
(2008) 08 BOM CK 0103
In the Bombay High Court
Case No : Second Appeal No. 193 of 1987

Lachmabai and Others

APPELLANT

Vs

Vithabai Namawar and Gangabai

RESPONDENT

Date of Decision : 13-08-2008

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 64(8)
Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 20 Rule 12, Order 7 Rule 11, 54

Citation : (2008) 6 ALLMR 144 : (2008) 6 BomCR 623 : (2008) 110 BOMLR 2759

Hon'ble Judges : P.R. Borkar, J

Bench : Single Bench

Advocate : S.M. Kulkarni, for the Appellant; M.B. Sabnis and R.L. Chintalwar, for the Respondent

Judgement

P.R. Borkar, J.—This is an appeal preferred by the original defendants being aggrieved by the decree of partition and separate possession passed by the III Additional District Judge, Nanded while deciding Regular Civil Appeal No. 174 of 1981 on 17th June, 1987. By the said decree the learned Additional District Judge reversed the judgment and decree passed in Regular Civil Suit No. 53 of 1974 decided on 30th March, 1981, whereby the original suit for partition was dismissed by the learned Civil Judge.

2. Some of the facts giving rise to this appeal are admitted at this stage and it is preferable to set them out at the outset. . One Piraji Koli had two sons Hanumant and Maruti. Maruti is present appellant No. 2 who was also original defendant No. 2. He died on 31.07.1987 after decision of first appeal. Hanumant expired on 23.09.1968. Appellant No. 1 Lachmabai was his widow. She died pending this appeal on 11th June, 1999. Lachmabai had a son Laxman who has been missing since about 3-4 years prior to 1969. It is also said that he was lunatic. Present respondent No. 1 Vithabai is wife of Laxman and present respondent No. 2 Gangabai is his daughter. Vithabai and Gangabai are original plaintiffs. Defendant Nos. 3 to 21 are various persons who have purchased various plots out of Survey

No. 298 situated at Tamloor, Tal. Degloor, Dist. Nanded. Many of them have purchased plots from Hanumant and some from original respondent No. 1 Lachmabai prior to the filing of suit.

3. It may be mentioned that there were 21 defendants when the suit was decided. When the first appeal was decided by the learned Additional District Judge, the respondents were 24 in number and in this appeal the appellants are shown 29. It is mainly because on death of some of the defendants their LRs are brought on record and they are shown separately. In this Second Appeal the original defendants and L.Rs. of deceased defendants are the appellants and original plaintiffs are respondents.

4. The suit filed by the plaintiff/respondent is for partition & separate possession and for declaration that the sale-deed dated 18.11.1968 by original appellant No. 1-Lachmabai in favour of original appellant No. 2 Maruti for Rs. 7000/- in respect of Survey No. 182 is void and not binding. The suit properties are parts of Survey Nos. 182 and 298 situated at village Tamloor, Tal. Degloor, Dist. Nanded. In order to avoid confusion, it is necessary to summarise the plaint as it stands today. Just below title, it is stated that the suit was filed for establishing right of share in partition and for possession over 7 Acres 8 Gunthas land out of Survey No. 182 and for declaring the sale-deed dated 18th November, 1968 by appellant No. 1 in favour of appellant No. 2 as null and void. Abuttals of said 7 Acres and 8 Gunthas land allotted to the share of Hanumanta are mentioned. It is said that on Eastern side there was share of original appellant Lachmabai, on Western side there was land of Dakaji s/o. Nagappa, on Northern side there was agricultural land of Shankar and on Southern side there was Panand and village boundary. Then it is stated that respondent/plaintiff wanted 1/3 share out of 4 Acres 7 Gunthas land from Survey No. 298. No abuttals are given of the 4 Acres 7 Gunthas land. In Para 2 it is stated that Survey No. 182, which was 14 Acres 16 Gunthas land, was purchased by joint family of Hanumant and appellant Maruti u/s 38A of the Hyderabad Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as "the H.T. & A.L. Act). It is also said that Hanumant was owner of 4 Acres 7 Gunthas land out of Survey No. 298. As per the H.T. & A.L. Act, said land was given to him. It is further stated in Para 3 that there was partition between Hanumant and appellant No. 2 Maruti in 1964 and Hanumant was allotted 7 Acres 16 Gunthas land on the Western side out of Survey No. 182 of which Hanumant was in possession. In order to establish his right over said Western 7 Acres 16 Gunthas land Hanumant had filed Regular Civil Suit No. 86 of 1964 in which appellant No. 2 Maruti gave written statement admitting claim and accordingly decree was passed.

5. It is further stated that Laxman was missing since before death of Hanumant and appellant No. 2 Lachmabai had sold portion of land of Hanumant in Survey No. 182 to appellant No. 2 original appellant No. 2 Maruti by sale-deed dated 18.11.1968. She had no right to sell entire land and each respondent has 1/3 share in said portion of survey No. 182. Each is entitled to 2 Acres 16 Gunthas

land (total 4 Acres 32 Gunthas). Originally the suit was only in respect of Survey No. 182. Thereafter 4 Acres 7 Gunthas portion out of Survey No. 298 was added by amendment and original defendant No. 3 to 21 were added without any addition to contents of the plaint. Thus, there is no pleading made or separate relief claimed so far as original defendant Nos. 3 to 21 are concerned.

6. Original defendant Nos. 1 and 2 have filed their written statement at Exh.11 and after amendment they filed amended written statement at Exh.26. It is stated that appellant No. 2 Maruti was protected tenant of 14 Acres 16 Gunthas Eastern portion of Survey No. 182. Hanumant was protected tenant of Western 14 Acres 16 Gunthas land. In Survey No. 298 which is admeasuring 8 Acres 14 Gunthas land, in Southern 1/2 portion Hanumant was protected tenant and appellant No. 2 Maruti was protected tenant of Northern half. The land was declared u/s 38-E of the H.T.& A.L. Act. Both Hanumant and appellant No. 2 Maruti got separate certificates of tenancy. One Narayanrao Khandekar was landlord of Survey No. 298. Venkatrao Deshmukh was landlord of Survey No. 182. The matter was fought up to High Court and the same was compromised. Hanumant surrendered his rights to Venkatrao Deshmukh and remaining land was agreed to be sold to Maruti. Accordingly, sale certificate was issued on 13.01.1964. It is specifically admitted in Para 4 that at the instance of some respectable persons (panch), though certificate was issued in the name of appellant Maruti, he gave 7 Acres 8 Gunthas land on Western side in Survey No. 182 to Hanumant. However, said transfer is illegal as there was no permission of the Additional Collector. It is also stated that decree obtained in Regular Civil Suit No. 86 of 1964 is also against the provisions of Section 38 and 50-B of the H.T.& A.L. Act.

7. It is further stated that as per decree obtained by Venkatrao Tejerao Deshmukh, Hanumant was to pay Rs. 4751/- and a decree was being executed by Venkatrao. For making payment of said amount and other amounts, respondent No. 1 Lachmabai sold Hanumant's share, as his sole heir, to appellant No. 2 Maruti by sale-deed dated 18.11.1968. Laxman s/o. Hanumant was missing during lifetime of Hanumant. Therefore, present respondents/ plaintiffs have only right of maintenance and no other right. It is further stated that out of 4 Acres 74 Gunthas land out of Survey No. 298 deceased Hanumant had sold his land by various registered sale-deeds and since the said land was adjacent to Tamloor village, several persons have purchased portions of land and made constructions in the portions of property in their possession. The details of sales are given in Para 12 in favour of various persons. In Para 12-D it is stated that plots were formed in Survey No. 298 and 2 Acres 10 Gunthas land out of share of Hanumant was under plots sold and roads prepared. Only 1 Acre 37 Gunthas is possession of appellant No. 1 Lachmabai and it is cultivated by appellant No. 2 Maruti. These are very important pleadings for the purpose of this appeal. It is further stated that more than half of Survey No. 298 was utilized for formation of plots and construction houses. The value of construction is more than Rs. 75,000/- and therefore the valuation is beyond pecuniary

jurisdiction of the Civil Judge Junior Division.

8. At Exh.75 there is written statement filed by defendant Nos.3 to 5, 7 to 13, 19,20 and heirs of defendant No. 6 and they have stated that from Hanumant one Ahmed Saheb s/o. Moulana had purchased 24 Gunthas land for Rs. 1000/- by a registered sale-deed dated 01.12.1966. Ghalappa and others resident of Tamloor have purchased 17 Gunthas from Southern middle portion for Rs. 2000/- from Hanumant by a registered sale deed dated 16.04.1968. It is further stated that Hanumant had formed plots in Survey No. 298 and sold them to various defendants. Similarly, Lachmabai sold 9 Gunthas land by registered sale deeds after death of Hanumant. The details of various sales are given in the written statement. Thus it is clear that defendant Nos. 3 to 15 & 20 have purchased properties from Hanumant. Defendant No. 16 has purchased 2 Gunthas land from Lachmabai on 14.02.1973 for Rs. 400/-. Defendant No. 17 Maruti purchased 4 Gunthas land from defendant No. 1 Lachmabai on 14.02.1973 for Rs. 400/-. Defendant No. 19 Hashanna purchased 3 Gunthas land for Rs. 600/- from Lachmabai. It is said that defendant Nos. 3 to 13, 15 to 17 and 19 & 20 are bonafide purchasers for value without notice and they have made constructions. The valuation of constructions was more than Rs. 75,000/- which was beyond pecuniary jurisdiction of Civil Court Junior Division.

9. All the sale-deeds were executed prior to filing of the suit. None of the sale-deeds are challenged nor any Court Fee is paid for setting aside said sale-deeds, nor there is prayer for declaration that the sale-deeds in favour of original defendant Nos. 3 to 21 are not binding on the appellants. No such prayer was added even by way of amendment though amendments were carried out to the plaint and litigation has been pending for more than 28 years.

10. The learned Civil Judge held that already there was partition between Hanumant and Maruti. Present suit is barred by principle of res judicata in view of decision of Suit No. 67 of 1969. He also held that the division of land between Hanumant and Maruti was invalid in view of Section 58-B of the H.T. & A.L. Act. So also the decree in Regular Civil Suit No. 86 of 1964 was also void for want of sanction u/s 58-B of the H.T. & A.L. Act. He held that present respondents/plaintiffs had no share. In the result he dismissed the suit.

11. The learned Additional District Judge came to the conclusion that the decree passed in Regular Civil Suit No. 86 of 1964 was binding. There is no bar of res judicata to the present suit, because of decision of Regular Civil Suit No. 86 of 1964 or Regular Civil Suit No. 67 of 1969. He further held that respondents/plaintiffs were entitled to partition and separate possession and accordingly he decreed the suit for partition and separate possession declaring that each of the respondents and Lachmabai have 1/3rd share in Western 7 Acres 8 gunthas land out of Survey No. 182 and in 298 admeasuring 4 Acres 7 Gunthas. He declared that the sale-deed Exh.119 was not effective and binding of the plaintiffs. It is this order which is challenged in this Second Appeal.

12. This appeal is admitted on 14.09.1987 on the substantial questions of law raised in ground Nos. VIII and IX of appeal memo, which may be stated as follows:

(i) Whether the transfer of portion of S.No. 182 to Hanumant by Maruti is against the provisions of Section 50-B of the H.T. & A.L. Act?

(ii) Whether the decision of previous suit filed in 1964 between the said parties and regarding the same property operates as bar of res-judicata to the present suit? At the time of hearing it is made clear that following two more questions of law need to be considered for deciding this Second Appeal and the parties have addressed the Court on the same.

(iii) Whether the shares of the parties are properly determined?

(iv) Whether the relief can be granted to the plaintiff-respondents, in absence of any pleading or relief regarding alienations of various portions of Survey No. 298 in favour of defendant Nos.3 to 21?

13. At Exh.95 there is copy of decree passed in Regular Civil Suit No. 86 of 1964. It is a suit filed by deceased Hanumant against his brother appellant No. 2 Maruti for perpetual injunction in respect of Survey No. 182 - Western half portion. The portion of the plaint is reproduced as part of the decree and it shows that as per the pleadings of deceased Hanumant, Survey No. 182 was in all admeasuring 14 Acres 16 Gunthas. It was purchased by both Hanumant and appellant No. 2 Maruti from their joint family income u/s 38-A of the H.T. & A.L. Act. However, certificate was issued in the name of appellant No. 2 - Maruti by mutual agreement dated 31.01.1964. At the time of Gudi-Padwa (Yugadi) of 1964, Hanumant and deceased Maruti by mutual consent partitioned the land to the extent of 1/2 each. The Western 1/2 was given to Hanumant and Eastern 1/2 was given to appellant Maruti and they were in possession of their respective shares. It is clear from the order that said claim of the plaintiff was admitted by the defendant by written statement Exh.6 and since the parties were not at issue, the suit was decreed under Order 12 Rule 6 of the C.P.C. We cannot say that this decree is a transfer. In-fact, it is averment of one party regarding past act of the parties in entering into family arrangement or oral partition and admission of said position by the other.

14. Section 50-B of the H.T. & A.L. Act is as follows:

50B - (1) No land purchased by a tenant u/s 38, 38A, 38E, 38F, 38G, 38H or 46D or 48 or sold to any person u/s 53F, 53G, 53H or 98C shall be transferred by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector. (2) Any transfer of land in contravention of Sub-section (1) shall be invalid.

15. This section makes it clear that transfer of in violation of Section is not null and void, but only invalid and Section 98-C lays down how there should be disposal of land of which alienation is invalid. It is clear from Section 98-C of the

H.T. & A.L. Act that where in respect of the permanent alienation, transfer or acquisition of any land made on or after the commencement of the Amendment Act, 1957, the Tahsildar suo motu or on the application of any person interested in such land has reason to believe that such alienation, transfer or acquisition is or becomes invalid under any of the provisions of the Act, the Tahsildar shall issue a notice and hold inquiry as provided for in Section 98-B and decide whether the alienation, transfer or acquisition is or is not invalid.

16. Sub-section 3 of Section 98-C of the H.T.& A.L. Act lays down that where declaration is given that alienation, transfer of acquisition was invalid, the land shall be deemed to vest in the State Government free from all encumbrances lawfully subsisting thereon on the date of such vesting and shall be disposed of in the manner provided in Sub-section (4). So, it is not that invalid alienation which are in contravention of Section 50-B are null and void. They are only invalid after declaration by the Tahsildar and then the land vests in the Government and it does not go back to the vendor or transferor. Such lands are to be disposed of as per Sub-section 4. On payment of price determined such land is to be sold to the tenant in actual possession or the person or bodies as per the order given in Section 53-E. There are detail guidelines about disposal of the land. Section 98C-1 further lays down that notwithstanding anything contained in Sections 98A, 98B or 98C, a permanent alienation, transfer or acquisition of any land in contravention of Section 38D or any of the provisions of Chapter V as they stood immediately before the commencement of the H.T.& A.L. (Amendment) Act, 1965 made before the 9th day of July, 1965 and which has not already been validated u/s 98A, 98B or 98C before such date shall not be deemed or declared invalid, if purported alienee is in possession of the land and he pays to the State Government a penalty equal to 1 per cent of the consideration or Rs. 100 whichever is less.

17. In the first place there is no alienation by appellant No. 2 Maruti to Hanumant. It is admitted by both that it was their ancestral property owned by both, purchased out of joint family income and that they have partitioned it with mutual consent.

18. Here I may refer to only those judgments cited by the parties which are necessary to refer to for the decision of this Second Appeal. As laid down in the case of Ram Charan Das Vs. Girjanandini Devi and Others, family settlement does not amount to transfer as it does not create interest. The observations in Para 11 are as follows:

(11)...In the first place once it is held that the transaction being a family settlement is not an alienation, it cannot amount to the creation of an interest. For, as the privy Council pointed out in AIR 1914 44 (Privy Council) in a family settlement each party takes a share in the property by virtue of the independent title which is admitted to that extent by the other parties. It is not necessary, as would appear from the decision in Rangasami Gounden v. Nachiappa Gounden 46 IA 72 : AIR 1918 PC 196 that every party taking benefit under a family

settlement must necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground as, say affection.

19. In view of above the Appellate Court have not committed any error in holding that there was no transfer of any portion of land by appellant No. 2 Maruti to Hanumant. Accordingly, I answer the first issue.

20. It is argued before me that above said decree in Regular Civil Suit No. 86 of 1964 amounts to res judicata and the present suit is not tenable. It may be noted that the decision of Regular Civil Suit No. 86 of 1964 was in respect of Survey No. 182 only. Therein decree of perpetual injunction was passed on the basis of admission. It was a suit for perpetual injunction simplicitor. Present suit is suit for partition of lands allotted to the share of Hanumant. So it would not act as res judicata. However, the pleadings in Regular Civil Suit No. 86 of 1964 makes it clear that already there was partition of Survey No. 182 between Hanumant and appellant No. 2 Maruti. The partition had taken place on the day of Gudipadwa of 1964 and Western 1/2 portion of Survey No. 182 was given to Hanumant and Eastern half was given to the share of appellant No. 2 Maruti. This position is admitted by appellant No. 2 Maruti in Written Statement Exh.26 in Para 4 and 5. Hanumant is predecessor in title of present respondents. So the parties are bound by what has been pleaded and admitted in said suit, as the Court has acted on those admission and passed the decree. They are now stopped from denying the same. However, so far as appellant No. 1 Lachmabai and present respondents are concerned, there was no partition between them, so far as property inherited by them from Hanumant, and as such it cannot be said that there is any bar of resjudicata or estoppel. However, since it is admitted position now that the portion of land inherited by Hanumant was purchased by appellant No. 2 Maruti from appellant No. 1 Lachmabai, he has entered in to shoes of Lachmabai. There is no bar of res judicata to the present suit.

21. At Exh.32 there is copy of Regular Civil Suit No. 67 of 1969 filed by the present respondents/plaintiffs and Laxman through his wife respondent No. 1 Vithabai. That suit was against appellant No. 1 Lachmabai and appellant No. 2 Maruti. It is stated in the judgment (copy of which is produced at Exh.84) and the decree (copy of which is produced at Exh.85) that as per the present respondents, Hanumant died on 23.09.1968. Hanumant and Laxman were joint and suit property Survey No. 182 was their joint family estate. Laxman had become mad and left the village and his whereabouts were not known for three years prior to filing of the suit. It is further stated that present respondents were entitled to right of maintenance and in that capacity they have right to get possession of the land. However, appellant No. 2 Maruti had obtained sale-deed from appellant No. 1 Lachmabai for Rs. 7000/- on 18.11.1968. Lachmabai was not competent to execute the sale-deed and therefore it is ineffective against plaintiffs and therefore the suit was filed for getting possession of Survey No.

182 and also declaring the sale-deed was ineffective. The learned Judge framed issues and held that it was not proved that Laxman was insane and was missing for three years prior to filing of the suit and his whereabouts were not known. Therefore, he held that present respondents were not entitled to sue and therefore the suit was dismissed with following order:

Having regard to the above findings it is held that suit of the plaintiffs in the present form or nature is not tenable so it is dismissed. In the circumstances parties to bear their own costs.

22. In my opinion, this judgment does not decide any issue which is raised in the present suit. The suit was necessarily disposed of as it was not tenable in the form in which it was filed. So, there is no bar of res judicata to the present suit.

23. Here I may refer to the case of Agricultural Produce Market Committee v. Ranvijaysingh Channusingh Dikkat 1994 Mh.L.J.1127. In that case it is held that where plaint is ordered to be rejected under provisions of Order 7, Rule 11 of the Civil Procedure Code, the order does not amount to dismissal of suit on merits. Similarly, it cannot be said that Civil Suit No. 67 of 1969 was decided on merits and rights of respondents were determined vis-a-vis appellant Nos. 1 and 2 and therefore I hold that there is no bar of principle of res judicata to the present suit.

24. That takes me to other two issues framed. So far as alienations to respondent No. 3 to 21 are concerned, in the written statements Exh.26 so also at Exh.75, all the details were given. As admitted in the plaint of Regular Civil Suit No. 86 of 1969 Hanumant and Laxman were joint and present respondents were claiming their right through Laxman. It is not disputed that during lifetime of Hanumant, he was manager of the family and as such he had right to dispose of the property for legal necessary and also for benefit of estate. The written statements filed by the defendants which are extensively reproduced earlier clearly show that Hanumant during his lifetime sold various portions of Survey No. 298 by registered sale deeds for different consideration to different persons. He even developed a portion of Survey No. 298, prepared roads and constituted plots and sold them during his life time. Copies of none of those sale-deeds are produced by the plaintiffs/respondents nor any details of those sales are given. Those sale deeds are not challenged. As Karta or manager of the joint family, Hanumant had every right to sell the joint family property for benefit of estate and legal necessity. Developing a land for residential purpose and then selling plots or selling land for development for residential purpose is definitely an activity for benefit of estate. In absence of any challenge to alienations made by Hanumant during his life time, in my opinion all those sale-deeds need to be protected and definitely the Additional District Judge has overlooked this aspect.

25. So far as defendant Nos. 16,17 & 19 who have purchased respectively 2,4 & 3 gunthas lands for consideration from appellant No. 1, it may be noted that in the 7/12 extract produced on record, name of appellant Lachmabai is appearing as owner after the death of Hanumant. The documents even show that said

entering name of Lachmabai in the revenue record was challenged by present respondent Nos. 1 and 2. The 7/12 extracts are at Exh.97. Copies of Ferfar register are at Exh.104 & 105. At Exh.108 to 117, the defendants have produced Sanads issued to them by the Special District Inspector of Land Records. Those are not disputed. Defendant nos. 3 to 21 have also come with a case that they are bonafide purchasers for value without notice. There is nothing on record to show that any attempt was made to challenge the sale deeds. But, assuming for a moment that after death of Hanumant, Lachmabai was not sole owner and as such was not entitled to sell the land still property which is sold by Lachmabai of defendant Nos. 16, 17 & 19 can be allotted to the share of Lachmabai, as definitely she had right to sell property of her share. It is also worth noting that sales in favour of such defendant Nos. 16, 17 and 19 are not challenged within three years from their execution. The amendment to add defendant Nos. 3 to 21 was made in 1979 though original suit filed on 17.07.1974. So, looking to these aspects, in my opinion, it is necessary to protect interest of defendant Nos. 3 to 21. It has also come in evidence that they have constructed houses and other structures on the portions of land purchased by them and if suit was to be filed for possession thereof, the valuation should have been made accordingly. When properties are changed from agricultural land to residential properties and they have become non-agricultural lands, in that case, market value of such properties should have been shown in the plaint for the purpose of Court Fee and jurisdiction. The defendants have taken plea that valuation of structures on Survey No. 298 was Rs. 75,000/- which was far more than pecuniary jurisdiction of Civil Judge Junior Division. No issue was framed to that effect. No prayer for transferring the suit to Civil Judge Senior Division was made by amending valuation of the suit. In these circumstances I hold that the suit deserves to be dismissed against appellant Nos. 8 to 29 (defendant Nos. 3 to 21).

26. It is argued before this Court that sale effected by appellant No. 1 in favour of appellant No. 2 dated 18th November, 1968 is hit by Section 58-B of the H.T. & A.L. Act. We have already referred to the relevant provisions of the H.T. & A.L. Act and it is clear that any sale without permission of the Collector would be invalid. An enquiry has to be made u/s 98-C by Tahsildar who can declare the alienation or transfer as invalid and thereafter it vests in Government. It is to be disposed of as per Sub-section 4 of Section 98-C. The transfer is not void or nullity. So that part of the argument has no merit.

27. Here I may refer to a case decided by the Gujrat High Court while interfering word "invalid" in context of Section 64(8) of the Bombay Tenancy and Agricultural Lands Act, 1948. The Gujrat High Court in Mavjibhai Dharsibhai and Others Vs. State of Gujarat and Others, held that "transaction in contravention thereof would be invalid" mean that an invalid transaction per se may be invalid but it will not be invalid unless it is decided or declared to be so. It is clear that invalid transaction is made equivalent to a voidable transaction and not a void transaction.

28. However, after death of Hanumant, appellant No. 1 Lachmabai who was widow of Hanumant had no right to sell any property of her son Laxman or present respondents. She had no powers of Karta. In this view of the matter the sale deed dated 16th April, 1968 is not binding on the respondents to the extent of their shares.

29. It may be noted that the decision in Regular Civil Suit No. 86 of 1964 which is decided on 3rd August, 1964 and the pleadings there in are clear enough to show that in Survey No. 182 Western 7 Acres 8 gunthas land was owned by Hanumant. As admitted in written statement by present appellant No. 1 and 2 - (Lachmabai and Maruti) at Exh. 26, Western 7 Acres 14 Gunthas land out of Survey No. 182 was owned by Hanumant. Out of Survey No. 298, Hanumant owned Southern 4 Acres 7 Gunthas land. After sales by Hanumant and appellant No. 1 Lachmabai only 1 Acre 37 Gunthas land remained in possession of appellant No. 1 Lachmabai, which was cultivated by appellant No. 2 Maruti (see para 12-D of Exh.26). Only these properties are now available for partition and/or possession as properties of Hanumant. In the final decree proceedings, opportunity can be given to the parties to lead evidence to identify said 1 Acre 37 Gunthas land.

30. Hanumant who died on 23.09.1968 had two heirs one appellant No. 1 Lachmabai and son Laxman. Each of Hanumant, Laxman & Lachmabai had 1/3 share in the ancestral property. After death of Hanumant, his 1/3 share would devolve on both appellant No. 1 Lachmabai and her son Laxman equally. So appellant No. 1 Lachmabai would be entitled to 1/2 share in total property of Hanumant and Laxman would be entitled to remaining 1/2 share. It is not disputed anymore that Laxman has been missing since three years prior to filing of the suit No. 67 of 1969 and his whereabouts are not known. So, he could be deemed to be dead in 1973-74 as nobody had heard of him since he was missing. Present respondents have share in the share of Laxman as his heirs with Lachmabai. As Lachmabai has died on 10.06.1999 as per document produced as R-1 at Civil Application No. 8387 of 2008, therefore 1/2 share of Laxman would be equally divided amongst appellant No. 1 Lachmabai and each of respondent Nos. 1 and 2. So each respondent/plaintiff has 1/6th share in the property of Hanumant.

31. The appellants filed Civil Application No. 8632 /2008 for amendment of the appeal memo and want to add few grounds. In this Civil Application filed on 05.08.08, appellants do not plead execution of any will or gift or sale or other transfer by appellant No. 1 Lachmabai in favour of Maruti or his heirs. So after death of appellant No. 1 Lachmabai pending this appeal, her share would be inherited in Survey No. 298 by the present respondents. So, there is no question of its partition. They should get possession of entire 1 Acre 37 Gunthas land belonging to them and appellant No. 1 Lachmabai which as per Para 12-D of written statement (Exh.26) is in possession of appellant No. 2 Maruti. However, since appellant No. 2 Maruti had purchased share of appellant No. 1 Lachmabai

by sale-deed dated 16.04.1968, his legal representatives have 4/6th share in Survey No. 182.

32. In the result, the Second Appeal succeeds partly. Regular Civil Suit No. 53 of 1974 is dismissed against original defendant Nos. 3 to 21. Western 7 Acres 8 Gunthas land in Survey No. 182 of village Tamloor, Tal. Degloor, Dist. Nanded is liable for partition between respondents/plaintiffs and legal representatives of deceased appellant Maruti Piraji. Each of the respondents has 1/6th share and legal representatives of appellant Maruti Piraji have 4/6th share in it. The partition of said land be effected by the Collector or any gazetted subordinate deputed by him in this behalf, as per Section 54 of CPC and the respondents be put in to possession of their shares. The respondents are entitled to possession of 1 Acre 37 Gunthas land out of Survey No. 298 of Tamloor, Tal. Degloor from legal representatives of appellant Maruti Piraji. Parties be given opportunity during final decree proceedings to identify said portion referred in para 12-D of Written Statement (Exh.26). The sale-deed dated 16.04.1968 executed by appellant Lachamabai in favour of appellant Maruti Piraji is held not binding to the extent of shares of the plaintiff/respondent in S.No. 182. Enquiry be held about mesne profits under Order 20 Rule 12 of the Code of Civil Procedure. The respondents are entitled to mesne profits from the date of suit till actual possession from legal representatives of deceased appellant Maruti Piraji. . The decree of the first appellate Court is set aside and modified as above. . The Second Appeal is disposed of accordingly. Parties are directed to bear their own costs.