

(1999) 04 BOM CK 0084
In the Bombay High Court
Case No : Second Appeal No. 499 of 1987

Vasant Narayan Khakhanis

APPELLANT

Vs

Mrs. Prabhavati Balchandra Harjarnis, since deceased by
heirs and others

RESPONDENT

Date of Decision : 06-04-1999

Acts Referred:

Succession Act, 1925 — Section 29, 57

Citation : (1999) 4 BomCR 369 : (1999) 2 BOMLR 908 : (1999) 2 MhLj 889

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : R.S. Chitnis, instructed by Crawford Bayley and Co, for the Appellant; R.S. Ante, instructed by y Dalmiya and Co. and Deenal Chitnis, instructed by Chitnis Vaithy, for the Respondent

Judgement

R.M. Lodha, J.—By this judgment the second appeal filed by the original plaintiff and the cross objections filed by original defendant No. 1 are being disposed of.

2. The suit property is the bungalow known as Laxmi Kunj built on City Survey No. 33/1B of Erandavane on the plot obtained on permanent lease from Deccan Gymkhana Co-op. Housing Society Ltd. in Pune. One Narayan Kashinath Karkhanis (for short Narayan) obtained the said plot on permanent lease. The bungalow thereon was constructed by him from his own earnings as well as from the funds of his wife Ramabai. He died on 16-4-1968 and his wife Ramabai died somewhere in the year 1977. The original plaintiff Sou. Prabhavati Bhalchandra Hajarnis, the original defendant No. 1 Vasant Narayan Kharkhanis, the original defendant No. 3 Gopal Narayan Karkhanis and the original defendant No. 2 Sou. Sumati Yeshwant Mathure are sons and daughters of Narayan and Ramabai. Narayan is alleged to have executed the Will bequeathing the aforesaid property in favour of his wife Ramabai on 21-1-1956. Later on the said Will is said to have been revoked by execution of the Will dated 17-1-1963 which was jointly executed by Narayan and his wife Ramabai. After death of Narayan on

16-4-1968, his wife Ramabai is said to have revoked the said Will (though according to original plaintiff Ramabai could not have revoked the said Will) and executed her last Will on 25-7-1974. By the Will dated 17-1-1963, according to the original plaintiff, on death of her parents, namely, Narayan and Ramabai, she claims to have acquired 1/4th share in the suit property and despite her efforts when the defendants who are brothers and sister refused to give her 1/4th share as per the Will dated 17-1-1963, she filed the suit claiming joint possession of 1/4th share in the suit property and in the alternative for the sale of the suit property and allotment of 1/4th price amount to her. The original defendant No. 1 contested the suit and denied that his father Narayan and Ramabai executed the last Will dated 17-1-1963 by giving joint 1/4th share each to the plaintiff and the defendants. He set forth the defence that the said Will dated 17-1-1963 was not the last Will but subsequent to that Will, after the death of Narayan, Smt. Ramabai became the absolute owner of the suit property and Smt. Ramabai by her Will dated 25-7-1974 bequeathed the suit property to the original defendant Nos. 1 and 2 by revoking the Joint Will dated 17-1-1963. The defendant No. 1 also set forth the defence that the said Will dated 17-1-63 was got executed under coercion and undue influence and, therefore, it was not valid Will. According to him, Narayan has executed the Will dated 21-1-1956 bequeathing the entire suit property in favour of his wife and after death of Narayan, his wife became absolute owner who bequeathed property in favour of original defendant Nos. 1 and 2 by her last Will dated 25-7-1974. The original defendant No. 2 filed separate written statement denied that his mother Ramabai contributed anything towards the cost of construction of the suit property. His defence was otherwise similar and identical to the defence set up by original defendant No. 1. On the basis of the pleadings of the parties, the trial Court framed various issues and after recording the evidence dismissed plaintiffs suit on 31-8-1984. The original plaintiff carried the matter in appeal and the Appellate Court after hearing the learned Counsel for the parties allowed the appeal in part, set aside the judgment and decree passed by the trial Court and declared that original plaintiff has joint 1/8th share in the suit property. The judgment and decree passed by the Appellate Court on 20-12-1986 is under challenge in second appeal at the instance of the original defendant No. 1 whereby 1/8th share in the suit property has been declared in favour of original plaintiff and is under attack in cross objections at the instance of the original plaintiff by contending that she has 1/4th share in the suit property and accordingly her share be declared to the extent of 1/4th share instead of 1/8th share in the suit property.

3. The Appeal Court has recorded the findings that the suit property belonged to both Narayan and Smt. Ramabai and that they were tenants in common of the said property. The Appeal Court also held that the Will dated 27-1-1956 executed by Narayan in favour of his wife Ramabai was proved and that the said Will was revoked by Narayan by executing Joint Will alongwith Smt. Ramabai on 17-1-1963. The Appeal Court negatived the stand taken by original defendant Nos. 1 and 2 that the Will dated 17-1-1963 executed jointly by Narayan and

Ramabai was executed by Ramabai under coercion and undue influence. The Appeal Court further held that the original defendant No. 1 has been able to prove the last Will of Ramabai dated 25-7-1974 and that Joint Will dated 17-1-1963 stood revoked to the extent of joint half share of Ramabai on execution of Will dated 25-7-1974 by Ramabai. With these findings, the Appeal Court held that the plaintiff has got 1/8th share in the suit property and if she desired she be put in possession of her joint 1/8th share of the suit property.

4. The learned Counsel for the appellant and original defendant No. 1 mainly canvassed before me that the Will dated 17-1-1963 executed by Narayan is Joint Will and after the death of Narayan was validly revoked by Ramabai by executing her Will and testament on 25-7-1974 and, therefore, the plaintiff has no right in the suit property. On the other hand, the learned Counsel appearing for the respondents in the appeal and original plaintiff in support of cross objections argued that the Will dated 17-1-1963 though executed jointly by Narayan and Ramabai was in fact mutual Will and could not have been revoked by Smt. Ramabai after the death of Narayan Kashinath Karkhanis by execution of the Will dated 25-7-1974 and therefore the original plaintiff has 1/4th share in the suit property.

5. The entire debate has centered round the true nature of Will dated 17-1-1963 and I am called upon to construe the said Will and effect of subsequent Will dated 25-7-1974."

6. The distinction between Joint Will and mutual reciprocal Will had been a matter of judicial consideration before various courts. The mutual reciprocal Will is the Will by two or more persons which are reciprocal in their prospects and executed in pursuance with agreement or contract between the two or more persons to dispose of their property to the other or to third person in a particular mode or manner. A Will is mutual when two testators confer upon each other reciprocal benefits as by either of them constituting the other his legatee, that is to say, when the executants fill the role of both the testator and legatee towards each other. One of the two characteristics of the mutual Will is : it becomes irrevocable after the death of one of them if the survivor takes advantage of the provisions made by other. If the two conditions are concurrently satisfied, namely, (i) the surviving testator has received the benefit under the Will and (ii) the mutual Wills have been executed in pursuance to an agreement that the testator shall not revoke, the mutual Wills become irrevocable. However, two persons may also agree to make mutual Will revocable. A Joint Will, on the other hand is a Will made by two or more testators contained in a single instrument duly executed by each testator disposing of either of their separate property or their joint property. By a Joint Will is meant a single instrument by which two persons give effect to their testamentary wishes. Such a Will is revocable at any time by either of them or by survivor. But in certain cases it is enforced in equity as contract where there is a joint interest, on the death of the first testator the position of the part of the property which belongs to the survivor is that the

survivor is treated as holding the property on trust to apply it so far as to carry out the effect of the Joint Will. If the survivor takes the benefit conferred on him by the Joint Will, he or she will be appointed as a trustee and would not be allowed to do anything inconsistent with the provisions of the Joint Will. In *Kuppuswami Raja and Another Vs. Perumal Raja and Others*, , the Division Bench of the Madras High Court had occasion to deal with a Will executed jointly by two brothers and the question that fell for determination before the Division Bench of the Madras High Court was the legal character of the said Will in as much as whether the said Will was a mutually reciprocal Will and therefore an irrevocable Will or was only Joint Will which was open to be revoked either jointly or separately during the life time of brothers or thereafter or after the death of either of them. The Madras High Court after survey of various English and Indian authorities held thus:

(11) A Joint Will is a single testamentary instrument constituting or containing the Wills of two or more persona and jointly executed by them; while mutual Wills are the separate Wills of two or more persons which are reciprocal in their provisions and executed in pursuance of compact contract or agreement between two or more persons to dispose of their property to each other or to third persons in a particular mode or manner. Mutual Wills as distinct from Joint Wills are sometimes described as reciprocal Wills. In describing a Will the adjective "Mutual" or "reciprocal" is used to emphasise and denote the contractual element which distinguishes it from a Joint Will.

.....

(13) In England the courts have evolved their own principles of law regarding joint and mutual Wills and so far as English law is concerned, the principles appear to be fairly well settled. In regard to joint and mutual Wills, the decisions in England have recognised a distinction in the powers and jurisdiction of a Court issuing a probate and a Court Whose jurisdiction has been invoked by a party for the enforcement of the rights based upon the agreement embodied in a mutual Will.

An examination of the cases in England shows that in the case of a Mutual Will, if there is an agreement that neither of the testators shall have power to revoke, and the surviving testator receives benefits from the deceased under the mutual Will, the survivor is not entitled to revoke the Will when the first testator had died leaving the mutual Will unaltered and unrevoked in pursuance of the agreement and in the hope and trust that the mutual Will will be adhered to by the survivor. If, however, the survivor in breach of faith revokes a mutual Will by making a new Will, it is the new Will which will have to be necessarily admitted to probate so far as the properties of the survivor are concerned. In an application for probate the Court has no jurisdiction to enquire into the nature of the rights of the testator in the property covered by the Will. If the probate Court is satisfied about the due and proper execution of a Will by a testator in a sound disposing state of mind, it is bound to grant a probate of the Will. It is however

open to the beneficiaries under the mutual Will to take proceedings in the Chancery Division for the enforcement of their rights and the execution of the trust as envisaged in the mutual Will. The personal representatives under the latter Will can be compelled to hold the entire estate upon trust to give effect to the provisions of the mutual Will. Vide 39 Halsbury, Lord Simonds 3rd Edn., page 853 para 1299.

....

(24) From the above discussion of the relevant cases, it will be clear that under English law in order to render Mutual Wills irrevocable, both the conditions must be concurrently satisfied: (a) the surviving testator must have received benefits from the deceased under the mutual Will and (b) the mutual Wills should have been executed in pursuance of an agreement that the testator shall not revoke the mutual Wills. Such an agreement not to revoke the Wills may either appear from the Wills themselves or may be proved outside the Wills. Vide 39 Halsbury 3rd Edn. by Lord Simonds page 553, para 1289 and 1914 P. 192.

(25) The law relating to Joint Wills under the American Law is discussed in Volume 97 Corpus Juris Secundum pages 282 to 313 and American Jurisprudence, Vol. 57. Section 710, 713 and 717. In America also the limited jurisdiction of the Court issuing the Probate in contrast to the general jurisdiction exercised by the Court under the normal procedure when the beneficiaries under the earlier Will commence an action is emphasised. At page 311 of Vol. 97 Corpus Juris the law in America is stated as follows.

"A Court of Probate cannot admit a mutual will to probate where it has been revoked by the testator, and cannot enforce an agreement to make mutual Wills by ordering probate of a Will which was revoked in breach of such agreement. However, it is well settled that, where the revocation was wrongful and unauthorised, and the testator had devised or bequeathed his property in a manner other than that contemplated by the agreement on which the mutual Will was founded, a Court of Equity, by reason of its extraordinary power to enforce specific performance of contracts and to prevent frauds, will ordinarily enforce such agreement, in order to prevent fraud or injustice by decreeing a specific performance of the agreement or by fastening, or impressing a trust on the property in favour of the beneficiaries of the Will revoked in violation of the arrangement....."

(26) As regards the right of revocation however several courts of the various States in America appear to have taken varying views in some cases the view appears to have been taken that there should be an express agreement between the testators prohibiting them from revoking the Will except by their mutual consent. The statement of the law in Vol. 57. American Jurisprudence, is more definite and emphatic against the revocation of mutual Wills. As the law is succinctly stated in Vol. 57. Section 713, it may be useful to set it out here :

"A Will jointly executed by two testators or one or two separate Wills containing

reciprocal provisions, and provisions for the benefit of third persons effective upon the death of the surviving testator, which in a fruition of a contract between the testators, cannot be revoked to the detriment of the third persons, by the survivor after the death of the other testator and the acceptance of benefits derived from the Will of the other which conformed to the contract without committing a breach of contract, at least not from the view point of the Court of equity. The surviving testator having accepted the benefits of a Will jointly executed by him and another and containing reciprocal provisions cannot repudiate the contract by which the Will was made so as to effect the disposition made by the Will for the benefit of third persons upon the death of the surviving testator. The rule is that where separate Wills executed in pursuance of a valid contract between the parties, provide for a life estate to the survivor, with certain remainders over the survivor, having probated the Will of the deceased testator and accepted the benefits there-under, cannot abrogate or repudiate the contract to the injury of the remainder man by revoking his own Will."

.....

(28) The right of third parties and- the trusts arising by reason of the bequests for third parties effective upon the death of the surviving testator is declared and enforced not only as against the properties in the hands of the surviving testator who has violated the contract, but also as against the properties in the possession of his personal representatives, heirs, legatees and devisees. Vide Vol. 58 pages 483-93. Reciprocal provisions as well as bequests to third persons in whose welfare the testators have a common interest in a single Will executed jointly by the testators have been held to be by themselves evidence that the Will was the fruition of a contract between the testators that it is irrevocable."

7. In the aforesaid case before the Madras High Court the Will executed by two brothers which fell for consideration read thus :

(5) As the only substantial question in dispute relates to the determination of the true legal character of the document Ex. A-1 and the proper interpretation of its terms, an agreed translation of the same is set out hereunder :-

"(1) Will dated 31st October, 1942, executed by (1) Perumal Raja and (2) Chinnappa Raja, both sons of Alga Raja, Kshatriya Caste, Agriculturists, residing at Kallakudi Village, Kannanore, village, Majara, Lalgudi Taluka, jointly with our free will and without instigation from others and with good intention is as follows :

(2) We both are until now living together as a joint family without partition. The properties set out in the Will are both self-acquired and ancestral. Of us, Perumal Raja is now aged about 70 years and Chinnappa Raja about 65 years. Uptil now we have had neither male nor female issue. As we are not likely to get any santhathi hereafter and as we often become unwell by reasons of our old age and with a view to avoid disputes to our properties after our lifetime if any danger should happen to our live suddenly and also with a view to nominate a

person for performing the funeral ceremonies of ourselves and our wives, we have executed this Will with the following details :

(3) This Will should come into effect after our lifetime. We are entitled to revoke or alter this Will during our lifetime. This Will will not be valid if during our lifetime any of us gets male or female children. Perumal Raja has a wife by name Kuppammal and Chinnappa Raja, a wife by name Ammani Ammal. Besides, we have three sisters. The eldest sister Nachiar Ammal is dead. She has got only one son by name Duraiswami Raja. He has got children. The other two sisters Lakshmi Ammal and Vengammal are at present living. Lakshmi Ammal has got four sons and Vengammal has only one son by name Kuppuswami Raja.

(4) Of the under-mentioned properties, Kuppammal, wife of Perumal Raja, shall take the A schedule properties and Ammani Animal, wife of Chinnappa Raja shall take the B schedule properties. After the death of their respective husbands, they shall enjoy the properties for their life without making any alienation and shall live within the income of the properties.

(5) Krishna Raja, son of our sister Lakshmi Ammal, and her husband Venkata Raja of Mahalikudi, Lalgudi Taluka and who has been living with us from his young age, shall perform the funeral obsequies of both of us and our wives without any shortcomings and shall take the said properties after the lifetime of the four of us absolutely for himself and his heirs. If per chance, Krishna Raja should die during the lifetime of the four of us Celvarangam Raja who is the son of Krishna Raja and who is to, take the F schedule properties shall perform our funeral obsequies and take the A and B schedule properties. Besides, he should also perform our annual ceremonies without any shortcomings and also feed the poor on those days.

(6) Duraiswami Raja, son of our elder sister and Alagar Raja of Mahalkudi Lalgudi, Taluka, and his heirs shall take the C schedule properties after our lifetime and enjoy the same without alienating the same in any manner.

(7) Our second sister Lakshmi Ammal shall take and enjoy the D schedule properties during her lifetime without alienating the same in any manner and after her lifetime her four, sons shall take the same equally and shall not alienate them in any manner. "If per chance Lakshmi Ammal should die even during our lifetime, her four sons and their heirs shall enjoy the D schedule properties as aforesaid.

(B) Kuppuswami Raja, son of our third sister, Vengammal, shall enjoy the E schedule properties without alienating the same in any manner. Kuppuswami Raja has no issues at present. If per chance he does not get any issue during his lifetime, the said properties shall be taken by the heirs of Lakshmi Ammal equally along with the D schedule properties.

(9) Celvarangam Raja, minor aged 5 years, son of Krishna Raja shall take the F schedule properties absolutely.

(10) Krishna Raja and after him his heirs while enjoying the C schedule properties shall not of their income, give 9 kalams of paddy and have daily puja performed to Sri Visalakshmi Amman in Kallakudi village without any shortcomings.

(11) Besides, whether cash, outstandings, jewels, vessels and all other moveable properties, we may have at the time of our death, shall be taken and enjoyed absolutely by the aforesaid Krishna Raja. No one else has any right to the same. We have no debts to pay."

8. On construction of the said Will in the light of the legal position as already quoted above, the Division Bench of Madras High Court held that the said Will was a mutually reciprocal Will and was not capable of revocation and it was not competent for surviving brother to revoke the said Will later on.

9. In *Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad*, the Apex Court was dealing with the question whether the Will executed by husband and wife jointly demarcating portions of the house bequeathed to the grand sons was a Joint Will or a mutual Will capable of revocation by the survivor of the Will. The relevant portion of the Joint Will is reproduced by the Apex Court in paragraph 4 of the report and that is as under :

"During our life time we shall continue to be joint owners of the land, bungalow and blocks with their common bathroom and two privies including the garage bearing No. 48/1 and shall be jointly entitled to the rents and income of the said land and blocks and the user and rent of the bungalow. After the death of one of us, the survivor shall become the owner of the said land, bungalow and blocks including the garage No. 48/1 with the said bath room and privies and shall become entitled to the rents and income and user of the said land, bungalow and blocks including garage No. 48/1 and the bath room and privies. The provisions hereinafter contained shall become effective after the death of the survivor of us. After the death of the survivor of us, we hereby devise and bequeath our said furnished Bungalow including all things, articles, furniture, utensils, fixtures etc. together with the portion of the land and compound walls delineated on the plan hereto annexed and coloured red and marked "B" to our grandson *Dilharshankar, Chintanvanshankar Bhachech*. We hereby devise and bequeath our Block Nos. 48/2 to 48/6 including garage bearing No. 48/1 with the said bath room and privies together with the portion of the land and compound walls delineated on the plan hereto annexed and coloured blue and marked "D" to our grandson *Snehitshankar Chintavanshankar Bhachech*. We hereby devise and bequeath the portion of the open land and the compound walls delineated on the plan hereto annexed and coloured green and marked "A" to our grandson *Hasitshankar Drupadshankar Bhachech*."

After recording the rival contentions, the Apex Court observed thus :

22. It is the correctness of that decision which is under challenge in this appeal. The sole question in the background of the provisions of the relevant sections

namely section 29 read with other sections that have been referred to hereinbefore is, whether it was merely a Joint Will or it was a joint and mutual Will or in other words there was agreement implied between the parties namely the executants of the Will not to revoke the Will after the death of one of the executants. It is, therefore, appropriate to refer to the relevant provisions of the Will. The Will was jointly executed by Kamlashankar Gopalshankar and Mahendraba on 24th December, 1950 and described as "last Joint Will and testament". They appointed the accountable person the appellant herein as our Executor. The Will thereafter goes on to say:

"We are the joint owners of a Bungalow known as "Dilhar Dwar" situate at Fillis Bridge, Pritam Nagar bearing Plot No. 825, Bungalow No. 48/A. In addition to the main bungalow there are certain other blocks bearing Nos. 48/2 to 48/6 and one garage bearing No. 48/ 1 which is below Block No. 48/2 and a common bath room and two privies for blocks Nos. 48/2 to 48/6. We have been in possession of the land, the bungalow and the blocks for many years past. We are in actual occupation of the main bungalow. The other blocks except the garage bearing No. 48/1 and Block No. 48/5 are rented to tenants. The garage bearing No. 48/ 1 is for the present allowed by us to be used by our permission and leave and licence by our son Chintavanshankar Kamlashankar Bhachech without payment of any sum.

23. Then the Will goes on to make the request in favour of the three grandsons in terms set out hereinbefore.

24. The Will thereafter goes on to provide in detail for the contingencies that might happen in case where either by the rules of the Town Planning Scheme or the Municipal Laws the portions of the property need and require alterations. The Will further stipulates in detail about the payment of the house taxes in respect of the properties coming to the shares of each of their grandsons, and even in respect of the areas built by them. The Will further stipulates that for the purpose of partitioning the land as demarcated on the plan thereto annexed and referred to above if there was any obstruction on the land going to the share of each of their grandsons which encroached upon the portion or portions coming to the share of other grandson or grandsons the same should be removed by the person or persons whose encroachment or obstruction, it may be.

25. Reading the different clauses of the said Joint Will it was manifest that the intention was to keep the property as it was at the time of execution of the Will so that the ultimate beneficiaries and the grandsons may enjoy the property in full with such modifications as the contingencies of time and situation might require.

26. In this background it is necessary to find out whether the Will in question was a Joint Will only or a joint and mutual Will.

The Apex Court considered the Theobald on Wills, Twelfth Edition page 28 and 29 Earl Dowitt in the Dictionary of English Law, 1st Edn. (Second Impression 1965

at page 1283) Stroud's Judicial Dictionary 4th Edn., Vol. 3 page 1907, Halsbury's Laws of England, 4th Edn., Vol. 50 at pages 95 & 96, Jarman on Wills in 8th Edn., at page 42 and then in paragraph 32 observed thus :

32. The joint executants have been described as joint owners. Again the said clause goes on to use the expression during our lifetime we shall continue to be the joint owners and shall be jointly entitled to the rents and income of the said land and blocks and the user and rent of the bungalow. The Will goes on to say that after the death of one of them survivor shall become the "owner" of the said land, bungalow and blocks including the garage with the said bath room and privies and shall become entitled to the rents and income and user of the said land, bungalow and blocks. The provisions contained in the said Will were stipulated to be effective after the death of the survivor of them. After the death of the survivor the Will went on to use the expression "we hereby devise and bequeath our said furnished bungalow....." Then the Will made detailed provisions for the enjoyment of the property in specific species.

10. Then the Apex Court went on examining the various Indian and English judgments including the judgment of Kappuswami Raja (supra) and ultimately reached the conclusion that the dominant intention of the parties was that the Will could be revoked during the life time of both the executants but after the death of one of the executants and after the benefit has been received by the survivor, the property in question must remain intact to be enjoyed by the grand children in terms of the Will which was to become effective on the death of both the executants. Ultimately in paragraph 55 of the report, the Apex Court held that the said Will was a mutual Will. It was held thus. The husband Kamlashankar Gopalshankar received the benefit under the Will after the death of Mahendraba. It became irrevocable by him after her death. Therefore, he had no disposing power over the share of Mahendraba in the property.

11. According to Mr. Apte, the learned Counsel for the original plaintiff, the Will in question is quite identical and similar to the Will which fell, for consideration before the Apex Court in Dilharashankar's case (supra). He submitted that the observations made by the Apex Court in Dilharashankar's case are squarely applicable in the present case and it would be clearly seen that the Will in question dated 17-1-1963 is mutually reciprocal Will and on death of Narayan, it was not open to Ramabai to revoke the said Will. On the other hand, Mr. Rahul Chitnis, the learned Counsel appearing for the original defendant No. 1, (the appellant in the second appeal) strenuously urged that the judgment of the Apex Court in Dilharashankar's case is clearly distinguishable. According to him, in Dilharashankar's case (supra) the property had been bequeathed in species to the grandsons; the Will having expressly set out the physical division of the property to be given to each one of the grandsons was held to be the most important circumstance which would lead to an inference that there was an agreement not to revoke the Will, He would submit that the Apex Court attached much importance to the fact that there was a provision for distribution of the

property in specie. He referred to paragraph 51 of the report wherein the Apex Court held that the fact that the executants had described themselves as joint owners was not conclusive and urged that the detailed provisions in species to be effective after the death of the survivor in different portions to be given to the different grandsons without any provision as to what was to happen in case of the diminution of the property within the lifetime of either of the survivors lead to the ultimate conclusion by the Apex Court that the Will was mutual Will.

12. Though there was some controversy before the Appeal Court that the Will dated 17-1-1963 was got executed by Ramabai under coercion and undue influence, after the findings have been recorded by the Appeal Court that the said Will dated 17-1-1963 was not got executed under coercion and undue influence, the learned Counsel for the parties did not challenge She said finding before me. The finding recorded by the Appeal Court that the Will dated 21-1-1956 executed by Narayan in favour of Ramabai was revoked by the Joint Will dated 17-1-1963 executed by Narayan and Ramabai jointly was also not challenged during course of arguments. The question, therefore, that needs to be considered and determined by me is the true legal character of the Will dated 17-1-1963 and the effect of the Will dated 25-7-1974. The Will dated 17-1-1963 is Exhibit 35 on record. The English translation of Exhibit 35 has been placed on record by the learned Counsel for the original plaintiff and the correctness of the said English translation is not under dispute. The English translation of the Will (Ex. 351) dated 17-1-1963 reads thus :

THIS Will is executed by Shri (1) Narayan Kashinath Karkhanis, pensioner approximately 73 years of age residing at Erandavane, House No. 33, 18 Pune-No. 4. (2) Ramabai W/o Narayan Karkhanis. housewife approximately 67 years of age residing at Erandavane, House No. 33-18. Pune -4.

We have made our this Will as aforesaid

1. As day by day we are getting old, by this our Will with full knowledge we are cancelling a Will dated 21st January, 1956, which is registered and sealed in the office of District Sub-Registrar, Pune under Serial No. 1 of 1956 on 24th January, 1956 and after cancelling the same we are executing our this Will by this Will it should be construed that said seal will bearing No. 1 of 56 is hereby cancelled permanently.

2. We both are husband and wife and we have two sons and two daughters, as mentioned below. In our family we got two daughters," their husbands, their sons and daughters their wives (daughter in laws) and their children and we both of us love them and all of them offer love on us. We all of us treat each other as our family members and all our family members treat us well and also look after us during our illness as per the above we have sons, son in law, daughters and grand sons, etc. thus we have a big lovable and affectionate family and a happy home.

3. We have spend our last days of our life with fullest satisfaction however we do

not know when we will expire. We hope that after us all our family members should maintain a co-ordinal relationship and treat each other with love and affection. We further desire that our sons and daughters after us will become the full owner of our self acquired property which is described below and this intention we have satisfied by this writing.

(1) Shri Gopal N. Karkhanis, service, aged approximately 50 years reside at Pune.

(2) Shri Vasant Narayan Karkhanis service approximately 48 years of age reside at Pune.

(3) Smt. Prabhavati Bhalchandra Hajarnis, house wife 45 years of age approximately reside at Kolhapure and

(4) Mrs. Sumati Yeshwant Mathure, House wife, 43, years of age approx, reside at Dadar.

4. We are not owners of any ancestral property. We have purchased a property in Deccan Gymkhana Co-operative Housing Society which is situate at and post Pune Tal, Haveli within the registration district of Pune City, and which is situated within the limit of Pune Municipal Corporation at Pet Erandavane bearing City Survey No. 33-1B, Pune in which we have constructed a bungalow, about 27 years ago. The said bungalow is situate at Prabhat Road, Near Canal Road. We are occupying some portion of the said bungalow, while the rest of the portion is given on rent. We have developed the said property from the money which remained with us and also from selling the gold ornaments belonging to the Executor No. 2 (which is known as her Stridhan). Accordingly this is our self acquired and owned property. On this property apart from us no other person have any right and/or interest and/or any inheritance. We have to pay a sum of Rs. 1.500/- as and by way of loan to co-operative society. We are regularly paying the installment in respect of the said loan and that loan is getting reduced automatically. Today the price of the said property is approximately Rs. 35,000/- (Rupees thirty sic five thousand only)

5. By this will both of us after our death appoint our two sons and two daughters as a joint owner of the said property, which means that each one of them will have 1/4 equal share in the said property, as per Hindu Succession Act all of them will be the owner of the said property as our legal heirs. After our death they should take possession of the said property as a joint owners thereof. However the balance loan amount should be paid by all of them equally. They should reside in that house and jointly enjoy the said property during their lifetime and after them by generation it should be used by their family. If that is not possible in that event out of them who so ever will be in a position to reside in the said house and will be in a position to purchase the respective shares of the others should purchase the same as per the market price prevailing during that time and he should pay the other co-sharer, the amount coming to the share and on receiving the said amount the others should sign, execute and register a Deed of Conveyance in the office of Sub-Registrar of assurances and thereafter

only that person will be the owner of the said property. If this is not possible then with the consent of them the said property should be sold at the best available market price and the amount which will be received should be distributed in the said equal proportion. If the loan amount is not repaid the said loan amount should be first paid from the amount which will be received from selling the said property.

6. During our lifetime we will continue to be the owners of the said property and we have bequeathed the said property as we are entitled to dispose of the same. The said arrangement shall come into effect only after our death.

7. We have executed this Will at our freewill and both of us were in sound state of mind and we were of good health and this Will is prepared as per our wishes and this Will was read out to us and we found that the same is in order and thereafter we have put our signatures in the presence of the witnesses who have also signed in our presence at our requests as mentioned below. The said Will is executed at our above referred residence.

13. By way of Clause 1 of the Will dated 17-1-1963 the earlier Will dated 21-1-1956 has been cancelled. Clause 2 of the said Will makes mention that the testator and testatrix have two sons and two daughters and the details of their families. In Clause 3 of the said Will it is stated that after the death of testator and testatrix their sons and daughters shall become the full owner of the said property. Clause 4 provides the details of the property and the fact that the said property has been developed from the money of both of them. It has been provided in Clause 5 of the said Will that after the death of both the testator and testatrix the two sons and two daughters shall become joint owners of the said property and each one of them shall have 1/4th equal share in the said property as per Hindu Succession Act and remain in possession of the said property as joint owners thereof. It is further provided therein that the balance loan amount shall be paid by all the legatees equally and they should reside and jointly enjoy the said property during their life time and after them by generation it should be used by their family. Clause 5 further provides that if that was not possible then in that event out of them who-so-ever in a position to reside in the said house and was in a position to purchase the respective shares of the others should purchase the same as per the market price prevailing during that time and he should pay the other co-sharers the amount coming to their shares and on receiving the said amount the others should sign, execute and register a Deed of Conveyance in the office of Sub-Registrar of Assurances and thereafter only that person shall be the owner of the said property and if that was not possible then with the consent of them the said property should be sold at the best available market price and the amount to be received should be distributed in the said equal proportion. In Clause 6 of the Will it is stated that during their life time they (testator and testatrix) shall continue to be owners of the said property. It is further stated in Clause 6 that they have bequeathed the said property as they are entitled to dispose of the same and the said arrangement shall come into

effect only after their death. In order to render a joint mutual Will irrevocable, it is settled law that two conditions, namely, (i) that the surviving testator must have received benefits from the deceased under the mutual Will and (ii) the mutual Will should have been executed in pursuant to an agreement that the testator shall not revoke the mutual Wills must be concurrently satisfied. Whether there was an agreement between the testator and testatrix to revoke the Will or not may be proved either from the Will or may be proved outside the Will. Upon turning to the expressions and terms of present Will which have been set out exhaustively above, it would be seen that the property in question has been described as "our self-acquired and owned property". The expression used in Clause 6 of the Will "during our life time we will continue to be the owners of the said property" is suggestive that the ownership which the joint executants contemplated was the user during the lifetime and it was this ownership which was to devolve on the death of either of them to the survivor. This becomes further clear from the use of the expression "the said arrangement shall come into effect only after our death". The intention of the executants, therefore, was to keep the said property in-tact for the benefit and enjoyment of the ultimate legatees and during the lifetime of either of them the property was not in any manner to be parted with or diminished. This is reflected from the statement made in the Will "we further desire that our sons and daughters after us become the full owners of our self-acquired property....." and in Clause 5 of the Will, "by this Will both of us after our death appoint our two sons and daughters as joint owner of the said property....." The circumstances, therefore, in the Will clearly indicate that both the executants of the Will agreed to not to revoke the Will after he or she has received the benefit under the Will on the death of either of them. The underline intention of the executants is categorical and clear and that is that either of them shall not revoke the Will and the suit property must after the death of the executants fall on the two sons and two daughters. So long as both the executants were alive, the executants could revoke the Will but the tenor of the Will and the various clauses therein are suggestive of their intention that they agreed not to revoke the Will after the death of any one of them. Since they desired to enjoy the property during their life time and after them, they decided that property should to go all their sons and daughters jointly. As has already been observed by me for a Will to be a mutual Will two conditions must be concurrently satisfied i.e. serving testator or testatrix has derived some benefit from the deceased under the mutual Will and that there must be an agreement between the executants that such Will shall not be revoked. The first condition is satisfied in the present case in as much as after the death of Narayan, the surviving testatrix Ramabai was in full and exclusive enjoyment of the said property. Of course such exclusive enjoyment and user was during her life time but nevertheless that was the benefit received by Ramabai from the deceased Narayan under the Will. The second condition that there must be an agreement between the executants to not to revoke the Will, the various clauses already referred to herein-above clearly indicate the intentions between them that the property should as it is, after the death of executants go in the hands of

their sons and daughters. The intention of the testator and testatrix in not revoking the Will after the death of one of them is evidenced from the language used which I have already elaborately stated. On true construction of the Will dated 17-1-1963 in its proper light, I am satisfied that the said Will dated 17-1-1963 is joint and mutual Will and both the conditions necessary for such Will being mutual Will are fully satisfied.

14. The Will dated 17-1-1963 being joint and mutual Will, and intention of the executants being to keep the property intact till the death of both the executants to enable the property to go in the hands of the ultimate legatees i.e. all sons and daughters being very clear, the Will dated 25-7-1974 executed by Ramabai is rendered useless and of no legal consequence. In view of my aforesaid finding that the Will dated 17-1-1963 is a joint and mutual Will and the conditions prerequisite for such Will are fully satisfied, the judgement and decree passed by the Appeal Court granting only 1/8th share to the plaintiff in the suit property cannot be sustained. As a matter of fact the Appeal Court while passing the decree relied upon the judgment of the Apex Court in Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others, and Bhawani Prasad v. Smt. Surendra Bala AIR 1959 All 126 but none of these cases can be applied once it has been found that the Will and testament dated 17-1-1963 was joint and mutual Will though by tenants in common which was irrevocable after the death of either of the executants and the property was bequeathed to the ultimate legatees. In the case of Kochu Govindan Kaimal and others (supra) the Apex Court did not hold the Will in that case as a mutual Will and accordingly the said authority has no application to the present case. The Division Bench of the Allahabad High Court in Bhawani PRASAD's case (supra) on construction of the Will in that case held that since the Will was executed by tenants in common and there was no mutual arrangement or reciprocal arrangement between the husband and wife regarding devise it was open to the wife after the death of husband to revoke the part of the Will by gifting away the house to another during her life time. The said authority also has no application in the facts and circumstances of the case since the Will in the present case is joint and mutual Will.

15. Accordingly, the second appeal filed by original defendant No. 1 is dismissed. The cross objections filed by original plaintiff are allowed. The judgment and decree passed by the courts below are set aside. The plaintiff's suit is decreed in terms of prayer (a) of the plaint. No costs.

16. Upon the oral prayer made by the learned Counsel for the original defendant No. 1 for a period of eight weeks, operation of the judgment and decree passed by me shall remain stayed.

17. Second appeal dismissed.