

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

SECOND APPEAL NO. 129 OF 2003

Mainabai W/o. Rangnath Patankar,
Age : 52 years, Occu. Agriculture & Household,
R/o. Village Girwali Bawne, Tal. Ambajogai,
Dist. Beed. ... Appellant

VERSUS

1. Kundalik S/o. Dhondiba Kaladhone,
Age : 56 years, Occu. Agriculture,
R/o. Sugaon, Tal. Ambajogai,
Dist. Beed.
2. Nagu s/o. Dhondiba Kaladhone,
(Since deceased through legal representatives)
- 2a. Shivaji s/o. Nagu Kaladhone,
Age : 40 years, Occu. Agriculture,
R/o. Sugaon, Tal. Ambajogai,
Dist. Beed.
- 2b. Bhivaji S/o. Nagu Kaladhone,
Age : 35 years, Occu. Agriculture,
R/o. Sugaon, Tal. Ambajogai,
Dist. Beed. ... Respondents

.....
Dr. Swapnil D. Tawshikar, Advocate for the appellant
Mr Vivek Bhavthankar, Advocate for respondents
.....

CORAM : A. M. DHAVAL, J.

DATE OF RESERVING THE JUDGMENT : 25TH OCTOBER, 2018.
DATE OF PRONOUNCING THE JUDGMENT : 7TH DECEMBER, 2018.

JUDGMENT :-

1. The appellant is original plaintiff. Her suit bearing RCS No. 477/1984 for declaration that she was daughter of Bala, certificate u/s 38(E) of Hyderabad Tenancy and Agricultural Lands Act, 1950 be

declared non-effective and she be put in possession of Bala's land was decreed by Civil Judge Jr. Divn., Ambajogai. Aggrieved defendants had preferred RCA No. 8/92. The ld. Addl. District Judge, Ambajogai by his Judgment dt. 27.06.2002 held that, the plaintiff failed to prove that Bala had married Vanchalabai and she was daughter of Bala. The defendants proved that they were nephews of Bala and by virtue of will, the suit property was bequeathed to them. Hence, the appeal was allowed and the judgment and decree of the trial Court was set aside and the suit was dismissed with no order as to costs. The aggrieved plaintiff has preferred the present second appeal.

2. The facts relevant for deciding this appeal may be stated as under : -

The appellant Mainabai is the original plaintiff and respondents 1A to 1E are legal heirs of defendant No. 1 – Kundlik. Respondents No. 2A & 2B are legal heirs of defendant No. 2 – Nagu. For the sake of brevity, the parties are hereinafter referred to by their first names. Mainabai filed R.C.S. No. 477/84 in the court of Jt. Civil Judge Jr. Division at Ambajogai. As per admitted facts, the land adm. 6 Acres 23 Gunthas at Survey No. 4 at Sugaon is the suit land. Admittedly, it belonged to one Brijlal Bansilal. Bala Nirba was the

tenant in the suit land. In the proceedings u/s 38(E) of Hyderabad Tenancy and Agricultural Lands Acts, 1950, he was put in possession and in 1961, he was declared as a deemed purchaser. He had no issues from his wife Kadubai. According to the plaintiff, Bala then married to Vanchalabai and Vanchalabai had two daughters and one son. The eldest son and daughter died and the plaintiff Mainabai is the only surviving daughter of Vanchalaba and Bala. Vanchalabai died during life time of Bala, and Bala died in 1961. Mainabai was maintained by her stepmother Kadubai. The suit land was in cultivating possession of Kadubai and the plaintiff as owners thereof. Bala had no other legal heirs. Kadubai died on 17.10.1977 and thereafter Mainabai became the sole owner of the suit land. Bala had no brothers but Kundalik & Nagu, the original defendants claimed that they were the sons of Bala's brother – Dhondiba. Mainabai's mother Kadubai was illiterate and the plaintiff – Mainabai was cohabiting with her husband at Girwali (Bawne). Taking advantage of this fact, the defendants got their names entered in the revenue record of the suit land and also obtained certificate u/s 38(E) in their name. Mainabai came to know about it at later stage. She issued notice and requested the defendants to hand over the possession. The defendants falsely replied it. Hence, the plaintiff Mainabai filed suit for declaration that she is the daughter of Bala Nirba, (ii) she

should be put in possession of the suit land and (iii) the 38(E) certificate be declared as non-effective.

3. The defendants by Written Statement (Exh. 10) admitted that, Bala was protected tenant and subsequently declared as purchaser of the suit land. They denied that, Bala had married to Vanchalabai and that plaintiff was the daughter of Bala. According to them, Bala was married to Kadubai, who had no issue. Vanchalabai was his concubine. She was earlier married to Vitthal Kumbhar. She had two daughters including the daughter from her previous husband. The elder daughter Jija was given in marriage to defendant No. 1. Bala was real brother of Dhondiba, father of the defendants. He died in Margashish-1963 and not in 1961. Parents of the defendants died early and Bala and Kadu had maintained them. There was a joint family of Bala & the defendants. On 25.11.1962, Bala executed a will bequeathing the suit land to the defendants. On his death, the defendants started cultivating the suit land and got their names mutated in 1963-64. The defendants alternatively claimed that, they were in open and continuous possession of land for more than 12 years and they had become owners. The Tenancy Court has accepted them as owners and issued 38(E) certificate. The Civil Court has no jurisdiction to entertain the challenge to the said

certificate. They claim that, Vanchalabai was a dancer in a Tamasha and Bala being addict to watching Tamasha, he came in contact with her and he was maintaining her along with her previous two daughters. Since elder daughter Jija was born from Vitthal, she was given in marriage to defendant No. 1, who is nephew of Bala. She begot one son Vishnu from defendant No. 1 – Kundalik, and thereafter, she became adulterous and left him. Hence, he contracted second marriage with Shantabai. Then he had differences with son Vishnu and at the instance of Mainabai, defendant No. 1 filed Reg. Civil Suit and obtained temporary injunction. The suit land was in cultivation of defendants Kundalik and Nagu. In 1970, they effected partition of the suit land. At the same time, consolidation scheme was implemented and separate shares of defendant Nos. 1 and 2 were separately numbered. The suit is barred by limitation and the suit deserves to be dismissed. In the light of these pleadings, the learned trial Judge framed 12 issues. Learned trial Judge after recording the evidence, on merits decreed the suit with costs. The 38(E) certificate was declared as null and void. The aggrieved defendants preferred appeal No. RCA 8/92. The ld. Addl. District Judge, Ambajogai by his judgment dt. 27.06.2002 held that, plaintiff failed to prove that Bala had married Vanchalabai and she was daughter of Bala. The defendants proved that, they were nephews of Bala and by virtue of

will, the suit property was bequeathed to them. Hence, the appeal was allowed and the judgment and decree of the learned trial Court was set aside and the suit was dismissed with no order as to costs.

4. The aggrieved plaintiff has filed the present Second Appeal. By order dt. 10.09.2004, para nos. A & B and one more question framed specifically were formulated as substantial questions of law. Those are as follows:

A] Whether the learned First Appellate Court has committed a gross error in reversing the judgment and decree passed by the learned trial Court after perfectly appreciating the case of the parties and properly elucidating the evidence on record?

B] Whether the ld. First Appellate Court has further committed an error of law in reversing the findings of the Trial Court on all the factual issues. It ought to have been appreciated that it is well established by law and by catena of judgments of the Hon'ble Apex Court and by this Hon'ble Court, that a finding of fact should not be reversed merely because two views are possible. Even though two views are possible, the learned First Appellate Court should not disturb the findings of the learned Trial Court, unless it is perverse. In the present case, the appellate Court has not recorded a finding that the findings of the learned Trial Court are perverse, still erroneously proceeded to disturb the findings without assigning elaborate and legal reasons as to why and how the findings of the Trial Court, which are reversed, are wrong.

C] Whether the findings of the Appellate Court are perverse and have been reached by excluding the admissible evidence and by admitting non-admissible evidence?

5. Heard learned advocate Shri. Swapnil Tawshikar for the appellant and Mr. Vivek Bhavthankar for the respondents at length.

My findings on above points are as follows:

1. Question No. A - In the negative
2. Question No. B - In the negative.
3. Question No. C- In the negative.
4. What order? - The appeal is dismissed.

6. At the outset, it must be stated that, the substantial question of law should have been specific as to finding on which issues were erroneous. Considering the vagueness of the three substantial questions framed, the ld. advocates have advanced arguments on all points and, therefore, it is necessary to consider whether the reversal of the findings on following points was erroneous.

1. Whether the plaintiff was daughter of Bala?
2. Whether the defendants were nephews of Bala?
3. Whether the defendants by virtue of will deed of Bala became owners of the suit property?
4. Whether the findings of the trial Court that the 38(E) certificate in favour of the defendants is not binding, legal and proper?

. My findings on the above points are as under:

Point No. 1 – In the negative.
Point No. 2 – In the affirmative.
Point No. 3 – 'Will' not proved owner by inheritance.
Point No. 4 – In the negative.

7. The ld. trial Judge wrongly placed main burden on the defendants and called upon the defendants to lead the evidence first.

The defendants have examined following witnesses:

1. Defendant No. 1 - Kundlik
2. Defendant No. 2 - Vishnu, son of Kundlik
3. DW 3 - Dattatraya Nirantar (Police Patil & Scribe to the will).

8. The plaintiff – Mainabai has examined herself as PW1 and one Shankar, a villager, as PW2.

9. The defendants have relied on 7/12 extracts, mutations, record of tenancy proceedings, 38(E) certificate, consolidation proceedings and will (Exh. 97). The plaintiff has relied only on notice dt. 22.08.84 (Exh. 87) and its reply by the defendants (Exh. 88).

10. The admitted facts disclose that, deceased Bala namely Nirba Kumbhar was cultivating the suit land belonging to Brijlal. Under receipt dt. 17.06.1961, he was put in possession of the same by the Talathi as per directions of Tahsildar. The proceedings for

deciding ownership rights on the basis of tenancy were initiated u/s.38 in respect of the suit land, but during the pendency of the same, Bala has died. It is in evidence that, Bala was declared as tenant but 38(E) certificate in his name is not on record. The 38(E) certificate is dt. 24.03.70 (Exh. 42). Similar certificates dt. 07.04.65 (Exh. 35) are issued in the name of defendants. A torn notice is at Exh. 40 declaring that the occupancy price was fixed at Rs. 630/- and it was addressed to deceased Bala. There is declaration under 38(E) dt. 01.02.59 in favour of Bala Khariba (Mutation No. 184, dt.14.11.62). The mutation at Exh. 43 shows that, Bala was declared as deemed purchaser and was put in possession as per mutation no.199, dt. 19.06.63 (Exh. 45). Bala died and by virtue of will deed, the defendants Kundalik and Nagu were held as his successors. Accordingly, 38(E) certificates are issued in their names. The consolidation certificates Exh. 35 & 36 dt.04.05.1974 disclose that, the lands of defendants were separated into two parts. The land allotted to Kundalik was numbered as Block No. 46 and the land allotted to Nagu was numbered as Block No. 45. The 7/12 extracts of the suit land at Exh. 47 to 53 consistently disclose the name of defendants in the occupation and cultivation column since 1963-65, and previous to that the name of deceased Bala Nirba was shown in occupation and cultivation column. There are separate

7/12 extracts in favour of Nagu and Kundalik for subsequent periods upto 1983-84.

11. Admittedly, Bala was tenant of the suit land and was residing in Sugaon. He was married to Kadubai and no issue was born out of the said wedlock. Bala died after November-1962 but before June-63 (mutations at Exh. 43 & 45). Kadubai died in October - 77.

12. The plaintiff's evidence shows that, Bala was married to Vanchalabai and they had three issues. Two of them died early and the plaintiff was the sole surviving heir of Bala. The defendants were not related to Bala. Kadubai had maintained the plaintiff. She got married at the age of 10 or 12 and thereafter she resided at her matrimonial house at Girwali (Bawane) from the same taluka Ambajogai. The plaintiffs' evidence shows that she was cultivating the suit land along with Kadubai. After Kadubai's death, the defendants took over the suit land in 1977.

13. There is no evidence on record to show that the deceased-Bala had married to Vanchalabai. There are no specific pleadings and evidence about the date, time, month and the mode of marriage.

The plaintiff cannot have any personal knowledge about their marriage. Her witness has also not stated about marriage between Vanchalabai and Bala.

14. However, there are admitted facts that, Vanchalabai was a dancer in Tamasha and Bala was fond of watching Tamasha. He developed relations with Vanchalabai and Vanchalabai used to come to him. There are admissions of the defendants that, Vanchalabai was paramour of Bala. According to them, she was concubine of Bala. The evidence of the defendants shows that, Vanchalabai was married to one Vitthal Kumbar. Their case is that, she had two daughters by name Jijabai and Mainabai (plaintiffs). Bala arranged marriage of Jijabai with defendant No. 1. Jijabai begot one Vishnu from defendant No. 1 but thereafter she eloped with one Mehboob to Ausa. When the evidence of defendant No. 1 (husband of Jija and her son Vishnu) shows that, Jija was adulterous and she was residing with Mehboob at Ausa, there is no reason to disbelieve the same. Though the plaintiff has denied that, Jijabai was her sister, defendant No. 1 Vishnu stated that Jijabai was his mother and Mainabai was his mother's sister. His evidence to that effect goes unchallenged. There is also evidence that, marriage of Mainabai was arranged by defendant No.1. Though the said fact was disputed, later on learned

advocate for the appellant argued that it was indicative of relations between Maina and Bala as father and daughter but, defendant No. 1 might have arranged marriage of Mainabai as she was his sister-in-law and she had nobody to look after.

15. Thus, it is not disputed that Mainabai was daughter of Vanchalabai. The evidence shows that, she was born sometime in 1960. Vanchalabai used to visit the house of Bala since defendant No. 1 was aged 10-12 years i.e. from 1942 approximately.

16. The crux of the issue is, whether Mainabai was daughter of Bala or whether she was born to Vanchalabai from her previous husband Vitthal Kumbhar? The evidence on record shows that, Vanchalabai was having her matrimonial house at Babhalgaon. She was married to Vitthal Kumbhar. There is no evidence that, their marriage was dissolved. There is no evidence showing that Vanchalabai was residing along with Bala Kumbhar continuously in village Sugaon and during her cohabitation with Bala Kumbhar, she begot plaintiff - Mainabai.

17. The learned advocate for the appellant has relied on three admissions. Defendant No. 1 – Kundalik admitted that, father's name

of plaintiff-Mainabai was Bala and Bala's father was Nirba. PW3 Dattatraya has admitted that, Mainabai was daughter of Bala Kumbhar and PW2 Shankar, a villager, has stated that, the plaintiff was daughter of Bala Kumbhar. Mr. Tawshikar also relied on evidence of PW2 – Vishnu, who stated that, Mainabai was his mother's sister and deceased Bala was his real grand-father. Mr. Tawshikar argued that, these admissions disclose that, Mainabai was daughter of Bala. In fact, Vishnu has latter admitted that, Bala was his grand-uncle. His father's father was Dhondiba and Bala was his brother. Pertinently, Bala was having relations with Vanchalabai, who was real grand-mother of Vishnu. In that way, his statement will have to be appreciated that, Bala was his maternal grand-father.

18. When a married woman having children maintains illicit relationship with somebody, the society may accept her as his wife and her daughters may be referred as his daughters. Those are step daughters of Bala in case there was marriage between Vanchalabai and Bala. Even in absence of marriage, the daughters are treated as step daughters. That does not mean that, a statement that Mainabai's father was Bala or Mainabai was daughter of Bala means she was biological daughter of Bala. As far as admission of defendant No. 1 is concerned, the learned appellate Court rightly held that, there is

some suspicion about the recording of evidence in this regard. About 5 to 6 sentences earlier, defendant No. 1 had denied that name of Mainabai's father was Bala. The sentence 'Mainabai was daughter of Bala and Bala's father was Nirba is followed by the words that, it is not true but the same appears to be connected to the subsequent sentence. I find that, defendant No. 1 at many places has denied that, Mainabai was daughter of Bala. Therefore, this admission in his evidence cannot be relied upon. Otherwise, after this admission, his cross would have been over but he has been extensively crossed even thereafter.

19. DW-3 Dattatraya Nirantar, Police Patil, has deposed that Mainabai was daughter of Bala but, he has not deposed when she was born and where she was born. He was a witness to the will and was cross-examined with regard to status of Mainabai.

20. PW2-Shankar is a former resident of Sugaon. He was aged 51 years in 1991. So he might have been born in 1940 or so. DW3-Dattatraya and PW2-Shankar have not stated that, deceased Vanchalabai was cohabiting with Bala in village Sugaon for sufficient length of time and during their cohabitation, the plaintiff was born. In cross-examination of PW2-Shankar, he could not tell the house

number of house of the plaintiff and defendants. He could not tell as to how long Kadubai was in possession of the suit land. He stated that, he was not knowing the relations of Bala Kumbhar, the plaintiff and the defendant. He admitted that, Kadubai was legally wedded wife of Bala. Contrary to the admitted facts, he deposed that, Vanchalabai died about 10-15 years before Kadubai. Kadubai has died in 1977 but, Vanchalabai died much earlier to the death of Bala in 1963. He admitted that, as Bala was attracted to Vanchalabai, out of love, there was marriage between defendant No. 1 and Jijabai, daughter of Vanchalabai.

21. Thus, there is some oral evidence on record but the plaintiff could have produced documentary evidence to prove her relationship. She has not produced a single document to show her relations with Bala. Her evidence is extremely vague. She has not stated what was the period of cohabitation between Bala and Vanchalabai and where they were cohabiting, what is her date of birth, where she was born. There is no birth certificate produced. No ration card showing her name along with deceased-Bala is produced. No marriage invitation cards of the plaintiff is produced. There is no other marriage invitation card from the family of Bala showing the name of the plaintiff as invitee is produced. There is no evidence that,

Bala used to visit her house and used to reside with her and when he was ill, she invited him to his house for treatment. There is no evidence that, during her illness, she was attending to her father. There is no evidence that, on the death of Bala, the plaintiff and her husband attended the funeral and the last rites were performed by her husband. There is no evidence that, the plaintiff or her husband reported the death of Bala. The death certificate of Bala is not on record. The evidence shows that, the plaintiff was not even aware of the date of death. She stated that, Bala died in 1961 but the mutation No. 184 (Exh. 43) shows that, Bala was alive on 14/11/1962 and it along with ME No. 199 (Ex. 142) shows that Bala died somewhere between November-1962 or June-1963.

22. If the plaintiff was daughter of Bala, her name would have appeared in the revenue record and the ration card. Her name never appeared in the revenue record of the suit land. On death of Bala, the plaintiff Mainabai would have taken away his belongings, which included the documents of tenancy proceedings but the documents of tenancy proceedings are filed by the defendants. The document of tenancy proceedings which were in possession of Bala were produced by the defendants. Admittedly, at the time of death of Bala, his wife Kadubai was alive. The defendants could not have stolen or removed

the documents of deceased Bala from his house. Those documents would have been given to the plaintiff if she would have been real daughter of Bala. There is no evidence that, after death of Bala, his widow Kadubai attempted to mutate the suit lands in the name of plaintiff-Mainabai. In normal course, Bala and thereafter Kadubai out of love and affection would have made some arrangement to effect transfer of the suit land in the name of the plaintiff but the same was not done.

23. The plaintiff or her husband would have taken efforts to get the suit land transferred in their name but since 1961 to 1984, the plaintiffs took no steps for a long period of 23 years. Meanwhile, the suit lands were mutated in the name of defendants No. 1 and 2. The tenancy proceedings were held in their names. The suit land was allotted to them as deemed purchaser by receiving price thereof from them and 38(E) certificates are issued in their name. Thereafter, in 1974, consolidation proceedings took place. The suit land was divided into two parts as per partition effected between defendants No. 1 and 2 among themselves. The parts allotted to defendants No. 1 and 2 were separately numbered as Block Nos. 45 and 46 and the Consolidation Officer has issued certificate to that effect in favour of the defendant. The subsequent conduct of the plaintiff is not consistent with her case that she was real daughter of Bala.

24. The learned trial Court wrongly placed burden on the defendants. It was for the plaintiff to prove her relationship and the plaintiff should have been called upon to lead the evidence first but, the learned trial Court was under wrong notions. He also carried wrong notion that a will is required to be registered u/s 17 of the Registration Act. There was no document of the plaintiff's cultivation, still the learned trial Court held that the plaintiff had no reason to file and contest the suit against the defendants. The plaintiff in a way can be called as step daughter if it is assumed that, Vanchalabai was wife of Bala though it is not a fact. In that context, the plaintiff could have expected that the suit land should have been allotted to her but since the plaintiff was not the real daughter, she did not take steps for several years and only when Kadubai died in 1977, she felt that the suit land should be grabbed. Even thereafter, she filed the suit after seven years.

25. The ld. Trial Judge had ignored most of the above referred material facts. The ld. First appellate court considered some of these facts. This Court can consider interference when the courts below have ignored material evidence. I find that, the above referred oral and documentary evidence shows that, the plaintiff even by

preponderance of probabilities failed to show that she was daughter of Bala. The view taken by the learned first appellate court is the correct view. The ld. trial Judge has ignored material discrepancies and particularly complete absence of documents and the issuance of certificate u/s 38(E) in favour of the defendants and complete inaction of the plaintiff for 23 years. The relationship between Bala and plaintiff Mainabai could not have been held to be proved only on stray admissions of some witnesses, in the light of conspicuous absence of any supporting document. Mr. Tawshikar submitted that, there was no document and the plaintiff was illiterate. It is difficult to believe that the births and deaths were not recorded and even the ration card was not there. I therefore find that, learned first appellate Court did not err in reversing the finding of trial Judge that the plaintiff was the daughter of deceased-Bala.

26. The defendants have deposed that, deceased Bala was their uncle. The plaintiff's advocate tried to show that, name of Dhondiba's father was Khariba whereas; Bala's father's name was Nirba.

27. The evidence on record shows that, immediately after the death of Bala, the suit lands were mutated in the name of the

defendants. The tenancy proceedings were initiated in their name and 38(E) certificates were also issued in their name. The certificates of consolidation are also issued in their name. There is voluminous documentary evidence to show that, they were claiming ownership and cultivating possession over the suit land and they are in cultivating possession of the same. The dissimilarity in the name of father of Bala and Dhondiba tried to be shown is not significant. Bala's own name has appeared different at different places.

28. In the possession receipt dt. 17.06.1961, Bala's father is shown as Mariba. In the notice u/s 38, Bala's father is shown as Kerba (Exh. 40). In Government declaration dt. 01.02.1959 (Exh. 41) Bala's father is shown as Khariba. In Mutation Entry No. 184 dt.14.11.1962 and Mutation Entry No. 199 dt. 19.06.1963, Bala's father is shown as Nirba. Pertinently, the claims made by the defendants to the suit land and cultivation of the suit land after Bala's death was never challenged by Kadubai from 1963 till her death in 1977.

29. Though, for reasons separately recorded, I hold that, will was not proved and learned Addl. District Judge erred in holding that it was proved, it is a matter of fact that, Bala had purchased a stamp

paper on 24.11.1962 and some writing was executed wherein there is admission that the defendants were his nephews. In absence of attesting witness, it cannot be used as a will but it can be used for collateral purpose for proving the relationship between Bala and the defendants. One DW3 – Dattatraya Nirantar, Police Patil was a witness to the document. In the cross-examination of the defendant's witnesses there was no serious challenge to the relationship of defendants with deceased Bala. From the subsequent conduct and the documentary evidence on record, I hold that, the relationship between deceased Bala and the defendants as uncle and nephews is well established.

Point No. 3 : Proof of Will.

30. The defendants filed will dt. 24.11.1962 (Exh. 97). The defendant No. 1 has taken lead in the execution of will. The defendants have not examined attesting witness to the will. Only DW3 Dattatraya (Scribe) was examined. There is contradiction as to when these documents were executed. Defendant No. 1 stated that, Bala died 8-10 months after the will whereas; the defendant stated that he died 10 days after the will.

31. Shri. Tawshikar, learned counsel for the appellant, rightly relied on Janki Narayan Bhoir v. Narayan Namdeo Kadam AIR.

2003 SC 761, N. Kamalam v. Ayyaswamy AIR 2001 SC 2802, Shashi Kumar Banerjee v. Subodh Kumar Banerjee AIR 1964 SC 529 and Chinthamani Ammal v. Nandagopal Gounder & Anr. 2007(4) SCC 163, to submit that, a will cannot be proved without examining the attesting witness. The examination of scribe cannot be substituted for a statutory requirement of examining the attesting witness. The reasoning of learned first appellate court that, will was not challenged by the plaintiff has no substance. It was not admitted in writing and if it is not admitted, it must be duly proved. In absence of attesting witness, the will was not proved. Nonetheless, the defendants being the only closest legal relatives of the deceased Bala, they were entitled to inherit the suit property.

32. Another very material point was wrongly decided by the learned trial Judge to which the ld. First appellate Court has not given proper attention. The ld. trial Judge held that, 38(E) certificate issued in favour of the defendants was null and void and not binding on the plaintiff. While delivering such finding, the learned trial Judge has completely overlooked the provisions of Hyderabad Tenancy and Agricultural Lands Act (for short "HTAL Act") and the judgments thereunder.

33. The HTAL Act, 1950 was enacted to empower Government to assume in certain circumstances the management of agricultural

lands, to provide for the registration of Co-operative Farms and to make further provision for matters incidental to the aforesaid purposes. Section 38 grants rights to the protected tenants to purchase the landholders' interest. The competent Tribunal under the said act is empowered to hold enquiry and determine the claims for purchase of the lands made by the tenants. He can fix the price as provided under the law and can grant installments, and u/s 38E he can issue certificate. These provisions are analogous to Sections 32(g) and 32(m) of the Bombay Tenancy & Agricultural Lands Act.

34. Section 99 of the Hyderabad Tenancy and Agricultural Lands Act, 1950 takes away the jurisdiction of civil court in the matters to be dealt with by the Tribunal under the Act. It reads as under:

S. 99. Bar of Jurisdiction. :- (1) [Save as provided in this Act] no Civil Court shall have jurisdiction to settle, decide or deal with any question [including a question whether a person is or was at any time in the past a tenant or protected tenant and whether any such tenant or protected tenant is or should be deemed to be full owner of the lands]] which is by or under this Act required to be settled, decided or dealt with by the Tahsildar, Tribunal or Collector or by the [Commissioner] or Government.

(2) No order of the Tahsildar, Tribunal or Collector or of the [Commissioner] or Government made under this Act, shall be questioned in any Civil or Criminal Court.

35. Section 99A of HTAL Act reads as under: -

S. 99A. Suits involving issues required to be decided under this Act.:-

- (1) If any suit instituted in any Civil Court involves any issues which, are required to be settled, decided or dealt with by any authority competent to settle, decided or deal with such issues under this Act (hereinafter referred to as the "competent authority") the Civil Court shall stay the suit and refer such issues to such competent authority for determination.
- (2) On receipt of such reference from the Civil Court, the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable thereto.

. These sections are analogous to Section 85 and 85A of Bombay Tenancy & Agricultural Lands Act.

36. The issue whether the civil court has any jurisdiction or not to decide the validity of 32(M) certificate under BTAL Act has been decided under several rulings. Since the provisions of Section 38(E) of HTAL Act are similar to Section 32(M) of BTAL Act, the rulings under the BTAL Act would be equally applicable to the proceedings u/s 38(E) of HTAL Act.

37. In Sau. Saraswatibai Trimbak Gaikwad Versus Damodhar D. Motiwale & Ors. reported in 2002 (4) SCC 481, the

Apex Court has referred to Section 85 of BTAL Act and held thus:

If the Tribunal fixes a purchase price and issues a certificate then that certificate would be conclusive proof of purchase. The civil court would then be bound to give effect to the certificate and cannot ignore it. It was further held that, even if any question had been raised the civil court could not have decided it. The civil court would have had to refer the issue to the appropriate authority and then abide by its decision. A decree passed without the consideration of the provisions of the said Act must be subject to orders of the appropriate authority in proceedings under the said Act. It is further held that, so long as the certificate stands the decree cannot be executed against the Appellant. It is only if Respondents 1 and 2 succeed in getting the Certificate set aside, in their pending Revision, that they can execute the decree.

38. In **Shrikant Teli v Bhaskar Kolekar**, 1983 (3) Mh.L.J. 542, it is held that, even if it is assumed that the petitioner had no notice of the proceedings initiated by respondent No. 1 under section 32-G and pursuant thereto the certificate under section 32-M was issued in favour of respondent No. 1, upon acquiring the knowledge of such certificate having been issued in favour of respondent No. 1, the petitioner could have only challenged its legality in appeal and not by way of proceedings under section 32-G of the Bombay Tenancy Act. The Tahsildar acted without jurisdiction in declaring the certificate issued in favour of respondent No. 1 as nullity and grossly erred in declaring the petitioner as deemed purchaser on the face of the certificate issued under section 32-M in favour of respondent No. 1. The said order passed by the Tahsildar being patently erroneous has

rightly been set aside by the Collector, Sindhudurg. The Maharashtra Revenue Tribunal also did not commit an error in affirming the correct order of the Collector, Sindhudurg. (These rulings are discussed in detail and followed by me in Pushpalata Godbole vs. Purshottam, SA 448/2014 decided on October 12, 2018).

39. I therefore hold that, the ld. Trial Judge could not have granted a declaration as claimed and the appellant-plaintiff was bound to approach the competent authority under the HTAL Act for getting the 38(E) certificate in favour of the defendants set aside. Point No. 4 is thus answered in the negative.

40. Since, there were conflicting views of the trial Court and the first appellate Court, I was required to consider the evidence in detail to find out whether the trial Court was justified in recording the findings and decreeing the suit or whether the lower appellate court was justified in reversing the findings and dismissing the suit. I find that, the judgment of the learned trial Judge was perverse and was based on no evidence with regard to the finding that the plaintiff was daughter of Bala. The ld. trial Judge also erred in ignoring the fact that the defendants were nearest legal heirs of deceased Bala and were entitled under law to inherit the suit property even in absence of the will. The trial Judge erred in placing the burden on the

defendants and ignoring the binding nature of 38(E) certificates issued by the competent authority in favour of the defendants and the voluminous documentary evidence produced by the defendants.

41. In the result, the reversal of the judgment and decree of the trial Court by the first appellate Court was legal and correct. However, I do not agree with the finding of the first appellate Court that the will was duly proved. I answer the points formulated by me accordingly and pass the following order.

ORDER

The Second Appeal is dismissed. The parties shall bear their own costs.

[A. M. DHAVALA]
JUDGE

Punde