

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

APPEAL SUIT No.1148 OF 1996

Between:

Appana Buchi Raju and others. --- Appellants

And

Atyam Narasimha Murthy and others. --- Respondents

Date of Judgment Pronounced : 29.07.2015

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SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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| 1. Whether Reporters of Local newspapers may be allowed to see the Judgment? | No |
| 2. Whether the copy of Judgment may be marked to Law Reporters/Journals? | No |
| 3. Whether Their Lordship wish to see the Fair copy of the Judgment? | No |

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No.1148 OF 1996

JUDGMENT:

The defendants 12, 13 and 14 in Original Suit No.90 of 1984, on the file of the Court of Subordinate Judge, Narsapur, West Godavari District (for short, 'the trial Court'), preferred this Appeal, challenging the decree and judgment dated 27.12.1995; wherein the Suit filed for partition of plaint schedule property into 6 equal shares by metes and bounds and for allotment of 1 such share to the plaintiff and also for a direction to the defendants 1 to 3 to pay damages for use and occupation of the schedule property, was decreed.

2. The appellants herein were defendants 12, 13 and 14 and the respondents 1 to 14 herein were defendants 1 to 11, 15 to 17 and the 15th respondent herein was the plaintiff in O.S. No.90 of 1984. For convenience of reference, the ranks given to the parties in O.S. No.90 of 1984, before the trial Court, will be adopted throughout this judgment.

3. During pendency of the Appeal, 3rd appellant herein died and appellants 4 to 6 herein were brought on record as her legal heirs *vide* order of this Court in A.S.M.P. No.202 of 2012 dated 27.02.2012. Respondents 14 and 15 herein died and respondents 16 to 19 and 20th respondent herein were brought on record as their legal heirs *vide* orders of this Court in A.S.M.P. No.390 of 2010 dated 30.11.2012 and A.S.M.P. No.399 of 2010, dated 27.02.2015.

4. The plaintiff, 15th respondent herein, filed the suit for the aforesaid reliefs alleging that his father late Venkata Rama Chandra Rao, defendants 1 and 2 are brothers and sons of late Atyam Mamillayya, who had a daughter by name Venkata Sattiraju and Smt. Venkata Sattiraju died prior to filing of the suit, and 4th defendant is her daughter. Late, Atyam Veera Raghavulu, 3rd defendant and the plaintiff are brothers and sons of late Atyam Venkata Rama Chandra Rao. Plaintiff's brother late Veera Raghavulu had separated himself from the joint family, relinquishing his right in the schedule property, even during the life-time of plaintiff's father, Venkata Rama Chandra Rao and the plaintiff's grand father late Atyam Mamillayya acquired properties with his own efforts and the plaint schedule property was the self acquired property of late Mamillayya. Mamillayya in sound disposing state of mind executed a registered will dated 20.04.1923. As per the terms of said will, his daughter Smt. Venkata Sattiraju was given right only to live in the suit schedule property along with her

children without any power of alienation. Smt. Venkata Sattiraju died in 1973 without any male issues leaving behind her only daughter, 4th defendant. Since the date of death of Smt. Venkata Sattiraju, her daughter, 4th defendant, has been residing in the house; plaintiff, defendants 1 and 3 became entitled to claim 1/6th share each along with other persons inheriting the property under the Hindu law.

The plaintiff made several demands for partition of the schedule property but defendants 1 to 3 and 4 did not co-operate for partition. Having no other alternative, the plaintiff got issued a notice dated 29.01.1975, calling upon the defendants to co-operate for partition of schedule property into 6 equal shares by metes and bounds and allot 1 such share to him and for separate possession of the same after evicting 4th defendant therefrom but the 4th defendant having received the said notice got issued a contentious reply dated 07.02.1975 with false and baseless allegations and defendants 1 to 3 did not send any reply. The plaintiff further contended that late Smt. Venkata Sattiraju had no heritable right in the suit property and she has no right to deal with the property. The will dated 14.03.1971 allegedly executed by Smt. Venkata Sattiraju is purposefully brought into existence in connivance with defendants 1 to 3 and the said will is null and void under law and thus the plaintiff is entitled to claim damages for use and occupation of his share and as such defendants 1 to 3 are liable for the same.

3rd defendant, Atyam Mamillayya died at Palakol on 02.08.1991; defendants 5 to 9 are sons and defendants 10 and 11 are the dependants of late Mamillayya, they are only legal representatives of 3rd defendant and all the properties of deceased Mamillayya devolved upon defendants 5 to 11 as per the provisions of Hindu Succession Act, 1956. Therefore, they are impleaded as proper and necessary parties to the suit.

4th defendant died on 09.02.1992 and 12th defendant is the husband and 13th defendant is the son and 14th defendant is the daughter of 4th defendant. Therefore, they are impleaded as proper and necessary parties to represent 4th defendant, after her death.

1st defendant Atyam Narasimha Murthy, died on 14.10.1992 and his legal representatives *i.e.*, defendants 15 to 17 are impleaded as his legal heirs to represent the branch of 1st defendant.

5. As the learned counsel for the defendants-appellants limited his argument only with regard to maintainability of the suit for non-joinder of proper and necessary parties and non production of the alleged relinquishment deed executed by Veera Raghavulu, it is wholly unnecessary to advert to the other contentions raised by defendants in their written statements, while limiting reference of specific allegations with regard to non-joinder of proper and necessary parties and denial of the alleged relinquishment deed executed by Veera Raghavulu.

6. Defendants 1 and 2 filed joint written statement wherein at Para 3 they specifically contended that the suit is bad for non-joinder of proper and necessary parties. The brother of the plaintiff Veera Raghavulu and his children are also proper and necessary parties to the suit.

Further, in Para 5 of the written statement, they denied the alleged separation of Veera Raghavulu from the joint family even during life time of plaintiff's father. The alleged relinquishment of right by Veera Raghavulu is not true and correct. It is further contended that the plaintiff deliberately and designedly made a vague allegation without disclosing the details of relinquishment by Veera Raghavulu, in the absence of any details of relinquishment, the same cannot be

believed.

Further, in Para 10 of the written statement, they contended that during the life time of Smt. Venkata Sattiraju, she executed a will on 14.03.1971 in sound disposing state of mind and kept the will with the District Registrar as pocket will. As per the terms of will dated 14.03.1971, 4th defendant was only given life interest in the plaint schedule property. The said Venkata Sattiraju, created life interest to 4th defendant, while creating vested remainder to her children. Therefore, the children of 4th defendant are proper and necessary parties to the suit. On these grounds, the defendants 1 and 2 sought for dismissal of the suit.

7. 3rd defendant filed written statement supporting the case of the plaintiff *in toto*.

8. 4th defendant filed separate written statement raising a specific contention in Para 3 that the suit is bad for non-joinder of proper and necessary parties *i.e.*, Veera Raghavulu and his children. In his absence, the plaintiff is to be non-suited. In Para 4, she further contended that father of plaintiff had two wives and late Veera Raghavulu is the son of Venkata Rama Chandra Rao through 1st wife, plaintiff and 3rd defendant is son through 2nd wife. The allegation that late Veera Raghavulu separated himself from the joint family even during life time of Venkata Rama Chandra Rao is not true and correct. She also denied relinquishment of share by Veera Raghavulu during the life time of Venkata Rama Chandra Rao is false and non-disclosure of any details creates any amount of suspicion and she reserved her right to file additional written statement as and when the details of relinquishment are disclosed.

In Para 5, she further contended that Mamillayya acquired the

properties with his self exertions and the plaint schedule property is the self acquired property of late Mamillayya, during his life time, the said Mamillayya in sound disposing state of mind executed a will on 20.04.1923 permitting Smt. Venkata Sattiraju to reside in the house along with her children without power of alienation is not correct. Thus, 4th defendant raised two specific contentions besides other contentions, however sought for dismissal of the suit.

9. 13th defendant filed written statement, and subsequently additional written statement, adopting the written statement filed by 4th defendant, while raising a specific contention in Para 5 of the written statement that the suit is bad for non-joinder of proper and necessary parties to the suit. The children of Veera Raghavulu, brother of the plaintiff are necessary parties to this suit. In their absence, the plaintiff is to be non-suited. In Para 12 of the written statement, 13th defendant specifically contended that during the life time Smt. Venkata Sattiraju executed a will on 14.03.1971 in sound disposing state of mind and the same was kept with Deputy Registrar as a pocket will. As per the terms of will dated 14.03.1971, 4th defendant was given life interest in the plaint schedule property and vested remainder to her children, the children of 4th defendant are also necessary and proper parties to the suit and finally prayed to dismiss the suit.

10. Defendants 12 and 14 filed separate memos adopting the additional written statement filed by 13th defendant.

11. Defendants 5 to 11 and 17 remained *ex parte* before the trial Court. Defendants 15 and 16 have been given up.

12. On the basis of various contentions raised in the written statements, the trial Court framed as many as 13 issues, which are as follows:

- 1) Whether Atyam Veera Raghavulu got separated from the family and relinquished his rights in the suit property?
- 2) What right in the property was acquired by Venkata Sattiraju under the will dated 20.04.1923?
- 3) Whether the restraint on the power of alienation is void?
- 4) Whether the right of Venkata Sattiraju enlarged into an absolute estate under Section 14 of the Hindu Succession Act?
- 5) Whether Venkata Sattiraju had a son who predeceased her?
- 6) Whether the will dated 14.03.1981, executed by Venkata Sattiraju is true, valid and binding on the plaintiff and 3rd defendant?
- 7) Whether Venkata Sattiraju effected any improvements over the suit property?
- 8) To what share, if any, is the plaintiff entitled?
- 9) Whether the plaintiff is entitled to damages for use and occupation of his share, if any, if so to what amount?
- 10) Whether the suit is bad for non-joinder of brother and sister of the plaintiff and the children of A. Veera Raghavulu?
- 11) Whether the Court fees paid is not correct?
- 12) Whether defendants 1, 2 and 4 are entitled to exemplary costs under Section 35(A) of C.P.C.?
- 13) To what relief?

13. During course of trial, on behalf of the plaintiff, PW.1 was examined and Exs.A-1 to A-4 were examined. On behalf of the defendants, DWs.1 to 3 were examined and Ex.B-1 was marked.

14. Upon hearing argument of both the counsel, the trial Court decided Issues 1, 8 and 10 in favour of the plaintiff assigning its own

reasons and decreed the suit.

15. Aggrieved by the decree and judgment of the trial Court, the defendants 12, 13 and 14 preferred this Appeal raising several contentions.

16. Since the learned counsel for the defendants-appellants restricted his argument only to few aspects, more particularly, regarding non-joinder of proper and necessary parties to the suit and non-production of the alleged relinquishment deed executed by Veera Raghavulu, it is wholly unnecessary for me to advert to other contentions raised in the grounds of Appeal. Therefore, I am refraining to advert to other findings while confining to the findings with regard to non joinder of proper and necessary parties and relinquishment of right by Veera Raghavulu. The specific contentions are as follows:

- a) The alleged relinquishment deed executed by Veera Raghavulu though allegedly available with 3rd defendant, non production of it is fatal, in the absence of any satisfactory explanation. Even otherwise, it is registered relinquishment deed, nothing prevented the parties to produce the certified copy at least before the trial Court but based on the evidence of 3rd defendant, the trial Court accepted the contention that Veera Raghavulu relinquished his right, erroneously;
- b) If the relinquishment is disbelieved, the children of Veera Raghavulu are necessary parties to decide the suit effectively and finally but the trial Court on erroneous appreciation of pleadings and evidence held that Veera Raghavulu relinquished his right and this finding is not based on any evidence; and
- c) The trial Court answered issues 1, 8 and 10

erroneously on the premise that the defendants did not raise any specific plea as to non-joinder of proper and necessary parties and no evidence was adduced but there are clear pleadings in the written statements filed by defendants, 1, 2, 4 and 13 and in the oral evidence adduced by parties, there are clear admissions about availability of the alleged registered relinquishment deed executed by Veera Raghavulu but non production of it creates any amount of doubt about the alleged relinquishment deed. Despite it, the trial Court accepted the contention of the plaintiff and held that the children of Veera Raghavulu and other children of Smt. Venkata Sattiraju are not proper and necessary parties decreed the suit.

17. During course of argument, learned counsel for the defendants-appellants, while reiterating the above contentions drawn the attention of this Court to various pleas raised in different paragraphs of the written statements regarding non-joinder of proper and necessary parties and denial of execution of relinquishment deed by Veera Raghavulu during the life time of his father and also drawn the attention of this Court to several evidentiary admissions in the evidence of PW.1, more particularly, in the cross-examination of PW.1 by counsel for defendants 1 and 2; so also other witnesses and further drawn the attention of this Court to Section 88 of Indian Succession Act and Section 91 of Indian Evidence Act, 1872 in support of his contention that when the agreement or contract *etc.*, are reduced into writing and the parties to the said document cannot be permitted to let in oral evidence, without producing the document but the trial Court totally ignored the interdict contained under Section 91 of the Indian Evidence Act and committed an error, finally prayed to allow the Appeal setting-aside the decree and judgment under challenge.

18. *Per contra*, learned counsel for the plaintiff-respondents 15 and 20, would contend that a suit cannot be dismissed merely because proper and necessary parties were not impleaded, since it is a curable irregularity; in the absence of any prejudice caused to the defendants, the suit cannot be dismissed, placed reliance on a judgment of the Apex Court in **Kuldeep Kumar Dubey Vs. Ramesh Chandra Goyal**^[1]. He further contended that when there is satisfactory and cogent evidence to prove the relinquishment deed executed by Veera Raghavulu, more particularly, the evidence of DW.3, whose evidence is reliable and on the strength of his evidence, the trial Court believed the relinquishment of right of Veera Raghavulu and rightly decreed the suit. Moreover, non production of document *i.e.*, relinquishment deed executed by Veera Raghavulu is not fatal. On this sole ground, the decree and judgment of the trial Court cannot be reversed and finally prayed to dismiss the Appeal confirming the decree and judgment of the trial Court.

19. Considering rival contentions, perusing the decree and judgment under challenge including oral and documentary evidence available on record, the points that arise for consideration are:

1) Whether Veera Raghavulu relinquished his right, by executing any relinquishment deed, in the joint family property?

2) Whether the wife and children of Veera Raghavulu are proper and necessary parties to the suit? If so, whether the suit is liable to be dismissed for non-joinder of proper and necessary parties?

3) Whether the other children of Smt. Venkata Sattiraju are proper and necessary parties to the suit in view of the will executed by her father under the original of Ex.B-1? If so, the suit is liable for dismissal on the ground of non-

joinder of proper and necessary parties to the suit?

20. **POINT No.1:** The plaintiff filed the suit for partition of schedule property into 6 equal shares and for allotment of 1 such share, while admitting that the property belongs to Veera Raghavulu, defendants 1 and 2, and deceased Smt. Venkata Sattiraju, daughter of Mamillayya, since the property was acquired by Mamillayya with his own assertions. In Para 6 of the plaint, the plaintiff admitted that their grand father late Mamillayya acquired the property with his own efforts. The plaint schedule property is the self acquired property of late Mamillayya and he executed a will in sound disposing state of mind dated 20.04.1923 creating right to reside in favour of Smt. Venkata Sattiraju without any power of alienation. Therefore, the undisputed fact is that the property was acquired by Mamillayya, grand father of the plaintiff. Plaintiff is the son of late Venkata Rama Chandra Rao, S/o. Mamillayya. Veera Raghavulu, 3rd defendant and plaintiff are brothers and they are sons of late Atyam Venkata Rama Chandra Rao; the plaintiff's brother Veera Raghavulu separated himself from the joint family relinquishing his right in the property as alleged in Para 5 of the plaint. In view of the undisputed relationship between the plaintiff and defendants including Veera Raghavulu, it is for the plaintiff to prove that Veera Raghavulu relinquished his right, otherwise his children are also entitled to claim share in the schedule property, in the absence of any relinquishment.

21. In the entire plaint, the plaintiff did not disclose execution of the alleged relinquishment deed or even whether it is registered or un-registered. When the plaintiff is claiming right based on the alleged relinquishment, apart from his right by succession, it is for him to disclose a material fact as to execution of relinquishment deed and its nature but obviously for different reasons, conveniently the plaintiff avoided to disclose the details of relinquishment deed allegedly executed by Veera Raghavulu.

22. Defendants 1 and 2 in Para 5 of their written statement specifically denied the very execution of relinquishment deed and similarly the 4th defendant in Para 4 of the written statement and 13th defendant in Para 5 of the additional written statement categorically denied the execution of relinquishment deed while contending that Veera Raghavulu and his children are necessary parties to the suit. Thus, there is a specific affirmation about the factum of relinquishment by the plaintiff and specifically denied by the defendants 1, 2, 4 and 13 in their written statements, which give rise to an issue under Order XIV Rule 1 of C.P.C. Accordingly, the trial Court framed an issue. When the plaintiff set-up a relinquishment allegedly executed by Veera Raghavulu, it is for him to disclose the details of relinquishment of right by Veera Raghavulu and prove such relinquishment.

23. To substantiate his contentions, the plaintiff examined himself as PW.1; in his examination in chief, the plaintiff asserted that his brother late Veera Raghavulu separated himself from the joint family even prior to the death of his father and the plaint schedule property is the self acquired property of his grand father. In the further examination in chief dated 22.10.1990, he further asserted that his step brother Veera Raghavulu in or about 1935 separated from the family giving up his right in the joint family property. Veera Raghavulu executed a registered relinquishment deed relinquishing his share in the joint family property and that the schedule property is the self acquired property of Mamillayya. In view of the testimony of PW.1 about execution of registered relinquishment deed by Veera Raghavulu the same is required to be produced before the Court and not entitled to adduce evidence to prove the contents of the said relinquishment in view of the bar under Section 91 of the Indian Evidence Act.

24. When I adverted to the cross-examination of PW.1, PW.1 made a categorical admission that Veera Raghavulu is his step brother, who

died about 4 or 5 years prior to his examination was survived by wife and children and was born in the year 1935. Veera Raghavulu executed a relinquishment deed but he cannot say the date of the relinquishment deed, however, it is registered the said registered document is in possession of 3rd defendant.

25. From this evidentiary admission, both in the examination-in-chief and cross-examination, it is clear that Veera Raghavulu allegedly executed a relinquishment deed in or about 1935 relinquishing his right in the joint family property. To corroborate the testimony of PW.1, he did not examine any other witness. According to the cause title of the plaint, by 1984 the plaintiff was aged 45 years; if it relates back, he might have born in 1939 but the alleged relinquishment was executed even prior to his birth. Therefore, the testimony of PW.1 to prove relinquishment of right by Veera Raghavulu is not credible for the simple reason that he was not born by the date of execution of registered relinquishment deed as contended by the plaintiff.

26. A fact can be proved by adducing primary evidence under Section 64 of Evidence Act, but subject to exceptions contained under Section 65 of the Evidence Act, the parties may be permitted to adduce secondary evidence in certain circumstances but in the present case the plaintiff had neither produced the document *i.e.*, the registered relinquishment deed allegedly executed by Veera Raghavulu in the year 1935 nor adduced any secondary evidence, after obtaining necessary permission from the Court to adduce secondary evidence.

27. Section 91 of Indian Evidence Act created an interdict against adducing oral evidence and the same is extracted hereunder for better appreciation:

“When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or

other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.”

28. The case of the defendants does not fall within any of the exceptions, in view of the bar under Section 91 of the Indian Evidence Act, the oral evidence whatever adduced to prove the execution of registered relinquishment deed need not be looked into. When the relinquishment deed is a registered deed allegedly executed by Veera Raghavulu in the year 1935, nothing prevented the plaintiff at least to obtain certified copy from the Registrar Office and produce the same before the Court and no such effort was made. Even otherwise, according to the evidentiary admission of PW.1 in the cross-examination, the relinquishment deed is available with 3rd defendant. In such case, the plaintiff can take necessary steps to issue notice under Order XII Rule 8 of C.P.C. which permits the plaintiff or any party to the suit but issued notice in Form No.12 of Appendix-C of C.P.C. to produce the document, if it is required, but no such steps were taken. Similarly, Order XI Rule 16 permits the party to produce any document referred to in the pleadings or affidavit in proforma No.7 of Appendix- C for inspection by the plaintiff or any of the parties to the suit. Obviously for different reasons, the plaintiff did not take steps either under Order XI rule 16 or under Order XII Rule 8 of C.P.C. to compel the 3rd defendant, who is allegedly in possession of the relinquishment deed executed by Veera Raghavulu. In the absence of any steps taken by the plaintiff to produce relinquishment deed and in view of the bar under Section 91 of the Indian Evidence Act, the oral evidence of PW.1 is insufficient to accept execution of relinquishment deed by Veera Raghavulu.

29. The trial Court while answering Issue No.1, in Para 21 of the judgment, relying on the evidence of DW.1 accepted separation of Veera Raghavulu from the joint family and accepted relinquishment of share of Veera Raghavulu. In the evidence of DW.1, A. Suryanarayana

Murthy, who is no other than the brother of deceased Veera Raghavulu testified that children of Veera Raghavulu are proper and necessary parties while denying right of the plaintiff to claim any share in the property. Nowhere DW.1 admitted about relinquishment of right by Veera Raghavulu in the property. Therefore, the conclusion arrived by the trial Court that DW.1 admitted about separation of Veera Raghavulu from the joint family is *ex-facie* erroneous. However, in the cross-examination, an admission is made by him about partition of the property during life time of his father under a registered partition deed. Again he re-assailed from the statement and contended that after death of his father, DW.1 and his brothers entered into a registered partition and later he testified that Veera Raghavulu relinquished his right in the remaining properties. It is not clear whether Veera Raghavulu relinquished his right by executing any registered document or oral relinquishment. Therefore, basing on a stray admission, which is contrary to the plea raised in the written statement by 1st defendant, the trial Court recorded a finding.

30. It is settled principle of law that a stray evidentiary admission which is contrary to the pleadings cannot be the basis for recording a finding and the Court has to scrutinize both pleadings and evidence while appreciating the evidence in civil proceedings, but based on a bald evidentiary admission of DW.1, with regard to separation of Veera Raghavulu and relinquishing his right in the remaining properties, concluded that Veera Raghavulu relinquished his right ignoring the specific plea of the 1st defendant from the beginning. Hence, the finding of the trial Court with regard to relinquishment of right by Veera Raghavulu is *ex-facie* erroneous.

31. In view of my foregoing discussion, the plaintiff failed to establish the relinquishment of right by Veera Raghavulu by executing registered relinquishment deed as contended by him but adduced oral evidence contrary to the interdict contained under Section 91 of Indian Evidence Act. Therefore, the relinquishment of right by Veera

Raghavulu pleaded by the plaintiff cannot be accepted by the trial Court, as the plaintiff failed to discharge the burden which rests on him and consequently the finding of the trial Court is erroneous and the same is liable to be set-aside. Accordingly, the point is held in favour of the defendants-appellants and against the plaintiff-respondents.

32. **POINT Nos.2 and 3:** The defendants resisted the claim of the plaintiff on the ground that the legal heirs of Veera Raghavulu are proper and necessary parties to the suit as Veera Raghavulu never relinquished his right in the property. Similarly, the other children of Smt. Venkata Sattiraju are also proper and necessary parties to the suit, as mentioned in the earlier paragraphs, but the trial Court held that the legal heirs of Veera Raghavulu are not proper and necessary parties since Veera Raghavulu relinquished his right in the property taking advantage of stray admission of DW.1 in his cross-examination. The said finding is challenged before this Court on a specific ground that the plaintiff miserably failed to establish relinquishment of right by Veera Raghavulu in the property and thereby his legal heirs are also entitled to claim share in the schedule property along with the plaintiff and defendants 1 to 3. In a suit for partition, all the persons entitled to a share are proper and necessary parties, therefore, in their absence the suit for partition cannot be decided effectively and finally.

33. In the judgment of the trial Court while answering Issue No.8, the trial Court observed that in view of the relinquishment of right by Veera Raghavulu, his children need not be impleaded thereby the plaintiff is entitled to 1/6th share; while answering Issue No.10, the trial Court held that the evidence of DW.1 is sufficient to believe the relinquishment of right by Veera Raghavulu and that there is no pleading in the written statements about non-joinder of sisters of the plaintiff and in the absence of pleading, the suit cannot be dismissed on the ground of non-joinder of proper and necessary parties cannot be accepted. This finding is now challenged in this Appeal.

34. As per my finding on Point No.1, the plaintiff failed to prove

relinquishment of right by Veera Raghavulu in the property and in the absence of proof of relinquishment, the children and wife who are admittedly alive by the date of filing the suit are entitled to claim share of Veera Raghavulu. Therefore, they are proper and necessary parties to decide the real controversy between the parties finally and effectively. The word necessary party or proper party was not defined anywhere in the Code of Civil Procedure, however, necessary party means one without impleading whom no effective decree can be passed. Proper party is a party in whose presence as a matter of convenience the Court can adjudicate the matter in issue more effectively but according to Order I Rule 9 of C.P.C. when a necessary party is not impleaded to a suit or proceedings suit is liable for dismissal. Here, the defendants raised a specific plea about non-joinder of necessary party while disputing the relinquishment of right by Veera Raghavulu in the written statements before framing of issues as required under Order I Rule 13 of C.P.C., no steps have been taken by the plaintiff to implead the legal heirs of Veera Raghavulu, who are co-owners of the property. In the absence of any relinquishment by Veera Raghavulu, where the plaintiff failed to implead necessary party, even after giving opportunity, the suit is liable to be dismissed and similarly, a co-owner if not impleaded, despite raising a plea of non-joinder of parties in the written statement the suit is liable for dismissal.

35. The suit for partition is slightly on different footing than the other suits. When a question of non-joinder of necessary parties in a suit for partition is raised either in the written statement or at any subsequent stage and it goes to the root of the matter. Consequently, in the absence of necessary parties, a suit for partition cannot be decreed. Time and again the Apex Court and this Court in *catena* of decisions reiterated the principle that failure to implead necessary parties in a suit for partition more particularly co-sharers or co-owners is fatal.

36. When a suit is filed both for the reliefs of partition and declaration, all the persons interested in the property be impleaded as

parties to the suit, more particularly, in a suit for partition in the absence of persons entitled to claim share in the property, the suit cannot be decided effectively. When a similar situation came up before this Court in ***Balireddy Appalanarasaiah (died) and others Vs. Balireddy Saddhu and others***^[2], this Court held that in a suit for partition all the persons who are entitled to claim right are to be impleaded otherwise the suit is liable to be dismissed.

37. The Apex Court in ***Kanakarathanammal Vs. V.S. Loganatha Mudaliar***^[3], held as follows in Para 15:

"It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under Section 12 of the Act. That, in fact, is the conclusion which the Trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule [10](#), Sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In *Naba Umar Hazra v. Radhashyam Mahish* [MANU/PR/0053/1931](#) the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in

not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of Order 1, Rule 9 of the Code. In rejecting the said prayer, Sir George Lowndes who spoke for the Board observed that 'they are unable to hold that the said rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India'.

38. Even in the earlier judgment of this Court in ***Uppu Jhansi***

Lakshmi Bai Vs. Venkateswara Rao^[4], it was held as follows:

“When necessary party to the appeal was not impleaded in the appeal, the appeal is liable to be dismissed on that ground alone.”

39. Therefore, if necessary party is not impleaded to the suit, it has to be dismissed on that ground alone. In another judgment of this Court in ***Jahangirji and others Vs. K. Kumar***^[5], this Court laid down similar principle that defect of non joinder of necessary parties could not be cured by impleading them in Appeal and fatal to suit for partition.

40. In ***K. Bhaskar Rao Vs. K.A. Rama Rao***^[6], a learned judge of this Court while dealing with a suit for partition, where the defendants in the written statements raised the plea of non-joinder of two sisters of the parties for which the plaintiff stated in his rejoinder that as they were already married and were given sufficient share in the form of cash and articles, they were not necessary parties, the plaintiff came up with an application to implead the sisters as parties in the first appeal, this Court rejected the request holding that the defect of non-joinder of necessary parties being fatal, the same cannot be cured by impleading them in the appeal and upheld the dismissal of the suit on

the ground of non-joinder of necessary parties by the trial Court. The decisions reported in ***Naba Kumar Hazra and another Vs. Radhashyam Mahish and others***^[7], ***Chenthiperumal Pillai Chanthanamuthu Pillai Vs. D.M. Devasahayam***^[8] and ***Loganatha Mudaliar***³ were on the similar proposition that non-joinder of necessary party is a fatal defect and the suit for partition is liable to be dismissed even on that ground alone.

41. In another Division Bench judgment of this Court in ***Addepalli Venkata Laxmi Vs. Ayinampudi Narasimha Rao***^[9], this Court considered about the plea of non-joinder of necessary parties for the first time in the Appeal during argument but the same was not entertained.

42. In view of the law declared by the Apex Court and this Court, the suit is liable for dismissal for non-joinder of necessary parties to the suit *i.e.*, children and wife of Veera Raghavulu, who are alive by the date of filing the suit, as admitted by the plaintiff.

43. According to Section 99 of C.P.C. when no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any mis-joinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court but the proviso added to Section 99 is clear that the bar under Section 99 is not applicable to non-joinder of parties.

44. According to Order XLI Rule 33 of C.P.C. this Court, while exercising jurisdiction as first appellate Court, can pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court not

withstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

45. In view of the power conferred on this Court, under Order XLI Rule 33 of C.P.C., when the trial Court passed a decree based on inadmissible evidence, the appellate Court can interfere and set-aside the findings recorded by the trial Court. Here, the trial Court accepted the oral evidence of PW.1 with regard to relinquishment of right by Veera Raghavulu and admission of DW.1 regarding relinquishment of right in the other properties of the joint family though it is not specific whether Veera Raghavulu relinquished his right in the schedule property and the oral evidence adduced by the plaintiff with regard to proof of relinquishment. When the relinquishment is reduced into writing, it is inadmissible in view of the interdict contained under Section 9 of the Indian Evidence Act. Therefore, the wife and children of Veera Raghavulu are necessary parties, being the legal heirs, who succeeded his estate. In their absence, the alleged relinquishment cannot be proved and if any finding is recorded in their absence, it will have its own impact on the rights of the parties, though such finding is not binding on them. Therefore, this Court is competent to reverse the finding of the trial Court, if it is based on inadmissible evidence or contrary to the case set-up in the pleadings, by exercising power conferred under proviso to Section 99 read with Order XLI Rule 33 of C.P.C. and set-aside the decree and judgment of the trial Court on the ground of non-joinder of necessary parties *i.e.*, the wife and children of Veera Raghavulu.

46. Learned counsel for the plaintiff-respondents 15 and 20 would submit that in the absence of any prejudice caused to the defendants, non-joinder of proper and necessary party is not a ground to dismiss the suit in total placed reliance on a judgment of the Apex Court in

Kuldeep Kumar Dubey¹, wherein the Apex Court while dealing with the scope of Order 1 Rule 10 and Section 99 of C.P.C. held as follows in Para 10:

“10. In our view, the District Judge is, thus, not justified in reversing the decree of the trial Court on such a technicality which did not in any manner affect the merits of the case. Section [99](#) of the Code of Civil Procedure, 1908 provides as under:

99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction:

No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

[Provided that nothing in this section shall apply to non-joinder of a necessary party.]”

47. In the facts of the above decision, after death of respondent during pendency of the Appeal, notices on the legal heirs were not duly served but only 3rd respondent has chosen to put in appearance and other legal heirs set *ex parte*. In view of the irregularity, it was contended that the decree is liable to be reversed for non-joinder of necessary parties but the Apex Court held that it is only a reliable irregularity and on such irregularity the decree cannot be reversed. The said principle has no direct application to the present facts of the case for the reason that the instant suit is for partition and all the co-owners or joint owners are necessary parties, in view of the law consistently declared by the Apex Court and this Court in the decisions cited *supra*. In such a case, the suit is liable to be dismissed on the sole ground of non-joinder of proper and necessary parties.

48. Though the defendants contended that the children of Smt. Venkata Sattiraju are proper and necessary parties in the absence of details of children of Smt. Venkata Sattiraju and in the absence of any finding on the will executed by Mamillayya in favour of Smt. Venkata

Sattiraju and later by Smt. Venkata Sattiraju in favour of 4th defendant about their right and title, it is difficult for me to record any finding about non-joinder of the children of 4th defendant as proper and necessary parties to the suit.

49. Learned counsel for the defendants-appellants made a feeble attempt to establish the right of 4th defendant on the strength of will drawing attention of this Court to Section 88 of Indian Succession Act but no finding is required to be recorded about the title of 4th defendant as legatee under the will since the scope of suit is limited for partition among co-owners or joint owners. Hence, I need not record any finding about the purport of the will and effect of the recitals in the later part of the will over the earlier part. Hence, no finding is recorded.

50. In view of my foregoing discussion, I find that in a suit for partition, non-joinder of legal heirs of deceased Veera Raghavulu *i.e.*, his wife and children is fatal since they are entitled to claim share on par with the plaintiff. Though the plaintiff miserably failed to establish the relinquishment of right by Veera Raghavulu, the trial Court without appreciating the pleadings and evidence in proper perspective committed an error in holding that they are not proper and necessary parties while believing the relinquishment, based on inadmissible evidence. Hence, the finding of the trial Court is hereby set-aside holding this point in favour of the defendants-appellants and against the plaintiff-respondents.

In view of my finding on Point Nos.1 to 3, I find that the decree and judgment of the trial Court is *ex-facie* erroneous and the same is liable to be set-aside.

In the result, the Appeal Suit is allowed setting aside the decree and judgment dated 27.12.1995, passed in O.S. No.90 of 1984 by the learned Subordinate Judge, Narsapur, West Godavari District.

In consequence, miscellaneous petitions, if any, pending in this Appeal shall stand closed.

**M. SATYANARAYANA MURTHY,
J**

Date: 29-07-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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APPEAL SUIT No. 1148 OF 1996

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Date. 29-07-2015

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- [\[1\]](#) 2015 (3) SCC 525
 - [\[2\]](#) 2004 (5) ALD 308
 - [\[3\]](#) 1964 (6) SCR 1
 - [\[4\]](#) AIR 1994 AP 90
 - [\[5\]](#) 2012 (2) ALD 406
 - [\[6\]](#) 2010 (5) ALD 339
 - [\[7\]](#) AIR 1931 PC 229
 - [\[8\]](#) 1956 TC 181 (FB)
 - [\[9\]](#) AIR 1994 AP 72