

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

TUESDAY THE SIXTH DAY OF OCTOBER, TWO THOUSAND AND
FIFTEEN

PRESENT
THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

A.S.No.128 of 2006

Between:

Kanakam Satyamma (Died) and others

..... APPELLANTS

AND

Kalepu Chittemma (Died) and others

.....RESPONDENTS

The Court made the following:

THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

A.S.No.128 of 2006

ORDER:

The Legal Representatives of the unsuccessful plaintiff in O.S.No.28 of 1993 on the file of the Subordinate Judge, Rajam are the appellants in the present appeal.

2. The plaintiff filed the said suit for a partition of the plaint schedule property into 5 equal shares and for delivery of one such share to the plaintiff, or in the alternative if the Court comes to the conclusion that the sons of Jagannadham are also co-heirs along with the plaintiff, for partition of 1/8th share of the plaintiff and for delivery of one such share, or in the alternative, if the Court finds that the plaint schedule

property was once the joint family property of Jagannadham and his sons, for partition of 1/20th share of the plaintiff and for delivery of one such share with trees and standing crops thereon, for an enquiry into the realizations over the plaint schedule property from the date of the suit till the date of delivery of possession and for costs.

3. For the sake convenience, the parties are referred to as arrayed in the suit.

4. The material averments in the plaint are as follows:

Sole plaintiff (since deceased) is the daughter of one late Donthamsetti Jagannadham. The said Jagannadham and his brother Suryanarayana migrated to Rajam about 55 years ago and started doing independent cloth business in separate rented houses. Jagannadham acquired properties at Rajam, and he had three sons and five daughters, plaintiff is the eldest daughter and one Satyanarayana (@ Satyam) is the eldest son of Jagannadham. Since 1967 Jagannadham and his 3 sons were living separately as divided members. The properties are self-acquired properties of Jagannadham, and his three sons, though not having any right to claim over the said properties, Jagannadham gave some properties to his three sons. Jagannadham and his wife only are enjoying the schedule Mango tope of an extent of Ac.9.71 cents, situated at Ponugutivalasa of Santhakaviti Mandal, Srikakulam District. Jagannadham died on 02.01.1971, and his wife Narayanamma i.e. mother of the plaintiff died in the year 1979. After death of Jagannadham and his wife, the schedule property is vested in the plaintiff and her 4 other sisters (Defendants 1 to 4) under the Hindu Succession Act. Though the brothers of the plaintiff have no right over the plaint schedule property, out of affection, the plaintiff and her sisters allowed her brothers to manage the plaint schedule property.

5. It is stated that Donthamsetti Satyanarayana, the eldest brother of the plaintiff was addicted to bad vices and he died in April 1982, while the 2nd brother of the plaintiff, by name, Donthamsetti Mukhalingam died in February, 1981. During his lifetime, the eldest brother of plaintiffs Satyanarayana used to pay usufruct on the schedule property to the

plaintiff and her sisters. After 1982, the 3rd brother of the plaintiff, by name, Apparao, could not pay any usufruct of the schedule property pleading that he is in difficulties.

6. Defendants Nos.6 to 15 are the children of late Satyanarayana, Defendant No.16 is his widowed wife and Defendants 17 and 18 are the wife and eldest son of another deceased brother of plaintiff Mukhalingam. Defendant No.18, the eldest son of deceased Mukhalingam is the Manager of their branch.

7. The plaintiff and her sisters came to know that their eldest brother Satyanarayana, by suppressing the real facts with regard to the right and title over the schedule property, availed loans from Vysya Bank and Andhra Bank, Rajam Branches and committed default. In addition to that, Satyanarayana, the elder brother of the plaintiff, executed a sham and nominal sale deed on 27.12.1978 – Ex.B.11 in favour of defendants Nos.20 to 22 in respect of the schedule property for a meager consideration. Further, with an intention to deprive the rights of the plaintiff and her sisters over the schedule property, their elder brother Satyanarayana, through Defendant No.19, got instituted a collusive and fraudulent suit in O.S.No.169/1978 on the file of the District Munisif, Rajam against him, and allowed to pass a decree against him in respect of the schedule property. Thereafter, Defendant No.19 filed E.P. No.5/1987 seeking sale of the schedule property for execution of the decree in O.S.No.169/1978 and in the Court auction, Defendant No.23 purchased the schedule property on 20.06.1988. It is stated that since Satyanarayana had no right whatsoever over the schedule property, the sale deed – Ex.B.11 dated 27.12.1978 in favour of defendants 20 to 22 and the decree and auction proceedings in O.S.No.169/1978 do not bind the plaintiff and her sisters.

8. It is stated by the plaintiff that the plaint schedule property is not joint family property and it is self-acquired property of her father late Jagannadham, and during his lifetime, Jagannadham and his three sons got divided, and hence the plaintiff and her sisters alone could be lawful

successors to the plaint schedule property. Defendants Nos.19 to 23 are strangers and cannot claim any right over the schedule property. Defendants Nos.24 and 25 are the Banking Institutions and their loans, if any given to Satyanarayana or any loans availed by Satyanarayana from Defendant No.19 cannot bind the plaintiff and her sisters.

9. Defendants Nos.1 to 15, 17 and 18 remained *ex parte*. Defendant No.16, who is the wife of 2nd brother of the plaintiff Mukhalingam and who was appointed as Guardian of the minor defendants 13 and 15 also remained *ex parte*, and died subsequently.

10. Defendant No.19, who filed suit against Satyanarayana in O.S.No.169/1978 on the file of the District Munsif, Rajam and obtained a decree in respect of the schedule property, resisted the suit and filed written statement raising the following contentions;

11. It is not correct to say that late Jagannadham, the father of the plaintiff, acquired all the properties and gave separate assets to his three sons. It is contended that Satyanarayana, elder brother of the plaintiff, has been in peaceful possession and enjoyment of the schedule property for more than 15 years before the death of parents of the plaintiff and the same is known to the plaintiff and her sisters. The plaint schedule property is the joint family property of Jagannadham and his sons. The plaint schedule property fell to the share of Satyanarayana in the partition with his father and brothers long ago. Satyanarayana was a top cloth merchant in Rajam and he was never under his influence and he was under the influence of Defendants 20 to 22 as they are his close friends. He lent substantial amounts to Satyanarayana for his legal necessity and for development of his business. When Satyanarayana failed to repay the loan amount, he filed suit in O.S.No.169/1978 on the file of the District Munsif, Rajam against Satyanarayana and obtained a decree. It is stated that several creditors filed series of suits against Satyanarayana and got attached the plaint schedule property. At that stage, it is stated that in order to defeat the claim of this defendant and other creditors, Defendants Nos.20 to 22, who are close friends of Satyanarayana, might have obtained sham and

fraudulent deeds. It is contended that after obtaining decree in O.S.No.169/1978, this defendant filed E.P.No.5/1987 seeking sale of the schedule property to recover the EP amount and in the Court auction Defendant No.23 purchased the schedule property. Aggrieved by the same, Defendants Nos.20 to 22 filed E.A.No.89 of 1988 under Order XXI Rule 90 CPC. That was dismissed and they filed CMA.No.1/1990 which was later dismissed as withdrawn and thereafter Defendants 20 to 22 filed O.S.No.36/1990 on the file of the Subordinate Judge, Rajam. The plaintiff is well aware of the fact that Satyanarayana is the absolute owner of the pliant scheduled property and hence she did not make any claim till 1991. Therefore, it is contended that the plaintiff and her sisters are not entitled to claim any right over the schedule property. It is contended that only to deprive the right of this defendant, the plaintiff, in collusion with some third parties, filed the present suit.

12. Defendant No.21 also resisted the suit and filed written statement raising the following contentions and the same was adopted by Defendants Nos.20 and 22.

13. It is contended that the plaint schedule property fell to the share of Satyanarayana in the partition with his father and brothers. It is not correct to say that brothers of the plaintiff used to give usufruct on the plaint schedule mango tope to the plaintiff and her sisters. This defendant pleaded ignorance about the filing of O.S.No.169/1978 as well as filing of E.P.No.5/1987 by the 19th defendant. This defendant pleaded that there is collusive attachment and sale of schedule property behind his back. He pleaded that himself and defendants 20 and 22 are non-residents of Rajam and as such they are not aware of the proclamation and attachment proceedings in respect of the schedule property. It is contended that himself and defendants 20 and 22 have already took the physical possession of the schedule property under sale agreement followed by a registered sale deed in their favour. It is contended that immediately after they came to know about the sale proceedings in favour of 23rd defendant, defendants 20 to 22 filed

E.A.No.89/1988 under Order 21 Rule 90 CPC, but the same was dismissed. Aggrieved by the same, this defendant and defendants 20 and 22 filed CMA.1/1990 and the same is pending. (Later this CMA was dismissed as withdrawn and Defendants 20 to 22 filed O.S.No.36 of 1990 which was also dismissed and is the subject matter in A.S.No.938 of 1995 before this Court).

14. It is further contended by the 21st defendant that it is false to say that plaintiff and her sisters and wife of late Jagannadham would be the lawful successors to the plaint schedule property. It is contended that the plaintiff and her sisters had no right in the schedule property and they had even no right to question the alienations made by Satyanarayana. It is contended that during his lifetime, Jagannadham settled the claim of his daughters and wife. As the suit schedule property fell to the share of Satyanarayana, himself along with his minor sons sold the said property for the purpose of joint family necessities in favour of Defendants 20 to 22 for a consideration of Rs.27,300/-. Satyanarayana executed a sale agreement on his behalf and on behalf of minor sons in favour of Defendants 20 to 22 in respect of the schedule property on 22.11.1978 (Ex.B.10) and received Rs.2,300/- towards advance. Defendants 20 to 22 agreed to clear off the Vysya Bank loan of Rs.8,000/- which is due by Satyanarayana. Subsequently, Defendants 20 to 22 obtained a registered sale deed on 27.12.1978, which is known to all family members. It is further contended that Defendants 20 to 22 filed a suit in O.S.No.36/1990 on the file of the Subordinate Judge, Rajam seeking declaration of their title over the schedule property and for consequential injunction.

15. Defendant No.23, who purchased the schedule property in the Court auction, resisted the suit and filed written statement with the following contentions:

16. It is not correct to say that late Jagannadham acquired all the properties and gave separate assets to his sons and that Jagannadham and his wife were enjoying the plaint schedule property till 1979. It is contended that Satyanarayana, brother of the plaintiff, was in actual

physical possession of the schedule property in his own right for more than 12 years before death of his parents to the knowledge of the plaintiff and her sisters. The father and the sons formed a joint Hindu family and did business in cloth, which is their ancestral occupation.

Satyanarayana got the schedule mango tope in the partition with the father and his brothers. Satyanarayana never addicted to any vices. He was a prosperous cloth merchant and also worked as Upa-Sarpanch of Rajam Gram Panchayat. He never kept any concubine. It is contended that Satyanarayana was under the influence of Defendants 20 to 22 who are his close friends. Several creditors attached the plaint schedule property in 1978 by filing urgent suits. It was at that time Defendants 20 to 22 obtained sale deed to defeat the rights of the creditors to attach the property. Ultimately, after the attachment subsisted for 10 years, the plaint schedule property was sold in open court auction in E.P.No.5/1987 on 20.06.1988 and Defendant No.23 became the highest bidder for a sum of Rs.3,25,000/-. It was at that stage Defendants 20 to 22 raised objections to the sale by filing E.A.No.1/90 and O.S.No.36/1990. The suit is barred by time as plaintiff and her sisters never had any possession of the plaint schedule property. It is contended that the attachment proceedings in the year 1978 and the subsequent execution proceedings clearly bar the right of the plaintiff and her sisters to make any claim to the plaint schedule property. It is contended that the plaintiff having been aware that her brother Satyanarayana is the owner of the schedule property, did not make any claim till 1991. The plaintiff and her sisters cannot plead ignorance of the Court proceedings. It is contended that Defendant No.23 and others have participated in the Court auction on the belief that Satyanarayana, the Judgment Debtor in E.P.No.5/1987 in O.S.No.169/1978 is the absolute owner and having saleable interest in the plaint schedule property. It is further contended that Defendant No.23 is the *bona fide* purchaser in the Court auction and only to deprive his rights, the plaintiff filed the suit with all false claims.

17. Defendant No.24 – Vysya Bank though made appearance,

reported that it had no written statement to be filed in the suit.

18. Defendant No.25- Andhra Bank filed a memo adopting the written statement filed by Defendant No.21.

19. The trial Court framed the following issues arising out the of pleadings of the parties;

- 1) Whether the decree in O.S.No.169/78 and the subsequent proceedings in E.P.5/87 on the file of the District Munsif Court, Rajam are collusive and fraudulent?
- 2) Whether the sale deed dt.27.12.1978 is sham and nominal?
- 3) Whether the suit claim is barred by time?
- 4) Whether the plaintiff is entitled for the partition and separate possession as prayed for and if so, to what share?
- 5) To what relief?

20. During course of trial, on behalf of plaintiff, PWs 1 to 5 were examined and Exs.A1 to A22 were marked. On behalf of defendants, DWs 1 to 4 were examined and Exs.B1 to B20 were marked.

21. The trial Court after consideration of the oral and documentary evidence adduced on either side, dismissed the suit on 31.07.1995, holding that the sale deed dated 27.12.1978 executed by late Satyanarayana in favour of Defendants 20 to 22 is a sham, nominal and collusive transaction and it will not bind the rights of defendants Nos.19 and 23, that the claim of the plaintiff is barred by time, and that the plaintiff failed to establish her case that late Jagannadham reserved the plaint schedule tope to be enjoyed by him and his wife for their lifetime with vested remainder to devolve upon the plaintiff and her sisters and hence the plaintiff is not entitled for partition and separate possession of any portion of the suit schedule tope.

22. Aggrieved by the said judgment, the present appeal is filed by the unsuccessful plaintiff, contending that the learned trial Court failed to understand the respective contentions of the parties and evidence adduced on their side; that it erred in holding that the plaintiff is

not entitled to any share in the schedule property; that the learned trial Court failed to consider that Satyanarayana has no alienable right over the suit schedule property as the same is self-acquisition of late Jagannadham and after his demise, it is vested on the plaintiff and her other sisters; that the learned trial Court failed to see that the judgment and decree in O.S.No.169/1978 do not bind the plaintiff as the suit is a collusive suit; that the learned trial Court also failed to see that Ex.B11 sale deed is a sham and nominal transaction and it do not bind the plaintiff; and that the learned trial court erred in holding that the suit is speculative on the ground that the other sisters did not join the plaintiff and contending thus, prayed this Court to allow the appeal as well as suit.

23. The original parties to the suit i.e. plaintiff and her sisters and her brothers are no more. The legal representatives of the plaintiff filed the present appeal.

24. Heard the learned counsel appearing for the appellants as well as the respondents.

25. The points that arise for consideration in this appeal are:-

- (i) Whether the plaintiff proved her entitlement to relief of partition in the suit schedule property; and
- (ii) Whether on the facts and in the circumstances of the case, the trial Court is justified in dismissing the suit of the plaintiff for partition, and whether there are any grounds to set aside the decree and judgment of the trial Court?

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Points:-

26. The sole plaintiff who is the appellant, being aged about 67 years (in 1990), filed the suit for partition with three alternative, rather inconsistent claims. Firstly, she is claiming for 1/5th share in the suit schedule property along with her other four sisters who were shown as Defendants Nos.1 to 4 in the suit; secondly, alternatively, she is claiming for 1/8th share in the plaint schedule property, if the Court holds that the sons of Donthamsetti Jagannadham (her father) are also entitled to a share; and thirdly, she is claiming alternatively a 1/20th share, if it is held

to be joint family property of her father Jagannadham and his sons. The suit schedule property consists of an extent of Ac.9.71 cents of dry land in Sy.No.54/1, Patta No.730 of Penugutivalasa village of Santhakaviti Mandal, Srikakulam District, and is commonly known as "Mango Tope". The suit schedule land is situated on Palakonda-Rajam road, near Doolapeta village.

27. Admittedly, the suit land belongs to one Donthamsetti Jagannadham having purchased it in 1964. He had three sons, viz., (1) Satyanarayana (Satyam), (2) Mukhalingam; and (3) Apparao (Defendant No.5). Satyanarayana and Mukhalingam died in April, 1982 and February, 1981 respectively, and their wives are arrayed as Defendants Nos.16 and 17. Apparao was alive during the pendency of the suit. The legal representatives of Defendants Nos.16 and 17 figured as Defendants Nos.6 to 15 and 18. Out of them, the 12th defendant also died and her legal representative is on record. Subsequently, Apparao also died during the pendency of this appeal and his legal representatives are on record as Respondents Nos.32 to 36. The appellant/plaintiff, after giving her evidence as PW 1, died, and her legal representatives have come on record as Plaintiffs 2 to 10. The plaintiff had four other sisters, who are shown as Defendants Nos.1 to 4. Defendants Nos.2 and 4 also died and their legal representatives are on record as Respondents Nos.26 to 30 and 37 to 52.

28. On 26.12.1990 the plaintiff filed the suit *in forma pauperis* and was registered as OP.No.7/91 on the file of the Subordinate Judge, Rajam. After due enquiry, the same was converted into O.S.No.28/1993. The suit was originally filed against Defendants Nos.1 to 25, out of them, Defendants Nos.24 and 25 are the Vysya Bank and Andhra Bank, Rajam Branches, they were impleaded as they gave certain loans to Donthamsetti Satyanarayana by mortgaging the suit schedule mango tope. As against the entire battery of the legal heirs of the deceased Jagannadham, those who are out of the family are Defendants Nos.19 to 23. Defendant No.19 is the person who filed

O.S.No.169/1978 and obtained a decree against Satyanarayana. He also obtained an attachment before judgment pending suit under Order XXXVIII, Rule 5 CPC. Subsequently, the suit was decreed and execution proceedings were taken out and on 20.06.1988 the suit schedule property was sold in Court auction for a consideration of Rs.3,25,000/- and it is Defendant No.23-Potta Seetharama Gupta, who is the auction purchaser. The possession of the mango tope was also delivered to the auction purchaser.

29. Defendants 20 to 22 are the persons who claim to have purchased suit schedule mango tope from Donthamsetti Satyanarayana under Ex.B11 registered sale deed dated 27.12.1978 and this was, according to the defendants Nos.20 to 22, in pursuance of Ex.B10 agreement of sale dated 22.11.1978. Defendants Nos.20 to 22 have originally filed a claim petition in E.A.No.89/1988 in E.P.No.5/1987 in O.S.No.169/1978 and the same was dismissed, and thereafter, they preferred CMA.No.1/1990 and the same was withdrawn and later they filed O.S.No.36/1990 on the file of the Subordinate Judge, Rajam for declaration of their title over the suit schedule property and for delivery of possession of the same. The suit filed by Defendants Nos.20 to 22 in O.S.No.36/1990 was dismissed, aggrieved thereby, Defendants Nos.20 to 22 filed A.S.No.938/1995, which is being disposed of by this Court on even date, upholding the judgment and decree of the trial Court, whereby, the claim of defendants Nos.20 to 22 that they are *bona fide* purchasers of the suit mango tope on 27.12.1978 under Ex.B11 has been disbelieved and the agreement of sale under Ex.B10 dated 22.11.1978 has been held to be a document brought into existence with ante-date to defeat the rights of the auction purchaser and further holding that any sale of the property subsequent to the attachment by the Court is not valid. It may be recalled that the trial Court has ordered attachment of suit schedule mango tope before judgment in O.S.No.169/1978 on 05.12.1978 under Ex.B2 prior to execution of Ex.B11 registered sale deed in favour of Defendants Nos.20 to 22. In that view of the matter, Ex.B.10 agreement of sale was brought into

existence by putting the date “22.11.1978”. That controversy need not however be gone into in the present appeal, since the matter is covered in A.S.No.938/1995.

30. Defendants Nos.20 to 22, who are the appellants in A.S.No.938/1995 sought for an injunction by filing CMP No.11158/1995 in A.S.No.938/1995. When the learned Single Judge of this Court refused to grant injunction pending disposal of the appeal, the appellants therein preferred LPA No.155/1995 and a Division Bench of this Court, by judgment dated 21.11.1995, refused to grant injunction in favour of the appellants therein (Defendants Nos.20 to 22), but directed the auction purchaser (Defendant No.23) to deposit a sum of Rs.25,000/- every year to the credit of the suit by way of security.

31. Parallel to the above legal proceedings by the purchasers, the appellant/plaintiff herein, being the eldest daughter of Donthamsetti Satyanarayana has filed the suit for partition *in forma pauperis*. As already stated, she was aged about 67 years in 1990 when the suit was filed and she admitted that one of her sons who is Sarpanch of the village has been guiding and looking after the present litigation. The contention of the contesting respondents is that it is purely a speculative and vexatious litigation commenced by the appellant/plaintiff claiming herself to be a pauper at the behest of the legal heirs of Donthamsetti Jagannadham who all remained *ex parte* with a sole object of defeating the rights of Defendant No.23, the auction purchaser of the suit schedule property, who had been enjoying the same, having purchased in the court auction, held on 20.06.1988 for a consideration of Rs.3,25,000/-.

32. At the outset, the contention of the contesting defendants is that quite inconsistent pleas were taken by the plaintiff which would go to show that she herself is not sure as to what her case is. As already stated, the plaintiff is firstly claiming 1/5th share on the ground that the suit schedule tope was devolved on herself and her four sisters, after the death of her father Jagannadham, or, in the alternative, she pleads for 1/8th share, if it is to be held that sons of Jagannadham are also entitled

to a share; and thirdly, she claims for 1/20th share, if it is held to be a joint family property of Jagannadham and his children. The person approaching the court with a prayer for partition is required and supposed to know as to what her claim is and she cannot take such inconsistent pleas which would go to show that she herself does not know as to what her claim is.

33. However, when the plaintiff is examined as PW.1, she admits that her father and brothers did business JOINTLY for 15 years. Same assertion is made by PW.2. PW.3 deposed that the properties were acquired by Jagannadham and his sons JOINTLY with the father Jagannatham as Manager of JOINT FAMILY and they are joint.

34. The circumstances which give weight to the contention of the defendants are that the entire family of Jagannadham is pitched against Defendant No.23, the auction purchaser and Defendant No.19, the decree holder in O.S.No.169/1978. None of the defendants who are all the family members of Jagannadham, shown as Defendants Nos.1 to 18, have contested the suit. All of them remained *ex parte* and more significantly, the 5th defendant-Apparao, one of the surviving brothers of the plaintiff, not contested the suit and neither supported the claim of the plaintiff nor denied the same. The plaintiff/PW.1 admits that Defendant No.5-Appa Rao is not only her own brother but her daughter is also married to Appa Rao. He did not even enter into the witness box, even though he was very much alive during the trial of the suit. The four other sisters who were shown as Defendants Nos.1 to 4 have also remained *ex parte* thereby neither admitting the claim of the plaintiff nor denying the same, even though two of them were alive and they also did not enter into the witness box. The suit was only contested by Defendant No.19, the decree holder in O.S.No.169/1978, Defendants Nos.20 to 22, who are alleged to have purchased the schedule property under Ex.B11, and Defendant No.23, who is the auction purchaser of the suit tope in the court auction held by the Court below on 20.06.1988 in E.P.No.5/1987 in O.S.No.169/1978.

35. The other aspect of the matter is about the averments in the

plaint. However, before going into that aspect, a brief history of the family, which is not refuted by any of the family members may briefly be noticed. Donthamsetti Jagannadham was a weaver by profession and belongs to Devangula community and he is native of Kagam, and he was a petty hawker and he used to weave the clothes and sell the same by moving around the villages on a bicycle. He had two brothers, by name, Veeraiah and Suryanarayana. Unable to make both ends meet, Jagannadham and Suryanarayana migrated to Rajam and continued their business. Luck favoured them and within no time, they became leading clothiers in Rajam. Within 2 or 3 years after migrating to Rajam, both brothers separated. Jagannadham had three sons and five daughters. He along with his sons, after having grown up, did family business in cloths and acquired several properties, and Jagannadham was also participating actively in village politics and was known to be a man of reputable character. He was respected by all the community people of Weavers. He also worked as Vice-President of the village and also worked as Head of the Cooperative Society of the Weavers. As was the father, the sons also grown up and they are also said to be very intelligent, hard workers and men of repute.

36. The eldest son Satyanarayana set up independent business and the family has already acquired different types of properties, such as the Mango tope, which is suit schedule property, residential houses, residential plots, shops and also a share in the Theatre, which is known as "Mallikharjuna Theatre". Even according to P.Ws.1, 2 and 3, all the properties were joint family properties acquired out of joint business carried on by the father and sons. The family was prosperous and all five daughters of Jagannadham were married, so also three sons. In and around 1967 Jagannadham suffered from Asthma and blood vomiting. At that time, Jagannadham is said to have called the respectable people and elders, namely, PWs 2, 3, 4 and the father of PW 4 and in their presence, he orally divided all his properties. He gave substantial properties to all his three sons which comprise of shop, stock-in-trade, rights in the cinema theatre and other properties. There

were other lands in Billani village and that was not part of the family distribution. The plaintiff and her witnesses (P.Ws.1 to 4) gave broad details of distribution which is equal amongst the three sons but they also deposed that Satyam was given larger share since he had ten children. If the suit mango tope is excluded from the share of Satyam, it cannot be said that Satyam was given larger share. While substantial part of division that took place in the year 1967 is admitted, the contentious aspect is only with regard to the suit mango tope. According to the plaintiff, after having given all his properties to his sons, Jagannadham and his wife Narayanamma retained the suit schedule mango tope for themselves for their lifetime and it was also orally declared by Jagannadham in the presence of the elders and the sons that the suit mango tope will be with him till his death, and thereafter, it shall devolve on his five daughters. While this is the contention of the plaintiff, the contesting defendants, though not members of the family, submitted that in the said partition, the suit mango tope also fell to the share of Satyanarayana and it is Satyanarayana, who has been enjoying the mango tope even till the lifetime of Jagannadham and thereafter. Jagannadham admittedly died in 1971 whereas his wife died in 1979. It is also not disputed that till his death in 1982 it was Satyanarayana who was enjoying the mango tope. According to the plaintiff, he was giving certain amounts to his sisters out of the profits, but absolutely no evidence in that aspect is produced. It is also on record and documents produced which show that the suit Tope was mortgaged by Satyam with Bank and he took loan in his individual capacity and the suit Tope was also attached by the Court of District Munsif, Rajampet, in as many as six suits filed by creditors of Satyam. After the death of Satyanarayana, since the other brother Mukhalingam pre-deceased Satyanarayana, the only surviving brother Apparao was managing the suit schedule mango tope. According to the plaintiff, the cause of action for filing the present suit arose when the said Apparao refused to give share in the profits in the suit mango tope to the sisters on the ground that he is in financial difficulties.

37. Smt.Bhaskara Lakshmi, learned senior Counsel appearing for the appellant/plaintiff relied upon several authorities, which lay down the well settled and undisputed proposition of law, in support of her contentions. They are as under:-

In ***P.S.Sairam v. P.S.Ramarao Pissey***^[1] the Supreme Court held as under:

“So far as immovable property is concerned, in case the same stands in the name of individual member, there would be a presumption that the same belongs to joint family, provided it is proved that the joint family had sufficient nucleus at the time of its acquisition, but no such presumption can be applied to business.”

In ***G.Narayana Raju (dead) by his legal representatives v. G.Chamaraju and others***^[2], a Three Judge-Bench of the Supreme Court held as under:-

“It is well settled that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate.

It is a well-established doctrine of Hindu Law that property which was originally self-acquired may become joint family if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims up to it. But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred from acts which may have been done from

kindness or affection. The important point to keep in mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. Such intention can be discovered only from his words or from his acts and conduct.”

In ***B.Nadamuni Chetty v. P.Krishna Reddy***^[3], a learned single Judge of this Court held as under:-

“There is admittedly clear absence of any ancestral property or nucleus as admitted by PW.1 himself. The first defendant has started earning as a coolie initially and then worked on the Soda machine by taking it on lease from PW.3 and later started his own business and earned monies out of the same. The contention of the plaintiff, therefore, that there was any joint family is itself not established apart from the fact that there is no evidence to establish existence of any joint family or any property acquired through the funds of joint family. Both the Courts below have failed to take into consideration these basic principles relating to joint family and the joint family property and on an assumption have proceeded as if all the plaint schedule properties are joint family properties. In reaching the aforesaid conclusion, both, the Courts below have also ignored the legal position settled by the Privy Council and as approved by the Hon'ble Supreme Court as early as in 1954 in *SRINIVAS KRISHNARAOKANGO v. NARAYAN DEVJI KANGO* (AIR 1954 SC 379).

The legal position as settled by the decisions has not been taken into consideration by both the Courts below. Undoubtedly, the burden of proof was entirely on the plaintiff so far as issue No.1 is concerned.”

38. Mrs.Sridevi, learned Counsel appearing for Respondents Nos.1 and 3/Defendants 1 and 3 and some of the legal representatives, has relied upon the following authorities in support of her contentions.

In ***Income Tax Officer v. Tippala Yerrayamma***^[4], a learned single Judge of High Court at paragraph Nos.16 and 17 held as under:-

“In *SIDRAMAPPA v. BABAJAPPA (AIR 1962 Mysore 38)* where the father carried on family kulachar of dyeing without any aid of ancestral nucleus and though son assisted him in the business, it was held that the said dyeing business cannot be called family trade and subsequent starting of clothes business is not an extension of the trade.

In *P.MURUGAVVA v. S.SOMASUNDARAM (AIR 1957 Madras 100)* it was held that there is no presumption that a business carried on by a member of a joint family is the joint family business or is there is any presumption that a business carried on by such a member in partnership with a stranger is a joint family business and there is no presumption that a business started by even the manager is a joint family business but if the joint family funds had been utilized in opening a new branch, then the new branch will be regarded as part of the old business.”

In ***R.Deivanai Ammal v. G.Meenakshi Ammal***^[5], a Division Bench in para 15 observed as under:-

“It is a well-established principle of law that where a party claims that any particular item of property is joint family property, the burden of proving that it is so rests on the party asserting it. Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifted to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus should be such that with its help the property claimed to be joint could have been acquired. A family house in the occupation of the members and yielding no income could not be nucleus out of which acquisitions could be made

even though it might be of considerable value.”

In ***Mudigowda Gowdappa Sankh and Others v. Ramchandra***

Revgowda Sankh (died) by his L.Rs. and another^[6], a three Judge Bench of the Supreme Court laid down as under:-

“There is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.”

In ***Jamunabai v. Sharadabai***^[7], a learned single Judge of this Court held as under:-

“Hindu law on the aspect of the nature of the property in the name of a member of the joint family, is well settled. There is no presumption that the property held by any member of joint family is joint. The initial burden rests upon the person who seeks to assert that the property is joint. If it is established that the family possesses adequate joint family property which might have formed the nucleus to acquire the property, then the burden shifts to the person alleging that the property is self-acquired, to establish affirmatively that the property was acquired without the aid of the joint family property.”

39. According to the contesting defendants, Satyanarayana, who was a man of high reputation in the town and among the community members and a leading clothier, addicted to bad vices and he contacted several debts from several people, including 19th defendant and others.

In or around 1978 as many as six money suits were filed by different persons against Satyanarayana for recovery of money and in all the suits, the suit mango tope which was being enjoyed and possessed by Satyanarayana was attached before judgment. Neither the sisters nor the two other brothers of Satyanarayana made any protest while the attachments were effected on the suit mango tope in pursuance to the suits filed by third parties against Satyanarayana for the debts said to have been contacted by Satyanarayana. According to the 19th defendant, who was one of the decree holders against Satyanarayana, Satyanarayana borrowed the money for business needs, whereas according to the plaintiff, Satyanarayana having become prosperous and a man of dominating authority not only in the family but also in the community, developed certain bad vices, such as gambling, drinking and womanizing and she even alleged that Satyanarayana had mistress who was living with him and subsequently shifted to Vizianagaram.

40. It is also an admitted fact that the relation between the plaintiff and her four sisters vis-à-vis Satyanarayana and two brothers was cordial and they were always on visiting terms. All the sisters were living in neighbouring villages and one of the sister even migrated to Rajam. Even though Satyanarayana was enjoying the suit mango tope and not only that he has mortgaged the mango tope with the banks and obtained loans and also borrowed huge amounts from other people and those lenders have filed as many as six suits and obtained attachment of suit mango tope, none of her sisters and her two brothers have moved a little finger till 1990 when the present suit came to be filed on 26.12.1990. In the meantime, the suit mango tope was attached and after execution proceedings went on for nearly 10 years since the J.Dr. – Satyam was keenly contesting the attachment proceedings, the same was sold in court auction on 20.06.1988, in which Defendant No.23 was the highest bidder for Rs.3,25,000/-. Even though this was happened in 1988, the suit was filed only two years thereafter. In that view of the matter, there is sufficient force in the submission of the contesting defendants that if really the mango tope was not allotted to the share of

Satyanarayana, neither her two brothers nor her four sisters would have kept quiet all along while their brother Satyanarayana was creating number of charges and encumbrances on the suit mango tope, and their feigning ignorance about all this is difficult to be believed.

41. It may also be noted that even though Defendants Nos.20 to 22 who are alleged to have purchased the suit property, filed claim petition in E.A.No.89/1988 in E.P.No.5/1987 in O.S.No.169/1978, and being unsuccessful, went in CMA No.1/90 and subsequently they withdrew the same, and though these proceedings were pending from the year 1978, neither of the two brothers nor her four sisters have tried to come on record and contend that Satyanarayana had no right over the suit mango tope which was attached and subjected to sale in pursuance to the alleged debts said to have been contacted by Satyanarayana. The contention of the plaintiff that herself and her sisters are not aware of those proceedings even though Satyanarayana was keenly contesting the application filed by Defendant No.19 cannot be believed. Only after the purchasers i.e. Defendants Nos.20 to 22 filed a suit in respect of the mango tope, it is the plaintiff alone, unsupported by any of her brothers and sisters, filed the present suit for partition, claiming that not only herself, her four sisters or in the alternative, all the three brothers along with four sisters are entitled to share in the suit mango tope, which was retained by her father Jagannadham who died intestate.

42. The ignorance pleaded by the plaintiff about the attachment proceedings by any of her sisters and brothers to some extent can be believed, if the relationship in between the brothers and sisters is not so cordial or is in any way unpleasant. The plaintiff who examined herself as PW 1 admitted that she was married and was living in the village Boddam, which was just about 3 miles away from Rajam. It is also on record that she was married when she was aged about 16 years, more than 50 years prior to filing of the suit. It is also on record that even though Jagannadham died in 1971, his wife was alive till 1979 and even during that 8 years period, it is Satyanarayana who was enjoying the suit schedule mango tope and neither wife nor other sons and daughters of

Jagannadham have set up any claim in so far as the suit mango tope is concerned.

43. It is also to be noted that Jagannadham and his sons and also his five daughters were all worldly-wise people and not only that the male persons were doing independent businesses of different types such as Rice Mill, Cinema Theatre, Cloth shops, agriculture etc., and were also dominating in the community and village politics. Jagannadham has vast extensive properties and it is difficult to believe that such a person would have orally declared before the elders that the suit mango tope shall devolve on his five daughters after death of himself and his wife. He was alive for more than three years after such oral declaration. The plaintiff as PW 1 admitted that she came to know about such declaration and division of family properties within less than one month after it was effected in 1967. None of them made any request or demanded Jagannadham to reduce his oral will into writing so as to avoid any litigation. It is admitted by the plaintiff as PW 1 that Jagannadham wanted to distribute his properties to his sons, since their families were growing and they have been doing independent businesses. It is also admitted that comparatively large properties were given to Satyanarayana since he had as many as 10 children who are subsequently impleaded as defendants in the suit.

44. As already stated, it is a peculiar case where none of the family members of Jagannadham are either supporting the plaintiff or denying her contention. They all remain mute spectators. The contesting parties, viz., Defendants Nos.19 to 23 are admittedly strangers in so far as the family affairs of Jagannadham are concerned. Defendant No.19 is the decree holder in O.S.No.169/1978 who filed the execution petition and got the suit property sold in the court auction, whereas Defendants Nos.20 to 22 are the persons who claim to have purchased the suit mango tope from Satyanarayana under Ex.B11 registered sale deed dated 27.12.1978, and whereas Defendant No.23 is the person who purchased the suit mango tope in court auction on 20.06.1988 for a consideration of Rs.3,25,000/-. Naturally, we cannot

expect effective contest from these defendants in so far as the internal affairs of the family of Jagannadham and his children are concerned. At best, they can only speak about the conduct of the children of Jagannadham which made them believe that the suit mango tope is a property which fell to the share of Satyanarayana, since none of the brothers and sisters were protesting even though Satyanarayana was dealing with the suit mango tope as if he is the sole and exclusive owner thereof.

45. It is pertinent to note that admittedly, Apparao, who is Defendant No.5, who is not only the own brother but also the son-in-law of the plaintiff/PW.1, is the attesting witness of Ex.B11 registered sale deed, registered in favour of Defendants Nos.20 to 22 on 27.12.1978. If the suit schedule tope is not exclusive property of Satyanarayana and that their father had orally declared that the suit mango tope be devolved on his five daughters, Apparao would not have acted as attesting witness to Ex.B11 registered sale deed in favour of Defendants Nos.20 to 22. This solitary instance is sufficient for believing that it is Satyanarayana who has got the suit mango tope in the family distribution exclusively in the year 1967, as claimed by the contesting defendants.

46. In *Parimal v. Veena @ Bharti*^[8], the Supreme Court in para 15 held as under:-

“The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a Judgment in his favour. Section 103 provides that burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in

issue.”

47. In ***Sebastiao Luis Fernandes (dead) through L.Rs., v. K.V.P.Shastri (dead) through L.Rs.***^[9], the Supreme Court held in para 25 as under:-

“In the matter of onus of proof and burden of proof as per Sections 101 and 102 of the Evidence Act, we have to hold that it was upon the plaintiff-appellants to furnish proof regarding ownership of 1/3rd share of the suit schedule property and discharge their burden of proof as per the afore-mentioned sections.”

48. Adverting to the claim of the plaintiff, what is to be seen is as to whether the plaintiff who is claiming a share in the suit schedule property has succeeded in proving her contentions that the suit mango tope was left undivided in the family partition which admittedly took place in the year 1967. It is not as though the plaintiff is seeking partition of all properties earned by Jagannadham. As a matter of fact, PW 1 admitted that she has got nothing to do whatsoever with other vast extensive properties which Jagannadham gave it to his three sons. So also she does not have any claim in so far as the lands in Billani village are concerned. The burden heavily lies on the plaintiff to prove that in the family distribution, which took place in 1967, Jagannadham has distributed all his properties among three sons except the suit schedule mango tope which he declared that it should devolve upon his wife and 5 daughters after his demise.

49. The plaint is basis for the claim and the evidence should revolve round the pleadings of the plaint which though brief is supposed to precisely contain the specifics. Only on such pleadings, a plaintiff can build up the case and as it is well known, any amount of evidence, either oral or documentary, without there being a foundational pleading, cannot be accepted. The evidence adduced by a plaintiff should be in proof of the averments of the plaint.

50. It may be apposite to refer to the relevant portions of the plaint, which shows the nature of the claim of the plaintiff.

“3(b) Jagannadham had three sons, Satyanarayana, Mukhalingam and Apparao and 5 daughters of whom petitioner is one. The sons grew up under him and became fathers. As the family was growing late Jagannadham wanted to provide for the separate livelihood and residence of the sons. Though the sons had absolutely no rights against their father in respect of the properties which are the absolute self-acquisitions of Jagannadham, he wanted to give them something in discharge of his responsibility as a father and respectable citizen for the existence of his sons. He gave them separate assets and made everything for their independent existence. Donthamsetti Satyanarayana started cloth business under the name of ‘Mallikarjuna Silk Palace’ in the busy Madhava Bazaar Road of Rajam. Donthamsetti Jagannadham and his three sons lived separately as divided members since 1967.

3(c). Jagannadham and his wife who are enjoying the plaint schedule land, Jagannadham died on 2.1.71. The mother of the petitioner died in the year 1979. The plaint schedule land vested absolutely in the petitioner and her sisters under the Hindu Succession Act after the death of the parents.

3(g)The three sons of Jagannadham became divided long before his death and the daughters of Jagannadham alone along with wife of Jagannadham alone could be the lawful successors to the petition schedule property of Jagannadham. The petition schedule property was never and could never have been the joint family property of Jagannadham and his sons. All the respondents herein who are well aware of the affairs of Jagannadham and his sons are estopped to question the absolute rights of the petitioner and her sisters to the petition schedule land to the exclusion of the sons of Jagannadham.

3(h)The petitioner and her sisters will at least be co-sharers and co-heirs even if the petition schedule property is held to be the joint family property of Jagannadham and his sons or even if it is held that the sons of Jagannadham will also be successors to the petition schedule property along with the daughters of Jagannadham. The petitioner and her sisters lawfully continued to be in joint legal possession of the petition

schedule property as they did not joint in any transaction.

(3(k)The petitioner and her sisters do not have any further divisible properties with her brother or the children of the deceased brothers. The petitioner submits that whatever claims that the petitioner or her sisters have against their brothers in regard to the estate of late Jagannadham (except the schedule property) or his wife are fully satisfied and adjusted. As such, the petitioner and her sisters have no further claims except the petition schedule property which as submitted is solely vested in the petitioner and her sisters.”

51. The plaintiff is intending to prove her case with such inconsistent and ambiguous averments made in the plaint. The learned counsel for the contesting defendants rightly submit that a bare reading of the plaint shows that the plaintiff herself is not clear in her own pleadings as to what is the nature of property.

52. The learned counsel for the appellant relied upon a decision of this Court in ***T.Bheem Reddy v. Smt.P.Laxmi Bai***^[10], wherein it was held as under:-

“Learned counsel for the defendants argued that the plaintiff has taken inconsistent pleas, at the first instance she has averred that the plaint schedule properties are the joint family properties at four places in the plaint, but subsequently she got amended the plaint and claimed that the suit A schedule property is Stridhana property of her mother. Relying on the judgment in case between *Baldev Singh v. Manohar Singh (2006 (5) ALT 52 (SC)*, it is submitted that the defendants may take inconsistent pleas, but the plaintiff is not permitted to take inconsistent pleas. It is true that in the said decision it is held that the plaintiff cannot take inconsistent pleas, but whereas the defendants may take inconsistent pleas. We should not forget that we are dealing with a partition suit. Each party whether plaintiff or defendant claims a share in the suit properties and has to be treated as a plaintiff. It is true that the plaintiff claimed 1/8th share at one time and subsequently claimed 1/3rd share. However, the same may not amount to taking totally inconsistent pleas. Of

course, it is clear that at the initial stage the plaintiff did not claim that suit properties are stridhana properties of her mother late Kishtamma and plaintiff claimed 1/8th share in the plaint A schedule property and averred that her brothers and sisters have got equal share in the plaint A schedule property. It is also a fact that after the 8th defendant filed her written statement, the plaintiff got amended the plaint and claimed that the property is Stridhana property of her mother. Merely because subsequently she had averred that it is her mother's Stridhana property and thereby claimed a larger share, it cannot be said that she had taken totally inconsistent and irreconcilable pleas. Unless the pleas are irreconcilable and totally inconsistent, the above referred decision appears to be not applicable to the present case."

53. The above authority is not helpful to the appellant/plaintiff because in the cited decision, subsequently amended stand was taken in view of coming to know about that aspect from the pleading of one of the defendants. That is not the case herein. By the date of filing plaint itself, the plaintiff took inconsistent stand with regard to the nature of the suit property.

54. Sri K.S.Gopala Krishnan, learned Counsel appearing for respondent No.23/auction purchaser relied upon the following authorities:-

In ***Ladly Prasad v. Karnal Distillery Co.***^[11] it is laid down that the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their case. A vague or general plea cannot serve the purpose; the party pleading must therefore be required to plead the precise nature of fraud, the manner of use and the unfair advantage obtained. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise.

In **A.C. Ananthswamy v. Boraiah**^[12], the Supreme Court observed as under:-

“Fraud is to be pleaded and proved. To prove fraud it must be proved that the representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The degree of proof required in such cases is extremely high”.

In **Sadashiv Prasad Singh v. Harendar Singh and Others**^[13] the Supreme Court held as under:-

“5. ... The above facts do weigh with the Court in not interfering with the sale or the proceeding where it has been reached. The petitioner has no satisfactory explanation for not approaching the Court well within time challenging such a decision or the subsequent proceedings or orders of the Recovery Officer at an appropriate time. The conduct of the petitioner by itself has precluded and prevented this Court from passing any order in his favour at this belated stage.

In any event, ordinarily, a *bona fide* purchaser for value in an auction-sale is treated differently than a decree-holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the *bona fide* purchaser in an auction-sale is saved. (See *Nawab Zainn-ul-Abdin Khan v. Mohd. Asghar Ali Khan* (1887) 15 IA12. The said decision has been affirmed by this Court in *Gurjoginder Singh V. Jaswant Kaur* (1994) 2 SCC 368). On the same subject, and to the same end, learned Counsel placed reliance on another Judgment rendered by this Court in *Janatha Textiles and others V. Tax Recovery Officer* (2008) 12 SCC 582 wherein the conclusions drawn in *Ashwin S. Mehta's case* came to be reiterated. In the above Judgment, this Court relied upon the decisions of the Privy Council and of this Court in *Nawab Zainn-ul-Abdin Khan v. Mohd. Asghar Ali Khan* (1887-88) 15 IA12), *Janak Raj V. Gurdial Singh* (AIR 1967 SC 608), *Gurjoginder Singh V. Jaswant Kaur* (1994) 2 SCC 368), *Padanathil Ruqmini Amma v. P.K. Abdulla* (1996) 7 SCC 668) as also, on *Ashwin S. Mehta's case* in

order to conclude, that it is an established principle of law, that a third party auction purchasers interest, in the auctioned property continues to be protected, notwithstanding that the underlying decree is subsequently set aside or otherwise.

20. Law makes a clear distinction between a stranger who is a *bona fide* purchaser of the property at an auction-sale and a decree-holder purchaser at a Court auction. The strangers to the decree are afforded protection by the Court because they are not connected with the decree. Unless the protection is extended to them the Court sales would not fetch market value or fair price of the property.”

55. As already stated, the case of the plaintiff is that in the year 1967 of all the properties except the suit mango tope were distributed and the suit mango tope was left to be enjoyed by the wife and daughters of Jagannadham. Except for PW 1, none of the family members of Jagannadham gave any evidence in support of her contention. PW 1 herself admitted that she was not present at the time when the said distribution and devolution was made by Jagannadham and the decision was announced. PW 1 in her evidence claims that when she went to the house of her father Jagannadham about one month after the partition, she came to know about it. Therefore, she cannot be the direct witness to the declaration said to have been made by Jagannadham that the suit schedule mango tope should be enjoyed by his wife and daughters after his death.

56. On behalf of plaintiff, PWs 2, 3 and 4 who are said to have been present at the time of such distribution and declaration by Jagannadham have been examined. PW 2 is not only the grandson of Jagannadham but the sister of PW 2 was given in marriage to Satyanarayana. He spoke about the distribution of the other properties and also admitted that during his lifetime and prior to partition Jagannadham and his sons used to carry on business jointly. PW 1 also admitted that her father and brothers did business jointly for about 15 years. PW 3 another elder deposed that Jagannadham informed him that due to his old age he is effecting partition of the properties and

requested that he and others should act as elders for his decision. He also deposed that Jagannadham retained the suit mango tope for himself and for his wife. PW 4, who along with his own father was present at the time of partition, deposed that Jagannadham informed that he is effecting partition among the children.

57. It is in the evidence of PW 2 that when he enquired Jagannadham as to what about suit mango tope, Jagannadham informed him that he is retaining it for himself and his wife and daughters, and that Jagannadham declared that after his lifetime, his daughters may enjoy the mango tope equally. It is admitted by all the witnesses that even during the lifetime of Jagannadham and subsequently thereafter, till the same was sold in the court auction, it was Satyanarayana who has been in possession and enjoyment of the suit mango tope.

58. It may be stated here that PWs 2, 3 and 4 are the persons who are said to have acted as elders at the time of family distribution and oral declaration made by Jagannadham. They were all businesspersons and belong to weavers' community. None of them have either questioned or requested Jagannadham to execute a document expressing his intention and desire at the time when the partition took place. PW 3 admitted that he was member of the Gram Panchayat for about 25 years during which period Jagannadham and his son Satyanarayana were the Vice-Presidents of the Gram Panchayat. PW 2 admitted that after partition Jagannadham and his wife decided to live with Mukhalingam, the other son of Jagannadham. He also admitted that three sons of Jagannadham are educated, intelligent and tactful in dealing with men and matters. He also admitted that son of the plaintiff Sathi Raju is Sarpanch of Boddam village and also President of Weavers Cooperative Society.

59. In so far as PW 4 is concerned, he was a boy aged about 20 or 25 years when the partition took place and he has accompanied his own father by name Chinna Surapunaidu, who was called as a mediator. He admitted that at the time of distribution all three sons of

Jagannadham were present and they agreed for division as made by Jagannadham and that Jagannadham was alive for four years after effecting the partition.

60. In that view of the matter, it is difficult to believe that even though the distribution and decision were made by Jagannadham about his vast and extensive properties, none of them got any documents executed or even any jottings were made by either of them. Their giving evidence as to what happened about 25 or 30 years prior to the date of their evidence is purely on the basis of memory, it is difficult to believe as truthful and the inference that can be drawn is that they are required to speak to suit the case of the plaintiff, as set by her belatedly.

61. In that view of the matter, the specific case of the plaintiff that her father Jagannadham promised to give the suit mango tope to his wife and five daughters after his death amount to oral will which was neither proved nor acted upon after the death of Jagannadham who died in 1971. Only in 1990 the plaintiff filed the present suit, and till then, in none of the proceedings, such a stand was taken by any of the family members. The contesting defendants, as noticed, are strangers to the family and therefore, they could not place any positive evidence which has a direct bearing upon the family arrangement. What is all that is known to them, told to them and made them believe by conduct of the family members and heirs of Jagannadham is that it is Satyanarayana who was enjoying and possessing the suit mango tope and has obtained loan from the banks by mortgaging the same, was the person who got it in the family partition of 1967.

62. Strong reliance is placed upon by the plaintiff on the fact that in the encumbrance certificate that was produced at the time of court auction, it was specifically mentioned that there is sale deed in favour of Defendants Nos.20 to 22 and in spite of that, the Court proceeded with the auction. This submission would have been relevant, had the sale deed be prior to the attachment before judgment was ordered. It may be recalled that the court has attached the mango tope on 05.12.1978 and Ex.B11 registered sale deed is dated 27.12.1978. Therefore, any

alienation made subsequent to the attachment is liable to be ignored and they need not be considered and accepted. Therefore, it cannot be said that the Executing Court went wrong in putting the suit mango tope in auction even though it was already sold in favour of Defendants Nos.20 to 22 on 27.12.1978.

63. Reliance is placed upon **Ahmedabad Municipal Corpn. v. Haji Abdulgafur**^[14], wherein, the Supreme Court held as under:-

“There is no warranty of title in an auction sale. It is axiomatic that the purchaser at the auction sale takes the property subject to all the defects of title and the doctrine of *caveat emptor* (purchaser be aware) applies to such a purchaser. The case of judgment-debtor having no saleable interest at all in the property sold is, however, different and is not covered by this doctrine.”

The above dictum is not in dispute.

64. Sri Hariharan, learned Counsel appearing for the Defendants 20 to 22/purchasers under registered sale deed, Ex.B11, dated 27.12.1978, relied upon the following authority:-

In **Sai Enterprises v. Bhimreddy Laxmaiah**^[15], it is observed as under:-

“The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseela Pedda Subba Reddi v Pujari Padmavathamma (AIR 1977 SC 1789). In all execution proceedings, Court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the Court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion but an

obligation imposed on the Court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See: [Ambati Narasayya v. M. Subba Rao and Anr.](#) 1989 Suppl. (2) SCC 693). The duty cast upon the Court to sale only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar, view has been expressed in S. Mariyappa (Dead) by LRs. [And Ors. v. Siddappa and Anr.](#) (2005 (10) SCC 235). The position was also highlighted in [Balakrishnan v. Malaiyandi Konar](#) (2006 (3) SCC 49)".

65. In the instant case, the auction sale by the Court is not challenged on any ground other than that Satyam is not the owner of the entire suit tope.

66. It is not in controversy that as many as six suits were filed by different persons against Satyanarayana in 1978 and 1979 for recovery of money and one of them is O.S.No.169/1978 which was filed by Defendant No.19. He obtained attachment before judgment in I.A.No.667/1978 though the said application was keenly contested by Satyanarayana who was alive by that time, the attachment was made absolute. Thereafter, Satyanarayana did not contest the suit, he remained *ex parte* and the suit was decreed and execution proceedings were taken out in E.P.No.5/1987. After following the due procedure, sale was conducted by the executing Court on 20.06.1988 and Defendant No.23 is the auction purchaser, and these aspects are not in controversy and they are also established from the documents that are marked.

67. While Defendants Nos.19 and 23 are having one set of defence, namely while Defendant No.19 is the decree holder in O.S.No.169/1978, whereas Defendant No.23 is the auction purchaser in the court sale conducted in pursuance of the decree in the said suit. Defendants Nos.20 to 22 are having different set of defence and as a matter of fact their contest is against Defendants Nos.19 and 23. To put it in other words, Defendants 20 to 22 have no point in issue in so far as

the plaintiff is concerned. Their case is that Satyanarayana who enjoyed and possessed the suit mango tope has sold the same to them under Ex.B11 registered sale deed dated 27.12.1978. Nearly one month prior thereto, there was an agreement of sale and in pursuance thereto, the registered sale deed was executed. The consideration for the suit tope is said to be Rs.25,000/- In the sale deed, it was mentioned that Satyanarayana is selling the suit schedule property to meet certain debts including that of Vysya Bank to which Satyanarayana was indebted to a tune of about Rs.8,000/- This sale deed is dated 27.12.1978. The attachment before judgment was effected on 05.12.1978. As matters stand, since the sale deed is subsequent to the attachment before judgment, it becomes irrelevant in so far as the decree holder is concerned. However, in order to overcome the same, Ex.B10 which is said to be agreement of sale has been brought into existence on 22.11.1978 and that is prior to the attachment by the Court. On the basis of Ex.B10, it is contended by Defendants Nos.20 to 22 that even prior to registered sale deed, there is an agreement of sale effected in respect of the suit schedule property and thereafter, Ex.B11 sale deed was executed. Defendants Nos.20 to 22 pleaded ignorance with regard to the suit and attachment application filed by Defendant No.19. However, their contention is that Satyanarayana keenly contested the suit as well as attachment application filed by Defendant No.19 at that time.

68. Upon carefully perusing the recitals of Exs.B10 and B11 and surrounding facts and circumstances, it can be said that Ex.B10 is not a genuine document and that the same has been brought into existence only to circumvent the requirement of law that the agreement of sale in respect of the suit schedule mango tope is prior to attachment before judgment. One of the strong circumstances for drawing such conclusion is that in Ex.B11 sale deed there is no reference about Ex.B10 agreement of sale and only reference thereto is by way of interpolation and insertion and even that interpolation and insertion is made in a most inappropriate place in the sale deed. Even if the said interpolation is

taken to be made at the relevant time that do not appear to be having any bearing to the agreement of sale. It appears that the said "agreement" was in respect of making the payment of part of sale consideration to the Vysya Bank as agreed. The scribe of Ex.B.11 and Ex.B.10 is one and same. He was examined as DW 2. He is a Teacher and a professional document writer. He admits that when Ex.B.11 sale deed was being scribed, the agreement Ex.B.10 was very much before him. Still he did not make a reference to it and he admits that it may be due to oversight. It is also in the evidence that the agreement Ex.B.10 was executed in the Office of Sub-Registrar, Rajam. Yet it was not registered. That apart in Ex.B10 itself there was mention that possession of the suit tope was delivered. The consideration was said to be Rs.25,000/- On the date of agreement of sale, only a sum of Rs.2,300/- was paid by the purchasers and that is said to be the cost of electrical motor pump set which existed in the suit schedule land. That means, virtually even without receiving any consideration for the suit mango tope on the date of Ex.B10 agreement, Defendants Nos.20 to 22 want it to be believed that Satyanarayana delivered possession to them on the date of agreement. It is also to be noted here that even though Defendants Nos.20 to 22 claim to have put in possession of the suit mango tope, which was to an extent of Ac.10.00 as long back in 1978, no revenue record was produced by them to show their possession. Payment of electricity consumption charges by itself cannot be taken as establishing the possession of the schedule mango tope.

69. Upon a careful appraisal of the evidence on record and facts and circumstances of the case, I find substance in the submissions of the learned counsel for the contesting defendants that the present suit filed by the plaintiff is a speculative in nature and was filed at the behest of the other members of the family whose sole aim appears to be to see that the suit mango tope should not go to the auction purchaser i.e, Defendnat No.23. Their silence in the matter right from 1967 to 1990 and further onwards clearly show the evil intention of the plaintiff and other family members of the plaintiff. The plaintiff has miserably failed to

establish that the suit mango tope is the undivided property and it was left over by Jagannadham to be enjoyed and possessed by him during his lifetime and thereafter shall devolve on the plaintiff and her sisters.

70. In **Ashwin S.Mehta & Anr. v. Custodian & Ors.**^[16], the Supreme Court made the following observations:-

“In view of the matter, evidently, creation of any third-party interest is no longer in dispute nor the same is subject to any order of this Court. In any event, ordinarily, a *bona fide* purchaser for value in an auction-sale is treated differently than a decree-holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the *bona fide* purchaser in an auction-sale is saved. (See *Nawab Zainn-ul-Abdin Khan v. Mohd.Asghar Ali Khan* (1887) 15 IA12. The said decision has been affirmed by this Court in *Gurjoginder Singh V. Jaswant Kaur* (1994) 2 SCC 368).

71. In a suit for partition it is no doubt true that burden lies on both the plaintiff and defendants to prove their respective contentions. The contention of Defendants Nos.20 to 22 is that the suit mango tope is joint property and it fell to the share of Satyanarayana in family partition. In the instant case, none of the family members who are all made parties to this suit have supported the claim of the plaintiff. Only defendants Nos.19 and 23 i.e. Decree holder and auction purchaser contested the suit. Even though the surviving brother of the plaintiff, by name, Apparao was alive and arrayed as Defendant No.5 in the suit, he did not choose to enter into the witness box and either admit or deny the claim of the plaintiff. He is the best witness available to speak about what transpired in 1967 at the time when Jagannadham made a division of the properties. On the other hand, the said Appa Rao (Defendant No.5) attested Ex.B.11 sale deed in favour of Defendants Nos.20 to 22 on 27.11.1978 executed solely by his brother Satyam declaring and claiming himself to be the owner of the suit mango tope, which would not have been the case if what is now being claimed by the plaintiff is true. Admittedly, the relations between the brothers and sisters is and had

been as cordial as it should be. Admittedly, the plaintiff as PW 1 was not present at that time. The non-examination of Apparao, who is none other than surviving brother, is therefore considered to be detrimental factor against the plaintiff.

72. One aspect which though not relevant for the present purpose but which shows the conduct of the original plaintiff in getting her cause adjudicated and the seriousness with which she has been conducting herself in getting her share is to be stated. Her suit for partition was dismissed by the Trial Court on 31.07.1995. The present Appeal was filed before this Court on 04.12.1995. It was returned with certain objections on 13.12.1995. The said Appeal is resubmitted on 21.02.2006 with a delay of **3709** days with A.S.M.P.No.357 of 2006. During this period, the original plaintiff/appellant died on 30.01.2000. Six years thereafter, her L.Rs., filed a petition to condone the delay of **3709** days in re-presenting the Appeal which was however allowed on costs of Rs.3,000/-. Hence, the Appeal came to be taken on file in 2006. One of the sons of the deceased plaintiff who came on record is the son who admittedly was looking after the litigation from 1990, and it is averred in the affidavit filed in support of A.S.M.P.No.357 of 2006 that till January, 2006, they (L.Rs.) were not aware about the filing of the Appeal by their mother who herself was alive for four years after the present Appeal was filed, but returned.

73. The learned senior civil judge has appreciated the voluminous oral and documentary evidence elaborately in all aspects in proper perceptive and delivered the judgment. As a matter of fact, each and every contention coupled with oral and documentary evidence has been considered and discussed in detail. I agree in total with the findings arrived at by the Court below and I find no infirmity legal or otherwise warranting interference with the said findings.

74. For the foregoing reasons, the Appeal is dismissed. The appellants shall pay to Respondent No.19-Nadikoppula Seetharamaswamy (Decree Holder) and Respondent No.23-Potta Seetharama Gupta (Auction Purchaser) the costs of this appeal.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

Date: 06.10.2015
Dsr

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- [\[1\]](#) (2004) 11 SCC 320
 - [\[2\]](#) AIR 1968 SC 1276
 - [\[3\]](#) 2011 (2) ALD 362
 - [\[4\]](#) 2011 (5) ALT 169
 - [\[5\]](#) AIR 2004 Madras 529
 - [\[6\]](#) AIR 1969 SC 1076
 - [\[7\]](#) 1998 (4) ALT 676
 - [\[8\]](#) 2011 (2) ALT 33 (SC)
 - [\[9\]](#) 2014 (1) ALT 51 (SC)
 - [\[10\]](#) 2012 (5) ALT 345
 - [\[11\]](#) (1964) 1 SCR 270
 - [\[12\]](#) (2004) 8 SCC 588
 - [\[13\]](#) 2014 (3) ALD 120
 - [\[14\]](#) (1971) 1 SCC 757
 - [\[15\]](#) (2007) 13 SCC 576
 - [\[16\]](#) (2006) 2 SCC 385