

(2011) 11 KAR CK 0399

In the Karnataka High Court

Case No : Regular First Appeal No. 1011 of 2001 [DEC]

Vaijinath Sajjanshetty

APPELLANT

Vs

Vasanthrao S/o Gunderao died by L.Rs. (Kamalabai, Ashok,
Pradeep and Hema and Others

RESPONDENT

Date of Decision : 02-11-2011

Acts Referred:

Citation : (2011) 11 KAR CK 0399

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

Bench : Single Bench

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—This Regular First Appeal under Section 96 of Code of Civil Procedure by the second defendant in the suit is directed against the judgment and decree dated 7-9-2001 passed in OS No 45 of 1994, on the file of Addl Civil Judge (Sr Dn), Bidar. For the sake of convenience, the parties will be referred to in their respective ranks in the suit.

2. The suit of the plaintiffs for declaration and perpetual injunction having been decreed by the trial court, only contesting defendant amongst the persons impleaded as defendants to the suit is in appeal before this court to get over this judgment and decree.

3. Plaintiffs, numbering two, claim to be sons of one Gunderao, had filed the suit impleading their another brother as the first defendant, son of yet another brother, who was no more, as second defendant; third defendant, now appellant herein, being purchaser of two parcels of properties as per two sale deeds, one dated 29-5-1986, executed by the first defendant in respect of an extent of 2 acre 35 guntas in Sy No 86/2A and the other sale deed dated 7-12-1986, executed by father of second defendant, in respect of 1 acre 17 guntas in Sy No 86/2B, both situated at Aurad village, Aurad taluk, Bidar district; fourth defendant being a third party who was averred in the plaint as a person claiming

under the third defendant but was interfering with the possession of the suit schedule property in the possession of joint family. Of which Gunderao was the propositor.

4. The suit was for a prayer to the effect that the suit schedule properties viz., parcels of lands in Sy No 86/2 totally measuring 5 acres 30 guntas [later sub-podded as Sy Nos 86/2A measuring 2 acres 33 guntas and Sy No 86/2B measuring 2 acres 37 guntas] was a joint family property; that the status of the family remained joint and therefore the two sale transactions in favour of third defendant do not bind the share of the plaintiffs in the joint family and also for a consequential restraint order against defendants 3 and 4 alone from interfering with the joint possession of the suit schedule properties by the plaintiffs etc.

5. The suit was on the premise that even when the family was joint, parts of suit schedule properties had been sold by the first defendant and father of second defendant and on the strength of the sale transactions, defendants 3 and 4 were trying to interfere with the joint possession etc.

6. It is rather ironic that even second plaintiff was a culprit in so far as selling a part of the so-called joint family property, as Ex.D3 sale deed dated 17-12-1988 is, undisputedly, executed by the second plaintiff and in favour of third defendant, but nevertheless pleading that the transactions including the one executed by the second plaintiff, as obnoxious.

7. The suit was contested by the third defendant alone and the other defendants conveniently remained ex parte. Third defendant mainly contended that he is the purchaser for valuable consideration from the members of the family which was once joint having executed sale deeds; that there was a prior partition in the family and therefore the total extent of 4 acres 12 guntas of land acquired under the two sale deeds are valid acquisitions; that the properties were not given exclusively to the mother of the plaintiffs and defendants 1 and 2, but the plaintiffs 1 and 2 and some of the members of the family were government servants residing in different places and therefore their mother was managing the affairs of the family properties and as she could not manage the agricultural land on her own, she had given it for cultivation to the third defendant on bhattai basis and the third defendant had been put in possession of the properties even during the life time of mother of plaintiffs Vithabai; that possession of the defendants in respect of suit lands and non-suit lands occupying the entire survey number, was lawful possession and from out of such land, third defendant having purchased the suit schedule properties; that the plaintiffs, first defendant and father of second defendant - four children of Gunderao - were never in joint possession of the suit schedule properties; that after the death of their mother Vithabai in or around the year 1984, the land revenue entries did not reflect the correct position; that even the second defendant had neither cultivated any portion of the suit land nor was in possession of the same, as he was also a government servant serving in the forest department in Andhra Pradesh government; that with the sale deeds, possession of the third defendant over the

suit schedule properties was not merely de facto possession but also as de jure and third defendant having acquired valid title and having also after such purchase got an extent of 3 acres 35 guntas converted for non-agricultural use with the permission of the revenue authorities and also having developed as a layout with the permission of the town planning authority, all these developments are testimony of the fact of not only the valid acquisition of title by the third defendant, but also his continuing in physical possession ever since 1980 onwards; that even the second plaintiff himself had purchased about 22 house sites in the layout formed by the third defendant from out of the suit schedule properties and therefore the plaintiffs are estopped from contending the contrary to seek relief in the suit; that the suit averments and the cause of action are all false, fictitious and there is no cause of action at all for filing the suit; that the valuation of the suit is also not proper or correct; that the suit for declaration and injunction is not tenable either on facts or in law; that the plaintiffs having not sought for cancellation of the impugned sale deeds, the suit was not maintainable in law; that the first plaintiff, first defendant and the father of second defendant had alienated some other properties in the year 1985 with the consent of the second defendant and likewise the second plaintiff had alienated some other portion in Sy No 86 measuring 2 acres 39 guntas; that all such periodic sales effected by the children of Gunderao, were with the knowledge and consent of heirs of Gunderao and all such transactions bind one another and are valid transactions; that the plaintiffs who were all well aware of all these developments, have kept quiet for a long time and without any demour and it is only because third defendant had invested a huge amount for development and by such silence had tacitly enabled the subject lands to be converted for non-agricultural use and formation of a layout etc., but now the plaintiffs, out of greed and jealousy have come up with false allegations; that the suit is without basis in law and a mala fide one and a collusive one amongst plaintiffs and defendants 1 and 2 to the detriment of third defendant; a bona fide purchaser for valuable consideration and therefore pleaded for dismissal of the suit with exemplary compensatory cost of Rs. 10,000/-etc.

8. In the wake of such pleadings, the learned judge of the trial court proceeded to frame the following issues:

1. Whether the plaintiffs prove that the suit properties are the joint family property of the plaintiffs and defendant No. 1 and 2?
2. Whether the plaintiffs further prove that the sale deed executed by the defendant No. 1 and father of defendant No. 2 to the extent of 2-acres 33-guntas in the suit land towards Eastern portion, through a registered sale deed dated. 29.5.1986 is null and void and ineffective against the rights of the plaintiffs?
3. Whether the defendant No,3 proves that he purchased the suit land measuring 02-acres 35-guntas shown as figure-"C" in the map annexed to the written statement from defendant No. 1 and father of defendant No. 2 with the consent of other plaintiffs through registered sale deed in the year 1986?

4. Whether the defendant No. 3 further proves that he purchased the suit land measuring 01-acre 17-guntas as shown in figure-"B" in the map annexed to the W.S. from plaintiff No. 2 with the consent of other brothers, through registered sale deed in the year 1989?
5. Whether the defendant No. 3 proves that the suit is bad for non joinder of necessary parties namely who have purchased the house plots from the suit land shown as figure "C" in the annexed map to the W/S which was converted into N/A?
6. Whether the defendant No. 3 proves that the Court fee paid by the plaintiffs is in sufficient and not correct as contended in his W/S?
7. Whether the defendant No. 3 proves that he is entitled for the compensatory costs of Rs. 10,000/-?
8. Whether the plaintiffs are entitled to the relief of declaration that they are the joint owners and possessors having equal share in the suit land?
9. Whether the plaintiffs further prove that the defendant No. 3 and 4 are interfering and obstructing into the lawful joint possession and enjoyment of the plaintiffs over the suit land?
10. Whether the plaintiffs are entitled to the relief of permanent injunction as sought for?
11. Whether the plaintiffs prove that they are entitled to the relief sought for?
12. What order or decree?

and the parties went to trial on such issues.

9. On behalf of plaintiffs, first plaintiff deposed as PW1, owner of a neighbouring land deposed as PW2 and another acquaintance of plaintiffs was examined as PW3. Documentary evidence comprised in Exp1 to P9. Exp1 is certified copy of the sale deed, original of which is exhibited as ExD2 by the third defendant, Exp2 to 9 are copies of revenue records.

10. On behalf of defendants only the contesting third defendant deposed as DW1, first defendant, but son of the second plaintiff, deposed as DW2 and supported the case of contesting third defendant! DW3 is an attesting witness who had attested the second sale deed [ExD3] and DW4 is likewise a consenting witness in respect of earlier sale deed [ExD2]. Documentary evidence exhibited on behalf of the defendants are ExD1 to 13. ExD1 being the very plaint in the suit for the purpose of identification of the signatures of plaintiffs 1 and 2 and for comparing them with the signatures in the sale deeds etc., ExD2 and 3 being two sale deeds, referred to earlier. ExD4 6, to 8 to 13 being extracts of revenue records and ExD7 is sketch map.

11. The learned judge of the trial court, appreciating such evidence, answered issues 1, 2, 8, 9, 10 and 11 in favour of the plaintiffs and answered issues 3, 4,

5, 6 and 7 in the negative and against the third defendant and therefore proceeded to decree the suit in terms of the plaint prayer. It is challenging this judgment and decree of the trial court, the present appeal.

12. Appellant-third defendant has raised several contentions in this appeal, contending that the learned judge of the trial court has failed to appreciate the unimpeachable documentary evidence in the form of ExD2 and 3, which concluded the case against the plaintiffs; that the learned judge of the trial court has missed the bus by giving more importance to record of rights than to the actual sale deeds produced and proved before the court; that very fact that the second plaintiff having purchased as many as 22 house sites from out of the sites formed in the layout by the third defendant has virtually estopped the plaintiffs from claiming any relief either for declaration or for injunction and therefore the suit should have been dismissed on this ground alone; that the court below also failed to appreciate the fact that relief of injunction could never have been granted in favour of plaintiffs, particularly when the third defendant had been put in possession of the suit schedule properties way back in the year 1980 onwards; that even as per the plaint averments and relief for joint status in respect of suit schedule properties, the third defendant stepped into the shoes of his vendors who were also parties either as plaintiff or defendant to the suit and therefore even for arguments' sake the plea is treated as true and correct, the possession of the third defendant being joint, the relief of injunction can neither be sought for, nor could have been granted by the court and therefore urges for allowing the appeal and dismissal of the suit.

13. I have heard Sri Chaitanya Kumar Chandriki, learned counsel for the appellant-third defendant, Sri Ameet Kumar Deshpande, learned counsel for the respondents 1(B) and (C), Sri Subhash Mallapur, learned counsel for the respondents 1(A) and (D) and Sri Sharanabasappa N Bhashetty, learned counsel for the respondents 3(1) and 3(2) and fourth respondent, who have made elaborate submissions in support of their clients and their respective cases.

14. The principal contentions urged by learned counsel for the appellant are:

Dictated on 2-11-2011:

15. While dictation could not be completed on 31-10-2011 for want of time and is being continued today, Sri Ameet Kumar Deshpande, learned counsel for the respondents 1(B) and 1(C), taking advantage of the interval in between, has tried to sneak in two applications before this court, one under Order VI Rule 17 read with Section 151 CPC praying for amendment of the plaint pleadings and the other application under Order XLI Rule 27 of CPC praying for permission to bring on record additional evidence in the form of a document - an agreement dated 16-12-1988, said to have been executed by the third defendant-appellant in favour of original second plaintiff.

16. Copies of these applications are just now furnished to Sri Chaithanya Kumar Chandriki, learned counsel for the appellant-third defendant, has strongly

objected to the two applications and seeks time to file written objections etc.

17. Submission of Sri Deshpande, learned counsel for the respondents 1(B) and 1(C) is that a fact which was very material to the plaintiffs' case had not been pleaded and the plaintiffs having realized this shortcoming, have now made these applications and have sought permission of the court for not only amending the plaint but also to bring in additional evidence on record etc.

18. While it is conceded in the plaint averments that there is nothing which is in consonance with the present plea sought to be introduced by way of amendment to the effect that the sale deed was only for the purpose of enabling the appellant to undertake development of the subject land for forming it into a residential layout after obtaining permission for non-agricultural use and even when the second plaintiff had purchased such residential plots, which the very appellant had developed the same out of another property purchased from first defendant and father of second defendant, which goes to show that such developments were within the knowledge of the plaintiffs, the application for amendment of the plaint in the suit and at this belated point of time changing the complexion of the suit and the grounds for declaration, in my considered opinion, is not either justified in law or on facts. The application does not come within the scope of Order VI Rule 17. I do not find the application being a bona fide one either and therefore the application for amendment and consequentially even the application for production of additional evidence, are both dismissed.

19. Now continuing the main judgment, contentions urged by Sri Chaithanya Kumar Chandriki, learned counsel for the appellant are that, in the first instance, the plaintiffs have suppressed material facts and the fact that the second plaintiff had himself executed the sale deed dated 7-12-1988 [ExD3] in favour of the appellant and in respect of an extent of 1 acre 17 guntas of land in Sy No 8G/2B and very conveniently omitting this have sought for a declaration only in respect of ExD2 sale deed and that too only to the effect that the sale deed is not binding on the share of the plaintiffs. Learned counsel for the appellant submits that this amounts to virtually a suppression and in the wake of such lack of bona fides, the plaintiffs are definitely not entitled for an equitable relief of declaration in terms of Section 34 of Specific Relief Act, 1963 [for short, the Act] and therefore the learned judge of the trial court should have dismissed the suit.

20. It is also pointed out by Sri Chaithanya Kumar Chandriki that the prayer of declaration in respect of ExD2 only to the extent of the document not binding on the plaintiffs in respect of their shares is an incomplete relief sought for and also having not sought for the full/following consequential relief, the suit is hit by the proviso to Section 34 of the Act and the suit should have been dismissed.

21. Learned counsel for the appellant also submits that the prayer for injunction is an illusory one, as the plaintiffs were never in possession and even on the very plaint pleadings, the plaintiffs and the second defendant are members of the joint family and with the plaintiffs not having sought for any specific relief

against third defendant-appellant and the third defendant claiming interest in the suit schedule properties under first defendant and father of defendant 2 being not in dispute, virtually the third defendant having stepped into the shoes of the defendants 1 and 2, as he is claiming interest over the property through their predecessors, equitable relief of injunction could never have been granted against a co-owner, to the detriment of the third defendant in the suit; and therefore the judgment and decree passed by the trial court is not sustainable and liable to be set aside.

22. Learned counsel for the appellant has also strongly urged that the suit of the plaintiffs was barred by limitation and that the learned judge of the trial court has not framed an issue on this point, the question of limitation being a question of law and the third defendant having raised it specifically, the judgment and decree passed by the court below is not sustainable on this ground also.

23. In support of his submissions, learned counsel for the appellant has placed reliance on the following decisions: The first decision is in the case of Sri Aralappa Vs. Sri Jagannath and Others, , regarding maintainability of the suit for declaration and injunction when the plaintiff is not even in possession and has not made good his title to the property and secondly in the case of Vinay Krishna Vs. Keshav Chandra and another, , wherein the Supreme Court has held that in a suit for declaration of share of the plaintiff in the schedule property and when the plaintiff is not in exclusive possession of the subject property, unless possession is also sought for, suit for declaration will not be tenable and is hit by the proviso to Section 34 of the Act.

24. On the other hand, Sri Ameet Kumar Deshpande, learned counsel for the respondents 1(B) and 1(C) - legal heirs of original first plaintiff - has very strongly urged that the suit has been rightly decreed; that in terms of Section 34 of the Act, reading as under:

34. Discretion of Court as to declaration of status or right - Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court, may in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Explanation -- A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence and for whom, if in existence, he would be a trustee.

it is open to the plaintiffs to seek a declaratory relief, as the plaintiffs have disputed exclusive possession of third defendant in the suit schedule properties and the plaintiffs being in joint possession as members of the family in the suit schedule properties, which were, without dispute, joint family properties and therefore while they need not seek for relief of recovery of possession from third

defendant etc., at the same time the suit was also tenable in terms of Section 34 of the Act, under which a person, who is entitled for any legal character and in this case the status of the members of joint family and therefore the right in the suit schedule properties is definitely enabled to institute the suit against third defendant, who had acted adverse to the right of the plaintiffs and it was not necessary for the plaintiffs to seek any other relief other than seeking for a restraint order against the defendants 3 and 4, who alone were trying to interfere with the joint possession of the properties etc.

25. Sri Deshpande also points out that the provisions of Articles 109 and 110 of Schedule-I to the Limitation Act, 1963 [for short, Limitation Act] to contend that the suit has been laid within 12 years from the date of execution of the sale deed ExD2 and therefore is not hit by the provisions of limitation Act. It is also further submitted by Sri Deshpande that being members of joint family, plaintiffs are entitled to seek for declaration of this status.

26. In the wake of the submissions made by the learned counsel for the appellant and the learned counsel for the respondents, contentions urged on behalf of the appellant and the respondents, grounds raised in support of the appeal and the authorities cited at the bar, the following points arise for my determination in this appeal:

i) whether the trial court is right in answering issues 1, 2, 8 to 10 in the positive and in favour of the plaintiffs?

ii) Whether the finding of the learned judge of the trial court on issues 3 to 7 against the third defendant is correct?

27. I have perused the judgment under appeal, pleadings and the evidence on record, considered the submissions made at the Bar and in the light of the relevant statutory provisions and the authorities cited at the Bar, and my answer to the points are in the negative that the trial court has committed a glaring error in law and on facts in not only answering the issues 1, 2, 8 to 10 in favour of the plaintiffs but also in answering issues 3 to 7 against the defendants and that the findings are not sustainable in law and are required to be set aside and so also the judgment and decree passed by the trial court and the suit deserves to be dismissed with exemplary costs.

28. The reasons for my above conclusion are that: The plaintiffs' very case was that plaintiffs 1 and 2 and first defendant and father of second defendant are the sons of one Gunde Rao and the suit schedule property was joint family property of said Gunde Rao and had been given to heir mother during her lifetime for her maintenance and thereafter all sons have inherited the property as members of the joint family and therefore when there was no partition, a sale deed though registered one dated 29-5-1986 executed by first defendant and father of second defendant in respect of an extent of 2 acres 33 guntas of land in Sy No 86/2A of Aurad village in Bidar district [Sy No 86/2A and Sy No 86/2B together measures 5 acres 30 guntas and is claimed to be the joint family property of plaintiffs 1

and 2 and defendants 1 and 2, second defendant being son of one amongst the four brothers, who had inherited the property after the demise of their parents Gunde Rao ad Smt Mitha Bai, pleaded to have expired in the year 1984 as per the plaint], and in so far as the third defendant is concerned, he is considered to be in possession of the subject land under ExP1 sale deed, executed by first defendant and father of second defendant, but that does not derive any right, title and interest in the subject property, though two brothers have joined in executing the sale deed and on the premise that there was a prior partition in the family and the subject land had fallen to their share etc and on such basis had been trying to keep out the plaintiffs from the joint possession and enjoyment of the suit land and therefore the prayer for declaration that the suit land is joint family property of plaintiffs and defendants 1 and 2 and the third defendant does not derive any right, title and interest under the sale deed, though it is a registered sale deed.

29. Plaintiffs also disputed there being a partition amongst the members of the family as recited in ExP1 sale deed. Even as per the plaint pleading, plaintiffs have averred about prior partition and having claimed there was none though it was so indicated in ExP1 sale deed and not seeking for a declaration in respect of the sale deed, but very cleverly seeking for a declaration that it is a joint family property and therefore sale deed executed by only two members of the family does not bind the other members of the family etc., demonstrates that the suit is one filed not with any intention of seeking any legitimate, bona fide relief, but only to defeat the rights of the third defendant-third party purchaser, who had paid valuable consideration for purchasing the suit property.

30. Third defendant alone contested the suit and had claimed that first defendant and father of second defendant had authority to execute the sale deed as members of the family, but the learned judge of the trial court has answered issue No 1 in the positive, for the reason that there was no dispute about the property being originally in the name of Gunde Rao - father of plaintiffs 1 and 2 and first defendant and grandfather of second defendant, and therefore, obviously, it is a family property, third defendant who alone had contested the suit had not made good his version of prior partition in the family and defendants 1 and 2 having not supported his case but having remained ex parte, I am of the clear opinion that the manner in which the learned judge of the trial court has appreciated the material placed before the court, particularly oral and documentary evidence, and the reasons assigned for recording a finding on issue Nos 1, 2, 3 and 4 in the negative and against the defendants, is virtually a most irrational reasoning and almost a perverse finding.

31. Material on record shows that Sy No 86/2A and 86/2B were originally part of Sy No 86/2, which was owned by Gunde Rao and measuring 5 acres 30 guntas, that is the admitted case of the plaintiffs also. Amongst the four members of the family, brothers-plaintiffs 1 and 2 and first defendant and second defendant being son of fourth brother, it is only the first plaintiff who entered the witness

box and supported the plaint pleadings. No other members of the family is examined to support the claim made in the plaint. Defendants 1 and 2 conveniently remained absent and ex parte. ExP1 - copy of the sale deed - and ExD1 - original of the sale deed executed by first defendant and father of second defendant, acted upon in terms of the revenue records is not questioned or challenged by the plaintiffs at any point of time, but the suit is filed in the year 1994, eight years after, that too without seeking for declaration to set aside the registered sale deed, and that suit is, perhaps, within the period of limitation for recovery of possession, relief of recovery of possession is not sought for, but relief of injunction is sought for against defendants 3 and 4.

32. Adding to this is the subsequent development viz., execution of sale deed dated 7-12-1988 [ExD3] executed by second plaintiff in favour of third defendant in respect of an extent of 1 acre 17 guntas in Sy No 86/2B, which was part of Sy No 86/2.

33. Apart from the legalities and technicalities and even on an examining the very common sense approach, particularly with the plaintiffs not joining issue about the execution of ExD3 sale deed, in the sense, the second plaintiff not entering the witness box, though he himself the executant of ExD3 sale deed but remained content with denying the same etc., is a clear pointer that the suit is a collusive suit to defeat the rights of third party-third defendant-purchaser by projecting the interest of first plaintiff as though he is championing he cause of joint family and is fighting for the shares of other members of the family.

34. It is obvious that interest of three brothers to the extent of 2 acres 33 guntas and 1 acre 17 guntas i.e. 4 acres 10 guntas or 12 guntas has been sold under the two sale deeds - ExD2 and 3 - and the extent of land corresponds to their legitimate shares in the joint family property i.e. 3/4th of 5 acres 20 guntas of land in Sy No 86/2 and when none of them joined issue by entering witness box to depose in support of the plaintiffs' case and on the other hand PW1, first plaintiff, alone entered witness box and seeks support of some third persons - PWs 2 and 3 - to make good his version that the family was joint, no partition had taken place; that first defendant and father of second defendant had no manner of right, title interest to sell an extent of 2 acres 33 guntas of land in Sy No 86/2A, it only demonstrates falsity and hollowness of the plaintiffs' case. It does not call for a legal expert or a trained judicial mind to notice this, but a layperson can notice this position, but if a trained judicial mind misses this obvious state of affairs and calls in aid all sorts of legalities and technicalities to grant a decree in favour of the plaintiffs to deprive the third defendant of subject land, there is something radically wrong not only in the manner of thinking of the learned judge of the trial court, but in our judicial system also.

35. Even on an equitable basis, from out of the total five acres 30 guntas of land, which is claimed to be joint family property, there will remain an extent of 1 acre 17 guntas of land which is definitely attributable to the share of first plaintiff, whose share will fetch only extent of land even in the family was joint and

partition takes place and if his other brothers or their legal heirs not supporting his case and in fact very conveniently avoiding entering witness box, it is a telltale story that the suit is a collusive one to defeat the rights of third defendant.

36. Even on the legal front also, when the plaintiffs themselves have pleaded that third defendant is in possession of the suit schedule property and to the knowledge of the plaintiffs, third defendant has asserted his exclusive possession on the strength of ExP1 sale deed, a suit for mere declaration that the suit schedule property is a joint family property and therefore a sale deed executed by the two members of the family does not bind them, but not seeking a declaration for setting aside the sale deed, but more importantly, not seeking necessary consequential relief of recovery of possession, but on the pretext of possession being joint, seeking the relief of injunction is not only hit by Section 34 of the Act, but also the very plaint pleading is hit by legal principle that a co-owner or a member of a joint family cannot seek for a relief of injunction against another member or claiming under a member in respect of family property, as that would virtually amount to excluding a member of the joint family from enjoying a property of the family.

37. I am, therefore, of the clear view that answer to issues 1, 2, 8, 9 and 10 should have been in the negative and therefore the plaintiffs should not have granted any relief and the suit should have been dismissed.

38. In answering issues 3 to 5, the learned judge of the trial court has virtually ignored the definite material on record to the effect that even second plaintiff himself had purchased 22 house sites from the layout formed by defendant No 3 and this conduct of the second plaintiff not only executing a sale deed - ExD3 - but also purchasing plots from third defendant carved out of the land purchased by the third defendant from very members of the plaintiffs' family not only estops the plaintiffs from seeking a relief of the nature as sought for in the plaint, but also paves way of setting aside the findings of the learned judge of the trial court on issues 3 to 5, which should not have been answered in the negative, as has been done by the learned judge of the trial court.

39. The suit was a false one, without bona fides or not tenable either in law or on facts or on the ground of equality either and only deserves to be dismissed with exemplary costs.

40. Though trial court has not framed an issue on limitation, but nevertheless arguments having been addressed at the Bar on this question, learned counsel have relied upon many authorities in support of their versions, particularly Sri Ameet Kumar Deshpande, learned counsel for the respondents 1(B) and (C), submits that it is not Articles 109 and 110 of Schedule-I to the Limitation Act is attracted, the question is not much significance and the view that I have taken as indicated above and is, therefore, not examined any further. In the result, this appeal is allowed, judgment and decree passed by the court below set aside and

the suit dismissed with costs throughout.