IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 222 of 1982

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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SONAJI RAGHALA CHAUDHARI
Versus
AKHA DIWALA CHAUDHARI THR'HEIRS

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Appearance:
MR SHIVANG M SHAH(5916) for the Appellant(s) No. 1.1,1.2,1.3
MS DHARA M SHAH for the Appellant(s) No. 1
MS DHARA M SHAH(5546) for the Appellant(s) No. 1.1,1.2,1.3
DELETED(20) for the Respondent(s) No. 1.7
MR NAGESH C SOOD for the Respondent(s) No. 1.2,1.3,1.4,1.5
MR NAGESH C SOOD(1928) for the Respondent(s) No. 1.1,1.6

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CORAM:**HONOURABLE DR. JUSTICE A. P. THAKER**

Date : 02/07/2021

ORAL JUDGMENT

1. Being aggrieved and feeling dissatisfied with the judgment and decree of the Appellate Court, Surat passed in Regular Civil Appeal No. 33 of 1981 dated

17.11.1981, the original defendant has preferred this Second Appeal under Section 100 of CPC. The appellant is the original defendant- respondent and the present respondent is the original plaintiff-appellant. It is contended that the respondent had filed a Suit against present appellant being Suit No. 108/1978 for the partition alleging that the properties are of the joint family properties and possession of his 1/2 share in the suit property. According to him, the trial Court, by its judgment and decree dated 31.12.1980, dismissed the suit of the plaintiff against which the plaintiff has filed First Appeal No. 33/1981, wherein the First Appellate Court allowed the Appeal filed by the plaintiff.

2. For the brevity and convenience the parties are referred to herein as plaintiff and defendant.

3. The defendant has challenged the judgment of the First Appellate Court on the ground that the First Appellat Court has erred in holding that the Diwala Gausa was not in sound state of mind and he did not

understood the effect of the disposition he has made. According to defendant, the learned Appellate Court overlooked the fact that after marriage of the plaintiff, the plaintiff has been residing at his Father-in-law's house at Ghantoli. It is also alleged that the learned Appellate Court has not considered the important fact that the defendant's father died before 30 years so the deceased Diwala Gausa had naturally more love and affection to his grand-son, who lost the love of his father at the age of around 12 or 14 years forever. It is also contended that the learned Appellate Court has misread the evidence on record. It is also contended that the plaintiff in his evidence admitted that his father Diwala Gausa died at the age of was 65 years. This fact is not properly considered by the learned Appellate court. It is also contended that the learned Appellate Court has not properly appreciated the evidence on record. That the version of the defendant and his witnesses ought to have been believed by the learned Appellate Court and learned appellate Court ought not to have set

aside the well reasoned judgment and decree of the learned trial Court. It is also contended that the learned first appellate Court has mis-read the evidence of the defendant's witnesses and also the documentary evidence i.e. "Will". It is also contended that the observation of the learned first appellate Court that at the time of execution of the Will false statement was made that no son of the deceased is alive, is contrary to the documentary evidence on record. The defendant has prayed to set aside the impugned judgment of the first Appellate Court and restore the judgment and decree of the trial Court passed in Civil Suit No. 108/1978.

4. The defendant-appellant has raised almost 4 substantial questions of law. However, this Court has raised the following questions of law.

(1) Whether on the facts and circumstances of the case, the lower Court has committed error in holding that the Will on which the appellant relied on is a Will executed by the deceased Diwala Gausa in sound state of mind on 11.1.1975?

(2) Whether after the appellate Court came to the conclusion that the plaintiff does not prove that the suit properties are undivided family properties and erred to decree the suit of the plaintiff for one half share in the Suit property?

5. Heard learned advocate Ms. Dhara Shah for the appellant and Mr. Nagesh Sood, as *amicus-curiae* for the respondent through video-conferencing at length.

6. The facts leading to the present Appeal are as under:

6.1 The plaintiff has filed the Suit for partition of the suit-properties which consist of two agricultural lands bearing Survey No. 55, admeasuring 2 Acres, situated in the Sim of village – Talsada- Khurd and the agricultural land bearing Survey No. 30 admeasuring Acre-3 and 8 Gunthas situated in the Sim of village Umarkhadi, Taluka: Mandvi. The case of the plaintiff is that the suit-properties are the joint family properties of the deceased Diwala Gausa, the plaintiff and the defendant. It is further case of the plaintiff that deceased Diwala Gausa was the Karta of

the joint family and Diwala Gausa purchased the suit properties with the aid of joint family funds under the provisions of the Bombay Tenancy and Agricultural Lands Act. Further, the case of the plaintiff is that the deceased Diwala Gausa died on 13.1.1975. According to the plaintiff, he has share in the suit properties. He has also contended that Diwala Gausa was physically and mentally infirm to execute a Will. It is further case of plaintiff that Diwala Gausa has not executed any Will and has not bequeathed the Suit lands to the defendant. The plaintiff contended that Diwala Gausa has no right to execute a Will. According to him, yet the Suit lands were mutated in the name of the defendant in the Revenue records on the basis of the fabricated Will alleged to have been executed by the plaintiff's father Diwala Gausa. It is alleged that the plaintiff had called upon the defendant to partition the suit properties, but the defendant refused to do so. The case of the plaintiff is that he has 1/2 share in the suit properties. On the basis of these averments, the plaintiff has filed the

Suit for partition of the suit-properties and for possession thereof by metes and bounds and mesne profits thereof.

7. It appears from the record that the defendant has filed his Written Statement at Exh-8 before the trial Court wherein, he has denied that the suit-properties are undivided joint family properties. He has also denied that Diwala Gausa was Karta of the joint family. He has denied the contention of the plaintiff that the Suit lands were purchased by Diwala Gausa with the aid of joint family funds. According to the defendant, the suit lands were self-acquired properties of Diwala Gausa and he had right to make Will and to bequeath the said properties. According to him, the plaintiff had separated from Diwala Gausa before many years and he was residing at village Ghantoli at his father-in-law's house since last 30 years. It is also contended that since that time i.e. separation of the plaintiff from the deceased Diwala Gausa, the deceased has purchased the lands, which are self-acquired properties of the deceased. It is

also contended that the deceased Diwala Gausa has acquired the suit lands under the provisions of the Bombay Tenancy and Agricultural Lands Act and, therefore, the concerned Court has no jurisdiction to entertain the Suit.

8. On the basis of the pleadings fo the parties, the trial Court has framed following issues at Exh-10.

(1) Does the plaintiff proves that the deceased Diwala Gausha had no authority to execute a Will in respect of suit-property?

(2) Does the plaintiff proves that the suit-property is of the H.U.F. of the parties?

3. Does the plaintiff proves that he has got 1/2 share in the suit-property?

4. Does the plaintiff proves that he is entitled to partition, separate possession and mesne-profit?

5. Has this Court has jurisdiction to hear and decide the suit?

6. Is this suit-property valued for Court-fees and jurisdiction?

7. To what relief, if any, is the plaintiff entitled?

8. What order and decree?

9. Whether the plaintiff is a joint tenant with the deceased Diwala in respect of the suit-land?

9. After considering the evidence on record, the trial Court held that the suit properties were the self-acquired properties of the deceased Diwala Gausa. The trial Court has also held that the plaintiff has failed to prove that the Suit properties were undivided family properties of the parties. The trial Court further held that Diwala Gausa had executed Will in respect of the suit properties and the deceased Diwala Gausa had executed the Will at Exh-49 in sound disposing state of mind and had bequeathed the suit properties in favour of the defendant. It has also held that the plaintiff has no right and interest in the suit lands and ultimately dismissed the Suit of the plaintiff.

10. Being aggrieved with the judgment and decree of the trial Court, the plaintiff has preferred First Appeal being Regular Civil Appeal No. 33 of 1981 before the

Appellant Court, Surat which has been decided by the Assistant Judge, Surat vide judgment and decree dated 17.11.1981, whereby the Appellate Court has framed the following Points:

1. Whether the defendant proves that the testator Diwala Gausa was in sound disposing state of mind on 11.1.1975?

2. Whether the Will (Exh.49) dated 11.1.1975 is proved to have been executed by Diwala Gausa in sound disposing state of mind?

3. Whether the plaintiff proves that the suit-properties are undivided joint family properties of the parties?

4. What order?

11. The First Appellate Court has decided the aforesaid points in negative and has ultimately passed the Order to the effect that the plaintiff is entitled to partition with metes and bounds and also directed the Collector, Surat or any subordinate to the Collector deputed by him, to make partition and separation of the lands and has also passed order for

drawing the decree. This judgment and decree of the first Appellate Court has been challenged by the defendant in this Second Appeal.

12. Ms. Dhara Shah, learned advocate for the appellant has vehemently submitted that deceased Diwala Gausa has executed the Will whereby the properties have been bequeathed to the appellant herein. She has also submitted that the plaintiff has never resided with the deceased and he was residing with his wife at his father-in-law's house. She also submitted that the allegations made by the plaintiff regarding the properties being HUF, is not proper as entire properties were self-acquired properties of the deceased. She has contended that the trial Court has, after considering the entire evidence on record, dismissed the suit of the plaintiff and the judgment and decree of the trial Court are tenable in the eyes of law. She has submitted that the plaintiff challenged the same before the appellate Court wherein the appellate Court has allowed the Appeal by declaring that the plaintiff has got 1/2 share in the

properties and he is entitled for partition of the same. That the appellate Court also ordered to partition by metes and bounds and held that the plaintiff shall recover 1/2 share in the suit properties. According to her submissions, the appellate Court has committed serious error of facts and law by setting aside the decree of the trial Court. She has also submitted that the observations made by the appellate Court regarding the Will are not proper. She has also submitted that the observation made by the appellate Court that the deceased Diwala Gausa died intestate without making any Will is not based on evidence on record. According to her submissions, there is ample evidence on record to suggest that the deceased Diwala Gausa has executed Will and, therefore, the observation of the Appellate Court is not legal and valid.

12.1 She has also submitted that Will has been produced at Exh-49 and on the basis of the same, the trial Court has held that the properties are self-acquired

properties of the deceased. She has also submitted that the plaintiff has not challenged the Will on the ground of illness of the deceased and of unsoundness of the mind of the deceased. She has also submitted that it was challenged only on the ground that the properties were of HUF and the properties were not self-acquired properties of the deceased. She has submitted that learned first Appellate Court has committed serious error of facts and law in passing the impugned decree. She has relied on the decisions in case of **Narinder Singh Rao v. AVM Mahinder Singh Rao and Ors, reported in AIR 2013 SC 1470.**

13. Per contra, Mr. Nagesh Sood, learned advocate as an *amicus curiae*, has submitted that there are two agricultural properties and the deceased was only Karta of HUF. He has also submitted that the properties being agricultural lands and deceased being Karta of the HUF, the deceased had no right to bequeath the properties in favour of the defendant. He has also submitted that the deceased has not

executed any Will and the Will produced in the matter is a fabricated one. He has also submitted that the properties are of joint family properties and, therefore, the plaintiff has 1/2 share in the same. He has also submitted that the trial Court has not framed any issues regarding the validity or execution of the “Will”. He has submitted that the suit was filed for partition only which is legal and valid. He has also submitted that the trial Court has not properly considered the evidence on record and has committed error in framing issues and has ultimately dismissed the suit of the plaintiff. He supported the judgment and decree of the first appellate Court and has submitted that the findings of the fact recorded by the first appellate Court is proper and valid and this being Second Appeal, this Court may not disturb the findings of fact, which has been recorded by the first appellate Court, which is based on the oral and documentary evidence. He has also submitted that though the attesting witness to the Will has been examined but the scribe of the Will is not examined

to substantiate that there was a legal Will executed by the deceased. He has submitted that the present Appeal may be dismissed.

14. In rejoinder, Ms. Dhara Shah, learned advocate for the appellant has submitted that the plaintiff has failed to establish the fact that the properties were of joint family properties. She has also submitted that the plaintiff being Son was not residing with father and was residing with his wife at his Father-in-law's house since 1950. This fact, according to her, is relevant which has not been considered by the First Appellate Court. She has also submitted that the societal approach of the deceased treating his Son as of non-existence for all purposes is a relevant factor, which is not properly considered by the First Appellate Court. She has submitted that there is no legal need that there should be registration of the Will in every case. According to her submissions, there is always no necessity of giving entire description of the properties of the deceased. She has further submitted that the first appellate Court

has failed to consider the legal aspect regarding to the Will and has committed serious error of facts and, therefore, this Court being second appellate Court, can re-appreciate the evidence on record. She has prayed to allow the present Appeal.

15. In the case of **Narinder Singh Rao v. AVM Mahinder Singh Rao and Ors (Supra),** the Apex Court has upheld the observations made by the High Court of Punjab & Haryana, which is as follows:

> *"7. It is pertinent to note as to how the High Court has decided the Second Appeal and for that purpose let us look at the findings, which are as under:*
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> *The ultimate findings arrived at by the court below are to the effect that the writing executed by Rao Gajraj Singh, which stated that upon death of himself or his wife, the suit property would be inherited by the survivor, was neither in the nature of a Will nor in the nature of transfer of the property because the said writing was neither registered as required under the provisions of the Indian Registration Act, 1908 nor was attested by two witnesses as it should have been done, had it been a Will. Thus, the writing executed by Rao Gajraj Singh, in the eyes of law, was only a piece of paper, having no legal effect. Factually also, the said writing was not a Will because it was not attested by two attesting witnesses as is required to be done for execution of a valid Will. It is also a fact that the said writing had not been registered and by virtue of the said writing either complete ownership or share of Rao Gajraj Singh was not transferred to Sumitra Devi, thus, the High Court in its impugned judgment rightly ignored the said writing executed by Rao Gajraj Singh".*

15.1 While rejecting the submissions made on behalf of appellant regarding the mental capacity of the testator to execute a Will, the Apex Court has observed in Para-16 as under:

> *"16. The submissions made with regard to the mental capacity of Sumitra Devi at the time of execution of the Will cannot also be looked into at this stage because the mental capacity of the testator to execute a Will being a question of fact, we would like to accept the findings arrived at by the court below and all allegations with regard to soundness of mind of Sumitra Devi at the time of execution of the Will or allegation with regard to undue influence of the present appellant with whom Sumitra Devi was residing at the time of her death cannot be looked into by this Court as they are the issues pertaining to fact. We, therefore, do not accept the submissions made with regard to validity of the Will executed by Sumitra Devi".*

16. Prior to coming into force of the Hindu Succession Act, no coparcener could dispose of whole or any portion of his undivided coparcenary interest by Will. But by virtue of Section 30 of the Act read with explanation, a coparcener derives his right to dispose of his undivided share in Mitakshara joint family property by Will or any testamentary disposition i.e. by virtue of law. The said provision reads thus:

> *Section 30: Testamentary succession : Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him or by her, in accordance with the provisions of the*

Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.
Explanation.— The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section.

17. In the case of **Radhamma and Ors v. H.N.Muddukrishna and Ors, reported in AIR 2019 SC 643**, the Apex Court has dealt wiht Section 30 on the Hindu Succession Act and especially in Para-7 has observed as under:

"7. Section 30 of the Act, the extract of which has been referred to above, permits the disposition by way of Will of a male Hindu in a Mitakshara coparcenary property. The significant fact which may be noticed is that while the legislature was aware of the strict rule against alienation by way of gift, it only relaxed the rule in favour of disposition by way of a Will of a male Hindu in a Mitakshara coparcenary property. Therefore, the law insofar as it applies to joint family property governed by the Mitakshara school, prior to the amendment of 2005, when a male Hindu dies after the commencement of the Hindu Succession Act, 1956 leaving at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary. An exception is contained in the explanation to Section 30 of the Act making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property can be disposed of by him by Will or any other testamentary disposition ...".

18. It is pertinent to note that Section 6 and 19 of the Hindu Succession Act, 1956 deals with devolution of

interest in coparcenary property as well as mode of succession of two or more heads respectively. Both these provisions provide as under:

Section 6: Devolution of interest in coparcenary property. —

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—
(a) by birth become a coparcener in her own right in the same manner as the son;
(b) have the same rights in the coparcenary property as she would have had if she had been a son;
(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the

Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of

such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation. —For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.*

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation. —For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.] Statement of Objects and Reasons [The Hindu Succession (Amendment) Act, 2005] Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the

females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975. It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. State Amendment Sections 6A to 6C Karnataka: After section 6 the following sections shall be inserted, namely:— "6A. Equal rights to daugher in co-parcenary property.— Notwithstanding anything contained in section 6 of this Act-

(a) in a joint Hindu family governed by Mitakshara law, the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son and have the same rights in the co-parcenary property as she would have had if she had been a son inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(b) at a partition in such a joint Hindu family the co-parcenary property shall be so divided as to allot to a

daughter the same share as is allotable to a son: Provided that the share which a predeceased son or a predeceased daughter would have got at the partition if he or she had been alive at the time of the partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter: Provided further that the share allotable to the predeceased child of a predeceased son or of a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or of such predeceased daughter, as the case may be;

(c) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (a) shall be held by her with the incidents of co-parcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

(d) nothing in clause (b) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of Hindu Succession (Karnataka Amendment) Act, 1990.

6B Interest to devolve by survivorship on death. — When a female Hindu dies after the commencement of the Hindu Succession (Karnataka Amendment) Act, 1990, having at the time of her death an interest in a Mitakshara co-parcenary property, her interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act: Provided that if the deceased

had left any child or child of a pre-deceased child, the interest of the deceased in the Mitakshara co-parcenary property shall devolve by testamentary or intestate succession as the case may be under this Act and not by survivorship.

(Explanations) — (1) For the purposes of this section the interest of female Hindu Mitakshara co-parcenary shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death, irrespective of whether she was entitled to claim partition or not.

(2) Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of the deceased had separated himself or herself from the co-parcenary, or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

6C Preferential right to acquire property in certain cases. —

(1) Where, after the commencement of Hindu Succession (Karnataka Amendment) Act, 1990 an interest in any immovable property of an intestate or in any business carried by him or her, whether solely or in conjunction with others devolves under sections 6A or 6B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under sub-section (1) shall in the absence of any agreement between the parties, be determined by the court, on

application, being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this section 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may by notification in the Official Gazette specify in this behalf. [Vide Karnataka Act 23 of 1994, sec. 2 (w.e.f. 30-7-1994).]

(i) The contention of the petitioners that there was automatic partition amongst the heirs of the deceased Karta on his death has been negatived because it is only when the deceased had left his surviving female heirs as provided in proviso to section 6 of the Act, a notional partition is deemed to have taken place in the joint family property for the purpose of ascertaining the share of the deceased in the joint family properties which comes to the share of the female heirs. If there are male heirs there is no automatic partition; Shivgonda Balgonda Patil v. Director of Resettlement, AIR 1992 Bom 72.

(ii) The heirs will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death in addition to the share which he or she received or must be deemed to have received in the notional partition; Gurupad v. Hirabai, AIR 1978 SC 1239.

(iii) The fiction in the explanation of section 6 of the Act should be carried to a narrow extent only with a new point to implement the purpose for which it was introduced. When there were only two coparceners and one of them died, then if any person other then the coparcener is entitled to a share as a result of severance of the share of the deceased coparcener, the share of such other person will become fixed; Shushilabai v. Naraynarao, AIR 1975 Bom 257.

(iv) The deceased coparcener's share gets fixed on the date of his death, subsequent fluctuations in the fortunes of the coparceners do not affect it; Karuppa v. Palaniammal; AIR 1963 Mad 254.

19. Mode of succession of two or more heirs.—If two or more heirs succeed together to the property of an intestate, they shall take the property,—

(a) save as otherwise expressly provided in this Act, per capita and not per stirpes; and

(b) as tenants-in-common and not as joint tenants.

19. In the case of **M. Arumugam Vs. Ammaniammal and Ors., reported in (2020) 11 SCC 103**, the Apex Court in Para-10 has observed as under:

"10. When we read Section 6 of the Succession Act the opening portion indicates that on the death of a male Hindu, his interest in the coparcenary property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. That would mean that only the brothers would get the property. However, the Proviso makes it clear that if the deceased leaves behind a female heir specified in Class-I of the Schedule, the interest of the deceased in the coparcenary property shall devolve either by

testamentary or by intestate succession under the Succession Act and not by survivorship. The opening portion of Section 6, as it stood at the relevant time, clearly indicates that if male descendants were the only survivors then they would automatically have the rights or interest in the coparcenary property. Females had no right in the coparcenary property at that time. It was to protect the rights of the women that the proviso clearly stated that if there is a Class-I female heir, the interest of the deceased would devolve as per the provisions of the Act and not by survivorship. The first Explanation to Section 6 makes it absolutely clear that the interest of the Hindu coparcener shall be deemed to be his share in the property which would have been allotted to him if partition had taken place immediately before his death".

20. The Supreme Court has referred to the case of **Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum and Ors, reported in (1978) 3 SCC 383**, wherein it was held in Para-11 that the partition which was a deemed partition cannot be limited to the time immediately prior to the death of the deceased coparcenary but *"all the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the life time of the deceased.: This Court further held that the partition has to be treated and*

accepted as a concrete reality, something that cannot be recalled at a later stage."

21. The Supreme Court has also referred to the judgment of **Appropriate Authority (IT Deptt.) and Ors v. Arifulla and Ors., reported in (2002) 10 SCC 342** wherein the issue arose was whether the property inherited in terms of Sections 6 and 8 of the Succession Act was to be treated as the property of co-owners or as joint family property. The Court has held as follows:

> *"3. ... This Court has held in CWT vs. Chander Sen that a property devolving under Section 8 of the Hindu Succession Act, is the individual property of the person who inherits the same and not that of the HUF. In fact, in the special leave petition, it is admitted that respondents 2 to 5 inherited the property in question from the said T.M. Doraiswami. Hence, they held it as tenants-in-common and not as joint tenants."*

22. Regarding the status of the Karta as a Manager of the joint family property, the Supreme Court in Para-17, in the aforesaid case of M. Arumugam Vs. Ammaniammal and Ors.(Supra), has observed as under:

> *"17. A Karta is the manager of the joint family property. He is not the guardian of the minor members of the joint family. What Section 6 of the Act provides is that the natural guardian of a minor Hindu shall be his guardian for all intents and purposes except so far as the*

undivided interest of the minor in the joint family property is concerned. This would mean that the natural guardian cannot dispose of the share of the minor in the joint family property. The reason is that the Karta of the joint family property is the manager of the property. However, this principle would not apply when a family settlement is taking place between the members of the joint family. When such dissolution takes place and some of the members relinquish their share in favour of the Karta, it is obvious that the Karta cannot act as the guardian of that minor whose share is being relinquished in favour of the Karta. There would be a conflict of interest. In such an eventuality it would be the mother alone who would be the natural guardian and, therefore, the document executed by her cannot be said to be a void document. At best, it was a voidable document in terms of Section 8 of the Act and should have been challenged within three years of the plaintiff attaining majority".

23. Having considered the contentions made by learned advocate for both the sides coupled with aforesaid legal aspects and facts of the case, and on perusal of the judgment of the trial Court along with the judgment of first appellate Court, it is crystal clear that there is concurrent findings of fact that the suit properties were self-acquired properties of the deceased Diwala Gausa. This concurrent finding of facts, based on the evidence on record, and this being Second Appeal, this Court has limited jurisdiction to interfere with the findings of fact in absence of any material illegality or mis-appreciation

of evidence on record of the Court below. Therefore, the question of the suit properties being self-acquired properties by the deceased Diwala Gausa is well established. On perusal of both the judgment, it is clear that the stand taken by the original plaintiff that the suit properties were ancestral properties which were purchased after the sale of the joint family which was situated in another village is not believed by both the Courts below. Further, there is no cogent evidence on record to suggest that the suit properties were purchased from the sale price of the ancestral properties. It is clear from the documentary evidence that the deceased Diwala Gausa has purchased the same under the Bombay Tenancy and Agricultural Lands Act and there is entry to that effect in the government record. This concurrent findings of fact has not been challenged by the original plaintiff by filing any objection or any Appeal herein.

24. Now, the controversy is regarding as to whether the deceased Diwala Gausa had any authority to execute any Will of the suit properties in favour of the

defendant herein. It is held by the trial Court that the suit property being self-acquired properties of the deceased, he has authority to execute the Will. This findings of the fact has not been interfered with by the first appellate Court however, the controversy in the matter is regarding the genuineness of the Will at Exh-49 alleged to be executed by the deceased Diwala Gausa on 11.1.1975.

25. On perusal of the judgment of the first appellate Court, it is found that the first appellate Court has interfered with the decision of the trial Court regarding the execution of the Will by the deceased on the following grounds:

1. There is no description of the properties in the Will.
2. There is recital in the Will that the deceased has only one son, whereas he had two sons.
3. There is discrepancy of the oral evidence of the important witnesses of the defendant regarding the colour of the thumb impression i.e. blue or black of the deceased.

4. There is contradictory version of the defendant witness regarding purchase of the stamp.

5. There is contradictory evidence of the defendant's witness as to whether the drafting of the Will was done while they were sitting either on the *Otta* of the house of the scribe or in the interior room of the scribe namely Gemalsinh.

6. Non-examination of the scribe i.e. Gemalsinh of the Will.

7. That the deceased was suffering from Paralysis and he was not in a position to execute Will as he was ill before the time of his death.

8. The registration of the Will after the death of the deceased.

26. On the aforesaid ground, the first appellate Court has doubted the execution of the Will and has observed that the Will at Exh-49 alleged to be executed by the deceased Diwala Gausa is suspicious one and it cannot be relied on for the facts of the bequeath of

the properties in the name of the defendant who is grand-son of the deceased.

27. It is pertinent to note that in support of the execution of the alleged Will, the defendant has examined himself at Exh-47 and his witnesses namely Jethabhai Keshavbhai (who is attesting witness of the Will) at Exh-48, Chhaganbhai Lakhabhai at Exh-53, Ravjibhai Bhimjibhai (attesting witness of the Will) at Exh-56, Dalpatbhai Nadabhai Chaudhari at Exh-58 whereas the plaintiff has examined himself namely Akha Diwala at Exh-23 and his witnesses namely Akhabhai Michhlabhai at Exh-43 and has also produced documentary evidence which consist of entries of the revenue record.

28. As regards the capacity to execute or make a Will as well as construction of Will, the provisions contained in the Indian Succession Act, 1925 needs to be taken into consideration. Section 59 and Section 82 of the Indian Succession Act respectively provide as under:

> ***"Section 59. Person capable of making wills****.— Every person of sound mind not being a minor may dispose of his property by will.*
> *Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.*
> *Explanation 2.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.*
>
> *Explanation 3.—A person who is ordinarily insane may make a will during interval in which he is of sound mind.*
> *Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.*
>
> ***Section 82. Meaning or clause to be collected from entire Will****.—The meaning of any clause in a Will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.*

28.1 In view of the aforesaid provision, even a person who are deaf or dumb or blind can make a Will if they are able to do what they do by it. Not only that, even a person who is insane may make a Will during interval if he is of sound mind. Therefore, under Section 59, only rider for non-capability of making Will is of being minor who is prohibited to dispose of his property by Will. Except minor, as provided in explanation under Section 59, other persons, as referred to above, can execute Will.

28.2 For consideration of a Will, as provided under Section 82, as referred to hereinabove, the meaning of any clause in the Will is to be collected from the entire instrument and all its parts are to be construed with reference to each other. There cannot be a piecemeal reading of a Will.

29. *Further, a* Will is an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his life time, to be acted upon only on his/ her demise, it is no longer *res integra*, that it carries with it an overwhelming element of sanctity. A Will needs to be attested by the witnesses. Section 68 of the Evidence Act deals with the proof of execution of document required by law to be attested. The provision thereof runs as under:

> *"**Section 68**: Proof of execution of document requied by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:*
> *[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in*

accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

29.1 Attested in relation to an instrument, means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument, in the presence, and by the direction, of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one such witness shall have been present at the same time and no particular form of attestation shall be necessary.

29.2 The Supreme Court in *Beni Chand v. Kamala Kunwar, reported in AIR 1977 SC 63* held that by attestation is meant the signing of a document to signify that the attestor is a witness to the execution of the

document; and by Section 63(c) of the Indian Succession Act, 1925, an attesting witness to a Will is one who signs the document in the presence of the executant, after seeing the execution of the document, or after receiving a personal acknowledgment from the executant as regards the execution of the document.

29.3 In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and the testator had signed in the presence of two witnesses who attested it in his presence and the presence of each other. Requirement of Section 68 of the Evidence Act in proving the Will is to produce at least one of the attesting witnesses. In view of the provisions of Section 68 of the Evidence Act, there is

no need to examine the scribe of Wil. What law requires is examination of atleast on attesting witness.

30. In view of the aforesaid legal preposition there is no need of examining scribe of the Will. The only legal requirement is examination of one attesting witness. Nows, in this case, the defendant side has examined both the attesting witnesses, viz. (i) Shri Jethabhai Keshavbhai (Exh-48) and (ii) Shri Ravjibhai Bhimjibhai (Exh-56) wherein they have categorically stated that the deceased has executed Will in their presence, and deceased has put his thumb impression on the Will at Exh-49 and at that time the deceased was in sound state of mind. However, the learned appellate Court has heavily relied on the fact that the scribe of the Will has not been examined by the defendant. This reasoning and observation of the learned first Appellate Court is not in consonance with the legal requirement for the proof of the Will.

31. It is pertinent to note that the first Appellate Court

has also heavily relied on the fact that the testator in his Will has mentioned that he has only one son and has doubted the genuineness of the Will. On this ground, it is well settled principles of law that while interpreting the Will, the entire Will has to be read and construed. There cannot be reading of the Will piece-meal. Now, on reading of alleged Will at Exh-49, there is clear averment that deceased has other son namely Akho, who is plaintiff, is residing with his father-in-law and has left him and he has never taken care of the testator and due to that, he is not reserving any right in favour of him in deceased's properties. It is also averred in the Will that his grand-son is maintaining him since his Son Akho left him to reside with his father-in-law. This fact clearly suggests that the testator has knowledge regarding his second Son Akho and due to his not taking care of him during his entire life, he has left out from properties. This recital has not been taken into consideration by the first Appellate Court. Since plaintiff has not maintained his deceased father

Diwala Gausa, it is natural for the deceased Diwala Gause to exclude his own son from getting any share in the self-acquired properties and there is nothing wrong in bequeathing the entire properties to his grand-son who has maintained the deceased. Therefore, the observation and the reasoning on the part of the first Appellate Court regarding suspicious condition as to execution of the Will, is not in consonance with the facts on record and is also not legally tenable.

32. Further, there is consistent stand of the witnesses of the defendant appellant that all of them have went to the scribe's home at Mandvi along with deceased and the Will was written by Shri Gebalsinh. Of course, there is some discrepancy regarding the colour of the ink used for thumb impression of the testator and witnesses thereof, but, that fact has no relevance as on perusal of the Will along with the statement recorded therein by the Sub-Registrar, Mandvi it is found that there are some thumb impression in

black. Therefore, it is possible for the witnessess of the defendant that they may have committed some mistake regarding the same.

33. it also reveals from the execution of Will at Exh-49 that after his death the same has been got registered and it has been registered by the Sub-Registrar. This fact of Registration after the death of the deceased has some relevance for doubting the execution of Will. But, the action on the part of the concerned Sub-Registrar Mandvi in registering the Will after the death of the deceased Diwala Gausa is an act done by Official, for which the beneficiary of the Will cannot be blamed. It was for the concerned Sub-Registrar not to register the Will after the death of Diwala Gausa. Mistake as well as erroneous action on the part of the Sub-Registrar, Mandvi cannot affect the right of the person in whose favour the deceased has bequeathed his self-acquired properties.

34. On perusal of the entire evidence on record, it clearly

appears that all the legal requirements of proving the Will has been satisfied and the factum of excluding the plaintiff Akha from the properties by the testator is reflected in the Will itself, are sufficiently proved. Of course, there is no description of the entire properties in the Will. However, there is specific averment of bequeathing all his properties which are available at the time of his death to his grandson in the Will. Therefore, there is no question of non-specification of properties in the Will. The observation made by the first Appellate Court in this regard is also not in consonance with the facts and circumstances of the case as well as on legal aspects.

35. In view of the legal provisions as discussed hereinabove, questions of law referred to above are answered as under:

(1) It is properly held by the trial Court that the Will was executed in the sound state of mind by the deceased Diwala Gausa.

(2) Since the properties were held to be self-acquired properties of the deceased and 'Will' is found to be valid, the First Appellate Court has committed serious error of facts and law in passing decree in favour of plaintiff for 1/2 share in the suit properties.

36. Having considered all these facts and circumstances of the case, it clearly transpires that the first Appellate Court has committed serious error of law and facts in setting aside the decree passed by the trial Court and therefore, the decree passed by the first Appellate Court requires to be set-aside, Whereas the decree of dismissing the Suit, as passed by the learned trial Court is required to be restored.

37. In view of the aforesaid discussion, the present Appeal is allowed. The Judgment and decree dated 17.11.1981 passed by the First Appellate Court, Surat i.e. Assistant Judge, Surat in Regular Civil Appeal No. 33/1981 are hereby quashed and set-aside. The

judgment and decree dated 31.12.1980 passed by the learned trial Court i.e. Civil Judge (J.D.) Mandvi in Civil Suit No. 108/78 are hereby restored. The suit filed by the Respondent herein- original plaintiff stands dismissed.

37.1 Considering the facts and circumstances of the case, there will be no order as to costs.

37.2 Necessary decree to be drawn in this Second Appeal.

37.3 Alongwith copy of this judgment and decree, R&P to be sent back to the learned trial Court.

(DR. A. P. THAKER, J)

SAJ GEORGE