed that, defendants have not stated anything about marriage of Rama and Baijabai,

however held that there is presumption about the validity of marriage. This case is having peculiar facts where admittedly Rama was already married

with Gunabai. In the circumstances, mere long standing residence of another lady is not sufficient to draw a general presumption of valid marriage.

The defendants have not led evidence on the point of actual marriage. Notably defendant Khemchand is silent in his evidence as to when the marriage

between Rama and Baijabai took place. Moreover, during cross-examination, he admits that he does not know as to when Baijabai remarried with

Rama. Absolutely, there is no evidence about second marriage of Rama with Baijabai.

18. It has come in the evidence that plaintiff No.1 Kewalram born in the year 1956 and Rama brought Baijabai when he was barely 6 to 7 years of

age. It means that Baijabai came in the family somewhere in the year 1961 or in the year 1962. Even if remarriage is assumed in between Rama and

Baijabai of the year 1961-62 however, it is void being in contravention of Clause (i) to Section 5 of the Hindu Marriage Act. Therefore, in absence of

evidence, it is difficult to hold that Baijabai acquired any legal status in the family. In other words, Baijabai has not succeeded the property of Rama

and therefore, her testamentary document of Will carries no substance.

19. Reverting to the plaintiffs right to property, admittedly, Rama was owner of suit property. Undisputedly, plaintiffs are nephews of Rama. Plaintiffs

are coming with three fold case of acquisition of ownership. Firstly, they claimed ownership on the basis of Will dated 17.06.1981 executed by Rama.

Secondly, document of Will executed by Gunabai dated 02.12.1995 and lastly on the basis of succession. Defendants have strongly assailed the

plaintiffsâ?? claim by submitting that the plaintiffs cannot raise inconsistent pleas. In this regard, defendants relied on the decision of Supreme Court

in case of Sarva Shramik Sangh Vs. Indian Oil Corporation Limited and othes, (2009) 11 SCC 60,9 wherein their Lordships have expressed that

mutually repugnant and contradictory pleas, destructive of each other cannot be permitted to be urged simultaneously by a plaintiff. However, in said

case, it is also observed that, when there is no inconsistency in the facts alleged, parties are not prohibited from taking alternative pleas available in

law.

20. Generally neither the plaintiffs nor defendants can take contradictory pleas, but they both can take inconsistent pleas which are essentially

alternative pleas. There is no bar in law that inconsistent pleas cannot be taken. It is for the Court to determine whether they are inconsistent or

alternative pleas. The plaintiffs can rely upon different rights alternatively and there is nothing in the Code to prevent party from making two or more

sets of allegations and claiming relief thereunder in the alternative form. Both the pleas about acquiring title by way of Wills in the alternative form

are in the pleading itself by which the defendants had opportunity to meet the alternative claim. Ultimately, the plaintiffs claim is of ownership of suit

property but through different sources. The said set of pleadings cannot be considered, to be inconsistent and totally contradictory to each other.

21. In case at hand though the plaintiffs were claiming ownership by three sources, however it can not be said that the please are incosistent and

mutually destructive to each other. So far as the plea of acquisition of ownership

by inheritance is concerned, it is nothing but a legal fiction which naturally flows due to relationship. Though the plaintiffs were relying on two Wills, first executed by Rama and second by his widow Gunabai, there is no inconsistency as such. In rural area, the people use to prepare document as per their own understanding of the things. Merely because Gunabai has executed a Will despite knowledge of first Will executed by Rama, it cannot be termed as an inconsistent plea. The plaintiffs were making their case of acquisition of title by different sources which cannot be considered as inconsistent plea. The legal effect may be different, if Will of Rama is proved then the Will of Gunabai carries no meaning. The plaintiffs ultimately claimed ownership in alternative form which is quite permissible.

22. It is plaintiffs case that Rama bequeathed the entire suit property to them by executing Will dated 17.06.1981. The plaintiffs have examined PW-2

Vikram to prove the testamentary document. It appears that he is a scribe of the Will. He never deposed that after seeing the testator signing on the

Will, he has attested the same. The attestation of the Will is not an empty formality. It means that signing on document for the purpose of testifying of

the signature of the executant. The execution of the Will has to be proved in the manner laid down in the Section 68 of the Indian Evidence Act and

Section 63 of the Indian Succession Act.

23. The attestation of the Will means signing a document for the purpose of testifying of the signatures of the executant. Since a Will is required by

law to be attested, its execution has to be proved in the manner laid down in section 68 of and the Evidence Act which requires that at least one

attesting witness has to be examined for the purpose of proving the execution of such a document. Therefore, having regards to the provisions of

Section 68 of the Evidence Act and Section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner

provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about

the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.

24. The learned counsel for defendants would submit that the plaintiffs have failed to establish both Wills executed by Rama and Gunabai. In this

regard, defendants placed reliance on various decisions of Supreme Court in

cases of (i) Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam

Joykumar Singh and others, (2009) 4 SCC 780 (ii) Bhaiya Girja Datt Singh Vs. Gangotri Datt Singh, AIR 1955 SC 34 6(iii) Lalitaben Jayantilal Popat

Vs. Pragnaben Jamnadas Kataria and others, (2008) 15 SCC 365 (iv) Jagdish Chand Sharma Vs. Narain Singh Saini (dead) through legal

representatives and others, (2015) 8 SCC 615 (v) Meenakshiammal (dead) through Lrs. and others Vs. Chandrasekaran and another, (2005) 1 SCC

280. The law in this regard is fairly well settled by series of decisions. The burden lies on the propounder to show that Will was signed by the testator,

he was in a sound disposition state of mind, he understood the nature and effect of disposition and then put his signature on the Will by his free will,

inasmuch as testator has signed the Will in presence of two witnesses who attested it in their presence.

25. Evidence of PW-2 Vikram is totally silent that he has attested the Will after signature/thumb impression of Rama. It is pertinent to note that a Will

executed by Rama is an unregistered Will. No doubt, there is no legal requirement of registration of Will, however suspicious circumstances have to

be dispelled. Prominently, it strikes that though Will was allegedly executed in the year 1981, it has not seen the light of the day for a long period of 17

years. Plaintiff No. 1 who born in 1956 was near about 25 years of age at the time of execution of Will. Despite death of Rama in the year 1981, he

had not mutated his name on the strength of Will. It is not the plaintiffs' case that he was not aware about the execution of Will by Rama. Though

the property was mutated in the name of Gunabai and Baijabai, still plaintiffs slept over a Will for 17 years which is very suspicious circumstance and

to my mind a cogent reason to discard the Will. In the circumstances, plaintiffs failed to prove Will executed by Rama and finding of Courts below to

that effect is well justifiable.

26. It takes me towards another Will dated 02.12.1995 executed by Gunabai. In absence of proof of Will executed by Rama, Will of Gunabai assumes

significance. Undisputedly, the suit property was owned by Rama. There is no dispute that Gunabai was the legally wedded wife of Rama. In forgoing

discussion it is held that defendants failed to establish that Baijabai was legally wedded wife of Rama. The plea of adoption canvassed by the plaintiffs

was not established. In the circumstances, after demise of Rama, his widow

Gunabai being Class-I heir, became absolute owner of entire suit property. Therefore, naturally, she has right to dispose the property by way of testamentary document.

27. Coming to the disputed Will dated 02.12.1995, notably, it was a registered document. Registration of Will is one of the circumstance leading

towards genuineness. In order to establish the Will, the propounder has examined PW-2 Vikram Nagdeote (Exhibit-59) who is attesting witnesses to

the Will. Coincidentally, he was also the scribe of the Will of Rama. It has come in his evidence that on 02.12.1995, propounder Kewalram summoned

him as a witness to the Will executed by Gunabai. The Will was scribed by one Ghongade as per narration of Gunabai. The contents of Will were

read over to Gunabai who accepted the same, and put her thumb impression on the Will in presence of witnesses. He further testified that after seeing

Gunabai putting her thumb impression on the Will, he had also signed on the Will as witness. Then, another witnesses namely Kashinath Kambadi and

Shailesh Nagdeote also signed as a witness. He has identified the documents of Will which was marked as Exhibit-61.

28. Section 63 of the Indian Succession Act, 1925 deals with execution of unprivileged Wills. It lays down that the testator shall sign or shall affix his

mark to the Will or it shall be signed by some other person in his presence and by his direction. It further lays down that the Will shall be attested by

two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the

presence and on the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. Section 68 of the Evidence

Act mandates examination of one attesting witness in proof of a Will. The plaintiffs have complied the legal requirement by examining attesting

witness PW-2 Vikram Navghare. The defendants have criticized the evidence of attesting witness and raised some other grounds to discard the Will.

29. While assailing the Will, it is argued that Gunabai was aware about prior Will of Rama, hence there was no necessity for her to execute another

Will of the same property. It is matter of record that though Rama had allegedly executed a Will in the year 1981, it has not given effect to the

Revenue Record. Perhaps towards additional protection and to safeguard the rights of her keen, Gunabai had executed another Will. The said action

may be out of rustic commonsense or an outcome of villagers mentality. Therefore, the said reason itself cannot be sufficient to discard the Will.

30. Attesting witness PW-2 Vikram was unable to recollect the day of 02.12.1995 when Will was executed. He was unable to say the contents of

Will and was also unable to say as to who had brought the stamp paper for scribbling the Will. These admissions do not have much impact on the

genuineness of the Will. It is to be noted that Will was executed in the year 2005 whilst the rustic witness has faced the cross-examination after long

gap on 10 years. Therefore, these admissions which do not touch to the core issue have no impact on the genuineness of the Will. The evidences led

by the propounder and the attesting witness is cogent and reliable. It is not the case of defendants that the testator was of feeble mind or was under

influence when the Will was executed.

31. The disposition appears to be natural and probable one. Admittedly, Gunabai was issueless. There is no dispute that plaintiff No. 1 Kewalram was

residing with Rama and Gunabai for pretty long years. Testator Gunabai had no other relative than the plaintiffs. It has come on record that during old

age of Gunabai, she was under plaintiffs shelter. Therefore, it was quit natural for Gunabai to develop love and affection towards the plaintiffs so as to

bequeath the property. Undisputedly since childhood PW-1 Kewalram was living with Rama and Gunabai. Testamentary disposition discloses that one

piece of land was also bequeathed to the wife of PW-1 Kewalram. Since Kewalram and his wife were living with Gunabai at her old age, the said

disposition is quiet natural.

32. Pertinent to note that plaintiff No. 1 Kewalram was not the sole beneficiary of the Will. Gunabai had assigned her property not only to Kewalram

and his wife Kusum but to her nephews from other branches. Plaintiff Nos. 3 to 5 are also beneficiaries of Will who are her nephews from other two

brothers of deceased Rama. This circumstance leads towards genuineness of the document. Had it been the fraudulent document then plaintiff No. 1

Kewalram, would have got it prepared in his sole interest. Certainly he would not have asked Gunabai to bequeath the property to his cousins.

33. It is apt to note the observations of Honâ??ble Supreme Court in off quoted decision in case of H. Venkatachala Iyengar Vs. B. N.

Thimmajamma, AIR 1959 SC 443 which is as below:-

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death

of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his

will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is

proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as

in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator,

that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his

signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient

to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in

favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.â??

34. On these parameters the genuineness of the Will is examined. The evidence of attesting witness is reliable. There are no suspicious circumstances

to put dent on the Will. It was quite natural for Gunabai to bequeath property to plaintiffs who were taking her care during old age. Inasmuch as

without any discrimination, she had bequeathed the property equally among her all nephews. In the result, the Will executed by Gunabai is duly proved

and its effect has to follow.

35. The matter can be looked from one another angle. Even if Will executed by Gunabai is kept aside, still the plaintiffs would acquire ownership

rights. As noted above, after demise of Rama, Gunabai being sole Class-I heir would inherit ownership rights and after death of Gunabai, the plaintiffs

being Class-II heir would get rights by succession. However, the plaintiffs have proved that they acquired right, title and interest on the basis of valid

Will executed by Gunabai. Defendants are the children of erstwhile husband of Baijzabai who had no legal status. At the threshold, the First Appellate

Court has wrongly placed negative burden on plaintiffs to prove that Baijabai did not marry to Rama moreover, the burden was wrongly caste on

plaintiffs to prove that Baijabai was brought by Rama in the year 1965. As elaborated above, it is for defendants to prove their positive case of

marriage of Baijabai before commencement of Hindu Marriage Act. Consequently, the First Appellate Court erred in holding that Baijabai acquired

half rights over suit property by way of mutation entries. It is well settled that mutation entries are made for fiscal purpose which cannot create or

extinguish the title. Therefore, the entire approach of First Appellate Court was erroneous which leads to illegality.

36. It is plaintiffs case that they were in peaceful possession of entire suit property. The plaintiffs have led evidence about possession and produced

revenue extracts to support their case. Moreover, they produced several tax receipts showing that they had paid the taxes of suit property. On the

other hand, defendants have also produced some tax receipts, however they were post filing of the suit. Admittedly, in the year 1996 itself when the

defendants's names were entered on the strength of Will of Baijabai, it was challenged by Gunabai before the Revenue Authorities. The matter

was carried upto to the Additional Collector who in his wisdom has not resolved the controversy since civil suit was pending. Therefore, even if any

revenue extracts are filed by defendants which are after the suit, it will not assist them.

37. It has come in the defendants cross-examination that Baijabai was staying with them for a period near about 5 to 10 years preceding to her death

of year 1995. In the circumstances, it is difficult to believe that still defendants were cultivating suit land which was at some other place. The

defendants have not led any convincing evidence on the point of possession, therefore on the preponderance of probabilities, the plaintiffs's case

about long standing possession is acceptable.

38. To summarize the position, admittedly, Rama was absolute owner of the suit property. Gunabai was legally wedded wife of Rama who being sole

Class-I heir, had succeeded the suit property after demise of Rama. It is proved that Gunabai had bequeathed suit property to plaintiffs by executing a

Will. The Defendants miserably failed to prove that Baijabai was legally wedded wife of Rama. Consequently, the documents of Will executed by

Baijabai is of no consequences since she had no legal right to bequeath the property. In the result, the substantial question can be answered that the

Appellate Court failed in disbelieving the Will of Gunabai and in holding plaintiffs ownership to the extent of half share only.

39. It can be recapitulate that the plaintiffs have restricted suit claim to the extent of properties described in para 1A and 1B of the plaint. The Trial

Court by holding plaintiffsâ?? ownership over suit property passed declaratory decree and consequential relief of injunction which is well

maintainable. The First Appellate Court erred in reversing the decree by misreading evidence and placing negative burden on plaintiffs. The judgment

and decree passed by the First Appellate Court is not sustainable in the eyes of law. In view of that, second appeal is allowed. The judgment and

decree passed by the First Appellate Court is set aside and decree passed by the Trial Court is restored. No order as to costs.