

(2010) 11 KAR CK 0144

In the Karnataka High Court

Case No : Regular First Appeal No. 496 of 2003 (PAR)

Mhalsa Marthand Kulkarni, Vijaya @ Ranjani and Sanjeeva
Marthand Kulkarni

APPELLANT

Vs

Bheemaji Malharrao Kulkarni and Others

RESPONDENT

Date of Decision : 12-11-2010

Acts Referred:

Citation : (2013) 1 AKR 322 : (2013) 1 KCCR 363

Hon'ble Judges : V.G. Sabhahit, J;B.V. Pinto, J

Bench : Division Bench

Advocate : V.P. Kulkarni, for the Appellant; G. Balakrishna Shastry, Advocate for R1 and R2 and Sri G. Ravishankar Shastry, Advocate for R4, for the Respondent

Final Decision : Dismissed

Judgement

V.G. Sabhahit, J.—This appeal is filed by the defendant Nos. 4, 5 and 7 in O.S. No. 5/1997 on the file of Prl. Civil Judge (Sr.Dn.), Bailhongal being aggrieved by the judgment and decree dated 17.12.2002, whereunder suit filed by the respondents 1 & 2 herein has been decreed against Defendants 1a to 8 for partition and separate possession of their 7/36th share each or 14/36th share together in the entire suit properties mentioned in the plaint schedule A, B and C and defendants 2 & 3 are entitled to 7/36th share each, defendants 4 to 7 together are entitled to 7/36th share, defendant 1a is entitled to 1/36th share in the entire suit properties mentioned in the plaint schedule A, B & C and they are at liberty to apply to the court during the final decree proceedings for partition and division of their share by paying necessary court fee. It is further ordered that the registered sale deed dated 22.11.1996 executed by defendant No. 7 in favour of defendant No. 8 with respect to the Sl. No. 1 of plaint schedule "B" is null and void and not binding on the share of the plaintiff Nos. 1 & 2. The essential facts of the case leading upto this appeal with reference to the ranks of the parties before the trial court are as under:

Plaintiffs 1 & 2 (Respondents 1 & 2 herein) filed O.S. No. 5/97 on the file of the

Prl. Civil Judge (Sr.Dn.), Bailhongal, seeking for partition and separate possession of their share in the suit schedule "A", "B" & "C" properties, more fully described in the schedule.

2. The plaint commences with a description of the suit properties. Schedule "A" landed properties comprises of seven items of land; Sl. Nos. 1 to 6 situated at Jamalur Village and the land in Survey No. 225 at Sl. No. 7 is at Sangolli Village. Schedule "B" comprises of one house and backyard situated at Jamalur Village at Sl. No. 1, an open site at Sl. No. 2 and houses at Sl. Nos. 3 & 4 are situated at Sangolli Village. Schedule "C" comprises of "A" Class shares of M.K. Hubli Sugar Factory standing in the name of deceased Marthand Malharrao Kulkarni.

3. It is the case of the plaintiffs that Malharrao Bheemaji Kulkarni, defendant No. 1 in the suit had five sons, Viz., Marthand (predeceased his father), Dattatraya (Defendant No. 2), Chidamber (Defendant No. 3), Bheemaji (Plaintiff No. 1) and Neelkanth (Plaintiff No. 2). Marthand died leaving behind his wife: Mhalasa (Defendant No. 4), his daughters: Smt. Vijaya @ Ranjani W/o. Gurunath Nadgir (Defendant No. 5) & Smt. Vinaya W/o. Prakash Torvi (Defendant No. 6) and son, Sri Sanjeev (Defendant No. 7). It is the case of the plaintiffs that the suit schedule properties are the joint family properties of the family as there was no partition of the same. It is averred that the plaintiffs have got 50% share in the schedule properties. That Malharrao and his brother Vitthal Bheemaji Kulkarni were also not divided and they were entitled to 50% share each in the schedule properties and Malharrao had a brother whose grandson: Pradeep is arrayed as Defendant No. 9 in the suit. It is averred in the plaint that the family of the plaintiffs and defendants 1 to 7 is a joint Hindu family. Suit schedule properties are the joint family properties as there is no partition between plaintiffs and defendants 1 to 7 in regard to the suit schedule properties. Properties at Sl. Nos. 1 and 2 in Schedule "A" were purchased in the names of Defendant Nos. 2, 3 and deceased Marthand Malharrao Kulkarni/father of Defendant Nos. 5 to 7 and husband of Defendant No. 4, out of the compensation amount received by the submergence of the joint ancestral family land at Old Sangolli. The suit property mentioned at Sl. No. 1 in "B" Schedule was previously an open site, which was purchased in the name of the deceased Marthand as the elder member of the family; it was purchased from one Sri Irappa Shivarudrappa Telgede under the registered sale deed dated 03.05.1976 and measuring east-west 23 cubits and north-south 50 cubits out of the joint family funds. After the purchase of the open site, a house has been got constructed on this open site and the house measures totally 150 Sq.ft. The remaining portion is the back yard to this constructed house and at the time of purchase of this open site, the number of the property was G.P. No. 433/A. After the construction of the house on this open site, it has been given G.P. No. 54/A. After the death of Marthand, now this property is standing the name of Defendant No. 7. The joint family had a house in Old-Sangolli which has been acquired by the Government under Malaprabha Project and compensation was awarded. With the help of this compensation amount, a new house has been got constructed in gaon-thana of Sangolli village

for residential purpose and so also out of this compensation amount, another building is got constructed wherein now Defendant No. 3 is running his hospital. These two properties are now bearing G.P. No. 455 and 456. There is also an open site allotted by the Government and it is bearing G.P. No. 453. These properties are now standing in the name of Defendant No. 1.

4. It is further averred that shares worth Rs. 500/- of "A" Class of M.K. Hubli Sugar Factory was also purchased in the name of deceased Marthand. The said shares were also purchased out of the joint family funds. The shares and other benefits of it are also the joint family properties. The Defendants 1 and 3 are residing in Sangolli and are managing the joint family properties. The joint family properties are in joint possession of plaintiffs and defendant Nos. 1 to 7 till the date of this suit. And even after the death of Marthand, the sugarcane grown in the joint family lands is sent to M.K. Hubli Sugar Factory in the name of deceased Marthand and the proceeds were accumulated in the said share. It is further averred that if there is any property in the name of plaintiffs and Defendant No. 2, it is their self-acquired property. They have never taken any joint family income for the acquisition of the property. Defendant No. 3 is also practicing doctor at Sangolli and out of his own income, he has purchased some lands in his name. They are also his self-acquired properties. After the death of Marthand, the names of defendants 4 and 7 are entered as his legal heirs to the lands and house properties. Defendant No. 7 is a spendthrift. He is not doing any job. To meet out his illegal expenses and the expenses for his bad vices, he has sold the property mentioned at Sl. No. 1 in Schedule "B" to Defendant No. 8. There was and is no any family legal necessity to sell the joint family property. Defendant No. 7 has no any exclusive right, title and interest to sell the joint family property. He is not the manager of the joint family also. Simply taking the undue advantage of his name appearing in the property extract and to harass the plaintiffs and other defendants, he has sold the house and backyard property to Defendant No. 8. It is not binding on the plaintiffs and defendants 1 to 3. It is further averred that the plaintiffs have together got 2/5th share in all the suit properties and the sale deed executed by Defendant No. 7 in favour of Defendant No. 8 on 22.11.1996 is liable to be decreed as not binding on the plaintiffs and the plaintiffs have sought for the following reliefs in the suit:-

- (a) 2/5th share in all the suit properties to plaintiffs and they be put in actual separate possession of their share by effecting partition by metes and bounds;
- (b) That declaring that the sale deed dated 22.11.1996 executed by defendant No. 7 in favour of defendant No. 8 is not binding on the plaintiffs share;
- (c) Awarding full cost of this suit to plaintiffs from defendants;
- (d) Awarding any other relief/reliefs for which the plaintiffs are found entitled to;

5. Defendant Nos. 4 and 7 have filed their common written statement which was adopted by defendant No. 5. Defendant Nos. 8 and 2 have filed separate written statements. Defendant Nos. 1 and 6 have been placed *exparte* and Defendant

No. 9 has not filed his Written statement.

6. In the written statement filed by the Defendant Nos. 4 and 7, it is contended that the genealogy given in para 2 of the plaint is incomplete because the propositus/Malharrao Bheemaji Kulkarni has a daughter who is married and residing in her husband's house at Sangli. (It may be noted that the said daughter has been brought on record as the LR of defendant No. 1 after the death of Malharrao). The averment made in the plaint, that the properties at Item Nos. 1 and 2 of Schedule "A" and item No. 1 of Schedule "B" are purchased in the name of Marthand out of joint family funds, is false and they are self acquired properties of Marthand, which has been inherited by Defendants 4, 5 and 7. It is contended that the deceased Marthand had purchased the shares of M.K. Hubli Sugar factory out of his own funds and it is also a self acquired property and so far as Item Nos. 1, 2 and 6 in "A" Schedule is concerned, they are also self acquired properties of Marthand and they are not purchased out of the funds of joint family and the said properties were in possession of Marthand and after his death, Defendants 4, 5 and 7 are in possession of the said properties.

7. Having regard to the above said pleadings of parties, following issues were framed by the trial court for its consideration:-

1. Whether, the plffs. prove that landed and house properties mentioned in schedule A & B of the plaint and the shares mentioned in schedule C of the plaint are the properties belonging to the joint family of themselves and defts. 1 to 7?

2. Whether, the plffs. prove that they are in joint possession and enjoyment of all the suit properties?

3. Whether, the plffs. prove that landed properties mentioned at Sl. No. 1 and 2 of schedule A have been purchased in the names of defts 2 & 3 and deceased Marthand, out of the compensation amount awarded for the joint family ancestral land situated at old Sangolli?

4. Whether, the plffs. further prove that property mentioned at Sl. No. 1 of B schedule was previously a open site purchased out of joint family funds and after the purchase, a house has been constructed out of joint family funds i.e., out of the compensation amount awarded in respect of a joint family house situated at old Sangolli which has been acquired under Malaprabha project?

5. Whether, the plffs. prove that the sale deed executed by deft. No. 7 in favour of deft. No. 8 in respect of joint family house i.e. item no. 1 of schedule B is not binding on them and deft. No. 1 to 3 and the said alienation is without any family legal necessity?

6. Whether, the suit is bad for non-joinder of other legal heirs of deceased Vittal Kulkarni?

7. Whether, deft. Nos. 4, 7 prove that house bearing G.P. No. 54/A of Jamalur

village was self-acquired properties of his father Marthand Kulkarni and said house has been sold to meet out family legal necessity?

8. Whether, the valuation made for the purpose of Court-fee and jurisdiction is proper?

9. Whether, the plffs. are entitled to 1/5 share each? If not what is the extent of share of the plffs?

10. Whether, the plffs are entitled to preliminary decree as prayed for?

:Addl. Issues:

1. Whether the deft no. 4 & 7 proves that Sl. No. 1 & 2 of the suit lands namely R.S. No. 102/2, 103/2 of Jamalur village were purchased out of their independent earnings of deceased Martandrao, deft no. 2 and 3 and is their exclusive property?

2. Whether the deft no. 4 & 7 proves that Sl. No. 6 of the suit land namely R.S. No. 110 of Jamalur village was the self-acquired property of deceased Martandrao or in the alternative they prove that the deceased Martandrao Kulkarni and his legal-heirs namely deft no. 4 to 7 became the owners by way of adverse possession?

3. Whether the deft no. 4 & 7 proves that suit schedule C namely the share in the M.K.Hubli Sugar Factory was the self-acquired property of deceased Martandrao?

4. Whether the deft no. 4 & 7 proves that whatever the properties that are standing independently in the name of plff Nos. 1 & 2, deft Nos. 2 & 3 were also the joint family properties?

5. Whether the plffs. and deft Nos. 2 & 3 proves that the properties that are independently standing in their names are their self-acquired properties?

8. On behalf of plaintiffs, Plaintiff No. 1 was examined as PW-1 and he got marked 12 documents as Ex.P-1 to Ex.P-12. The defendant No. 4 got herself examined as DW-1 and no documents were produced on behalf of defendants.

9. The trial court, after considering the contentions of learned counsels appearing for the parties and on appreciating the oral and documentary evidence produced before it, held that the suit schedule properties are the joint family properties of the plaintiffs & defendants 1 to 7 and negated the contention of the Defendants 4, 5 and 7 that Item Nos. 1, 2 & 6 in Schedule "A", Item No. 1 in Schedule "B" and the shares described in Schedule "C" are the properties of Marthand and accordingly, answered the issues against the defendants and in favour of plaintiffs and decreed the suit as referred to above.

10. Being aggrieved by the said judgment and decree, Defendants 4, 5 and 7 preferred this appeal. During the pendency of this appeal, appellant No. 3/ defendant No. 7 died and his name has been deleted. Therefore, the appeal is

confined to the contentions urged by appellants 1 & 2 only, namely defendants 4 & 5. The other defendants have not preferred any appeal against the judgment and decree passed by the trial court.

11. We have heard the learned counsels appearing for the appellants and learned counsel appearing for the respondents 1, 2 & 4. The other respondents though served have not chosen to represent this appeal.

12. Learned counsel appearing for the appellants has taken us through the oral and documentary evidence adduced by the parties before the trial court and submitted that even as per the averments made in the plaint, properties at item Nos. 1 & 2 of "A" Schedule namely the land comprising survey Nos. 102/2 measuring 4 acres 26 guntas PK 0.01 acres and survey No. 103/2 measuring 3 acres 2 guntas PK 0.01 acres respectively are situated at Jamalur village. Even according to the averments made in the plaint, they are purchased in the name of Marthand, though it is averred in the plaint and is deposed by the plaintiff to that regard that the said property was purchased out of the compensation amount awarded in respect of the property of the family acquired for Malaprabha project. In view of the fact that the property was purchased in the name of a younger member in the family, as Malaharrao was father was alive at the time of purchase, the burden is heavy on the plaintiffs to discharge the initial burden of showing that the properties at Sl. Nos. 1 & 2 of "A" Schedule and Sl. No. 1 of "B" Schedule were purchased out of the compensation amount awarded and Item No. 6 of "A" Schedule was purchased out of the joint family funds and he further submitted that unless the plaintiffs are able to show the extent of joint family properties acquired for the purpose of Malaprabha Project, the quantum of compensation awarded and the date of award, they cannot be said to have discharged their initial burden cast on the plaintiffs to show that there was sufficient nucleus from the income of the joint family properties or from the compensation received in this case to purchase the said properties, that too in the name of Marthand who was not the manager of the family and father Malharrao was looking after the affairs of the family and in the absence of any evidence in that behalf, then the onus never shifts to the defendants 4, 5 and 7 who are the LR's of Marthand to show that the said properties were acquired out of the income of Marthand and not out of the income received from joint family funds and therefore, in the absence of discharge of the initial burden cast upon the plaintiffs, the plaintiffs are bound to fail as they have approached this Court for partition and separate possession of the suit schedule properties.

13. In support of his contentions, he has relied upon certain observations made in the XVI Edition of Commentary on Hindu Law & Usage on the basis of decisions of various courts including Hon"ble Apex Court, at page Nos. 746 & 748. The relevant portion of which is extracted as under:-

Onus on coparcener to prove nucleus.- The burden of proving that nay particular property is joint family property, is in the first instance upon the persons who claims it as coparcenary property. Where the possession of a nucleus o joint

family property is either admitted or proved, an acquisition made by a member of the family is presumed to be joint family property, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. Until and unless adequate nucleus is shown the onus is not on the acquirer to prove that the property standing in his name was purchased from joint family funds. And it is only after the possession of an adequate nucleus is shown, the onus shifts on to the persons whom claims the property as self-acquisition, affirmatively to make out that the property was acquired without any aid from the family estate.

....

The sufficiency of the evidence to be adduced to shift the onus that initially rests upon plaintiff of showing adequate nucleus from which acquisitions could have been made is essentially a question of fact that depends upon the nature and extent of the nucleus. One of the tests to assist in the termination of the adequacy of the nucleus is the income which the nucleus yields. If the court is not satisfied that the joint family nucleus is sufficient to buy any additional property, the property would be held to be self-acquired.....

14. The learned counsel appearing for the appellants submitted that the trial court has not appreciated the evidence adduced before it and has erroneously held that Item Nos. 1, 2 & 6 of Schedule "A" and item No. 1 of Schedule "B" and also the shares of MK Hubli Sugarcane factory are the joint family properties and not self acquired properties of Marthand and to that extent the judgment and decree passed by the trial court is liable to be set aside.

15. Learned counsel appearing for the Respondents 1, 2 and 4 submitted that the averments made in the plaint would clearly give description of the properties held by the family. Defendants 4, 5 and 7 only contend that item Nos. 1, 2 & 6 of "A" Schedule and item No. 1 of "B" Schedule were self acquired properties of Marthand and do not dispute that the other properties described in the schedule at Item Nos. 3, 4, 5 & 7 of "A" Schedule and Item Nos. 2, 3 & 4 of "B" Schedule are the joint family properties and the extent of lands at Sl. Nos. 3, 4, 5 & 7, which would come to 20 acres, in which Malharrao's share is 50% and there was sufficient nucleus. He further submitted that acquisition of the property belonging to the joint family and passing of the award in favour of Malharrao, the father of plaintiffs and Marthand, and the fact that compensation has been awarded for the property acquired, have not been disputed. However, it is contended that the quantum of compensation received and the date of receipt of amount is not proved and the material on record would clearly show that the award was passed in the year 1970 and property at Sl. Nos. 1 and 2 of "A" Schedule have been purchased during the year 1970-71 and house at Sl. No. 1 of "B" Schedule was also purchased after the award was passed on 03.05.1976 and the averments made in the plaint and the evidence of PW-1 and documents produced by him would clearly show that there was sufficient nucleus from the income of other properties held by the family for the purchase of Item Nos. 1, 2 & 6 of "A"

Schedule, Item No. 1 of "B" Schedule and the shares described in "C" Schedule were purchased out of the joint family funds and the same has been transferred in the name of Marthand at the instance of his father/Malharrao, which is clear from the mutation entry which has been got marked and therefore, the findings of the trial court that the schedule properties at Item Nos. 1, 2 & 6 of "A" Schedule, Item No. 1 of "B" Schedule and the shares described in "C" Schedule are the joint family properties and are not self acquired properties of Marthand, who has died leaving behind Defendants 4, 5 & 7, is justified and does not call for interference in this appeal.

16. In reply, learned counsel appearing for the appellants submitted that since the averments made in the plaint and evidence of PW-1 would show that they have acquired the house at Old-Sangli and there is no evidence on record in regard to the quantum of compensation awarded in favour of Malharrao regarding the submergence of joint family ancestral lands, and in the absence of material on record, it cannot be held that same was the nucleus for purchasing a site and two items of lands and for putting up construction and therefore, initial onus which is on the plaintiffs is not discharged and since the property was standing in the name of Marthand, the said property should be held as self-acquired property of Marthand which the appellants herein and defendant No. 7 have succeeded as LR's.

17. Having regard to the above said contentions, the points that would arise for determination in this appeal are:-

(i) Whether the findings of the trial court that item Nos. 1, 2 and 6 of "A" Schedule, Item No. 1 of "B" Schedule and the shares described in "C" Schedule are the joint family properties and negating the contentions of the appellants and Defendant No. 7 that they are the self acquired properties of Marthand is justified or calls for interference in this appeal?

(ii) What order

18. We answer the above points for determination as follows:-

(i) The findings of the trial court is justified;

(ii) In view of our findings on Point No. 1, the appeal is liable to be dismissed;

For the following reasons:

19. We have given our anxious and careful consideration to the contentions of learned counsel appearing for the parties and scrutinised the material on record.

20. Learned counsel appearing for the appellants has taken us through the averments made in the plaint, written statement, evidence of PW-1 and the contents of the documents marked by him and also to the evidence of DW-1. Having regard to the relief that is sought for in this appeal, it is clear that what is required to be determined by us in this appeal is only whether the findings of the trial court that item Nos. 1, 2 and 6 of "A" Schedule, Item No. 1 of 13" Schedule

and the shares described in "C" Schedule are the joint family properties or the self acquired properties as contended by the parties and whether the findings of the trial court in that behalf is justified having regard to the evidence adduced by the parties and settled principles of law.

21. It cannot be disputed that it is well settled that when the plaintiffs come to the Court contending that the suit schedule properties are joint family properties, then it is for them to aver and prove the same by giving description as to how they were acquired either by inheritance or by purchase and the nucleus for purchase of the properties and so far as this appeal is concerned, the said burden can be discharged by proving the nucleus that was available for purchasing the properties though in the name of an elder member of the family. Then the onus would shift to the person in whose name the property was made, to show that it was self acquired property, purchased out of his own income with no support of the income from the joint family.

22. The scrutiny of the material on record would clearly go to show that there is no dispute about the relationship of the parties and the fact that apart from the said items of land, house and the shares, which is in dispute in this appeal, the other properties were the joint family properties.

23. Item No. 1 in "A" Schedule is a land comprised in Survey No. 100/2 measuring 4 acres 2 guntas PK 0.01 acre, Item No. 2 in "A" Schedule is a land comprising Survey No. 103/2 measuring 3 acres and 2 guntas PK 0.01 acre and Item No. 6 in "A" Schedule is a land comprising Survey No. 110 measuring 7 acres 37 guntas situated in Jamalur Village. Item Nos. 3 to 5 are the lands situated in Jamalur village and Item No. 7 is situated in Sangolli Village, totally measuring 20 acres 5 guntas. Sl. No. 1 of "B" Schedule comprises of a house bearing G.P. No. 54/A situated in Jamalur Village which is the subject matter of dispute in this appeal and it also comprises of open site at Sl. No. 2 and house bearing GP No. 455 situated in Sangolli Village market value of which is shown as Rs. 80,000/- and also a house bearing G.P. No. 456 described in Sl. No. 4 and the shares in MK Hubli Sugar Factory described in the "C" Schedule are standing in the name of Marthand Malharrao Kulkarni.

24. It is clear from the evidence of PW-1 /plaintiff No. 1 that he, in his evidence, has reiterated the averments made in the plaint and has stated that the lands mentioned at Sl. Nos. 1 & 2 of "A" Schedule have been purchased out of the compensation amount awarded by the Government in respect of the submerged lands and also from the income from other lands which are ancestral properties and that the lands situated in Sangolli village are also ancestral properties. He has also deposed that the suit properties are the joint family properties and the shares were purchased out of the joint family funds. He has got marked the documents Ex.P-1 to Ex.P-12. The mutation entry No. 710/Ex.P-12 pertains to transfer of land. He has denied the suggestion in his cross examination that Item Nos. 1, 2 & 6 in "A" Schedule, Item No. 1 in "B" Schedule and the shares described in the "C" Schedule are the self acquired properties of Marthand.

25. On behalf of Defendants, Defendant No. 4 is examined as DW-1. DW-1 who is the wife of Marthand, has deposed in her examination-in-chief in consonance with the averments made in the written statement and has stated about the relationship among the parties and has stated that Defendant No. 1 is the eldest son of Malharrao. The house situated in Jamalur Village (Item No. 1 of "B" Schedule) is her husband's house and was purchased by her husband out of his own funds and her son Defendant No. 7 has sold that house. In that house, plaintiffs have no share and right. She also deposed that in her husband's name, there are shares in MK Hubli Sugar Factory and the shares were self acquired properties and are not joint family properties. The shares still stand in her husband's name. The survey Nos. 102, 103 and 110 situated at Jamalur village belonged to her husband. Accordingly, her husband's name is shown in the record of rights. After his death, those lands have been mutated in her name. The plaintiffs have no right and share in these lands. After the death of her husband, herself and her children alone have right and share over these lands.

26. It is elicited in the cross-examination of DW-1 that defendant No. 1 was residing at Sangolli. Defendant No. 1 apart from the suit properties, owned other lands at Sangolli and house properties at old-Sangolli village. That old-Sangolli village is submerged. It is true that the properties owned by defendant No. 1 i.e., lands and house properties at old-Sangolli village were submerged and the Government has sanctioned compensation. The compensation was awarded to Defendant No. 1, which might be in the year 1970. It is further elicited that Sl. Nos. 1 and 2 of the suit "A" lands were purchased in the name of her husband, Defendants 2 & 3. It might be purchased in the year 1970-71. Sl. No. 6 of "A" Schedule was purchased in her husband's name. She cannot say from whom this land came to him. Even at the time of filing her written statement, she did not make any efforts to know how the land at Sl. No. 6 of schedule "A" came to her husband. She has not seen the record of rights of Sl. No. 6 land. She has not produced any document to show that how Sl. No. 6 land of "A" Schedule came to her husband. It is true that to get a share of M.K. Hubli Sugar Factory, one should have land in his name and her husband was the "A" Class member of the said sugar factory. It is also elicited that she does not know as to whether there is mutation entry No. 710 of Jamalur Village in respect of schedule "A" land, regarding entry in the name of her husband and that she has denied that she is deposing falsely that Sl. No. 6 of "A" Schedule property is an exclusive property of her husband. It is further elicited regarding item Nos. 1 and 2 of Schedule "A" lands that it is true that item Nos. 1 and 2 of "A" Schedule lands were jointly purchased in the names of her husband, Defendant Nos. 2 and 3. It might be in the year 1970. It is false to suggest that Sl. Nos. 1 & 2 of "A" schedule lands were purchased in the name of her husband, Defendant Nos. 2 and 3 by Defendant No. 1. In the year 1971, there was no partition between Defendant No. 1 and his sons. It is false to suggest in 1970, defendant No. 1 was managing the joint family affairs. It is true to suggest in 1970, defendant No. 1 was the elderly person in the family. That she has given instructions to her advocate to

draft the written statement. She has not given instructions to her advocate that defendant No. 1 was not managing the joint family affairs before 1970 and she has not instructed to file written statement in that regard and the income of defendant No. 1 was out of landed properties. She does not know whether defendant No. 1 has purchased properties at Item Nos. 1 and 2 of Schedule "A" out of the income of joint family properties and also from the compensation amount. She has not produced any documents to show that Item Nos. 1 and 2 of Schedule "A" were purchased by her husband, Defendant Nos. 2 and 3 separately. It is false to suggest that Sl. No. 1 and 2 of Schedule "A" were jointly cultivated by her husband and Defendant Nos. 2 & 3, i.e., all the members of the family. She has no documents and she has not produced any documents to show that Sl. Nos. 1 and 2 lands were cultivated by her husband and defendant Nos. 2 and 3 separately. It is further elicited in her cross-examination that it might be the fact that during the year 1970, defendant No. 1 had only source of income from his land. Her husband had Kirana shop till 1971 and he was running that shop in front of primary school No. 2 at Bailhongal. She does not know to whom that shop belonged. Her husband was running the same in a rented shop. She has no receipts to show that about the payment of rents to that Kirana shop. It is true to suggest that to run Kirana shop licence is required. She has no documents or licence to show that her husband was running Kirana shop. The owner of the Kirana shop would pay the sales tax to the Government. She has no documents to show that her husband has paid sales tax. She has no documents to show that her husband was running Kirana shop. It is false to suggest that she is deposing falsely that her husband was running a Kirana shop at Bailhongal. It is false to suggest that her husband used to help his father, by residing at Sangolli. It is further elicited that Kirana merchants write the account books from Deepavali to Deepavali. There is no document to show that about the accounts maintained by Marthand Kulkarni, with regard to the Kirana business.

27. It is further elicited in her cross examination that she does not remember in which year a house was purchased at Jamalur in her husband's name, but that house was purchased after her marriage. She knows personally that her husband had purchased that open plot at Jamalur and at that time, he was not separated from his father. Her husband was the eldest amongst the sons of defendant No. 1. It is false to suggest that the defendant No. 1 has purchased the open plot at Jamalur in the name of her husband by paying the consideration amount. It is further elicited that Sl. Nos. 1 and 2 of Schedule "A" properties were purchased by her husband in the year 1971. She does not know for how much amount, those lands were purchased and from whom they were purchased, witness says papers are not with her. Still she has not taken any steps from the Court to summon those documents from the concerned. It is further elicited that she does not know for how much amount her husband has shared in purchasing Sl. Nos. 1 and 2 of "A" Schedule land. There is no document to show that her husband has shared so much of amount for purchasing Sl. Nos. 1 & 2 of "A" Schedule lands. It is false to suggest that her husband and defendant Nos. 2 & 3 have not shared

any amount while purchasing the said lands. It is false to say that defendant No. 1 out of the compensation amount has purchased the Sl. Nos. 1 and 2 of "A" schedule lands in the name of her husband and Defendant Nos. 2 and 3. It is false to say that she is deposing falsely that Sl. No. 1 of "B" Schedule house was the self acquired property of her husband. It is true that the consideration amount, under the Sl. No. 1 of Schedule "B" house, was not given either to plaintiffs or to defendant Nos. 2 and 3 and her husband has sold the house to Defendant No. 8 and witness says that the said house is a self acquired property of her husband.

28. The documentary evidence produced on behalf of plaintiffs comprises Ex.P-1 to Ex.P-12 whereas defendants have not chosen to produce any documentary evidence. Exs.P-1 to 7 are the extracts of record of rights; Ex.P-8 to Ex.P-11 are the extracts of house property and Ex.P-12 is the mutation entry extract.

29. It may be noted at the outset that so far as the Item No. 6 of "A" Schedule is concerned, though the appellants claim that it was the self acquired property of Marthand, the documents produced would clearly show that the property was standing in the name of Malharrao father of Marthand and his brother Krishnaji who is represented by Defendant No. 9. Therefore, the contention of the appellants that Item No. 6 was a self acquired property cannot at all be accepted as there is no material to show that the property was standing in the name of Marthand. As per the mutation entry extract/Ex.P-12, which clearly shows that Malharrao, father of Marthand, gave consent for entering the name of Marthand and his name was entered and therefore, the contention that Item No. 6 is the self acquired property of Marthand has been rightly rejected by the trial court.

30. So far as Item Nos. 1 & 2 in Schedule "A" are concerned, it is clear from the material on record that according to the averments made in the plaint and the evidence of PW-1, the said properties were purchased out of the compensation amount awarded towards acquisition of land and house at Old Sangli was purchased out of the income of the joint family funds and the property was purchased by Defendant No. 1 (father: Malharrao Kulkarni) in the name of Marthand who was his eldest son and Defendant Nos. 2 and 3. The said fact is admitted in the evidence of DW-1 that the properties were purchased in the name of Marthand and Defendant Nos. 2 & 3 and it was not standing exclusively in the name of Marthand. The extent of land held by the joint family, admittedly, as the appellants do not dispute that Item Nos. 3 to 5 and 7 of the "A" Schedule properties and Item No. 1 in "B" Schedule were ancestral properties, would clearly go to show that the family was owning 20 acres 5 guntas of land and apart from Sl. No. 6, which is also held to be joint family property measuring 7 aces 37 guntas.

31. Further, it is clear from the facts elicited in the cross examination of DW-1 that the fact that the land and house property belonging to the family was acquired for Malaprabha project and award was passed in the year 1970-71 is not disputed by the appellants as is admitted by DW-1/defendant No. 4 in her

cross examination. However, what is contended by the learned counsel for the appellants is that the exact date of award, extent of land acquired and quantum of compensation awarded, has not been proved and therefore, cannot constitute nucleus for purchase of item Nos. 1 & 2 of Schedule "A" and Item No. 1 of "B" Schedule. It is clear from the evidence of DW-1, wherein she had reiterated the averments made in the plaint, that in the light of admitted joint family properties measuring 28 acres 2 guntas of Item Nos. 3 to 7, as findings of the trial court regarding Item No. 6 that it is a joint family property has been confirmed, is not disputed by the appellants and it is not disputed that they are the valuable lands wherein sugarcane crop was grown, as the material on record and description of shares obtained in M.K. Hubli Sugarcane Factory which shows that they were growing sugarcane crops. It is specifically contended that Item Nos. 1 and 2 of Schedule "A" and Item No. 1 of Schedule "B" was purchased out of the compensation amount received and income from other properties and therefore, having regard to the other extent of admitted ancestral properties and the evidence on record, it is clear that the initial burden which is cast upon the plaintiffs to prove that the said properties were purchased out of the nucleus comprising of the income received from the other properties owned by the family and the compensation amount awarded towards acquisition of land and house at old Sangli belong to the family, is discharged and therefore, the onus would shift upon the defendants 4, 5 & 7/appellants herein, to prove that the said properties at Item Nos. 1 & 2 of "A" Schedule and Item No. 1 of "B" Schedule have been purchased out of the separate income of the Marthand and independent of the income of the joint family funds.

32. The appellants in order to discharge the onus of proving that item Nos. 1 and 2 of "A" Schedule, Item No. 1 of "B" Schedule and the shares described in "C" Schedule are the self acquired properties, have examined Defendant No. 4 as DW-1 but no documentary evidence is produced. It has to be noted at the outset that defendant No. 4/Appellant No. 1 herein, who has been examined as DW-1, has admitted in her cross examination that the sale deed was not exclusively in the name of Marthand, but the sale deed in respect of Sl. Nos. 1 and 2 of "A" Schedule was in the name of Marthand and defendants 2 and 3 who are the brothers of Marthand and plaintiffs. Defendant Nos. 2 and 3 having claimed that the said properties are the self acquired properties belonging to them and it is only the LR's of Marthand, Defendants 4 to 7, who claim that the said properties are the self-acquired properties of Marthand and in order to succeed in discharging the said onus, it has to be proved that Marthand had his own income other than the income from the ancestral properties and that the properties that are claimed to be the self acquired properties of Marthand were purchased out of his own funds and they were the exclusive properties of Marthand. However, the facts elicited in the evidence of DW-1 would clearly show, when appreciated with reference to the facts elicited in the cross-examination, that an attempt has been made to show that Marthand was doing the business at Bailhongal and he was running a Kirana shop. However, the said fact has not been proved by leading

any cogent evidence, much less, the fact of income of Marthand was getting, even assuming that he was running Kirana business as has been stated by DW-1. The facts elicited in the cross examination of defendant No. 4/DW-1, the only witness examined on behalf of appellants, would clearly show that she has admitted in her cross-examination that she has no documents to show that her husband Marthand was running a Kirana shop at Bailhongal. She has not produced the licence obtained for running the Kirana shop, though she admits that the accounts books were maintained for the financial year from Deepavali to Deepavali, she has not produced the documents regarding the income from the said business and no documentary evidence whatever is produced on behalf of defendant No. 1. Further, it is clear from the facts elicited in her cross examination that she has admitted that she has no documents to show that her husband was running a Kirana business and she has denied the suggestion that she is deposing falsely that her husband was running a Kirana shop at Bailhongal.

33. So far as item No. 1 of "B" Schedule is concerned, it is clear from the evidence of DW-1 that she has stated that the said plot on which the house is constructed at Sl. No. 1 was purchased by her husband as her husband purchased an open plot at Jamalur Village. She knows personally that her husband has purchased the open plot at Jamalur village. He was not separated from his father. Her husband was the eldest among the sons of Defendant No. 1. No explanation whatsoever is given by DW-1, the only witness examined on behalf of appellants, as to why the property at Sl. Nos. 1 and 2 was purchased in the name of Marthand and his brothers, Defendant 2 and 3. Under the circumstances, it is clear that the appellants have miserably failed to prove that lands at Item Nos. 1 and 2 of Schedule "A" and house at Sl. No. 1 of Schedule "B" were self acquired properties of Marthand and that they are not liable for partition. So far as shares described in "C" Schedule are concerned, in view of the above said findings that appellants have failed to prove that Item Nos. 1 and 2 of Schedule "A" and house at Sl. No. 1 of Schedule "B" are the self acquired properties of Marthand, it has to be held in view of the discharge of initial burden by the plaintiffs that those properties are also joint family properties and the shares issued by MK Hubli Sugarcane Factory in respect of Members of Sugarcane growers to supply sugarcane and another is a corollary of the findings that the suit schedule properties are the joint family properties, it has to be held that the shares are also purchased out of the joint family properties and they are not exclusive property of Marthand and accordingly, we hold that the findings of the trial court in so far as it relates to Item Nos. 1, 2 and 6 of "A" Schedule, Item No. 1 of "B" Schedule and the shares described in "C" Schedule are the joint family properties and the appellants and defendant No. 7 have failed to prove that they are the self acquired properties of Marthand is justified and we do not find any error in the judgment and decreed passed by the trial court, decreeing the suit in favour of the plaintiffs. Accordingly, we answer the point for determination and pass the following order:

ORDER

- (i) The appeal is dismissed;
- (ii) Judgment and decree in O.S. No. 5/1997 dated 17.12.2002 passed by the Civil Judge (Sr.Dn.), Bailhongal is confirmed;
- (iii) There shall be no order as to costs in this appeal.