HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No. 1699 OF 1996

JUDGMENT:

The defendants 1 to 3 in Original Suit No.253 of 1985 on the file of the Court of Subordinate Judge, Rajahmundry, East Godavari district (for short, the 'trial Court') preferred this appeal challenging the decree and judgment dated 08.05.1996, whereunder and whereby a preliminary decree for partition of the schedule property was passed in favour of the plaintiffs.

2. For convenience of reference, the ranks given to the parties in O.S. No.253 of 1985, by the trial Court, will be adopted throughout this judgment.

3. The 1st plaintiff is the wife of Venkata Suryanarayana and the 2nd plaintiff is her daughter born to Venkata Suryanarayana, during his life time. The defendants 1, 2 and deceased Venkata Suryanarayana are the sons of Narasimha Rao and whereas the 3rd defendant is the wife of deceased Narasimha Rao. They constituted as Hindu joint family possessing A, B and C schedule immovable property. During life time of Narasimha Rao, he acted as a manager of the Hindu joint trading family. The said Narasimha Rao used to carry on kirana business and money lending during his life time.

4. The joint family started kirana shop; Narasimha Rao, being the manager and his three sons *i.e.,* defendants 1, 2 and deceased Venkata Suryanarayana used to participate in the said business. The 1st defendant obtained a Dealership for sale of cigarettes of different varieties and Pan Material carrying on business in the name and style of '*Aravinda Enterprises*', earned considerable profit.

5. The 1st plaintiff's husband Venkata Suryanarayana, who worked as a Life Insurance Agent, during his life time, used to earn Rs.10,000/- as commission, died intestate on 15.05.1985. The earnings of all the three sons thrown into a common stock of the joint family and acquired A, B and C schedule immovable and other movable property, being the members of Hindu undivided coparcenary and that some items of the property were acquired with the aid of the joint family nucleus. None of the members of coparcenary had any individual or separate source of income. Therefore, the entire A, B and C schedule property is the joint family property belonging to Narasimha Rao, Venkata Suryanarayana, husband of the 1st plaintiff and defendants 1 and 2, who are the sons of deceased Narasimha Rao and the 3rd defendant, who is the wife of deceased Narasimha Rao.

6. The marriage of the 1st plaintiff with deceased Narasimha Rao was performed on 14.06.1979 at Patha Pattiseema and on 28.11.1980, 2nd plaintiff was born to them. After marriage of the 1st plaintiff with Venkata Suryanarayana, father of the 1st plaintiff, Kollu Latchanna, gave movables described in plaint D schedule, annexed to the plaint. Apart from the movables described in D schedule, the 1st plaintiff's father contributed an amount of Rs.48,000/- in joint family business for the benefit of the 1st plaintiff's husband and his family members. By the date of said investment, the 1st plaintiff's husband was carrying on contract works in P.W.D. and, at the request of late Narasimha Rao, 1st plaintiff's husband advanced the aforesaid amount for the purpose of investment in the contract works, so as to help the 1st plaintiff's husband to carry on the contracts successfully. The 1st plaintiff's father requested Narasimha Rao to credit the aforesaid invested amount to their account. The items described in plaint D schedule are the

stridhana property of 1st plaintiff and now they are in the custody of the defendants. The movables mentioned in D schedule were given to the 1st plaintiff at the time of her marriage, apart from '*bala todugu*' (colloquial name of jewellery presented during her childhood) and the same was with the 1st plaintiff. During the life time of late Venkata Suryanarayana, he took the gold chain mentioned as item No.4 in D schedule from the 1st plaintiff and pledged the same through his sister Smt. D. Lakshmi Rani in State Bank of India, Innispet Branch, Rajahmundry, and obtained a loan of Rs.6,000/-. The 1st plaintiff came to know that the 3rd defendant got the aforesaid pledge redeemed through her daughter Smt. D. Lakshmi Rani and took the gold chain weighing eight sovereigns.

7. The 1st plaintiff's husband died intestate while continuing as member of the joint family; consequent upon his death, his 1/4th share in the coparcenary property devolved upon the plaintiffs and the 3rd defendant as per the provisions of Hindu Succession Act, 1956 in equal shares. Thus, the plaintiffs are entitled to 2/3rd share and the 3rd defendant is entitled 1/3rd share in the 1/4th share of late Venkata Suryanarayana. The 1st plaintiff including 2nd plaintiff stayed with the defendants in joint family house till the middle of September, 1997. Thereafter, the 1st plaintiff's father took the plaintiffs to Patha Pattiseema where they resided for a while and then shifted to the 1st plaintiff's brother's house at Rajahmundry.

8. Since the date of death of Venkata Suryanarayana, husband of 1st plaintiff, defendants 1 and 2 and their father promised to settle the plaintiffs claim in A to D schedule property. Despite repeated requests, personally and through mediators and through the father of 1st plaintiff, no purpose was served except making a promise while pleading lame

excuse, postponed settlement of the plaintiffs claim in plaint A to D schedules. The said Narasimha Rao died on 09.11.1985; thereby, his 1/4th share in the coparcenary property devolved upon the defendants and legal heirs of Venkata Suryanarayana in equal shares. After death of Narasimha Rao, the defendants openly proclaimed that late Narasimha Rao executed a Will making arrangement with regard to plaint A to C schedule property. The 1st plaintiff contended that, to her knowledge, late Narasimha Rao did not execute any Will in sound disposing state of mind as late Narasimha Rao did not express any such intention at any time. The 1st plaintiff further contended that the said Narasimha Rao was bed ridden and was ailing for a long time and had not been in a sound disposing state of mind, when the alleged Will was executed. Even if Narasimha Rao executed any Will in respect of plaint A to C schedule property, the Will is not valid if the bequeath is for the property exceeding his share in the schedule property and, therefore, bequeathing entire property by Narasimha Rao in favour of any of the defendants is not valid and on the basis of the such Will, the defendants are not entitled to claim exclusive right over entire schedule property. After death of Venkata Suryanarayana and Narasimha Rao, the plaintiffs demanded the defendants to co-operate for partition of the schedule property into five equal shares and to allot due share to them, but no purpose was served. Hence, the present suit is filed for passing a preliminary decree dividing the property into four shares and allot one such share to the plaintiffs 1 and 2 and 3rd defendant as per good and bad quality and for other reliefs.

9. The 2nd defendant filed written statement, and the same was adopted by defendants 1 and 3, admitting the relationship between the plaintiffs and deceased Venkata Suryanarayana, who was the member of the alleged joint family, if any, existing and denied his possessing any joint family property and resisted the claim of the plaintiffs raising the following contentions:

1) The business being carried on by the 1st defendant under the name and style of '*Aravinda Enterprises*' is his exclusive business. Neither, Narasimha Rao nor any of his other sons, are entitled to claim any share in the schedule property and that the plaintiffs, being legal heirs of deceased Venkata Suryanarayana, are not entitled to claim any share in any item of schedule property;

2) The defendant admitted that husband of the 1st plaintiff by name Venkata Suryanarayana was working as an Agent in Life Insurance Corporation, but denied his annual income at the rate of Rs.10,000/-. The schedule property is the self acquired property of defendants, acquired by their self exertions and, thereby, the alleged throwing income of deceased Venkata Suryanarayana into common stock is baseless and carrying on kirana business by the joint family is false and the business, if any, being run by the defendant is his separate and independent business;

3) The business in sale of all varieties of cigarettes and pawn material is only an agency between the concerned companies and the defendant. Admittedly, the joint family is not the agent and the agency is an individual business and the joint family never acted as an agent for any cigarettes or pan material with manufacturing company and, thereby, the question of throwing the earnings of all other members into the common stock is *ex-facie* false;

4) The property purchased by the defendant was never acquired with the aid of joint family nucleus; the question of throwing earning into the common stock is

incorrect;

5) The investment of Rs.48,000/- by father of the 1st plaintiff for the benefit of the 1st plaintiff, in the business being carried on by defendants 1 and 2 and late Narasimha Rao, if any, appears to be an innocent plea raised by the plaintiffs and hence denied. The 1st plaintiff's father never demanded to credit the alleged investment of Rs.48,000/- at least, it appears that the property was acquired with the aid of joint family nucleus. Therefore, the 1st plaintiff or her father are not entitled to claim refund of Rs.48,000/-; even if such amount is invested in the business, it is for the 1st plaintiff's father to recover said amount from the possession of 1st defendant or from the deceased Narasimha Rao, father of defendants 1 and 2 and husband of 3rd defendant;

6) The defendant specifically denied that items described in B schedule do not constitute *stridhana* property of the 1st plaintiff and the same are in custody of the defendants. It is specifically contended that except items 5, 6 and 7 of plaint D schedule, the defendants are not aware about rest of the items, called upon the plaintiffs to put the same to strict proof;

7) The defendant also denied handing over of item 4, gold chain to pledge in the bank through D. Lakshmi Rani and discharge of the loan taking custody of the gold chain by 3rd defendant with the help of D. Lakshmi Rani;

8) The defendant denied devolution of any interest on the defendants 1 to 3 and deceased Venkata Suryanarayana. It is specifically denied that after death

of Venkata Suryanarayana, the plaintiffs lived along with the defendants. In fact, when the 1st plaintiff was pregnant, she was taken to her parents house at Patha Pattiseema and after delivery of the 2nd plaintiff, she did not come back to Rajahmundry and from there only she attended the marriage of Ramadevi, 3rd sister of 2nd defendant, she was not even present at the time when her husband died and late Narasimha Rao sent a telephone message and taxi to bring the plaintiffs when her husband died. Thereupon, the 1st plaintiff's parents, brother and sister-in-law came and left on 15th day. Within one month, as per custom, late Narasimha Rao sent the taxi and again brought the plaintiffs; two days later, the 1st plaintiff's father came and took them; again, she came only on the next day of Narasimha Rao's death. Thus, the plaintiffs never lived with the defendants;

9) The specific contention of the defendant is that the schedule property was the exclusive property of Narasimha Rao. On 02.10.1985 the said Narasimha Rao in a sound and disposing state of mind executed Will and got it registered on 07.10.1985 at his residence and it is his last testament. After death of Narasimha Rao, a photostat copy of the said Will was furnished to all the concerned including the 1st plaintiff. Thus, the 1st plaintiff is aware of existence of the Will and its contents, but she denied the execution of the Will with ulterior motive to claim share in the property. By virtue of the Will, plaint A, B and C schedule property devolved on the legatees of the Will, after death of Narasimha Rao;

10) Naganna, father of Narasimha Rao possessed only 50 Sq. yards of site along with house bearing municipal door No.6/859 and used to run a petty pan shop. He did not get substantial income from the said property. After death of Naganna, Narasimha Rao succeeded the said property of 50 Sq. yards along with house bearing door No.6/859. The said Narasimha Rao started kirana business in 1944 and expanded his business, obtained agency for sale of cigarettes and pan material from different companies, carried on business in the name and style of '*Sri Lakshmi Cigarettes and General Stores*' which was a proprietary concern. By then, the 1st defendant was not even born and he was born in or about 1947, 1st daughter Smt. Lakshmi was born in 1949, 2nd plaintiff's husband was born in 1956, 3rd daughter Ramadevi was born in 1957 and the 2nd defendant was born in 1963. While the matter stood thus, Narasimha Rao improved his fortune carrying on money lending business, acquired immovable property. He also constructed upstairs building item 1 of plaint E schedule with his self earning. The business carried on by late Narasimha Rao was assessed to tax and he was an income tax and wealth tax assessee;

11) Narasimha Rao, father of defendants 1 and 2 succeeded initially 50 Sq. yards of site and used to earn on petty pan shop, which was closed later. Therefore, the question of acquiring schedule property with the aid of the joint family nucleus or income from petty pan business which was run by Naganna does not arise. Thus, there is no sufficient joint family

nucleus to acquire substantial property described in A to D schedule;

12) During life time of Narasimha Rao, he performed the marriages of his three daughters, presented gold jewellery to his daughters at the time of their marriages; 3rd defendant herein possessed *stridhana* property and the plaintiffs are not entitled to claim any share in *stridhana* property of the 3rd defendant;

13) Narasimha Rao carried on business up to March, 1979, later discontinued his business, gave Rs.13,000/- to the 1st defendant and with the help of the said amount, started his own business in the name and style of '*Aravinda Enterprises*'. Thus, the said Aravinda Enterprises is the exclusive business of the 1st defendant but not the joint family business;

14) The 1st plaintiff's husband studied B.Com., 3rd year but discontinued his studies before completion of graduation and became an L.I.C. Agent in 1980. He obtained three policies which are his absolute properties. The 2nd defendant discontinued his study after death of his father. The marriage of Srilakshmi was performed in 1967 with one doctor, D. Subbarao. She sold away some of her gold ornaments and purchased Ac.8.00 cents of land at Patha Pattiseema village; the locker No.44 and jewellery therein belongs to her and the amount lying in term deposit is the exclusive property of the holders of the deposits. Thus, the plaintiff or any person, except the deposit holder and locker holder had any right to claim share in the property;

15) The second sister K. Nagendramani was married to

K. Satyanarayana in 1974, who was an officer in State Bank of India. As per the terms of the Will executed by late Narasimha Rao, item 4 of the plaint A schedule property was allotted to her. After death of Narasimha Rao, she took possession of item 4 of plaint A schedule property, constructed a house consisting two portions. Since then, she is in exclusive possession and enjoyment of the property. The marriage of Ramadevi, who studied M.Sc., and working as lecturer in Womens College, Rajahmundry, was performed on 03.08.1980 with Gauri Surya Prakasa Rao, who studied M.B.A. He possessed Ac.2.50 cents of land and 1/4th undivided share in the house. As the 3rd daughter of Narasimha Rao has been utilizing the locker in the State Bank of India, Innispet Branch though it was in the joint names of her father and mother. She kept her jewellery in a box under the lock and key in that locker. At the time of inventory, she opened the lock containing jewellery and they are her exclusive property and nobody has right to claim any share therein. Thus, all the sisters of the defendants 1 and 2 are in affluent circumstances, well settled in life. The description and extent of item 1 of plaint A schedule property is incorrect. The correct extent of item 1 of plaint A schedule is 700 Sq. yards, exclusively belongs to Narasimha Rao, who bequeathed the same under the Will to the 2nd defendant. The other items of the property were sold away by Narasimha Rao, during his life time. Item 2 of plaint A schedule property does not belong to any of the defendants. Item 3 was bequeathed to 3rd

defendant for her living by Narasimha Rao. She is enjoying the rents thereon. Item 4 of plaint A schedule was bequeathed to the 2nd daughter of late Narasimha Rao, Nagendramani, who is in possession and enjoyment of the property by constructing a two portioned house and thereby, the plaintiffs are not entitled to claim any share in any of items of the schedule property;

16) The descriptive particulars of item 1 of plaint B schedule property are not correct. Item 2 belongs to the 1st defendant's wife and others and the value of item 2 is negligible. Item 3 is exaggerated and item 4 of the plaint B schedule property belonged to the 2nd defendant. Items 6 and 7 of plaint B schedule exclusively belong to 2nd defendant; Item 8 of plaint B schedule belongs to individual defendants;

17) Items 1 to 3 of plaint C schedule property is the exclusive property of late Narasimha Rao and the said fact is mentioned in the Will executed by him during his life time and necessary arrangements were made in his last testament regarding items 1 to 3 of plaint C schedule property. Item 4 of the plaint C schedule is false. Item 5 of plaint C schedule property is the exclusive property of 1st plaintiff's husband and after his death, the plaintiffs and the 3rd defendant are entitled to equal shares. Thus, defendants are in possession of items 5 to 7 of plaint B schedule and other items were not in their possession. Therefore, the plaintiffs are not entitled to recover items 5 to 7 of plaint B schedule from the defendants;

18) Plaint E schedule was purchased by late

Narasimha Rao with his hard earned amount and in the Will necessary arrangement for plaint E schedule was made and the Will is true, valid and genuine. Hence, the defendants being the legatees under the Will are entitled to their rights in the schedule property and the plaintiffs are not entitled to any share in any of items of the property and, finally, prayed for dismissal of the suit.

10. Basing on the above pleadings, the trial Court framed as many as 15 issues, which are as follows:

1. Whether the plaint A, B and C schedule properties are the joint family properties?
2. Whether the plaintiffs are entitled to partition of A, B and C schedule properties into 15 equal shares and allotment of 4 such shares?
3. Whether the D schedule properties are the *stridhaina* properties of the plaintiff and they are entrusted to the defendants? If so, whether they are liable to be accounted for by the defendants?
4. Whether and to what are the properties available for partition?
5. Whether the plaint E schedule property is the self acquired property of late Narasimha Rao?
6. Whether Aravind Enterprises is the exclusive business of the 1st defendant?
7. Whether the Will executed by late Narasimha Rao is true and the bequeath therein are valid and binding on the plaintiffs?
8. Whether items 1 to 3 of C schedule properties are the exclusive properties of late Narasimha Rao and the plaintiffs are not entitled to any share in these properties?

9. Whether items 1 and 2 of plaint E schedule are the exclusive properties of late Narasimha Rao and the plaintiffs are not entitled to any share in them?

10. Whether the plaintiffs are entitled to recovery of D schedule properties or in the alternative the value thereof Rs.29,200/- with interest at 12% p.a.?

11. Whether the plaintiffs are entitled to provision of residence in E schedule properties?

12. Whether the court fee paid is correct?

13. Whether the daughters of late Narasimha Rao are necessary parties to the suit and the suit is bad for non-joinder of parties?

14. Whether the 1st plaintiff's father appropriated Rs.48,000/- for investment of business and the defendants have to be accounted for?

15. To what relief are the plaintiffs entitled?

11. During course of trial, on behalf of plaintiffs, PWs.1 to 4 were examined and marked Exs.A-1 to A-3 and Ex.C-1. On behalf of defendants, DWs.1 to 7 were examined and marked Exs.B-1 to B-40.

12. Upon hearing argument of both the counsel, considering oral and documentary evidence, the trial Court passed a preliminary decree in favour of the plaintiffs for partition of items 1, 3 and 4 of plaint A schedule property into four equal shares and allot 1/4th share each in item 1, 3 and 4 of plaint A schedule property to the plaintiffs so also in all items of plaint B schedule and items 1 to 3 of C schedule property, while holding that the plaintiffs alone are the owners of items 1, 7 and 8 of plaint D schedule property and created a provision for residence in plaint E schedule property while dismissing the claim in item 2 of plaint A schedule, items 4 and 5 of plaint C schedule and items 2 to 6 of plaint D schedule property, respectively.

13. Aggrieved by the decree and judgment under challenge, the present appeal is preferred by the defendants.

14. The main contentions raised in the grounds of appeal and during hearing are that late Narasimha Rao was the sole proprietor of his shop and he did not carry on business of his father *i.e.,* pan shop, but the trial Court on erroneous appreciation of facts concluded that the deceased Narasimha Rao acquired plaint A, B and C schedule property with the aid of the joint family nucleus *i.e.,* income from the pan shop and one tiled room shop at Rajahmundry town, while accepting that the wholesale business of sale of cigarettes and pan material is the separate business of 1st defendant's wife. If the material on record is considered in proper perspective, late Narasimha Rao was the absolute owner of the property except a tiled shop in Rajahmundry town and the pan shop.

It is further contended that the trial Court did not consider the evidence on record to find out whether there is sufficient ancestral nucleus to acquire the schedule property or not, but basing on vague alleged admissions in the evidence of DWs.1 and 2 concluded that there is sufficient nucleus to acquire the schedule property without proper appreciation of the evidence on record.

Yet, the defendants-appellants, at one stage, contended that the trial Court came to a conclusion that the schedule property was acquired with the aid of ancestral joint family nucleus and, at another stage, the trial Court concluded that the plaintiffs and the defendants constituted as members of Hindu Undivided Family and they participated in the business, contributed their income for the benefit of business. Thus, they have thrown the earnings of the defendants and the plaintiffs into common stock, thereby, constituted as members of the joint family; consequently, the schedule property is the joint family property. The finding that the schedule property was acquired with the aid of ancestral joint family nucleus and the other finding that the schedule property belongs to joint family due to contribution by all the members of the joint family throwing their income into the common stock, which findings are not coextensive but they are different and distinct. The trial Court, without appreciating the distinction between Hindu coparcenary and Hindu joint family, recorded two inconsistent findings at different paragraphs and committed an error.

The trial Court having accepted execution of Ex.B-5, registered Will, erroneously limited the Will to the extent of share of late Narasimha Rao. The trial Court also failed to consider the plea of non-joinder of proper and necessary parties, in proper perspective, while deciding the issue regarding non-joinder of proper and necessary parties, the trial Court again reiterated that the plaintiffs established that schedule property was acquired with the aid of nucleus from the ancestral property and in view of execution of Ex.B-5, Will, daughters of Narasimha Rao, having accepted the Will and concluded that they are not necessary parties. These findings are depending upon the nature of the acquisition of the property, but the trial Court on erroneous appreciation recorded its inconsistent findings.

It is further contended that the property devolved upon late Narasimha Rao, from his father, Naganna, was only a tiled room with open veranda in an extent of 50 Sq. yards and a pan shop on the road side. The tiled room in 50 Sq. yards would not fetch income, much less sufficient income, to acquire the suit schedule property. Apart from that, late Narasimha Rao discontinued to carry on business of his father *i.e.,* pan shop and started his own kirana business which would clinchingly establish that the business carried on by Narasimha Rao is the separate business or the sole proprietary concern of late Narasimha Rao but not the joint family business. Merely because all the members are living under one roof, the Court cannot draw an inference that the schedule property is the property acquired with the aid of joint family nucleus or acquired by all the members of joint family contributing their earnings and by participation in the said business, but the trail Court committed a serious error in recording those findings and did not consider oral and documentary evidence in proper perspective, consequently prayed to allow the appeal setting aside the decree and judgment under challenge.

15. The learned counsel for the defendants-appellants, while reiterating the grounds urged in the grounds of appeal, mainly contended that the pan shop would not fetch sufficient income to acquire vast property described in the schedule, but the trial Court basing on stray admissions with regard to living together by Narasimha Rao and his sons including husband of the 1st plaintiff concluded that there exists joint family nucleus to acquire schedule property without considering income expected to be received by Narasimha Rao from the shop consisting one tiled room and veranda, committed an error in arriving conclusion that the schedule property was acquired with the aid of joint family nucleus.

Yet, the counsel for the defendants-appellants further contended that the evidence on record established that the business carried on by late Narasimha Rao was discontinued, as it was closed in the year 1979 and the 1st defendant started wholesale business of sale of cigarettes and pan material and obtained license in the name of 1st defendant's wife, the trial Court recorded a specific finding that wholesale business being run by the 1st defendant is the separate business of the 1st defendant. However, on erroneous appreciation, concluded that there is sufficient nucleus from the ancestral property to acquire the schedule property. This finding is erroneous on the face of the record.

Finally, it is contended that the trial Court did not draw distinction between joint family and Hindu coparcenary and committed an error in recording finding that the schedule property was acquired with the aid of the ancestral nucleus and at the same time recording finding that the property was acquired with the joint exertions of the 1st plaintiff's husband, defendants 1 and 2 and late Narasimha Rao. Thus, the approach of the trail court is *prima-facie* erroneous and, in such case, the decree passed by the trial Court cannot be sustained.

The learned counsel for the defendants-appellants further contended that the plaintiffs are not entitled to take inconsistent pleas and, even if, any such inconsistent plea is raised during trial, they must confine to any one of such pleas, but they did not limit their contentions either to acquisition of property with the aid of joint family nucleus or acquisition of property with the joint exertions by late Narasimha Rao, his son late Venkata Suryanarayana, and other sons, defendants 1 and 2 but the Court believed both the inconsistent pleas and recorded a finding without drawing any distinction. If the property was acquired with the aid of joint family nucleus, the question of acquiring the property with the joint exertions by late Narasimha Rao, his son late Venkata Suryanarayana, his other sons, defendants 1 and 2 does not arise. Thus, committed a grave error in recording such finding and, prayed, to *set-aside* the decree and judgment of the trial Court, placed reliance on a judgment of the Division Bench judgment of the Apex Court in ***P.S. Sairam and another Vs. P.S.Rama Rao Pisey and others***[1].

16. *Per contra*, learned counsel for the plaintiffs-respondents, supported the findings of the trial Court, in all respects, while contending that parties to the proceedings are entitled to take alternative pleas and the pleas raised by the plaintiffs are only alternative not inconsistent to one another; even otherwise, the shares would not change, if for any reason, the Court records a finding that the

schedule property was acquired with the aid of joint family nucleus or acquired with the joint exertions of late Narasimha Rao, Venkata Suryanarayana, defendants 1 and 2. Finally, it is contended that the trial Court, after analyzing both oral and documentary evidence recorded its findings. Therefore, there is no legal or factual infirmity in the findings recorded by the trial Court and prayed to confirm the decree and judgment passed by the trial Court by dismissing this appeal.

17. Though there are certain adverse findings recorded by the trial Court against the plaintiffs regarding Will, yet the plaintiffs did not challenge the adverse findings by filing any cross-objections or by filing a separate appeal, during argument also the finding of the trial Court was not challenged. Therefore, the findings regarding Ex.B-5 registered Will attained finality, consequently, I need not reappraise the findings of the trial Court regarding genuineness of Ex.B-5.

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

1. Whether plaint A, B and C schedule property was acquired either with the aid of ancestral nucleus or with the joint exertions of late Narasimha Rao, his sons late Venkata Suryanarayana and defendants 1 and 2, and to what share the plaintiffs and defendants are entitled on division of the property into 15 equal shares?
2. Whether the daughters of late Narasimha Rao are proper and necessary parties to the suit?
3. Whether the plaintiffs are entitled to reside in E schedule property?

19. **POINT No.1**: Admittedly, the plaintiffs filed suit for partition of plaint A, B and C schedule property into 15 equal shares and for

allotment of 4 shares to them, for rendition of true and correct account of income from C schedule property and for recovery of Rs.29,200/- together with interest at 12% p.a., and other reliefs.

20. The contention of the plaintiffs in paragraphs 4 and 5 is that the plaintiffs and defendants constituted as Hindu Joint Family possessing A, B and C schedule property and Narasimha Rao was the manager of the joint family running joint family business including money lending business. He also maintained kirana shop and the defendants 1 and 2 and the 1st plaintiff's husband, Venkata Suryanarayana, participated in the business and the 1st defendant obtained dealership for sale of cigarettes of all varieties manufactured by different companies and pan material carrying on trade in the name and style of 'Aravinda Enterprises'. It is also averred that Venkata Suryanarayana, husband of the 1st plaintiff, was a Life Insurance Corporation Agent, earning Rs.10,000/- per annum as commission and all the resources of Venkata Suryanarayana was thrown into common stock of joint family and acquired A, B and C schedule property. In the last five lines of Para 5 of the plaint, the plaintiffs asserted that A, B and C schedule property is the ancestral property which includes the property acquired with the aid of ancestral nucleus and acquired with joint exertions by all the members of joint family throwing their earnings into common stock. At the same time, in first line of plaint in Para No.7, the plaintiffs asserted that the 1st plaintiff's husband died as undivided joint family member, and on his death, his 1/4th share in the coparcenary property devolved upon the plaintiffs and the 3rd defendant, as per the provisions of the Hindu Succession Act, 1956 in equal shares. Similarly, in other paragraphs of the plaint, more particularly, in Para 9, the plaintiffs asserted that plaint A, B and C schedule property is the coparcenary property and D schedule property is the *stridhana* property of the 1st plaintiff. Thus, it is clear from the pleadings in

various paragraphs of the plaint, the plaintiffs raised two contentions with regard to nature of acquisition of A, B and C schedule property; at one stage, it was contended that the schedule property was acquired with the aid of joint family nucleus and at another stage, it was contended that the schedule property was acquired with the joint exertions of late Narasimha Rao, his deceased son Venkata Suryanarayana, husband of the 1st plaintiff and two other sons *i.e.,* defendants 1 and 2.

21. The defendants denied existence of any coparcenary property while admitting that late Narasimha Rao succeeded one tiled room with veranda from his father, late Naganna, besides a pan shop and that there was no sufficient nucleus to acquire the suit schedule of property and that the suit schedule property was acquired by Narasimha Rao, during his life time, carrying on his independent business with the income earned from separate business and he executed a Will bequeathing the schedule property in favour of defendants 1 and 2 totally disinheriting the plaintiffs. The trial Court framed several issues and issues 1, 6 and 8 are pertaining to nature of acquisition of the property. The trial Court, at one stage, held that the schedule property was acquired with the aid of ancestral nucleus and, at another stage, held that it was acquired with the joint exertions of late Narasimha Rao, his deceased son Venkata Suryanarayana and other sons, defendants 1 and 2, but failed to draw the distinction between coparcenary and joint family. At the end of Para 11, the trial court recorded the following finding:

> "For the foregoing reasons, it is found that plaint A, B and C schedule properties are the joint family properties of late Narasimha Rao and both parties to the suit."

22. At the end of Para 6 of the judgment, the trial Court recorded its finding which is extracted hereunder for better appreciation:

> "Basing on the decision cited in AIR 1993 Karnataka page

148, it is found that the plaintiffs have established their case basing on the circumstantial evidence that there is some ancestral nucleus to the joint family of late Narasimha Rao and his sons."

23. This finding would go to show that the family consisting of Narasimha Rao, his sons possessed some property fetching income and established that there is ancestral nucleus. From Para 7 onwards of the judgment, the trial Court went on deciding whether there is sufficient nucleus to acquire the schedule property and relied on the judgment of Madras High Court in ***Lakshmi Ammal Vs. Meenakshi Ammal and others***[2], wherein several observations importing the knowledge of the trial court judge about the business, concluded in the middle of paragraph of the judgment are extracted hereunder:

"If really, late Narasimha Rao had no ancestral properties, it is highly improbable for late Narasimha Rao to contract any loans. Therefore, the ancestral property succeeded by late Narasimha Rao was the only goodwill or solvency for late Narasimha Rao to contract loans so as to improve his business. Therefore, the ancestral nucleus of late Narasimha Rao had played a pivotal role in earning the plaint schedule properties. Therefore, the ancestral nucleus of late Narasimha Rao is sufficient to derive income to earn the subsequent properties. Suppose, if the ancestral nucleus is in the nature of a vacant site then in such a case the entire case would have been different. But in the present case the ancestral nucleus of late Narasimha Rao is a killi shop, a shop building in main bazaar of Rajahmundry and a tiled house consisting of room and vasara in an open extent of 50 square yards. Therefore, the ancestral nucleus derived by late Narasimharao was sufficient enough to fetch income and productive. Therefore, as per the decision reported in 1974 Madras page 294, the plaintiffs have established their case that the ancestral property was sufficient and productive enough and the income from the property was utilized for the purpose of business of late Narasimharao. Therefore, the contention of defendants is rejected that the ancestral properties of late Narasimharao and his son are not yielding any income to acquire plaint schedule properties."

24. While deciding 13th issue, regarding non-joinder of proper and

necessary parties *i.e.,* daughters of late Narasimha Rao as parties to the suit, the trial Court reiterated the following in Para No.33 and made its observations, which are extracted hereunder:

> "There is positive evidence on record to show that the joint family constituted since the time of late Naganna, who is father of late Narasimha Rao and the chain of joint family continued even till today and the evidence of defendants itself is sufficient to believe that there is some or other ancestral nucleus since the times of late Naganna. Therefore, it is clear that the plaint schedule properties are the coparcenary properties. Since the suit schedule properties are coparcenary properties, the married daughters of late Narasimha Rao has no right over the coparcenary property. If at all there is any right to the daughters of late Narasimharao they have right over the share of late Narasimharao but not in coparcenary property. Now that the plaintiffs have filed the suit to recover the share of late Venkata Suryanarayana, who is a coparcener of the Joint Hindu Family. Therefore, the daughters of late Narasimha Rao are not at all necessary and proper parties to the present suit for recovery of a share of late Venkata Suryanarayana. In view of the Will in Ex.B-5, executed by late Narasimha Rao, the plaintiffs cannot claim any share from out of the share of late Narasimha Rao"

25. In view of various findings and observations made by the trial Court, extracted above, there is lot of inconsistency in the findings, at one stage, the trial Court concluded that the schedule property was acquired with the aid of ancestral nucleus thereby it is a coparcenary property and, at another stage, the trial Court concluded that the property was acquired with joint exertions of late Narasimha Rao, his son late Venkata Suryanarayana and other sons, defendants 1 and 2. Coparcenary is distinct from a joint family, as per settled law; a coparcenary is totally different from joint family. In coparcenary, prior to amendment of Hindu Succession Act, all the male descendents became entitled to claim share, but in the joint family, the members of the family alone are entitled to claim share. If the property is descended from one ancestor, who is still alive with generations

together, and that no partition took place, each coparcener is entitled to a share in the coparcenary property but, this is not so in the joint family. The true expression of Hindu Joint Family and Hindu Coparcenary are not synonymous and there is a marked distinction between these two. A coparcenary is a joint family where the right to property arises by birth and succession takes place by survivorship. Prior to enforcement of Hindu Women's Rights to Property Act, 1937, females were excluded from Hindu coparcenary. A coparcener acquires right in ancestral property of a family by birth. A Hindu Joint Family consists of all persons lineal descended from a common ancestor and includes their wives and unmarried daughter, while a Hindu coparcener is much narrower body that the joint family includes only those persons who acquire by birth an interest in the coparcenary property. These persons are the sons, grand sons and great grand sons of the holder of joint family property for the time being, *i.e.,* son, grand son and great grand son who acquire right by birth in the ancestral property of his father and for this reason it is said that a coparcenary is limited to four degrees. Prior to promulgation of Hindu Women's Rights to Property Act, 1937, females were excluded from coparcenary, therefore, the members of joint family but they could not be coparceners.

26. A Hindu coparcenary is a creation of law and it cannot be created by acts of the parties but whereas a joint family can be created by agreement between the parties or by their act. Therefore, a coparcenary cannot be created by agreement because the basis of joint family is tie of son-ship arising by birth, marriage or adoption, prior to amendment of Hindu Succession Act.

27. According to Mithakshara Law, the essential feature of ancestral property is that the son, grand son and great sons of the persons who inherits to acquire interest, for such property by birth; in other words, according to Mithakshara School of Hindu Law, each son

acquires equal right by birth with his father in all ancestral property held by the father and on the death of father, the son takes the property not as his heir but by survivorship.

28. In the joint family, the sole successors of property of her husband is the wife and children and when the joint family property was managed by one of the embers, the powers of the manager are different from kartha of Hindu coparcenary. It is evident from various texts that in coparcenary, the shares are fluctuating and the shares of coparceners will be decreased by birth and increased by deaths; but in joint family, a share of the member of the joint family is static. Similarly, in coparcenary, the female members including wives and sons, unmarried daughters are also the members of the joint family, but in coparcenary the females who became the members of the joint family by marriage will not become coparceners.

29. In view of subtle distinction between Hindu coparcenary and joint family, the share of the members may vary in Hindu coparcenary and joint family. Assuming for a moment that the schedule property is the joint family property, the deceased Narasimha Rao, Venkata Suryanarayana husband of the 1st plaintiff, defendants 1 and 2 and any other member of the joint family, unmarried daughters are entitled to equal share, if it is a Hindu coparcenary, only lineal male descendents became coparceners and entitled to claim share. But the trial Court while deciding 13th issue, in Para 33 came to a conclusion that the daughters of deceased Narasimha Rao are not entitled to claim any share in the property for the simple reason that the schedule property is the Hindu coparcenary property and that Narasimha Rao executed Ex.B-5 Will bequeathing his share in the schedule property in favour of defendants 1 and 2. The reason for rejecting the contention that the suit is not maintainable for non-joinder of daughters of late Narasimha Rao is the finding that the schedule property is the

coparcenary property as it was acquired with the aid of ancestral nucleus. At the same time, a total inconsistent finding is recorded by the trial Court holding that the schedule property was acquired with the joint exertions throwing exertions to a common stock, thereby, it is a joint family property, but no agreement or act of the parties to constitute a joint family was pleaded by the plaintiffs and the trial court did not record any finding that there was an agreement or by act of the parties, late Narasimha Rao, late Venkata Suryanarayana, defendants 1 and 2 became the members of joint family and not coparceners.

30. In view of the above distinctions between Hindu Coparcenary and joint family, it is difficult to sustain any of the finding at this stage, I feel that it is better to advert to the pleadings to find out whether the plea of the plaintiffs is limited either to coparcenary or joint family, if any, and what would be the effect of inconsistent pleas raised by the plaintiffs in the plaint. In Para 3 of the plaint, the plaintiffs specifically pleaded that plaint A, B and C schedule properties are the coparcenary properties and it has to be divided into 15 equal shares. At the same time, in Para 4 of the plaint, while asserting that the schedule property was acquired with the income derived from coparcenary property and that Narasimha Rao was the Manager of joint family. It is also further contended in Para 7 that the plaintiffs are entitled 1/4th share in the coparcenary property, devolved upon the plaintiffs, defendants 1 to 3 consequent upon death of Narasimha Rao. In Para 8 of the plaint in last three lines, the plaintiffs asserted that the schedule property is the coparcenary property. However, in Para 5 of the plaint, the plaintiffs asserted that all the resources of the aforesaid three joint family members obtained by their individual exertions were thrown into common stock of the joint family. Thus, the plaint A, B and C schedule immovable and movable property constitute coparcenary property which includes the ancestral nucleus. The acquisitions with the help of the ancestral nucleus and joint

acquisitions is also separate property of the coparceners thrown into the common stock and all the members are having joint possession and common enjoyment.

31. Thus, the pleas raised by the plaintiffs in plaint in various paragraphs are inconsistent with one another, more over in different paragraphs, the plaintiffs asserted that the property is the coparcenary property but in Para 5 of the plaint, the plaintiffs asserted that the property belongs to joint family, though part of the property was acquired with the aid of ancestral nucleus. If for any reason, the Court accepted the plea of the plaintiffs that the schedule property is the coparcenary, the question of recording any finding that the schedule property was acquired with joint exertions throwing their income into common stock and, thereby, declaring as joint family property does not arise. Both the pleas of Hindu Coparcenary and joint family are inconsistent with one another and the finding recorded by the trial Court accepting both the pleas is an error apparent on the face of the record.

32. In ***Hardeo Rai Vs. Sakuntala Devi and others***[3], the Apex Court while deciding an appeal against the suit for specific performance drawn the distinction between coparcenary property and Hindu Joint Family relying upon the earlier judgment of Apex Court in ***State Bank of India Vs. Ghamandi Ram (dead) through Gurbax Rai***[4], wherein the Apex Court held as follows:

> "According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born. The incidents of coparcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants

can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co- ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter."

33. Where a coparcener takes out share in the property, he is the owner of that share and as such, he can alienate the same by sale or mortgage in the same manner as he can dispose of separately. If the principle laid down by the Apex Court in ***State Bank of India***[4] is applied to the present facts of the case, it is difficult to sustain two inconsistent findings recorded by the trial Court with regard to the nature of the property.

34. In ***Satrughan Isser Vs. Sabujpari and others***[5], the Apex Court while deciding similar question as to how a coparcenary could be entitled to claim share in the property, observed as follows in Para 5:

"A Hindu coparcenary under the Mitakshara school consists of males alone; it includes only those members who acquire by birth or adoption interest in the coparcenary property. The essence of coparcenary property is unity of ownership which is vested in the whole body of coparceners. While it remains joint, no individual member can predicate of the undivided property that he has a definite share therein. The interest of each coparcener is fluctuating, capable of being enlarged by deaths, and liable to be diminished by the birth of sons to coparceners: it is only on partition that the coparcener can claim that he has become entitled to a definite share. The two principal incidents of coparcenary property are: that the interest of coparceners devolves by survivorship and not by inheritance; and that the male issue of a coparcener acquires

> an interest in the coparcenary property by birth, not representing his father but in his own independent right acquired by birth."

From these observations it is clear that coparcenary is distinct from a joint family as pointed out by me in the earlier paragraphs, but the trial Court recorded two inconsistent findings and decreed the suit basing on a stray contention raised at the end of Para 5 of the plaint that the schedule property was acquired with the joint exertions by throwing earning of late Narasimharao, his sons late Venkata Suryanarayana and defendants 1 and 2 into common stock.

35. As per the settled principles of law, the parties are entitled to take alternative pleas but not inconsistent pleas. Even if any such inconsistent plea is raised, they must limit their plea during the trial, to any one of the pleas available in the pleadings but in the present case, the plaintiffs did not confine the trial to any one of those pleas urged in various paragraphs of the plaint regarding the nature of acquisition of property and the trial Court also recorded inconsistent findings basing on the inconsistent pleas urged by the plaintiffs.

36. A perusal of entire evidence on record, there is evidence to prove the contentions of either parties, but I am not in a position to express any opinion about the specific pleas raised by the plaintiffs in the plaint notwithstanding the pleas raised by the defendants regarding acquisition of A, B and C schedule property.

37. If for any reason, the schedule property is the joint family property as held by the trial Court, it will have its own impact on the finding on 13th issue since unmarried daughters are also members of the joint family though not coparceners by the date of filing suit. In such case, the suit is liable to be dismissed. If for any reason, the property is deemed to be a coparcenary, the share of the 2nd plaintiff is different than the share claimed by the plaintiffs since a coparcener is

entitled to claim right by survivorship but not by inheritance in view of law laid down in the judgments referred *supra*. In those circumstances, in view of the inconsistent pleadings and findings recorded by the trial Court with regard to nature of acquisition of plaint A, B and C schedule property, I find that it is a fit case to remand the matter, by exercising power under Order 41 Rule 23(a) of Code of Civil Procedure, directing the plaintiffs to confine to any one of the pleas urged in the plaint directing the trial Court to record a finding on the plea specifically limited by the plaintiffs on remand and decide the matter, afresh, according to law. Accordingly, the point is decided.

38. **POINT Nos.2 & 3:** In view of my finding on point No.1, this Court need not record any finding since the matter is remanded to the trial court with a specific direction.

In view of my finding on point No.1, the matter is remanded to the trial Court, directing the plaintiffs to confine their plea either to coparcenary or to joint family by filing an affidavit before the trial Court, directing the trial Court to restore the suit to its original number in the suit register, and both the plaintiffs and the defendants are directed to appear before the trial Court on 20.03.2015, on such appearance, the plaintiffs are directed to file an affidavit confining to any one of the pleas regarding nature of acquisition of property *i.e.,* with the aid of joint family nucleus (coparcenary) or with the joint exertions of late Narasimha Rao, and his sons late Venkata Suryanarayana and defendants 1 and 2, by filing an affidavit and, thereupon, the trial Court may afford reasonable opportunity to both parties to adduce evidence in support of the specific plea of the plaintiffs and defendants and record a finding about the nature of acquisition of property within six (6) months from the date of receipt of a copy of the judgment and dispose of the suit according to law, afresh.

Accordingly, the appeal suit is disposed of. In consequence, the miscellaneous petitions, if any, pending in this appeal, shall stand disposed. No order as to costs.

M. SATYANARAYANA MURTHY, J

Date: 06-02-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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CMSO:11.02.2015.

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Date. 06-02-2015

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[1] AIR 2004 SC 619

[2] AIR 1974 Madras 294

[3] AIR 2008 SC 2489

[4] 1969 (3) SCR 681

[5] AIR 1967 SC 272