

(2012) 08 KAR CK 0396

In the Karnataka High Court

Case No : Regular First Appeal No. 425 of 2000

Omanna Since Deceased by his LRs

APPELLANT

Vs

Smt. Sushibai and Others

RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Evidence Act, 1872 — Section 90

Citation : (2013) 1 KCCR 152

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : K. Raghavendra Rao for Sri V.R. Venkateshappa, for the Appellant;
Sriyuths Ravi S. Balikai, R.D. Gokakar and R.K. Hanumannavar, for the
Respondent

Final Decision : Allowed

Judgement

N. Kumar, J.—This is a defendants' appeal against the judgment and decree dated 4th April 2000 passed in O.S. No. 35/1988 decreeing the suit of the plaintiff granting relief of declaration as well as possession in respect of 18 guntas of the suit schedule land from defendant Nos. 25 to 35 and declining to grant decree of permanent injunction. For the purpose of convenience, the parties are referred to as they are referred to in the original suit.

2. The pedigree of the family is clearly set out in schedule "A" annexed to the plaint which is not in dispute.

3. The land bearing R.S. No. 1389 originally measured 23 acres 36 guntas. It was owned by one Thakkoji. Thakkoji had five sons by name Omanna, Narayan, Parashram, Neelu and Meenaji. None were alive at the time of filing of the suit. The case of the plaintiffs is, during the lifetime of Thakkoji, he executed a registered Will with respect to entire R.S. No. 1389 situated in Kangrali village of Belgaum Taluk. Under the said Will, R.S. No. 1389 was bequeathed in favour of Meenaji, his last son. This Will was executed when his sons were alive. Meenaji

son of Tukkoji died in about 1926. At the time when the Will was executed on 10.11.1890, R.S. No. 1389 was not sub-divided. On 27.01.1926 Meenaji died. By virtue of M.E. No. 995, name of his eldest son Yeshwant Meenaji Kangralkar was entered. Yeshwant's name was shown with respect to R.S. No. 1389/1. The said land, which was bequeathed in favour of Meenaji, was the exclusive property of the deceased Meenaji Thakkoji Kangralkar. None of his brothers had any right, title and interest in the said land.

4. After the death of Omanna son of Thakkoji, his two sons Ramachandra Omanna Kangralkar and Venku Omanna Kangralkar got their names entered with respect to 15 acres 2.1 guntas out of Sy. No. 1389 i.e., R.S. No. 1369/2. For entering their names, no notices were issued to any sons of Meenaji. The said entries of names of Ramchandra and Venku was without even following any principles of natural justice or without following any of the mandatory requirements of law. The said entry did not confer any right, title or interest upon the deceased Ramchandra Omanna Kangralkar or Venku Ornanna Kangralkar. Consequently, the right, title and interest of sons of deceased Meenaji never affected in any manner.

5. After the death of Meenaji, all the properties which were possessed by Meenaji were managed by his eldest son Yeswant. Meenaji had five sons viz., Yeshwant, Balwant, Shivaji, Thakkoji and Kashinath. Yeshwant died in the year 1973, Balwant died in 1936, Shivaji died in 1982, Thakkoji son of Meenaji died in 1958 and Kashinath died in 1962.

6. On 19.12.1956, the legal representatives of the deceased Meenaji got divided their properties. In the said partition, R.S. No. 1389 and 1390 came to be allotted to the share of Kashinath son of Meenaji Kangralkar, who is the father of the present plaintiffs 2 to 5. These plaintiffs have become the absolute owners of the suit property inheriting the same after the death of Yeshwant son of Meenaji Kangralkar. After the partition, the present plaintiffs have sold an area of 7 acres 22 guntas which is numbered as 1389/1. Kashinath died in 1962 and at that time, the relationship of plaintiffs herein with the defendants was cordial. At the time of selling R.S. No. 1389/1, defendant No. 1 Omanna Venku Kangralkar and Bharmanna Bhimrao Kangralkar played dominant role in settling the said sale transaction. Therefore, they have attested the sale deed as witnesses. In the year 1967, though the plaintiff Nos. 2 to 4 were majors, still then they were ignorant of the realities of legal transaction and consequences of executing any documents and writing the contents on any documents. Plaintiff No. 1 though she was a party to the document, all the while she remained a household woman and also she was ignorant about the procedure of writing documents or the legal implications in any document. In view of this ignorance on the part of the plaintiffs, the plaintiffs who wanted to sell their property requested defendant No. 1 and Bharmanna Bhimrao Kangralkar to have negotiations with the purchasers and settle the matter. Defendant No. 1, who is a scheming man, got the description of R.S. No. 1389/1 in a wrong manner. The contents for writing the

deed were given by defendant No. 1 though it was on behalf of the plaintiff. Defendant No. 1 alone went to the office of the writer and got prepared the deed and asked the plaintiffs to put the signatures. Defendant No. 1 alone took a leading part in getting the sale deed registered. Later on the plaintiffs have learnt that first defendant's father Venku and defendant's paternal uncle Ramachandra had got their names entered with respect to R.S. No. 1389/2. After obtaining record of rights extract the plaintiffs were shocked to know that name of their father was not entered in the revenue records with respect to the said property. The plaintiffs in the year 1983 came to know the fraud played by the deceased Ramachandra Omana Kangralkar and Venku Omana Kangralkar. Therefore the plaintiffs in order to rectify the entire record of rights, filed an appeal in the Court of the Assistant Commissioner, Belgaum bearing RTS. AP No. 210/83. In the said appeal the plaintiffs challenged the illegal certification of 5 mutations bearing mutation entry Nos. 9907, 5445, 3331, 9548 and 6108 which was certified on 14.05.1962, 09.01.1972, 12.04.1969, 10.02.1981 and 30.01.1969, Similarly certification of ME 2560 was also challenged. The Assistant Commissioner, Belgaum, under his order dated 27.10.1986 allowed the appeal. In the said appeal, even ME No. 598 was also challenged.

7. The plaintiffs submit, D1 to 24 have got their names entered in the record of rights of Sy. No. 1389/2 behind the back of the plaintiffs. These entries are illegal and void. Under ME 9907 which is alleged to have been certified on 14.05.1962 name of Jyothiba s/o Parashuram Kangralkar is ordered to be entered as a heir of Parusharam Takkappa Kangralkar. The plaintiffs submit that since Parashuram himself did not possess any right, title and interest in R.S. No. 1389/2, question of entering name of his son Jyothiba did not arise. Parashuram did not possess 1/2 joint share in Sy. No. 1389/2. Therefore the certification of ME 9907 did not give the deceased Jyothiba any right, title or interest. Deceased Jyothiba Parashuram Kangralkar has managed to get this ME to gulp the property of the plaintiffs. This fraud is further perpetuated by getting one more ME No. 957 got certified by filing an application styled as Varadi immediately on 16.10.1962 by creating a false deed styled as Will and got names of D20-Narayan Laxman Kangralkar, Laxman Jyothiba Kangralkar, Basavant Jyothiba Kangalkar, Kashinath Jyothiba Kangralkar is entered. Out of these, Laxman s/o. Jyotiba Kangralkar died and D20-Narayan, D21-Parashuram, D22-Maruthi, D23-Rama and D24-Vittal; D19-Gangubai, are the legal representatives of deceased Laxman Jyothiba Kangralkar. The plaintiffs submit that even certification of ME 957 is bad in law and is illegal. ME No. 2893 is also bad in law and void because this ME is based on certification of ME No. 9907 and 957. All these mutation entries are not binding upon the plaintiffs.

8. Under ME 5445 which is alleged to have been certified on 09.01.1973 also is not binding upon the present plaintiffs. Under this ME it is alleged that Parashuram Ramachandra Kangralkar died on 22.09.1972 and names of heirs are to be entered. The alleged heirs are Anil-Defendant No. 9, Vilas-Defendant No. 10, Subhas-Defendant No. 11, Madhu-Defendant No. 8. and Sadhashiva-

Defendant No. 12. This alleged mutation entry relates to entire RS No. 1389/2. Before certifying this mutation no notice was issued to the plaintiffs who are the owners. Hence this ME No. 5445 is illegal and inoperative and does not confer any right, title or interest on D9 to 12 and is void. Plaintiffs are not bound by this mutation. Plaintiffs submit that the deceased Parashuram Ramachandra did not possess any right, title or interest in Sy. No. 1309/2 and as such his heirs could not get any right, title or interest in this land.

9. Similarly another ME 1548 came into existence on 10.03.1981. Under this ME an application was filed on 12.12.1980 stating that Rama Venku Kangralkar died on 20.8.1969 and defendants Venkatrama Kangralkar, Shankararama Kangralkar and Anantharama Kangralkar and his heirs and their names are to be entered in ROR of Sy. No. 1389/2. This entry is illegal because Venku did not possess any right, title, or interest in Sy. No. 1389/2. Plaintiffs are not bound by this illegal mutation. Omana Venku Kangralkar-Defendant No. 1. could not have sold 18 guntas of land out of Sy. No. 1389/2 to the present D25 to 35. D25 to 35 who claim to be the purchasers of 18 guntas of land have no valid right, title and interest in the land in question. Sy. No. 1389/2 is not converted for non agricultural purposes under the Karnataka Land Revenue Act of 1964. Omana Kangralkar had no authority to sell any portion of Sy. No. 1389/2. Therefore these sale transactions between Defendant No. 1 and Defendant Nos. 25 to 35 being illegal and void, do not confer any right, title or interest in favour of Defendant Nos. 25 to 35. Hence as these transactions are void, basically they are not binding upon the present plaintiffs. The said sale transactions do not effect right, title and interest of the plaintiffs. Those mutations and sale transactions are void, question of seeking a decree of declaration to set aside the transactions does not arise.

10. The Will Deed executed by deceased Thakkoji on 10.11.1890 in favour of Meenaji, is a registered instrument. It created absolute right, title and interest in favour of Meenaji and consequently in favour of present plaintiffs. Neither the present Defendant Nos. 1 to 24 nor their predecessors questioned the genuineness of the Will, it is binding upon them. Hence the present defendants cannot claim any right, title or interest in the land No. 1339/2. The non entry of the name of Meenaji or sons of Meenaji regarding Sy. No. 1389/2 was purely an accidental omission as the question of filing any application did not arise on the part of Meenaji since the Will was a registered instrument, Hence the defendants cannot take protection of this and agitate that they are the holders of the land in question.

11. The plaintiffs are the absolute owners of the suit property. The defendants have no right, title or interest in the suit property. Therefore the plaintiffs filed the suit for declaration that they are the owners of the suit land. They also wanted a consequential relief of a decree of, permanent injunction restraining the defendants from interfering with peaceful possession and enjoyment of the suit property. Though according to the plaintiffs it was not necessary to pray for

setting aside the alleged sale transaction dated 19.07.1972 in favour of the Defendant Nos. 25 to 35 regarding 18 guntas of land out of Sy. No. 1389/2 for Rs. 6,000/-. Still, by way of abundant precaution the plaintiffs have filed this suit for declaration that the alleged sale of 18 guntas of land Out of Sy. No. 1389/2 is illegal and bad in law. In case the Court comes to the conclusion that D24 to 35 are in possession, the plaintiffs may be awarded actual possession of the said area of 18 guntas of land in possession of D25 to 35, The possession of D25 to 35 even if it is there, the said possession is illegal, unauthorized and without any colour of right. Hence the mere unauthorized possession of this area of 18 guntas does not come in the way of the plaintiffs seeking possession and question of limitation in seeking this relief also does not arise.

12. The plaintiffs filed RTS. AP No. 210/83 in the Court of Assistant Commissioner, Belgaum. The said appeal came to be allowed. The defendants in the suit, i.e., respondent in RTS No. 80/210/83 preferred a revision in the Court of D.C., Belgaum. The said revision which was numbered as RB RTA 37/86-87 came to be allowed on 31.10.1969. The revision was allowed on the ground that probate was not obtained. Plaintiffs submit that order of Deputy Commissioner, Belgaum, is illegal inasmuch as the question of obtaining probate does not arise in this case, as the parties are Hindus. Hence the plaintiffs or their predecessors in title are exempted u/s. 57 of the Indian Succession Act. Plaintiffs are in possession of the suit property as absolute owners. Therefore the suit was filed seeking declaration, possession and injunction.

13. Defendant Nos. 1 to 24, in fact, filed objection statement to the application filed by the plaintiffs under Order 39 Rules 1 and 2. Subsequently they filed a written statement u/o. 8 Rule 1 CPC in which they sought the leave of the Court to adopt the statement of objections, in response to IA No. 1 as the written statement. They contended in the said written statement that the claim and contents set out in the plaint are not true and correct. They specifically repudiate the claim of the plaintiffs in toto. The suit of the plaintiffs is bad for non joinder of necessary parties and non inclusion of all the properties. In other words, the allegation which is not specifically denied, may not be construed as having been admitted. Again they stated that they adopt the objections filed by the plaintiff. They admitted the relationship that is pleaded in the plaint. They denied the Will propounded by the plaintiffs and contended it is a rank fabrication. The alleged Will of Thakkoji did not see the light of the day till the presentation of the plaint. The recitals and the tenor of the alleged Will would indicate that is shrouded in suspicious circumstances. The alleged Will of Thakkoji was not acted upon, as it was curious and suspicious document. They contend that it is false to state that the alleged Will was executed when Thakkoji's son was alive. Without prejudice to the aforesaid contentions alternatively they stated that Thakkoji was not even competent to execute the Will. They admit that Meenaji died in or about the year 1956; they admit after the demise of Meenaji the name of his eldest son Yashwanth came to be recorded in respect of R.S. No. 1389/1 by virtue of mutation entry No. 995, but they deny the allegation that R.S. No. 1389/1 of

Belgaum was the exclusive property of deceased Meenaji Thakkoji Kangralkar; D. Patrika, to 19.10.2011 reveal that the name of Menoji Thakkoji Kangralkar was recorded in respect of R.S. No. 1389 by the name of Omana and Parashuram, sons of Thakkoji recorded in respect of R.S. No. 1389/2 of Belgaum in ME No. 598; they submit that ME 598 was entered in accordance with law. In pursuant thereof a survey map was prepared showing R.S. No. 1389/1 as that of Menoji aid R.S. No. 1389/2 as that of Omana and Parashuram, Sons of Thakkoji Kangralkar by demarkating their boundaries. The conduct of Meenaji and his successors in interest and Omana and Parashuram, sons of Thakkoji indicate they were seeking consenting mind to ME 596, which recorded the name of Meenaji in respect of R.S. No. 1389/1 and Omana and Parashuram, Sons of Thakkoji in respect of R.S. No. 1389/2 of Belgaum. Therefore they did not challenge the same. The plaintiffs who claim interest through Menoji are estopped from questioning the legality and correctness of ME No. 598 or mutation entries effected specifically thereto, which are the basis of ME No. 598. These defendants submit that the Deputy Commissioner has acquired portion of R.S. No. 1389/2. under the provisions of Requisition and Acquisition of Immovable Property Act, 1952 under an order dated 11.03.1970 in the name of sons of Omana and Parashuram They denied the allegations made to the ME under which the names of sons of Omana were recorded an respect of R.S. No. 1389/2. The plaintiffs have no concern in respect of R.S. No. 1389/2. Therefore there is no question of giving of notice to them before recording the names of sons of Omana in respect of R.S. No. 1389/2 of Belgaum.

14. The allegation that the said entry recording the names of sons of Omana, did not confer any right, title or interest upon the sons of Omana, as false. The entry was effected in due process of law. The same has become final and conclusive. It is true that on 19.12.1956 the LRs of deceased Meenaji got divided their properties, it is mischievous to allege that the said partition related to R.S. No. 1389 and that the same came to be allotted to the share of Kashinath son of Meenaji Kangralkar and that the plaintiffs have become the absolute owners of the Suit property inheriting the same after the death of Kashinath s/o. Meenaji Kangralkar executed. All the mutation entries were effected by following due procedure prescribed in law. The plaintiffs preferred RTS AP No. 210/03 challenging these mutation entries before the Assistant Commissioner, Belgaum. These defendants preferred revision petition No. RTA 37-86-87 before the Special Deputy Commissioner, Belgaum, who, on being satisfied about the legality of the MEs was pleased to confirm all those MEs and was further pleased to set aside the order of the A.C., Belgaum, passed in RTS No. 80 No. 210/83 by his order 31.10.1987. It is not permissible for the plaintiffs to question the legality of these MEs in this forum. D1 has sold 18 guntas of land from R.S. No. 1389/2 to the present Defendant Nos. 25 to 35. The purchasers have come in possession of this property sold to them. The allegation that these purchasers-Defendant Nos. 25 to 35 have no valid right, title and interest in the land sold to them is false. It is the plaintiffs who have no manner of right, title and interest in R.S. No.

1389/2. Therefore they have, no right to question any transfer effected by Defendant Nos. 1 to 24 in favour of Defendant Nos. 25 to 35. The suit of the plaintiffs in this behalf is clearly barred by Law of Limitation.

15. The plaintiffs who are the owners of R.S. No. 1389/1 and they have sold the entire R.S. No. 1389/1 and have now turned their evil eyes on the properties belonging to these defendants. The valuation of R.S. No. 1389/2 is more than Rs. 10,00,000/-, The plaintiffs have undervalued the suit. The records produced by the defendants clearly establish that it is they who are the owners of R.S. No. 1389/2. These defendants have no personal intention to alienate the property, they are putting up temporary sheds for storing materials and grazing the cattle. The plaintiffs have no right to restrain these defendants from doing anything in their own property. The Court has no jurisdiction to entertain the suit, the relief of declaration and injunction is totally misconceived. Therefore they sought for dismissal of the suit.

16. On the aforesaid pleadings the trial Court framed the following issues.

1. Whether the genealogy produced by the plaintiffs is correct?
2. Whether the plaintiffs prove the Will of Thakkoji in favour of Meenaji dt. 10.11.1890?
3. Whether the description of the suit property is correct?
4. Whether the plaintiffs prove the fraud played on them by the defendants as alleged in para 6 of the plaint?
5. Whether M.E. No. 9907 is not binding on the plaintiffs?
6. Whether M.E. No. 1548 is not binding on the plaintiffs?
7. Whether M.E. No. 657 is not binding on the plaintiffs?
8. Whether M.E. No. 957 is not binding on the plaintiffs?
9. Whether the sale in favour of D.25 to 35 by D1 to D24 is not binding on the plaintiffs?
10. Whether this Court has got jurisdiction to try the suit?
11. Whether the Court fees paid is proper?
12. Whether the suit is barred by limitation?
13. Whether the plaintiffs are entitled for declaration sought?
14. Whether the plaintiffs are entitled for the injunction sought?
15. Whether the plaintiffs are entitled for possession of suit property as claimed by them?
16. Whether the suit is maintainable in the present form?

17. What decree or order?

17. On behalf of the plaintiffs, third plaintiff Prakash was examined as PW 1. They also examined two witnesses, i.e., Bhalachandra Balavant Manjrekar and Keshava Bhimappa Gunjkar, as PW 2 and 3. They produced 36 documents which are marked as Ex. P. 1 to 36. On behalf of the defendants Defendant No. 9-Anil Pararashurarn Kangralkar was examined. Similarly Defendant No. 23-Rama Laxman Kangralkar was examined as DW 2; Balavant Yeshwant Kangralkar was examined as DW 3 and they produced 9 documents which are marked as Ex. P. 1 to Ex. P. 9.

18. On the aforesaid oral and documentary evidence on record the trial Court held that the genealogy produced by the plaintiffs is correct. The plaintiffs proved the Will of Thakkoji in favour of Meenaji dated 10.11.1980, the description of the suit property is correct; the plaintiffs have proved the fraud played on them by the defendants; the mutation entries 9907, 1548, 657 and 957 are not binding on the plaintiffs; the sale in favour of defendant Nos. 25 to 35 is also not binding on the plaintiffs; the Court has jurisdiction to try the suit; Court fee paid is proper; the suit is not barred by limitation; the plaintiff is entitled for the declaration sought for: however, he is not entitled for the injunction sought for. It also granted possession in respect of 18 guntas which is sold by D1 to 24 to D25 to 35. The suit is held to be maintainable. Aggrieved by the said judgment and decree of the trial Court, the defendants have preferred this appeal.

19. The learned Counsel appearing for the defendants submitted when the trial Court declined to grant a relief of injunction on the ground that the plaintiffs are not in possession of the property, granting of the decree for declaration is illegal. Secondly he contended, the claim of the plaintiff is based on the Will dated 10.11.1989, which is marked as Ex. P.5 in the case. The said Will did not see the light of the day for a period of nearly 98 years. It is not acted upon; it is not proved; and the material on record discloses the defendants are in possession of the property which is said to have been bequeathed to the plaintiffs' branch. In fact, on the date of filing of the suit, the suit schedule property was not in existence as it had been acquired by the Belgaum Urban Development Authority. Therefore he submits the decree of declaration and possession in respect of 18 guntas of land which is in the possession of the defendants 25 to 35 is illegal and requires to be set aside.

20. Per contra, the learned Counsel for the plaintiffs submitted, the Will is a registered one, all the attesting witnesses have died long back. Therefore the officials of the Sub Registrar's office were summoned, who have produced the register showing the registration of the Will. As the Will is registered and it is a document which is of more than 30 years old, by virtue of Sec. 90 of the Indian Evidence Act, presumption is, it is validly and duly executed. The defendants have not adduced any evidence in rebuttal. It is not their case that the testator was not in a state of sound mind at the time of execution of the Will and therefore he submits the trial Court was justified holding that the Will is proved,

and granting declaration in favour of the plaintiffs and also granting a decree for possession in respect of 18 guntas of land. Therefore he submits no case for interference is made out.

21. In the light of the aforesaid facts and rival contentions the point that arise for my consideration is:

Whether the Will dated 10.11.1890 as per Ex. P.5 is proved in accordance with law and consequently the decree for declaration granted by the Court is sustainable?

22. The relationship between the parties is not in dispute. Ex. P.5 is the Will dated 10.11.1890 executed by Thakkoji in favour of not only his last son Menoji but also in favour of 5 sons. Thakkoji died before 1900. On a reading of the said Will we cannot make out whether it is the self acquisition or a joint family property or a coparcenary property. After his death there is no indication that the said Will was acted upon; when he distributed the property under the Will to various children; if the children wanted the mutation entries to be made in their name in respect of the lands which are bequeathed; they ought to have produced the copy on the Will to enable them to get the mutation entries made. No such claim appears to have been made by any one of the sons. Meenaji to whom the suit property is bequeathed, was well aware of the execution of the Will. As on the date of the execution of the Will, Thakkoji was living with Meenaji and without his assistance Will could not have been registered. He did not take any steps to give effect to this Will or to claim the property under the Will. However, the material on record shows after the death of Thakkoji the name of his sons are mutated in respect of his several properties. Similarly Meenaji's name also came to be mutated. Meenaji died in the year 1926. After his death his eldest son Kashinath's name came to be entered in the mutation register, not on the basis of the Will-Ex. P.5, but by inheritance. On 19.12.1956 in Meenaji's branch there was a partition. In the said partition also there is no whisper about this Will. Kashinath died in the year 1962. Even after his death though the mutation entries have been made it is not on the basis of the Will. Therefore till the suit was filed in the year 1988 this Will did not see the light of the day. None of the parties acted on the said Will. Therefore it probabalises the defence that the Will, even if it is true, was not acted upon. On the contrary, the evidence on record discloses, that the defendants 1 and 2 were managing all the properties; It is they, who approached the Revenue Authorities got the mutation entries made and in fact the plaintiffs belatedly filed an appeal challenging those mutation entries before the Assistant Commissioner, Belgaum, who set aside the mutation entries, but, in a revision petition filed before the Deputy Commissioner, the order of the Assistant Commissioner was set aside, mutation entries in the name of the respondents were restored and that is how the present suit is filed for declaration of title. In the present suit, the relief of setting aside these mutation entries have been made by the plaintiffs.

23. The learned trial Judge has proceeded on the assumption that the Will is 30

years old; it is a registered document; the defendant did not contend that the testator was not in a sound state of mind or there was any suspicious circumstances surrounding the execution of the Will and in the absence of all these materials when the original Will is produced the officials of the Sub Registrar's office is examined to speak about the registration, the Will stands proved. No doubt, the Will is a registered document which is 30 years old. The officials of the Sub Registrar have spoken about the registration. However, it is settled law, mere registration of a document is not a proof of Will. Moreover, the testator can bequeath his self acquired property under a Will. As stated earlier, there is no material on record to show that the properties which are covered under the Will are the self acquisitions of the testator. It is not in dispute that Thakkoji and his 5. sons constitute a Hindu Undivided family. During his lifetime there was no partition. He could have effected a partition of the joint family properties through a Will, even without consent of the other members of the family, but he did not adopt the said procedure. On the contrary, he choose to bequeath the property. If the property which is the subject matter of the Will is a joint family property, he had no right to bequeath the property. Assuming that document is to be construed as a partition, the subsequent conduct of the parties in not relying on the said Will, not approaching the Revenue Authorities for mutating their name on the basis of the Will, but on the contrary, by an agreement enjoying the properties separately by getting mutation entries made in respect of portion of the property in their favour and selling the properties by executing the Sale Deeds go to show that this Will was never acted upon. Plaintiffs admit they have sold 7 acres of land in the very same property. A portion of the property had been notified for acquisition subsequently. The property is acquired by Belgaum Urban Development Authority. Awards are passed, compensation amount is deposited. It is after all this, the plaintiff has come to Court seeking a declaration without setting forth all these facts. When we read the plaint and the evidence of the plaintiff on record it gives an impression this property exists; it is in their possession and defendants are trying to interfere with their possession. They have managed to get the mutation entries made in their name. Defendant Nos. 1 to 24 have sold 18 guntas out of this land in favour of Defendant Nos. 25 to 35 who are in possession of the said property. But the evidence on record shows 18 guntas are sold in favour of Defendant Nos. 25 to 35 and the rest of the property is the subject matter of acquisition. In other words, the plaintiff is not in possession of the property; the plaintiffs cannot claim to be the exclusive owner of the schedule property. In this background, the finding of the trial Court that the Will is proved, cannot be sustained and consequently the finding of the trial Court that the plaintiff has established his title over the property and therefore he is entitled to declaration also cannot be sustained. However, the material on record discloses that this property at an undisputed point of time was a joint family property. Plaintiffs and Defendant Nos. 1 to 24 are the members of the joint family, even during lifetime of Thakkoji they were not living together but the property continue to be joint. If the schedule property continues to be joint or by way of acquisition now the

property is transformed into money, it is open to the parties to agitate their rights to claim their share of compensation by filing a suit for partition. None of them can claim exclusive title.

24. It is submitted the Government after acquiring the subject matter of the suit, because of the dispute pending in the Courts has not distributed the amount on the order of this Court. The amount is kept in a deposit which is earning interest. Now that the suit is dismissed setting aside the decree granted by the trial Court declaring the plaintiffs are the absolute owners, it should not be construed as if the plaintiffs have no right in the property. The plaintiffs were claiming absolute title to a Will. If the Will is not proved, that character of the property continues to be joint family property. Therefore each member of the family, i.e., the plaintiffs and the defendants, would be entitled to a definite, share in the property and consequently in the amount of compensation. Till the rights of both the plaintiffs and defendants are ascertained and crystalised the amount in deposit should not be paid to any of those parties. The amount shall be distributed only in terms of a decree of a competent Civil Court or if the parties mutually agree for resolving the dispute and partitioning their rights in accordance with law. In that view of the matter, the judgment and decree of the trial Court requires to be interfered with. Hence I pass the following order.

ORDER

(a) Appeal is allowed. Judgment and decree of the trial Court is hereby set aside.

(b) It is made clear, in the event of any suit for partition is being filed by any of the parties, this judgment will not come in the way of filing of such a suit, liberty is reserved.

(c) Parties to bear their own costs.