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

A.S.No. 608 OF 1997

Between:

Srikhakolapu Narasimha Murthy … Appellant/1st Defendant

AND

Srikhakolapu Rama Mohana Rao & others … Respondents

A.S.No. 902 OF 1997

Between:

Srikhakolapu Rama Mohana Rao … Appellant/Plaintiff

AND

Srikhakolapu Narasimha Murthy & others … Respondents

Date of Judgment Pronounced: 13-08-2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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A.S.Nos. 608 AND 902 OF 1997

COMMON JUDGMENT:

The 1st defendant in O.S.No. 11 of 1985 on the file of the Court of Subordinate Judge, Razole (for short, 'the trial Court'), filed A.S.No. 608 of 1997 challenging the decree and judgment dated 06-01-1997 for rendition of both past and future mesne profits and the plaintiff before the trial Court preferred A.S.No. 902 of 1997 challenging the decree and judgment declining to grant relief of partition of item Nos. 2, 10 and 11 of A schedule property and B schedule property. Since both the appeals are filed against the decree and judgment in O.S.No. 11 of 1985, I feel that it is expedient to decide both the appeals by common judgment.

2. For convenience of reference, the ranks given to the parties before the trial Court will be adopted throughout this common judgment.

3. The plaintiff filed the suit; for partition of A and B schedule property into 24 equal shares by metes and bounds, allot 7 such shares to the plaintiff and for past and future mesne profits together with interest at 12.5%; alleging that the plaintiff and defendant Nos. 1 and 2 are undivided brothers and defendant Nos. 3 and 4 are their sisters who are all children of Srikhakolapu Venkanna. Srikhakolapu Venkanna, the 5th defendant-wife of Srikhakolapu Venkanna, the plaintiff and defendant Nos. 1 and 2 constituted Hindu joint family. During lifetime of Srikhakolapu Venkanna, he used to manage the property. Thus, A and B schedule property is ancestral property of the plaintiff and defendant Nos. 1 and 2. Srikhakolapu Venkanna died intestate

on 15-01-1967. Since then, the 1st defendant, being the elder male member, was acting as manager of joint family and the family did not indebt to anyone.

While the matter stood thus, the 1st defendant started wholesale and retail medical shop business at Kothapet in item No. 9 of A schedule property under the name and style of Sri Surya Medical Stores investing joint family funds. The plaintiff also used to assist the 1st defendant in the business occasionally. Suddenly, the 1st defendant developed hostile attitude towards the plaintiff for the last two years prior to the suit. Therefore, the plaintiff decided to get separated himself from joint family claiming partition of schedule property and demanded the 1st defendant for partition of schedule property personally and through mediators but no useful purpose was served. Thereupon, the plaintiff got issued legal notice dated 04-02-1985 demanding for partition of schedule property; the 1st defendant, on receipt of notice, got issued contentious reply on 20-02-1985 and defendant Nos. 3 and 4 also issued separate reply. Thereupon, the plaintiff got issued rejoinder on 24-03-1985 but no further reply was received. Thus, the 1st defendant did not cooperate for partition of schedule property and for rendition of account of income derived from A and B schedule property. Hence, the suit.

4. The 1st defendant filed written statement resisting the claim of the plaintiff on various grounds while denying the allegations made in the plaint. However, the 1st defendant admitted that item Nos. 1 and 3 to 9 of A schedule are joint family properties but item Nos. 2, 10 and 11 of A schedule are Stridhana and separate property of his wife. B schedule property is his separate property, the business is his exclusive business and the 1st defendant did not invest any joint family funds in the business. Therefore, the plaintiff is not entitled to claim partition of item Nos. 2, 10 and 11 of A

schedule property and B schedule property.

It is further contended that the suit is for partial partition as 621 ½ square yards of house site adjoining house located at Vadapalli, which is registered in the name of the 5th defendant, gold and silver articles and fixed deposit amount of Rs.9,000/- belonging to joint family were not included in the suit for partition. Thereby, the suit is for partial partition and, therefore, liable for dismissal.

The defendant further contended that he borrowed an amount of Rs.12,000/- in February, 1981, from Seeta Mahalakshmi under one promissory note to perform marriage of the plaintiff. Later, the 1st defendant made part payment of Rs.50/- in the month of January, 1984, acknowledging the debt, the said debt is joint family debt and, therefore, all the members of joint family are liable to discharge the same. Finally, it is contended that the 1st defendant never acted as joint family manager. The 5th defendant alone acted as manager of joint family. Therefore, the 1st defendant is not under obligation to render true and correct account of income from joint family. The 1st defendant unequivocally reported no objection for partition of item Nos. 1 and 3 to 9 of A schedule property in addition to vacant land of 621 ½ square yards stood in the name of the 5th defendant, gold and silver articles and fixed deposit amount of Rs.9,000/- belonging to joint family while denying right of the plaintiff to claim share in item Nos. 2, 10 and 11 of A schedule property and B schedule property.

The 1st defendant also contended that the suit is bad for mis-joinder of parties and cause of action. The 1st defendant finally prayed for dismissal of the suit against him.

5. The 2nd defendant filed memo adopting the written statement of the 1st defendant.

6. Defendant Nos. 3 and 4 filed common written statement totally supporting the case of the 1st defendant. I, therefore, need not repeat the specific contentions of defendant Nos. 3 and 4 raised in their written statement.

7. The 5th defendant remained *ex parte* initially but, during trial, she filed an application to set aside the *ex parte* order and, accordingly, the order passed against her was set aside. Thereafter, the 5th defendant filed written statement contending that, after death of her husband Srikhakolapu Venkanna, the 1st defendant has been in management of schedule property being the eldest son; the 5th defendant was never in possession and enjoyment of joint family property and she is entitled to 1/24th share in schedule property as Class-I heir of Srikhakolapu Venkanna.

The 5th defendant also filed additional written statement contending that she was not in possession and enjoyment of gold and silver ornaments and fixed deposit amount of Rs.9,000/- belonging to joint family. The house site referred in the written statement filed by the 1st defendant was purchased by her with her Stridhana amount and it is not joint family property. The fixed deposit amount of Rs.9,000/- is exclusive property of the 5th defendant; she already withdrew the same from State Bank of India, Kothapet; no such deposit was in existence and finally prayed to dismiss the suit.

8. While the matter was pending, the plaintiff impleaded the 6th defendant who is wife of the 1st defendant.

The 6th defendant filed written statement contending that, at the time of her marriage, her mother gifted one acre of land to her under registered gift deed dated 09-03-1972. Later, the 6th defendant sold away the said property and purchased part of item No. 2 of A schedule property. The 6th defendant also purchased the remaining extent of item No. 2 of A schedule property with her Stridhana funds and she also purchased item Nos. 10 and 11 of A schedule property under registered sale deeds. Since then, the 6th defendant has been in exclusive possession and enjoyment of the property by paying property tax to the concerned. Thereby, item Nos. 2, 10 and 11 of A schedule are not joint family properties, they are separate properties of the 6th defendant, not liable for partition and prayed to dismiss the suit against her.

9. After filing written statement by the 6th defendant, the plaintiff filed rejoinder contending that item Nos. 2, 10 and 11 of A schedule are joint family properties and they were purchased with the income from joint family funds and business. Merely because the above items of property are registered in the name of the 6th defendant, she cannot claim exclusive right in those items of property. Therefore, those items are liable for partition and prayed to pass decree for partition of item Nos. 2, 10 and 11 of A schedule property.

10. On the strength of the above pleadings, the trial Court framed the following issues and additional issues:

<u>Issues:</u>

1) *Whether the "B" schedule properties are the joint family properties as claimed by the plaintiff?*
2) *Whether Items 2, 10 and 11 of the plaint schedule properties are the Stridhana properties of the 1st defendant's wife?*
3) *Whether the plaintiff is entitled for partition of the family properties and if so of what items?*
4) *Whether the defendants are liable to render account of profits as claimed by the plaintiff?*
5) *Whether the suit is bad for mis-joinder of parties and mis-joinder of causes of action?*
6) *To what relief is the plaintiff entitled?*

Additional Issues framed on 21-07-1986:

1) *Whether the 5th defendant is entitled for 1/24th share?*

2) *Whether the 1st defendant is liable to account as manager as claimed by 5th defendant?*

Additional Issues framed on 03-08-1989:

1) *Whether Items 2, 10 and 11 of the plaint schedule properties are the Stridhana properties of the 6th defendant?*

2) *Whether items 2, 10 and 11 of the plaint schedule properties are the joint family properties and are liable for partition?*

11. During the course of trial, on behalf of the plaintiff, the plaintiff himself was examined as P.W.1 and got marked Exs.A1 to A7. On behalf of the defendants, D.Ws.1 to 5 were examined and got marked Exs.B1 to B27.

12. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court partly decreed the suit for partition of item Nos. 1 and 3 to 9 of A schedule property while directing the 1st defendant to pay past profits for two years prior to filing of the suit and future profits from the date of suit till the date of delivery of possession of item Nos. 1 and 3 to 9 of A schedule property.

13. Aggrieved by granting relief of past and future mesne profits, the 1st defendant filed A.S.No. 608 of 1997 challenging the decree and judgment on various grounds mainly contending that, in the absence of recording any finding about management of the property by the 1st defendant, direction issued against him is illegal and contrary to the principles of law. By the date of death of his father, Srikhakolapu Venkanna, the 1st defendant was aged 17 years and, therefore, management of the property by him does not arise. On the other hand, the 5th defendant, mother of the plaintiff and defendant Nos. 1 and 2, being the elder member of joint family, managed the property. Therefore, she alone is liable to pay past and future mesne profits and the 1st

defendant cannot be made liable to pay profits as claimed by the plaintiff. Finally, the 1st defendant requested this Court to re-appreciate the evidence and set aside the direction given by the trial Court for payment of past and future mesne profits.

14. Dissatisfied with the decree and judgment of the trial Court, the plaintiff preferred A.S.No. 902 of 1997 challenging the finding recorded by the trial Court in respect of item Nos. 2, 10 and 11 of A schedule property and B schedule property raising various contentions. The main contentions of the plaintiff are that the trial Court did not consider the age of the 1st defendant as on the date of filing the suit and, in the absence of any independent source of income to the 1st defendant to start medical shop business, the business shown in B schedule shall be presumed to be the joint family property, more particularly when joint family possessed sufficient nucleus to start B schedule business, but the trial Court did not appreciate this contention in proper perspective. The trial Court also failed to consider the evidence adduced by the plaintiff and the 6th defendant with regard to source of income to acquire item Nos. 2, 10 and 11 of A schedule property but the trial Court, on erroneous appreciation of evidence, held that item Nos. 2, 10 and 11 of A schedule are separate properties of the 6th defendant. The evidence on record clearly established that joint family possessed sufficient nucleus and the 6th defendant did not possess any independent source of income. In such case, denying relief of partition of item Nos. 2, 10 and 11 of A schedule property and B schedule property is an error apparent on the face of record and prayed to allow the appeal passing decree for partition of item Nos. 2, 10 and 11 of A schedule property and B schedule property.

15. During the course of argument, Sri V.L.N.G.K.Murthy, learned counsel for the plaintiff, would contend that the clinching evidence on record established that item Nos. 2, 10 and 11 of A schedule property and B

schedule property are joint family properties for the reason that the 1st defendant and his wife, the 6th defendant, had no independent source of income to acquire those properties. On the other hand, there is sufficient joint family nucleus to acquire item Nos. 2, 10 and 11 of A schedule and to commence business with joint family funds. When the plaintiff established that joint family possessed sufficient nucleus, burden will shift to defendant Nos. 1 and 6, who are claiming that item Nos. 2, 10 and 11 of A schedule property and B schedule property are their separate properties, but they did not discharge their onus of proof. However, the trial Court, accepting the contention of the defendants, declined to grant decree for partition of item Nos. 2, 10 and 11 of A schedule property and B schedule property. Thereby, the approach of the trial Court is totally erroneous and, therefore, the findings of the trial Court with regard to those items are required to be set aside. In support of his contentions, learned counsel for the plaintiff placed reliance on ***Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Nagpur Vs. Seth Govindram Sugar Mills***[1] and ***Kalepu Subbarajamma Vs. Tiguti Venkata Pediraju and others***[2].

16. *Per contra*, learned counsel for the defendants, supporting the decree and judgment of the trial Court with regard to disentitlement of the plaintiff to claim share in item Nos. 2, 10 and 11 of A schedule property and B schedule property, would contend that the plaintiff though failed to establish management of the property after death of his father Srikhakolapu Venkanna, the trial Court accepted the contention of the plaintiff and directed the 1st defendant to pay past and future mesne profits. In the absence of any finding regarding management of the property, the direction given by the trial Court for payment of past and future mesne profits is an apparent error and the same is liable to be set aside. Finally, it is prayed to set aside the direction for payment of past and future mesne profits while confirming other part of the

decree for partition of item Nos. 1 and 3 to 9 of A schedule property.

17. Considering rival contentions and perusing the material available on record including the decree and judgment under challenge, the points that arise for consideration are as follows:

(1) Whether B schedule property is separate property of the 1st defendant, if not, whether the plaintiff is entitled to claim share in B schedule property?

(2) Whether item Nos. 2, 10 and 11 of A schedule are separate properties of the 6th defendant, if not, whether the plaintiff is entitled to claim share in item Nos. 2, 10 and 11 of A schedule?

(3) Whether the 1st defendant is liable to render true and correct account of income from item Nos. 1 and 3 to 9 of A schedule?

18. **In Re. Point No. 1:**

B schedule property consists of 2 items. Item No. 1 again consists of 5 items which relate to business. Item No. 2 is scooter bearing No. A.T.P.No. 6539. It is the contention of the plaintiff from the beginning that the 1st defendant, while acting as manager of joint family, started medical shop business in item No. 9 of A schedule in the name and style of Sri Surya Medical Stores at Kothapet by investing joint family funds and he was managing the shop maintaining accounts in the business. Therefore, the said business is not exclusive business of the 1st defendant and it is the business of joint family. However, the 1st defendant, denying his acting as manager of joint family after death of his father Srikhakolapu Venkanna and carrying on business with the investment of joint family funds, contended that the business is purely his personal business, unconnected to joint family and, therefore, the plaintiff is not entitled to claim any share. Undisputedly, the business was commenced by the 1st defendant, drug license was obtained by him, sales tax was registered in the name of the 1st defendant and other furniture was also purchased by him but the assertion of the plaintiff is that the purchase was by investment of joint family funds. In such case, it is the duty of the plaintiff to establish that the 1st defendant acted as manager and invested joint family funds in the business. When the plaintiff discharged his initial onus of proof, onus of proof will shift to the 1st defendant to rebut the same. In examination in chief, P.W.1 supported his contention with regards to investment of joint family funds in the business and carrying on business by the 1st defendant. In cross-examination dated 10-04-1996, the plaintiff admitted that the 1st defendant was born in or about 1950 and his father died in the month of January, 1967. In view of the evidentiary admission of P.W.1, the 1st defendant was only 17 years old by the date of death of their father and prosecuting studies in high school. Ex.B2 Higher Secondary and Multipurpose School Leaving Certificate produced by the 1st defendant would establish that the 1st defendant was born on 10-01-1950 and their father Srikhakolapu Venkanna died in the month of January, 1967. Thus, by the date of death of Srikhakolapu Venkanna, father of the plaintiff and the 1st defendant, the 1st defendant was only less than 17 years, prosecuting studies and even not a major. Therefore, question of his managing the property being the male elderly persons is doubtful. The 1st defendant completed his education by 26-04-1967 as per Ex.B2. Thereby, it is evident from Ex.B2 that even after death of Srikhakolapu Venkanna, the 1st defendant prosecuted his studies for another three months. When the plaintiff is claiming that the business is joint family business, it is for the plaintiff to plead and prove that joint family had sufficient nucleus for acquiring the property. The property in the name of any member of joint family should be presumed to acquire from out of family funds and so to form part of joint family unless the contrary is shown. When the 1st defendant contended that B schedule property is his separate property, onus of proof that B schedule property is separate property of the 1st defendant will be shifted after the plaintiff discharges his initial onus of proof that joint family had sufficient nucleus to acquire the property. Therefore, a pleading in the plaint is necessary and, in the absence of pleading and evidence, it is difficult to shift the burden of proof to the 1st defendant to prove that B schedule property is his separate property.

19. Only where there was a nucleus of ancestral property, the presumption was that all properties acquired by any one coparcener was joint property, the question of proportion of the nucleus to the property acquired being immaterial. It has been now held as a result of several decisions the nucleus must be such from which the property ultimately acquired might be fairly said to have grown. The law as developed by series of judicial decisions is now well-settled. Proof of the existence of a joint family does not lead to the presumption that properties held by any members of the family are joint, and the burden rests upon any one asserting that any item of the properties is joint to establish the fact. But where it is established that the family possesses some joint properties which from their nature and relative value may have formed the nucleus from which the properties in question may have been acquired, the burden shifts to the parties alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. 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 must be such that with its help the property claimed to be joint could have been acquired. An important element for such consideration is the income which the nucleus yielded. Where the finding of the Court is that the nucleus of the joint properties was not sufficient for the acquisition of the properties, the burden is upon the person who alleges such properties to

have been acquired out of joint family fund, to establish it.

20. In the present case, there is an allegation in para No. 6 of the plaint that the 1st defendant, who is acting as manager of joint family, started medical shop business both wholesale and retail at Kothapet in item No. 9 of A schedule property in the name and style of Sri Surya Medical Stores by investing joint family funds. In examination in chief, P.W.1 asserted that joint family is not a trading family but, after demise of his father Srikhakolapu Venkanna, the 1st defendant started business in the name and style of Sri Surya Medical Stores at Kothapet in item No. 9 of A schedule property and he used to assist the 1st defendant in the business by writing accounts. In cross-examination, P.W.1 admitted that he was studying third class and aged 7 years by the date of death of his father. P.W.1 further admitted that there is no evidence to prove that the 1st defendant managed joint family after death of their father. P.W.1 made an unequivocal admission that license for medical shop is in the name of the 1st defendant only. The 1st defendant applied for issue of license, business continued in the name of the 1st defendant alone as his individual business and paying drug license fee and other fee for running shop from the beginning. P.W.1 pleaded ignorance about borrowing of Rs.10,000/- from D.Subbarao of Vakalanka Village and he does not know the details of D.Subbarao. P.W.1 also admitted that there is no evidence to prove that the 1st defendant started medical shop business with the income of joint family while accepting that the 1st defendant started business initially as a small scale business and he was writing accounts in the business.

21. It is the specific assertion of the 1st defendant in his evidence that he borrowed Rs.10,000/- from D.Subbarao and started medical shop business. In cross-examination, a suggestion was put to D.W.1 that he did not borrow

any amount from the said Subbarao and invested joint family amount in the business but got denial of it. In fact, when the 1st defendant asserted that B schedule property is his separate property, it is for the plaintiff to disclose the details of income from joint family so as to invest the same in the business. Obviously, for different reasons, the plaintiff did not disclose any details of income from various items of joint family property, more particularly item Nos. 1 and 3 to 9 of A schedule property, and whether income derived from those items is sufficient for maintenance or anything about saving of amount by joint family. In the absence of any details, mere assertion in plaint and evidence would not give raise to presumption that the business being carried on by the 1st defendant, one of the coparceners of joint family, is joint family business. The evidence on record both oral and documentary clearly established that drug license and registration under sales tax were obtained by the 1st defendant, the 1st defendant alone was paying for renewal of license from time to time and filing sales tax returns as sole proprietor but not as joint family business from the date of commencement in the year 1969 till filing of the suit in the year 1985. Therefore, in the absence of any evidence regarding possessing sufficient nucleus by joint family to invest the same in the business, more particularly when the business was treated as separate and exclusive business of the 1st defendant for a long period of 16 years, presumption cannot be drawn that it is joint family business.

22. Refuting the contentions of learned counsel for the plaintiff, learned counsel for the defendants, in support of his contentions, drawn attention of this Court to ***K.L.S.V.E.Annamalai Chetty Vs. K.L.S.V.E.Subramanian Chetty and others***[3]***.*** In the said judgment, the Privy Council, while dealing with a suit for partition, held that

> *"The burden of proving in an action for partition of joint family property that any particular item of property is joint, primarily rests upon the plaintiff. Circumstances no doubt may readily cause the onus to be discharged, but*

where this has not been done and in the face of direct evidence accepted by the High Court, Privy Council is not at liberty to speculate as to alternative possibilities."

I n ***D.S.Lakshmaiah and another Vs. L.Balasubramanyam and another*** [4], the Apex Court, while discussing about burden of proof, laid down certain principles similar to the principles laid down by Privy Council in the decision referred *supra*.

Learned counsel for the defendants further contended that when a member of joint family carrying on business cannot be presumed to be the business of joint family. In support of this contention, learned counsel for the defendants drawn attention of this Court to ***Bhuru Mal Vs. Jagannath and others*** [5], wherein the Privy Council held as follows:

"Though a business, if it belongs to a Hindu joint family, is an item of joint family property, special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu law. Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate, they remain free and separate."

In view of the principles laid down in the decisions referred *supra*, there is no bar to carryon business by a coparcener while continuing as a member of joint family and presumption cannot be applied to such business. Apart from that, joint family is not a trading family and it is originally an agricultural family and, that apart, P.W.1 did not deny borrowing of Rs.10,000/- from D.Subbarao by the 1st defendant to invest the same in the business. Therefore, in the absence of such denial, it is difficult for me to conclude that the business is joint family business.

23. One of the contentions of learned counsel for the plaintiff is that borrowing of Rs.10,000/- from D.Subbarao was not disclosed in the written statement and, therefore, the same cannot be accepted. No doubt the written statement of the 1st defendant is totally silent about source of income to commence business by the 1st defendant. However, a pleading shall contain only facts and evidence. Non-mentioning the name of the creditor in the written statement, certainly creates suspicion but, when the 1st defendant elicited truth either through his cross-examination or adducing independent evidence, the same is of no importance. In cross-examination, P.W.1 admitted that the 1st defendant purchased one iron safe, refrigerator and a scooter from K.Surreddi of Ravulapalem and C book in the name of the 1st defendant only. Thus, all the circumstances clinchingly established that the 1st defendant carried on the business independently and, in the absence of proof that joint family possessed any nucleus much less sufficient nucleus to invest any amount in the business, therefore, it is difficult for me to hold that B schedule property is joint family property.

24. Learned counsel for the plaintiff; contending that when the business being carried on by joint family, the family members cannot be partners and widow cannot act as Karta of joint family; drawn attention of this Court to ***Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Nagpur Vs. Seth Govindram Sugar Mills*** (1st *supra*), wherein the Apex Court held as follows:

> *"Under Hindu Law, coparcenership is a necessary qualification for the managership of a joint Hindu family. A widow is not a coparcener, she has no legal qualifications to become the manager of a joint Hindu family. A widow of a coparcener cannot, therefore, be a karta of the joint Hindu family consisting of three widows and two minors."*

In the same judgment, the Apex Court, in para No. 11, further held as follows:

> *"A joint Hindu family as such cannot be a partner in a firm, but it may, through its karta enter into a valid partnership with a stranger or with the karta of another family. When two kartas of different families constituted a partnership, the other members of the families did not become partners, though the kartas might be accountable to them."*

In the present case, it was not even the case of the plaintiff that medical shop business is partnership business and it is sole proprietary. Therefore, the principle laid down in the above judgment has no direct application to the present facts of the case since the dispute involved in the above judgment is with regards to joint family becoming a partner in partnership business through its karta with another karta of joint family. Hence, the principle laid down is distinguishable and cannot be applied.

25. In view of Privy Councils' judgments and the judgment of Apex Court referred *supra*, there is no iota of evidence to show that joint family possessed sufficient nucleus to invest amount in medical shop business. That apart, there was no blending of the business being carried on by the 1st defendant with joint family. In the absence of proof of possessing sufficient nucleus to invest any amount in the business and blending of income with joint family, it is difficult to hold that B schedule property is joint family property so as to enable the plaintiff to claim share in B schedule.

26. The trial Court, after close analysis of each and every piece of evidence, concluded that B schedule property is not joint family property and it is separate property of the 1st defendant. Even after reappraisal of entire material available on record by this Court, being the first appellate Court, I find no infirmity in the finding recorded by the trial Court with regards to B schedule property warranting interference of this Court. Hence, the finding of the trial Court is hereby confirmed holding that B schedule property is separate property of the 1st defendant and, therefore, not liable for partition.

Consequently, the plaintiff is not entitled to claim any share in B schedule property. Accordingly, the point is held in favour of the 1st defendant and against the plaintiff.

27. **In Re. Point No. 2:**

It is the case of the plaintiff from the beginning that item Nos. 2, 10 and 11 of A schedule are purchased in the name of the 6th defendant by the 1st defendant with the aid of joint family nucleus but defendant Nos. 1 and 6 clearly asserted that item No. 2 of A schedule was purchased by the 6th defendant after sale of land given to her by gift by her parents and item Nos. 10 and 11 of A schedule were purchased with her Stridhana funds and income derived from agricultural property. In view of this controversy, it is for the plaintiff again to prove that joint family possessed sufficient nucleus and, if he is able to establish that joint family possessed sufficient nucleus to acquire item Nos. 2, 10 and 11 of A schedule, onus of proof will shift to the 6th defendant, who was subsequently impleaded as a party to the suit, to establish that she got source of income to acquire item Nos. 2, 10 and 11 of A schedule property. In the plaint, the plaintiff pleaded that item Nos. 2, 10 and 11 of A schedule property were purchased with joint family funds. The plea is sufficient but the plaintiff has to establish the income derived from joint family and savings from the income to show that joint family possessed sufficient nucleus to acquire item Nos. 2, 10 and 11 of A schedule property. In the entire evidence of P.W.1, he did not disclose anything about the income from joint family property but, in examination in chief, P.W.1 denied ownership of the 6th defendant on the ground that she has no capacity to purchase item Nos. 2, 10 and 11 of A schedule property while asserting that those items were purchased with the income derived from joint family property and medical shop business.

28. The specific contention of the 6th defendant is that she is the absolute

owner of item Nos. 2, 10 and 11 of A schedule and they are her separate property. In fact, the 6th defendant is not a member of Hindu undivided coparcenary and, therefore, the presumption that the property in the name of one of the coparceners is part of joint family property would not apply to the property owned and possessed by the 6th defendant. In the entire plaint, there is no pleading that the property was purchased by the 1st defendant in the name of the 6th defendant as a benami and the purchase is only for and on behalf of joint family. Even in the evidence of P.W.1, he did not assert anything that the property was purchased with joint family nucleus in the name of the 6th defendant by the 1st defendant. Unless there is pleading and evidence that the transactions pertaining to item Nos. 2, 10 and 11 of A schedule property are benami transactions, it is difficult to hold that the property registered in the name of the 6th defendant is part of Hindu undivided coparcenary. To determine nature of acquisition, there must be a pleading and proof with regard to manner of acquisition of property in the name of a person other than a coparcener. In ***Nirmala Devi Vs. Om Prakash***[6], it was held that

> *"There was no averment either in pleading or in evidence to manifest nature and extent of joint family property and income and savings therefrom forming joint family fund, at time when acquisition of suit property had been made. Bald statement in plaint that suit property had been acquired out of joint family fund cannot suffice requirement of law to raise presumption in favour of plaintiff on and shift onus upon defendant to establish self-acquisition of suit property. Plaintiffs having failed to plea and prove that joint family was possessed of sufficient income or property, which cannot form nucleus for acquisition of suit property, there could be no presumption that plaintiff had any interest in property. Presumption will be that suit property belonged exclusively to its owner. Issue whether owner had sufficient income to purchase suit property will become immaterial."*

In view of the principle laid down in the above judgment, it is imperative for the plaintiff to plead that item Nos. 2, 10 and 11 of A schedule are purchased in the name of the 6th defendant by the 1st defendant with joint family nucleus as benami but no such plea was raised in the plaint and no evidence was adduced in support of such plea if any raised.

29. Turning to the case of the 6th defendant, her specific contention is that she purchased item Nos. 2, 10 and 11 of A schedule with her Stridhana property. The 6th defendant relied on Ex.B13, which is registration extract of gift deed, and Ex.B14, which is registration extract of rectification deed, executed by K.Venkata Mahalakshmi, mother of the 6th defendant, in her favour, whereunder certain property was gifted to the 6th defendant towards pasupu kunkuma. The 6th defendant sold away the property covered by Exs.B13 and B14 by executing Ex.B15 dated 11-06-1981 in favour of G.Subbaraju. The 6th defendant realized substantial amount by sale of the property and obtained Exs.B16 to B19 for item Nos. 2, 10 and 11 of A schedule. Under Ex.B13, the 6th defendant was given one acre of land in 1972 and sold the same under Ex.B15 on 11-06-1981 *i.e.* almost after 9 years from the date of execution of gift deed by her mother in her favour. During the said period of 9 years, the 6th defendant was supposed to earn income from the land by cultivation and question of her incurring any amount for her personal expenses normally does not arise when she was living with the 1st defendant being maintained by him. Therefore, the 6th defendnat could save the income derived from the land covered by Ex.B13. Thus, with the sale proceeds of Stridhana property and with the income which the 6th defendant earned on cultivation of land, possibility of acquiring item Nos. 2, 10 and 11 of A schedule property cannot be ruled out.

30. When I advert to the evidence of P.W.1, he testified in his cross-examination as follows:

> *"It is not true to say that item No. 2 was purchased by D.6 under two*

separate sale deeds. I have not seen those sale deeds filed into Court. I have not enquired about the details of those sale deeds including the names of the vendors and the consideration. Item No. 10 was purchased by D.1 in the name of D.6. I do not know for which amount the same was purchased so also the mode of passing of consideration, names of attestors and other details. Item No. 11 also was purchased by D.1 in the name of D.6. But I never enquired about the same so also the details of the said document including the mode of consideration, names of attestors and vendors and etc."

The ignorance pleaded by P.W.1 during his cross-examination clearly shows that he had no knowledge about source of acquisition of the property. That apart, learned counsel for the plaintiff drawn attention of the trial Court to the entry at page No. 162 of Ex.A7, which is daybook, evidencing payment of Rs.5,000/- to the 6th defendant on 31-03-1981 but the trial Court, assigning its own reasons, did not accept that the property was purchased by the 1st defendant in the name of the 6th defendant. Moreover, the business is separate property according to my finding on point No. 1 and Ex.A7 pertains to the business being carried on by the 1st defendant in his individual capacity. Assuming for a moment that Rs.5,000/- was paid on 31-03-1981 to the 6th defendant by the 1st defendant, the same cannot be said to be joint family property or acquired with joint family nucleus. Therefore, it is difficult to accept the contention of the plaintiff that item Nos. 2, 10 and 11 of A schedule were acquired with joint family nucleus and obtained registered sale deed in the name of the 6th defendant by the 1st defendant. Since the date of purchase of the property by the 6th defendant, she has been in possession and enjoyment of the same by paying land revenue and electricity consumption charges under Exs.B22 to 26. The 6th defendant also obtained pattedar passbook marked as Ex.B27. Thus, it is evident from Exs.B16 to B27 that the 6th defendant purchased the property with the amount realized by sale of her Stridhana property and with the income derived therefrom. That apart, there is neither pleading nor evidence to substantiate that the property was purchased by the 1st defendant in the name of the 6th defendnat as benami.

31. Learned counsel for the plaintiff would contend that the transactions pertaining to item Nos. 2, 10 and 11 of A schedule are benami transactions and, unless the 6th defendant proved that she got separate means to pay consideration, it can be presumed that the property purchased by the 1st defendant in the name of the 6th defendant is joint family property. No doubt the contention is not based on any factual foundation in pleadings and evidence. In ***Nand Kishore Mehra Vs. Sushila Mehra***[7]***,*** the Apex Court held as follows:

> *"When Section 3 (2) permits a person to enter into a benami transaction of purchase of property in the name of his wife or unmarried daughter, the question of punishing him under Section 3 (3) or the question of acquiring the property concerned under Section 5 can never arise. The same reason shall equally hold good for non-applicability of the provisions of sub-sections (1) and (2) of Section 4 in the matter of filing of the suit or taking up the defence. Further it cannot be held that such a person cannot enforce his rights in the property, the purchase whereof was permitted by Section 3 (2). Therefore, there is no valid reason to deny to a person, enforcement of his rights validly acquired even in the past by purchase of property in the name of his wife or unmarried daughter, by making applicable the prohibition contained in respect of filing of suits or taking up of defences imposed in respect of benami transactions in general by sub-sections (1) and (2) of Section 4 of the Act. But, it is clarified that a person cannot succeed in such suit or defence unless he proves that the property although purchased in the name of his wife or unmarried daughter, the same had not been purchased for the benefit of either the wife or the unmarried daughter, as the case may be, because of the statutory presumption contained in sub-section (2) of Section 3."*

In view of the law declared by the Apex Court in the above judgment, plea of benami is available to claim right or defence. However, burden is upon such person, who is claiming such right, to prove that '***purchase in the***

name of wife or unmarried daughter is not intended to confer any benefit on the person in whose name document was obtained'. In the present case, sale transactions covered by Exs.B16 to B19 are prior to the commencement of the Benami Transactions (Prohibition) Act, 1988 ('the Act of 1988' for brevity). Therefore, the provisions of the Act of 1988 have no application to the transactions covered by Exs.B16 to B19.

32. Learned counsel for the defendants further contended that initial onus of proof is on the person who is asserting that the transaction is benami and, unless the plaintiff discharges his initial onus of proof, it will not shift to the defendants to prove contra. Certain tests are laid down to determine whether a transaction is benami transaction or not and, unless those tests are satisfied, sale transactions covered by Exs.B16 to B19 cannot be treated as benami transactions and placed reliance on ***Valliammal (d) by L.Rs. Vs. Subramaniam and others***[8]. In the above judgment, the Supreme Court ruled that

> *"There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken benami in the name of another person for some reason, and the person whose name appears in the document is not the real owner, but only a benami. Heavy burden lies on the person who pleads that the recorded owner is a benami-holder."*

The source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami.

33. In ***Ramaiah Vs. Singaraiah***[9], this Court held that

> *"Each factor by itself may be decisive, but the cumulative effect or the*

totality of all the relevant and material factors should be the safe guide for determining the benami nature or otherwise of a transaction."

In ***Lachu Reddy Vs. Venkamma***[10], this Court held that

"In a benami transaction, the intention of the parties is the essence of the transaction and the source of the sale price also plays a large part in the determination of the nature of the transaction."

In ***Ramarao Vs. Srikrishna Murthi***[11], this Court laid down four tests to determine the nature of a transaction, they are as follows:

"1. Motive for taking the sale deed in the name of another.

2. Custody of the sale deed and connected vouchers.

3. Passing of consideration; and

4. Possession of the property."

In ***Jaydayal Poddar (deceased) Vs. Mst. Bibi Hazra and others***[12], the Apex Court laid down certain tests to decide the nature of a transaction and ruled as follows:

"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances, unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs."

In view of the law laid down by the Apex Court and this Court, while determining that the nature of a transaction is benami transaction, the Court has to apply the tests laid down in the above judgments. In the present facts of the case, the 6th defendant is able to prove her independent source of income to meet the sale consideration paid under Exs.B16 to B19. Even otherwise, if the 1st defendant paid Rs.5,000/- as per the entry at page No. 162 of Ex.A7, it is only for the benefit of his wife *i.e.* the 6th defendant and that too the business is independent or sole proprietary business of the 1st defendant. If, for any reason, this Court comes to a conclusion that the business is joint family business, then there is possibility to contend that payment of Rs.5,000/- to the 6th defendant by the 1st defendant is sufficient to conclude that the source of income was from joint family business to acquire the property but, as per my finding on earlier point, the business is separate business of the 1st defendant and payment of Rs.5,000/- is not sufficient to establish that the property was purchased with joint family nucleus.

34. In ***Binapani Paul Vs. Pratima Ghosh and others***[13], the Supreme Court discussed about burden of proof and nature of transfer in the name of wife paying consideration by husband at length. When I advert to the present facts of the case, it is clear that there is no pleading that the property was purchased by the 1st defendant in the name of the 6th defendant with joint family funds as benami and no cogent and satisfactory evidence is brought on record to establish that item Nos. 2, 10 and 11 of A schedule were acquired with joint family nucleus though burden heavily lies on the plaintiff who is asserting that item Nos. 2, 10 and 11 of A schedule would form part of joint family estate. Since the plaintiff miserably failed to establish any of the tests as laid down by the Apex Court in the judgments referred *supra*, it is

difficult to hold that item Nos. 2, 10 and 11 of A schedule are joint family property so as to enable the plaintiff to claim his due share in those items.

35. The trial Court, after elaborate analysis of oral and documentary evidence with reference to law laid down by various Courts, rightly concluded that the plaintiff miserably failed to plead and prove that the transactions covered by Exs.B16 to B19 are benami transactions and the property was purchased by the 1st defendant in the name of the 6th defendant with the aid of joint family nucleus. Even on re-appraisal of entire oral and documentary evidence, I find sufficient material to accept the contention of the 6th defendant that she has got independent source of income to pay consideration under Exs.B16 to B19 to acquire item Nos. 2, 10 and 11 of A schedule property and the finding of the trial Court is, therefore, well reasoned and does not call for interference of this Court as I find no legal infirmity warranting interference of this Court by exercising power under Section 99 of the Code of Civil Procedure (for short, 'C.P.C.'). As I find no perversity or illegality in the finding recorded by the trial Court, I am of the view that the finding recorded by the trial Court cannot be reversed or set aside by exercising power under Section 99 of C.P.C. The finding of the trial Court is, therefore, hereby confirmed holding that the 6th defendant is exclusive owner of item Nos. 2, 10 and 11 of A schedule property and not liable for partition. Accordingly, the point is answered in favour of the defendants and against the plaintiff.

36. **In Re. Point No. 3:**

The trial Court directed the 1st defendant to render true and correct account of income from item Nos. 1 and 3 to 9 of A schedule property and the said finding is now challenged by the 1st defendant by filing A.S.No. 608 of 1997 on the sole ground that the property was managed by his mother *i.e.* the 5th defendant since he was aged 17 years by the date of death of his father

Srikhakolapu Venkanna. The 5^{th} defendant, mother of the plaintiff and defendant Nos. 1 to 4, filed her written statement denying management of any of the items of the property including item Nos. 1 and 3 to 9 of A schedule property while contending that the 1^{st} defendant alone was managing the property and the said fact was proved by the plaintiff. Though the 1^{st} defendant denied his management, he is, admittedly, elder male member in joint family though he was minor aged 17 years by the date of death of his father. Moreover, the 5^{th} defendant, being female in coparcenary, is incompetent to act as manager of Hindu undivided coparcenary.

37. Learned counsel for the plaintiff placed reliance on ***Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Nagpur Vs. Seth Govindram Sugar Mills*** (1^{st} *supra*) to contend that widow cannot be a Karta of joint family. In view of the law declared by the Apex Court, the 5^{th} defendant, being widow, is not a coparcener and is, therefore, disqualified to act as manager of Hindu undivided coparcenary. However, minority is not a disqualification to act as manager of Hindu undivided coparcenary but incompetent to enter into contracts or agreements with third parties in respect of the property owned and possessed by Hindu undivided coparcenary. Therefore, in the absence of any disqualification of the 1^{st} defendant to act as manager of Hindu undivided coparcenary and in view of disqualification of the 5^{th} defendant to act as manager of Hindu undivided coparcenary, it can safely be concluded that the 1^{st} defendant alone managed item Nos. 1 and 3 to 9 of A schedule property since other members of joint family were too young by then. When the 1^{st} defendant managed the property, certainly he is under obligation to render true and correct account of income from item Nos. 1 and 3 to 9 of A schedule property. The main contention of learned counsel for the defendants is that the 1^{st} defendant is not under obligation to render

true and correct account of income but this contention cannot be accepted in view of the law declared by the Apex Court in the decision referred *supra*. Except minority of the 1st defendant, no other ground is raised to believe that the 5th defendant was managing item Nos. 1 and 3 to 9 of A schedule property. In the absence of any evidence to its contrary, it is difficult to exonerate the 1st defendant from his obligation to render true and correct account of income from item Nos. 1 and 3 to 9 of A schedule property. Hence, I find no substance in the contention raised by the 1st defendant. Accordingly, the point is answered in favour of the plaintiff and against the defendants.

38. In view of my foregoing discussion, I find no merits in both the appeals and, therefore, both the appeals deserve to be dismissed.

39. In the result, both the appeals are dismissed confirming the decree and judgment dated 06-01-1997 passed in O.S.No. 11 of 1985 on the file of the Court of Subordinate Judge, Razole. Pending miscellaneous petitions in both these appeals, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA MURTHY, J.

Date: 13th August, 2015.

JSK

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[1] AIR 1966 SC 24

[2] 1983 (1) APLJ 333

[3] AIR 1929 PC 1

[4] 2003 (6) SUPREME 540

[5] AIR (29) 1942 PC 13

[6] AIR 2013 Pat 174

[7] (1995) 4 SCC 572

[8] (2004) 7 SCC 233

[9] 1973 (2) APLJ 10 (SN)

[10] 1956 An.W.R.943

[11] AIR 1962 AP 226

[12] AIR 1974 SC 171

[13] AIR 2008 SC 543