IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF MARCH, 2024

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BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

R.S.A. NO.1011/2007 (INJ)

BETWEEN:

1 . SMT SAJIDA
W/O MOHAMMED GHOUSE
MAJOR, AGRICULTURIST
R/O. HOSANAGAR TOWN

2 . SMT. DILSHAD
D/O SHAIK HUSSAIN SAB
MAJOR, AGRICULTURIST
R/O. ACHAPURA VILLAGE
ANANDAPURAM HOBLI
SAGAR TALUK
NOW RESIDING AT: SMT. DILSHAD
W/O MOHAMMAD ATAULLA MALLAPURA
SHIMOGA TALUK

... APPELLANTS

[BY SMT. G.K.BHAVANA, ADVOCATE FOR APPELLANT NO.1;
SRI AJAY D. PATIL, ADVOCATE FOR APPELLANT NO.2]

AND:

1 . SMT BIBI JAN
W/O SAYED SABJAN SAB
MAJOR, R/O. ACHAPURA VILLAGE
ANANDAPURAM HOBLI
SAGAR TALUK
SINCE DEAD BY LRS

1(a) SHRI. SYED YUNUS
S/O LATE SMT.BIBI JAN
MAJOR

1(b) SHRI. SYED ALTAF
S/O LATE SMT.BIBI JAN
MAJOR

1(c) SHRI. SYED AARIF
S/O LATE SMT.BIBI JAN
MAJOR

1(d) SHRI. SYED SANAULLA
S/O LATE SMT.BIBI JAN
MAJOR

1(e) SMT. GULFIRA BANU
D/O LATE SMT.BIBI JAN
MAJOR

1(f) SHRI. SYED RIZWAN
S/O LATE SMT. BIBI JAN
MAJOR

1(g) SHRI. IRSHAD BANU
S/O LATE SMT.BIBI JAN
MAJOR

1(h) SMT. MOHMINA BANU
D/O LATE SMT.BIBI JAN
MAJOR

1(i) SMT. MUBINA BANU
D/O LATE SMT.BIBI JAN
MAJOR

ALL RESIDENTS AT ACHAPURA,
ANANDAPURA, SAGARA TALUK-577412.

2 . SAYED SAB JAN @ SYED ABDUL KHADER
S/O SYED SEERU SAB
MAJOR, AGRICULTURIST
R/O. ACHAPUR VILLAGE
ANANDAPURA HOBLI
SAGAR TALUK. … RESPONDENTS

[BY SRI R.V.JAYAPRAKASH, ADVOCATE FOR R1(a to d);
R1(f, g, i) AND R2 SERVED;
VIDE ORDER DATED 21.09.2023,
NOTICE TO R1 (e & h) IS HELD SUFFICIENT]

THIS R.S.A. IS FILED UNDER SECTION 100 OF CPC AGAINST THE JUDGEMENT & DECREE DATED 01.12.2006 PASSED IN R.A.NO.71/2001 ON THE FILE OF THE CIVIL JUDGE (SR.DN.), SAGAR, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGEMENT AND DECREE DATED 01.03.2001 PASSED IN O.S.NO.134/1993 ON THE FILE OF THE MUNSIFF AND ADDL. JMFC, SAGAR AND ETC.

THIS R.S.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 13.03.2024 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

1. Heard the learned counsel for the appellants and also the learned counsel for the respondents.

2. The parties are referred to as per their original rankings before the Trial Court, in order to avoid confusion and for the convenience of the Court.

3. The factual matrix of case of plaintiffs before the Trial Court while seeking the relief of declaration of title and permanent injunction are in the alternative possession. It is contended that wet land bearing Sy.No.49 measuring 2 acres 32 guntas situated at Malandur village, Anandapuram Hobli, Sagara Taluk, Shivamogga District purchased by the father of the plaintiff under a registered sale deed dated 12.03.1949 from one Mastanbi who is the mother of the defendant No.2. It is also the case of plaintiff that the father of the plaintiff was in possession and enjoyment of the suit schedule property and the revenue entries also stands in the name of the father of the plaintiff. After his death, since the plaintiffs were minors, the property was managed by their uncles Mr.Mohammad Ghouse and Mr.Sheik Makthum Sab. When the plaintiffs have attained their majority started looking after the property and started cultivating the same. It is contended that since 1987-88 and 1988-89, the pahani entries are also stands in the

name of plaintiff. It is contended that the defendant with the help of political persons and goonda elements started interfering with the peaceful possession of the plaintiff and hence the plaintiff filed the suit in O.S.No.88/1981 against the Mastanbi and the same was dismissed. The plaintiffs preferred an appeal in R.A.No.27/1989 and the same came to be abated after the death of the Mastanbi.

4. In pursuance of the suit summons, the defendant has appeared and filed written statement admitting the relationship between the plaintiffs and Shiek Hussain Sab but denied the other averments including Mastanbi sold the property to the father of the plaintiff. On the other hand it is contended that Mastanbi daughter and son-in-law are cultivating the property and Mastanbi also executed a registered Will. It is contended that therefore the said Bibi Jan who is the daughter of Mastanbi become necessary party. It is contended that the revenue entries are made against the interest of Mastanbi and the same

was challenged before the A.C Court and in view of death of Mastanbi, the appeal was abated and the plaintiff is not entitled for any relief.

5. When the plaintiffs have filed the present suit seeking for the relief of declaration of title and permanent injunction earlier suit was numbered as O.S.No.719/1989 and later re-numbered as O.S.No.134/1993. The defendant No.1 has also contended in the written statement that Mastanbi had no power to sell the suit schedule property as her daughters were also entitled to a share and the sale deed under which the plaintiffs were relying upon did not convey any valid title in respect of the suit schedule property. The said suit was decreed vide judgment dated 27.10.1994 and against the said judgment and decree dated 27.10.1994, the defendant No.1 along with his wife Bibi Jan filed an appeal in R.A.No.104/1994 before the appellate Court and the appellate Court ordered to implead the name of appellant No.2 i.e., Bibi Jan since she was not

a party to the suit. The First Appellate Court allowed the appeal vide order dated 24.12.1994 and set-aside the judgment and decree and remanded the matter to the Trial Court with a direction to implead Bibi Jan as a party/defendant by filing appropriate application and to dispose of the suit in accordance with law. After the remand, the plaintiffs impleaded the Bibi Jan as 2nd defendant in the said suit. The 2nd defendant has also filed a written statement. It is contended that Mastanbi was not the absolute owner of the property and she has no right to sell the suit schedule property. The sale deed executed by Mastanbi was not binding on her daughters.

6. It is contended that originally property belongs to her father Khatal Sab and after his death, his wife Mastanbi and her daughters became the absolute owners of the property by succession. It is also contended that after the death of Khatal Sab, his wife Mastanbi and his daughters have been cultivating the suit property as

absolute owners and Mastabi during her life time had executed a registered Will deed dated 28.12.1984 in favour of defendant No.2 Bibi Jan bequeathing her right in the suit schedule property. In order to prove the case of 2nd defendant she examined herself as DW3 and also examined two witnesses as DW4 and DW5.

7. The Trial Court after considering both oral and documentary evidence though held that Mastanbi has no right to sell the entire suit property but decreed the suit declaring the plaintiffs are the absolute owners and in possession of the suit schedule property and granted a decree of permanent injunction. Being aggrieved by the said judgment and decree, the defendant No.2 who is the 1st respondent in this appeal has filed an appeal in R.A.No.71/2001 before the First Appellate Court. The First Appellate Court after re-appreciating the entire evidence available on record, set-aside the judgment and decree of the Trial Court by allowing the appeal and as a result, the

suit filed by the plaintiffs was dismissed. Being aggrieved by the judgment of the appellate Court in allowing of the appeal, the present second appeal is filed before this Court.

8. The main contention of the appellants in the second appeal that the appellate Court has failed to consider the document Ex.P1 which is not challenged by the respondent at any point of time, the same is a valid document, the same has conferred title on the plaintiff's father as on the date of the execution of the document itself. The contention of the respondent at Ex.P1 is outcome of fraud cannot be accepted without leading any evidence, the said aspect has been appreciated by the Trial Court, but the First Appellate Court lost sight of the same. The First Appellate Court also failed to notice that the revenue records also show that the appellants' father was in occupation of the properties from 1949 itself. It is contended that the RTC for the year 1993-94 reveals that Mastanbi is a cultivator and the plaintiffs are the owners.

But, the said Mastanbi died in the year 1989. Hence, the revenue entries as far as cultivators list is concerned, cannot be appreciated and the appellate Court committed an error. The First Appellate Court failed to take note that nowhere in the entries or in list, the name of Bibi Jan i.e., 2nd defendant is mentioned. Eventhough if the document produced by the respondents are perused nowhere the name of the respondent appears and in view taken by the appellate Court is erroneous. It is contended that the appellate Court failed to take note of the fact that Will executed by 2nd defendant's mother i.e., Mastanbi cannot be held as a valid. Moreover the Will is produced at the footing of the conclusion after lapse of 30 years cannot be considered and also the First Appellate Court failed to take note that delay defeats equity. Moreover, the registered sale deed at Ex.P1 has not been annulled by any competent Court. The document is more than 30 years old, presumption under Section 90 ought to have been applied.

There was no justification for the First Appellate Court to reverse the finding of the Trial Court regarding validity of Ex.P1. The First Appellate Court failed to take note of the fact that the mother of the 2nd defendant has filed an application for grant of occupancy rights and contended that the appellant is the owner of the land in question. It is also contended that they are in adverse possession adverse to the interest of the appellant herein. The plea raised are not only inconsistent but also destructive in nature. When such being the case, the First Appellate Court ought to have accepted the final conclusion of the Trial Court and committed an error.

9. This Court having considered the grounds urged in the second appeal, while admitting the appeal formulated the substantial questions of law which are framed as hereunder:

i) Whether the inconsistent plea in the nature of destructive pleading enure to the

benefit of the defendant since the defendant has pleaded that they were tenants under the appellants, they are in possession of the property and exclusive right of ownership adverse to the interest of the appellant?

ii) Whether the appellate Court is justified in disbelieving Ex.P1 dated 12.03.1949 i.e., after a lapse of 30 years without there being a specific pleadings and supporting evidence to that effect contrary to Section 90 of the Evidence Act?

iii) Whether Ex.D16-Will executed by Smt.Mastanbi in favour of Smt.Bibi Jan is valid since the parties are Mohammedans by religion? In view of the same whether the First Appellate Court is justified in reversing the judgment and decree of the Trial Court basing on the Will and disbelieving Ex.P1?

10. The counsel appearing for the appellant in her argument would vehemently contend that suit is filed for the relief of declaration, injunction and alternative relief is

sought for the possession. The Trial Court granted the relief of declaration and injunction and the same is reversed by the appellate Court. The fact that the property was sold by Mastanbi in favour of the father of the plaintiff in terms of Ex.P1 though disputed and during the course of evidence, it is emerged that there was a sale. The counsel also would vehemently contend that when an application is filed before the land Tribunal contending that the plaintiffs are the absolute owners and she is in occupation as tenant and document Ex.P35 is clear that they claimed as tenant and the same was rejected. No doubt the appellant's father filed a suit for bear injunction and judgment was passed in coming to the conclusion that no possession and an appeal is also filed. In the meanwhile, the said Mastanbi passed away and the suit is abated since the suit is filed only for the relief of permanent injunction.

11. The counsel also would vehemently contend that when the son-in-law who is the 1st defendant started to

interfere with the possession of the plaintiff, the present suit is filed and subsequently the daughter of Mastanbi is also impleaded as defendant No.2. It is the claim of defendant No.2 that Mastanbi executed the Will. The counsel would vehemently contend that when the sale deed executed by Mastanbi was not challenged during her life time and only in the suit filed by the plaintiff, the said sale deed has been challenged by the legal heirs. When the defendant No.2 examined witnesses who are their neighbors, but they are not having knowledge of possession. The tax paid by the plaintiffs is admitted and possession is also admitted and claimed as tenant, the same was rejected. All these factors were not taken note of by the First Appellate Court while reversing the finding of the Trial Court.

12. The appellant's counsel in support of her argument, relied upon the judgment reported in ***(2006) 5 SCC 353 in case of Prem Singh and others V/s Birbal***

and others and brought to notice of paragraph No.27 wherein the Apex Court held that there is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption.

13. The counsel also relied upon the judgment reported in ***(2010) 12 SCC 112 in case of Suhrid Singh Alias Sardool Singh V/s Randhir Singh and others*** and brought to notice of this Court paragraph No.7 wherein the Apex Court held that where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non est, or illegal or that it is not binding on him.

14. The counsel also relied upon the judgment reported in ***(2000) 7 SCC 543 in case of Gram***

Panchayat of Village Naulakha V/s Ujagar Singh and others and brought to notice of this Court paragraph No.10 wherein the Apex Court held that we may also add one other important reason which frequently arises under Section 11 of CPC. The earlier suit by the respondent against the panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed V/s Musa Dadabhai Ummer where this Court, on a detailed consideration of law in India elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title. Even the mere framing of an

issue on title may not be sufficient as pointed out in that case.

15. The counsel also relied upon the judgment in ***Civil Appeal Nos.2055-2056 of 2022 in case of Premalath @ Sunita V/s Naseeb Bee*** and brought to notice of this Court paragraph No.4 wherein this Court held that the respondents-original defendants cannot be permitted to take two contradictory stands before two different authorities/Courts. If the submission on behalf of the respondents-defendants is accepted in that case the original plaintiff would be remediless. In any case the respondents-original defendants cannot be permitted to approbate and reprobate and to take just a contrary stand than taken before the revenue authority.

16. Per Contra the counsel appearing for the respondents in his argument, he vehemently contend that the fact that O.S.No.88/1981 was filed is not in dispute and

the same was dismissed. The appeal in R.A.No.27/1989 was also dismissed as abated. The present suit was filed in the year 1989. It is the claim of the appellant that the suit schedule property was purchased in the year 1949. The fact that the suit was decreed and appeal was filed and the appellate Court remanded and thereafter again also defendant No.2 was impleaded as party to the suit and the same is not disputed.

17. The main contention of the counsel before this Court is mother cannot be a guardian to sell the property and *de facto* guardian cannot sell the property and hence the very sale becomes void. The appellate Court taken note of the said fact into consideration.

18. The counsel for respondent in support of his argument he relied upon the judgment reported in ***AIR 1952 Supreme Court 358 in case of Mohd. Amin and others V/s Vakil Ahmad and other*** brought notice of this

Court paragraph No.10 wherein discussed with regard to the question of how far, under what circumstances according to Mahomedan law, a mother's dealing with her minor child's property are binding on the infant has been frequently before the Courts in India. The decisions, however, are by no means uniform, and betray tow varying tendencies: one set of decisions purports to give such dealings a qualified force; the other declares them wholly void and ineffective. In the former class of cases the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor; in the latter, the admitted absence of authority or power on the part of the mother to alienate or encumber the minor's property. The test of benefit resulting from the transaction to the minor was negatived by the Privy council and it was laid down that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently

called a "de facto guardian", has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant.

19. The counsel also in support of his argument relied upon the judgment reported in ***(1996) 7 Supreme Court Cases, page 436 in case of Meethiyan Shdhiqu V/s Muhammed Kunju Pareeth Kutty and others*** and brought to notice of this Court paragraph No.4 wherein contention was raised and in paragraph No.5 discussed no other relation is entitled to be the guardian of the property of a minor as of right; not even the mother, brother or uncle but the father or the paternal grandfather of the minor may appoint the mother, brother or uncle or any other person as his executor or executrix of his will in which case they become legal guardian and have all the powers of the legal guardian as defined in Sections 362 and 366 of the Mulla's Principles of the Mohammadan Law. The Court may also appoint any one of them as guardian of the

property of the minor in which case they will have all the powers of a guardian appointed by the Court as stated in Sections 363 to 367 The counsel also brought to notice of this Court paragraph No.10 wherein held father is a natural guardian and in his absence other legal guardians would be entitled to act. In their absence, property guardian appointed by the competent Court would be competent to alienate property of the minor with the permission of the Court.

20. The counsel also relied upon the judgment reported in ***AIR 1995 Madhya Pradesh, page 238 in case of Chirojilal and others V/s Khatoon Bi and others*** and the counsel referring this judgment brought to notice of this Court paragraph No.8A wherein held that it is settled law that a de facto guardian of Muslim minor has no power to transfer any right or interest of the minor and such transfer is not merely voidable but *void ab initio qua* all the parties including those who were *sui juris*. The

counsel also brought to notice of this Court paragraph Nos.9 and 10 of the judgment wherein held that a void transaction in respect of minor's share is considered not voidable but is void, hence, cannot be ratified, nor any question of its ratification arises.

21. The counsel also relied upon the judgment reported in ***AIR 1973 Gujarat, page 88 in case of Parshotamdas Narasimbhai and others V/s Bai Dhabu and another*** wherein the Apex Court held that one of the Co-heirs of the deceased Mahomedan not being a guardian of the minor-co-heir has no power to alienate the interest of the minor in the property even for the purpose of discharging the debt of the deceased under the decree obtained against the minor. The transaction would be void and not merely voidable. The counsel also brought to notice of this Court discussion made in paragraph No.4. The counsel referring these judgments would vehemently contend that the appellate Court rightly appreciated the

material available on record not committed any error and it does not requires any interference.

22. In reply to the arguments of the respondents' counsel, the appellants' counsel would vehemently contend that when the sale deed is not challenged during the life time of the executant, now the legal heir cannot question the same. They have not filed any suit for cancellation or for declaration and they are also aware of the same in the earlier suit filed by the plaintiffs against the very executant in the year 1981 itself and knowledge of the same is admitted in the cross-examination and a suit is not filed to challenge the same. Hence, they cannot question the same in respect of Ex.P1.

23. The counsel for respondents also in her reply relied upon the judgment reported in ***(2008)17 Supreme Court Cases 491 in case of Bachhaj Nahar V/s Nilima Mandal and another*** and brought to notice of this Court

paragraph No.10 wherein discussion was made that no amount of evidence can be looked into upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the Court. A Court cannot make out a case not pleaded. The Court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint. The counsel also brought to notice of the principles laid down in the judgment in paragraph Nos.11 and 23 wherein held that it is fundamental that in a Civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like Court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action of parties, etc., which require pleading

and proof. Therefore, it would hazardous to hold that in a civil suit whatever be the relief that is prayed, the Court can on examination of facts grant any relief as it thinks fit.

24. Having heard the appellants' counsel and also the counsel appearing for the respondents and also the grounds which have been urged in the second appeal as well as during the course of arguments by the respective counsels and also considering the substantial question of law framed by this Court, this Court has to re-analyze the material available on record within the scope of Section 100 of CPC.

25. The 1st substantial question of law framed by this Court is Whether the inconsistent plea in the nature of destructive pleading enure to the benefit of the defendant since the defendant has pleaded that they were tenants under the appellants, they are in possession of the property and exclusive right of ownership adverse to the interest of

the appellant. Having perused the material available on record, particularly in the written statement, 1st defendant who is the son-in-law of Mastanbi denied the very sale made by his mother-in-law in the year 1949. He had pleaded that the property was belongs to her husband Mastanbi and they are cultivating the property and also pleaded with regard to the earlier proceedings and also pleaded with regard to the execution of Will in favour of his wife i.e., defendant No.2. It is also pleaded with regard to the change of revenue entries and filing of appeal before the Assistant Commissioner and filing of earlier suit and dismissal of the earlier suit. The defendant No.2 has been arrayed subsequently who is the daughter of Mastanbi also denied the very execution of sale deed dated 12.03.1949 by her mother and pleaded that Mastanbi has not executed the sale deed and even if it is proved, the sale deed was not acted upon. The purchaser has not acquired any right. It is contended that the mother of defendant No.2 is not the

owner of the suit schedule property and she has no exclusive right to alienate the suit schedule property. The defendant and her sisters are not bound by the alleged sale deed and possession never handed over in favour of the purchaser and still possession is with them and also claims that Will has been executed in the year 1984. It is also the claim that alternatively they have been in possession of the suit property for more than 45 years in adverse to the interest of any of the plaintiffs and perfected the title by adverse possession. The defendant No.2 also pleaded with regard to the same.

26. It is important to note that during the course of evidence, in consonance with the pleadings in the plaint, the plaintiffs got marked the documents particularly, the sale deed at Ex.P1. This Court has framed the first substantial question of law that whether the inconsistent plea in the nature of destructive pleading enure to the benefit of the defendant since the defendant has pleaded

that they were tenants under the appellants, they are in possession of the property and exclusive right of ownership adverse to the interest of the appellant.

27. It is not in dispute that there is a registered sale deed of the year 1949 in terms of Ex.P1. It is also important to note that Ex.P35 is the document of an application under Section 48A(1) which was filed before the Land Tribunal by the original seller Mastanbi wherein the purchaser name Hussain Sab is mentioned as owner. Hence, it is clear that even though the respondents disputed Ex.P1-sale deed, the very executant of the sale deed claims the tenancy right. Hence, the very contention of the respondents that Ex.P1 does not convey any title cannot be accepted when the said application at Ex.P35 was also filed in respect of the very same property claiming herself as tenant and purchaser as owner.

28. The other document is Ex.P38 wherein Mastanbi made an application before the Tahsildar objecting making of an entry of Hussain Sab on the ground that by playing fraud, the Hussain Sab transferred the katha and this application was given on 18.12.1980 itself. Hence, it is clear that it was in the knowledge of Mastanbi. The contention of Mastanbi that a fraud was played but not filed any suit challenging the said sale deed during her lifetime questioning the sale deed. It is also important to note that no doubt, a suit was filed by the plaintiffs in O.S.No.88/1981 against Mastanbi for the relief of permanent injunction and the said suit was dismissed. Inspite of suit was filed against the original owner Mastanbi who sold the property in favour of the father of the plaintiffs, either Mastanbi challenged the said sale deed or her legal heirs, instead of that they took the contention in the present suit stating that Mastanbi has no right to sell the property. No doubt, the Trial Court also comes to the

conclusion that Mastanbi has not having exclusive right over the property and also comes to the conclusion that the transaction made by the Mastanbi is not valid and the same is a void document considering Section 362 and 368 of Mohammedan Law. But the Trial Court comes to the conclusion that the same was not challenged by the Mastanbi during her lifetime. But the very approach of the First Appellate Court that not examined any of the witnesses in respect of Ex.P1 is concerned and the said fining is erroneous since the sale deed is of the year 1949. The observation of the First Appellate Court that the plaintiffs have not made any efforts to ascertain whether any of the witnesses and scribe were alive and the said observation is erroneous since the said document is more than 30 years old and also in the earlier suit, the plaintiffs have relied upon the sale deed and same has not been questioned by the very executant of the sale deed during her lifetime. No doubt, the First Appellate Court comes to

the conclusion that the property belongs to Kathal Sab and after his death, his wife and daughters have succeeded to his properties. It is also observed that wife is entitled for 1/8th share whereas the daughters together inherited 2/3rd share and remaining property comes to the residuary.

29. It is also important to note that once the sale deed was not questioned which was executed in the year 1949 during the lifetime of Mastanbi and also even defendant No.2 is also not challenged the same on the ground that at the time of selling the property she was minor. But the fact that after attaining majority also, she has not questioned the same. It is not in dispute that the original vendor as well as her children have not questioned the sale deed for the reasons best to known to them. The said fact has been taken note of by the Trial Court while considering the material available on record. It is also important to note that when the original vendor who sold the property herself has admitted the ownership of the

father of the plaintiffs in the very application in terms of Ex.P35, when the tenancy right is claimed, the question of disputing the title of the plaintiffs does not arise.

30. No doubt, the respondents' counsel relied upon the judgment in the case of **MOHD. AMIN AND OTHERS** wherein discussed with regard to under what circumstances according to Mahomedan law, a mother's dealing with her minor child's property are binding on the infant has been frequently considered the Courts in India and also held document is void. So also, in the case of **MEETHIYAN SIDHIQU** discussion was made that father is the natural guardian and though the mother is the *de facto* guardian, not conveys any right and also held that is a settled law that a *de facto* guardian of Muslim minor has no power to transfer any right. Thus, there is no dispute with regard to the principles laid down in the aforesaid judgments.

31. On the other hand, the counsel for the appellants also relied upon the judgment of the Apex Court in the case of **PREM SINGH** referred supra wherein the Apex Court held that a registered document is validly executed and prima facie would be valid in law. In the judgment of **SUHRID SINGH ALIAS SARDOOL SINGH's case** referred supra, wherein also the Apex Court held that where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, nor non est, or illegal or that it is not binding on him. But in the case on hand, first of all, the very executant of the sale deed has not sought any relief of declaration to annul the said sale deed and her daughters also have not sought any relief of declaration that sale deed is invalid, thus, they estopped from contending that the said document does not convey any right. Hence, the law of estoppel as well as law of acquiescence applies to the

case on hand since either the original executant or the legal heirs who are having right in respect of the property have not questioned or sought for any relief of cancellation of the said deed or sought for any relief to annul the same and also not sought for the relief of declaration that sale deed is invalid and instead of that they only raised the contention that the said Mastanbi was not having any absolute right. When the same came to the knowledge of the defendants about the sale made by the Mastanbi, the same was not questioned and they kept quiet. Even though they are the minors at the time of execution of sale deed, immediately after attaining the age of majority, they ought to have sought for the relief of declaration that sale deed is invalid but the same was not done. Hence, they were estopped from taking such a defence in the written statement.

32. It is also important to note that the destructive pleading is made by the respondents. In one breath they contend that not conveyed any title in favour of the

plaintiffs' father and in another breadth, they contend that they are the tenants. Once they admitted that they are the tenants, once again they cannot contend that they are the owners and may be the document is void, such void document has not been questioned for a longer period and also contended that they are in possession adverse to the interest of the appellants thus, they cannot blow hot and cold. In one breath, they contend that the document at Ex.P1 does not convey any right and on the other hand, they admitted that they are the tenants and the father of the plaintiffs is the owner, hence, it is nothing but destructive pleadings.

33. The second substantial question of law is that whether the appellate Court is justified in disbelieving Ex.P1 dated 12.03.1949 i.e., after a lapse of 30 years without there being a specific pleading and supporting evidence to that effect contrary to Section 90 of the Evidence Act. I have already discussed with regard to the validity of the

document at Ex.P1 and also discussed with regard to the law of estoppel is applicable to the case on hand so also law of acquiescence. The document of sale deed came into existence on 12.03.1949 and even after lapse of 30 years also they have not challenged the said sale deed even though having knowledge about the existence of the sale deed. I have already pointed out that the very executant of sale deed has not challenged the same even after filing the suit by the plaintiffs for the relief of bare injunction wherein the executant of the sale deed has contested the matter and not taken any decision to challenge the said sale deed at Ex.P1. Even defendant No.2 also did not make any efforts to challenge the said sale deed seeking the relief of declaration declaring that the document is not valid and also pleaded fraud by the original executant long back i.e., in the year 1980 in terms of document at Ex.P38, not taken any steps to question the same. When the documentary evidence is available on record and Section 90 of the

Evidence Act is very clear that documentary evidence prevails, not oral evidence, I answer second substantial question of law accordingly.

34. The third substantial question of law framed by this Court is that whether Ex.D16-Will executed by Smt.Mastanbi in favour of Smt.Bibi Jan is valid since the parties are Mohammedans by religion? In view of the same, whether the First Appellate Court is justified in reversing the judgment and decree of the Trial Court basing on the Will and disbelieving Ex.P1. No doubt, the document at Ex.D16-Will was executed by Mastanbi on 28.12.1984 but she has executed the sale deed in the year 1949 itself. Though not joined along with her minors as guardian to execute the said sale deed, law is also very clear that mother cannot act as a natural guardian. Even assuming that she is a *de facto* guardian and no right has been conveyed but the very document has not been questioned either by the daughters or by herself by filing a suit for

cancellation of document or for declaration. Once she has executed the sale deed, unless the document has been annulled or cancelled or any relief of declaration to declare that same is not valid, the question of execution of Will in term of Ex.D16 in respect of the very property does not arise. The said fact is also not taken note of by the First Appellate Court but the First Appellate Court committed an error in coming to the conclusion that the document does not convey any title in favour of the plaintiffs, but the said approach is erroneous. No doubt, the First Appellate Court while considering the material available on record, ignored the document of Ex.P1 and comes to the conclusion that the very title has not been disputed by the original executant and also the daughters of the original executant and an observation is made that the plaintiffs have failed to prove the sale deed in question and they have not acquired any title over the suit schedule property and the very approach is erroneous when the document is registered

long back i.e., in the year 1949 and the question of examining any witnesses to prove the said document also does not arise.

35. I have already pointed out that in Ex.P35, it is admitted by Mastanbi that Hussain Sab as the owner thus, the admitted fact need not be proved. But the First Appellate Court erroneously comes to the conclusion that the plaintiffs have relied upon the documents at Ex.P1 to P39 to prove the possession over the suit schedule property and fails to take note of the fact that the entries were made immediately after the sale in the year 1949 and particularly, in the index of land, the name of the purchaser was entered in the revenue records long back but the First Appellate Court only taken note of entries found in the RTCs. Even though noticed that RTCs are in the names of Hussain Sab and Mastanbi were continued, mere continuation of the name of the earlier vendor in the document will not create any right and it is the duty of the

revenue authority under Section 129 of the Karnataka Land Revenue Act to change the same. The First Appellate Court also made an observation that for change of entries, no notice was given either by Mastanbi or her daughters. But there is no question of giving notice when there was a sale deed and in the year 1980-81 itself an endorsement was issued stating that already katha stands in the name of the purchaser and claim made by the Mastanbi cannot be entertained and all these documents have not been considered by the First Appellate Court. The First Appellate Court also made an observation that there are no material to show that after the termination of first round of litigation, the plaintiffs came into possession of the suit schedule property but the fact is that when the earlier suit for the relief of permanent injunction and the same was dismissed and an appeal was filed and during the appeal, Mastanbi passed away and the appeal was abated. Hence, the appeal was not considered on merits. The First Appellate

Court fails to take note of the documents of 'P' series. The defendants relied upon the document of Ex.D2 and the same was came into existence in the year 1993-94 before that all the documents were standing in the name of the plaintiffs. The documents produced by the plaintiffs is in voluminous and the said documents clearly disclose that the plaintiffs are paying the tax in respect of the very suit schedule property. Hence, the First Appellate Court committed an error in reversing the finding of the Trial Court.

36. It is important to note that the Trial Court while granting the relief of permanent injunction, in detail discussed with regard to validity of the document of Ex.P1 and also taken note of both oral and documentary evidence placed on record. The judgment relied upon by the appellant in the case of **GRAM PANCHAYAT OF VILLAGE NAULAKHA** referred supra, is very clear that the earlier suit filed by the respondent against the Panchayat was only

a suit for injunction and not on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. In the said judgment, the Apex Court referred the judgment of **Sajjadanashin Sayed vs Musa Dadabhai Ummer** and referring the same, the Apex Court also held that on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was founded or based on the finding on title. In the case on hand, the Trial Court discussed with regard to the contention that Mastanbi is having 1/8th share in the suit schedule property and also discussed with regard to Section 262(B) of Mohammedan Law and as per the said Law, she cannot become the legal

guardian of the minors property. No dispute with regard to the said fact is concerned.

37. Admittedly, there was a sale by Mastanbi and Mastanbi was not having absolute right to sell the property and same become void but the Trial Court rightly taken note of factual aspects that the parties have never challenged the said sale deed in the earlier point of time and they have kept quiet for more than 30 years and hence, their contention cannot be considered because delay is itself will defeat the equity also. Once the legal heirs of late Mastanbi have accepted the execution of the sale deed, impliedly then they definitely cannot subsequently challenge the said sale deed as a void document. I have already pointed out that once they admitted that the plaintiffs are the owners and claims that they are the tenants and also when the sale deed is of the year 1949 and even till date, they have not challenged the said sale deed either seeking the relief of cancellation by the original

executant of the sale deed or seeking the relief of declaration by the defendants to declare that the said document is not a valid document, they estopped from the same and law of acquiescence is applicable to the case on hand.

38. At this juncture, this Court would like to refer Section 31 of the Specific Relief Act, 1963 which reads thus:

> *"**31. When cancellation may be ordered**.— (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the*

copy of the instrument contained in his books the fact of its cancellation."

39. Having perused Section 31 of the Specific Relief Act, it is very clear that if any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled. But, in the case on hand, no such effort is made by the respondents herein by filing a suit for declaration to declare that the said document is not a valid document and the same is a void document and in terms of the said Section, it is clear that the said instrument is void or voidable, requires to be cancelled or annulled. Under such circumstances, ought to have sought for the specific relief under Section 31 of the Specific Relief Act to adjudge the said document as void or voidable. But no such effort has

been made by the respondents/defendants. Hence, this Court having taken note of the said fact into consideration observed that either the executant of the sale deed or the legal heirs of the original executant have sought for any cancellation of the said sale deed or for declaration as void document. Such being the case, they have been estopped from claiming any right contending that the said document is a void document and they have acquiesced their right.

40. The Trial Court also taken note of the earlier judgment wherein also defendants are not parties and only the mother was the party and the earlier suit is also against the original executant of the sale deed and subsequent suit is against the son-in-law since the son-in-law started interfering with the disposal of the earlier suit. The First Appellate Court fails to take note of the factual aspects that means the document of sale deed is more than 30 years old and the same has not been questioned and apart from that not discussed anything about law of estoppel and law of

acquiescence and mere taking the contention that not having any right to sell the property cannot be a ground to reverse the finding of the Trial Court unless the same has been challenged and same has been declared by the competent Court of law that the document is not valid and Mastanbi cannot execute any document when herself is a signatory to the earlier document of Ex.P1 and the First Appellate Court ought not to have disbelieved the document of Ex.P1 which is a registered document and fails to take note of the conduct of the defendants when themselves have admitted that the purchaser is the owner and the very Mastanbi made the claim that she is a tenant and accepted that the earlier purchaser as a owner. Hence, the First Appellate Court is not justified in reversing the judgment and decree of the Trial Court. The Trial Court considered the aspect of not questioning the document of sale deed and now the said document is almost 75 years old, but till date, not questioned the said document. When such being

the case, the First Appellate Court committed an error in reversing the finding of the Trial Court. Hence, I answer the third substantial question of law accordingly. In view of answering the aforesaid substantial questions of law accordingly, the judgment and decree of the First Appellate Court requires interference.

41. In view of the discussions made above, I pass the following:

ORDER

The regular second appeal is allowed. The judgment and decree dated 01.12.2006 passed in R.A.No.71/2001 by the First Appellate Court is set aside and the judgment and decree dated 01.03.2001 passed in O.S.No.134/1993 (O.S.No.719/1989) by the Trial Court is restored.

The parties to bear their own cost.

Sd/-
JUDGE

RHS/SN