

(2008) 03 KAR CK 0006

In the Karnataka High Court

Case No : Regular Second Appeal No. 243 of 2002

Seetharama Narayan Hegde (since deceased by his LRs and Others) APPELLANT

Vs

Venkataramana Seshagiri Shet (since deceased by his LRs and Others) RESPONDENT

Date of Decision : 13-03-2008

Acts Referred:

Citation : (2008) 03 KAR CK 0006

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : S.V. Bhat and S. Harish, for the Appellant; Ganapathy S. Shastri, for R4(A) (Absent) and R1A, R2, R5A to R5D and 6, for the Respondent

Judgement

1. This second appeal is by the 1st defendant in O.S. No. 26/1972 on the file of the Court of Munsiff at Kumta, which suit was decreed by the trial Court not once but twice. Once earlier the Lower Appellate Court had remanded the matter to the trial Court and it has been affirmed by the Lower Appellate Court in the second round of first appeal by the 1st defendant and to get over this decree, the present second appeal.

2. Suit is one for separate possession of 1/9th share of the plaintiff in the suit schedule properties, which were described to be joint family properties of the plaintiff and defendants 8, 9, 10, 11, 12 and 13 and three other members, who did not figure as defendants in the suit. Defendants 1 and 2 who are described as the purchasers of shares of two other members of the family viz., one Mahabaleshwar Ganapathi Shet and Manjunath Ganapathi Shet have been arrayed as defendants for the reason that the shares of those members of the family who it was conceded have sold their share in the family property in favour of defendants 1 and 2, while another member of the family who according to the plaintiff was entitled for a share viz., Chidambara Sheshagiri Shet was also not included as a defendant on the premise that the share of this member of the

family had been given even earlier and that was suit item No. 9 of the properties in the schedule and therefore, there was no need to implead that member of the family as a defendant. Plaintiff had impleaded defendants 3, 4 and 5 as persons who had purchased suit items 1, 2, 4 and 5 from the 1st and 2nd defendants and therefore, they were added as defendants to the suit and defendants 6 and 7 are pleaded to be the purchasers of suit Item No. 3 from defendants 1 and 2 again and therefore they were also added as parties in as much as the plaintiff was claiming a share in respect of the suit items 1 to 8 in the schedule to the plaint. It was pleaded that suit item No. 9 was given to Chidambara Sheshagiri Shet who was not impleaded as a defendant to the suit in terms of partition suit 17/1947 and therefore, the plaintiff did not claim any share in the suit item and thus there was no need to implead the said Chidambara Sheshagiri Shet as a party to the suit. Plaintiff also sought for mesne profits for the past three years from the date of filing of the suit

3. First defendant contested the suit by filing written statement pleading that the suit was not tenable and at any rate the suit was not maintainable as against the 1st defendant. It was pleaded that suit Item No. 3 the agricultural land in Sy. No. 633 Hissa No. 3+4+5+6+7 measuring 0-11-4 Kh.0-0-8 was exclusive property of defendants 1 and 2; that the plaintiff or defendants 5 to 8 have no right title and interest in this property; that defendants 1 and 2 having sold this property in favour of defendants 6 and 7, it has now become the property in possession and ownership of defendants 6 and 7. The first defendant pleaded that plaint averment in paragraph 2 was not correct; that the answering defendant had not sold suit Item Nos. 1, 2 and 4 in favour of defendants 3 to 5 and that the plaint averments that the 1st defendant had sold the property in favour of defendants 3, 4 and 5 was incorrect. It was also pleaded that in respect of suit items 6, 7 and 8 they were not very much available or productive lands and not yielding any income. However, the answering defendant did not have any objection for the plaintiff claiming his share in these properties.

4. The 2nd defendant virtually reiterated the defence of the 1st defendant by filing a separate statement but defendants 6 and 7 through a memo adopted defence of defendants 1 and 2. The other defendants did not file any statement either contesting or supporting the case of the plaintiff.

5. In the light of such pleadings the trial Court had framed the following seven issues.

1. Does the plaintiff prove that he is entitled to 1/9th share in Sy. No. 1 to 8 of the suit properties?

2. If so, whether defendant Nos. 2, 6 and 7 prove that Sl. No. 3 property belongs exclusively to defendant Nos. 1 and 2 and as such they had sold the same to defendant Nos. 6 and 7?

3. Do defendant Nos. 1 and 2 prove that Sl. 1, 2 and 4 property belonged exclusively to them?

4. Whether the plaintiff is entitled to partition?
5. Whether the plaintiff is entitled to past income?
6. What is found due?
7. What decree or order?

6. Parties went to trial on such issues. On behalf of the plaintiff, the legal heir of the 8th defendant who had expired during the pendency of the trial was examined as PW-1 who deposed not only for himself but also as power of attorney holder on behalf of the defendants 8, 9 & 10. Documentary evidence comprises of Ex.P-1 to Ex.P-11 on the defendants' side. Defendants 1 and 2 were examined as DW-1 and 2 and documentary evidence Exs.D-1 to D-9 were got marked.

7. The trial Court on examination of the pleadings and the supporting material in the form of evidence and the arguments addressed on behalf of the parties answered the issues in favour of plaintiff and against the defendants and accordingly decreed the suit for 1/9th share of the plaintiff in the suit properties. Aggrieved by this judgment and decree the 1st defendant by then had appealed in R.A. No. 17/1980. The appellant - 1st defendant having died during the pendency of the proceedings his legal heirs continued the appeal and the Lower Appellate Court in terms of its order dated 28.7.1987 set aside the judgment and decree of the trial Court and remanded the matter to the trial Court for adducing the additional evidence for the purpose of enabling the parties to place the additional material before the Court. On remand 1st defendant filed additional written statement pleading further that the answering defendant having purchased some of the suit items in Court auction sale, the 1st defendant himself being the decree holder in a suit that had been filed against the plaintiffs family for recovery of lands as the 1st defendant was the owner of suit item No. 3 and the plaintiff viz., was the moolagenidar and having failed to pay the rents in satisfaction of this decree, the moolagenidar rights of the plaintiffs family in all the suit lands including the suit item No. 3 having been purchased by the 1st defendant for satisfaction and the 1st defendant having been put in possession and being in enjoyment of the same, ever since the possession of the 1st defendant was as full owner of the property and had continued to enjoy the same and though as part of the execution proceedings some of the members of the family had filed objections and had obtained an order from the Court that the sale does not bind their shares in the property nevertheless the 1st defendant having continued to remain in possession and perfected their title to the possessory right of the property and therefore, the plaintiff again maintained a suit at this point of time as the 1st defendant was in possession and enjoyment ever since 1944 and till the date of filing of the suit. It was also pleaded that on the death of defendants 4, 8, 9, 10, 11, 12 and 13 subsequent to the execution of the suit and legal heirs having not been brought on record the suit abates as against these defendants and the entire suit has to be dismissed as having

abated and the further additional pleading was that as the members of the family of the plaintiff had already filed Form No. 7 before the Land Tribunal seeking for conferment of occupancy rights in respect of the suit Item Nos. 6 and 7 and restricting their claim to a portion of these properties, the plaintiff was not entitled to claim a share in the properties independent and contrary to the claim made before the Land Tribunal. It is also pleaded that suit was not proper.

8. The 1st defendant also contended that the entitlements of the members of the family vis-a-vis the 1st defendant in respect of the lands in Item Nos. 6, 7 and 8 having been determined before the Court of Revenue, Shira at Kumta and the defendant having been allotted 3/5th share in these properties and the plaintiff having got 1/10th share and likewise 8th defendant got 1/5th share and the 9th defendant got 1/10th share, the plaintiff cannot maintain the suit for claiming a different share and was virtually estopped from contenting to the contrary and having appealed against that share ratio. It was also pleaded that the power of attorney which had been executed in favour of Brahmanand on behalf of defendants 8, 9 and 10 does not survive as these defendants themselves had died and the authorization had come to an end with the death of these defendants, 1st defendant pleaded that the land Tribunal having already conferred occupancy rights to the extent of 3/5th share in suit Item Nos. 6 and 7, any share contrary to this was not tenable. It was also pleaded that the plaintiffs' entitlement of 1/10th share in some suit items having been determined even by the Land Tribunal the plaintiff cannot maintain the suit for claiming any share which is at variance with the rights as recognized by the Land Tribunal and as such in the light of the orders passed by the Land Tribunal, the defendant pleaded for dismissal of the suit. The demand that had been made earlier by the power of attorney holder was examined on behalf of the plaintiff indicating that plaintiff and other members of the family had already filed Form No. 7 before the Land Tribunal in respect of their entitlement, which was in the possession and cultivation of the family and having admitted the right of the 1st defendant for the remaining portion of the property in the suit items, the present suit was liable to be dismissed even otherwise.

9. In the light of the additional written statement filed by the 1st defendant, the trial Court framed addl. issues as under:

8. Whether the suit is barred by limitation as contended by the defendant No. 1?

9. Whether the suit is abated by virtue of the LRs. brought late on record?

10. Whether the partition barred by virtue of KLR Act?

11. Whether the power of attorney issued by Defendant No. 8, 9 and 10 have no legal effect as contended by defendant No. 1?

12. Whether the defendant No. 1 proves that he has the right by adverse possession?

10. The issue No. 8 relating to limitation was answered against the defendant,

the issue relating to the suit having been abated by the death of some of the defendants and the LRs. not on record was also answered against the defendants it was held that suit was not barred by the provisions of the Land Reforms Act and the issue relating to the fact of the death of defendants 8, 9 and 10 on the power of attorney which they had issued in favour of Brahmanand Narasimha Shetty was also answered against the defendant and even the issue as to whether the defendant proves that he had acquired prescriptive right by adverse possession was also answered against the defendant, and consequently the suit was yet again decreed for the 1/9th share in the suit properties, also for future mesne profits as to whether the plaintiff had not placed material before the Court as to what was the income earlier.

11. The aggrieved 1st defendant filed appeal yet again in R.A. No. 24/01. It was urged in the appeal that the trial Court has committed an error in decreeing the suit; that the suit should have been dismissed as not tenable; that the suit should have been held to be barred by limitation; that at any rate the trial Court has committed an error in decreeing the suit even in respect of the suit Item No. 3 in respect of which the 1st defendant had claimed prescriptive title by adverse possession and urged for setting aside the judgment and decree. In the light of such arguments as the decree holder defended the decree, the Lower Appellate Court formulated the following points for its determination:

1. Whether the plaintiff, defendant Nos. 9 and 10 are entitled for partition and separate possession of their 1/9th share and defendant No. 8(a) is entitled for partition and separate possession of 2/9th share in the suit properties item Nos. 1 to 8 along with the mesne profits?
2. Whether the defendant No. 1 has proved that he has perfected his title over the suit property at Sl. No. 3 by adverse possession?
3. Whether the judgment and decree of the trial Court calls for interference by this Court?
4. What order?

12. The Lower Appellate Court agreed with the finding of the trial Court that the plaintiff and defendants 9 and 10 are entitled for partition of 2/9th share in the suit properties and for mesne profits and held that the 1st defendant had failed in proving that he had again prescriptive title to the suit Item No. 3 and therefore dismissed the appeal holding that the judgment and decree of the trial Court was valid and legal. It is aggrieved by this judgment and decree the present second appeal by the 1st defendant.

13. Appearing on behalf of the appellants - legal heirs of original first defendant in the suit - Sri S.V. Bhat, learned Counsel, has submitted that the background leading to the filling of the suit in OS No. 26 of 1972, on the file Munsiff, Kumta, from the angle of the first-defendant-appellant is as under:

SYNOPSIS

Sri Narayana Venkappa Hegde -predecessor-in-title of appellant and 2nd respondent, was the owner of the property of the Sy. No. 633, hissa No. 3, 4, 5, 6, 7 measuring 11 guntas 8 an as and 8 an as of kharab (Item No. 3) situated at Hedge Village. He granted mulageni rights in favour of family of Sri. Manja Shetti/ Shet under who the plaintiff & other defendants claim interest.

O.S. 797/1929

Since the said Sri Manja Shetti has not paid the rents. Sri. Narayana Venkappa Hegde filed a suit in O.S. No. 797/1929 for recovery of the same against the legal heirs of Sri Manja Shet i.e., one Sri Kannappa Shet, Sri Devaiah Shet, Sri. Subraya Shet, Sri Ganapathi Shet, Sri Venkatarama Shet (Plaintiff/1st respondent in this appeal) and the same came to be decreed.

Ex. 523/1942

As the defendants therein failed to pay the same. Sri Narayana Venkappa Hegde filed Ex. Pet. 523/1942 in which he sought for

June, 1944

With the court's permission he purchased the same and was also put in possession by the Hon''ble Court. Thus, the family of Sri Manja Shet has lost possession in respect of these properties in or about June, 1944. Mulageni rights were merged with the larger rights of Sri. Narayana Venkappa Hegde and after his death, his LR's i.e., the appellant and 2nd respondent enjoying the said properties.

Mis.4/45

1st respondent/plaintiff along with Sri Venkatesh Kannappa Shet and Sri Devaiah Manja Shet filed Misc. Case No. 4/45 to set aside the sale to the extent of their shares and sought possession. The said miscellaneous came to be allowed which the legal heirs of Sri. Narayana Venkappa Hegde unsuccessfully challenged. Though sale of mulageni rights was set aside, possession was not restored.

O.S. 17/47

R.A.120/49

Meanwhile, one Sri Chidambara Sheshagiri Shet/brother of the plaintiff, filed a suit in O.S. No. 17/1947 seeking declaration that the decree obtained by the Sri Narayana Venkappa Hegde is not binding on him and consequently sought for partition of his 1/10th share in mulageni rights, separate possession and mesne profits in the property sold in the said execution. The plaintiff, defendants 9, 10, 11 and 12 were impleaded stated that they are entitled to certain rights in the properties. In the said suit defendants No. 10 to 13 were ex parte and the suit came to be dismissed on 22.07.1949 (Ex-P8), however the appeal was allowed. But possession not restored.

O.S. 193/1964

17.12.1965

One Sri Satyanarayana Kannappa Shet and Padmanabha Subraya Shet have also filed a suit in O.S. No. 193/1964 against the appellant and others for general partition of their mulageni rights. Defendants 6 & 8 had filed written statement and claimed share in the suit property, later on did not press for the same. An ex parte preliminary decree was passed on 17.12.1965 for division of their shares together being 1/5. However no final decree proceedings were initiated thereafter.

18.05.1972

Item No. 3 of suit schedule property was in the joint possession of defendant No. 1 & 2 as owners thereof. In the family partition dated 28.01.1950 made between them, items No. 6 to 9 were allotted to the share of defendant No. 1. These defendants No. 1 & 2 (appellant and 3rd respondent) sold to defendant No. 6 and 7 through registered sale deed dated 18.05.1972 which is exhibited as Ex-D2 and is in their possession.

22.05.1972

Suit O.S No. 26/72 is filed by the plaintiff for partition and separate possession of his mulageni rights and mesne profits of.

14. This Court admitted this second appeal on the following substantial question of law:

1) Whether the courts-below were justified in granting a decree in favour of the plaintiff when the lands were vested in the government under the Land Reforms Act?

15. Submission of Sri S.V. Bhat, learned Counsel for the appellants is that a few more substantial questions of law do arise from the judgment and decree passed by the courts below; that the questions as had been mentioned in the memorandum of appeal are also required to be examined and in addition submits that the issue relating to the limitation has been wrongly answered by both the courts below. One another question is as to whether the courts below were right in concluding that the present suit of the plaintiff is not barred by the principle of res judicata or that the plaintiff is estopped from filing the present suit, in view of the judgment in the earlier suit in OS No. 17 of 1947, to which both the plaintiff and the first and second defendants were parties. A memo is filed in this regard indicating the additional questions of law which are required to be examined by this Court.

16. Sri Bhat would vehemently urge that the courts below have committed a serious error in law in holding that the suit is not barred by limitation, particularly as against the first defendant for claiming any share in the properties held by the first defendant and the which were in his possession ever since the year 1944, wherein which the first defendant got into possession of the property by purchasing the suit items in court auction sale and having not been disturbed

from possession thereafter, particularly in respect of suit item No. 3 agricultural land in Sy Nos. 633/3, 4, 5, 6 and 7 of Hegde village, Kumta taluk. While learned Counsel would submit that though the law of limitation would definitely operate in respect of the suit schedule properties also, as the family of the plaintiff had only moolgeni rights in respect of these suit lands and the entire moolgeni rights of the family in all the suit lands had been purchased by the first defendant through court auction sale, the first defendant having not remained in possession in respect of other suit items in Sy No. 633 viz., suit item Nos. 1, 2, 4 and 5, the first defendant is not concerned about the outcome in the suit with regard to these suit items and with regard to suit item Nos. 6 to 9, submission is that the first defendant having already been conferred occupancy rights in suit item Nos. 6 to 8 to the extent of 3/5th share and in so far as the decree is not in any way at variance to this order of the tribunal, particularly, the plaintiff is given 1/10th share by this Court and that being not in any way adverse to the interest of the first defendant, the first defendant is not averse to a decree being passed in favour of the plaintiff as it is virtually an inter se matter amongst the plaintiffs and defendants 8 to 13, who are members of one family, and who were claiming as descendants of one Manja Shetti.

17. Learned Counsel for first defendant-appellants would submit that the suit for claiming any share in suit item No. 3 was clearly barred by limitation under any Article of the Limitation Act, inasmuch as the first defendant was in continuous, uninterrupted, hostile possession of suit item No. 3 as his own and not in any other capacity, a suit filed in the year 1972 is clearly barred against the first defendant for claiming any share in respect of suit item No. 3. What is submitted is in respect of other suit items, though the reasoning equally applies for the application of law of limitation, as the first defendant is not admittedly in possession of suit item Nos. 1, 2, 4 and 5, this defence is not available and in so far as suit item No. 6 to 8 are concerned, the first defendant being not in possession of entire extent of these suit items, but being in part possession of these items and to that extent the land tribunal having recognized that possessory rights and having conferred occupancy rights in favour of first defendant, a decree in the present suit not. at variance to this order would not in any way affect the interest and law of limitation would operate only in respect of that part of the land which continues to remain in possession of the first defendant in respect of item No. 6 to 8 are concerned.

18. The finding of the courts below that the possession of first defendant in respect of suit item lands was not adverse to the interest of the plaintiffs and defendants 8 to 13 is questioned by submitting that the courts below committed a clear error in law in holding that the first defendant was in possession of these suit items as co-sharer. The learned Counsel would submit that the very assumption that the first defendant was in possession of the land in question as a co-sharer is an error in law, as the first defendant was in possession in his own right as owner of the land and particularly as purchaser of moolgeni rights of plaintiff and other members of family in so far as suit item No. 3 is concerned

and having continued that possession on the strength of the sale deed executed by court in court auction sale and that sale having not either set aside by courts but the court having held that it was not binding on some of the members of family, who had raised objections to the legality of the sale in miscellaneous proceedings and even then, the parties raising objections having not reversed the possession of the property from the first defendant and the first defendant having continued to remain in possession, that possession was definitely adverse to the interest of the plaintiff and other members of the family and not a possession on behalf of the other co-sharers of the family, as a co-sharer in the family.

19. Though Sri S.V. Bhat, learned Counsel for the appellants would urge many other contentions to impugn the legality of the judgments and decrees passed by the courts below, I am of the view that the answer to these two questions is more than sufficient for the disposal of this second appeal.

20. In so far as the question of limitation is concerned, the trial court formulated the question as additional issue and as Issue No. 8 and proceeded to answer it against the defendant-appellants. The trial court has simply held that it was not clear as to whether the suit was barred by limitation and any evidence led on that point and has answered the issue in the negative. The lower appellate court has not bestowed its attention on this aspect.

21. Question of limitation is a question which is required to be answered by court and if the suit is barred by limitation, there is no question of suit being entertained only because the first defendant has not expressly pleaded or proved by leading any material evidence if the plea is not in dispute and would indicate that the suit is barred by law of limitation.

22. The courts below have together found, as a matter of fact, that the first defendant had continued to remain in possession of the suit item No. 3 and some of the other suit item like suit item No. 6 to 8, but concluded that such possession is not any adverse possession to the plaintiff or other members of the family, but as one by co-owner or member of the family. It is this premise that has led to the conclusion not only that the suit is not barred but also that the possession of the first defendant in respect of some of the suit items are not adverse to the interest of the plaintiff.

23. It is borne out from the records that the family of the plaintiff had only moolgeni rights in the suit lands. It is also not in dispute that the first defendant was the owner of suit item No. 3 in respect of which the family had moolgeni rights under the first defendant. When the family lost the moolgeni rights after they were sold in court auction sale and also parted the possession of the suit lands because of such sale, unless such possession is restored to the members of the family of plaintiff and so long as the first defendant continues to be in possession, such possession can never said to be on behalf of the family of the plaintiff, cannot be lost sight of the fact that the first defendant had purchased

moolgeni rights and if so on being put in possession of the lands in question in respect of suit item No. 3, he had become full owner and in respect of other suit items, had obviated the possessory moolgeni rights. The possession of this nature does not become a possession on behalf of the plaintiff or other members of his family unless the first defendant is dispossessed and possession is resumed or possession is delivered symbolically in favour of the plaintiff and members of his family. That never happened. But on the other hand, it appears, even admittedly the first defendant has lost possession of the suit items 1,2,4 and 5 and some part of the suit item Nos. 6 to 8 and therefore, to this extent the first defendant cannot plead law of limitation, but in respect of suit item No. 3 and extent which he had remained in possession in suit item Nos. 6 to 8 are concerned, that possession continued adverse to the interest of the family of the plaintiff and if so the suit filed in the year 1972 though styled as a suit for a share in the properties, is definitely barred in so far as it seeks to recover possession of the land from the first defendant and to this extent, the suit is definitely barred by law of limitation.

24. It should also be held that the first defendant had perfected his title even by adverse possession by being in continues, uninterrupted and hostile possession of these items of suit schedule properties from the year 1944. While this position is not disputed, it cannot be held that the plaintiff or members of the family have a substantial right in these suit items for claiming a share in these properties.

25. The first defendant does not become co-owner in law along with the other members of the family of just because the plaintiff had indicated that the first defendant had succeeded to the 1/10th share each of Manjuntha Ganapathi Shet and Manja Shetti, who are also entitled for 1/10th share in the family and these two persons have not questioned the sale of moolgeni rights in favour of first defendant in the court auction sale.

26. The sharing ratio obviously is indicated in terms of the judgment and decree in O.S. No. 17 of 1947, wherein even according to the plaint averments, separated member of the family namely Chidambara Sheshagiri Shet having been given 1/10th share in the suit schedule property and suit item No. 9 was adjusted against that 1/10th share, it is on such premise these two members namely Manjunatha Ganapathi Shet and Manja Shetti also given 1/10th share each and that share having been apportioned in favour of the first defendant as purchaser of moolgeni rights of properties, which was not challenged by these two sharers of family, will enure to the benefit of the first defendant. Here again if even in terms of the judgment and decree in OS No. 17 of 1947 if the shares of the members of the family had been defined in that suit itself and obviously the plaintiff having got 1/10th share of the properties there, there is no question the plaintiff filing yet another suit impleading the defendants 1 to 7 as parties and that defendants 1 and 2 being purchasers of moolgeni rights and indicating that the defendants 3 to 7 are the purchasers in turn of such right from the defendants 1 and 2 as if the parties to OS No. 17 of 1947 had not put into

operation the decree by suing for final decree proceedings, that result cannot be achieved by filing a subsequent suit for partition. At any rate the members of the family who could have executed the decree in OS No. 17 of 1947 having failed to do so, particularly against the first defendant herein, cannot, at a subsequent point of time, bring yet another suit for claiming the very relief. To this extent, the present suit should be definitely held to be not maintainable for claiming anything from the first defendant or persons claiming under the first defendant. If such is the legal position and the possession of first defendant is not as a co-owner and on behalf of the members of the family of plaintiff, which is the reason why the courts below held the point of limitation against the first defendant and in favour of plaintiff, the answer is definitely correct in law and it should be held that the suit in so far as the first defendant is concerned is definitely barred by law of limitation and more so in respect of suit item No. 3 and the portion of lands which continued to remain the possession of first defendant in suit item Nos. 6 to 8.

27. Two questions viz., a to whether the courts below are justified in granting a decree in favour of the plaintiff, though not necessarily for the reason that the land had vested in the government but for the reason that the plaintiff could not maintain yet another suit and that the suit is barred by limitation as against the first defendant, particularly in respect of the suit items mentioned therein, it has to be answered in favour of appellant-first defendant and to this extent the appeal has to be necessarily allowed.

28. Sri S.V. Bhat, learned Counsel for the appellants-first defendant very gracefully submits that as the interest of the first defendant is confined to suit item No. 3 and parts of item No. 6 to 8, the first defendant is not so much concerned with the judgment and decree in respect of other items and in respect of other extents of the suit lands, which is also not in variance with the order passed by the land tribunal and therefore having submitted that the decree in so far as these shares which are given in favour of plaintiff and other than items referred to above, is not. questioned or challenged.

29. In the light of this submission, this second appeal is allowed and the judgments and decrees passed by the courts below are set aside and the decree in so far as it grants 1/9th share in favour of the suit item No. 3 is modified. It is declared that the plaintiff or other members of the family have no right or share in suit item No. 3 and in respect of suit item No. 6 to 8, the first defendant having not evinced any interest in these items of suit schedule properties for any share over and above 3/5th in these properties and the land tribunal having already conferred the occupancy rights in his favour to the extent of 3/5th share on the premise that the first defendant was in possession of this extent of suit items, it is only in the balance extent of the suit lands the plaintiff and other members of the family can seek share and partition and therefore it is declared that the plaintiff along with the original defendants 7 to 13 are each entitled to 2/35th share in these three suit items viz., suit item Nos. 6 to 8 are concerned.

30. It is further declared that the judgment and decree of the courts below in so far as the suit items 1, 2, 4 and 5 are concerned, they are left undisturbed. Registry to draw up a modified decree in terms of this judgment.

32. Appeal is allowed in part. Parties to bear their respective costs.